JUDGMENTS OF THE SUPERIOR COURTS OF SIERRA LEONE:
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COURT OF APPEAL

2006

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AMAL TOUFIC HUBALLAH v. CHERNOR SOW

[CIV. APP. 67/2005] [p.23-25]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 23 MAY 2006

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.A. (PRESIDING)

JUSTICE P.O. HAMILTON, J.A.

JUSTICE S. KOROMA STRONGE, J.A.

BETWEEN:

AMAL TOUFIC HUBALLAH — APPELLANT/ APPLICANT

VS.

CHERNOR SOW — PLAINTIFF/RESPONDENT

HEARING:

RULING:

Advocates:

C.F. Edwards: for Applicant

Allan B. Holloway: for Respondent

RULING:

TEJAN-JALLOH JA

It is a well settled principle that the only ground on which under the rules the Court would stay execution of a judgment is where special circumstances are shown.

Having heard and considered the affidavit filed in support of the application by C.F. Edwards Esq., we have asked ourselves whether any of very special circumstances have been shown. In that line we have observed that the [p.24] judgment which the Appellant/Applicant relied upon is that of Hon. Justice L.B.O. Nylander dated the 24th day of January 2002. (Exhibits ABH4B) which is not appealed. It is alleged in paragraph 7 of the affidavit that the Appellant/Applicant has a conveyance in respect of the whole portion of land being claimed by the Plaintiff/Respondent in his Writ of Summons dated 8th February 2005 that the Applicant/Respondent is operating a mattress factory in the portion of the land in dispute, which is being occupied by most of the workers in the factory as their residence for over 12 (twelve) years. The workers will be rendered homeless. We think it is important to note that by paragraph 5 of the judgment of Justice L.B.O. Nylander the title of deed (Conveyance) which formed the basis of the Judgment of Justice A.N.B. Stronge is deem in law to have been expunged from the record book of Conveyances in the Office of the Registrar-General until that Judgment is set aside.

More importantly, it is averred in paragraph 13 and which is not denied that the Deponent have been informed by the Appellant/Applicant and verily believe that the Plaintiff/Respondent intends to part with the said portion of land before the determination of the appeal. The said Averments have not been denied there being no affidavit in opposition filed to the application.

Without further ado, we consider the facts to be weighty and substantial enough to warrant our interference at this stage. Consequently, a stay of execution of the Judgment of Justice A.N.B. Stronge dated 26th day of November, 2005 and all subsequent proceedings pending the hearing and [p.25] determination of the Appeal to the Court of Appeal of Sierra Leone is hereby granted. Costs in the cause.

SGD.

JUSTICE U.H. TEJAN-JALLOH, J.A.

SGD.

JUSTICE P.O. HAMILTON, J.A.

SGD.

JUSTICE S. KOROMA, J.A.

BASITA MACKIE DAKHLALLAH v. THE HORSE IMPORT AND EXPORT COMPANY LTD. & 2 ORS

[MISC. APP. 21/2005] [p.1-4]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 14 FEBRUARY 2006

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.A.

(PRESIDING)

JUSTICE P.O. HAMILTON JA

JUSTICE A.M.B. STRONGE JA

BETWEEN:

BASITA MACKIE DAKHLALLAH — PLAINTIFF/RESPONDENT

BY HER ATTORNEY S. DAKHLALLAH

TRADING UNDER THE NAME AND

STYLE OF D.M. DAKHLALLAH

AND

THE HORSE IMPORT AND EXPORT — 1ST DEFENDANT/APPLICANT

COMPANY LIMITED/EL HOSAN

20 QUEEN ELIZABETH ROAD

KISSY DOCKYARD

FREETOWN

EL HOSAN — 2ND DEFENDANT

FOR IMPORT & EXPORT CO. SAE

9 EL SHAHID MOH GAMEL

BOVEI, ST. GULF CAIRO

REPUBLIC OF EGYPT

EMAD EL GALADA — 3RD DEFENDANT

9 ELSHAHID MOH GAMEL

BOVEI, ST. GULF CAIRO

REPUBLIC OF EGYPT

HEARING:

JUDGMENT: Advocates:

Appellant: S. Macaulay; Esq.;

Respondent: A.J.B. Gooding; Esq.;

RULING:

TEJAN-JALLOH JA:

This is an application by way of Notice of Motion brought on behalf of the first Defendant/Applicant for the following orders:—

[p.2]

1. For leave to appeal to the Court of Appeal of Sierra Leone against the Order of the Hon. Justice Sir John Muria J.A. dated 22nd March 2005 on grounds set out in the notice of appeal.

2. The second Order is already spent.

3. For a Stay of Execution of the Judgment in Default dated 4th November 2004; Judgment dated 19th January 2005 and Order of Hon. Sir John Muria J.A. dated 22nd March 2005 be granted pending the hearing and determination of the appeal, if leave be granted.

4. Any other order as may be deemed fit and just.

5. That the cost of this application be cost in the cause.

This application is supported by a twenty-five (25) paragraph affidavit of TEREK YOUNESS the Managing Director of the applicant sworn to on the 24th day of May, 2005. It is relevant to observe that most of the Averment relate to the history of the matter.

The paragraphs which I consider germane to the application are paragraphs 21, 22 and 23 which are as follows:—

21. That I verily believe that the applicant has very good grounds of Appeal which might be to naught if a stay is not granted and execution is levied against the applicant. A copy of the proposed notice to appeal is now shown to me exhibited and marked TJ21.

22. That I verily believe that unless a stay of execution of the Default Judgment dated 4th November 2004, Judgment dated 19th January 2005 and Order of Hon. Justice Sir John Muria J.A. dated 22nd March 2005 is granted, the appeal if successful would be rendered nugatory.

[p.3]

23. That the interest of justice will best be served if the orders prayed for in the Notice of Motion are granted.

In considering the application, it must be borne in mind that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which he is prima facie entitled pending appeal. **The Annot Lyle (1886) 11 P.O. 114 at page 116. See also Monk v Bartram (1891)1 AB 346 where Lord Esther M.R. said inter alia at Page 346:**

"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 they 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."

In **T.C. Trustees Limited vs. J.S. Darwen (Successors) Limited (1969) 2 QB 295;** the Court of Appeal laid down that special circumstances in which execution may be stayed on grounds other than inability to pay must be circumstances relevant to a stay, and not to matters of defense in law or relief in equity, which must be raised in the action, they must be relevant to the enforcement of the judgment and not to the judgment itself.

The most important factor that must weigh with any Court dealing with motion for stay of execution is the question whether the Judgment Creditors will be able to refund the Judgment debt if the appeal succeeds. **See Baker v Lovery (1885) 14 QB D 769., Brandford v Young Re: Falconer and Trusts (1884) 28 CH.D. 18 and; Wilson v Church (No.21) (1870) 12Ch. D.454**.

A defendant cannot obtain a Stay of Execution by arguing that he would be ruined and that he has an appeal which has some prospect of success — **Lino Type Hell Finance Limited v Baker (1992) 4 All ER 887 CA.**

[p.4]

The only question before this Court is whether a case has been made out for depriving the plaintiff of the benefit of the Judgment which has already been obtained.

This is a Judgment for payment of money. The applicant has not proffered any reason how the appeal if successful can be nugatory. He has not said that if paid the Judgment award it would be impossible for

him to recover it from the plaintiff. How grounds of appeal can be brought to naught is not explained. It is not every ground of law that qualifies as special circumstances for a Stay of Execution. For a ground of appeal to be so qualified it ought to be shown that a decision on it will one way or the other affect the substratum of the whole case substantially.

The sum total of the material before us is that the applicant has failed to establish special circumstances. We are of the opinion that the justice of the case is on the side of the Respondent that he be left free to his legal remedies to recover his money.

In the circumstances, the application for stay of execution is refused with costs against the applicant such costs to be taxed if not agreed upon. However, as the applicant is exercising his constitutional right of Appeal, leave to appeal is granted.

SGD

JUSTICE U.H. TEJAN-JALLOH

SGD

JUSTICE P.O. HAMILTON, JA

SGD

JUSTICE A.M.B. STRONGE, JA

CASES REFERRED TO

1. The Annot Lyle (1886) 11 P.O. 114 at page 116.

2. Monk v Bartram (1891)1 AB 346

3. T.C. Trustees Limited vs. J.S. Darwen (Successors) Limited (1969) 2 QB 295

4. Baker v Lovery (1885) 14 QB D 769.

5. Brandford v Young Re Falconer and Trusts (1884) 28 CH.D. 18

6. Wilson v Church (No.21) (1870) 12Ch. D.454.

7. Lino Type Hell Finance Limited v Baker (1992) 4 All ER 887 CA.

CONTINENTAL COMMODITIES AND SERVICES COMPANY v. THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[CIV. APP. 7/2004] [p.5-16]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 17 MARCH 2006

CORAM: JUSTICE SIR JOHN MURIA, J.A. (PRESIDING)

JUSTICE A.N.B. STRONGE, J.A.

JUSTICE U.H. TEJAN-JALLOH, J.A.

BETWEEN:

CONTINENTAL COMMODITIES AND

SERVICES COMPANY LIMITED — APPELLANT

AND

THE ATTORNEY-GENERAL AND

MINISTER OF JUSTICE — RESPONDENT

HEARING: 2 November 2005

JUDGMENT: 17 March 2006

Advocates:

A.F. Serry-Kamal Esq. for the Appellant

E. Roberts Esq. for the Respondent;

JUDGMENT

MURIA JA:

"Where a Commission of Inquiry makes an adverse finding against any person, which may result in a penalty, forfeiture or loss of status, the report of the Commission of Inquiry shall, for the purposes of this Constitution, be deemed to be a judgment of the High Court of Justice and accordingly an appeal shall be as of right from the Commission to the Court of Appeal." (Section 149(4), Constitution).

It is the interpretation of this provision of the Constitution that is central to the determination of this appeal.

[p.6]

Background

To appreciate the nature of the appeal, let me set out the brief background to this case. Following complaints of irregularities over the allocation and disposition, and encroachment of both private and

State lands, the Government set up a Commission of Inquiry (COI), with the following terms of reference—

(i) To enquire and make appropriate recommendations on the present laws relating to the allocation and use of state lands.

(ii) To examine the extent of state land granted or leased with a view to finding out lapses in the procedure relating to the appropriation of state land.

(iii) To ascertain whether there are any persons or organizations in possession of any state lands without proper grant or authorization.

(iv) To determine the extent of compliance by the grantee of state lands with the conditions of his or her grant.

(v) To examine the extent of environmental degradation that has occurred as a result of the granting and leasing of state lands.

(vi) To ensure that in carrying out this exercise consideration will be given to the recent report of the National Commission for Unity and Reconciliation (NCUR) in so far as it relates to the granting and leasing of state lands.

(vii) To investigate the possibility of transferring the administration of state lands to local authorities.

(viii) To make appropriate recommendation to arrest the lapses brought about in line with the findings.

[p.7]

The Commissioner, Hon. Justice Marcus-Jones, was appointed by His Excellency the President on 27th October 1998 and soon thereafter conducted the Commission of Inquiry. Despite the setback in its work due to the rebel invasion of Freetown in January 1999, the Commission concluded its work and published its findings and recommendations in its "Report on the Mrs. Justice Laura Marcus-Jones Commission of Inquiry on the Leasing and Sale of State Lands in the Western Area, 1999". A Government White Paper (GWP) was subsequently prepared as a result of the Report of the COI. The Government White Paper was published in October 2000, more than six months after the Commission of Inquiry Report was presented to His Excellency, The President.

High Court

Following the publication of the Commission of Inquiry Report, and more particularly, the Government White Paper, the respondent instituted proceedings by way of an Originating Notice of Motion in the High Court to set aside the sale and purchase of the land at 28 Wallace Johnson Street, Freetown and to cancel the Deed of Conveyance over the said property made between the Government of Sierra Leone and the appellant on 16th September 1993 and take possession of the said property. The High Court heard the application and granted the order setting aside the transaction leading to the sale and

purchase of the Government property at 28 Wallace Johnson Street and canceling the grant/Deed of Conveyance made between the parties over the said property.

Court of Appeal

The appellant, being aggrieved by the High Court's decision appealed to Court of

Appeal on four grounds, namely:

1. The whole proceedings were null and void and in that the Respondent herein proceeded by originating process which was ab initio void.

[p.8]

2. The learned trial Judge misdirected himself when he held that he could not interfere with the process by which the decision was arrived at since it is deemed to be a judgment.

3. The learned trial Judge erred in law in that having found that there was no express forfeiture, granted the orders prayed for in the motion.

4. The decision is against the weight of the evidence.

As it will become apparent, the grounds of appeal raise both procedural as well as substantive issues of law. For the purpose of dealing with the issues raised, it will be convenient to deal with ground two of the appeal first.

The contention by Mr. Serry-Kamal of Counsel for the appellant is that the Commission of Inquiry Report made no "adverse finding" against the appellant. Consequently the appellant saw no need to exercise his right of appeal; and did not do so, against the Commission's findings. The adverse comments were raised in the Government White Paper and Mr. Serry-Kamal conceded that. Counsel, however, argued that the Government White Paper was not a Report of the Commission of Inquiry under Section 149 of the Constitution and could not be deemed to be a High Court judgment under subsection (4) of Section 149 of the Constitution. Mr. Roberts of Counsel for the respondent was adamant that the Commission of Inquiry Report made an adverse finding against the appellant, referring to page 116 of the Record of Appeal where it is stated:

"The internal working of the Ministry is not healthy either. Allocation of State Land to Applicants is not always equitable. Procedures used could vary with applicants. The Commission looked at the File of Continental Commodities and Services Limited, File No. SLD10/64 Vol.6T [p.9] on a Commercial Lease for 21 years; lease effective from 15th October, 1986.

The only File available was a Temporary File but the Commission was told vital files got missing now and again. In 1993, this property was sold. The Report made before sale says Commercial lease have been sold before.

Specifically however the valuation, Recommendation and Approval on this Application for freehold title, were all done so quickly, 13th-14th September 1993. On 14th September, 1993 the Director was instructed by the Permanent Secretary to.... Communicate this Approval to the Applicant with Dispatch'. I would call this applicant a very special Applicant.'"

That is the 'adverse finding' referred to by Counsel for the respondent. Having read the conclusion and the summary of suggestions and Recommendations in the Commission of Inquiry Report, it is hardly surprising to see the basis of Mr. Serry-Kamal's vehement contention that there was no adverse finding against the appellant in the Commission of Inquiry Report. The passage referred to was part of the comments by the learned Commissioner on the manner in which State Land had been administered. It was not an 'adverse finding' by the Commission against the appellant. An 'adverse finding' entails a decision or a determination or a pronouncement which is unfavourable to a person by a tribunal or a body charged with the task of making a decision on a matter. In the present case, we agree with Counsel for the appellant that there has been no adverse finding against the appellant in the Commission of Inquiry Report.

The Government White Paper

The Commission of Inquiry Report was published in December 1999 but was actually submitted to His Excellency the President in January 2000. The Government White Paper was prepared and issued by the Government in [p.10] October 2000, more than six months after the Report of the Commission of Inquiry was furnished to the President. The Government White Paper contained detailed adverse comments regarding the appellant and manner in which it came to acquire the property at 28 Wallace Johnson Street, Freetown. The status of a Government White Paper had already been decided by this Court **in Matilda Victoria Sesay v Attorney-General and Minister of Justice (4th June 2004) C.A. Misc.App.7/2004**,where it was held that a Government White Paper does not form part of the Report of the Commission of Inquiry and that the right of appeal under section 149(4) is against an adverse finding in the Report of the Commission of Inquiry and not against adverse statements contained in the Government White Paper.

It would not be correct to regard the Government White Paper as forming part of the Report of the Commission of Inquiry for the purpose of section 149(4) of the Constitution.

Section 149(4) of the Constitution

The wording of Section 149(4) of the Constitution is set out at the beginning of this judgment. It will be observed that Section 149(4) of the Constitution expressly provides that the report of the Commission of Inquiry shall for the purposes of this Constitution be deemed to be a judgment of the High Court and an appeal lies as of right from the Commissioner to the Court of Appeal.

The words "for the purpose of this Constitution" used in the subsection are deliberately chosen by the draftsman of the Constitution. They denote the purpose of and limitation of that provision. It must be understood that the Report of Commission of Inquiry shall be deemed to be a judgment of the High Court for the purpose of the Constitution and not for all purposes. Had the intention of the provision

been to deem the Report a judgment of the High Court for all purposes, the draftsman would have plainly said so. The purpose of the subsection is to deem the Report which contains an adverse finding against a person, to be a [p.11] judgment of the High Court and to accord the aggrieved person the automatic right of appeal to the Court of Appeal. The Constitution recognizes that, as a result of an adverse finding in the Report against a person, certain legal consequences may well flow from the Report, such as penalty, forfeiture or loss of status.

It will also be observed that the Constitution does not provide for the manner in which such legal consequences may be pursued. Thus the procedure for enforcing the adverse finding of the Commission lies, not under the Constitution, but elsewhere. Section 149(4) simply provides that for the purpose of the Constitution, where an adverse finding against any person is made by the Commission in its Report, that Report is deemed to be a judgment of the High Court, and that the aggrieved person has a right of appeal against it. That is all that section 149(4) permits.

How is the Report to be enforced?

In the present case, the respondent sought to enforce the Report of the Commission of Inquiry by issuing an undated Originating Notice of Motion against the appellant claiming, inter alia:

1. An order setting aside the transaction leading to the sale and purchase of Government property situate lying and being at 28 Wallace Johnson Street, Freetown and or canceling the grant/Deed of Conveyance made between the Government of Sierra Leone and the Defendant/Respondent herein dated 16th day of September 1993 and registered as No.855/93 in volume 472 at page 30 in the Book of Conveyances kept in the office of the Registrar-General in Freetown pursuant to the Findings, Report and Government White Paper of the Mrs. Laura Marcus-Jones Commission of Inquiry of 1999 on the Leasing and Sale of State lands in the Western Area.

[p.12]

2. An order for immediate possession to the Plaintiff/Applicant and/or an order to immediate re-enter the said Government property situate lying and being at 28 Wallace Johnson Street, Freetown.

The contention by Counsel for the respondent is that the orders sought were to give effect to the adverse findings of the Commission of Inquiry relating to the property situate, lying and being at 28 Wallace Johnson Street, Freetown. The Report of the Commission, argued Counsel, is a judgment of the High Court and thus the application to the High Court was merely to realise or give effect to the Report/Judgment.

With regard to the argument advanced by the respondent, we are in agreement with Mr. Serry-Kamal that section 149(4) of the Constitution does not give the respondent the right to bring an action such as that taken in this case to enforce the Report of the Commission nor the manner by which the respondent instituted the proceedings. We further agree, as contended for by Counsel for the appellant, that the appropriate procedures are to be found elsewhere, namely, under the Commission of Inquiry Act (Cap.54) as amended. It is quite clear that Section 7(2), (3) and (4) of the Act set out the machinery

whereby the Report, whether it is deemed to be a judgment of the High Court under Section 149(4) or not, of the Commission of Inquiry may be enforced. Section 7(2), (3) and (4) of the Act are as follows:

7. (2) Upon the receipt of such report, if it appears to the President that any person has acquired assets for himself or in the name of any other person in an unlawful manner or is responsible for any irregularity or malpractice resulting in any financial loss to the Government of Sierra Leone or to any local authority or corporation, or any other body whatsoever, the President may, on the advice of the Cabinet, make an Order—

[p.13]

(a) Requiring such person to make good the financial loss to the Government of Sierra Leone, or any local authority or corporation or any other body as the case may be;

(b) forfeiting to the Government of Sierra Leone or any local authority or corporation or any other body as the case may be, all or any part thereof of the assets of such person, whether or not such assets are in his name.

(3) Any Judge if the High Court shall, upon application by the Attorney-General and Minister of Justice, make such Order or Orders as may be necessary for the purpose of giving full effect to the Order for forfeiture of assets made by the President under sub-section (2) hereof, and shall in particular but without prejudice to the generality of the foregoing where necessary, order any person to execute such instrument as may be necessary for enabling any assets situated outside Sierra Leone to be vested in the Government of Sierra Leone, or any local authority or corporation, or any other as the case may be.

(4) Any Order made under sub-section (2) may include provision for vesting the assets or any part thereof or the property in such assets or part thereof in a department of Government, a local authority or corporation or any other body as the case may be and, in particular, the Order may direct—

(a) In the case of assets lodged in a bank, the Manager or a person in charge of the bank in which the assets are lodged shall pay the assets into the Consolidated Fund, or any bank account as the case may require;

[p.14]

(b) In the case of assets in the form of stocks, shares, debentures, bonds or choses-in-action, the responsible officer concerned shall register them as required or necessary, in the name of the Government of Sierra Leone or any local authority or corporation, or any other body as the case may require.

(c) in the case of assets in the nature if immovable property the Administrator and Registrar-General shall remove the name of the person or that of any person in whose name the property is registered, from the Register and register forthwith such property in the name of the Government of Sierra Leone or any local authority or corporation, or other body as the case may be, and the property shall vest

forthwith in the Government of Sierra Leone or local authority or corporation, or other body (as the case may be)

as from the date of such Order.

By those provisions, it is obvious that the power to enforce the findings and recommendations of the Commission of Inquiry as contained in the Report is vested in the President. An order of forfeiture in this regard may be made by the President and the High Court is obliged to enforce such order of forfeiture. Despite the obvious procedure laid down under the Commission of Inquiry Act, the respondent chose to enforce the findings and recommendations of the Commission of Inquiry by coming to Court by way of Originating Notice of Motion purporting to have the right to do so under Section 149(4) of the Constitution. Such a procedure is wrong. There is no known authority for the manner in which the respondent sought to repossess the appellant's property in this case. Beside the procedure set out in section 7(2), (3) and (4) of the Commission of Inquiry Act, there are also rules governing the procedure for seeking the order of [p.15] forfeiture of land. Proper procedures must be followed, especially where a person's right to his property is sought to be taken away from him.

We are of the opinion that the learned trial judge erred in law in his apparent acceptance that the appellant was entitled to enforce the Commission's finding by way of an originating notice of motion under section 149 (4) of the Constitution. We further feel that His Lordship erred in law in not addressing his mind to the proper procedure that ought to be followed where the respondent seeks to take enforcement actions in respect of the findings and recommendations of the Commission of Inquiry.

Other matters were also urged upon us by Counsel for the appellant. These include the irregularity of the originating notice of motion. We do not need to deal with those matters since in our judgment the proceedings ought not to have been instituted in the manner it was brought, and consequently, the order granted by the High Court to set aside the Conveyance of the property concern between the Government and the appellant ought not to have been made. There is no basis both in law and in practice for granting that order in this case. That order must be set aside.

For the above reasons, the appeal is allowed and the Order of the High Court dated 27 February 2004 is set aside.

Order: Appeal allowed

Order of the High Court dated 27 February 2004 set aside.

[p.16]

STRONGE JA:

I agree

TEJAN-JALLOH: JA:

I agree.

CASES REFERRED TO

1. Matilda Victoria Sesay v Attorney-General and Minister of Justice (4th June 2004) C.A. Misc.App.7/2004

STATUTES REFERRED TO

1. Commission of Inquiry Act (Cap.54)

2. The Constitution

FUDI YANKUBA v. THE STATE

[CR. APP. 32/2003][p.61]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 13 JULY 2006

CORAM: JUSTICE JON KAMANDA JA (PRESIDING)

S. BASH-TAQI JA

S. KOROMA JA

FUDI YANKUBA — APPELLANT

Vs.

THE STATE — RESPONDENT

COUNSEL:

Abdul Tejan-Cole — Appellant

S.A. Bah (Principal State Counsel) — for State Respondent

JUDGMENT OF THE COURT MADE THIS 13TH DAY OF JULY, 2006

KAMANDA JA:

The Court, having fully considered the issues raised in this case, has adjudged that this Appeal is allowed with detailed reason to be given in due course after notices to the parties. The ORDER of this Court is as follows:

THE CONVICTION QUASHED, AND THE SENTENCE OF DEATH BY HANGING IS SET ASIDE. A CONVICTION FOR MANSLAUGHTER IS SUBSTITUTED, AND THE APPELLANT IS SENTENCED TO IMPRISONMENT FOR 5 YEARS, THAT SENTENCE TO TAKE ACCOUNT OF TIME APPELLANT HAS SPENT IN CUSTODY.

JUSTICE JON KAMANDA JA

I agree

JUSTICE S. BASH-TAQI JA

I agree

JUSTICE S. KOROMA JA

HAJA SILLAH & 3 ORS. v. PATRICK FREEMAN

[CIV. APP. 41/2004] [P.53-57]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 19 DECEMBER 2006

CORAM: JUSTICE U.H. TEJAN-JALLOH, JA

JUSTICE S. KOROMA, JA

JUSTICE A.N.B. STRONGE, JA

BETWEEN:

HAJA SILLAH

BAIMBA SILLAH

SHEKU SUMA — APPELLANTS

ABDUL RAHMAN

AND

PATRICK FREEMAN — RESPONDENT

Hearing: 16th November, 2006

Judgment: 19th December, 2006

Advocates:

E. Pabs-Garnon Esq., for the Appellant

A.Y. Brewah Esq., for the Respondent

JUDGMENT

TEJAN-JALLOH JA:

This is an appeal against the Judgment of Hon. Justice

Sir John Muria JA. Dated the 26th day of August 2004 in which he made the following orders.

[p.54]

1. That Judgment to be entered against the Defendants/Respondents.

2. That the Plaintiff do recover immediate possession of the premises situate at 17 King William Street, Freetown.

3. That cost should be to the Plaintiff/Applicant.

The Appellant being dissatisfied with the said Order of Honorable Justice Sir John Muria JA, appealed to the Court of Appeal on two grounds. Both grounds were argued together by Counsel.

GROUNDS OF APPEAL:—

1. The Learned Trial Judge erred in law in granting leave for the Respondents to enter final Judgment for recovery of possession in respect of 17 King William Street, Freetown.

2. The Learned Trial Judge erred in law in granting the Order Sought upon an Ex parte Application pursuant to Order X1 Of the High Court Rules 1960 as amended.

BACKGROUND OF CASE

1. The Writ of Summons was issued by the Plaintiffs on the 21st of June 2004.

2. An Appearance was entered by the Defendants on the 28th of June 2004.

3. An affidavit of Search filed by the Plaintiffs on the 14th of July 2004.

4. Judgment in Default of Defense entered on the 4th day of August 2004.

5. Judge's Summons (Order 11) filed on the 12th of August 2004.

6. Leave to enter final judgment granted to the Plaintiff on the 26th day of August 2004.

[p.55]

7. Motion to set aside judgment in default of Defence 14th of October 2004.

8. Interim Stay of execution of Judgment in Default of Defence granted 19th October 2004.

9. Order refusing to set aside Judgment in default of Defence 28th of May 2005.

The two grounds of appeal can be considered together. Ground one which is that the learned Trial Judge erred in law in granting leave to the Respondent to enter final judgment for recovery of possession in respect of 17, King Williams Street, Freetown:—

The application for final judgment was made during the long vacation: Ord. 64 r, 5 of the Annual Practice 1960 explicitly states that the time of long vacation should not be reckoned in the computation of time appointed or allowed for filing any pleading unless otherwise directed by the Court or a Judge. It is clear therefore that Judgment in default of Defence cannot be obtained during the long vacation. **See Macfoy vs. United Africa Co. Ltd. (1960) A.C. House of Lords Page 157)** where Lord Denning dealt with the effect of delivering a Statement of Claim in the long vacation The Judge's summons for final judgment is dated 12th August, 2004. There can be no doubt that that time does not run during the vacation. The final Judgment purportedly obtained is therefore irregular.

The Respondent contends that the Judge's summons pursuant to Order X1 was not made ex parte but the Appellants denied being served and they were entitled to be served; appearance having been entered in their behalf. There is no evidence of service of the Judges summons in the record.

In the circumstances we hold that the Judge's summons for final Judgment was made ex parte which renders the proceedings not only irregular but renders it a nullity: **See Craig v Kanssen (1942) All E.R. 108.**

We are aware of the case of **Hemp Adams v Hall (1911) 2 KB 942 at Page 94 4 945**, where Buckley L.J. said at page 945:

[p.56]

"Where a Plaintiff precedes by default every step in the proceedings must strictly comply with the rules; that is a matter strictism juris."

Vaughan —Williams LJ also said at Page 944:

"where proceedings are taken by a plaintiff in the absence of the Defendant, it is most important that there should be at every stage a strict compliance with the rule, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule not as mere irregularity which can be waived, but a matter which prevents any further proceedings from being taken on the writ."

As there was no strict compliance with the rules, we are bound to hold that the appellants were justified in asking the Court to set aside the Judgment ex-debito —justia.

As for the proposed defence filed, the defence on the merit, which the defendant is required to show need only disclose an arguable or triable issue and not that it has the merit to succeed.: **Drayton Giftware Ltd v Varyland Limited (1982) 132, Mew L.J. 558. See also Swain vs. Hillman and other 1 All E.R. P.91 at Page 95 Para. 1**. In an action for possession, it is enough if it is shown that there is no relationship of Landlord and tenant. In the instant case the Appellant claimed to have purchased the property. We are of the view that triable issues meriting their determination have been shown. In the premises, the appeal is allowed. Judgment dated 26th August 2004 is hereby set aside with costs to be taxed.

[p.57]

SGD.

HON JUSTICE U.H. TEJAN-JALLOH

SGD.

HON JUSTICE A.N.B. STRONGE JA

SGD.

HON JUSTICE S. KOROMA JA

CASES REFERRED TO

1. Macfoy vs. United Africa Co. Ltd. [1960] A.C. House of Lords (Page 157)

2. Craig v Kanssen [1942] All E.R. 108.

3. Hamp Adams v Hall [1911] 2 KB 942

4. Drayton Giftware Ltd v Varyland Limited [1982] 132, Mew L.J. 558.

5. Swain vs. Hillman and other 1 All E.R. P.91 at Page 95 para. 1.

STATUTES REFERRED TO

1. Ord. 64 r, 5 of the Annual Practice 1960

HENNEH WAFTA v. ALHAJI SANU BARRIE

[CIV. APP. 62/2005] [p.17-22]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 4 MAY 2006

CORAM: JUSTICE J. KAMANDA, J.A.

MRS JUSTICE S. BASH-TAQI, J.A.

MR JUSTICE G. GELAGA KING, J.A.

BETWEEN:

HENNEH WAFTA — APPELLANT/APPLICANT

AND

ALHAJI SANU BARRIE — RESPONDENT

Berthan Macaulay (Jnr) Esq., for the Applicant

Abdul Serry-Kamal, Esq., for the Respondent

MR JUSTICE G. GELAGA KING, J.A.

A Notice of Motion dated 9th November, 2005 was filed by the Applicant as a preliminary matter, prior to the hearing of the Grounds of Appeal herein. I opine that, more appropriately, it should have, in that circumstance, been entered as a Miscellaneous Application to distinguish it from the substantive appeal hearing itself. Be that as it may, the motion seeks two main orders:

1. That this Hon. Court do grant an injunction restraining the respondent by himself, his servants, agents or howsoever otherwise from conveying, selling, mortgaging, or in any way disposing of the property delineated in survey plan L.S. 2922/95 dated 21st December, 1995 and the building thereon and forming part of the conveyance marked exhibit "BMJ 6E2" to the affidavit of Mr. Berthan Macaulay (Jnr) sworn to on the 9th day of November, 2005 in support of the application herein, pending the hearing and determination of this application.

2. That an identical injunction as in 1. above be granted, pending the hearing and determination of the appeal herein.

The Notice of Motion is supported by the affidavit of Mr. Berthan Macaulay (Jnr) sworn to on the 9th day of November, 2005 and filed herein and counsel for the Applicant said he was making the application under rule 31 of this Court's Rules, Public Notice No.29 of1985. He based his submissions on the affidavit and exhibits in support. Ex. "BMJ1" is a copy of the writ of summons issued by the respondent against the applicant in which he claimed:

"(1) Recovery of possession of the premises known as 18 Sani Abacha Street Freetown, the property of the plaintiff

(2) Mesne profits at the rate of $200,000 US per annum from the 1st day of January, 2002 until possession is delivered up.

[p.18]

(3) Interest thereon at such rate as the court shall allow."

To that writ the Applicant filed a Defence and Counterclaim, ex. "BMJ2", and pleaded rather incomprehensibly in paragraph 6:

"Save as herein expressly admitted the Defendant admits each and every allegation of fact contained as if the same were set out and traversed seriatim." He then went on to plead in similar incomprehensible vein in paragraph 8: ". . . The Defendant did not execute the said conveyance but wrote back to the Defendant requesting that the purchase price be increased to United States Dollars One Hundred and Twenty Thousand which said sum the Defendant eventually agreed to pay." Emphasis mine

Judgment was eventually entered for the plaintiff, the Respondent herein and the Applicant's Counterclaim was dismissed, as exhibited in "BMJ4".

Mr. Macaulay went on to submit that he was asking for an injunction to be granted in order to preserve the status quo Vis a Vis the property in dispute and cited the following cases:

American Cyanamid Co. v. Ethicon 19751 All E. R. 504

Haja Adama Mansaray v. Alhaji Ibrahim Mansaray Civ. App. 37/81 (unreported)

Eboe v. Eboe [1961] G.L.R. 432 (High Court), and

NB Landmark Ltd. v. Lakiani [2001-2002] SGLR

Mr. Serry-Kamal, in reply, referred to his affidavit in opposition sworn to on 24th January, 2006 and filed herein and submitted that there was no legal basis for the application as there was no provision in the Rules of this Court which allows the application for an injunction to be made after judgment has been delivered by the trial court and which empowers this Court to grant it. He referred to O. 37 r. 10 of the High Court Rules which makes provision for a plaintiff before or after judgment to apply for an injunction to restrain a defendant from the repetition or continuance of the wrongful act or breach of contract complained of and submitted that that there was no similar provision in this Court's Rules. He argued that in the instant application it is the unsuccessful defendant who is applying for an injunction against the successful plaintiff. Mr. Serry-Kamal submitted further that the proper course was for the Applicant to apply for a stay of execution of the judgment. Referring to paragraphs 2, 3 and 4 of his affidavit, he stressed that Respondent has no intention of selling the said property and there is no evidence that the respondent is in the process of trying to sell the property. He contended that rule 31 deals specifically with the substantive appeal when it comes to be considered.

Mr. Berthan Macaulay, responding, contended that the Respondent's argument ran counter to the express wording of r. 31, which expressly states that this Court may grant any injunction which the court

below is authorized to grant and that generally this Court has as full jurisdiction over the whole proceedings as if they were instituted in this Court as a court of first instance. He posited that this all-embracing generality relating to jurisdiction is buttressed in s. 129 (3) of the Constitution of Sierra Leone, Act No. 6 of 1991. He maintained that the application is not for a stay of execution. He finally referred to r. 22 of our Rules which states that after an appeal has been entered and until it has finally been disposed of this Court is seised of the proceedings as between the [p.19] parties.

It seems to me that the principal questions which arise for determination in this application are twofold, namely:

(I) whether this Court has the power, under rule 31, at this stage of the proceedings to

grant the application for an injunction, and

(II) If it does have the power, whether we ought to grant it.

There is, also, an incidental question: whether the proper course is to apply for a stay of execution as contended by the Respondent, rather than an injunction as prayed for by the Applicant who contends that after his counterclaim for specific performance and damages had been dismissed by Ademosu, J., in the High Court, there was nothing to stay, citing **Eboe v. Eboe and; NB Landmark Ltd. V. Lakiani, supra**. He has, therefore, not applied for a stay, but instead has opted for an injunction. This incidental question can be disposed of in a short shrift and in terms of a local adage: 'Don't take off your jacket when you have not been invited to a fight'. In other words, it is the unfettered and undoubted right of the Applicant to decide, for better or worse, on what course he will take. And he has exercised that right by seeking an injunction and not a stay of execution, so that is the end of that contention.

I shall now go on to principal question (I) which must necessarily hinge on the construction of rule 31. The relevant portions of which read:

"The Court . . . may make any interim order or grant any injunction which the court below is authorized to make or grant . . . and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance..."

In construing that section, regard must also be had to r.22 which states:

"After an appeal has been entered and until it is finally disposed of, the Court shall be seised of the whole of the proceedings as between the parties thereto."

The appeal in this matter has been filed and this Court is, therefore, seised of the whole proceedings, including the instant application between the Applicant and the Respondent. That being the case and applying rule 22, this Court certainly has the power under r.3, at this stage of the proceedings, to grant any injunction which the High Court has the authority to grant, even though the Appellant has not even begun to argue his grounds of appeal. Has the High Court the authority to grant the injunction sought? If it has, then so also has this Court of Appeal, because of r.31 as well as s.129 (3) of the Constitution

which states, inter alia, that "the Court of Appeal shall have all the powers, authority and jurisdiction vested in the Court from which the appeal is brought".

Both parties agree that the High Court by O. 37 r.10 is empowered, with or without terms, "to restrain ...the respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like land relating to the same property or right, or arising out of the same contract." I am not persuaded that this is the appropriate authority in the instant case. I would myself call in aid the provisions of s. 25 (8) of the Judicature Act 1873 which state [p.20] that "the High Court may grant... an injunction...in all cases in which it appears to the Court to be just or convenient so to do. . ." And so may the Court of Appeal. For these reasons, principal question (I) must be answered in the affirmative.

Now that we have held that this Court has the power to grant the injunction sought, I shall now adumbrate on principal question (II): Ought we then to grant the injunction sought? In answering this question it is instructive to refer to the guidelines in deciding whether or not to grant an interlocutory injunction which are to be found principally in the case of American Cyanamid v. Ethicon, supra. But before I dwell on those guidelines*, let me state that the fundamental question that has to be answered when the court is hearing an application for an interlocutory injunction is what weight should it give to the relative strengths of the parties' case*?

It may be recalled that in the American Cyanamid application for an interlocutory injunction both Graham J. at first instance and the Court of Appeal based their approaches on a perceived rule of law that the court should not grant the interim injunction unless the applicant had shown that on the whole of the affidavit evidence, a prima facie case had been made out. As this was a primary issue, no injunction could issue unless the applicant had first made out his case on the affidavit evidence then before the court. As Russell L.J. put it and the other members of the court agreed [1974] F.S.R. 312,333:

". . .if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end to interlocutory — relief."

However, in the House of Lords, Lord Diplock, who gave the only speech said that this sine qua non was a "technical rule" of "comparatively recent origin" which would stultify the court's discretion to grant interlocutory relief by reference to the balance of probabilities. He had this to say at page 408:

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability,' 'a prima facie case,' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious issue to be tried." (Emphasis mine)

He then went on to say that the court should go on to consider whether the balance of convenience lay in granting or refusing the interlocutory relief that is sought. In this regard, the overriding principle is

that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained. He opined that "if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage." In the case before us where the injunction is applied for under a counterclaim, the defendant is to be regarded as a 'plaintiff and the plaintiff as a 'defendant.'

Lord Diplock's guidelines which I accept and adopt maybe summarized as follows:

(1) Has the applicant shown that there is a serious question to be tried?

[p.21]

(2) Is there doubt as to whether the remedies respectively available to the parties in damages would be adequate?

(3) Where does the balance of convenience lie?

It was only as a component of (3) that the strengths of the parties' case ought to be considered by the court, and even then only when it was plain whose case was the stronger. It may then be in place to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application.

I now turn to consider the present application and principal question (II) in the light of those guidelines and the applicable legal principles. My first observation is that the writ herein was issued on the 9th day of August, 2002, claiming recovery of possession of the said property and mesne profits. The defence and counterclaim was delivered and filed on 18th day of September, 2002, counterclaiming specific performance and damages for breach of contract. Significantly, there was no claim for an injunction of any sort then, nor during the trial, nor up to the time when judgment was delivered on the 21st day of October, 2005, nor up to the time when notice of appeal was filed on the 1st day of November 2005.

Rather unusually and strangely, it is only after the Applicant's counterclaim had been dismissed in the court below, the trial having ended, and when his appeal arising therefrom is about to be heard in this Court that the Applicant has applied for an injunction, for the first time, on the 9th day of November, 2005. It is important and helpful to reflect on the fact that even though more than three years have elapsed between the filing of what I might call the injunction less counterclaim and the hearing of this application, the status quo has been preserved, there being no evidence before us that the Respondent wishes, or threatens to sell mortgage, lease or otherwise dispose of the said property. Indeed, if the contrary were the case, then the Applicant should have led affidavit evidence that the Respondent is threatening or intending to do that which he is not entitled to do. And the Applicant has not so alleged. See on this **point Draper v. British Optical Association [1938] 1 All E.R. 115.**

On the contrary, the Respondent's counsel in paragraph 2 of his affidavit in opposition swore as follows:

"I am informed by our client and I verily believe that he has no intention of selling, mortgaging or otherwise disposing of any part of his property known as 18, Sani Abacha Street, Freetown."

The Applicant in his submissions highlighted his reason for the application as the need to preserve the status quo. Quite apart from what I have just said, supra, in relation to status quo, as I have already premised, we are obliged to look at the whole case, and have regard to the strength of the claim as well as the defence. It may not be enough for the Applicant to show that he has an arguable case that the Respondent may infringe his right. See **Hubbard v. Vosper [1972] 2 QB 84.** In any event, the trial stage has passed and this is an application for an injunction pending the appeal herein. And when one looks at the case as a whole and paragraphs 6 and 8 of the Applicant's defence, above, which I was impelled to term incomprehensible, the question whether there is a serious issue to be ruled upon in the application before us seems, to put it euphemistically, to hang in the balance.

[p.22]

In all the circumstances of the case and taking cognizance of the relative strengths of the parties' case as revealed by the affidavit evidence before us, I have come to the conclusion that damages recoverable at common law, if the Applicant were to be successful in the appeal, would be adequate remedy and the Respondent would be in a financial position to pay them. (See paragraph 3 of the affidavit in opposition.) I opine that the balance of convenience lies in not granting the injunction that is sought. To my mind the Applicant has failed to establish to the required degree, in relation to an application of this sort and in relation to all the other factors that have to be taken into account, that he ought to be granted an interlocutory injunction restraining the Respondent by himself, his servants, agents or howsoever otherwise from conveying, selling, mortgaging, or in any way disposing of the said property.

I, therefore, refuse to grant the injunction and will dismiss the application.

Costs in the cause

SGD.

Hon Mr Justice G. Gelaga King, J.A.

I agree

Kamanda, J.A. (presiding)

SGD.

Bash-Taqi, J.A.

I agree.

CASES REFERRED TO

1. American Cyanamid Co. v. Ethicon [19751] All E. R. 504

2. Haja Adama Mansaray v. Alhaji Ibrahim Mansaray Civ. App. 37/81 (unreported)

3. Eboe v. Eboe [1961] G.L.R. 432 (High Court)

4. NB Landmark Ltd. v. Lakiani [2001-2002] SGLR

5. Eboe v. Eboe and NB Landmark Ltd. V. Lakiani

6. Draper v. British Optical Association [1938] 1 All E.R. 115.

7. Hubbard v. Vosper [1972] 2 QB 84.

STATUTES REFERRED TO

1. High Court Rules

2. Constitution of Sierra Leone, Act No. 6 of 1991

3. The Judicature Act 1873

JAMES TILLAY & 6 ORS. v. THE STATE

[CR. APP. 19-2003,20-2003,21-2003,23-2003,24-2003,25-2003,26-2003] [p.58-60]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 23 MAY 2006

CORAM: MR. JUSTICE J. KAMANDA, J.A (Presiding)

MR JUSTICE G. GELAGA KING, J.A

MRS JUSTICE S. BASH-TAQI, J.A.

BETWEEN:

JAMES TILLAY }

MUSTAPHA CONTEH }

DADDY KOROMA }

AMARA KAMARA }

ISSA SESAY } — APPELLANTS

MUSTAPHA TURAY }

PATRICK TUCKER }

AND

THE STATE — RESPONDENT

I. F. Mansaray Esq, the Appellants

S. A. BAH Esq, for the State/Respondent

HON MRS JUSTICE S. BASH-TAQI, J.A:

This is an appeal from the Judgment of Hamilton, J. (as he, then was) sitting at the High Court in Kenema against sentence

The Appellants, on the 23rd day of October 2003, were convicted of conspiring together and with others unknown, to break into a shop belonging to a Mr. Ibrahim Khalil Basma, a businessman in Kenema, and of stealing there from, goods to the total value of Le18,000,000.00, the property of the said Ibrahim Khalil Basma,

The Appellants had been charged, on indictment, with the following offences, namely

Count One: Conspiracy contrary to Law;

Count Two: Larceny contrary to section 21 (1) of the Larceny Act of 1916.

All the Appellants pleaded not guilty. At the conclusion of the trial, the Jury unanimously found all the Appellants, save the 2nd, guilty of conspiracy and all 7 Appellants guilty of Shop Breaking and Larceny. The 2nd Appellant was acquitted and discharge 1 on the Conspiracy count. The Learned Trial Judge sentenced the Appellants to 12 years imprisonment in respect of the Conspiracy offence, and 14 years in respect of the Shop

[p.59]

Breaking and Larceny charge. He further ordered that the sentences were to run consecutively, that is say, that the Appellants, with the exception of the 2nd Appellant, are each to serve a period of 26 years imprisonment.

All the Appellants have now appealed to this Honourable Court against the sentences. At the commencement of his argument, Counsel for the Appellants, Mr. I. F. Mansaray, sought leave of the Court to abandon Ground 2 of the Grounds of Appeal, which was granted and Counsel proceeded to argue Ground 1, which reads:

“1. That the sentence was manifestly excessive."

Counsel for the Appellants submitted that the Learned Trial Judge did not consider mitigating factors which would have led to a considerable reduction of the sentences passed on the Appellants. He could not, however, refer the Court to any part of the Records of the proceedings where such mitigating circumstances were recorded.

Counsel submitted further that 5 of the Appellants, namely, the 1st , 2nd, 3rd, 5th and 6th Appellants were first offenders, and that the Learned Trial Judge ought to have considered this as a mitigating factor which should have led to a reduction of the sentences with respect to these 5 Appellants.

He further submitted that, all the Appellants, except for the 1st Appellant, begged for mercy, a factor which the Trial Judge should have taken into consideration when passing the sentences. Counsel submitted that in the circumstances, he was now appealing to this Honorable Court to temper justice with mercy and reduce the sentences so that they run concurrently rather than consecutively.

With respect to the 4th and 7th Appellants who have previous convictions, Counsel relied on the discretion of the Court to do what seemed best in the circumstances.

Counsel for the State, Mr. S, A Bah in his reply, submitted that he was relying on the Court's discretion in the matter.

The Court has taken into account the submissions made by Counsel for the Appellant and for the State and having perused the records of the proceedings in the High Court, this Court is satisfied that the Learned Trial Judge applied the correct sentences allowed by law. However, since Counsel for the Appellants raised the point that some of the Appellants were first offenders, this is a factor which the Learned Trial Judge ought to have considered in passing sentence. We must point out however, that it is within the Judge's discretion to order that the sentences run concurrently or consecutively. However, in all the Circumstances of the case, we have come to the conclusion that the appeals of the 1st, 2nd, 3rd, 5th, and 6th Appellants should be allowed, and that the sentences of 12 years and 14 years imprisonment should run concurrently instead of consecutively.

With respect to the 4th Appellant, the record states that he had three previous convictions, one for which he was sentenced to 14 years. This Court holds that his sentences of 12 years and 14 years should run consecutively.

[p.60]

The appeals of the 4th Appellant, Amara Kamara and the 7th Appellant, Patrick Tucker, are accordingly dismissed.

We order that the sentences for the 1st, 2nd, 3rd, 5th and 6th Appellants be set aside and the sentences of 12 years and 14 years run concurrently instead of consecutively.

HON. MRS. S. BASH-FAQI, J.A.

I agree

JUSTICE J. KAMANDA, J.A (PESIDING)

I agree

MR. JUSTICE G. GELAGA-KING J.A.

MOMODU KOROMA v. THE STATE

[CR. APP. 16/2003] [p.62-63]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 27 SEPTEMBER 2006

CORAM: MR. JUSTICE JON KAMANDA , J.A. (PRESIDING)

MRS JUSTICE S. BASH-TAQI, J.A.

MR. JUSTICE S.A. ADEMOSU, J.A.

MOMODU KOROMA

VS.

THE STATE

S.A. BAH ESQ., for State Counsel

Appellant in person.

JUSTICE JON KAMANDA, J.A.

The Appellant was charged with the offence of unlawful carnal knowledge contrary to Section 6 of Cap. 31 of the Prevention of cruelty to children Act. The particulars of offence allege that the appellant on Tuesday 9th May, 2000 at Malama Lumley, Freetown in the Western Area of Sierra Leone had unlawful carnal knowledge with Mariama Sesay a child under the age of 14years, to wit 9 years. The Appellant was tried by Judge alone in the High Court in Freetown and on 18th May, 2000 was found guilty of the offence charged and sentenced to the maximum imprisonment term of 15 years.

The Appellant comes to this Court on an appeal against sentence. He is asking this court to reduce the sentence and make him serve only 4 years instead of the remaining 8. Let it be said at this point that the sentence is within the bounds allowed by the law. The Appellant was a friend of the victim's father. The victim, a 9 year old pupil of the CCSL Primary School was on her way selling coal when appellant invited her to his house saying that he had a message for her father. When she entered the house appellant

grabbed her, stuffed clothes into her mouth and forcibly had sexual intercourse with her. She bled and made a report to her mother when she got home. She was examined in hospital and it was confirmed by the Doctor that her hymen had just recently been ruptured. These details are gory and diabolical. The judge was right to impose the maximum sentence on the appellant, a man with children of his own, one of them only as old as the victim.

[p.63]

The court finds no justifiable reason to alter this sentence, and is in total agreement with Mr. Bah's response to appellant case before this court.

The appeal is dismissed and the sentence of 15 years is confirmed.

NAZIH HASSANYEH v. EUGEMO SATORI

[CR. APP. 11/92] [p.41-49]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 24 OCTOBER 2006

CORAM: JUSTICE SIR JOHN MURIA, J.S.C. (PRESIDING)

JUSTICE U.H. TEJAN-JALLOH, J.A .

JUSTICE S. KOROMA, J.A.

BETWEEN:

NAZIH HASSANYEH — APPELLANT

AND

EUGEMO SATORI — RESPONDENT

Hearing: 31st May 2006

Judgment: 24th October 2006

Advocates:

B Macaulay Jr and C.F. Edward for Appellant

E.E.C Shears-Moses for Respondent

JUDGMENT

TEJAN-JALLOH JA:

This is an appeal against the Judgment of Hon. Justice F.C. Gbow delivered on the 13th March 1992 in which the learned Judge made the following Orders against the Appellant:

(i) delivery up of possession of the premises;

(ii) mesne profit;

(iii) be restrained from parting with possession of the premises other [p.42] than to the Respondent,

(iv) pay damages for breach of contract and

(v) pay cost of the action.

The appellant being dissatisfied with part of the Judgment appealed to the Court regarding the delivery up of possession, injunction and mense profit.

The grounds of Appeal are:

1. The learned Trial Judge having found that:

"(a) This 1990 was the same year in which the Plaintiff's own lease, the Head lease with Government in respect of the land on which these buildings are located was to expire …….The plaintiff himself had been a sub Lessee to one Dr. Sitta, who was the original Lessee to Government the lessor of the land. Dr. Sitta's unexpired term had been assigned to the Plaintiff."

"(b) Since according to the evidence the Plaintiff's term of years come to an end in 1990"

"(c) There is no evidence that the Plaintiff has exercised his right of option"

Erred in law in ordering, on the 13th March 1992, that the 2nd Defendant

[p.43]

"……. do delivery up of possession of both houses situate at No. 28 & 28A Horse Shoe Road, Kissy Dockyard."

"…….that the 2nd Defendant by himself his servants or agents or otherwise howsoever be restrained from parting with possession of the said premises save to the Plaintiff"

in that the Plaintiff no longer had any legal interest and or rights in respect of the said premises after the expiration of same as found by the learned trial Judge himself.

2. The learned trial Judge having reviewed the evidence of the Plaintiff with regard to the latter's instructions to the 1st Defendant that he wanted the revised rent to be in the sum of £5,000.00 (Five Thousand Pounds Sterling) misdirected himself in assessing mense profit when he said

"For any assessment of the mense profits I am going to adopt the amount of £2,500.00 (Two Thousand Five Hundred Pounds) as a fair rent for the dwelling house per annum for the period 1986—1990"

in the absence of any evidence whatsoever that such a figure represented the fair value of the said premises for the period in question.

3. The learned trial Judge in assessing mense profit with particular regards to the exchange rate prevailing over a period of time misdirected himself when he stated as follows:—

"With the aid of information obtained from Commercial Bank as well as the Bank of Sierra Leone I am in a position to consider this issue"

in that —

[p.44]

(a) no such information has been given in evidence during the course of the trial and

(b) The learned trial Judge was acting on information received by him personally which was not "evidence" for the purpose of adjudication on the issue of mense profit.

It is clear from the grounds of appeal that at the heart of this case is the legal status of the respondent's lease over the property in question. It is therefore necessary that the status of the respondent's right to the property concerned must first be ascertained. This is crucial to any claim that he may have against the appellant over the latter's reliance on his subsequent leasehold right in the property.

Status of the Plaintiff's Lease

According to the evidence before the court, the plaintiff was granted a sublease over the property in 1967 for a term of 22 years by one Dr. Sitta who held the head lease from the Government. The sublease was to expire in 1990 which was the same year in which Dr. Sitta's head lease was to expire. However, in or about 1985, Dr. Sitta's unexpired term was assigned to the respondent, thus making the respondent's sublease as well as the head lease expiring at the same time, that is, at the end of 1990. The evidence on this can be found at pages 54 and 55, as well as in "Exh. K and L" at pages 298 and 299 of the Record)

Further it is pertinent to note a very important finding of fact made by the learned trial judge relating to the status of the respondent's lease. His Lordship had this to say, before deciding on the question of mense profit (at page 272 of the Record):

[p.45]

"Before however coming to the issue itself I should state that whatever amount that I would arrive at, would be in respect of the period, 1986-1990, since according to the evidence the plaintiff's Term of Years came to an end in 1990. Although in his evidence the plaintiff told the Court that Dr. Sitter assigned his lease to him and that the Government gave its approval of the assignment and also an option to renew as stated in Exhs. 'K' & 'A' was given to him, there is no evidence that the plaintiff has exercised his right of option"

As the learned trial judge found, there was no evidence that the plaintiff (now respondent) ever exercised his right of option, although Exhibit "K" showed that he was allowed to do so. The only conclusion is that having not exercised his right of option to renew the lease at the end of 1990, his legal right to continue as a lessee of the property concerned (Nos. 28 and 28A Horse Shoe Road, Kissy Dock Yard) ceased at the expiration of the lease at the end of 1990.

The appellant's Lease

Learned Counsel for the Appellant sought and obtained leave to adduce fresh evidence and such evidence to be by way of affidavit. Such fresh evidence has revealed that on 19th March 1991 a lease of the property, the subject matter of this action was granted to the Appellant and that subsequent to that, by Deed of Conveyance dated 17th day of May 1994, conveyance of the said property was made to the Appellant and it is registered as No.404/94 in Volume 477 at Page 71 of the Book of Conveyances kept in the Office of the Registrar-General. The contention of learned Counsel for the Respondent is that there had been cancellations of the lease granted to the appellant vide Irrevocable Deed dated 9th May, 2001. This now raises the issue of the legality or validity of [p.46] the Irrevocable Deed of Cancellation. Learned Counsel for the Appellant submitted that the purported cancellation is invalid, null and void and of no effect. For this proposition, he referred us to Halsbury's Laws of England 3rd edition Vol. II page 365 at Para.593 under rubric "Cancellation Discharge" where the learned author states inter alia:

"A deed may lawfully be cancelled either by the person who has it in his possession as being solely entitled thereunder or by anyone (including the party bound by the deed) to whom the person has delivered it up to be cancelled.

The deed may be cancelled by mutual consent, or under the terms of an agreement between the parties or by order of the Court."

It is plain from the evidence, and it is not disputed by the Respondent, that the purported cancellation was not by the Order of the Court. We note the appellant strongly denied being a party or privy to the purported cancellation. We are, of the view that the Appellant's case is strengthened by the fact that his Lease Agreement was still with him and so is his Conveyance in respect of the property. Counsel also placed great reliance on Registration of Instruments (Amendment Act 1964) which made registration of Instrument compulsory. Section 4 as far as relevant reads:—

4(i) every deed, Contract or Conveyance executed after eighteen hundred and fifty seven, so far as regards any land hereby affected shall take effect as against other deeds affecting the same land from the date of its registration."

In **Dr. C.J. Seymour-Wilson v Musa Abbess (17th June 1981) S.C. Civ. App. 5/1979 (Unreported) the principle was restated that registration** of an [p.47] instrument under the law confer priority over other instruments attaching the same land which was registered later. In the case in hand, the Conveyance of the subject matter to the Appellant was prior to the Irrevocable Deed of Cancellation. In the light of the fresh evidence, we have received there can be no doubt that the "Irrevocable Deed" came into existence after the Lessor had already divested himself of title to the property (nemo dat quod non riabet). We hold that the freehold already granted to the Appellant remains effective and we see no justification to hold otherwise. We further hold that the Appellant is the one entitled to the possession of the premises subject-matter of this action situate lying and being at No.28 and 28A, Horse Shoe Road, Kissy Dockyard, Freetown. For the foregoing reasons, the order of the learned trial judge as regards delivery up of possession and injunction are hereby set aside.

As regards grounds 2 and 3 of the appeal, the complaints are that the mense profit awarded was without evidence that it was a fair value of the property and that there was no evidence before the Court as to the prevailing rate of exchange at the material time. We find it convenient to deal with these two grounds together.

Mense Profits and Rate of Exchange

The law is settled that mense profits are assessed at the amount of the rent, but if the real value is higher than the rent, then the mense profits must be assessed at the higher value. **See Clifton Securities Limited v Huntley and ors. (1948) 2 All E.R. 283.** At what rate the mense profit are to be assessed would depend on the evidence in respect of it; and the evidence required is one that will tell the Court the market value of the property. It would therefore be wrong for us to subscribe to the learned Trial Judge's view that he could, without evidence, assess the mense [p.48] profit based on information personally known to him. Such a practice amounts to only a conjecture.

We have considered the argument canvassed by both sides. The principal basis for the learned trial judge's assessment of the mense profit in this case was from information obtained and/or available to him from the Commercial Banks as well as the Bank of Sierra Leone. Learned Counsel for the Appellant argued that the exchange rate is not of the matter the Court can take judicial notice of. In support of the proposition he relied on Phipson on Evidence 11th Edition page 23 paragraph 48 under the rubric "judge or jury as witnesses" where the law is stated thus:—

"Although, however, Judges or Juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life, which men of ordinary intelligence possess they may not, as might, juries formerly act in their own private knowledge or belief (emphasise mine) regarding the facts of the particular case".

It can be seen here that the learned Trial Judge acted wrongly by basing his assessment on his private knowledge. The case **of John & Lamin v John 1957-60) A.L.R. S.L., 77 at page 81** also cited by the learned Counsel for the appellant is authority for the proposition that cases before the Court should be decided upon legal evidence. Suffice it to say there was no legal evidence adduced before the Court to support the learned trial Judge's decision on the rate of exchange. The conclusion we have reached is

that the decision is bad in law and should be set aside. We therefore set aside the order for mense profit. Grounds 2 and 3 of the appeal also succeed.

[p.49]

This appeal is allowed. The judgment of the learned Trial Judge dated the 13th of March 1992 and the orders made against the Appellant are hereby set aside.

Costs to be taxed if not agreed

SGD.

Justice U.H. Tejan-Jalloh, JA

SGD.

Justice Sir John Muria, JSC

SGD.

Justice S. Koroma

CASES REFERRED TO

1. Dr. C.J. Seymour-Wilson v Musa Abess (17th June 1981) S.C. Civ. App. 5/1979 (Unreported)

2. Clifton Securities Limited v Huntley and ors. (1948) 2 All E.R. 283.

3. John & Lamin v John [1957-60] A.L.R. S.L., 77 at page 81

STATUTES REFERRED TO

1. Halsbury's Laws of England 3rd edition Vol. II page 365 at Para.593

2. Section 4 of Registration of Instruments (Amendment Act 1964)

3. Phipson on Evidence 11th Edition page 23 paragraph 48 under the rubric "judge or jury as witnesses"

PAUL KAMARA v. THE STATE

[CR. APP. 32/2004] [p.26-40]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 14 JUNE 2006

CORAM: JUSTICE SIR JOHN MURIA, J.A. (PRESIDING)

JUSTICE A.N.B. STRONGE, J.A.

JUSTICE J. KAMANDA, J.A.

BETWEEN:

PAUL KAMARA — APPELLANT

AND

THE STATE — RESPONDENT

HEARING: 23rd and 29th November 2005

JUDGMENT: 29th November 2005 (Reasons Reserved)

Advocates:

J.B. Jenkins-Johnston Esq. for Appellant

O.V. Robbin-Mason Esq. and A.S. Sesay Esq. for Respondent

REASONS FOR JUDGMENT

MURIA JA (NOW JSC):

On 29th November, 2005 this Court allowed the appellant's appeal and quashed his sentence. We said that we would give our reasons for our decision. This we now do so. This case extends beyond the interest of the appellant and the respondent. It concerns the principle of freedom of the press which is one of the freedoms enshrined under the [p.27] Constitution of Sierra Leone. This appeal, however, is determined on the facts of the present case and law applicable to those facts.

Brief Background

The brief background to this case is that appellant, Paul Kamara, is the Editor of the newspaper FOR DI PEOPLE. On 3rd October 2003, respectively, the newspaper published the following statements about His Excellency the President of Sierra Leone.

"KABBA IS A TRUE CONVICT

…… Therefore, President Kabba is a convict who has refused with impunity to appeal his conviction……."

"BETWEEN CONSTITUTIONALITY AND A CONVICT PRESIDENT KABBA

As far as FDP is concerned Kabbah should not be a President. In the first place, the man never appealed the Beoku-Betts Commission of Inquiry and the simple definition of the term 'CONVICT' is an individual that has been found guilty of a crime or an offence……."

Following the publication of those statements in the FOR Dl PEOPLE Newspaper, the appellant was charged with Seditious Libel for which he was tried, convicted and sentenced to two years imprisonment by the High Court of Sierra Leone.

The High Court decision

I set out the two counts of Seditious Libel, contrary to Section 33(1) (c) of the Public Order Act No.46 of 1965 as amended in order to appreciate the nature of the offences with which the appellant was charged.

[p.28]

"COUNT 1

STATEMENT OF OFFENCE: SEDITIOUS LIBEL CONTRARY TO SECTION 33(1) (c) of the Public Order Act No.46 of 1965 as amended.

PARTICULARS OF OFFENCE: PAUL KAMARA on the 3rd day of October 2003 at Freetown in the Western Area of Sierra Leone seditiously published a certain seditious libel concerning His Excellency the President of Sierra Leone Alhaji Dr. Ahmad Tejan Kabba containing inter alia the following seditious matters in the 3rd of October 2003 Edition of "FOR Dl PEOPLE" Newspaper in an article captioned:— KABBA IS A TRUE CONVICT!" to wit"……Therefore, President Kabbah is a convict who has refused with impunity, to appeal his conviction……."

"COUNT II

STATEMENT OF OFFENCE: SEDITIOUS LIBEL CONTRARY TO SECTION 33(1) (c) of the Public Order Act No.46 of 1965 as amended

PARTICULARS OF OFFENCE: PAUL KAMARA on the 7th day of October 2003 at Freetown in the Western Area of the Republic of Sierra Leone seditiously published a certain seditious libel concerning His Excellency the President of the Republic of Sierra Leone Alhaji Dr. Ahmad Tejan Kabba containing inter alia the following seditious matters in the 7th of October 2003 Edition of "FOR Dl PEOPLE" [p.29] Newspaper in an article captioned BETWEEN CONSTITUTIONALITY AND A CONVICT PRESIDENT" KABBA " to wit:—

"As far as FDP is concerned Kabbah should not be should not be a president in the first place. The man never appealed the Beoku-Betts Commission of Inquiry and the simple definition of the term "CONVICT", is an individual that has been found guilty of a crime or an offence……"

As I have said earlier, following a trial the appellant was convicted and sentenced to two (2) years imprisonment.

It will be observed that before finding the appellant guilty and sentencing him, the learned trial Judge, in his Judgment, set out what Counsel for appellant called the "lofty goals" to be taken into consideration. His Lordship set these out at pages 139 to 140 as follows:—

"Having carefully considered the submissions made by Defence Counsel and Prosecuting Counsel in their final address except Counsel for the 2nd accused who is absent from the jurisdiction and I should now consider whether Prosecution have proven (sic) their case against each accused person beyond reasonable doubt — to my satisfaction in my capacity as Judge and Jury. Like in all criminal proceedings the prosecution in the present proceedings has the burden to prove the charges as laid in the indictment. The accused persons are under no obligation to put a defence.

There are four counts in this indictment. Counts 1 & 2 charge the 1st accused with publishing a seditious libel concerning His Excellency the [p.30] President. Counts 3 and 4 charge the 2nd, 3rd and 4th accused with the offence of printing a Seditious Libel concerning His Excellency the President.

My duty now is to see whether the evidence laid by the prosecution has established the ingredients and to see whether each accused has committed the Offence as alleged in each count."

The complaints by the appellant is that having set out the criteria to be taken into consideration before determining the guilt or the innocence of the Appellant, the learned trial Judge failed to do what he reminded himself necessary to be done.

Grounds of Appeal

There were 12 grounds of appeal originally filed on behalf of the appellant. However, having been granted leave to file amended grounds of appeal, Mr. Jenkins-Johnston (who did not file the original Notice of Appeal) filed only two grounds of appeal. The Court is now concerned with only those two grounds of appeal. I set them out here:

Ground 1.

The learned trial judge erred in law, and was totally wrong to have pronounced the Appellant as being guilty of the offences of Seditious Libel as charged, the prosecution having failed to establish by evidence or otherwise that the publications complained of were; (a) Seditious Publications and (b) were published by the appellant with a seditious intention.

Ground 2.

That the Judgment was against the weight of the evidence.

[p.31]

This appeal is being determined on those two grounds of appeal.

The issues and arguments

In the light of the now limited grounds of appeal, the issues are equally narrowed. Hence the central issue to be determined is in essence as follows: — have the elements of the offence of seditious libel been established? Essentially two questions are raised and must be answered. Firstly, whether the two articles complained of constituted seditious publications and secondly, if they were, whether they were so published with a seditious intention. These two requirements must be established if the offence of seditious libel is to be made out. Without having to look elsewhere for authorities on the point, the case of **Regina v Lamin and Taqi [1964-66] ALR S.L. 346;** is the authority in point, a case decided by the then Supreme Court of Sierra Leone. The other cases referred to by Counsel for the appellant are **Wallace-Johnson -v- The King [1940] 1 W.W.R 365 (P.C.) (Gold Coast); [1940] AC 231; R v Bums (1886) 16 Cox CC 355; R v Sullivan; R v Piggot (1868) 11 Cox CC 44 (IR)**. Each of these cases was decided according to its own circumstances. However, the two requirements or elements of the offence of seditious libel were central to the decisions in all of those cases referred to.

It is important to note that, although Wallace Johnson -v- The King was referred to in Regina v Lamin and Taqi, the Supreme Court in R v Lamin and Taqi, did not express any view as to whether Wallace-Johnson -v- The King should apply or not in that case. In contrast, when one reads the decision In R v Lamin and Taqi with those of R v Burns; R v. Sullivan and R v Piggot, it is obvious that the reasoning of the Court in R v Lamin and Taqi followed closely those of R v Burns; R v Sullivan and R v. Piggot. We can only presume that the Court in R v Lamin and Taqi viewed the decision in Wallace-Johnson -v- The King turned on a very [p.32] narrow point, namely whether it was necessary for the prosecution to bring evidence to show incitement to violence before seditious intention could be proved, and thus it was not an issue for consideration in the R v Lamin and Taqi case. We, however, expressed the view that, like the then Gold Coast Colony (now Ghana), Sierra Leone incorporates the law of seditious libel in a statute. In the then Gold Coast, it was in the Criminal Code, and in Sierra Leone, it was in the Sedition Act (Cap.29) and now in the Public Order Act, 1965. The Courts, in dealing with such an offence, must first turn to the statute which sets out the law of seditious libel. Only where the language used in the statute is unclear and ambiguous should the Court seek assistance from any expositions, however authoritative, of the common law. The Privy Council in Wallace Johnson -v- The King succinctly pointed this out in response to the submission by Counsel for the appellant relying on a number of English and Scottish Courts including R v Bums (above), at pp.239 -240:

"Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some color to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law on sedition by Stephen J. in the Digest of Criminal Law, 7th ed., arts. 123-126, quoted with approval by Cave J. in his summing up on Reg. v Bums and others. The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found. The Code was no

doubt designed to suit the [p.33] circumstances of the people of the Colony. The elaborate structure of s. 330 suggests that it was intended to contain, as far as possible, full and statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland."

We set out the above extract at length because we feel that similar approach should be taken by the Courts in Sierra Leone when dealing with offences created by statutes, such as the one with which we are dealing here.

Having said that, we return to the case before us to consider the two issues raised by the appellant we bear in mind, of course that our function is that of an appellate one and that we defer to the learned trial judge the benefit of being a judge at first instance. Be that as it may, the salutary principle remains that a finding of guilt of an accused person by the trial judge must be supported by evidence adduced before the Court, establishing the elements of the offence beyond reasonable doubt.

Whether there was a seditious publication?

There is no question here that the two articles complained of were published on 3rd October 2003 and 7th October 2003 respectively, in the FOR Dl PEOPLE NEWSPAPER of which the appellant was the Editor. The first issue for determination is whether the publication was seditious and secondly whether it was done so with a seditious intention. These are the criminal intent and the criminal act in the offence, and they must be established before the offence is made out. See R. v Sullivan (above).

[p.34]

Our reading of the record shows that the learned trial Judge, while properly directing himself as to the need of proof of the ingredients of the offence and that it was the accused who committed the offence, failed to make any finding at all on issues raised as required by law in a criminal trial. There was no finding that the elements of the offence were proved beyond reasonable doubt or at all. The learned trial Judge had simply repeated evidence and submissions of Counsel for the prosecution and defence. Having done so, the learned trial Judge did not make any express finding that, on the evidence, each of the elements of the offence had been proved. His Lordship simply concluded that the appellant was guilty on both counts. We view such treatment of the evidence, in a serious case such as the present one, as very unsatisfactory, particularly where a trial judge is sitting alone. The purpose of reviewing, not necessarily rehearing the evidence, is to ascertain whether or not the evidence adduced prove each of the elements of the offence. A ton of evidence may be adduced at the trial, and which may not necessarily establish proof of the elements of the offence. Conversely, brief evidence may be adduced and may be sufficient to prove the ingredients of the offence. As we have found, the learned trial Judge had failed to ascertain whether or not the elements of the offence had been proved on the evidence before the Court. This is an error of law and is fatal to the conviction of the appellant.

The error became obvious also because the learned trial judge proceeded to determine the issue of whether or not His Excellency President Kabbah was a true convict, instead of concentrating on the

elements of the offence. With respect, the issue of whether His Excellency was a true convict was not an element of the offence that was required to be established. The learned trial Judge clearly misdirected himself in law by directing himself to the issue of the truth or the untruth of the statement referring to the President as a true convict. Even the accused cannot plead the truth of the statement that he makes as a defence: **R v Aldred (1909) 74 JP 55; 22 Cox CC 1).** In any case, the authorities are clear that in dealing with the article in seditious libel cases, the [p.35] Judge or jury should not merely look at the objectionable sentence or word in particular, but the whole article: R v Burns (above), R v Lamin and Taqi (above); R v Sullivan (above).

Consequently, the learned Trial Judge failed to make any finding that the essential elements of the offence were established as required by law and could not have come to the conclusion that the offences with which the appellant was charged were proved against him. Publications of remarks or innuendoes may be capable of satisfying the definitions of seditious libel. However, in a charge of seditious libel the prosecution must prove the required intention, namely seditious intention which must be established on the facts.

This Court cannot accept the submission by Counsel for the respondent that there was no necessity for the learned trial Judge to make specific finding as to proof of each of the elements of the offence. Not only that such an approach would be contrary to our notion of the law and practice of criminal law, but that it will set a dangerous precedent contrary to our sense of justice.

We do not lose sight of the fact that those who disseminate information through media publication, whether by print or broadcast, cannot shelter behind the principles of freedom of expression where such publication interferes or threatens the rights of others. This is demonstrated by the South African cases of **Khumalo and Others v Holomisa (14 June 2002) CCT 53/01 CC** where it was held that the common law on defamation provides a justifiable limit to the right of freedom of expression, and **S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) S.A. 409 CC** where it was pointed out that the right to freedom of expression is also limited by the rights of others, and that these conflicting rights have to be balanced. The House of Lords had recently reiterated the need to balance these conflicting rights also in the case of the celebrated famous model, Naomi Campbell and the 'Mirror' newspaper: **Campbell v MGN Limited [2004] UKHL 22**. In that case, Lord Hope [p.36] of Craighead, commenting on the competing right of free speech and individual right to privacy, under Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms said,

"The context for this exercise is provided by articles 8 and 10 of the Convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognizes the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.

There is nothing new about this, as the need for this kind of balancing exercise was already part of English law: Attorney General v Guardian Newspapers (No 2) [1990] 1 AC 109, per Lord Goff of Chieveley. But account must now be taken of the guidance which has been given by the European Court on the application of these articles."

In our own jurisdiction the provision and the extent of the right to freedom of expression can be found in section 25 of the Constitution of Sierra Leone which clearly provides that:

"25. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and [p.37] operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning:

Provided that no person other than the Government or any person or body authorized by the President shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision —

(a) which is reasonably require:

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the telephony, telegraphy, telecommunications, posts, wireless broadcasting, television, public exhibitions or public entertainment; or

(b) which imposes restrictions on public officers or members of a defence force,

[p.38]

and except in so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

Thus freedom of expression is not a limitless right. However, the baseline is that the Constitution guarantees protection to the right of freedom of expression or freedom of the press. That is the starting point in considering the right to freedom of expression. The consideration of any limitation on that right follows thereafter. It is therefore incumbent on the Courts, in a case such as the present one, to be guided by the spirit of the Constitution in considering the case against the accused, taking into account the nature of the publication together with the surrounding circumstances of the case as a whole. The Court should not allow itself to be solely influenced by the objectionable language used in the passage complained of. See R v Lamin and Taqi (above).

One of the classic demonstrations of this was the **1962 New Orleans case of Garrison v Louisiana, 379 U.S. 64 (1964**) where Garrison sought the Fiat of the criminal judges to bring proceedings against the French Quarter of New Orleans. The eight criminal judges refused to give their approval. At a press conference Garrison accused the judges of laziness and inefficiency and of hampering his efforts to enforce the vice laws, adding that the judges' refusal raised "interesting questions about the racketeer influences on our eight vacation-minded judges." Garrison was charged with criminal defamation in violation of the Louisiana Criminal Defamation Statute, which in the context of criticism of official conduct includes punishment for true statements made with "actual malice" in the sense of ill-will as well as false statements if made with ill-will or without reasonable belief that they were true. He was convicted, sentenced to a fine of $1000 and four months in prison. The state appeal court affirmed the conviction, holding that the statute did not unconstitutionally abridge the appellant's rights of free expression. The Court went on to hold that". . . the use of the words 'racketeer [p.39] influences' when applied to anyone suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty." The Supreme Court of the United States overturned the conviction and said that public officials cannot collect for public criticism unless a statement is made with actual malice. Justice Black's comment is most telling when he said that:

"Indeed, 'malicious,' 'seditious,' and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now and not wait to hold later...that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel."

That libertarian stand found in the United States is unique to that country where the importance of free media under the First Amendment has been accorded presumptive priority. See **Douglas v Hello! Ltd [2001] 1 QB 967, 1004.** We must, of course, bear in mind the state of our own circumstances and the public mind of the people in Sierra Leone in this area of the law. We can do no better than to choose according to our intuition and hopes as relevantly determined by our circumstances, bearing in mind that seditious libel is still part of the law of Sierra Leone.

In the present case, considering the circumstances and manner in which the appellant's case had been dealt by the trial judge, we are satisfied that the errors of law raised in the grounds of appeal have been sufficiently established. Consequently, as we had announced on 29th November 2005, the appeal must be allowed and for the reasons that we have now published.

[p.40]

Order of the Court:

Appeal allowed.

Convictions and sentences quashed.

STRONGE, J.A.

I agree.

KAMANDA, J.A:

I agree.

CASES REFERRED TO

1. Regina v Lamin and Taqi [1964-66] ALR S.L. 346

2. Wallace-Johnson v The King [1940] 1 W.W.R 365 (P.C.) (Gold Coast); [1940] AC 231;

3. R v Bums (1886) 16 Cox CC 355;

4. R v Sullivan,

5. R v Piggot (1868) 11 Cox CC 44 (IR).

6. Criminal Law, 7th ed., arts. 123-126,

7. R v Aldred (1909) 74 JP 55; 22 Cox CC 1

8. Khumalo and Others v Holomisa (14 June 2002) CCT 53/01 CC

9. S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) S.A. 409 CC

10. Campbell v MGN Limited [2004] UKHL 22. E

11. Attorney General v Guardian Newspapers (No 2) [1990] 1 AC 109,

12. Garrison v Louisiana, 379 U.S. 64 (1964)

13. Douglas v Hello! Ltd [2001] 1 QB 967, 1004

STATUTES REFERRED TO

1. Public Order Act No.46 of 1965

2. Sedition Act (Cap.29)

3. Public Order Act, 1965

SAMUEL SESAY v. THE STATE

[CR. APP. 9/2003] [p.64-65]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 22 NOVEMBER 2006

CORAM: MR. JUSTICE JOHN KAMANDA, J.A

MRS. JUSTICE S. BASH-TAQI, J.A.

MR. JUSTICE S.A. ADEMOSU, J.A.

BETWEEN:

SAMUEL SESAY

Vs

THE STATE

R.A. Caesar for the Appellant

C.J. Peacock for the Respondent

ADEMOSU J.A.

On 6th February, 2003 the Appellant was arraigned before the Kenema High Court of Sierra Leone holden at Kenema on a two count indictment for the offences of Murder Contrary to Law and Wounding with intent Contrary to Section 18 of the Offences Against the Person Act 1861 and to which he pleaded not guilty. On the 12th of February, 2003 the Jury was empanelled. But it is observed that after the jurors had been sworn and had chosen their Foreman there is no evidence that the indictment was read and explained to them and to tell them that upon the indictment the Accused/Appellant had pleaded not guilty. Suffice it to say that the provisions of Section 187 of the Criminal Procedure Act No. 32 of 1965 relating to giving the accused in charge of the jury were completely ignored. The Trial Judge simply started receiving evidence from witnesses for the prosecution. There is no evidence that the jury took part in the whole proceedings because one would have expected the record to show whether or not questions were asked by the jury. This trend continued until the case for the prosecution closed. For the defence one witness was called after which the Defence's case closed. It was after the Prosecuting Counsel had addressed the court, that the Defence Counsel advised the appellant to plead guilty to a lesser offence of Manslaughter and also pleaded guilty to the offence of Wounding with Intent. The Trial Judge without asking the jury for their verdict recorded a verdict of guilty on its own and sentenced the Appellant to a term of 50 years imprisonment on each count but that the sentences were to run concurrently.

Mr. Caesar for the Appellant's contention is that the Appellant having pleaded guilty to a lesser offence of Manslaughter he should not have been sentenced to 50 years imprisonment. In other words; his complaint is that the sentence is excessive. He started his argument by saying that the Learned Trial

Judge erred, having heard the plea of the Appellant he failed to direct the jury to return a verdict of guilty, before he proceeded to pass sentence on the Appellant. For this proposition, he relied on the case of R. v Hayes (1950) 2 ALL ER, 587. In that case the accused changed his plea of not guilty to one of guilty after he was given in charge of the jury; and without any verdict taken he was sentenced. The conviction was quashed on the ground that the trial was a nullity. Coming back home, the local authority on this issue is Basma v. Reginam (1957-60) A.L.R.S.L. 301.(W.A.C.A.) in which the [p.65] court emphasised the principle that in R v Hayes (Supra) the jury must return a verdict even where accused changes his plea to guilty during trial. The court held that the trial is a nullity where verdict is not taken.

I must state here that the record of proceedings in this matter does not indicate whether or not the jury took part in the purported trial of the Appellant and consequently the inescapable conclusion is that the purported trial is a nullity. If the trial is a nullity the next point to consider is whether or not to order a retrial. But before deciding to order a retrial the court is duty bound to examine the evidence adduced properly so as to ascertain whether the evidence taken as a whole disclosed a substantial case against the appellant and to ensure that a retrial would not occasion a greater miscarriage of justice. Mr. Caesar's argument is that the appellant has spent almost four years awaiting the appeal and bearing in mind that he is a first offender it would work a great injustice to order a retrial. The theme of Mr. Peacock's submission is that he conceded that the trial is a nullity. He submitted that the legal consequence of it is for the court to order a retrial. But when his attention was drawn to the fact that the accused had already spent some four years coupled with the fact that it may not be possible to get all the witnesses to start a fresh trial in Kenema, Mr. Peacock dropped the idea of ordering a retrial. He urged the court to decide on a sentence that would meet justice of the case on each count.

This judgment will not be complete without considering the sentence of 50 years imprisonment passed on the 2nd Count of Wounding with Intent. In the considering the sentence passed we are guided by what the Court of Appeal said in Mottidge v. R. (1964-66) A.L.R.S.L. 571 at Page 573 on the issue of long prison sentence for the offence of wounding with intent. In that case although there was no appeal against the sentence of 10 years which in the face of the evidence seemed to the court to be unnecessarily severe Here is a sentence of 50 years. The court held that such sentences can only be justified on a proved record that the person concerned was of a violent nature and had previous convictions for similar violent acts. In the plea mitigation among the things said in his favour was that the accused/appellant was a first offender and that he had never had problem with anybody. I believe that the trial Judge could not have taken these facts into consideration before he passed a sentence of 50 years imprisonment. It goes without saying that this sentence is too severe and inordinate. On the proved facts and the circumstances of this case I think a sentence of two (2) years imprisonment will meet the justice of the case. In the premises, the sentence of 50 years imprisonment is reduced to two (2) years imprisonment.

As regards the offence of Manslaughter, the appellant having already pleaded guilty to the offence I think it would be fruitless ordering that he be retried for the same offence, mindful of the fact that it would be unfair to the relatives of the Victim if we set the appellant free instantly. For this reason, the sentence of 50 years imprisonment passed on him is reduced to six years imprisonment.

The Sentences to run concurrently.

SGD

MR. JUSTICE JOHN KAMANDA, J.A

SGD

MRS. JUSTICE S. BASH-TAQI, J.A.

SGD

MR. JUSTICE S.A. ADEMOSU, J.A.

CASES REFERRED TO

1. R. v Hayes (1950) 2 ALL ER, 587.

2. Basma v. Reginam (1957-60) A.L.R.S.L. 301.(W.A.C.A.)

3. Mottidge v. R. (1964-66) A.L.R.S.L. 571 at Page 573

TECHPROFIT LIMITED & ANOR. v. NATIONAL DEVELOPMENT BANK LIMITED

[CIV. APP. 41/2006] [p.50-52]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 14 DECEMBER 2006

CORAM: JUSTICE U.H. TEJAN-JALLOH, JA

JUSTICE S. KOROMA, JA

JUSTICE S. BASH-TAQI, JA

BETWEEN:

TECHPROFIT LIMITED — DEFENDANTS/APPELLANTS/RESPONDENTS

SUMATU INTERNATIONAL

LIMITED — DEFENDANTS/APPELLANTS/RESPONDENTS

AND

NATIONAL DEVELOPMENT

BANK LIMITED — PLAINTIFF/RESPONDENT/APPLICANT

Hearing: 5th December, 2006

Judgment: 19th December, 2006

Advocates:

E. PABS-GARNON ESQ. for the Applicant/Respondents

ELVIS KARGBO ESQ. for the Respondents/Appellants

RULING

TEJAN-JALLOH JA:

This is an application by way of Notice of Motion dated the 27th October, 2006 on behalf of the Respondent for the following Orders:—

1. That the Notice of Appeal dated the 1st day of August, 2006 filed on behalf of the Defendants/Appellants/Respondents be struck out by this Honourable Court.

[p.51]

2. Any further or other reliefs.

3. That the costs of this application be borne by the Defendants/Applicants/Respondents.

The application is supported by the affidavit of Editayo Pabs-Garnon sworn to on the 27th day of October 2006 and filed herein together with Exhibits attached hereto, to wit,

Exh. EPG1 — Final Judgment of the Hon. A.N.B. Stronge J.A. dated 25th day of May, 2006.

Exh. EPG2—- Notice of Appeal dated 21st day of July, 2006.

Exh. EPG3 — Notice of Civil Appeal dated 18th August, 2006.

There is an affidavit in opposition sworn to by Elvis Kargbo Esq., Barrister and Solicitor of the High Court of Sierra Leone and No.14 Upper Patton Street, Freetown in the Western Area of Sierra Leone.

Editayo Pabs-Garnon Esq. appears for the Plaintiff/Respondent/Applicant and Elvis Kargbo Esq., for the Defendant/Appellant/Respondent.

We have heard the arguments of Counsel and their submissions in respect of this application. We are of the view that to grant this application will be tantamount to keeping in the file the grounds of appeal filed by the previous solicitors, who have been replaced by Messrs. Betts and Berewa, whilst the grounds of appeal filed by them would result in being discountenanced. To start with, this fetters the discretion of the present Solicitors and deprives the Appellant of his constitutional right of appeal.

[p.52]

The fact that Messrs. Betts and Berewa are the new Solicitors cannot be ignored and the affidavit in opposition is clear and unequivocal that E.E.C. Shears-Moses Esq., is no longer in the matter. The question may be asked, will it be just and in consonant with the principles of justice to force Betts and Berewa to adopt the grounds of appeal filed by the former Solicitor? The answer no doubt, will be a resounding no. It is our view that the Appellant should have an unimpeded access to this Court. Application is accordingly dismissed. Each party to bear its costs.

SGD.

JUSTICE U.H. TEJAN-JALLOH, JA

SGD.

JUSTICE S. KOROMA, J

SGD.

JUSTICE S. BASH-TAQI, JA

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ALPHABETICAL LISTING

ALHAJI UNISA ALIM SESAY v. ANTHONY KAMARA

[CIV. APP. 72/2005] [p.17-22]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 15TH MARCH, 2007

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA, J.A.

JUSTICE A.N.B. STRONGE J.A.

BETWEEN:

ALHAJI UNISA ALIM SESAY — APPELLANT

AND

ANTHONY KAMARA — RESPONDENT

HEARING DATE: 24TH OCTOBER, 2006

JUDGMENT: 15TH MARCH, 2006

ADVOCATES:

M.E. MICHAEL ESQ., FOR APPELLANT

D.S. VINCENT, ESQ., FOR RESPONDENT

JUDGMENT

TEJAN-JALLOH JSC:

This is an appeal against the Judgment of Hon. Justice A.B, Raschid delivered on the 23rd day of November 2005 in which the learned Judge made the following Orders against the Appellant:

(a) A declaration that plaintiff is the Lessee and entitled to possession of all that Piece or Parcel of land situate lying and being at off Ross Road, Cline Town, CT1 Freetown in the Western Area of Sierra Leone. Damages for trespass assessed at Le.1,000,000 (One Million Leones).

(b) General damages, assessed at Le. 1,000,000 (One Million Leones).

[p.18]

(c) General damages, assessed at Le.1,000,000 (One Million Leones).

(c) An injunction restraining the defendant either by, himself, his servant, agent privies or otherwise howsoever from entering upon or otherwise, leased with the Plaintiff's land.

(d) Costs to be borne by Defendant. Such costs to be taxed.

The appellant dissatisfied with the decision/Order contained in the said Judgment of the 23rd day of November 2005 appealed to the Court of Appeal upon the ground set below:

1. That the Learned Trial Judge erred in law in adducing further evidence from D.W.2 DONALD MORRIS JONES on 21st June 2005 after the parties had closed their case, after the Defendant's Solicitor had addressed the Court and in the middle of the address by the Plaintiff's Solicitor.

2. That the Learned Trial Judge erred in law in continuing to hear the address of the Plaintiff's Solicitor following the further evidence of DW 2 and not affording the Defendant's Solicitor the opportunity to address him further following the further evidence of DW 2.

3. That the Learned Trial Judge erred in recalling DW 2 to further testify in this action at this stage of the proceedings.

4. That the Learned Trial Judge erred in examining DW 2.

5. That the Learned Trial Judge erred in failing to allow Counsel for the Defendant to address the Court on his objection to the recall of DW 2.

6. That the Learned Trial Judge failed to consider or to adequately consider the documentary evidence adduced on behalf of the Appellant.

[p.19]

7. That the Learned Trial Judge misunderstood and consequently misconstrued the evidence of DW 2.

8. That the Learned Trial Judge erred in law and in fact in holding that the Respondent's (Plaintiff's) purported lease for three years had to be revoked before it could come to an end Exh. O

9. That the Learned Trial Judge failed to consider at all or to adequately consider that the issue that the Respondent's lease had been determined by effluxion of time.

10. The judgment is against the weight of the evidence.

Background

By a Writ of summons dated 7th December 2000, the Plaintiff (Respondent herein) instituted an action claiming inter alia a declaration that the Respondent is the owner and entitled to possession of that piece or parcel of land situate lying and being at Off Ross Road, Cline Town, Freetown; damages to trespass; damages for trespass to goods on the said land.

In his particulars of claim, the Respondent alleged that he is the owner and occupier entitled to possession of the said land; that he became entitled to the same by virtue of a lease from Government of Sierra Leone contained in letters dated 20th March 1996 and 19th July 1999.

An appearance was entered on behalf of the Appellant defendant dated 22nd December 2000 and a defence filed dated 4th January 2001. The Appellant denied inter alia the Respondent's assertions and avers that if the Respondent had a lease in respect of the said land the same had expired by effluxion of time. The Defendant denied that he had ever made any personal claims to the said land. He averred that by letters dated 22nd and 23rd September 1999 a portion of land situate Off Ross Road, Cline Town, Freetown was approximately 0.4477 acre in area was leased by the State to East End Lions [p.20] At the trial, the Respondent/Plaintiff and 2 other witnesses testified on his behalf. The Appellant/Defendant and Donald Morris Jones, the Acting Director of Surveys and Lands, testified on behalf of the Defence.

Learned Counsel for the Appellant addressed the Court on 23rd May 2005 (page 56-59 of the records). On 7th June 2005, the Respondent's Counsel commenced his address (pages 59-61). In the middle of his address the learned trial judge on his own volition orders that a subpoena be sent to DW 2 Donald Morris Jones, the Acting Director of Surveys and Lands. The Learned Trial Judge then examined the witness. The witness was cross-examined by Counsel for the Plaintiff/Respondent after which he proceeded to address the court.

Judgment was delivered in this action on 23rd November 2005. It is against this Judgment that Counsel appealed. As regards these grounds of appeal we find it convenient to deal with them together.

From the defence filed the Defendant/Appellant made it abundantly clear that he had never made any personal claims to the said land in dispute and that he only acted as the Chairman of the East End Lions Football Club, on whose behalf he acted, but yet he was sued personally when it should have been a representative capacity. Having made this disclosure, he ought to have been sued in a representative capacity and a representative capacity in which he had been sued must be indorsed on the writ before it is issued. See Ord, 6 r. 3 and should also be stated in the title of the action:

Re Tottenham (1896) 1 ch.628. The endorsement of the representative capacity is a very crucial matter:

Bowler v Johnson Mowlem…….. & Co. (1954) 2 All E.R. 556 CA.

2. During the cause of the trial the learned Trial Judge recalled DW.2, Donald Morris Jones in spite of the objection raised by the Appellants Solicitor. In a civil suit the function of the Court is to decide cases on evidence that the parties think fit to call before it. It is not inquisitorial.

[p.21]

function of the Court is to decide cases on evidence that the parties think fit to call before it. It is not inquisitorial.

Re Enoch v Zaretzky, Buck & Co. (1910) 1 kB 327.

The Judge has power to recall a witness only if neither party object. See Harlsburys Laws of England 3rd ed.; para 804 at page 445 where the learned author states that with consent of the parties or in the absence of objection, the judge may at anytime recall a witness who has already given evidence. The learned Judge erred in law when he recalled DW 2.

3. The records demonstrated that the appellant was denied a proper opportunity of putting his defence in that following the recall of D.W.2 the appellant's solicitor filed a motion with an affidavit dated 27th June 2005 praying inter alia, leave to appeal against the recall of D.W.2; stay of proceedings pending the hearing and determination of the appeal. The application was never heard.

4. It is abundantly clear in the records that it is erroneous to say that the action is a claim of title to land, because the title to the land vested in the state. This can only be a case of encroachment or trespass to land. The several exhibits tendered reveal that the land leased to the Respondent as per Exhibit C is situated at Off Ross Road, Cline Town, whereas the lease to East End Lions Football Club, is land at CT1 Ross Road, Cline Town Compound, Cline Town, Freetown. See Exh. J.

It is not in dispute that both parties derived their title from the state. Exh. O which emanated from Lessor has expressly stated that "as far as their records are concerned only the East End Lions Football Club are the legal Lessee of the land in question and that only they are entitled to physical occupation thereof.

Finally it is wrong to give judgment for possession of land personally against a person who is not laying any claim to it and who does not possess or occupy it personally.

In this case, the party against whom order or judgment should be directed was not a party to the action. For all the foregoing reasons this appeal is allowed, the judgment [p.22] delivered on the 23rd day of November, 2005 is set aside. Costs in this Court (Court of Appeal) and the lower court to be taxed and paid to the appellant.

SGD.

HON JUSTICE U.H. TEJAN-JALLOH JSC

SGD.

HON JUSTICE: S. KOROMA JA

SGD.

HON JUSTICE: A.N.B. STRONGE JA

CASES REFERRED TO

1. Re Enoch v Zaretzky, Buck & Co. (1910) 1 kB 327.

2. Bowler v Johnson Mowlem & Co. (1954) 2 All E.R. 556 CA.

DR. ABDUL WAHAB LABI & ANOR. v. JOHN SAHR YAMBASU & ANOR. & ALL PEOPLES CONGRESS

[CIV. APP. 45/2005] [p.6-8]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 24TH JANUARY, 2008

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA J.A.

MR. JUSTICE S.A ADEMOSU

BETWEEN:

DR. ABDUL WAHAB LABI

MOHAMED L. BANGURA — APPELLANTS

AND

JOHN SAHR YAMBASU

MOHAMED AKA KOROMA

AND

ALL PEOPLES CONGRESS — RESPONDENTS

HEARING DATE: 16TH JANUARY 2007-02-02(sic)

RULING: 6TH FEBRUARY 2007

ADVOCATES:

A.F. SERRY-KAMAL ESQ. FOR THE APPELLANTS

BERTHAN MACAULAY (JNR.) ESQ. FOR THE 1ST & 3RD RESPONDENTS

V.V. THOMAS ESQ. FOR THE 2ND RESPONDENT

[p.7]

DELIVERED THIS 6TH DAY OF FEBRUARY 2007

RULING

TEJAN JALLOH, J.S.C.

When this appeal came up for hearing, Berthan Macaulay (Jnr.) Esq., Counsel for the 1st and 3rd Respondents took preliminary objection pursuant to Rules 19 (2) of the Court of Appeal Rules — Statutory Instrument No. 29 of 1985 that Dr. Abdul Wahab Labi nor his Solicitor or Counsel has filed a Notice of Appeal pursuant to Rule 9 Sub-Rule (1) of the Court of Appeal Rules and that the time within which an appeal can be brought against the final judgment or an Application for an enlargement of time within which an appeal can be brought against such judgment has expired. He made several legal submissions to support his contention.

Serry Kamal Esq. Counsel for the Appellant argued that it was not necessary for all appellants to sign and file the Notice of Appeal. It was enough if one of them did and in the instant case the Notice of Appeal signed and filed by M.L. Bangura — covered other would-be-appellants. He submitted that according to Rule 9 (1) a prospective Appellant was not bound to employ civil Form 1 prescribed by the Rules as the Rule does not expressly state that it must be followed. He cited Rules 40 and 41 of the Court of Appeal Rules, which specifically state that notices shall be in Forms 1, 2 or 3 in Appendix C as the case may be.

But Rule 9 (1) reads as follows:

"An appeals shall be by way of rehearing and shall be brought by notice (in these Rules called "Notice of Appeal") to be filed in the Registry of the court which shall set forth grounds of appeal etc.”

[p.8]

Mr. Serry Kamal's submissions on Rules 40 and 41 in respect of the use of the forms and signatures are correct, but those Rules deal with Criminal Appeals and not Civil Appeals and therefore Rules are not relevant.

A careful reading of the Rules show that Rule 9 (1) is the pivot of all Civil Appeals and must be read with Rule 8, which provides that the forms set out in Appendices A and C shall be used in all cases to which such forms are applicable. The marginal note to Rule 9(1) mentions the use of Civil Form 1 in respect of notice and grounds of appeal. That form is to be found in Appendix A, which cites Rule 9 (1).

In addition, a column designated "Appellant" is provided in Civil Form 1 and Rule 1 of the Court of Appeal Rules defines appellant to include the party appealing from a judgment, order or decree and his

Solicitor or Counsel. It follows that a Notice of Appeal under Rule 9 (1) can be filed and signed by not only the party appealing from a judgment but also order or decree by his Solicitor.

In the instant case there is no notice of appeal neither filed by Dr. Abdul Wahab Labi under Rule 9(1) nor signed by him or his Solicitor. The Notice of Appeal by M.L. Bangura cannot serve as a substitute as he is not Solicitor or Counsel for Dr. Labi nor can he avail himself if Sub-rule 3 of Rule 11 of the said Rules.

We therefore hold that there is no appeal by Dr. Abdul Wahab Labi.

JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA, J.A.

JUSTICE S. A, ADEMOSU, J.A.

STATUTE REFERRED TO

1. Court of Appeal Rules

EDWARD SISAY v. THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[CIV. APP. 3/2005] [P.43-53]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 22ND MAY, 2007

CORAM: JUSTICE U.K. TEJAN-JALLOH, J.A.

JUSTICE P.O. HAMILTON, J.A.

JUSTICE A.N.B. STRONGE, A.J.

BETWEEN:

EDWARD SISAY

(AS ADMINISTRATOR OF THE ESTATE)

(OF AHMED E. SISAY (DECEASED)

(INTESTATE) — APPELLANT

AND

THE ATTORNEY-GENERAL AND

MINISTER OF JUSTICE — RESPONDENT

HEARING: WEDNESDAY DAY, 22ND FEBRUARY, 2006

TUESDAY, 2ND MAY, 2006

THURSDAY, 21ST SEPTEMBER, 2006

COUNSEL:

MS. S.G. SESAY FOR APPELLANT

KEKURA BANGURA, ESQ. FOR RESPONDENT

JUDGMENT

A.N.B. STRONGE, J.A.:

This is an appeal from the decision of the High Court presided over by The HON. MR. JUSTICE A.B. RASCHID dated the 6th January, 2005. The appeal is on eight (8) grounds, namely:

1. The Learned Trial Judge erred in Law and misdirected himself when he held that in his opinion:

[p.44]

"The property situate at off Spur Loop measuring 0.4694 acre was forfeited to the State"

Having regard to the fact that there was no forfeiture of Assets Order before him.

(2) The Learned Trial Judge erred in Law and misdirected himself in holding that the Applicant is entitled to immediate possession to the property and/or is entitled to immediately re-enter the said property situate lying and being at off Spur Loop Wilberforce former residence of Mr. Foday Yumkella former Minister of Presidential Affairs as he had no jurisdiction to do so having regard to the fact that a judgment of the High Court (a Court of concurrent jurisdiction) granting immediate possession to the Respondent to the property and an Order of the High Court (a Court of concurrent jurisdiction) granting leave to issue a Writ of Possession to the Respondent in respect of the property subsists.

(3) The Learned Trial Judge erred in Law and misdirected himself when he held that the Applicant is entitled to an order setting aside all transaction leading to the sale and purchase of Government property situate lying and being at off Spur Loop Wilberforce also known as No. 2A Spur Loop Wilberforce former residence of Mr. Foday Yumkella formerly Minister of Presidential Affairs having regard to the fact that sufficient facts were not before him and further that the matter was not properly before him.

(4) The Learned Trial Judge erred in Law and misdirected himself when he held that the Applicant is entitled to an order cancelling the grant Deed of Conveyance dated the 5th September, 1991, pursuant to the findings of Report and Government White paper Report of the Hon. Mr. Justice Beccles Davies Commission of Inquiry as he had no jurisdiction to do so having regard to the provision of Section 7(3) of the Commission of Inquiry (Amendment) Act 1982.

[p.45]

(5) The Learned Trial Judge erred in Law and misdirected himself when he held that the applicant is entitled to an order for immediate possession and/or to an order that the Applicant is entitled to immediately re-enter the said Government property situate lying and being at off Spur Loop Wilberforce former residence of Mr. Foday Yumkella, former Minister of Presidential Affairs, in effect granting the Applicant relief which were prayed for in the alternative thereby making his ruling ambiguous.

(6) The Learned Trial Judge erred in Law and misdirected himself when he held that the order for forfeiture is found in the White Paper and nothing need be done after the publication of the White Paper to give legal effect to any order for forfeiture made when he said:

"In my view these provisions are clear as to the consequences of a Commission of Inquiry. Therefore Counsel for the Respondent cannot be heard to say that after the publication of the White Paper there must be publication of a Public Notice and Statutory Instrument." Having regard to the provisions of Section 7(2) and 7(4) of the Commissions of Inquiry (Amendment Act 1982.

(7) The Learned Trial Judge erred in Law and misdirected himself when he wrongly construed Section 149(4) of Act No.6 of 1991 thereby causing him to believe that the Respondent should have appealed against the adverse findings of the Commission.

(8) That the order dated 6th January, 2005 is against the weight of the evidence.

At the hearing of the Appeal Ms. S.G. Sesay appeared as Counsel for the Appellant and Mr. K. Bangura appeared for the Learned Attorney-General and Minister of Justice.

Ms. Sesay sought and obtained leave of the Court to deal first of all with Grounds 1 and 6 of the Grounds of Appeal. Counsel made the following submissions:

[p.46]

1. That there was no forfeiture of Assets Order before the Learned Judge and that he erred in Law and misdirected himself when he held that the Order for forfeiture is found in the White Paper and nothing need be done to give legal effect to any order for forfeiture made thereunder.

2. In the alternative if the Court were to hold as the Learned Trial Judge did that the provisions of the COMMISSIONS OF INQUIRY (AMENDMENT) DECREE No.5 of 1992 have been repealed by THE NATIONAL PROVISIONAL RULING COUNCIL DECREES (REPEAL AND MODIFICATION) ACT No.3 of 1996. Counsel will still submit that there was no forfeiture order before the Learned Judge. The COMMISSIONS OF INQUIRY (AMENDMENT) ACT No.l of 1982, SECTION 7(2) provide that the President may on the advise of Cabinet make an order forfeiting to the Government of Sierra Leone all or any part thereof of the assets of such person whether or not such assets are in his name.

3. That there must be an order made pursuant to the Act expressly identifying the asset to be forfeited and expressly declaring that the same is forfeited to the Government of Sierra Leone.

4. That after the publication of the WHITE PAPER a forfeiture of Assets Order must be made for the purpose of legally and validly divesting the person of his legal interest in the property and transferring the said interest to the STATE.

For reasons which will appear later in this Judgment I will at this stage consider and evaluate the above submissions and Mr. Bangura's reply thereto.

Mr. Kekura Bangura's reply to the Appellant's argument on GROUNDS 1 and 6 of the Appellant's Grounds of Appeal can be summarized as follows:—

[p.47]

1. That the subject matter of this Appeal was subject of a Commission of Inquiry appointed by the Government of Sierra Leone, to investigate into the Assets and other related maters of all persons who were Presidents, Vice presidents, Ministers, Ministers of State and Deputy Ministers, within the period from 1st day of June 1986 to the 22nd day of September 1991 and to inquire into and investigate whether such assets were acquired lawfully or unlawfully.

2. That by Section 149(4) of the Constitution of Sierra Leone "where a Commission of Inquiry makes an adverse finding against any person, which may result in a penalty, forfeiture or loss of status, the report of the Commission of Inquiry shall, for the purpose of this Constitution, he deemed to be a judgment of the High Court of Justice and accordingly an appeal shall lie, as of right, from the Commission to the Court of Appeal."

3. That there is an order of forfeiture against the Appellant which can be found at page 32 of the SIERRA LEONE GOVERNMENT WHITE PAPER ON THE REPORT OF THE JUSTICE BECCLES DAVIES COMMISSION OF INQUIRY, Volume 4 of March, 1994.

BACKGROUND:

To appreciate the nature of the Appeal it will be useful to set out the background to this case.

The N.P.R.C. Government in its attempt to eradicate corruption, mismanagement and in discipline in the affairs of Government, by Public Notice No. 172 in the Extraordinary Issue of the Sierra Leone Gazette dated Wednesday, 13th June, 1992, instituted the Justice Beccles-Davies Commission of Inquiry:— INTER ALIA:—

[p.48]

(i) To examine the Assets and other related matters of all persons who were Presidents, Vice-Presidents, Ministers, Ministers of State and Deputy Ministers within the period from the 1st day of June, 1986, to the 22nd day of September, 1991, and to inquire into and investigate whether such Assets were acquired lawfully or unlawfully;

(ii) To inquire into and investigate the activities of all persons who were Presidents, Vice-Presidents, Ministers, Ministers of State and Deputy Ministers within the period from the 1st day of June, 1986, to the 22nd day of September, 1991, and to ascertain as to—

(a) whether they maintained a standard of living above that which was commensurate with their past official emoluments;

(b) whether they were in control of pecuniary resources or property disproportionate to their past official emoluments.

(c) Whether allegations of corruption, dishonesty, or abuse of office for private benefit by them, or in collaboration with any person or persons in respect of such corruption, dishonesty or abuse of office are established;

(d) Whether they acted willfully or corruptly in such manner as to cause financial loss or damage to the Government, a local Authority, Corporation, a Statutory Corporation, or the University of Sierra Leone.

The Commission submitted its Report in Several Volumes, A Government White Paper (GWP) was subsequently prepared in several volumes as a result of the Report of the Commission of Inquiry. The Government White Paper was published in March, 1994. In Volume [p.49] FOUR of the Government White Paper which deals with the Appellant, the N.P.R.C. ordered that" State Land off Spur Loop measuring 0.4694 Acre ------- acquired by Mr. Sisay during the period under investigation whilst holding public office, be forfeited to the State".

THE HIGH COURT

Following the publication of the Commission of Inquiry Report and more particularly, the Government White Paper thereon, the Respondent instituted proceedings by way of Originating Notice of Motion in the High Court to set aside: "all transactions leading to the sale and purchase of Government property situate, lying and being at off Spur Loop Road, Wilberforce, also known as No. 2A Spur Loop Wilberforce Freetown, former residence of Mr. Foday Yumkella formerly Minister of Presidential Affairs and/or an order canceling the Grand Deed of Conveyance dated the 5th day of September, 1991, between the Government of Sierra Leone as Vendor of the one part and Ahmad Edward Sisay as purchaser of the other part and Registered as No. 1162/91 in volume 453 at page 12 in the Books of Conveyances kept in the office of the Administrator and Registrar-General at Roxy Building, Walpole Street, Freetown pursuant to the findings of Report and Government White Paper of the Hon. Mr. Justice Beccles Davies Commission of Inquiry into the Assets and other related matters of all persons who were Presidents, Vice Presidents, Ministers, Ministers of State and Deputy Ministers etc. and subsequent confirmation of the said confiscation by Justice P.L.V. Cross Commission of Inquiry (THE REPORT OF THE NATIONAL UNITY AND RECONCILIATION COMMISSION)." 2. Further that this Honourable Court grant immediate possession to the applicant herein and/or an Order for the applicant to immediately re-enter [p.50] the said Government property situate, lying and being at off Spur Loop Road Wilberforce, also known as No.2A Spur Loop Wilberforce, former residence of Mr. Foday Yumkella, Former Minister of Presidential Affairs.

By Order dated the 6th day of January, 2005, the High Court granted the two orders sought in the Originating Notice of Motion referred to above. It is against that order of the High Court that the Appellant has appealed to this Court.

THE COURT OF APPEAL

The EIGHT (8) GROUND of Appeal by the appellant have been reproduced. IN EXTENSU. The grounds of Appeal raise both procedural as well as substantive issues of law. It will be convenient in this Appeal to deal with GROUNDS 1 and 6 of the Appeal first.

As stated earlier in this Judgment, the Appellant made two submissions:

1. That there was no Forfeiture of Assets order before the Learned Trial Judge and that the Learned Trial Judge erred when he held that the order for forfeiture is found in the White paper.

2. The Commissions of Inquiry (Amendment) Act 1982, Section 7(2) provides that the President may on the advise of Cabinet make an order forfeiting to the Government of Sierra Leone all or any part thereof of the assets of such person whether or not such assets are in his name.

The Respondent sought to enforce the Report of the Justice Beccles-Davies Commission of Inquiry and the Justice P.L.V. Cross Commission of Inquiry, as they perceived these reports, by instituting proceedings in the High Court by way of Originating Notice of Motion for the reliefs stated earlier in this Judgment.

This Court is in agreement with the Appellant that the Respondent had no legal basis to institute the proceedings, such as that taken in this case to enforce the Report of the Commissions of Inquiry referred to. We agree that [p.51] the appropriate procedures are to be found under the Commission of Inquiry Act (CAP 54) as Amended. Sections 7 (2), (3) and (4) of that Act set out the machinery whereby the Report of a Commission of Inquiry may be enforced. Sections 7(2), (3) and (4) of the Act are as follows:—

7(2):

Upon the receipt of such a report, if it appears to the President that any person has acquired assets for himself or in the name of any other person in an unlawful manner or is responsible for any irregularity or malpractice resulting in any financial loss to the Government of Sierra Leone or to any Local Authority or corporation, or any other body whatsoever, the President may on the advice of the Cabinet, make an Order—

(a) requiring such person to make good the financial loss to the Government of Sierra Leone, or any local authority or corporation or any other body as the case may be:

OR

(b) forfeiting to the Government of Sierra Leone or any Local authority or corporation or any other body as the case may be, all or any part thereof of the assets of such person, whether or not such assets are in his name. 7(3) Any Judge of the High Court shall upon application by the Attorney-General and

Minister of Justice make such Order or Orders as may be necessary for the purpose of giving full effect to the Order for forfeiture of assets made by the President under sub-section (2) hereof, and shall in particular but without prejudice to the generality of the foregoing, where necessary, order any person to execute such instrument as may be necessary for enabling any assets situate outside Sierra Leone to be vested in the Government of Sierra Leone, or any Local Authority or corporation, or any other body as the case may be.

[p.52]

7(4):

Any order made under sub-section (2) may include provision for vesting the assets or any part thereof or the property in such assets or part thereof in a Department of Government, a Local Authority or corporation or any other body as the case may be and, in particular, the Order may direct:—

In the case of assets lodged in a Bank, the manager or a person in charge of the bank in which the assets are lodged shall pay the assets into the consolidated fund, or any bank account as the case may require:

(a) In the case of assets in the form of stocks, shares, debentures, bonds, or chooses-in-action, the responsible officer concerned shall register them as required or necessary, in the name of the Government of Sierra Leone or any local authority or corporation, or any other body as the case may require;

(b) In the case of assets in the nature of immovable property the Administrator and Registrar-General shall remove the name of the person or that of any person in whose name the property is registered from the Register and register forthwith such property in the name of the Government of Sierra Leone or any local authority or corporation, or other body as the case may be, and the property shall vest forthwith in the Government of Sierra Leone or local authority or corporation, or any other body (as the case may be) as from the date of such Order.

From the above provisions it is abundantly clear that the Power to enforce the findings and recommendations of a Commission of Inquiry is vested in the President [p.53] acting on the advice of the Cabinet. When an order of forfeiture has been made by the President acting on the advice of the Cabinet following the findings and recommendation of a Commission of Inquiry, the High Court is obliged to enforce such an order of forfeiture.

In glaring disregard of the obvious procedure laid down under the Commission of Inquiry Act, the Respondent chose to enforce the findings and recommendations of the Commission of Inquiry, as perceived by him, by instituting proceedings in the High Court by way of Originating Notice of Motion on the misconception that such a procedure is open to them under Section 149(4) of the Constitution. Such a procedure wrong. I nave searched in vain for any authority for the manner in which the Respondent purported to seize the Appellant's property as in this case. Apart from the procedure set out, in Section 7(2), (3) and (4) of the Commission of Inquiry Act, there are clear rules setting out the procedure to be

followed in seeking an order of forfeiture of land. Correct legal procedure must be followed, particularly where a person's right to his property is to be forfeited.

This Court is of the view that the Learned Trial Judge erred in Law in his acceptance that the Appellant was entitled to enforce the Commission's finding, as perceived by him, by way of an originating, notice of motion under section 149(4) of the Constitution. The order granted by the High Court setting aside the Conveyance of the property in question between the Government and the appellant ought not to have been made. There is no basis in law for the granting of that Order. That order is hereby set aside.

The Appeal is allowed. Order of Court dated 6th day of January, 2005 is set aside.

STATUTES REFERRED TO

1. Commissions of Inquiry (Amendment Act 1982).

2. Section 149(4) of Act No.6 of 1991

LAMIN B. NGOBEH v. FINDA L. KPUNDEH

[CIV. APP. 6/2004] [p.23-27]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 15 MARCH 2007

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA, J.A.

JUSTICE A.N.B. STRONGE J.A.

LAMIN B. NGOBEH — APPELLANT

AND

FINDA L. KPUNDEH — RESPONDENT

HEARING DATE: 2ND NOVEMBER, 2006

JUDGMENT: 15TH MARCH, 2007

ADVOCATES: C.F. MARGAI, ESQ., FOR APPELLANT

M.N. KAMARA, ESQ., FOR RESPONDENT

JUDGMENT

TEJAN-JALLOH JSC:

The Plaintiff now Respondent's claim against the defendant now Appellant is for:

1. Recovery of possession of all that portion or piece or parcel of land situate lying and being off Macauley Street, Murray Town, Freetown in the Western Area of the Republic of Sierra Leone measuring about 0.0118 Acre;

[p.24]

2. An injunction restraining the Defendant whether by himself, his servant or agents privies or howsoever otherwise from trespassing, entering and or remaining on the said land or portion thereof and from carrying out or continuing the erection of a structure/building/fall on the said land or any portion thereof.

3. Damages for trespass to the plaintiffs said piece or parcel of land.

4. All necessary and consequential directions thereof.

5. Further or other reliefs.

6. Costs.

The matter went to trial at the conclusion of which the Hon. Mr. Justice Nylander found in favour of the Plaintiff now Respondent and ordered as follows:—

1. Recovery of possession of the disputed land as prayed for in Relief No.1 is granted with immediate effect.

2. A permanent injunction is granted as prayed for in relief No.2 of the prayer.

3. Damages for trespass — five million Leones.

4. The defendant shall pull down the Boys Quarters he erected in contravention of the Court Order during trial. This shall be done within 5 days of the date of the Judgment otherwise Plaintiff shall seek a further Court Order to pull the structure down.

5. The defendant shall pay the cost of this action (SIC) of this action, such costs to be taxed.

[p.25]

The Appellant, being dissatisfied with the decision of the Court appealed to this Court. He has filed five grounds of appeal, the pith and substance of which in my own opinion is that the judgment is against the weight of the evidence. This is because each of the grounds of appeal alluded to various parts of the evidence adduced at the trial and to the conclusion by the Judge.

In my opinion the issues raised in the appeal may be summarized as follows:—

1. Did the Respondent's title deed cover the portion of land in dispute?

2. Did the Respondent prove title to the land in dispute?

3. Who has proved a better right to possession?

It has to borne in mind that this was a case of trespass and there is no claim for a declaration of title. The law is well settled that in a case of trespass, what the plaintiff has to prove is a better right of possession than the defendant.

The evidence of the Respondent which the learned Trial Judge accepted is the fact that the Respondent claimed to have bought her land at Macauley Street, Murray Town in 1998 from one Pa Alpha Amadu Mansaray. She alleged that sometime in the year 2001, the Appellant encroached on her land and the encroachment was confirmed by his licensed Surveyor. The encroachment in the land was by building a Boys Quarters on her access road. That when she complained to the appellant that the land was hers, Appellant ignored her protest and also laid claim to the land. The matter was reported to the police. Pa Alpha Amadu Mansaray who sold to the Respondent confirmed that the Appellant encroached on the Respondent's land. The witness told the Court that he advised the Respondent to take the [p.26] matter to Court. It was clear from the evidence of the witness that he was positive that the Appellant was the trespasser and that he never met the Appellant up to the time he sold the land to the Respondent.

The Respondent admitted that the Appellant bought his land before hers, but she maintained that her land is at the back of the Appellant's land and that she has her own Access Road close to Macauley Street and that the Appellants' land is not close to Macauley Street.

The fact that Appellant bought the land before the Respondent is not without more, evidence of a superior title.

See Dr. Seymour Wilson V Musa Abess (unreported) Civ.App.5/79(SC)

The strength of the Appellants case appears to rest on the evidence of his licensed surveyor (DW.3) who advised him to block the Access Road. It is observed that when the Surveyor was cross-examined, his evidence revealed that he prepared his Encroachment plan solely on the Appellants documents. That since 2000 he had not revisited the land and he did not know if there was land dispute between the Appellant and the Respondent in 2000. In the case of the Respondent her Surveyor said inter alia:—

"I did a field exercise by drawing two plans showing the actual survey plan LS1259/01. I made a compact (Sic) composite plan from the two plans. I also drew up Survey Plan showing the actual physical position of the land."

In cross-examination, the witness also told the Court that he determined the Access Road by the facts on the grounds. The learned Trial Judge quite rightly concluded by saying,

"I am satisfied in my mind that the behaviour of the defendant [p.27] and his surveyor is high handed. The evidence of the defendant and his surveyor is conflicting, and on the facts. I also believe the

evidence adduced by the Plaintiff." I do not believe the evidence by the defendant. I am satisfied in my mind that the Plaintiff has proved her case on the balance of probabilities, as such Judgment is in plaintiffs favour etc. etc.

In the premise, I see weighty and more convincing evidence in support of the Respondent' case that should entitle her to Judgment. As a result I see no merit in the complaint against the Judgment of Nylander J. As an Appellate Court, we should be more concerned with decision and not with reasons. I am guided in this view by what Blackhall P. said in Likejianya v Uchendu 13 WACA at page 46, — where he said:

"It seems to me, however, that what this Court has to decide is whether the decision of the Judge was right not whether his reasons were. It is only if the misdirection had caused him to come to the wrong decision that it would be material."

The decision of Nylander J, is in line with the justice of this matter. I agree with him. I affirm it. The appeal is dismissed with cost to be taxed.

SGD.

JUSTICE U.H. TEJAN-JALLOH, J.S.C.

SGD.

JUSTICE S. KOROMA, J.A.

SGD.

JUSTICE A.N.B. STRONGE, J.A.

CASE REFERRED TO

1. Dr. Seymour Wilson V Musa Abess (unreported) Civ.App.5/79(SC)

MARCO KOROMA & 2 ORS. v. ALHAJI BABA ALLIE & 2 ORS.

[CIV. APP. 59/2005] [p.39-42]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 18TH DECEMBER, 2007

CORAM: MR. JUSTICE P.O. HAMILTON, J.A. (PRESIDING)

MRS. JUSTICE S. BASH-TAQI

MR. JUSTICE E.E. ROBERTS, J.A.

BETWEEN:

MARCO KOROMA — APPELLANTS/APPLICANTS

LAMIN KOROMA

BORBOR KAMARA

ALHAJI BABA ALLIE — RESPONDENTS

MAHMOUD ALLIE

HAJA MARIATU KEBE

A.F. SERRY-KAMAL ESQ. FOR APPLICANTS

PATRICK LAMBERT ESQ. FOR RESPONDENTS

RULING

HAMILTON J.A.:

This is an application by Notice of Motion dated the 2nd day of May, 2007 for the following Orders:—

An interim order that the order of the court dated the 25th day of October, 2006 and or all subsequent proceedings thereto be stayed pending the hearing and determination of the application.

An order that the order of the court dated the 25th day of October, 2006 and or all subsequent proceedings thereto be stayed pending the hearing and determination of the Appellants/Applicants appeal to the Court of Appeal.

On the 7th day of March 2007 the High Court did refuse a similar application. However when this application came for hearing both Counsel agreed that the status quo be maintained until this application is heard and determined. In this regard therefore Order one (1) on the face of the Notice of Motion was therefore discarded.

The materials before this court upon which a decision may be reached as to the grant or refusal of a stay is contained in the affidavits filed by both sides.

The applicants filed two affidavits in support of this motion. One by their Solicitor Abdul Franklyn Serry Kamal Esq. with eight (8) exhibits attached to it and the other by Marco Koroma the 1st Appellant/Applicant with two(2) exhibits attached to it The Respondents (1stt Respondent herein) Alhaji Baba Allie filed an affidavit in opposition.

Counsel for the Appellants/Applicants did submit that at the commencement of this matter there were seven (7) Plaintiffs and at its conclusion there are now only two survivors. He went on that as regards the undertaking if all die then there would be nobody to enforce on in case the appeal succeeds. Exhibits MK 1 and MK2 shows that part of the land close to the subject matter of this appeal was sold by seven vendors of which only two are now available. Counsel finally submitted that paragraphs 4 and 5 of the affidavit of Abdul Franklyn Serry-Kamal and paragraph 3, 8 and 9 of the affidavit of Marco Koroma disclose special circumstances to warrant a stay.

Mr. Patrick Lambert Solicitor for the Respondents opposes the application relying on the affidavit in opposition and submitted that the affidavits in support is a mere speculation not supported by evidence that the property would be sold. Paragraph 4 refutes sending anybody on the land and paragraph 5 gives an undertaking not to sell. Counsel further submitted that the fact that the Appellants/Applicants have resided for forty-five (45) years on the land and is their ancestral home does not amount to special circumstances.

It cannot be doubted that in applications of this nature there are certain general principles which should guide the court in deciding to grant or refuse a stay of execution. The court has an unfettered discretion but that unfettered discretion ought to be exercised judicially. A discretion to grant or refuse a stay of execution ought to take into consideration the compelling interests of the parties. It must be borne in mind that a winning or successful party in a litigation has the right to enjoy the fruits of his litigation. See Ghana Supreme Court in the case of Joseph V Jebeile (1963) 1 GLR 387 at 389.

Therefore the courts will in no circumstance form the practice at the instance of the unsuccessful litigant of depriving the successful party of the fruits of the litigation until such a judgment is set aside. It is accepted that the legal basis for the exercise of the court's discretion to grant or refuse a stay of execution, is that the applicant must establish that there are special or exceptional circumstances justifying the grant of a stay of execution. The onus is on the applicant to demonstrate that such circumstances exist in his favour.

There are abundant authorities on the aspect of special circumstances in our jurisdiction. In Africana Token Village Ltd. V John Obey Development Investment Co. Ltd. (26th April. 1994) Court of Appeal. Misc. App. 2/94 (unreported), it was held that this Court has unfettered discretion to grant stay of execution provided the applicant can [p.41] satisfy the court that special circumstances do exist to warrant the grant of a stay. See also Alhaii Abdul Wahid (Jr.) V Fatmata Floode and others (11th November 2003) Misc. App. 7/2003. Patrick Koroma V Sierra Leone Housing Corporation and Dolcie Beckley (26th May 2004). Court of Appeal. Misc.App. 9/2004. Yusufu Bundu V Mohamed Bailor Jalloh (23rd July 2004) Court of Appeal Misc. App. 23/2004 and Evelyn Avo Pratt Administratrix of the Estate of Betsy Rogers Parkinson (Deceased) Intestate V Jaccquiline Carew and others (16th July 2005) Misc. App. 7/05. It must be pointed out that the principle governing the grant of a stay of execution were expressed in the cases cited above. In each of those cases it must be pointed out had their own peculiar circumstances and each case depends on its own facts.

The question to be asked at this stage is: have the applicants here in shown special circumstances in their own case to warrant a stay of execution? Counsel for the applicants did argue that this matter started off with seven Plaintiffs and presently there are now only two surviving and secondly that lands close to this one on appeal which is the subject matter was sold by seven vendors and there are now only two surviving.

Considering these facts even with an undertaken given if eventually the land is sold by the two survivors who are now old, on whom can this undertaken be enforced? Counsel for the applicants did submit that to recover the land following such a sale would be rather expensive in case the appeal succeeds and in my opinion this is rightly so.

Counsel for the Respondent did rely on the case of Evelyn Ayo Pratt Administratrix of the Estate of Betsy Rogers Parkinson (deceased) Intestate V Jacquiline Carew and others Misc.App. 7/05 supra in which an application for a stay of execution was refused in relation to a house which was claimed as an ancestral home and the property was one that could not disappear nor be dissipated and if the appeal should succeed it could be within the court's power to order it to be restored to the successful party.

This application relates to land unlike that of the case of Evelyn Avo Pratt supra which relates to a house. If a sale is effected even with an undertaken by the Respondents a bona fide purchaser for value without notice of this appeal would have incurred a lot of expenses on the land and would suffer if the appeal succeeds.

In order to save such unwarranted future expenses and having examined the grounds of appeal that is herein exhibited appears to be substantial as is therein contained.

[p.42]

I am quite satisfied that the applicants herein have adduced good and sufficient reasons for the grant of this application.

I do therefore grant the application and make the following orders:

Execution of the judgment of the High Court dated 25th day of October 2006 is hereby stayed pending the hearing and determination of the appeal filed therefrom.

I order that the parties hereto be restrained from parting with the property or any interest therein or thereunder until the final determination of the appeal.

I make no order as to costs.

Because of the special circumstances of this application, I further order that the Registrar of the Court of Appeal do see that this appeal comes up expeditiously or hearing by the Court of Appeal within a period of two (2) months and which hearing I shall now fix for the 18th day of February, 2008. Order accordingly.

SGD.

HON. JUSTICE P. O. HAMILTON, J.A.

I agree.

SGD.

MRS. JUSTICE S. BASH TAQY, J.A.

I agree.

JUSTICE E.G. ROBERTS, J.A.

CASES REFERRED TO

1. Joseph V Jebeile (1963) 1 GLR 387 at 389

2. Africana Token Village Ltd. V John Obey Development Investment Co. Ltd. (26th April. 1994)

3. Alhaii Abdul Wahid (Jr.) V Fatmata Floode

4. Patrick Koroma V Sierra Leone Housing Corporation and Dolcie Beckley (26th May 2004). Court of Appeal. Misc.App. 9/2004. (Unreported)

5. Yusufu Bundu V Mohamed Bailor Jalloh (23rd July 2004) Court of Appeal Misc. App. 23/2004 (Unreported)

6. Evelyn Avo Pratt Administratrix of the Estate of Betsy Rogers Parkinson (Deceased) Intestate V Jaccquiline Carew and others (16th July 2005) Misc. App. 7/05. (Unreported)

MOHAMED L. BANGURA & 2 ORS. v. ALL PEOPLES CONGRESS

[CIV. APP. 45/2005] [p.28-30]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 3RD APRIL, 2007

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA, J.A.

JUSTICE S.A. ADEMOSU, J.A.

BETWEEN:

MOHAMED L. BANGURA — APPELLANT

AND

JOHN SAHR YAMBASU

MOHAMED AKA KOROMA

AND

ALL PEOPLES CONGRESS —- RESPONDENTS

(APC)

HEARING DATE: 6TH FEBRUARY, 2007

RULING:

ADVOCATES:

A.F. SERRY-KAMAL ESQ., FOR THE APPELLANT

BERTHAN MACAULAY (JNR.) ESQ. FOR THE 1ST AND 3RD RESPONDENTS

V.V. THOMAS ESQ., FOR THE 2ND RESPONDENT

DELIVERED THIS 3RD DAY OF APRIL, 2007.

RULING

TEJAN-JALLOH JSC:

The issue before the Court for determination is whether the Court of Appeal has power to allow ground 7 of which is one of the amended grounds of Appeal. That ground reads:

"That the Learned Trial Judge acted on wrong principle of law when he refused in Volume 2 Page 399 to grant amendments sought by the [p.29] Plaintiff/Applicant in Paragraphs 4, 5, 9 of the endorsement, of the Writ of Summons dated 11th March 2005".

At the commencement of the argument, Berthan Macaulay Esq, (Jnr.) Counsel for the 1st Respondent drew the Court's attention to Page 399 of the Record of Proceedings, where a ruling was given on ground 7. His contention is that it was an interlocutory matter for which an appeal can lie and according to him by leave only pursuant to Rule 10(1) of the Court of Appeal Rules — Public Notice No. 29 of 1985 as amended by Constitutional Instrument Act No. 1 of 2003. V.V. Thomas Esq. Counsel for the 3rd Respondent adopted the argument of Mr. Macaulay. Both Counsels are of the view that the interlocutory issue raised and determined cannot be a ground of appeal and can only be so when an applicant invoked sub-rule 1 of Rule 10 of the Court of Appeal Rules.

In reply, Serry-Kamal Esq., Counsel for the Appellant submitted that Rule 10 (1) was only one of several ways by which an Appellant can appeal against a ruling on an interlocutory issue and stressed that he is not precluded from raising the issue as decided on appeal because an appeal to the Court of Appeal is by way of re-hearing. Furthermore, he cited Rule 9 (6) which provides that the Court in deciding an appeal

is not confined to the ground set forth by the Appellant, provided the Court does not rest its decision on any ground not set forth by the Appellant, unless the parties have had sufficient opportunity of contesting the case on that ground.

Ground 7 is an interlocutory issue, that is, an amendment which was sought and it was an interlocutory ruling in which an appeal could have been brought within 14 days as from the date of the ruling. The Appellant did not avail himself of that provision and decided to make it a ground of appeal in the substantive appeal itself. In such circumstances, Rule 9 (1) provides that all appeals shall be by way of rehearing. My understanding of the phrase is that the appeal is not a new or fresh trial, but a review or reconsidering of the trial or proceedings below [p.30] including the evidence adduced. Nothing precludes us to hear interlocutory issues,

This being the case, I hold that ground 7 can be argued and the objection is overruled.

SGD.

JUSTICE U.H. TEJAN-JALLOH, J.S.C.

SGD.

JUSTICE: S. KOROMA, J.A.

SGD.

JUSTICE: S.A. ADEMOSU, J.A.

STATUTE REFERRED TO

1. Court of Appeal Rules — Public Notice No. 29 of 1985 as amended by Constitutional Instrument Act No. 1 of 2003.

MOHAMED MUSA KING & ANOR. V. ARNOLD BILSON ULYSES NYLANDER

[MISC. APP.2/2006] [p.1-5]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 24TH JANUARY, 2008

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE S. KOROMA J.A.

JUSTICE A.N.B. STRONGE J.A.

BETWEEN:

MOHAMED MUSA KING — APPLICANT 2ND DEFENDANT

DR. GERSH

ON B.O. COLLIER — 1ST DEFENDANT/RESPONDENT

AND

ARNOLD BILSON ULYSES NYLANDER

BY HIS ATTORNEY LYNTON B.O. NYLANDER — PLAINTIFF/RESPONDENT

HEARING DATE: 6TH MARCH 2007

RULING 2007

ADVOCATES:

N.D. TEJAN-COLE ESQ., FOR APPLICANT 2ND DEFENDANT

DR. W.S. MARCUS-JONES FOR PLAINTIFF/RESPONDENT

RULING DELIVERED THIS 24TH DAY OF JANUARY 2007

RULING

TEJAN-JALLOH JSC:

By a Notice of Motion dated 1st November 2006, Mohamed Musa King, second Defendant/Applicant applied to the Court for enlargement of time for leave within which to appeal and for any other Order or Orders the Court may deem fit and just. The application is supported by the affidavit of the applicant sworn to on the 1st November 2006 and together with eight (8) Exhibits. The enlargement sought is to appeal against the Judgment of the Honourable Mr. Justice S.A. Ademosu, then High Court Judge delivered on 5th March 1990.

[p.2]

I remind myself that pursuant to sub rule 4 of Rule 11 of the Court of Appeal Rules, 1985, Statutory Instrument 29 of 1985, the affidavit must set forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause. I am not concerned with the merit or otherwise of the appeal.

The said Judgment is Exhibit MM4 and inter alias, ordered property situate lying and being at 70C Wilkinson Road, Freetown — Exhibit MM3 — recorded in Books of Conveyance kept in the Office of the Registrar-General be expunged. Paragraphs 5 and 9 of the said affidavit state that the applicant moved into Exhibit MM3 in 1999 and has been living there since and no one has ever challenged his claim to

ownership. The deponent in paragraph 6 also deposes that he had to leave the jurisdiction during the rebel incursion in Sierra Leone.

Dr. Marcus-Jones Counsel for the Plaintiff/Respondent filed an affidavit on behalf of Lynton Bankole Onesimus Nylander sworn to on the 21st day of November, 2006 in opposition to the Notice of Motion supported by 6 (six) exhibits. Exhibits LBON 1, LBON 2, and LBON 5 are letters purportedly copied to the Applicant and LBON 6, dated 17th April, 1990 deals with the removal of a wall. Juxtapose the two, the second defendant/applicant is concerned with the expunction of the Conveyance to his property at 70C Wilkinson Road, Freetown, from the books of Conveyances kept in the office of the Administrator and Registrar-General, and the Plaintiff/Respondent is concerned about a wall which according to paragraph 7 of the affidavit in opposition has been demolished. Nevertheless, Counsel for the Plaintiff/Respondent opposed the application because it was out of time. Dr. Marcus-Jones counsel for the Plaintiff/Respondent told the Court that his client is not laying any claim in respect of 70 Wilkinson Road, Freetown.

Counsel addressed the court on subrule 6 of Rule 11 of the Court of Appeal Rules 1985, whether the subrule is mandatory or directory. N.D. Tejan-Cole Esq. for the applicant submitted that no universal rule can be laid for the construction of Statutes as to whether mandatory enactments are to be considered directory only or obligatory; that in each case one must look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of the provision to the general object intended to be served by the Acts and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory. He referred us to the case of Doyle v Stephenson, 1, West Indian Law Report 296 and at p. 298, Craies on Statute Law, 4th edition at 240 and Maxwell on the interpretation of Statutes 17th edition at p. 316. He also drew the attention of the Court to the case of B v B 1941 2AER p. 396 at 397 where Scarman J., said that prior authority on other statutes is not of great assistance to the Court in determining the intention of the legislature when the section was enacted.

[p.3]

Mr. Tejan-Cole also referred to the case of Alhaji Bockarie Kakay v Clementina Yambasu a decision of the Court of Appeal unreported and delivered on the 9th day of June, 1999 — Misc.App.3/98. He pointed out to the Court that enlargement of time within which to file an appeal against the judgment in the High Court was granted.

As regards the submission that applicant was kept abreast of the proceedings Mr. Tejan-Cole referred to the case of De Stempel v Dunkels 1938 A.E.R. (Anotated) Vol. 1 at P. 238 at 255G where quoting from Taylor on Evidence 12th edition, p.551, it said:

"There is in general no duty cast upon the recipient of a letter to answer and his omission to do so does not amount to any admission of the truth of the statements contained in it".

Mr. Tejan-Cole, argued that the applicant in this case does not fall within the interpretation of "Appellant" in Rule 1 of the Court of Appeal Rules. He urged that we exercise our inherent jurisdiction.

He referred the Court to the case of Sierra Leone Oxygen Factory Limited v P.B. Pyne-Bailey, a decision of the Supreme Court of Sierra Leone, unreported and delivered on the 10th May 1974. He made available the case of Thynne (Marchioness of Batton) v Thynne (Marquess of Bath) 1955 3 A.E.R. 129 and Attah-Quarshie v Okpote, 1977 1 Ghana Law Report p.59 at p.65.

In the case of Meier v Meier 1948 P cited in Thynne's case Lord Evershed said he would prefer not to attempt a definition of the extent of the Courts jurisdiction to vary, modify or extend its own orders if, in its view, the purpose of Justice requires that it should do so and it is my view that Rule 32 of the Court of Appeal Rules enables this Court to make an order that the lower Court ought to have made. Similar view was expressed by Lord Justice Lindley and Lord Justice Morris in the case of the Swire 30 Ch. D at pages 246 and 146 respectively.

Similarly, in the case of Attoh-Quashie v Okpote 1977 1 Ghana Law Report 57 the Court indicated that tradition has sanctioned three areas where the Court generally invokes its inherent powers. They include powers to prevent wrong or injury being inflicted by its own acts or orders or Judgment including the power of vacating Judgments entered by mistake and of reviewing Judgments procured by fraud and a power to undo what it had no authority to do originally. At page 65 of the Judgment Hayford — Benjamin J said as follows:

"Having found that the provisions of order 9 Rule 17 are mandatory it is now necessary to consider whether or not the submissions of Counsel that the Court has an inherent power to vacate its own valid orders is well founded. Inherent power is an authority not derived from any external source, possessed by a [p.4] Court. Where jurisdiction is conferred on Courts by Constitutions and statutes, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the Court and its due functioning. They spring not from legislation but from the nature and Constitution of the law itself. They are inherent in the Court by virtue of its duty to do justice between the parties before it. The scope of inherent powers however cannot be extended beyond its legitimate circumscribed sphere. The safest guide lies in precedents ".

In reply Dr. Marcus-Jones submitted that there is no difference between Applicant and Appellant and the reason for the use of the former is because the applicant wishes to appeal to this Court and has indeed filed proposed grounds of appeal. He argued that the whole of Rule 11 of the Court of Appeal Rules applies. He cited Maxwell on the interpretation of Statutes 10th edition at page 379 and opined that sub rule 6 of rule 11 is mandatory.

Counsel reminded the Court that it has power to correct wrongs complained of and that the applicant should go to the lower Court, where the mistake was made. He did not think that there is any room for the invocation of the doctrine of inherent jurisdiction. The Court of Appeal did not make the Order and the jurisdiction of this Court is to correct errors. He said that there are many decisions of the Court in respect of sub rule 6 of Rule 11 and one cannot come to this Court after the period prescribed and to grant the application will be opening flood gates. Even if it has been a day of non compliance, the applicant cannot come to this Court, he concluded.

I have considered the arguments on both sides. For the Plaintiff/Respondent there has been a non-compliance with the provision of sub rule 6 of Rule 11 of the Court of Appeal Rules. Counsel for the applicant has canvassed non-compliance as well as in application of the sub rule. In the case of Re Coles and Ravershear 1907 1K.B. Lord Collins said:

"Although a Court cannot conduct its business without a Code of Procedure the relation of the Rules of Practice to the work of justice is intended to be that of a hand maid rather than mistress and the Court ought not to be so far bound and tied by rules of procedure, as to be compelled to do what will cause injustice in the particular case ".

Furthermore, it has been said that courts do not exist for the purpose of punishing bad taste, and Bowen L.J. in Copper v Smith (1844) 26 Ch.D750 at page 818, said as follows:

[p.5]

"Now I think it is a well established purpose that the object of Courts to decide the rights of Parties, and not to punish them for mistakes they make in the conduct of their case……I know of no kind of error or mistake which, if not fraudulent……. the Court ought not to correct, if it can be done without injustice to the other party, Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy ".

I foresee no harm will be done to grant the application of the applicant to argue his appeal. Incalculable injustice may occur if the applicant is so denied that right.

It is worth noting that subsection 2 of section 23 of the Constitution of Sierra Leone 1991 Act No. 6 of 1991 encourages parties to make use of the Court for determination of the existence or extent of their civil right or obligation. And under subsection 2 of section 129 of the said Constitution that right of appeal in any cause or matter determined by the High Court of Justice is as of right to the Court of Appeal. Subsection 15 of section 171 of the Constitution provides that any law found inconsistent with the last quoted section is to the extent of the inconsistency, be void and of no effect.

We think this is a fit and proper case to exercise the inherent jurisdiction of the Court and the application for enlargement of time within which to appeal is granted. There will be no order as to costs.

SGD.

JUSTICE U.H. TEJAN-JALLOH J.S.C.

I agree.

SGD.

JUSTICE S. KOROMA J.A.

I agree.

SGD.

JUSTICE A.N.B. STRONGE J.A.

I agree.

Ref: TJ/HJ

CASES REFERRED TO

1. B v B [1941] 2AER p. 396 at 397

2. Doyle v Stephenson, 1, West Indian Law Report 296 and at p. 298,

3. Alhaji Bockarie Kakay v Clementina Yambasu

4. De Stempel v Dunkels 1938 A.E.R. (Anotated) Vol. 1 at P. 238

5. Sierra Leone Oxygen Factory Limited v P.B. Pyne-Bailey, 10/5/1974 (Unreported)

6. Thynne (Marchioness of Batton) v Thynne (Marquess of Bath) [1955] 3 A.E.R. 129

7. Attoh-Quarshie v Okpote, [1973] 1 Ghana Law Report p.59

8. Meier v Meier 1948 P

9. Swire 30 Ch. D at pages 246 and 146

10. Re Coles and Ravershear 1907 1K.B.

11. Copper v Smith (1844) 26 Ch.D750 at page 818

12. The Constitution of Sierra Leone 1991 Act No. 6 of 1991

STATUTES REFERRED TO

1. Court of Appeal Rules, 1985

2. Statutory Instrument 29 of 1985

OKEKEY AGENCIES LTD v. KELFALA LAHAI & ANOR.

[CIV. APP. 32/2005] [p.31-38]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 1 NOVEMBER, 2007

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE SALIMATU KOROMA, J.A.

JUSTICE A.N.B. STRONGE, J.A.

BETWEEN:

OKEKEY AGENCIES LTD — APPELLANT

AND

KELFALA LAHAI

MRS. KHADIJATU LAHAI — RESPONDENTS

HEARING DATE: 14TH DECEMBER, 2006.

JUDGEMENT: 1ST NOVEMBER, 2007.

ADVOCATES:

N.C. BROWNE-MARKE, ESQ., FOR THE APPELLANT

J.B. JENKINS-JOHNSTON, ESQ, FOR THE RESPONDENTS.

DELIVERED ON 1ST DAY OF NOVEMBER, 2007.

JUDGEMENT

TEJAN-JALLOH, J.S.C.

This is an appeal against the judgement of the High Court dated 16th March 2005. The appellant being dissatisfied with the decision filed four grounds of appeal, namely:—

1. The learned trial Judge erred in law and in fact in holding that the plaintiff had not proved its title to the land on which the Defendant had trespassed and built a house.

2. The learned trial Judge erred in law and in fact in holding that, despite the fact that there was cogent and irrefragable evidence that the dimensions and boundaries of the plaintiffs land encompassed that of the defendants land the land did not, ipso facto belong to the plaintiff.

3. The learned trial judge erred in law and in fact in failing to hold that since there was clear evidence that defendants could not prove the legitimacy of their title to the property in dispute, while the plaintiff had proved its title to the said land Judgment should be entered for the plaintiff.

4. The Judgment is against the weight of the evidence.

The Parties gave evidence and called witnesses and produced documentary evidence to wit exhibits A and K; exhibits "A", copy of conveyance dated 10th November, 1992, exhibits K copy of lease dated 22nd August, 1983, and amongst others of particular importance are exhibits H1-H3 i.e. three (3) official reports from Messr Lincoln, Coker and Koroma which were produced by the witnesses called by the plaintiff/appellant. Amongst others of particular importance are exhibits H1 to H3 which were produced by the witnesses called by the plaintiff/Appellant. The evidence adduced clearly revealed that the portion of land being claimed and on which the defendants respondents built is a private [p.33] property and not state land that could have been sold to the plaintiff/ appellant as their plan depicted; and we note that the explanation for that is that the land was not surveyed when the plaintiff/appellant leased the land. The evidence is also to the effect that the Department of surveys and lands never inspected the property nor installed the boundary beacons at the time of the lease in 1970 as well as the time of the purchase of the free hold in 1992.

The evidence of PW6 together with exhibits H1— H3 confirm that the wall fence had been in place since 1958, when it was PWD works land, which was finally leased to Continental Fishing Company. We cannot ignore the evidence that Mrs. Princess Roberts occupied part of the land being claimed by the plaintiffs/appellants and the irrefutable evidence that she had seen in undisturbed occupation of the land and paying by leasehold rents to the Ministry for a period of about 26 years. Following the guidelines in Dr. Seymour Wilson Vs Musa Abess. C.V. App. No 5/79 (Unreported) that in an action for a Declaration of Title, the plaintiff must succeed on the strength of his title and not on the weakness of the Defendant's title, the appellant in an attempt to prove that the portion of land they are claiming belong to the state called witnesses who clearly testified that the place being claimed by the appellant could not properly be claimed by the appellants. Having heard all the arguments on both sides and after perusing the records, what I consider to be the heart and soul of the appeal is whether the appellant proved his case as pleaded. In answering this question, I am not unmindful that it is a well established principle of law that in a claim for declaration of title, the onus is always on the plaintiff to establish his claim and [p.34] that it is not open to him to rely on the weakness of the defendants' case as Mr. Browne-Marke was seeking to do.

We think it was obvious particularly at the stage when the evidence was adduced that the claim for a declaration of title was lost. It is clear that the claim of title which the appellant depicted by their pleading was not supported by the oral as well as documentary evidence tendered by the personnel of the Ministry of Lands and survey. The attack on the title of the defendants/respondents by Mr. Brown-Marke was designed to show the deficiency in the respondent's titles, but the law is clear that the appellants cannot and should not rely on that weakness.

There are numerous authorities on the point. We refer to Kodilinge vs. Odu (1935) WACA 336 at page 337-338. It was a case for declaration of title. The court said that onus lies on the plaintiff to satisfy the court that he is entitled and must rely on the strength of his case and not on the weakness of the defendant's case; that if the onus is not discharged the weakness of the defendant's case will not help him. Mr. Browne-Marke in his arguments placed reliance on this decision, but his argument seemed to ignore the principle of law emanated in the case. We do not think the plaintiff/appellant can succeed by canvassing a title, which itself was demonstrated to be defective. The trial Judge was not satisfied that

the plaintiff/appellant discharged the onus on them to satisfy the court that they are entitled on the evidence brought by them to a declaration of title to the land in dispute, because the appellant's vendor represented by the personnel of the Ministry of Lands and survey have firmly established that they could not properly lay claim to that portion of land, where the defendants/respondents [p.35] have built, although the defendants/respondents building ought not to have been where it is.

On the question of evaluation of the evidence a witness has first to be believed before a court can be satisfied with his testimony. Believing or disbelieving witnesses is within the competence of the trial Court and where such belief is supported by any evidence howsoever slight an appellate court will not normally interfere. In this case, there was enough evidence to justify the stand taken by the trial judge not awarding title to the plaintiff/appellants. It is trite law that a declaration of title is a relief entirely at the discretion of the trial judge, who should be satisfied that from the totality of the evidence led, and that on the proper evaluation of that evidence he should rightly exercise his discretion in favour of the successful claimant. We agree with Mr. Jenkins-Johnson that the learned trial judge in this case rightly decided that the plaintiff's/appellant's case had failed and rightly dismissed it.

We do not believe that this case comes within the principles under which an appellate court can interfere with the findings of the trial judge. We agree that the law is well stated in the well-known case of Dr. Seymour Wilson Vs Musa Abess (Supra) which considered Watt or Thomas (1947) AC 484. And Benmax Vs Austin Motors Company Limited (1955) 1 All ER 326.

In that case, Justice E.L. Luke said, inter alia,

"It is trite law that in an action for a Declaration of Title, the Plaintiff must succeed on the strength of his title and not the weakness of the Defendants' title"

[p.36]

Continued at Page 82,

"One of the ways that he may do this is to prove that he has a better title to the land than the Defendant.... the Party who proves a better title succeeds even though there may be another person, not a party, who has a better title than him".

On the question of evaluation of the evidence by an appellate Court, His Lordship stated in the Seymor — Wilson's case (Supra) at page 67-68 as follows:—

"There is no doubt that an appellate Court has power to evaluate the evidence led in the Court below, to reach its own conclusion, and in a suitable case, to reverse the finding of fact of a trial judge. But these powers are exercisable on well settled principles, and an appellate Court will not disturbed the findings of fact of a trial judge unless these principles are applicable, (and citing Thomas v. Thomas (1947).A.C.484 the appellate Court is, however, free to reverse his conclusions if the grounds given by him, therefore, are unsatisfactory by reason of material inconsistencies or in accuracies, or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses, or has failed to appreciate the weight and bearing of circumstances

admitted or proved, (and citing Benmax vs. Austin Motors Co. Ltd. (1955) 1 All ER 326 per Lord Reid at Page 329, said:—

[p.37]

“but cases where there is no question of the credibility or reliability of witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, thought it ought, of course, to give weight to his opinion".

Also, in Joint venture Construction Company vs. Conteh & Others A.C. 1971-72 ALR SL 145 per Mr. Justice Tambiah at Page 150 4452-10—

"It is a well known principle of law that judges' findings made after the hearing of witness, and observing their demeanour, are entitled to great weight and should not be disturbed, unless it is clear that they are unsound…… but it is often open to an appellate court to find that the view of a witness was ill-founded. Where the point in dispute has to be decided by the proper inferences to be drawn from proved facts, an Appeal Court is in as good a position to evaluate the evidence as the trial judge, and may form its own independent opinion".

A very important point that we did not lose sight of is the fact that it was the plaintiff's/appellants' witnesses, whom he cannot afford to disown or discredit that gave the damaging evidence against the plaintiff/appellant. The law is clear that the plaintiff's/appellants' cannot be heard to say that their witnesses should not be believed.

[p.38]

Mr. Brown-Marke also contended that since the defendants'/respondents' property was supposed to be at Roporting in Wellington, the plaintiffs/appellants should be held to have proved their case of trespass against the defendants/respondents on a balance of probabilities. This proposition over looked the fact that the land on which the defendants/respondents built has been said and declared by the plaintiff/appellant's witnesses to be a private land as against state land which they are claiming. The position would have been different if both places had been on state land.

For the forgoing reasons, we find the contention untenable and misconceived. We see no merit in this appeal and it is hereby dismissed. Costs to the Respondent to be taxed.

SGD.

HON JUSTICE U.H TEJAN-JALLOH, J.S.C.

SGD.

HON JUSTICE S. KOROMA, J.A.

SGD.

HON JUSTICE A.N.B. STRONGE, J.A.

CASES REFERRED TO

1. Dr. Seymour Wilson Vs Musa Abess. C.V. App. No 5/79 (Unreported)

2. Kodilinge vs. Odu (1935) WACA 336 at page 337-338

3. Watt or Thomas (1947) AC 484. And Benmax Vs Austin Motors Company Limited (1955) 1 All ER 326

4. Thomas v. Thomas (1947).A.C.484

5. Benmax vs. Austin Motors Co. Ltd. (1955) 1 All ER 326

6. Joint venture Construction Company vs. Conteh & Others A.C. 1971-72 ALR SL 145

REBACCA JOHNSON, ROBERT JOHNSON & 4 ORS. v. MARIATU ZUBAIRU

[CIV. APP. 15/93] [p.9-16]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 22ND FEBRUARY, 2007

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE A.N.B. STRONGE J.A.

JUSTICE S. BASH-TAQI, JA

BETWEEN:

REBECCA JOHNSON & ROBERT JOHNSON (ON BEHALF OF THEMSELVES AND THE CHILDREN OF CHARLES JOHNSON TEDDY JOHNSON (DECEASED) TWO OTHER BENEFICIARIES OF THE ESTATE OF HENRY NATHANIEL KING (DECEASED)

AND

FREDERICK JOHNSON — APPELLANTS

AND

THE ADMINISTRATOR & REGISTRAR-GENERAL

AND

SULAIMAN 2UBAIRU

AND

MR. BENJAMIN (AS AGENT OF SULAIMAN ZUBAIRU

AND

MARIATU ZUBAIRU — RESPONDENTS

HEARING: 7TH NOVEMBER, 2006.

JUDGMENT: 22ND FEBRUARY, 2007

ADVOCATES:

A.F. SERRY-KAMAL ESQ., FOR THE APPELLANTS

C.V. TAYLOR ESQ.; FOR THE 1ST RESPONDENT

M.E. MICHAEL ESQ. FOR THE 2ND & 4TH RESPONDENTS

[p.10]

DELIVERED THIS 22ND DAY OF FEBRUARY, 2007.

JUDGMENT

TEJAN-JALLOH JA:

This is an appeal against the Decision of Hon. Mrs. Justice L.A.E. Marcus-Jones dated 16th day of February, 1993.

The appellant's claims inter alia is

1. Cancellation of the Conveyance made in favour of the 2nd and 4th Respondents or any other person in respect of property situate at 13 Circular Road, Freetown.

2. Order of mandamus compelling 1st Respondent to carry out the order of the Court dated 24th day of March, 1986 by allowing the appellants or any of them to purchase the said property, or alternatively that the order of the court and subsequent proceedings be set aside for irregularity in that the Originating Summons was not personally served on Teddy Johnson.

It has to be noted that the order of the Court being sought to be set aside was contained in CC 582/85 1985 R. No.8, whereas the matter on appeal is CC 386/87 1987 J. No.19 dated 14th May 1987. The learned trial Judge held that she could not consider the Order in the proceedings. She agreed with Counsel for the Respondents that it should be a matter of appeal.

On the issue whether she could cancel the Conveyance in favour of the 2nd and 4th Respondents, the learned trial Judge held that as far as the purchasers were concerned, they had a right to infer that the Administrator and Registrar-General was acting fairly in the execution of his duty. That there was no evidence that they were aware of any irregularity if any. She concluded that she could not say [p.11] that the purchasers acted in collusion with the Administrator and Registrar-General. Judgment was entered in favour of the Respondents.

The Appellants being dissatisfied with the above decision of the Court dated 16th February 1993 appealed to the Court. The grounds of Appeal as amended by Notice dated 12th November 2002 reads:—

1. The decision is against the weight of the evidence.

2. The learned trial Judge acting on wrong principles in arriving at her decision in favour of the defendants.

3. The learned trial Judge misdirected herself or erred in-law when she ruled that she could not consider the evidence of Frederick Johnson.

4. The learned trial Judge failed to consider the case of the defendant, Frederick Johnson that he was not served with the papers leading to the Order of the sale of the property. Thus depriving the Plaintiff of an opportunity of having the Order of the Court dated 24th March 1986 set aside and allowing him to contest the granting of the aforesaid property.

5. The learned trial Judge failed to consider that the matter of Frederick Johnson and her children and grandchildren after her death had been in full and undisturbed possession of this property without paying any rent or acknowledging the title of any other person thereto for a total of 70 years. It was their family home. The Administrator-General was clearly with people whose title came after that of their parents. He simply treated the property as [p.12] part of the estate of Nathaniel King (deceased). That property was no longer part of that estate.

A.F. Serry-Kamal's contention if it can be summarized is that this action was brought to set aside the Order of the High Court dated 24th March, 1986 and all proceedings leading to it for irregularity. The Order for sale is CC582/85 and it was this Order that gave the 1st Respondent the authority to sell the property by public auction or private treaty. We share the view that the learned trial Judge was right in refusing to grant the application to set aside the Order in question. The appellants should have applied to intervene in the matter CC582/85 instead of taking a fresh action. The law is very clear where somebody's proprietary interest is affected; the person can apply for leave to be added as a defendant. An application may also be made after judgment if it is intended to set aside the judgment:

Jacques v Hamson (1983) 12 QB D 136.

See also Order Ord. 15/6/16 in the Supreme Court Practice 1999 or

Order 52 rule 3 of the Annual Practice 1960.

Mr. Serry-Kamal placed great reliance on a passage in Halsbury Laws of England 3rd edition Volume 22 paragraph 1665 at page 785 under the rubric "After judgment or Order drawn up". He relied particularly on the passage which reads:

"or in a fresh action brought to review such judgment or Order". What the learned authors stated here, cannot with respect, be practised in this jurisdiction, because a Court of co-equal or concurrent jurisdiction cannot set aside a judgment or order of another Court in separate and distinct action like the appellants did in the matter on appeal. This therefore disposes of part of the argument advanced in support of Ground 3. As regards the other issues raised and the following authorities:

[p.13]

Re May (1883)25Ch.D.

Re Harrison's share under a settlement,

Harrison v Harrison (1985) 1 All E.R. 185,

Re Scott and Alvarez's Contract Scott v Alvarez (1985) 1 Ch. 596 C.A.

Re Nazaire Co (1879) 12 CR 288 CA at page 291.

It is sufficient to state that all these are sound propositions of law and I opine that they would have been applicable in appropriate cases and I repeat, not where one has instituted a fresh action.

In the famous case of Graig v Kanseen (1943) A/I ER 108). It was held that the failure to serve the summons upon which the Order was made, was not a mere irregularity, but a defect which made the Order a nullity and that an order which is a nullity is something which the person affected by it is entitled to have set aside ex debito justitiae.

Lastly, it was held that the Court in its inherit jurisdiction can set aside its own order and an appeal is not necessary. This authority clearly indicates that it is the Court that one must apply to and not to initiate another action in the High Court to set aside an Order in another High Court.

Mr. Serry-Kamal stated in his brief as well as in his argument that the two plaintiffs are persons affected by the Order dated 24th March, 1986 but that they were not served. A point which ought to be borne in mind is that it is good law that entering Judgment against a dead person or non-existent company can be a nullity, see Lazard Brothers & Co. v Banque Industrielle de Moscon (1932) 1KB 617 CA at Page 624 on appeal sub nom Lazard Brothers Midland Bank (1933) A.C. 289 296.

[p.14]

Mr. Serry-Kamal argued that the Administrator and Registrar-General (1st Respondent) had no authority to fix time limit within which the property was to be sold. He added that Section 21(2) of Cap.45 enjoined the 1st Respondent to protect the interest of the beneficiaries. He submitted that the 1st

Respondent acted in an arbitrary manner and in gross violation of Administration of Estates Act Cap 45 of the Laws of Sierra Leone.

Finally, he submitted that on the basis that one of the beneficiaries was not served the appeal ought to be allowed.

The dividing line between the Appellant's Counsel and Counsel for the 1st Respondent is that Mr. Taylor put in the fore front of his argument and as well as in his synopsis that the appellant should not have instituted a fresh action to challenge an Order affecting her made in the different action. For the reasons we have already stated we are in agreement with him on the authorities relied upon in support of it. Mr. Taylor drew our attention to the findings of the learned trial Judge, which are that she saw no irregularity in the proceedings leading to the sale of the property. He submitted that the Court cannot disturb the findings of fact of the trial Judge, unless it is plainly unsound or it appears unmistakenly from the evidence, that he has not taken proper advantage of having seen or heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved. In support of the proposition, he relied on the decision of the House of Lords in the famous case of Watt or Thomas v Thomas (1946) A.C.484.

The case of the 2nd and 4th Respondent as presented by Mr. Michael is simply that assuming that the Order of the Court dated 24th March 1986 in the proceedings CC 582/83 which gave the Administrator and Registrar-General (1st Respondent) authority to sell the property at 13 Circular Road Freetown, should or could have been set aside for irregularity, his submission is that the setting [p.15] aside of that Order would not in anyway affect or interfere with the title or interest of the 2nd and 4th Respondents who purchased the property in question because according to him they are bona fide purchasers for value without notice. Mr. Serry-Kamal's contention is that they the buyers must have visited the property and that if they did they would have found the first Plaintiff and her brothers and sisters and cousins residing there.

In support of his submission Mr. Michael placed great reliance on the decision in the matter of the Estate of William Charles During v The Administrator-General, where Beccles-Davies J.S.C. (as he then was) delivering the Judgment of the Court of Appeal dated 10th July, 1980 said at Page 4:

"The revocation of a grant of letters of Administration would not affect the title of a purchaser, who has acquired any interest in real or personal property pursuant to an Order made under any Statutory power of the Court."

Mr. Michael also submitted that a purchaser from a personal representative obtains a good title irrespective of any irregularities in the administration of the estate unless he is a party to a breach of trust. In support of his proposition he cited the case of:

Camara v Macauley (1920-36) ALR S.L. 150 at page 153,

where it was held that a purchaser from a personal representative obtains good title despite irregularities in administration unless he is a party to the breach of trust. Mr. Michael argued that the

appellant did not plead or allege that there was a beach of trust and therefore the 2nd and 4th Respondents cannot be deprived of the property they have acquired. He also relied on Harlsbury Laws of England 3rd Edition Volume 16 at Page 361 and 363 where the learned authors say as follows:—

[p.16]

"The purchaser from the representatives has the right to infer that the representative is acting fairly in the execution of his duty. And it rests upon the person seeking to impeach the validity of the transaction to prove that the purchaser has notice of the true state of affairs."

He argued that the appellants have failed to prove that his clients had any notice of any irregularity. In the light of the above authorities and being aware of the provisions of Section 70(i) of the Conveyancing and Property Act 1881, which are to the effect that the Orders of the Court are conclusive and that a sale cannot be invalidated on the ground of want of jurisdiction; want of any concurrence, consent, notice or service whether the purchaser has notice of any such want or not, we dismiss the appeal with costs.

SGD.

JUSTICE U.H. TEJAN-JALLOH, J.S.C.

SGD.

JUSTICE A.N.B. STRONGE, J.A.

SGD.

JUSTICE S. BASH-TAQI, J.A.

CASES REFERRED TO

1. Jacques v Hamson (1983) 12 QB D 136.

2. Order Ord. 15/6/16 in the Supreme Court Practice 1999

3. Order 52 rule 3 of the Annual Practice 1960.

4. Re May (1883)25Ch.D.

5. Re Harrison's share under a settlement

6. Harrison v Harrison (1985) 1 All E.R. 185

7. Re Scott and Alvarez's Contract Scott v Alvarez (1985) 1 Ch. 596 C.A.

8. Re Nazaire Co (1879) 12 CR 288 CA at page 291.

9. Graig v Kanseen (1943) A/I ER 108).

10. Lazard Brothers & Co. v Banque Industrielle de Moscon (1932) 1KB 617 CA at Page 62; Bank (1933) A.C. 289.

11. Watt or Thomas v Thomas (1946) A.C.484.

12. Estate of William Charles During v The Administrator-General

13. Camara v Macauley (1920-36) ALR S.L. 150 at page 153

STATUTES REFERRED TO

1. Halsbury Laws of England 3rd Edition Volume 22 paragraph 1665

2. Harlsbury Laws of England 3rd Edition Volume 16 at Page 361

3. Section 70(i) of the Conveyancing and Property Act 1881

2008

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ADMIRE JOHNSON v. HANNAH MEMUNATU YILLAH

[CIV.APP 26/2008] [p.22-27]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: MRS JUSTICE S. BASH-TAQI, JSC (Presiding)

MS JUSTICE S. KOROMA, JA

MR JUSTICE E. E. ROBERTS, JA

BETWEEN:

ADMIRE JOHNSON — APPELLANT

AND

HANNAH MEMUNATU YILLAH — RESPONDENT

BARRISTERS

Ms. S. G. Sisay, for the Appellant

DELIVERED ON 11TH DAY OF JULY 2008

RULING

BASH-TAQI, JSC:

This is an appeal against the Judgment/Decision of the Hon. Mrs. Justice C. L Taylor dated 9th April 2008 refusing the Appellant's application to appoint her as Legal Guardian of Hannah Memunatu Yillah, an Infant.

By an Originating Notice of Motion dated 28th February 2008, the Appellant, Admire Johnson had applied to Taylor, J for the following Orders:

1. That the Court grants an Order appointing her legal guardian of the infant/juvenile Hannah Memunatu Yillah.

3. That the Court grants permission to the Appellant to take the infant/juvenile out of the Jurisdiction of Sierra Leone.

The application was supported by the Affidavit of the Appellant Admire Johnson sworn on 28th February 2008 attached to which were six (6) exhibits, namely:

Exhibit "AJ 1"— the birth certificate of the Infant/juvenile;

Exhibit "AJ 2" — death certificate of the infant/juvenile' mother;

Exhibit "AJ 3" — Letter dated 6th July 2006 to the Chief Social Development Officer notifying them of the Appellant's intention to apply for an adoption Order in respect of the Infant;

Exhibit "AJ 4" — Letter from the Chief Social Development Officer granting consent to the proposed adoption;

Exhibit "AJ 5" — Letter to consent from the Infant's nearest relation living;

[p.23]

Exhibit "AJ 6" — Letter from the Appellant's employer stating her employment and financial status.

On 9th April 2008 the application came up before Taylor J. who dismissed it on the same date for want of jurisdiction. This is what the Learned Judge had to say in her Judgment:

"I have considered the application by way of Originating Notice of Motion dated 28th "February 2008 by Learned Counsel S. G. Sisay for legal guardianship by the Applicant Admire Johnson of Hannah Memunatu Yillah whose date of birth is 10th October 1990.

I have read the Affidavit in support and the exhibits attached thereto. This Court does not have jurisdiction to grant the orders as prayed as she is above the age of 17 years. In the light of the above the application is refused," (emphasis added)

It is against this Judgment that the Appellant has appealed to this Court on one ground, namely:—

1. The Honourable Mrs. Justice C. 1. Taylor Judge, misdirected herself when she held that the Court did not have the jurisdiction to grant the Order for guardianship to the Appellant as the juvenile is above the age of 17 years having regard to the fact that an Order for guardianship is not limited to any particular age bracket"

The facts leading to the application before the Learned Judge can be gleaned from the affidavit of the Appellant sworn in Support of the application. It would appear that the Juvenile, subject matter of these proceedings, is the eldest daughter of the Appellant's sister, one Tunde Coker, who is now dead. During her life time, Tunde Coker was very sickly and she was unemployed, so that she was unable to take care of the children and herself. The Appellant had assumed sole responsibility for her and her two daughters, namely, the Juvenile, subject matter of this application, and her younger sister Sarah Elysee Yillah. On 17th November 2007, Tunde Coker passed away (see Exh. "AJ2"). The Appellant instructed Solicitors to process an application for the adoption of Tunde Coker's two children by the Appellant. The Solicitors, pursuant to section 3(4) of the Adoption Act 1969 notified the Chief Social Development Officer by letter dated 6th July 2007, of the Appellant's intention to adopt the Juvenile and her sister Sarah Elysee Yillah. On 15th March 2007 and 20th April 2007 the Ministry of Social Welfare, Gender and Children's Affairs conducted a home visit and interviewed the Appellant and members of her family for the purpose of ascertaining the suitability and economic circumstances of the Appellant. The Chief Social Development Officer prepared a report of her assessment of the Appellant, and she granted permission pursuant to Section 3(4) of the Adoption Act No. 9 of 1969, for Adoption proceedings to be commenced in favour the two juveniles of the Appellant on behalf of Appellant. (See Exhibit "AJ4).

The Appellant who is ordinarily resident in the United States of America was unable to come back to Sierra Leone to pursue the Adoption process, and when eventually she was [p.24] able to come to Sierra Leone, the Juvenile Hannah Memunatu Yillah had attained the age of 17 years, beyond the age permissible for the Adoption of juveniles under the Adoption Act 1989. The Appellant proceeded with the process of adopting the Juvenile's younger sister Sarah Elysee, then 12 years, and had applied for permission to remove the said child out of the jurisdiction. With respect to the juvenile, Hannah, the Appellant's Solicitors having advised themselves that she was above the age limited by the Adoption Act 1989, presented the present the application to the High Court, for the Appellant to be appointed the juvenile's legal guardian. It is this application (for legal guardianship) that came before Taylor, J in the High Court, and which she dismissed for lack of jurisdiction, as I have already stated.

Counsel Ms Sisay submitted that unlike the Adoption Act No. 9 of 1989, Guardianship proceedings have no age limit; that the juvenile is an Infant as defined by Section 4 of the Interpretation Act 1971, opposed to being a child, as defined by the Adoption Act 1989; that the High Court has jurisdiction to determine and dispose of all applications of guardianship, maintenance or advancement of infants; that this jurisdiction is vested in the High Court by Order 42 Rule 5 of the former High Court Rules 1960; and by section 18(2) of the Court's Act No 31 of 1965, the High Court has unlimited original and supervisory jurisdiction in all cases and matters both civil and criminal; that this jurisdiction is also guaranteed by section 132 (1) of the Constitution of Sierra Leone Act No. 6 of 1991; and finally that the application was properly before the High Court as the Court of competent and unlimited jurisdiction in these matters.

The legal definition of an "Infant", under Sec 4 of the Interpretation Act 1971 is a person who has not attained the age of 21 years. By that definition, we agree with Counsel that the juvenile in this matter has not attained 21 years as evidenced in the birth certificate, Exh. "AJ1". Counsel reminded us that under the Child Rights' Act 2007, a Child is defined as a person who is not above 18 years. Therefore even if the basis of the Judge's Ruling on the age limit of 17 was under the Child Right's Act of 2007, the juvenile in this case is still within the age bracket within that Act, since at the time of the application, she was not yet 18 years. Counsel further drew out attention to the fact that the juvenile's mother had already given her consent to her adoption by the Appellant;, that if the adopted order had been granted, it would have had the effect of extinguishing her parental rights. In the present application the legal and parental rights are not extinguished by the granting of the application. Ms. Sisay submitted finally that the Learned Trial Judge did not consider the interest and welfare of the juvenile, and urged the Court to grant the application in the interest of the welfare of the Juvenile in this case.

Ms. Sisay relied on the following authorities in support of the appeal:

Family Law by E. L. Johnson at page 290; Bromley's Family Law 4th Edition; Section 2 of the Child Rights Act No. 43 of 2007; Re Nevin (1891) 2 Ch. Page299; Johnstone v Beattie (1843) 10 Ch & F (HL) page 576.

I will now deal with what I regard as the present law on the subject in the absence of any provisions in our Rules regarding Guardianship proceedings.

[p.25]

Medieval law, Pollock and Maitland noted "never laid down any... rule that there [was] or ought to be a guardian for every infant." Had it done so it might have led to the formulation of a comprehensive definition of guardianship, which, in turn, might have checked the proliferation of different kinds of guardianships. In the long run the latter effect has not proved unduly harmful, for many types of guardianship have long been obsolete or of minimal significance particularly those limited to the estate of the minor, since they have virtually been absorbed into the laws of trusts. However, the lack of a unifying definition has had other serious consequences which have become increasingly apparent with the growth of "administrative family law". The necessary encroachment of the law upon the privacy of the family has not only undermined parental authority, it has put at risk the liberty of the child; there is a failure to adequately protect the interests of the child. It was to achieve this objective of providing adequate protection for the child that it was suggested to create a new kind of Office known as the Children's Guardian, who not only could represent the interests of the children in care, but equally could serve other needs of the children for which the law does not provide, for instance, to act with the mother's consent, as guardian of her illegitimate child where the father is unknown or shirks his parental responsibilities. One of the traditional categories of guardianship was that of guardianship by nature which expressed the relationship between the parent and his legitimate child. It is on this basis that the Common Law right of the father to custody and other rights which emanated therefrom are explained. The power to appoint a guardian was originally given to the father by the Tenures Abolition Act 1660, but the mother had to wait until the Guardianship of Infants Act 1886 was passed to give her greater rights in respect of guardianship of children; and even then her power was restricted until extended by

the Guardianship of Infants Act 1925 (the Acts are not applicable in our Jurisdiction). Such an appointment traditionally appertains to the Chancery Division, although the county courts may appoint a guardian to act jointly with a surviving parent in cases where the deceased parent did not appoint a guardian or where the infant has no parent, no guardian, and no other person having parental rights with respect to him.

Today, the term 'Guardian' in its most common meaning describes a person who has been appointed either by a parent under a deed or will or by a court of competent jurisdiction to stand in loco parentis to the child, and it is the High Court that now has the inherent jurisdiction formerly possessed by the Court of Chancery to appoint guardians. Thus, a guardian may be appointed conditionally or until the child reaches a specified age which is less than the attainment of his majority or until some other event happens. In our jurisdiction, our High Court is equally vested with the similar powers, "to hear and determine all applications for guardianship, custody, and maintenance of infants .... ", etc. So that where the parents of an infant are dead, the Court may appoint a guardian to the infant on the ground that he is in need of protection. In deciding who to appoint as guardian, the Court will consider mainly the interests of the infant, and other things being equal," the Court, according to its ordinary practice, gives a preference to the nearest blood relations, and does not appoint strangers when fit persons are to be found among the relation" (see Chitty J in Re Nevin (1891) 2 Ch. 299, 303.

[p.26]

Having thus held that the High Court is the competent Court to determine the issue of legal guardianship, it now remains for us to determine whether an infant above 17, but under 18, can be the subject matter of guardianship proceedings. The Learned Trial Judge was of the view that she lacked jurisdiction to entertain the Appellant's application because the Juvenile, the subject matter of the application, is above 17 years, although under 18 years at the date of the application. Unfortunately, she did not state by what authority she came to that conclusion. We can only assume that the Learned Trial Judge confused the proceedings before her with those under the Adoption Act 1989, which require the child, for whose benefit an adoption order is sought, to be under the age of 17 years at the date of the order.

We hold firmly that there is no such requirement in our Rules in respect of an application for legal guardianship of a juvenile who has not attained the age of majority. Authorities abound that in our jurisdiction the age of majority is 21 years; this age is recognized by our Constitution, it being the age of eligibility for any citizen seeking election to the Sierra Leone House of Representatives (Parliament); it is also the age recognized in the Interpretation Act 1971 as the age of majority. In Johnstone v Beattie (1843-60) ALL E. R.576 at 582, Lord Brougham held, in that case, that a guardianship order extends over the whole period of the infant's minority; that the guardians are appointed until the infant is twenty-one years of age. It stands to reason therefore that an infant below the age of 21 years can still be the subject of a guardianship order, and we see no reason to depart from the authorities on this point.

We think in this case, the interest and welfare of the juvenile is a paramount consideration — the love and affection the Appellant bear to the juvenile is undoubted. I have no doubt that the juvenile's welfare

will scrupulously be guarded by the Appellant. I am satisfied that as the juvenile's nearest relation by blood, and as the person who has had sole responsibility for her welfare and that of her sister and mother, before and after the mother's death, the Appellant is the proper person to be appointed the legal guardian of this infant.

We are told that the Appellant has already obtained an Adoption Order in respect to the juvenile's younger sister, Sarah Elysee, and she would be taking her out of the jurisdiction to live with her in the United States where she resides. It would be a very strange and unusual combination of circumstances that would make it to the interests of these children to be deprived at their ages, of association with each other or with their aunt. Refusing the application would mean cutting away from this juvenile all the tender associations and affection which she has experienced in her young life with her sister and with the Appellant.

Having regard to all these circumstances, I am exercising my discretion in favour of the Appellant and accordingly uphold the appeal and make the following orders:

1. The Appellant, Admire Johnson, is hereby appointed legal Guardian of the Juvenile, Hannah Memuna Yillah.

[p.27]

2. That the Appellant, Admire Johnson, is hereby granted permission to take the Juvenile, Hannah Memuna Yillah, out of the jurisdiction

3. That no order is made as to costs.

SGD.

S. BASH-TAQI, JSC

SGD.

MS. S. KOROMA, JA

I agree.

SGD.

MR. E. E. ROBERTS, JA

CASES REFERRED TO

1. Chitty J in Re Nevin (1891) 2 Ch. 299, 303

2. Johnstone v Beattie (1843) 10 Ch & F (HL) page 576

3. Johnstone v Beattie (1843-60) ALL E. R.576 at 582

4. 6. Re Nevin (1891) 2 Ch. Page299;

STATUTES REFERRED TO

1. Adoption Act 1969

2. High Court by Order 42 Rule 5 of the former High Court Rules 1960; and by section 18(2) of the Court's Act No 31 of 1965,

3. Section 4 of the Interpretation Act 1971

4. Section 132 (1) of the Constitution of Sierra Leone Act No. 6 of 1991

5. Child Right's Act of 2007,

6. Guardianship of Infants Act 1925

ALLIE BADARA KOROMA v. AMADU KAMARA

[CIV APP 16/2005] [p.23-33]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 20 JUNE 2008

CORAM: MS JUSTICE U.H. TEJAN-JALLOH, J.S.C.

MS JUSTICE SALIMATU KOROMA, J.A.

MR JUSTICE ADEMOSU, J.A.

BETWEEN:

ALLIE BADARA KOROMA — APPELLANT

AND

AMADU KAMARA — RESPONDENT

HEARING DATE: 16TH NOVEMBER, 2006.

JUDGEMENT: 20TH JUNE, 2008.

ADVOCATES: A.F SERRY-KAMAL ESQ. FOR RESPONDENT

E.E.C. SHEARS-MOSES FOR APPELLANT

DELIVERED ON 20TH DAY OF JUNE 2008

JUDGEMENT:

TEJAN-JALLOH - J.S.C.

This is an appeal against the decision of the High Court contained in the Judgment of Hon. Mr. Justice A.B. [p.29] Rashid, of March, 2005. The appellant being dissatisfied with the decision filed four grounds of appeal, namely:

I. The learned trial Judge wrongly evaluated the evidence in holding that the plaintiff gave the Defendant money to procure a visa to travel abroad and ignored the fact that the agreement was for the defendant to assist in getting his son to travel.

II. The learned trial Judge failed to consider the evidence by both sides and that the Defendant did all that was practicable to assist the plaintiff's son travel to Europe.

III. The learned trial Judge failed to consider that there was an intervening factor (novus interveniens) which prevented the plaintiff's son from getting to his destination having embarked on the Journey.

IV. The learned trial Judge failed to consider whether the agreement was to do acts contrary to immigration rules for the plaintiffs son to enter a European country illegally which would be contrary to public policy.

V. The decision is against the weight of the evidence.

The main complaint which could be discerned from the grounds of appeal filed on behalf of the appellant is that the contract or transaction was illegal.

[p.30]

From the material point of the pleadings filed on behalf of the parties it appears clearly enough that the sole issue is whether or not the appellant was liable to refund the sum of U$ 2,800.00 (Two Thousand Eight hundred — US dollars) received from the respondent.

It is essential that a pleading if it is not to be embarrassing should state the facts which would put those against whom it is directed on their guard and feel them what is the ease which they will have to meet c per Lord cotton L.J. in Phillips V Phillips (1878) 4 QBD 129 Page 139.

Each party must plead all the material facts on which he means so rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. For instance when the evidence at the trial establishes fats different from those pleaded and which constitute a radical departure from the case as pleaded the action will be dismissed (Waghorn V George) Wimpey & Co Ltd (1969) 1 WLR 1764, (1970) 1 All. E.R. 474. Even in pawding V London Brick Co. (197) 4 KIP 2007 where the plaintiff succeeded on findings of fact not pleaded by him the judgment not allowed to stand. It was said that the Court of Appeal could either discuss the action or order a new trial.

Similarly, a defendant may be prevented from relying at the trial on a ground of defence not pleaded by him. (Davie V New Merton Board Mills Ltd. (1956) 1 WLR 233, (1956), 1 ALL. E.R. 379. In the case in hand it [p.31] was at the trial not in his pleadings that the defendant raised the issue of illegality.

The law is well settled that certain matters must be specifically pleaded. Our High Court Rules are clear on it. The law requires a defendant in any pleadings subsequent to a statement of claim to plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation, fraud or any facts showing illegality,

(a) Which he alleges makes any claim or defence of the opposite party not maintainable, etc. etc.

The requirement for a party to plead illegality is mandatory (Shell Chemicals. U.K. Ltd V Vinul Ltd) formerly Vinyl Products (1991) 135 SJ 412 (1991) The Times March 7 C. A.)

At the discretion of the court, a party may be debarred from raising a case totally inconsistent with and contradictory to the case previously argued: Exp. P. Reddish, Re Wilson (1877) 5 Ch. D1 882.

Counsel for the appellant quite rightly referred to the evidence of the appellant, which is that the transaction was illegal, but in my view the learned trial Judge was entitled to ignore it as he right did, because if he had taken cognizance of it he would have been accepting a case contrary to and manifestly inconsistent with that which the parties had pleaded. In the words of Lord Normand, that would amount to [p.32] condemning a party on a ground of which no fair notice has been given;

Esso Petroleum Co. Ltd V Southport Corporation (1956)

Ac. 218 at page 239 (House of Lords).

And — Oloto V Williams (1944) 10 WACA 23.

In these two case, the court accepted a case contrary to and manifestly in consistent with that which they pleaded.

There can be no doubt that the purpose of giving the appellant money was to enable PW2, Agustin Marco Kamara to travel to Holland; The evidence before the learned trial Judge revealed that no attempt was made by appellant to obtain the Visa therefore consideration for which the money, was given to appellant totally failed. I share the view that the respondent is entitled to a refund of his money. The issue has been rightly disposed of by the learned trial Judge. I do not intend to repeat the other various contentions in the synopsis filed as they are irrelevant.

For all the reasons we have already stated, the conclusion we have reached is that we see no merit in the appeal; it is therefore dismissed; no order as the costs.

SGD.

MS JUSTICE U.H. TEJAN-JALLOH, J.S.C

SGD.

MS JUSTICE SALIMATU KOROMA, J.A

I agree.

MR JUSTICE A.N.B. STRONGE, J.A

CASES REFERRED TO

1. Phillips V Phillips (1878) 4 QBD 129 Page 139

2. (Waghorn V George) Wimpey & Co Ltd (1969) 1 WLR 1764, (1970) 1 All. E.R. 474

3. Pawding V London Brick Co. (197) 4 KIP 2007

4. Davie V New Merton Board Mills Ltd. (1956) 1 WLR 233, (1956), 1 ALL. E.R. 379.

5. Shell Chemicals. U.K. Ltd V Vinul Ltd formerly Vinyl Products (1991) 135 SJ 412 (1991) The Times March 7 C. A.

6. Exp. P. Reddish, Re Wilson (1877) 5 Ch. D1 882.

7. Esso Petroleum Co. Ltd V Southport Corporation (1956) Ac. 218 at page 239 (House of Lords).

8. Oloto V Williams (1944) 10 WACA 23.

CLEMENT BANKOLE COX v. SUNNY EDUWU

[CIV.APP.32/2007] [p.1-4]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 31 JANUARY 2008

CORAM: MR. JUSTICE P.O. HAMILTON J.A. (PRESIDING)

MR. JUSTICE N.C. BROWNE-MARKE J.A

MR. JUSTICE E.E. ROBERTS J. A.

BETWEEN:

CLEMENT BANKOLE COX — APPELLANT/APPLICANT

AND

SUNNY EDUWU — RESPONDENT/RESPONDENT

SOLICITORS:

E. E.C. Shears-Moses Esq. and Mrs. M.A.P. Davies for Applicant

R. Johnson Esq. for Respondent

RULING

This is an application by Notice of Motion dated 5th October, 2007 or the following Orders:—

(1) That there be an interim stay of execution of the Judgment dated 13th July, 2007 pending the hearing and determination of this application.

(2) That there be a stay of execution of the Judgment dated 13th July, 2007 pending the hearing and determination of an appeal to the Court of Appeal intituled Civ. App. 32/2007 lodged on the 2nd August, 2007.

(3) That this Honourable Court grants such further or other orders as it may deem fit.

The applicant herein filed an affidavit in support of this application sworn to on 5th October 2007 to which was attached eight (8) exhibits (CBC[1] to CBC8). The Respondent herein filed an affidavit in opposition sworn to on 10th October, 2007 by Patrick Lambert.

[p.2]

Counsel for the applicant Mr. E.E.C Shears-Moses submitted that there are two principles to be considered thus:—

(i) Looking at the appeal and the existence of success and

(ii) the existence of special circumstances to grant the stay. Counsel then submitted that if the respondent goes on to administer the estate he will be at liberty to do what he wishes relying on Exhibit CBC6. Counsel finally referred to the affidavit in opposition especially paragraph 4 in which Exhibits CBC4 1-6 fully satisfies it.

Counsel for the Respondent Mr. R. Johnson opposes the application relying on the entire affidavit in opposition. He then submitted that paragraphs 5-7 discloses no special circumstances since the accounts in Exhibit CBC4 1-6 is disputed as a sham in that there are no documents to support it.

Mr. Shears-Moses in his reply submitted that there is no locus to administer the Estate of Mabel Cox. He referred to Exhibits CBC2 and CBC7 and submitted that the respondent has no fixed abode therefore enforcement of the appeal if it succeeds would be difficult as such a stay is necessary.

Paragraphs 5, 6 and 7 of the affidavit in support of the application reads as follows:

"5. That pursuant to the Judgment of the 13th July, 2007, several orders were made by the High Court inter alia that I give an account of all the properties, real and personal including rents and profits

collected, and monies in the Bank which I received whilst acting as Administrator of the estate of Mabel Cox deceased. I have complied with this order. Produced and shown to me is a copy of the account tendered and marked CBC4 1-6.

[p.3]

"6. That the matter pertains to a deceased person which if in the wrong hands could lead to serious repercussions later on.

"7. That the Respondent was meddling with the estate of Mabel Cox and selling properties belonging to it even before he purportedly obtained a grant for Cynthia Eduwu which had several defects. Produced and shown to me is a copy of the grant marked CBC5."

Paragraph 4 of the affidavit in Opposition reads:

"4. That the Appellant/Applicant is occupying one of the properties forming part of the Estate of Mabel Cox situated at 4 Nurse Horton Drive Brookfields Freetown and has been solely collecting the rent from the other property situate at 35H Beckly Lane off Tengbeh Town Freetown since the death of Mabel Cox in 2005."

It is clear that the principles to be applied in determining whether to grant or refuse a stay of execution are well known and have been applied in numerous cases by the Courts in this our jurisdiction. The Applicant must show that he has a prima facie good grounds of appeal and also that there are special circumstances justifying a stay. The main reason for this is based on the fact that a successful litigant should not be deprived of the fruits of his judgment; See Patrick Kororma v Sierra Leone Housing Corporation and Dolcie Beckley Misc.App.9/2004 C.A. (unreported). It will be wrong to grant a stay of execution where an appeal is frivolous or where a grant of a stay will create hardship on the successful litigant. See: Firetex International Co. Limited Vs. Sierra Leone External Communications and Sierra Leone Telecommunications Misc.App.19/2002 C.A. The applicant therefore must show that there are special circumstances to justify the granting of a stay of execution and this involves a consideration of the need to balance the interest of the successful litigant and the Applicant's claim for a stay — See Patrick Koroma v SALHOC Supra.

[p.4]

From the affidavit in support and especially paragraphs 5, 6, 7 and Exhibit CBC1 and the submissions of Counsel for the Applicant the question to be determined is whether the averments constitute special circumstances to warrant a stay of execution.

The Respondent has not stated in his affidavit evidence or show that a stay of execution would cause him any hardship nor has he demonstrated that in case the appeal succeeds he would be in a position to restore the Applicant to his normal position.

I have considered the submissions of both Counsel and carefully examined the averments in the Affidavits in support and opposition. I am satisfied that if a stay is not granted extreme hardship would

be caused to the Applicant. I am satisfied that the Applicant has shown that special circumstances do exist for this Court to exercise its unfettered discretion to grant a stay of the execution of the Judgment dated 13th July, 2007 pending the hearing and determination of the Appeal to the Court of Appeal, and would therefore grant the stay. I shall make no order as to cost.

SGD.

HON. JUSTICE P.O. HAMILTON, J.A.

SGD.

HON. JUSTICE N. C. BROWNE-MARKE, J.A.

I agree.

SGD.

CASES REFERRED TO

1. Patrick Kororma v Sierra Leone Housing Corporation and Dolcie Beckley Misc.App.9/2004 C.A. (unreported).

2. Firetex International Co. Limited Vs. Sierra Leone External Communications and Sierra Leone Telecommunications Misc.App.19/2002 C.A. (Unreported)

CORNELIUS AUGUSTINE HARDING & MUSTAPHA ALLIE ABOU TARRAF & NASSER AYOUB

[MISC. APP. 7/2007] [p.52-60]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: MRS. JUSTICE S. BASH-TAQI, JSC (PRESIDING)

MS JUSTICE S. KOROMA, JA

MR. JUSTICE E. E. ROBERTS, JA

BETWEEN:

CORNELIUS AUGUSTINE HARDING — PLAINTIFF/RESPONDENT

AND

MUSTAPHA ALLIE ABOU TARRAF — 1ST DEFENDANT/APPLICANT

AND

NASSER AYOUB — 2ND DEFENDANT/APPLICANT

Barristers

P. Lambert, Esq. for the Defendants/Applicants

N. D. Tejan-Cole, Esq. for the Plaintiff/Respondent

DELIVERED ON THE 11TH DAY OF JULY 2008

RULING

BASH-TAQI, JSC:

The Defendants/Applicants who were the Defendants in the High Court, have appealed against the Ruling of Kamanda, JA (as he then was sitting as Judge of the High Court) dated 2nd May 2007, in which he upheld the objection of the Plaintiff/Respondent and struck out the Applicant's Notice of Motion dated 10th May 2007.

By that Motion, the Defendants/Applicants were applying, 1) for leave to be granted to them to appeal against the Ruling of the Learned Trial Judge of 2nd May 2007, 2) an interim stay of execution pending the hearing and determination of that application, and 3) for a similar order as in (2) above pending the hearing and determination of the proposed appeal to be filed if the application on the Notice of Motion was granted. It is alleged that while Counsel for the Defendants/Applicants was moving the Court on his application, but before completing his submissions, Counsel for the Respondent took an objection to its further hearing. The Judge after hearing Counsel upheld the objection and struck out the Defendants/Applicants' Notice of Motion.

It is against this Ruling that the Defendants! Applicants have applied to this Court by Notice of Motion dated 22nd June 2007 seeking the following Orders:

[p.53]

1. "That leave be granted to the Defendants/Applicants herein to appeal against the Ruling/Decision of the Hon. Mr. Justice Jon Kamanda, Learned Trial Judge(in this matter which is dated the 2nd May 2007 in the High court matter intituled CC460/0S 2005 H. NO. 9 Between Cornelius Augustine Harding (Plaintiff) and Mustapha Allie Abou Tarraf (1st Defendant) and Nasser Ayoub (2nd Defendant).

2. That this Honourable Court orders an Interim Stay of proceedings in the High Court matter intituled CC460/05 2005 H. NO. 9 Between Cornelius Augustine Harding (Plaintiff) and Mustapha Allie Abou Tarraf (1st Defendant) and Nasser Ayoub (2nd Defendant) pending the hearing and determination of this application.

3. That this Honourable Court orders a Stay of Proceedings in the High Court matter intituled CC 460/05 2005 H. NO. 9 Between Cornelius Augustine Harding (Plaintiff) and Mustapha Allie Abou Tarraf (1st Defendant) and Nasser Ayoub (2nd Defendant) pending the hearing and determination of the proposed appeal to be filed pursuant to an order made by the Court under Order 1 sought on the face of this motion."

The application is supported by the Affidavit of Patrick Lambert sworn on the 22nd day of June 2007 and a Supplemental Affidavit sworn on 21st day of May 2008 together with the exhibits attached thereto.

BACKGROUND

A brief background is necessary at this stage before going into the substance of the application before us.

The Plaintiff/Respondent herein had instituted proceedings in the High Court by Writ of Summons on 2nd May 2005 for possession of premises at No 5 Spur Road Freetown occupied by the Defendants/Applicants under a Lease, and for damages upon forfeiture for alleged breaches of covenants. On 12th May 2005, the Defendants/Applicants delivered a Statement of Defence and Counterclaimed for relief against forfeiture. On 18th May 2005, the Plaintiff/Respondent then filed a Reply and Defence to the Counterclaim.

On the 17th October 2006, the Defendants/Applicants served interrogatories on the Plaintiff/Respondent pursuant to Order XX © (1) seeking answers to the following questions:

1. Whether the plaintiff declared to the Income Tax. Department/The National Revenue Authority the amount of rent he had received from the 1st and 2ncl Defendants for the years 2002-2005;

2. Whether the declared rental value (if at all declared) was the same as provided for in the lease agreement between the parties;

[p.54]

3. Whether plaintiff did receive from the 1st and 2nd Defendants, rental payments in excess of that provided in the said lease agreement;

4. If there was an excess, the plaintiff to state the amount of excess for the years 2002-2005;

5. Whether plaintiff did sign a supplemental agreement in which the rental value for the demised premises was different from that in the initial agreement.

Upon receipt of the above interrogatories, the Plaintiff/Respondent applied to the Court by Motion seeking an Order that the interrogatories of 17th October 2006 served on him be within-drawn, On the 2nd day of May 2007, the Learned Trial Judge Kamanda, J.A, then gave a detailed Ruling, part of which is reproduced hereunder as appears at paragraph 3 of Mr. Lambert's Affidavit in Support of his application. It states:

i) "I will here attempt to the Central issue in the instant case as I see it. It is whether in a case for the possession of the premises resulting from breaches by a tenant of covenants relating to use of the demised premises, the tenant can raise issues of (or) serve interrogatories relating to what declaration the landlord had made about rent to the Income Tax or the Internal Revenue Authorities"

ii) "Interrogatories are not made to provide details which are within the knowledge of the person issuing them.

iii) "Further it is my view that the issuing of interrogatories in this matter, fails to satisfy the test laid down in the Foundation in that the Foundation of this case rests on alleged breach of covenant by the Defendants who are tenants of the Plaintiff. To hold in these circumstances that interrogatories pending to raise taxations issues are relevant would be to over stretch the tests for the applicability of interrogatories. I fail to see their relevance in this case, and will Order that they be withdrawn, and the matter continue to the next stage."

Thereafter Counsel drew up and filed the Judge's Order, which reads as follows:

"DATED THE 2ND DAY OF MAY 2007"

"UPON READING the Notice of Motion dated 27th day of October 2006 together with the affidavits in support and opposition thereto AND UPON HEARING N. D. TEJAN-COLE ESQ. of Counsel for the Plaintiff/Applicant and P. LAMBER ESQ, of Counsel for the Defendants/Applicants,

IT IS HEREBY ORDERED as follows:

1. That the interrogatories be withdrawn.

[p.55]

2. That the Costs of this application be costs in the cause"

On the 10th day of May 2007, being dissatisfied with the said Ruling, the Defendants/ Applicant applied by Notice of Motion for leave to appeal against the same and for an Interim Stay of proceedings pending the hearing and determination of the proposed appeal to be filed if the application succeeds.

The Motion came up for hearing before Kamanda, J A, on 15th May 2007. During the course of Mr. Lambert's arguments before the Learned Trial Judge, and according to him, before he had completed his submissions on his Motion, Counsel for the Plaintiff/Respondent, Mr. N. D. Tejan-Cole, objected to the Defendants/Applicants' application on the grounds that the full Ruling/Decision, the subject matter of the application, had not been exhibited with the Motion papers. The Learned Trial Judge heard the arguments of both Counsel on the objection and thereafter adjourned for Ruling.

On 8th June 2007, the Learned Judge gave the Ruling below, which I have found necessary at this point to reproduce in full as it appears in the Judge's handwritten notes supplied to the Court at our request, by Mr. Lambert and attached as exhibit "J" to his Supplemental Affidavit sworn on 21st May 2008. The Ruling/Decision reads:

"RULING"

"The background to this application will help to make this Ruling clearer. As part of the process in bringing this matter through its preliminary stages to trial, Mr. Lambert issued interrogatories on the Plaintiffs. On 2nd June (2nd May) 2007, I ruled against the interrogatories being issued (see pages 29 to 33 of these Records), and ordered that they be withdrawn.

"Consequent upon this order Mr. Lambert has moved this Court on a notice of motion dated 10th May 2007 for the following orders.

1. That leave be granted to the Defendants to appeal against the Ruling/Decision of the Learned trial Judge in this matter dated 2nd May 2007.

2. That this Hon Court Orders an interim stay of proceedings in this matter pending the hearing and determination of this application

3. That this Court orders a Stay of proceedings pending the hearing and determination of the proposed appeal to be filed pursuant to an order made by this Court under Order 1;

[p.56]

"Five documents were exhibited to an affidavit sworn to on 10th May 2007 by Mr. Lambert.

"What was however not been exhibited was the Ruling/Decision, the subject matter of the proposed appeal.

"Mr. Tejan-Cole for the Plaintiff/Respondent has submitted that the Ruling/Decision ought to be exhibited. Mr. Lambert holds a contrary view; such is the substratum of the Ruling.

"Put more succinctly the Ruling is to determine whether on an application seeking leave to appeal against a Ruling/Decision, that Ruling/Decision has to be exhibited, because the drawn-up order alone is not sufficient.

"My considered and categorical answer is Yes, and for the following reasons amongst others.

1. Mr. Lambert's leave sought to appeal against the Ruling/Decision as recorded in paragraph 1 above. How can that document be examined by Counsel for the Plaintiff/Respondent if it is not exhibited and seen by him? He would have to refer to the very Ruling/Decision to answer the points raised by Mr. Lambert.

2. Mr. Lambert has exhibited the Drawn-Up Order. This is deemed to have arisen from the Ruling/Decision, but is not drawn-up by the Court. Mr. Lambert's complaint is against what the Court has done in giving the Ruling/Decision it has reached. It will be absurd to think that the complaint is against the drawn-up order.

3. Mr. Lambert has supplied the Court with authority for the submission that "it is not necessary to exhibit in an affidavit the entire ruling of this Court for which leave is sought to be appealed against". He refers to Halsbury's Laws of England (3rd Edition) Vol. 15 page 335 where it is stated that:

"The Court is entitled to look at its own records and proceedings before it on any matter and take notice of their contents although they may not be formally brought before the Court by the parties".

There is no dispute whatsoever on this point of practice, where Judicial notice is concerned. What I do hold firmly though, is that the authority here, dealing with Judicial Notice, has no relevance whatsoever on the issue in dispute, and is in no way authority for the submission that a Decision/Ruling being appealed against need not be exhibited. My taking judicial notice of the records does not compensate for Counsel on the other side not to be served with the document. My taking judicial [p.57] notice of the records does not compensate for Counsel on the other side not to be served with the document.

I hold very firmly that Counsel for the Plaintiff/Respondent should be served with the Ruling/Decision complained of, and this is done by first exhibiting the Ruling/Decision.

I have no doubt that leave could have been granted if the application were made to file a supplemental affidavit to which the Ruling/Decision could have been exhibited and served on Counsel for the Plaintiff/Respondent.

In the absence of that on the strength of Mr. Tejan-Cole's objection and submission, and on my own analysis, I uphold the objection and strike out the Defendants/Applicant's Notice of Motion.

Signed: J/A Kamanda

7 June 2007" (emphasis added)

Subsequently, Mr. Lambert drew up and filed the following Order pursuant to the said Ruling:

"DATED THE 8TH DA Y OF JUNE 2007

UPON READING the Notice of Motion dated 10th day of May 2007 together with the affidavit in support thereto AND UPON HEARING P. LAMBERT ESQ of Counsel of the Defendants/Applicants herein and N.D. TEJAN-COLE of Counsel for the Plaintiff/Respondent

IT IS HEREBY ORDERED as follows:

1. I uphold the objection and strike out the Defendants/Applicants Notice of Motion

SIGNED: BY THE COURT M&R

Being dissatisfied, the Defendants/Applicants instructed their Counsel to appeal against the said Ruling. Mr. Lambert then applied to the Trial Judge for leave to appeal against the above Ruling pursuant to Rule 10 of the Court of Appeal Rules 1985, and I shall now deal with Mr. Lambert's application before this Court.

Rule 10 (1) & (2) of the Rules of this Court read:

"10(1) Where an appeal lies by leave only any person desiring to appeal shall apply to the Court below or to the Court by Notice of Motion for leave within fourteen days from the date of the decision against which leave is sought.

[p.58]

"10(2) Whenever an application may be made to the Court below or to the Court it shall be made in the first instance to the Court below, but if the Court below refuses the application the applicant shall subject to the provisions of rule 11 (4) be entitled to have the application determined by the Court"

Mr. Lambert first applied to Kamanda, J.A for leave to appeal against the Learned Trial Judge's interlocutory order made on 2nd May 2007. His submission is that the Trial Judge refused/dismissed his application when, on 8th June 2007, he ruled:

"I uphold the objection and strike out the Defendants/Applicants Notice of Motion."

He argued further that he had complied with the Rules of this Court by first making his application to the High Court, before coming to this Court. He laid emphasis on those portions of the High Court proceedings before the Trial Judge appearing at pages 36 paragraph 2 up to page 37 of the Judge's Ruling, and submitted that he had introduced the subject matter of his application in his arguments before Kamanda, JA, and had thereby moved the Court, before Counsel for the Plaintiff/Respondent took his objection; that that objection was not a preliminary objection which could have resulted in the striking out of the Motion. He further stressed that there is no rule of law that in an application for leave to appeal, the full text of the Ruling intended to be appealed against should be exhibited with the application. In the circumstances, there was no obligation on the Defendants/Applicants to exhibit the full text of the said Ruling, particularly so, Counsel added, for the reasons given by the Learned Trial Judge. Therefore when the Judge ruled "I uphold the objection and strike out the Defendants/Applicants' Notice of Motion", striking out the Motion in these particular circumstances amounted to a refusal of his application by the trial Court, and he was therefore at liberty to make a fresh application before this Court.

Mr. Tejan-Cole on the other hand strongly disagreed with Mr. Lambert's submission. He stated that the High Court being a Court of Record is entitled to look at the Records of its proceedings at any time, more so where there is doubt as to the contents of its Record or where there are complaints of misdirection. He submitted that Mr. Lambert's complaint before the Trial Judge was one that could be described as a misdirection; that the circumstances in which a misdirection can arise include cases where the Judge has misconceives the issues, or has summarizes the evidence inadequately for one side or the other or has made a mistake in the law applicable to the issues in the case. He submitted that in the above circumstances, it is obligatory on the Applicant to make available the complete record of the proceedings leading to the particular complaint. In this present case, Mr. Tejan-Cole submitted, Counsel failed to make available the full Ruling despite indications from judge for him to do so; that it was because of Counsel's insistence that he was under no obligation to produce the Record of the full text of

the ruling that his Motion was struck out. Mr. Tejan-Cole, finally submitted that the Learned Trial Judge's ruling was quite clear and when viewed within the prevailing arguments and [p.59] circumstances, the Learned Trial Judge meant to strike out the application, not merely refused it.

The question we have to determine therefore is: Was the application of 10th May 2007 for leave to appeal really heard and determined by Kamanda, J.A? And did the Learned Judge exercise his discretion on way or the other in the matter?

In other to answer those questions one has to look at the true meaning of Kamanda, JA's Order.

"I uphold the objection and strike out the Defendants/Applicants Notice of Motion."

In my opinion, what the learned Trial Judge was saying in summary, was that in his view, the application seeking leave to appeal against a Ruling/Decision ought to exhibit the full text of that Ruling/Decision; that a drawn-up order only, filed by Counsel relying on the Ruling, is not sufficient for an application of this nature, as it does not give an opportunity to Counsel opposing the application to examine said Ruling and counter the points that may be raised in argument by the Counsel for the Applicant. Since that had not been done, he could not entertain the application, as he felt an essential part on which the application is based is absent; he therefore felt, in my view, that the application was not properly before him. I suppose if Counsel has thereafter applied to the Learned Trial Judge for leave to produce his Ruling/Decision in a Supplemental Affidavit he would have entertained and determined the application. Indeed at paragraph 3 of Exhibit ''J'' the Learned Trial Judge had this to say:

"I have no doubt that leave could have been granted if the application were made to file a Supplemental Affidavit to which the Ruling/Decision could have been exhibited and served on Counsel for the Plaintiff/Respondent. In the absence of that and on the strength of Mr. Tejan-Cole's submissions and on my own analysis, I uphold the objection and strike out the Defendants/Applicants' Notice of Motion" (Emphasis added)

It appears from reading the Ruling/Decision of the Learned Trial Judge, he did not go into the merits of the application before him. Rule 10(2), in our view gives a condition precedent to an application to this Court for leave, and that condition, in our view, is that the merits of the application for leave ought to be considered by the Court below and if that Court rightly or wrongly refuses the application after examining the merits, an application can be made to this Court for such leave.

We are confronted in this instant case, with an application for leave against a Decision of a lower Court, when that Court has not had the opportunity of examining the merits of such application and making a pronouncement on it.

We find, for this reason, that application in this Court before us is premature. We accordingly dismiss it. The costs of this application will be costs in the cause.

[p.60]

SGD.

S BASH-TAQI, JSC

SGD.

JUSTICE S. KOROMA, JA

I agree.

SGD.

JUSTICE E.E. ROBERTS, JA

STATUTE REFERRED TO

1. Halsbury's Laws of England (3rd Edition) Vol. 15 page 335

HAMID MOJOE KAMARA v. OKEKY FISHING CO. LTD

[CIV.APP.4/2006] [p.15-21]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: MISS JUSTICE S. KOROMA, J A (PRESIDING)

MRS. JUSTICE S. BASH-TAQI, .TA

MR. JUSTICE E. E. ROBERTS, JA

BETWEEN:

HAMID MOJOE KAMARA — APPELLANT

AND

OKEKY FISHING CO. LTD — RESPONDENT

Barristers

Eke Halloway, Esq. for the Appellant/Applicant

E. E. C. Shears-Moses, Esq. and Ms. V. M. Solomon for the Respondent

DELIVERED ON 11TH DAY OF JULY 2008

RULING

BASH-TAQL JSC:

The Appellant/Applicant, by a Notice of Motion dated 13th June 2007 is seeking three orders, stated thereon as follows:—

"1) An order to allow the Appellant/Applicant for the furtherance of justice to adduce the omitted new/fresh evidence in the matter:

CC709/2001 2001 K No. 102

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

HAMID MOJOE KAMARA — PLAINTIFF

AND

OKEKY FISHING CO. LTD — DEFENDANT

by being permitted to tender before this Honourable Court the following documents:

a) Photostat copy of the Record Book of Income and Expenditure of the Rural Artesenal Fishing Union

[p.16]

b) Original copy of the Record Book of Income and Expenditure of the Rural Artesenal Fishing Union

Further or in the alternative an Order that the Photostat copy of the Record Book of Income and Expenditure of the Rural Aretesenal Fishing Union which the late Learned Trial Judge ruled to be admissible in evidence but which through inadvertence of Counsel for the Appellant/Applicant was not tendered in evidence be, in the furtherance of the interest of justice admitted in evidence as well as the Original Record Book of the Income and Expenditure of the Rural Artesenal Fishing Union be also admitted in evidence to form an essential part of the Record of this Appeal Pursuant to Rules 31 and 32 of the Court of Appeal Rules 1985 Public Notice No 29 of 1985 in the matter:

CC 709/2001 2001 K No. 102

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

HAMID MOJOE KAMARA — PLAINTIFF

AND

OKEKY FISHING CO. LTD — DEFENDANT

3) An order that the cost of this Application be costs in the Appeal"

The Motion is supported by the Affidavits of the Applicant and his Solicitor Henry H. Sandy both sworn to on 7th day of June 2008 and the application is made pursuant to Rule 27 of the Court of Appeal Rules 1985. Counsel relies particularly on paragraphs, 3, 4, 5, 6, of the Affidavit of Hamid Mojoe Kamara and paragraphs 8, 10, and 11 of that of Henry H. Sandy.

The Applicant, stated in his Affidavit deposed that he was the Plaintiff in the High Court above, and exhibited to the said affidavit is a ruling of the High Court in the matter, Exhibit "HMK1, and a Record Book of Income and Expenditure Exhibit HHK 2. In "HHK1, the Trial Judge, had ruled that the Photostat copy of the Record Book of Income and Expenditure (Exh. HHK2) was admissible in evidence in the trial before the court. However, during the trial, this exhibit was not tendered in evidence.

Mr. Halloway, for the Applicant submitted that this Court should allow the Applicant to adduce new evidence in the form of this Record Book of Income and Expenditure in support of his appeal and that such an order would further the ends of justice. He relied on Rule 27 of the Court of Appeal Rules as the basis for the first order prayed for on the motion, and that Rules 31 & 32 referred to on the Motion papers are in aid of the second [p.17] Order prayed for above. He submitted that because of the absence of the evidence contained in the Record Book of Income and Expenditure, there was insufficient evidence before the Trial Judge to persuade him to come to a different conclusion. He stressed that in all the circumstances of the case this new evidence ought to be considered by the Court.

Mr. Shears-Moses for the Respondent strongly opposed the application. He submitted that the three requirements necessary to invoke Rule 27 have not been met; that in order to benefit from Rule 27, the applicant must show:

1. That the evidence sought to be adduced was unavailable at the time of the trial;

2. That the evidence is such that if available at the trial, it would have a substantial effect on the outcome of the case; and

3. That the evidence is credible.

He submitted that the evidence sought to be used and tendered was available at the time of the trial before the Learned Trial Judge. To substantiate his submission, Mr. Shears-Moses referred to the Ruling (Exh. "HHK1") at page 19 of the Records where the Judge in his ruling stated that he had perused the Record Book. He also relied on the Ruling of Gelaga-King, J.A, in the case of Aiah Momoh v Sahr Samuel Nyandemoh, Misc. App.1/2004 at page 2, where the Learned Justice of Appeal cited the dictum of Lord Denning in the case of Ladd v. Marshall 1954 3 All ER 745 at p. 748, to emphasized the point that the Court must be satisfied that the evidence was unavailable at the time of the trial. In his further submissions, Counsel questioned the propriety of the application before the Court; he submitted that Rules 31 & 32 do not affect evidence that is not before the Court; that the second limb of the application is no different from the first. He concluded that what is being sought by the present application is to protract litigation contrary to the principle of law that there must be an end to litigation. In these

circumstances, he concluded, the applicant cannot avail himself of Rules 31 & 32. He urged us to refuse the application with consequential orders.

Mr. Halloway, asked us to distinguish the case Aiah Momoh v Nyandemoh from the present application, in that in the present application, the evidence was not available to the Court in the sense that the Judge was unable to see and assess the contents of the Record Book. In the Momoh & Nyandemoh case, the evidence was not available, and there was nothing to show that the evidence could not have been obtained with reasonable diligence for use at the trail. He submitted that in the present case the absence of the evidence had an effect on the outcome of the case, namely the Judge was unable to assess the quantum of Special damages. He therefore stressed that the Court should use its extensive powers to make the Orders prayed for, in furtherance of the interest of justice.

Rule 27 of the Court of Appeal Rules reads:

"27. It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but for the furtherance of justice, the Court may, where it thinks fit, [p.18] allow or require new evidence to be adduced. Such evidence shall be either by oral examination in Court or by affidavit or by deposition taken before an examiner or commissioner as the Court may direct, A party may, by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations.

It is quite clear from the above Rule that it is not a matter of right that a party to an appeal can invoke the Rule so as to adduce new/fresh evidence in support of his original case. However, the Rule empowers this Court with discretion, where it thinks fit, and in furtherance of justice, to allow new/fresh evidence to be adduced on appeal. Nevertheless such discretion must only be exercised based on settled principles, not arbitrarily. The principles on which Courts could exercise their discretion judicially have been deliberated on in a number of cases over the years in this jurisdiction and elsewhere. In well known case of Brown v Dunn {1919} A.C. 373, Lord Loreburn L.C, laid down the guidelines to be observed in the exercise of judicial discretion when he said in his dictum at page 374 thereof:

"When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Court, he is by law entitled not to be deprived of that judgment without very good grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive" (emphasis added)

It was thought that the use of the word "conclusive" in the above case was too strong; the modern view therefore which is now generally accepted and applied in modern cases is that which was expressed by Lord Shaw in his speech, which is, to the effect, that the evidence should be such as is presumably to be believed. (emphasis added)

In Ladd V Marshall 19 54 3 ALL ER 745 Lord Denning, in the Court of Appeal stated the principles to be applied quite clearly when he said:

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible." (emphasis added).

In the present application, it is very clear that the first condition, which is mandatory, has not been satisfied. The Plaintiff/Applicant has failed to show by his Affidavit evidence that the Record Book of Income and Expenditure could not have been obtained with reasonable diligence for use at the trial; there is clear indication in the Applicant's Affidavit and that of his Solicitor that the evidence, the Record Book of Income and [p.19] Expenditure, was available at the time of the trial, and even if not immediately available at the precise moment it was required, it could have been obtained with reasonable diligence for use at the trial.

In support of the above conclusion, I will here refer to the Affidavits in support of the application. The Applicant in his Affidavit had this to say at paragraphs 4, 5, 6, and 8 and in relation to the absence of the evidence at the trial:

"3) That when I was led in evidence in chief, Counsel for the Defendant/Respondent herein objected to me tendering a Photostat copy of the Record Book of Income and Expenditure of the Rural Artisenal Fishing Union.

4) That the original of the Record Book of Income and Expenditure of the Rural Artisenal Fishing Union was not then in my possession in Court.

5) That Defense Counsel objected to me tendering the copy of the Record Book of Income and Expenditure of the Rural Artisenal Fishing Union, but the late presiding Judge Hon. Justice A. B. Raschid, after having heard arguments from counsel of (sic) the Respondent and Counsel for the Appellant/Applicant herein, reserved his ruling on the question whether the Photostat copy can be admitted in evidence.

6) That the late Judge on the 15th June 2004 ruled that the Photostat copy was admissible in evidence, ……."

7) ……

8) That regrettably and to my detriment, my Counsel did not tender in evidence the Photostat copy of the Record Book of Income and Expenditure which the late learned Judge ruled was admissible in evidence,"

Mr, Henry H. Sanely who was Counsel and Solicitor for the Appellant/Applicant in the High Court matter, in his Affidavit in support of the Applicant's applicant, deposed at paragraphs 8, 10 and 11 as follows:

"8. that I inadvertently omitted to tender in evidence the said Record Book of Income and Expenditure;

10. that in his own words the Judge said "I have carefully perused the Record,"

11. That the Court was therefore aware of the Record Book;"

The above clearly shows that the Record Book sought to be tendered was available at the time of the trial; that it is not new or fresh evidence that surfaced after the trial. For this reason, I hold that the first condition has not been satisfied.

[p.20]

It is equally clear that the second condition has not been satisfied. The second condition is that the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.

A careful perusal of the Record Book shows that it was prepared by the Appellant/Applicant; that it was prepared by him on behalf of the Artisanal Fishing Union. Would the Trial Judge have been satisfied that the content of the Record Book of Income and Expenditure was sufficient proof of the Applicant's claim for Special damages, having regard to the fact that the Record Book was prepared by the Appellant/Applicant himself for the purpose of the trial? And could it be said that the contents of the Record Book reflected an accurate and true statement of the Applicant's Income and Expenditure so as to satisfy the principle of law that special damages must be strictly proved? The answer to that question is no. There is nothing to show that if the evidence had been given at the trial, it would probably have had an important influence on the outcome of the case; all these matters and more would have been considered by the Judge in deciding the question of the quantum of damages, which I presume was the purpose for which the Record Book was to be tendered. The Learned Trial Judge in his Ruling in dealing with the evidence sought to be adduced ("Exhibit HHK 2"), had this to say in so far as credibility of the document is concerned:

"……..I have carefully perused the Record Book…… In my view the maker of a document or someone who has custody of the document is eligible to tender it in evidence. The weight to be attached (sic) to produce a document is the Judge to decide. In the light of the above, I will admit it in evidence."

In other words although the Book can be admitted in evidence by the Appellant/Applicant as the maker thereof, the weight to be attached to the Book and its contents was for the Judge to determine; meaning that the admission of the Record Book alone is not in itself incontrovertible evidence of proof of what it is intended to establish in the case. Therefore it cannot be said that the Record Book, even if admitted, would probably have had an important influence on the outcome of the case.

Thirdly, even if the Record Book was accepted in evidence, the next question to consider will be: Is the evidence contained in the Record Book likely to be believed taking into consideration that it was prepared by one of the parties to the litigation and prepared on behalf of the Artisanal Fishing Union who are not parties to this action? In other words, is the evidence "apparently credible." No other witness gave evidence for the Appellant/Applicant although it is said that he brought the action on

behalf of the Artisanal Fishing Union. I am not here saying that his evidence alone would not have been sufficient to persuade the Trial Judge, what I am saying is that it would have been helpful and would have lent more credibility if another member of the Union had given evidence in the matter in addition to the Appellant/Applicant. In this respect also I find the third condition not satisfied.

In my Judgment therefore, in the light of the foregoing, this application is dismissed.

The Registrar is hereby ordered to fix a date for the hearing for the substantive appeal.

[p.21]

The costs of the application will be costs in the cause.

SGD.

S. BASH-TAQI, JSC

SGD.

JUSTICE S. KOROMA, JA

I agree.

SGD.

JUSTICE E. E. ROBERTS, JA

CASES REFERRED TO

1. Aiah Momoh v Sahr Samuel Nyandemoh, Misc. App.1/2004 at page 2

2. Ladd v. Marshall 1954 3 All ER 745 at p. 748

3. Brown v Dunn {1919} A.C. 373

HASSAN MAHOI v. THE STATE

[CR. APP. 31/05] [p.129-133]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 22 MAY 2008

CORAM: MR. JUSTICE JON KAMANDA, .J.A.

MRS. JUSTICE S. BASH-TAQI, J.A.

MR. JUSTICE S.A. ADEMOSU, J.A

BETWEEN:

HAS SAN MAHOI — APPELLANT

AND

THE STATE — RESPONDENT

ADVOCATES

D.G. THOMPSON FOR THE APPELLANT

DELIVERED THE 22TH DAY OF MAY 2008

JUDGMENT

S.A. ADEMOSU, J.A.

This is an Appeal by the Appellant against the judgment of the Hon. Mr. Justice R.A. Shuster before whom he was indicted for the offences of

1. Causing grievous bodily harm with intent. Contrary to Section 18 of the Offences against the Person Act 1861

2. Wounding with intent. Contrary to Sections 18 of the offences against the Person Act 1861

[p.130]

And

3. Wounding. Contrary to Section 20 of the Offences against the Person Act 1861.

On the 8th of November, 2005 the Appellant was convicted of the offence of Causing grievous bodily harm with intent and sentenced to 8 years imprisonment.

The Appellant being dissatisfied with the conviction on the 25th of November, 2005 filed a Notice of Appeal for leave to appeal against sentence and the Grounds of Appeal reads as follows.

That on the facts of the case the sentence was too severe.

On the same date another Notice of Appeal for leave to Appeal against conviction was filed on behalf of the Appellant. The Grounds stated are as follows:—

1. The Learned Trial Judge failed to consider the defence of alibi adequately or at all.

2. There was no evidence to support the verdict.

3. That the verdict is unreasonable and cannot be supported having regard to the evidence.

D.G. Thompson Esq., for the Appellant argued Ground 1 separately and Ground 2 and 3 together. In arguing Ground 1 he referred to the evidence of DW1 and 2 who were the accused/appellant himself and his sister Umar Safu Mahoi. The evidence of DW1 the appellant as far as relevant is to the effect that the complainant Mrs. Kadiatu Weston is her sister-in-law. That on the material day 15-4-03 at about 3 p.m. he saw one Joseph Beya and about 9 others coming towards his shop armed with stones and that Yusufu Mahoi was among them. By the way Yusufu Mahoi is the complainant's husband and he was P.W.2. Appellant further told the court that the group was throwing stones at the provision shop and damaged his drinks. According to the Appellant he was stabbed with a bottle by a boy. He said his sister came to his rescue. That she removed his under vest to stop the blood and from, there got a taxi which took him to the Police Station.

As regards the time of the alleged incident the Appellant is recorded as saying under cross-examination as follows:—

[p.131]

"about three o'clock. I have a big clock in the shop. I did not look at the time. I was stab(sic) but I saw it at the clock (Q) It was three o'clock. (A1) by the wall clock I saw it.

This is briefly the Appellant Testimony in the Lower Court.

Turning to the testimony of DW2 — Umar Safu Mahoi. The witness told the court inter alia that the appellant was her brother and the complainant Mrs. Weston was her sister-in-law. She remembered 15-4-03. She was at 2A Fanna Street Allen Town, something happened at about 3 O'clock. She was sitting when a group of people went towards her with stones and using abusive language. That the group threw stones inside the Appellant's Bar. She said the Appellant told her not to run and the appellant went along the street and then went to the Police Station to make a report. From there Maribi Vamboy took a bottle and his Appellant on the head with it. That she went along the junction to help the Appellant by taking his vest to tie his head.

In cross-examination she said she was not aware of any other incident. She stayed with the Appellant for 12 years and the Appellant was the one who took care of her during the period.

She confessed that she could not tell the exact time of the alleged incident. Mr. Thompson referred to the evidence of P.W.1 and P.W.2 who were the complainant. Mrs. Kadiatu Weston and her husband Yusufu Mahoi respectively. He submitted that the time of the incident alleged by them was 6 p.m. or thereabout and in his opinion this evidence is substantiated by Exhibit “E” indicates that the alleged incident was at about 1745 hrs and not 6 p.m. as canvassed by Mr. Thompson. He submitted that the evidence before the Lower Court is not strong to support the conviction and that it is unsafe to base the judgment on He then invited the court to allow the Appeal and quash the conviction.

Mr. Peacock for the Respondent on the other hand urged the court to dismiss the appeal and uphold the conviction. In support of the submission Mr. Peacock referred copiously to the evidence adduced which indicates that the Appellant was properly identified and there is no question of mistake identity.

In his judgment the Learned Trial Judge said inter alia.

"The Defendant puts forward as his sole defence, the defence of alibi. The defendant says that he was not at the scene of crime when it was said to have been [p.132] committed on the 15th April, 2003. As the prosecution has to prove his quilt so that I am sure of it, and the accused does not have to prove he was elsewhere at the time. On the Contrary the Prosecution must disprove the alibi"

Mr. Peacock for the Respondent contended that the Trial Judge stated the principles of law involved correctly. I agree with him. It is worthy to note that after quoting the law extensively on issue of identification, the Learned Trial Judge alluded quite rightly to a very important and pertinent point that the case before him involved close relatives and those parties had known each other for many years. He did all he could to spot light the evidence which weighed more with him.

I will add that the evidence before the court disclosed that the complainant Kadiatu Weston is the Appellant's sister-in-law whilst her husband- Yusufu Mahoi is the brother of the Appellant by the same father. These two people identified the Appellant. The Learned trial Judge indeed said recognition may be more reliable than identification of a stranger. He also referred to the quality of the identification evidence adduced. He alluded to the fact that those who identified the Appellant were long standing relatives.

I agree with Mr. Peacock that the Learned Trial Judge came to the right conclusion that the prosecution had proved its case beyond reasonable doubt before he rejected the defence of alibi. It is my view that this matter was a straight issue of fact.

The law is settled that the Court of Appeal should be reluctant to interfere with the judgment of the Lower Court in a case in which every issue was before the jury and in which the jury was properly directed. I derive support for this view in what Widgery L.J. said in R v Sean Cooper (1969) 53 Cr. App. R. 82. He stated inter alia." The court must recognize the advantage which a jury has in seeing and hearing the witnesses, and, if all the material was before the jury and the summing up was impeccable, this court should not lightly interfere. It is conceded that this was not a jury trial the principle enunciated by Learned Lord Justice is applicable in a case where the judge had the benefit of seeing and hearing the witnesses and there is no misdirection complained of by the Appellant. It is trite law that the Court of Appeal is always reluctant to differ from a trial judge on a finding of fact based on credibility of witnesses. It seems to me that the crux of the matter [p.133] hinges on the credibility of the witnesses. The learned trial judge saw and heard the witnesses coupled with the fact that he had the opportunity of watching the demeanour of the witnesses before him. The ascription of probative values to oral evidence is preeminently the duty of the judge. The learned trial judge gave his reasons for accepting the evidence of the prosecution. I am unable to see any justifiable grounds of complaint. In the circumstances I dismiss all the grounds of appeal as they are unmeritorious. I confirm the decision of the learned trial judge. As the complainant has lost one eye completely, I confirm the sentence. I cannot share the view that it is severe. The appeal fails and is dismissed accordingly.

SGD.

HON. MR. JUSTICE S.A. ADEMOSU, J.A.

SGD.

HON. MRS. JUSTICE S. BASH-TAQI, J.A.

I agree.

SGD.

HON. MR. JUSTICE JON KAMANDA, J.A.

CASE REFERRED TO

1. R v Sean Cooper (1969) 53 Cr. App. R. 82.

HECKMET JOSEPH v. JOSEPHINE E. E. MAC-THOMPSON & ANOR.

[CIV. APP. 57/2005] [p.61-65]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: JUSTICE S. KOROMA, J.A. (PRESIDING)

JUSTICE S. BASH-TAQI, JA

JUSTICE E. E. ROBERTS, J.A

BETWEEN:

HECKMET JOSEPH — APPELLANT/APPLICANT

AND

JOSEPHINE E. E. MAC-THOMPSON — 1 ST RESPONDENT

AND

MAMADU SAJOH BAH — 2ND RESPONDENT

Advocates

C. F. Edwards Esq. and E. E. C Shears-Moses for the Appellant/Applicant

N. D. Tejan-Cole Esq. for the 2nd Respondent

DELIVERED ON THE 11TH DAY OF JULY 2008

RULING

S. BASH-TAQI, JA:

The Appellant/Applicant in this application is seeking an Order for a Stay of Execution of the Judgment of the Court of Appeal dated 1st November 2007 pending the hearing and determination of an appeal against the said Judgment to the Supreme Court

The application, made pursuant to Rule 28 of the Court of Appeal Rules 1985, is supported by the Affidavit of Crispin Feio Edwards sworn on the 22nd day of November 2007, attached to which are five exhibits namely:

Exhibit CEF 1 — copy of the Certificate of the Order of the Court of Appeal;

Exhibit CEF 2 — copy of the Notice of Appeal to the Supreme Court;

Exhibit CEF 3a — copy letter dated 7/11/07 from N. D. Tejan-Cole Esq. to C. F. Edwards;

Exhibit CEF 3b — copy letter dated 10/11/07 from C.F. Edwards to N. D. Tejan-Cole; Exhibit CEF 3c — copy letter dated 13/11/07 from N. D. Tejan-Cole to C. F. Edwards;

Counsel for the Applicant relies on the entire contents of his Affidavit particularly on paragraphs 4 to 11, and more especially on paragraphs 6, 7, 10 and 12 thereof. He submitted that the purpose of the application is not to deny the Respondents of the fruits of their judgment, but that special circumstances, exists which make it necessary for the Applicant to apply for the Stay.

[p.62]

There is an Affidavit in Opposition sworn to by Alhaji Umaru M. Bah the Attorney of the 2nd Respondent exhibiting his Power of Attorney as Exhibit "A", a copy of the Judgment of the Court of Appeal as Exhibit "B"; copy of the High Court Order dated 3rd September 2002 ordering the sale of the property subject matter of this action as Exhibit "C".

BACKGROUND

A brief background of the case is that the 1st Respondent, Mrs. Josephine E. E. Mac-Thompson, having been appointed sole Administratrix of the Estate of John Jeremiah Thomas, applied to the High Court by Notice of Motion dated 19th September 2001, and obtained an Order to have the property at 21 ECOWAS Street Freetown, (subject matter of this application), sold by public auction or private Treaty pursuant to section 21 of the Administration of Estates Act Cap 45 of the Laws of Sierra Leone.

On the 31st day of January 2003, the 1st Respondent instituted an action in the High Court against the Appellant/Application, seeking, inter alia, an Order for recovery of possession of the portion of the

premises the Applicant occupied at 21 ECOWAS Street, damages for trespass, arrears of rent and an Injunction. The Appellant/Applicant in his defence admitted to being in occupation of the premises and doing business thereon for the past 15 years, having been put there by one Mackie. He has, therefore, during this time established goodwill in his business and employed about 20 workers; he denied being in arrears of rent and further asked to be given 5 (five years) within which to vacate the premises. In the meantime, the said property had been sold and conveyed to the 2nd Respondent by the Master & Registrar by a Conveyance dated 9th March 2004 pursuant to the Order of the High Court dated 19th October 2001 referred to above.

On 2nd day of November 2004, the High Court (Nylander, J) gave judgment to the effect that the 1st Respondent was entitled to possession of the property at 21 ECOWAS Street, on condition that in the event of a sale of the property, Appellant/Applicant should negotiate for the purchase of the property and be given first option to purchase same, and it is only when negotiations for such a sale fell through that the Appellant/Applicant was ordered to vacate the property.

On 31st December 2004 the Appellant/Applicant took out a motion seeking (a) Specific Performance of the sale of 21 ECOWAS Street, and cancellation on the 2nd Respondent's Conveyance of 9th March 2004. On 28th September 2005, the Hon. Mr. Justice Nylander, delivering the ruling of the Court ordered that the 2nd Respondent's Conveyance be cancelled and the Appellant/Applicant given first option to purchase the property in compliance with his Order of 2nd November 2004.

The Respondents, being dissatisfied with the High Court Judgment appealed to the Court of Appeal. During the course of arguments in the Court of Appeal, the 2nd Respondent, who was not a party to the original action in the High Court, was granted leave to be joined as a party and was represented by Counsel. On the 1st November 2007, the Court of Appeal gave Judgment in favour of the Respondents and further ordered the 2nd Respondent's Conveyance to be re-instated in the record Books of Conveyances. The Court of Appeal further confirmed [p.63] the High Court judgment regarding the 1st Respondent entitlement to possession of the property at 21 ECOWAS Street Freetown. The Appellant/Applicant being dissatisfied with the Court of Appeal Judgment filed a Notice of appeal dated 19th November 2001 to the Supreme Court.

It is against this background that the Applicant has now applied to this Court for an Order for Stay of Execution.

Mr. E. E. C. Shears-Moses of Counsel for the Appellant/Applicant, relied on the Affidavit in support particularly paragraphs 6, 7, 8,9 and 12 of the said Affidavit to show that there are special circumstances why a Stay should be granted. He submitted that the Applicant has occupied and carried on business in the premises for over 15 years thus building an enormous amount of goodwill; that "a sudden movement will cripple his business and necessitate the dismissal of some 20 workers thereby increasing unemployment. He referred to the Applicant's Notice of appeal filed in the Supreme Court which said would be rendered nugatory if a Stay is not granted. Referring to paragraph 12 of the Affidavit in support Counsel submitted that that by the time the appeal is disposed of in either way, the applicant would have made adequate arrangement for alternative business premises in the vicinity so as to

maintain goodwill and save the business from collapse; also that "should the appeal succeed, it will create difficulty for the parties to start moving out and in." In called in aid the unreported cases of; African Tokeh Village v John Obey Development Co. Ltd Misc. App. 2/94, C.A.

Mr. Tejan-Cole referring to Rule 38 of the Court of Appeal Rules submitted that an appeal does not operate as a Stay of Execution; that from 9th March 2004 when the 2nd Respondent bought the premises, he became the owner/lessor thereof and consequently entitled to rent from the occupants. He referred to paragraph 6 of the Affidavit in Opposition and submitted that since 2001 the Applicant has occupied the premises rent free in sense the Respondent has not received any rents from the Applicant for the premises. He submitted further that since the Respondent's purchase of the property in 2004, he had not been given vacant possession of it. He urged the Court to dismiss the application and to give the Respondent vacant possession of the premises as no special circumstances have been given to warrant the granting of a Stay of Execution.

It has been held in numerous cases in our jurisdiction and elsewhere that the Court's power to grant a Stay of Execution is entirely discretionary and the legal basis for the exercise of this discretion is that the Applicant must establish that there are special or exceptional circumstances justifying the grant of a Stay. Equally, it is also well established that the filing a Notice of Appeal does not operate as a Stay of Execution no matter how meritorious the grounds of appeal may be (see Rule 28 Court of Appeal Rules 1985). It is left therefore for the party requiring a Stay of Execution pending an appeal to show special or exceptional circumstances justifying the grant of a Stay. In this regard the onus is on the Applicant to demonstrate that such special or exceptional circumstances exist for the Court to exercise its discretion in his favour. In considering the circumstances relied on by an applicant for a Stay of Execution, we call in aid the decision in the unreported case of John Michael v. Adnan Abess Misc. App. 7/96 that,

[p.64]

"It is for this Court to determine what circumstances are special. It will look at all the facts and circumstances and decide whether or not they are so far above the usual and normal run of things to the extent of making it absolutely necessary and incumbent on it, in the interest of justice to intervene and stay proceedings."

Following from the above, it now remains for us to consider whether the Appellant/Applicant in this case has shown the requisite evidence of special circumstances in his Affidavit for this Court to be able to exercise its discretion in his favour, and in doing so we will look at all the facts and circumstances and decide whether or not they are so far above the usual and normal run of things....

We are told that the Applicant has been doing business in the premises for over 15 years, and he says a sudden move will cripple his business; meaning if a Stay is not granted he will be required to close his business and give up the property. We note from the Judgment of the Court of Appeal, Exhibit "B", in the Affidavit in Opposition, that the action giving rise to this application commenced by Writ of Summons dated 31st January 2003, that the action was for recovery of possession of the property at 21 ECOWAS Street Freetown. Since that time the Applicant must have known that there is a likelihood that he would be required to deliver up possession of the property, especially so in the light of the Judgment

of the High Court of 2nd September 2004 declaring that the 1st Respondent is entitled to take possession of the property at 21 ECOWAS Street. The Applicant's basis for occupying the premises has not been disclosed in the Affidavit evidence; the Affidavit is vague on this point. Suffice it to say that there is no dispute that the Applicant is still occupying the premises. Furthermore the Affidavit in support of the application has not stated whether the Applicant has been paying rent for his occupation, and if so, to whom such rents were or are being paid. At paragraph 12 of his Affidavit, Counsel for the Applicant merely deposed that the Applicant informed him "that he will pay all the rents demanded from him", giving credence to the allegation that he has not been paying rent.

This Court has on a number of occasions emphasized that when a party makes an Affidavit in Support of an application, the affidavit must contain all the relevant facts that the party relies on, including sufficient background information, to assist the Court to come to a fair conclusion of the matter before it. Regrettably the Affidavit in support in this present case is vague in the salient facts as stated above.

Moreover as recently as November 2007, when Counsel for the 2nd Respondent wrote, Exh. CFE 3A, and CEF 3C, to the Applicant's Solicitor referring to the Applicant's occupation of the premises rent free, there was no corresponding answer from the Applicant's Solicitor to say whether or not the Applicant was paying for the premises. If this is the case then this Court cannot be seen to grant a Stay of Execution which is intended merely to prolong the applicant's occupation of the premises. The fact that the Applicant has doing business on the premises for 15 years and the loss of goodwill, can in other circumstances, where the equities are equal, be considered as special circumstance, but not in this case; similarly the laying off of 20 workers cannot amount to special circumstances. It has been held by this Court that moral, social, or political consideration do not and ought not to form the basis of the exercise of the Court's discretion to grant or refuse a Stay of Execution of an Order of the Court. We [p.65] are of the view that the laying off of 20 workers does not amount to special or exceptional circumstances in this case.

The Applicant contended in his application that he has substantial grounds of appeal which have very good chances of success in the Supreme Court, and in the event of this happening he would encounter great difficulty in moving into the premises having moved out if a Stay were refused. He has also said that by the time the appeal comes up for hearing, a time which he estimated to be five (5) years the Applicant would have found alternative premises within the vicinity. While we are prohibited from discussing the grounds of appeal, nevertheless we are legally required to consider the chances of it success. There is no suggestion that these grounds appeal contains important questions of law which in more appropriate cases may amount to Special circumstances. There is no dispute that the property in question belongs to the Respondents. The High Court Judgment confirmed this when the trial Judge gave possession of the premised to the 1st Respondent. The subject matter of the action, that is, the property in this case, is a solid structure which is not likely to disappear or be destroyed. If the appeal succeeds the Court always has the power to Order that possession of the property to be given to the Applicant.

In the light of the finding of facts before us and the conclusion of the trial Judge on the status of the premises, it will be difficulty to see the special circumstances that exist to justify a Stay of Execution,

especially as it appears, that from the facts, the Applicant has no legal or equitable right over the property other than his occupation. This Court would be doing an injustice to a successful litigant if it is to grant this application. Accordingly, a Stay of Execution is refused and the application dismissed with costs to be taxed if not agreed.

SGD.

S. BASH-TAQI, JA

SGD.

JUSTICE S. KOROMA, JA

I agree.

SGD.

JUSTICE E. E. ROBERTS, JA

CASES REFERRED TO

1. African Tokeh Village v John Obey Development Co. Ltd Misc. App. 2/94, C.A.(Unreported)

2. John Michael v. Adnan Abess Misc. App. 7/96 (Unreported)

STATUTE REFERRED TO

1. Rule 28 of the Court of Appeal Rules 1985

HENNEH WATFA v. ALHAJI SANU BARRIE

[CIV. APP 62/2005] [p.34-40]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 20 JUNE 2008

CORAM: JUSTICE U.H. TEJAN-JALLOH, J.S.C.

JUSTICE SALIMATU KOROMA, J.A.

JUSTICE A.N.B. STRONGE, J.A.

BETWEEN:

HENNEH WATFA — APPELLANT

AND

ALHAJI SANU BARRIE — RESPONDENT

HEARING DATE: 17TH APRIL, 2007.

JUDGEMENT: 20TH JUNE, 2008.

ADVOCATES:

BERTHAN MACAULAY (JNR), ESQ, FOR THE APPELLANT

A.F. SERRY-KAMAL, ESQ, FOR THE RESPONDENT

DELIVERED ON 20TH DAY OF JUNE 2008.

JUDGEMENT:

TEJAN JALLOH, J.S.C.

The present appellant was the defendant in the High Court where he was sued by the present respondent for:—

1. Recovery of possession of premises known as 18 Sani Abacha Street, Freetown.

[p.35]

2. Mesue profits at the rate of U$ 200,000 per annum from the 1st day of January 2002 until possession is yielded up.

3. Interest there on at such rate as the court shall allow.

The Defendant/Appellant filed a defence and Counterclaim. For the purposes of this appeal it is only the Counterclaim that is important. It is a claim for specific performance of an agreement in 1998 to buy from the Plaintiff/Respondent part of S.C.O.A. property more particularly delineated on Survey Plan LS 2922/95 dated 29th of December, 1995, hereinafter referred to as the property) initially at a price of U$ 100,000.00. (One Hundred Thousand U.S. Dollars). The present appeal is against this Counterclaim, which was dismissed on the 21st day of October 2005 by Honourable Mr. Justice S.A. Ademosu. The Defendant/Appellant being dissatisfied with the decision filed four grounds of appeal which are as follows:

1. The learned trial Judge misdirected himself when he held inter alia as follows:—

“The defendant (Appellant) relies principally upon certain documents. They are Exhibits. E12 & E15, GH 1 & 3 and of course the testimony of the Defendant.

in that the learned Trial Judge failed to consider or adequately consider Exhibits A written by the Plaintiff's Solicitors dated 24th July, 2002, wherein the said Solicitors wrote to the Defendant requesting

him to collect the sum of U$ 130,000.00 which said sum included the U$ 120,000.00 being the agreed purchase price for the property, the subject matter of the Defendant's Counterclaim".

2. The learned Trial Judge misdirected himself when he held as follows:—

"The general principle of law is that he who asserts must prove. The onus is on the Defendant to prove that the signature in Exhibit L is that of the Plaintiff. This burden the Defendant did not discharge. Rather than discharging it I had been called upon to compare the signature of Exhibit L with other signatures on the Exhibit tendered before me "having regard to the fact that the Defendant gave evidence during the course of the trial that he was familiar with the handwriting of the Plaintiff and that he had received receipts (including those tendered at the trial) signed by the Plaintiff and was therefore in a position to and did compare the [p.36] signature of the 'Plaintiff with that set out in" Exhibit L thereby discharging the onus on him to prove that the said signature on Exhibit L was that of the Plaintiff.

3. The learned Trial Judge misdirected himself when he held that it was not in dispute inter alia that:—

"That since 25.2.1 when the Plaintiff offered to refund the Defendant's money to him is a clear manifestation of the Plaintiff s disinterestedness in the purported contract of sale".

in that there was documentary evidence before the learned Trial Judge in the form of Exhibit E15, being a receipt in the sum ofU$60,000.00 representing the balance of the purchase price of U$ 120,000.00 dated the 20th of April 2001 and signed by the Plaintiff himself thereby failing to properly evaluate the evidence before him.

4. The Judgment of the Court, in respect of the Defendant's Counterclaim is against the weight of the evidence adduced before the learned Trial Judge.

Mr. Berthan Macaulay Junior for the Appellant argued grounds 2, 3, 1 and 4 together. He drew the Court's attention to the judgment of the learned Trial Judge at Page 80 line 26 where the learned Trial Judge said:

"The Plaintiff's explanation about the U$60, 000.00 received from the Defendant by his sons is that he said the Defendant demanded a receipt which he gave to him and the receipt in question was written by the Defendant's Secretary. I note that this piece of evidence was not denied by the Defendant. In my opinion, the said receipt is one which the Defendant is using as his trump card. I now refer to Exhibit 12 for U$ 60,000.00 dated 25.2.01 back of which reads:

Grantee to pay on behalf of Umaru and M.B. Barrie the sum of Sixty Thousand U$ Dollars U$ 60,000.00

Witness: Catherine Patnelli 28/2/01

[p.37]

It is my view that the picture or story is incomplete if I leave out other salient points raised by the learned Trial Judge as regards another receipt which is Exhibit 15 for the sum of U$ 60,000,00 dated 20.4.01 and the analysis of the Plaintiff's case as he perceived and evaluated it.

The learned Trial Judge further said as follows:—

"In my own opinion the endorsement at the back of Exhibit E12 is a clear indication that the Plaintiff offered to refund the money his two sons took from the Defendant. It cannot be taken as an endorsement of the sons' plan to sell the property. I think it is important to note that there are certain facts that are not in dispute in the case.

Among them are:

1. The plaintiff went to Guinea after the 29th April, 1992 Coup detat and finally returned to Sierra Leone in year 2000.

2. That whilst in Guinea he gave his two sons Umaru Sanu Barrie and Borbor Sanu Barrie a Power of Attorney.

Exhibit D refers:

It is patently clear that Plaintiff did not clothe his sons with authority to sell his property at 18, Sani Abacha Street formerly known as 18, Kissy Street, Freetown.

3. That since 25. 2.01 when Plaintiff offered to refund the Defendant's money to him this is a clear manifestation of Plaintiff's disinterestedness in the purported contract of sale.

I pause here to say that Counsel for the Appellant attacked these findings of the learned Trial Judge and referred to the Exhibit L, which appears to be the main stay and trump card on which he hinges the claim for specific performance because it is there it is alleged that the purchase price should be increased to U$ 120,000.00, but the learned Trial Judge has rightly considered this letter as well as the oral testimony of the Plaintiff/Respondent as to the authenticity of Exhibit L coupled with the fact that the Plaintiff/Respondent strongly denied being the author of the signature on Exhibit L dated 11.1.96, when the Plaintiff/Respondent was resident in Guinea. It is beyond argument that the Respondent is an illiterate, who cannot read or write, but can only append his signature.

[p.38]

There is no doubt that the Respondent's sons took money from the Appellant but there is evidence which the learned Trial Judge accepted, that the Respondent disowned the letter and denied authorizing any person to write it. He went further to offer to refund the money taken by his sons. I have asked myself the question that taking all the circumstances into consideration after the Respondent had returned to Sierra Leone whether he agreed to sell this property to the Appellant. I see no evidence of that on the record.

Mr. Berthan Macaulay Junior referred to the evidence -in-chief of the Appellant at Page 59 of the records which reads as follows:—

"Whilst the Plaintiff was in the Republic of Guinea he sent two of his sons namely, M.B. and Umaru. M.B. is in Court. He sent them to me that if I wanted to buy the property he needed to pay some debt in

Guinea. I told them that if they wanted the money I would give them provided the sell the place to me (emphasis mine). They told me that they would go and discuss it with the Plaintiff and come back to me. They went away and subsequently came back.

They asked me how much I would pay for the place (emphasis mine). I told them that I would not pay more then U$100, 000.00 for the place. They went away and came later to say that the Plaintiff had agreed to accept that amount, but would like me to give him some of the money. I gave them at first the sum of U$60,000.00. The Conveyance in respect of the purchase was prepared by Jesse Gooding Esq. They collected the U$60,000.00 and the Conveyance was given to them to take it to the plaintiff etc.

It is trite law that the essential basis of a legally enforceable contract is an agreement between two or more persons. From the Viva voce evidence of the Appellant it was he who said he would not pay more that U$1,000,000.00 as the: purchase price of the property and not the Respondent. This is, therefore, clearly a case of an offer to receive an offer. Such an offer is merely a preliminary step in the formation of an agreement. No purported "acceptance of it can result in genuine agreement between the parties". I take judicial notice of the fact that in a case of sale of property it is the owner of the property who puts the property out for sale and who should dictate the selling price. According to the Appellant it was he who told them how much he was to pay for the place. This sounds to me like it was the children who were finding a way to take [p.39] money from the Appellant. The Power of Attorney "given to them did not authorize or empower them to sell any property for that matter. There is no evidence that the Conveyance prepared by Jesse Gooding Esq. was upon the instructions of the Respondent and when it was taken to the Respondent he refused to execute it. Another point one should not lose sight of is that the Respondent can not be bound in law by any misrepresentation made by his sons to the Appellant.

Mr. Serry-Kamal maintained there was no enforceable concluded contract. As regards Exhibit L he submitted that this is a case in which the provisions of Illiterates Protection Act Cap. 104 can be invoked because of lack of compliance with the Act as the preparer of the document did not sign it. The exact general effect of such non-compliance is that the document is not rendered void in the strict sense, as the illiterate can rely on it but it is unenforceable against the illiterate. The effect of this is that the Appellant cannot force or tie the Respondent to a document he denied signing.

Berthan Macaulay Jnr., contended that the learned Trial Judge was wrong in saying that the Appellant should have called a handwriting expert to prove the signature on Exhibit L. He submitted that the signature can also be proved by non-experts including the Appellant. He derived support for this view in Philipson on evidence 11th Edition paragraph 1317 at Page 527528. In this Appeal, the Appellant would want the Court to believe that the signature on Exhibit L was that of the Respondent whilst the Respondent strongly denied that it was his own. This is Oath against Oath. The learned Trial Judge formed his opinion by comparing the handwriting alleged to be that of the Respondent. He pointed out the dissimilarities between the signatures on the receipt signed by the Respondents and the signature on Exhibit L. before he came to the conclusion that the signature on Exhibit L could not be that of the Respondent. In our view, the course pursued by the learned Trial Judge was proper in the circumstances. I am of the view that the reasoning of the learned Trial Judge was sound in the circumstances and no argument of any substance has been addressed to us to disparage those

conclusions. We have observed that the authorities relied upon in support of grounds 1 and 2 were the same as those canvassed before the Court below. We have also considered the cases referred to by Counsel for the Appellant, but we do not think that they assist the Appellant on the fact before the Court likewise the additional evidence, which consists of documents which were apparently available during the course of the trial in the Court below. I wish to add that the application made for additional evidence was misconceived. Any application of that nature should only be made in special circumstances, where the admission of it will help the cause of justice and its rejection could cause a miscarriage of [p.40] justice. I opine that there is no such situation in this matter. The decisive consideration in this type of transaction is the intention of the parties. Were the parties ever ad idem on the issue of selling and buying of the property? There is one golden rule which is of very general application, namely, that the law does not impute an intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind; see Booker v Palmer (1942) 2 ALL. E.R. 674 per Lord Green M.R. where the principle was emphasized.

In this appeal effort has been made by Counsel for the Appellant, to impugn the learned Trial Judge's decision on the ground that it is against the weight of the evidence. Counsel's arguments in this connection, however, have been quite unconvincing and as we have already indicated, we find the learned Trial Judge's decision amply warranted.

We are not persuaded that any ground for interference with the learned Trial Judge's conclusion has been established and accordingly we dismiss the appeal with Costs to the Respondent to be taxed.

SGD.

JUSTICE U.H TEJAN-JALLOH, J.S.C.

SGD.

JUSTICE SALIMATU KOROMA, J.A

I agree.

SGD.

JUSTICE A.N.B. STRONGE - J.A

I agree.

CASE REFERRED TO

1. Booker v Palmer (1942) 2 ALL. E.R. 674

HUSSEIN ABESS MUSA v. MOHAMED ABESS MUSA & ANOR.

[CIV. APP. 39/2008] [p.81-84]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 29 SEPTEMBER 2008

CORAM: MRS. JUSTICE S. BASH-TAQI, J.S.C

MR. JUSTICE S.A. ADEMOSU, J.A.

MR. JUSTICE E. ROBERTS, J.A.

BETWEEN:

HUSSEIN ABESS MUSA — PLAINTIFF/APPELLANT

AND

MOHAMED ABESS MUSA — 1ST DEFENDANT/RESPONDENT

KHALIL M. LAKISS — 2ND DEFENDANT/RESPONDENT

RULING

This is a motion by Plaintiff/Applicant for an order of stay of execution of all subsequent proceedings of the judgment of the Honourable Mr. Justice A.B. Halloway dated 12th day of June 2008 be granted pending the hearing and determination of an appeal against the same in the Court of Appeal of Sierra Leone.

In support of the application is the affidavit of Hussein Abess Musa sworn on 8th day of July 2008 attached to it are exhibits HAM1-HAM18. Mr. Ngakui for the Plaintiff/Applicant told the court that the special circumstances relied upon are contained in paragraphs 5, 6, 7, 8, 9, 10 and 14 of the affidavit. The averments in the aforementioned paragraphs are to the effect that the 2nd Defendant/Respondent was negotiating to lease the property subject-matter of this action to World Vision but the transaction only stalled by the injunctions granted by the Court. That application was made for stay of execution of the judgment was refused but the 2nd Defendant/Respondent was restrained from disposing of the property in question by way of sale until the appeal is heard and determined. See exhibit HAM13. It is further averred that the 2nd Defendant/Respondent has filed a motion for assessment of damages. That such assessment will [p.82] lead to monetary judgment and that it will be very difficult to recover from the 2nd Defendant/Respondent the money the deponent would have parted with should his appeal succeed. That if a stay is not granted and third party right or interest is vested in the property through the conduct of the 2nd Defendant/Respondent, it will be unjust for that third party interest to be affected adversely should the appeal succeed. Mr. Ngakui's contention is that there is a real probability that the appeal will succeed in the Court of Appeal. He urged the Court to exercise its unfettered discretion to grant a stay of execution.

The application is opposed by both Defendants/Respondents. The 2nd Defendant/Respondent filed an affidavit in opposition to which he attached several exhibits including the judgment of the lower Court. The two salient averments there are that the Deponent/2nd Defendant/Respondent had calculated the total loss incurred as a result of the injunction granted on the application of the Plaintiff/Appellant. He averred that this application for a stay of execution is an attempt to deprive him of the use and occupation of the property which the Court has found that he bought lawfully and regularly.

The law is well settled that if the application for a stay is opposed, the principle is that the application should not be granted unless irreparable injury might be done by refusing it. Chesler v Powell (1885) 1 T.L.R. 390.

In my view, this Court should confine itself to the issues properly raised before us and which are on the judgment already delivered to determine whether or not special circumstances have been shown. The sum total of acceptable evidence is that the subject matter of this action is a property situate at No.45 Signal Hill, Freetown. That the 2nd Defendant/Respondent was about to lease it to the World Vision for a few years. The question to be answered is that does the Plaintiff/Applicant stand the danger of his appeal becoming nugatory if he succeeds as Mr. Ngakui has contended? In support of this contention Mr. Ngakui relied on the ruling of this Court in the matter of Ibrahim Mansaray v Adama Manasaray, Civ. App. 31/81 delivered on 4th day of March 1982 where a stay of execution was granted. In that case there was an order transferring Real Property or an interest therein by Deed of Conveyance. The Court said in such cases where an appeal has been lodged the Court should not readily refuse stay because the property or right thereunder or therein before the final determination of the Appeal might have [p.83] passed to a bonafide purchaser for value who has no notice of the Appeal pending relating to such property. With respect to the learned Counsel the facts and circumstances of the case are far removed from the ones in this application. It has to be borne in mind that the learned trial Judge has already indirectly granted a stay by the restraining order that the property should not be disposed of.

Granting of the lease without more does not, in my opinion amount to alienation of the property. In my settled view to stop the 2nd Defendant/Respondent from leasing the property will cause both economic and equitable waste. It would be tantamount to depriving the 2nd Defendant/Respondent of the fruit of his litigation if this Court were to grant the stayed prayed for. We do not have to be reminded that it has never been the practice of Courts to deprive a successful litigant of the fruit of his litigation (Monk v Bartram 1891) 1Q.B.346 C.A. The Court will as a rule only grant a stay of execution if there are special circumstances which must be deposed to on affidavit unless the application is made at the hearing. See Halsbury's Laws of England 3rd edition. Volume 16 at page 35 paragraph 56

As far as I am concerned the issue about assessment of damages which would become monetary judgment is not yet before us and so the question of whether or not the Respondents would be in a position to repay it if the appeal is successful or what should happen in that case is not before us in the strict sense of it and I so rule.

Terms under which a stay is ordered are also in the discretion of the Court but in regard to payment of costs under the judgment or order appealed from, they are usually that the costs be paid to the Solicitor

on the other side on his undertaking to return them if appeal is successful see Swyny v Harland (1894) 1 Q.B. 707 per hopes L.J. at page 709.

For all the foregoing reasons, I am in full agreement with Messrs. Shears-Moses and Jenkins Johnston that the burden of showing special circumstances to justify the granting of stay of execution has not been discharged by the Plaintiff/Applicant. The result is that the application is refused with costs to the Defendants/Respondents. Costs to the solicitors for the defendants assessed at …….

[p.84]

SGD.

HON. MR. JUSTICE S. A. ADEMOSU, J.A.

SGD.

HON. MRS. JUSTICE S BASH-TAQI, J.S.C.

I agree.

SGD.

HON. MR. JUSTICE E. ROBERTS, J.A.

I agree.

CASES REFERRED TO

1. Chesler v Powell (1885) 1 T.L.R. 390.

2. Ibrahim Mansaray v Adama Manasaray, Civ. App. 31/81

3. (Monk v Bartram 1891) 1Q.B.346 C.A.

4. Swyny v Harland (1894) 1 Q.B. 707 per hopes L.J. at page 709.

STATUTE REFERRED TO

1. Halsbury's Laws of England 3rd edition. Volume 16 at page 35 paragraph 56

IBRAHIM ABDUL HUSSEIN BASMA v. ADNAN YOUSSEF WANZA

[CIV. APP. 53/2005] [p.5-9]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 7 MARCH 2008

CORAM: MR. JUSTICE P. O. HAMILTON, J.A (PRESIDING)

JUSTICE S. KOROMA. J.A

MRS JUSTICE S. BASH-TAQI, J.A

BETWEEN:

IBRAHIM ABDUL HUSSEIN BASMA — RESPONDENT/APPLICANT

AND

ADNAN YOUSSEF WANZA — APPELLANT/RESPONDENT

A.F Serry-Kamal Esq. for the Respondent/Applicant

A. Koroma. Esq. for the Appellant/Respondent

RULING

S. BASH-TAQI:

By Notice of Motion dated 21st September 2007 the Applicant moved this Court for a Stay of Execution of the Judgment of the Court of Appeal dated 24th May 2007 and all subsequent proceedings:

a) pending the hearing and determination of this application;

b) pending the hearing and determination of the appeal against the Judgment of the Court of Appeal to the Supreme Court;

When this application came up for hearing, Counsel for the Respondent/Applicant informed the Court that he would be confining his arguments only to the second relief above.

The Applicant's Motion is supported by the Affidavit of Ibrahim Abdul Hussein Basma sworn on the 21st June 2007 together with Exhibit "IAHB 1" which is the certificate of the [p.6] Order of the Court of Appeal, Exhibit "IAHB2" Notice of Appeal to the Supreme Court, Exhibit "IAHB3 1-4 valuation certificates of Applicant's properties within the jurisdiction.

Against the Applicant's Affidavit is the Affidavit of the Appellant/Respondent sworn to by Adnan Youssef Wanza on the 26th June 2007 opposing the application and exhibited thereto is Exhibit "AYW1", a photocopy of a Sierra Leonean Passport issued to the Appellant/Respondent by the Government of Sierra Leone.

A brief background to this application is that following an appeal by the Appellant/Respondent to the Court of Appeal against the High Court Judgment in this matter in which the latter's appeal was upheld;

the Respondent/Applicant filed a Notice of Appeal to the Supreme Court against the judgment of the Court of Appeal

The Applicant has now come to this Court, seeking a stay of the execution of the judgment of the Court of Appeal. The relevant paragraphs relied on by Counsel, Mr. A. F. Serry-Kamal for the Applicant in aid of his Motion are paragraphs 5-7 of the Affidavit of Ibrahim Abdul Hussein Basma referred to above, pending the hearing and determination of that appeal by the Supreme Court. The relevant paragraphs read as follows:

"5. Prior to my illness, I had acquired substantial real properties. These include the following:

1. 17 Spur Loop Wilberforce Freetown;

2. 19 Smart Farm Road, Off Wilkinson Road Freetown;

3. Property Off Peninsular Circular Road Tokeh;

4. Property South of Cantonment Wilberforce, Freetown;

5. Properties at 22 and 24 Spur Road, Freetown;

6. Properties at 16 and 16A Spur Road, Freetown;

7. 2 Back Street, Freetown;

8. 2, Rock Street, Freetown;

"6. The values of the above properties are in excess of the judgment sum and cost of this action thus far. True copies of the valuation of some of my said properties in 2005 are now produced and shown to me marked Exhibits 3 1-4

"7. The Appellant/Respondent is a Lebanese national and if the Judgment sum is paid to him and he leaves the jurisdiction soon thereafter, I will not be able to recover the said [p.7] judgment sum if my appeal to the Supreme Court succeeds. My appeal will thus be rendered nugatory.

"8. I have no intention of disposing of any part of my property. I am prepared to give whatever undertaking not to dispose of any or some of my properties to the value of the judgment sum if the Court so orders……."

Counsel for the Applicant submitted that the above paragraphs contain special circumstances warranting a stay of execution. He emphasized that the Applicant's Appeal would be rendered nugatory if a stay of execution were not granted, in that settlement of the judgment debt in full pending the outcome of the appeal would depend on the realization of the Applicant's assets listed in paragraph 5 of the Affidavit, so that if a stay were not granted and the Applicant succeeded in his appeal, it would be difficult for the Applicant to get back the real value of the assets. He re-iterated that the Applicant had no intention of disposing of the properties until the outcome of the case, (see paragraph 8 of his Affidavit in Support). Counsel further submitted that the Respondent was a businessman whose

domicile of origin is Lebanon, and if the Court were to order the judgment debt to be paid in full to him, and he left the jurisdiction, the Applicant's appeal would be rendered nugatory in the event of the appeal succeeding.

Mr. A. Koroma for the Appellant/Respondent in opposing the application submitted that the Respondent being the successful litigant ought not to be deprived of the fruits of his judgment; further that a stay of execution is granted at the discretion of the Court which must be exercised taking into consideration the special and extraordinary circumstances furnished by the Applicant in his Affidavit. He submitted that the Applicant's Affidavit showed no such special circumstances, and that the averments in the Affidavit as to the value of his properties showed nothing more than that the Applicant possessed properties in the jurisdiction. He submitted that Counsel's submission that the Respondent was likely to leave the jurisdiction was unsupported by evidence. He pointed out that the Respondent was also a Sierra Leonean albeit by naturalization; and the action being one for the payment of a debt which the Applicant had already acknowledged, there was no chance of the appeal succeeding.

The principles to be applied in determining whether a stay of execution should be granted are well known and have been applied in a number of cases by the courts in this and other jurisdictions. The Applicant must show that he has prima facie good grounds of appeal and there are special circumstances justifying a stay; the rationale for this being that the successful litigant should not be deprived of the fruits of his judgment; See case Patrick Koroma v Sierra Leone Housing Corporation and Dolcis Beekley Misc. App. 9/2004 C.A. Therefore, in those circumstances, it will be wrong to grant a stay of execution where an appeal is frivolous or where a grant of a stay will inflict hardship on the successful litigant. See Firetex International Co. Ltd v Sierra Leone External Communications and Sierra Leone Telecommunications Misc. App. 19/2002 C.A. The Applicant must therefore demonstrate that there are special circumstances in this case justifying the grant of stay of execution, and it has been held that demonstrating "special circumstances" in an application for stay of execution involves consideration of [p.8] the need, among other things, to balance the interest of the successful litigant and the Applicant's claim for stay. (See Patrick Koroma supra).

It is clear from the applicant's affidavit, the exhibits and submissions, that the two main reasons for seeking the stay of execution are, firstly, that a refusal to grant the stay would result in the disposal of the applicant's assets listed above to payoff the judgment debt, and that in the event of his appeal succeeding, he would be unable to get back the assets or the original value thereof. Secondly, he fears that if he is ordered to pay the judgment debt and the Respondent, being of Lebanese origin, leaves the jurisdiction before his appeal is heard, he would be unable to recover the judgment debt if his appeal succeeds. Thus his appeal would be rendered nugatory.

The question that the Court has to determine is whether the above reasons can be said to constitute special circumstances to warrant a stay of execution. There is no doubt that the quantum involved is huge; there is equally no doubt that if a stay is not granted payment of the judgment debt at this time will involve the selling of the Applicant's properties mentioned in paragraph 7 of his affidavit. The Respondent has not stated in his Affidavit evidence or shown that a stay of execution would cause him any hardship, nor has he disputed the fact that realization of the Applicant's assets will be enough to

satisfy the judgment debt in the event the Applicant's appeal is dismissed. It has equally not been shown that the Applicant has other means of satisfying the Judgment other than by selling his assets, and the Respondent has not disputed the Applicant's ability to satisfy the Judgment at any time. The Applicant has stated in his Affidavit that he has no intention of disposing any of the properties listed in his Affidavit, and the Respondent has not disputed this averment.

We have considered the submissions of both Counsel, and have examined the averments in the Affidavits in Support and in Opposition. We are satisfied that if a stay is not granted extreme hardship would be caused to the Applicant. We are also satisfied that the Applicant has shown that special circumstances do exist for this Court to exercise its discretion and grant a stay of execution of the judgment.

Accordingly, I grant a stay of execution of the judgment of the Court of Appeal dated 24th May 2007. I will further order that because of the special circumstances of this matter, the Applicant/Respondent deposits the Title Deeds to the properties listed in the Affidavit of Ibrahim Abdul Hussein Basma sworn on 21st June 2007 to the Registrar of the Court of Appeal until final determination of the appeal.

SGD.

CASES REFERRED TO

1. Patrick Koroma v Sierra Leone Housing Corporation and Dolcis Beekley Misc. App. 9/2004 C.A.(Unreported)

2. Firetex International Co. Ltd v Sierra Leone External Communications and Sierra Leone Telecommunications Misc. App. 19/2002 C.A.(Unreported)

IBRAHIM KAMARA v. MRS. SESAY JABBIE KANDEH

[CIV. APP. 63/2005] [p.85-89]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 29 SEPTEMBER 2008

CORAM: MISS. JUSTICE S. KOROMA, J.A.

MR. JUSTICE E.E. ROBERTS, J.A.

MR. JUSTICE S.S. ADEMOSU, J.A.

BETWEEN: (AN INFANT)

IBRAHIM KAMARA — APPELLANT

(By Alpha Bundu)

His Guardian Ad. Litem

AND

MRS. SESAY JABBIE KANDEH — RESPONDENT

ADEMOSU J.A

BACKGROUND

By a Writ of Summons dated the 28th July, 2003 the Plaintiff claimed against the defendant the following reliefs

1. Declaration that she is the owner and/or person entitle to a possession of piece or parcel of land situate at 96 Blackhall Road Kissy

2. Damages for trespass

3. Possession of the said land

4. An injunction restraining the defendant from interfering with the said land

5. An order setting aside the conveyance

6. Cost of the defendant

By a notice of motion dated 1st September, 2003 the plaintiff applied for order for substituted service was made on 16th September, 2003

The action proceeded to trial on the 11th February, 2004 with the defendant being absent and unrepresented. Judgment in default of appearance was entered in favour of the plaintiff on 1st October, 2004.

[p.86]

The plaintiff/Respondent to enforce the judgment by applying for leave to issue a writ of possession which was granted on the 24th February,

On the 19th of April, 2005 a conditional appearance was entered on behalf of the defendant by Messrs Serry-Kamal & Co and also filed consent by one Alpha Bundu to act as Guardian and when for the defendant. By a notice of motion dated 19th April 2005 the defendant applied to set aside the judgment in default of 1st October, 2004 and all subsequent proceedings on the grounds of irregularity. Mr. Shears-Moses applied to cross-examine Alpha Bundu on his affidavit and did cross-examine but not without any objection being raised by A.F. Serry-Kamal Esq. This despite the fact that Mr. Serry-Kamal's submission that the defendant was a minor and even that there were triable issues and that the

defendant had a defence the learned trial judge upheld Mr. Shears-Moses objection and entered judgment in favour of the plaintiff. The ruling was in these terms.

"Having entertained all these submission and or arguments on both sides of this motion. The court is still not satisfied that the said Ibrahim Kamara whose address is No. 11 Leiceister Road, Freetown is the same person now held to be at 71, Leicester Road a minor. More is desired than what has been said in this argument. How come that Ibrahim Kamara now held to be minor entered a legal transaction held in Exhibit "AB2" is the same person who executed the conveyance as portrayed in Exhibit AB1" In Exhibit "AB3" a plan was attracted not to an empty vacant land i.e. without structure? No I don't think so"

I am not satisfied that the deponent has been fair and helpful to the court in this matter. Unless and until the person holding himself out as Ibrahim Kamara is clarified as the defendant in this motion, the motion must fail"

Being satisfied with the ruling of the court the four grounds of appeal were filed on behalf of the defendant/appellant. The grounds are as follows.

[p.87]

1. The learned trial judge failed to consider that it ha unfettered discretion to set aside a judgment in default where the defendant shows that he has a defence on the merits.

2. The decision is against the weight of the evidence

3. The learned trial judge erred in law when she went into matters not yet open to her for decision

4. The learned trial judge considered extraneous matters which were not within the province of the matter before her for a decision.

Jenkins-Johnston Esq., for the appellant informed the court that he was relying substantially on the synopsis he had already filed but drew out attention to the important point that this point that this matter on appeal judgment had been taken against an infant even though no guardian ad. litem was appointed or joined Mr. Jenkins-Johnston's contention is that such irregularity is very crucial.

Having perused the record before the court I agree that there was a Birth Certificate and affidavit evidence before the court showing the circumstances surrounding the purchase of the property in question in the name of an infant. The law is not in doubt that if judgment by default is signed against an infant without knowledge of the infant the court will set it aside whether the plaintiff know of the disability or not (Leaver v. Torres (1899) 43 S.J 778 but it is noted that such irregularity may be waived.

Mr. Shears-Moses' strong point which he emphasized is that the irregularity must be proved and perhaps be investigated as he appeared to have led the trial judge to do. In my considered opinion; the discretionary power to set aside a default judgment which has been entered regularly is unconditional and the court should not lay down rigid rules that my result in depriving it for jurisdiction. The primary

consideration in exercising the discretion is whether the defendant shows that there is an issue to be tried on the merits.

In the court below the record clearly demonstrates that the court was engaged in securitizing the reasons given for the defence and went on [p.88] to give a ruling on the credibility of a Deponent on the affidavit filed. Granted that court is entitle to take into the account the explanation of the defendant as to how the default occurred (Alphine Bulk Transport Co. Inc. v. Saueli Eagle (1986) 2 Lloyds Report 221 at 223 L.A) With due respect to the learned trial judge she had no duty or right to decide on the objection without allowing the defendant's side to say what they want to say to the action. I hold firmly to the view that regardless of the reason given for disputing the claim the learned trial judge's duty was to hear the suit and not to the action. I hold firmly to the view that regardless of the reason giving for disputing the claim the learned trial judge's duty was hear the suit and not to question the validity of the reasons given for defending. There is established by a long line of decisions of which the correctness has so far I know, never been seriously challenged among them is Evans V. Barthan (1937) 2 ALL E.R. 646. I noted that Mr. Shears-Moses placed great reliance and Kabia v. Conteh (1964-66) A.L.R.S.L. 354 but that authority says that a judgment in default may be set aside without affidavit showing defence on the merits if to obviate clear injustice. In Grimshaw v. Dunbar (1953) 1 .Q.B.408 at P.416 Jenkins L.J said that the court should seldom, if ever, refuse to set aside a judgment merely on the ground that the defendant's case appears to be a weak one.

The practice of the court is generally to grant rather a refusal of application to set aside a default judgment. This is clearly illustrated in Berthan Macaulay v. Diamantopoulos (1962) 2 S.L.L.R 14 where it was held that even though the defendant treated the court with contempt by not appearing to the writ even when the plaintiff wrote to tell him that he would sign judgment within a certain time yet the court held that this is not necessarily good ground for refusing to set the judgment if there is disclosed a defence on the merits and circumstances warrants it. I am satisfied that sufficient issues have been raised to take this matter to trial.

In this case the learned trial judge has given the reasons which will enable this court to know the considerations which have weighed with her.

[p.89]

The question is in what the circumstances in which the Court of appeal can interfere with the discretion of the judge? In Ward v. James (1966) 1 Q.B. 293 at 294; (1965) 1 ALL E.R. 570 at 571. It has since be settled that the court can, and will interfere, if satisfied that the judge was wrong.

I am satisfied that these proceeded are ill-advised. I am of the opinion that justice would be done if the action went to trial. I am unable to say for reasons already stated, that the judgment in this case should stand as it is. The result is that the appeal is upheld. The judgment dated the 17th day of October, 2005 is hereby set aside. I order that the matter should go for trial.

SGD.

HON. MR. JUSTICE S.A.ADEMOSU, J.

CASES REFERRED TO

1. Leaver v. Torres (1899) 43 S.J 778

2. Alphine Bulk Transport Co. Inc. v. Saueli Eagle (1986) 2 Lloyds Report 221 at 223 L.A)

3. Evans V. Barthan (1937) 2 ALL E.R. 646.

4. Kabia v. Conteh (1964-66) A.L.R.S.L. 354

5. Grimshaw v. Dunbar (1953) 1 .Q.B.408 at P.416

6. Berthan Macaulay v. Diamantopoulos (1962) 2 S.L.L.R 14

7. Ward v. James (1966) 1 Q.B. 293 at 294; (1965) 1 ALL E.R. 570 at 571

LANCE COPRORAL DANIEL SANDI & v. THE STATE

[CR APPS 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 & 14/2005] [p.134-140]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 14 NOVEMBER 2008

LANCE COPRORAL DANIEL SANDI & 10 OTHERS — APPELLANTS

AND

THE STATE — RESPONDENT

C.A. OSHO-WILLIAMS (now deceased) and C.C.V. TAYLOR Esq for the Appellants

S.A. BAH Esq for the Respondent

DELIVERED ON 14TH NOVEMBER, 2008

JUDGMENT

1. This is an appeal brought by the 11 Appellants herein against their respective convictions and sentences, for the offences of Treason and Misprision of Treason by the High Court. On 20th December, 2004 the High Court of Sierra Leone, RASCHID, J (now deceased) Presiding with a Jury, convicted the 1st to the 10th Appellants on a three Count Indictment: two Counts for the offence of Treason contrary to Section 3(1) (a) and (b) respectively of the Treason and State Offences Act, 1963 as amended, and the

11th Appellant on one Count for the offence of Misprision of Treason. The 1st to 10th Appellants were sentenced to death by hanging on both Counts; and the 11th Appellant was sentenced to a term of Imprisonment of 10 years.

2. By Notices of Appeal dated 10th January, 2005 the 1st, 2nd, 3rd, 5th and 6th and 11th Appellants appealed against their respective convictions and sentences. By Notices of Appeal dated 7th January, 2005 the 4th, 7th, 8th, 9th, and 10th Appellants, appealed against their respective convictions and sentences.

3. The Treason charges in Counts 1 and 2 of the Indictment state that the Appellants, and other persons, three of whom were acquitted at the trial, prepared, by conspiring together to overthrow the Government of Sierra Leone by unlawful means, in that they agreed to overthrow and take over the Government by unlawful means; and to suspend the Constitution of Sierra Leone by means other than that provided by Law. It was alleged also, that these same persons endeavored to overthrow the Government [p.135] by unlawful means, in that they agreed to over throw and take over the Government by unlawful means; to suspend the Constitution by means other than that provided by law; and to overthrow the Government by unlawful means, by carrying out and participating in an armed attack at the Army Engineers' Regiment at Wellington, Freetown. The convoluted and tautologous manner in which the Indictment was drafted, shows that the prosecution was in trouble from the word "go." Thus, for example, the Indictment alleges that the Appellants prepared to overthrow the Government by unlawful means, by conspiring to do so, and by agreeing to do so.

4. Count 3 of the Indictment, charges the 11th Appellant alone with the offence of Misprision of Treason. Misprision of Treason is the offence of concealing the commission of an act of Treason.

5. 40 witnesses were called for the prosecution, none for the defence. The exhibits tendered, were lettered "A" to "DDDD." The trial would have commenced on 23 April, 2003, but for non-compliance with the Orders of the Court for service of copies of the Indictment, and the proofs of evidence on the Appellants. B V S KEBBIE Esq, DPP appeared for the prosecution together with A K A BARBER Esq, O V ROBBIN-MASON Esq, S A BAH Esq, MS C C JARRETT, and J E O KEBBIE Esq. For the defence were the late C A OSHO-WILLIAMS and S M SESAY Esq. The matter was thus adjourned to 1 May, 2003 when the Court was informed by the by MR ROBBIN-MASON the current Acting DPP, that the Chief Justice had appointed a Special Session for the trial of the Appellants pursuant to Rule 5(1) of the High Court (Criminal Sessions) Rules, 1965, and that Notice of the Appointment had been published in the Gazette. On the next adjourned date, 9 May, 2003 amendments were made to the Indictment after which the charges were read out to the Appellants and their co-accused. All of them pleaded Not Guilty to the charges. A jury was empanelled between that date, and 15th May, 2003. On 19 May, 2003 the then AG & MJ opened the case for the prosecution, and began leading evidence.

6. During the course of the trial, the jury was reduced below 12, and the prosecution and the Appellants gave their respective consents to the trial proceeding with 11 jurors. The prosecution closed its case on 15th June, 2004. On 23rd June, 2004 the accused persons were put to their election. All the Appellants, save the 5th Appellant, chose to rely on their [p.136] statements to the Police. He had first elected to

testify on oath. Later, on 29 June, 2004 the 5th Appellant changed his option, and informed the Court he was relying on his statement to the Police. The DPP addressed the Court between 13 July, 2004 and 24 August, 2004. The late MR OSHO-WILLIAMS addressed the Court on behalf of the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th and 16th accused person, beginning 25 August, 2004 and ending on 12 October, 2004. S M SESAY Esq addressed on behalf of the 4th, 12th, 13th, 14th and 15th accused persons between 13 October, 2004 and 11 November, 2004; and A KOROMA esq for the 5th accused between 16th and 17th November, 2004. Summing-up should have commenced on 22 November, 2004 but due to the absence of jurors, did not actually commence until 7th or 9th December, 2004 and ended on 20 December, 2004 when the jury delivered the verdicts set out above.

7. I have narrated the course of the trial so as to give some perspective to the immense task the Trial Judge faced. The trial spanned a period of nearly 20 months. There were long breaks in between due to the absence of Counsel, the jurors, witnesses or likely witnesses, and electricity. Even the Summing-Up it seems ended abruptly at page 394 of the Record. Though it is clear there must have been several adjournments during the Summing-Up, none of this has been recorded by the L TJ. We do not know at what stage he invited the jury to retire to consider their verdicts. All we have are his minute at page 395 recording the verdicts of the jury. We do not know whether the jury took time to consider their verdicts, and the length of time this consideration took; nor do we know whether they were sequestered after the end of the Summing-Up until the verdicts were delivered. All of these procedures have to be recorded by the L TJ as evidence that the trial has been conducted in accordance with the Criminal Procedure Act, 1965. The lack of evidence that there had been due compliance with that Act would of itself have compelled us to set aside the convictions as being unsafe and unsatisfactory.

8. Given the spasmodic manner in which the trial was conducted, mistakes were bound to be made by the LTJ. The LTJ had himself been an experienced Prosecutor before transferring, first, to the Magisterial Bench in 1986, before his elevation in late 1992 to the High Court Bench. But the task he faced was enormous and taxing to his failing health, and may have been, in my estimation, not unconnected with his sudden demise nearly two years later. This explains in some measure why the complaints [p.137] made by the Appellants are supported by the Record before us, and why MR BAH for the Respondent, conceded the grounds argued, and we have decided to allow the appeals

9. We allowed the Appellants to file and to argue additional grounds of appeal. Filing was done on 24 April, 2008 and arguments were heard from both sides on 30 April, 2008 on which date Judgment was reserved. The late OSHO-WILLIAMS Esq began by abandoning his original grounds of appeal, and sought our leave to argue the fresh grounds filed on 24 April/2008. The two main complaints which run through all of the appeals are that the trial Judge failed to analyze the evidence led by the prosecution and to relate the same to the law; and that the LTJ failed to direct the jury adequately on the law relating to accomplices, and to the danger of convicting on the uncorroborated evidence of an accomplice. Other grounds canvassed, were that the L TJ failed to direct the jury on the issue of alibi raised by the 2nd Appellant, and that the verdicts were against the weight of the evidence. We hold the view that the complaints relating to the directions on the evidence of accomplices, and on the issue of alibi evidence, are justified.

10. It is well established in our jurisprudence, (now abrogated in the UK by Section 32 of the Criminal Justice and Public Order Act, 1994) that where the guilt or otherwise of an accused person depends on the evidence of an accomplice, it is the duty of the Trial Judge to warn the jury that though may convict the accused person on such evidence, it is dangerous to do so unless it is corroborated. He should explain what corroboration means in law, and should indicate the type of evidence which could amount to corroboration. It is for the jury to decide whether such evidence amounts to corroboration or not. Failure to give such warning will result in a conviction being quashed irrespective of whether there was corroborative evidence or not. The duty of the trial Judge is spelt out at page 155 in the Judgment of AMES,P in the Court of Appeal in SABRAH v R[1964-66] ALR SL 154. The duty of a trial Magistrate to do so was also emphasized in THOMAS v R [1957-60] ALR SL 187 at 190 LL26-35. The point was also taken by the Court of Appeal in KHAZALI v THE STATE [1974-82] SLBALR 5 at pages 15-17. All of these cases restate the position of English Law as expounded by the Court of Criminal Appeal in BASKERVILLE (1916) 12 Cr App Rep 81. See also the case of JALLOH v R [1964-60] ALR SL 20 C.A. at page 22. It follows therefore, [p.138] that if the Trial Judge failed to give this direction, the convictions cannot stand. Let us therefore examine what the LTJ actually said to the jury on this all important issue. We have gone through the whole of the Summing-Up recorded in pages 333-395 of the Record. We do not find any mention of the term accomplice, though it is clear from the evidence that at least PW1, 11, 14 and 17 were accomplices (PW11 later became an informant). They had taken part in the meetings at Devil Hole and elsewhere, and/or in the attack at Wellington. They were therefore accomplices in fact as well as in Law. A corroboration warning was certainly required in respect of their evidence. Regrettably, none was given. The omission is an error this Court cannot, on the authorities, correct.

11. As regards the compliant by the 2nd Appellant, that no direction was given to the jury on the issue of alibi, we think it is well grounded. The LTJ's direction on this all important issue is to be found at page 359 of the Record. He said inter alia, "... when an accused raises an alibi he cannot raise an alibi that is vague; he must particularize. In my view, to say I went to a man who lodged me with my wife behind soap factory; the man can say I was with him at the time of the shooting; I went to this man at about 1.30am.' Now you do not expect the police to investigate such an alibi because it is vague. The investigators cannot go to soap factory and ask questions about any particular man; he has not given his name; he has not given his address ... It is our considered Judgment that this direction was palpably wrong. The legal burden always, and at all times rests on the prosecution to prove every element of the offence with which an accused person is charged, and where this is necessary, his presence at the scene of the crime at the relevant time. Once the 2nd Appellant had raised an alibi, it was for the prosecution to destroy it. The Appellants were in custody from the date of their arrest to date. There was nothing stopping the investigators taking the 2nd Accused to the back of soap factory, there to request him to identify the person supporting his alibi. This was clearly not done. The direction given may have left the jury with the impression that it was down to the 2nd Appellant to prove the truth of his alibi; this was clearly a misdirection. The necessity for a proper direction where the defence of alibi is raised, was acknowledged, though obliquely, in R v KOROMA (1960-61) SLLR 221 at 223 per WISEHAM, CJ; that the burden of disproving the alibi raised, rested [p.139] throughout on the prosecution, was considered as settled by the Court of Appeal in SILLAH v R [1964-66] ALR SL 517 at 520 LL5-9 per SIR SAMUEL BANKOLE JONES, P. "In this passage, what the learned trial judge was saying was that it was the duty of the

appellants to have called evidence to prove their innocence. This is clearly a misdirection in law. Certainly, it is not the law in a case where an accused person has set up an alibi as a defence. In the case of R v Johnson ([1961] 1WLR 1478) it was held that if an accused person puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence, but the burden of proving his guilt remains throughout on the prosecution, "

12. As to the complaint that the LTJ did not adequately relate the law to the evidence in order to assist the jury to arrive at just verdicts, we think it is well grounded. What the L TJ did at the start of his Summing-Up, was to explain what was meant by the words "prepare" and endeavour." What he did not do subsequently, was explain to the jury, whilst dealing with the evidence, which parts of the evidence were probative of the actus reus of preparation, and of endeavouring. The jurors were therefore left to grope in the dark for directions in these respects. The LTJ merely directed them, repeatedly, that if they believed the evidence of the prosecution, they must find each accused guilty of the offence of Treason; if they did not believe the prosecution's evidence, they must return verdicts of Not Guilty. This was clearly insufficient in a case of Treason, where any act of preparation, or of endeavour could constitute the offence.

13. The LTJ also made the mistake of equating the firing at the ATC Compound, as probative by itself, of the offence of Treason. It is our respectful opinion, that the firing at that compound could only be considered as an act of preparation, if conjoined with the meetings held, where it was agreed to overthrow the Government. The evidence of these meetings was provided by the accomplices, four of whom I have referred to above, and in the recorded interviews given by some of the Appellants, some of which contained admissions, or which could be described as confessions. These meetings were not by themselves, irrefragable evidence of an agreement to overthrow the Government. Some of the· discussions held at these meetings had more to do with ways of [p.140] disturbing the peace, something more akin to an Unlawful Assembly than to full blown Treason.

14. I have dealt with the evidence of accomplices above. As regards confessions, the Law is clear. A jury could convict on the basis of a confession alone, but it is desirable to have outside the confession, some evidence, be it slight, of circumstances which make it probable that the confession was true. This is the direction approved by WACA in KANU v R 14 W ACA 30 and cited with approval in KULANGBANDA v R [1957-60] ALR SL 306 at page 307 LL 26-33. The only evidence outside the confessions in this case, connecting the Appellants with meetings during which a coup was planned, and the firing at the ATC Compound, is the evidence of accomplices which itself requires corroboration. As to the firing at the ATC Compound, there are more problems. There were several inconsistencies in the evidence of the prosecution witnesses which deprived it of reliability. Many of these inconsistencies have been highlighted in the synopsis dated 18 March, 2008, submitted on behalf of the Appellants jointly, and I need not here repeat them.

15. If the verdicts in respect of Treason cannot be upheld, it follows that the verdict in respect of the offence of Misprision of Treason cannot be upheld as well.

16. In the result, we agree with the Appellants, that the verdicts are unreasonable and cannot be supported having regard to the evidence. We therefore allow all the appeals, and set aside the all the convictions and sentences.

SGD.

N.C. BROWNE-MARKE, JA

SGD.

P.O HAMILTON JA

SGD.

S.A. ADEMOSU, JA

CASES REFERRED TO

1. Sabrah v R[1964-66] ALR SL 154

2. Thomas v R [1957-60] ALR SL 187 at 190 LL26-35

3. Khazali V The State [1974-82] SLBALR 5 at pages 15-17

4. Baskerville (1916) 12 Cr App Rep 81

5. Jalloh v R [1964-60] ALR SL 20

6. R v Koroma (1960-61) SLLR 221 at 223

7. Sillah v R [1964-66] ALR SL 517 at 520 LL5-9

8. R v Johnson [1961] 1WLR 1478

9. Kanu V R 14 WACA 30

10. Kulangbanda V R [1957-60] ALR SL 306 at page 307 LL 26-33

STATUTES REFERRED TO

1. High Court (Criminal Sessions) Rules, [1965]

2. Section 32 of the Criminal Justice and Public Order Act, [1994]

MATHEW MUSTAPHA MANNAH v. THE STATE

[CR. APP. 31 AND 32/2006] [p.146-155]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 6TH DECEMBER 2008

CORAM: MR. JUSTICE P.O. HAMILTON JA (PRESIDING)

MR. JUSTICE N.C. BROWNE-MARKE JA

MR. JUSTICE S.A. ADEMOSU JA

MATHEW MUSTAPHA MANNAH)

MOHAMED SYLVANUS KOROMA) — APPELLANTS

AND

THE STATE — RESPONDENT

SOLICITORS

E.N.B. NGAKUI ESQ., — FOR 1ST APPELLANT

M.A. BELOKU SESAY ESQ. — FOR 2ND APPELLANT

MS. GLENNA THOMPSON — FOR RESPONDENT

JUDGMENT

This is an Appeal by the Appellants herein Mathew Mustapha Mannah and Mohamed Sylvanus Koroma against their conviction and sentence by the High Court in Freetown presided over by Honourable Akiiki Kiiza J, on a four (4) Count Indictment of the offence of CORRUPTION contrary to Section 8(1)(a) of the Anti-Corruption Act, [p.147] No. 1 of 2000 (As Amended). The Appellants were convicted and sentenced on the 30th August, 2006.

This Appeal is brought pursuant to Section 57(b) and 57(c) of the Courts Act, 1965 (as amended by Section 6 of Act No. 21 of 1966) and the powers of the Court of Appeal on the hearing of such an Appeal are fully spelt out in Section S. 58(1), 58(2), 58(3), 58(4) and Sections 59(1), 59(2) and 59(5) of the Courts Act supra. I will not reproduce these sections on this Judgment.

The trial was held at the Freetown High Court as a result of the Anti Corruption Act No.1 of 2000 a (as amended) under which proceedings were taken:

The Indictment which was preferred pursuant to the provisions of Section 38 of the Anti-Corruption Act No.1 of 2000 (as Amended) and filed reads as follows:—

(COUNT 1)

STATEMENT OF OFFENCE:

Soliciting an advantage, contrary to Section 8(1)(a) of the Anti-Corruption Act, 2000 (as amended).

PARTICULARS OF OFFENCE:

MATHEW MUSTAPHA MANNAH on an unknown date between 1st July, 2001 and 31st July, 2001 at Port Loko District in Sierra Leone, did solicit an advantage of Le.500,000.00 (Five Hundred Thousand Leones) one male goat, one bag of rice and five (5) gallons of palm oil from one Idrissa Kanu, as an inducement to perform an act as a public officer.

COUNT 2

STATEMENT OF OFFENCE:

Soliciting an advantage, contrary to Section 8(1) (a) of the Anti-Corruption Act, 2000 (as amended)

PARTICULARS OF OFFENCE:

MATHEW MUSTAPHA MANNAH on an unknown date between 1st July, 2000 and 31st July, 2000 at Port Loko District in Sierra Leone did solicit an advantage of Le.500, 000.00 (Five hundred thousand Leones) one male goat, one bag rice and five (5) gallons of palm oil from one Amadu Orab Thullah, as an inducement to perform an act as a public officer.

COUNT 3

STATEMENT OF OFFENCE:

Soliciting an advantage, contrary to Section 8(1)(a) of the Anticorruption Act, 2000 (as amended).

PARTICULARS OF OFFENCE:

MOHAMED SYLVANUS KOROMA on 25th January 2002 at Port Loko District in Sierra Leone, did solicit an advantage of Le.500,000.00 (Five hundred thousand Leones), one male goat, one bag rice and [p.149] five gallons of palm oil from one Idrissa Kanu as an inducement to perform an act as a public officer.

COUNT 4

STATEMENT OF OFFENCE:

Accepting an advantage contrary to Section 8(1)(a) of the Anticorruption Act, 2000 (as amended).

PARTICULARS OF OFFENCE:

MOHAMED SYLVANUS KOROMA on a day unknown between 1st September, 2001 and 31st January, 2002, at Port Loko District in Sierra Leone did accept an advantage of Le.200,000.00 (Two hundred thousand Leones) from AMADU DRAB THULLA as an inducement to perform an act as a public officer.

The trial properly commenced on 21st June, 2006 and the learned Trial Judge in his recorded Judgment on 31st August, 2006 found 1st Appellant guilty on Counts 1 and 2 and 2nd Appellant guilty on Counts 3

and 4 and sentence the 1st Appellant to three months imprisonment on Counts 1 and 2 to run concurrently and the second Appellant to three months imprisonment on Counts 3 and 4 to run concurrently.

It is against these verdicts of Guilty and sentence that both Appellants have appealed to this Court on the following grounds of Appeal.

(1) The Judgment is unreasonable and cannot be supported having regard to the evidence before the Court.

[p.150]

(2) The Learned Trial Judge erred in allowing the Prosecution not to call a witness listed on the back of an indictment either to examine him or merely to tender him for cross examination by Defence Counsel.

(3) That the Judgment is against the weight of evidence.

In my humble opinion grounds one (1) and (3) can be conveniently entertained under one ground as being ground one (1).

GROUND (1) (One)

The Judgment is unreasonable and cannot be supported having regard to the evidence before the Court. When an appeal is anchored on this general and over used ground of appeal in criminal cases it is inviting the Court of Appeal to in other words review and evaluate the evidence that was adduced before the trial Court.

I have fully perused the record of proceedings especially the judgment of the learned Trial Judge. However, it is for me to note that there are very strict limitations on the power of the Court of Appeal to set aside or reverse the decision of the trial Court on issues of fact. The Court of Appeal cannot embark on a re-evaluation of the evidence and thereby arrive at a different conclusion from that of the trial Court because an appellate Court is not permitted to inquire into disputes but to inquire into the ways the disputes have been tried and settled. Moreover, to reverse the decision of the trial Court which is based on its assessment of the quality and credibility of witnesses [p.151] who testifies before it, the appellate Court must not only entertain doubts that the decision of the trial Court is right but must also be convinced that it is wrong. Findings of fact made by a trial Court are entitled to respect by an appellate Court, particularly when it is clear that the trial Court had performed its primary duty of evaluating and ascribing probative values to the evidence before it properly.

It is not every minor error committed by a trial Court that will result in its judgment being set aside. It must be demonstrated that the error was substantial and formed part of the basis of the decision complained of and that it resulted in a miscarriage of justice (Emphasis Mine).

On the basis of the above exposition and more so the underlined emphasis let me turn to the merits of the arguments in this appeal

The main argument by both Counsels for the appellants in support of ground one is that the evidence of P.W.2, P.W. 3, P.W.4 and P.W.5 were full of inconsistencies which rendered their evidence unreliable since they were filled with many contradictions and discrepancies which the Learned Trial Judge ought to have fully considered in detail.

This could be distilled thus — whether there are material contradictions in the prosecutions' case which ought to have been resolved in favour of the appellants and the failure of which occasioned a miscarriage of justice.

[p.152]

In considering the inconsistencies the Learned Trial Judge without in any way considering or showing some the inconsistencies in the prosecutions' evidence however slight, minor or major they may be said at Page 44 of the records:

"I have carefully reviewed all the evidence and have critically analysed the demeanours of the prosecution witnesses on this point and I find P. W.3, P. W.4 and P. W.5 reliable witnesses ..... there were minor inconsistencies are material ones in the prosecution witness testimonies. These could safely be ignored by the Court ……”

What are those minor inconsistencies? With due respect to the Learned Trial Judge the contradictions ought to have been treated seriatim and pointed out in some detail by the Learned Trial Judge and see whether or not they ought to have contradictions whether minor or not to see whether or not they go to the material issues of the case alleged against the appellants since a material point in the prosecutions' case does create a doubt in their case that the Appellants are entitled to benefit from. The Learned Trial Judge ought to have considered them however minor before dismissing them as not being material ones in the prosecutions' case. However it must be re-emphasized that it is not every minor contradiction that is fatal to the prosecutions' case but it must be pointed out clearly especially in a case of this nature where the Learned Trial Judge is both Judge of Law and fact. For the reasons above given, I shall resolve this issue in favour of the appellants.

[p.153]

GROUND 2(Two)

Both Appellants have argued that the Learned Trial Judge erred, in allowing the prosecution not to call witness whose name appeared at the back of the Indictment, either for him to be examined in-chief, or for him to be tendered for cross-examination. The witness was Abdulai Gbla 11. The Record does not state why it is he was not called. The prosecution did not ask for him to be dispensed with before closing its case; nor did the Defence request that he be brought to Court, for the purpose of him being examined in-chief, or for him to be cross-examined. The defence at the trial had a right to make this request,

It is true that the prosecution has a duty to call all of the witnesses whose names are listed at the back of the Indictment; but failing to do so does not necessarily invalidate a trial; nor does it render a

conviction null and void. ARCHBOLD 35TH Edition of paragraph 1373 states "that the prosecution must have in Court the witnesses whose names appear at the back of the Indictment but there is a wide discretion in the prosecution whether they should call them and having called them either to examine them or merely to tender then for cross-examination". The duty of the prosecution is also emphasized in HALSBURY'S LAWS OF ENGLAND 2nd Edition at page 164. Unless there are exceptional reasons for not doing so, Counsel for the prosecution should call all witnesses listed at the back of the Indictment so that the Defendant may have an opportunity of cross-examining them. The situation contemplated in the citations from ARCHBOLD and HALSBURY'S LAWS OF ENGLAND is one [p.154] where there has been a preliminary investigation, and an Indictment has been filed in the Crown Court based on a committal. That was the position in KELFALA v R (1937-49). The Learned Trial Judge may have been wrong to say, for the reasons he gave, that he was not bound by the decision of an Appellate tribunal. He said that was an old decision, and had no relevance in the present age. The point is that that decision was irrelevant in the present age, because, here the witnesses whose names appeared on the back of the Indictment had not testified at a preliminary investigation. Their names were listed at the back of the Indictment as persons whose summaries of evidence would be served on the defence in accordance with provisions of the Anti-Corruption Act, 2000, and who would testify at the trial.

Failure to call Mr. Gbla at the trial did not therefore invalidate the trial, as no request was made by the defence for him to be called.

One point I would like to highlight at this penultimate stage of this judgment is that in reading the records it is clear that Pa Roke Sesay was the one who demanded the Le.500,000.00 (Five hundred thousand Leones) and the food items which he received as Regent Chief (Acting Paramount Chief). By virtue of Sections 8(3) and 8(4) of the Anti-Corruption Act 2000 such are fully covered as gifts under native law and custom especially when issues of the settlement of bush land disputes and it is a recognized customary practice by Paramount Chiefs and Regent Chiefs (Acting Paramount Chiefs). It is not surprising that the prosecution did not call Pa Roke Sesay to testify in this matter as this would have put an end to the matter.

[p.155]

In conclusion of this Judgment it must be made clear "extract of findings or extract of evidence" in Anti-Corruption investigations does not form part of the evidence led in Court. Therefore Counsel for 2nd Appellant's submission of juxtaposing the evidence of witnesses in Court and the summary or extract of evidence is untenable and completely irrelevant.

I therefore hold that the conviction of both appellants is unsafe and unsatisfactory. The appeal is therefore allowed and the conviction quashed.

I Order that a verdict of acquittal and discharge be entered in the case of each appellant.

SGD.

HON. JUSTICE N.C. BROWNE-MARKE J.A.

I agree.

SGD.

HON. JUSTICE S.A. ADEMOSU J.A.

CASE REFERRED TO

1. Kelfala v R (1937-49)

STATUTES REFERRED TO

1. Anti-Corruption Act No.1 of 2000 (as Amended)

2. Halsbury's Laws of England 2nd Edition

MRS. VIVAT DAVIES v. ARCHIE B. JAMES & 3 ORS.

[CIV. APP. 23/89] [p.46-51]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: MRS. JUSTICE S. BASH-TAQI, J.S.C.

MR. JUSTICE E.E. ROBERTS, J.A.

MR. JUSTICE S.A. ADEMOSU, J.A.

BETWEEN:

MRS. VIVAT DAVIES — APPELLANT

AND

ARCHIE B. JAMES

MISS. E. JAMES

MRS. LUCY AGBAJE — RESPONDENTS

MRS. AMINATA BANGURA

ADEMOSU, J.A.

The subject matter of this appeal is a House, Land and hereditaments situate lying and being at 22, Sibthorpe Street, Freetown in the Western Area of the Republic of Sierra Leone, property of Mrs. Henrietta Rosanna James (deceased) Intestate and survived by [p47] her four (4) children namely: Archie Benson James, Mrs. Eunice James; Mrs. Vivat Davies (the Appellant and Mrs. Lucy Agbaje.

Letters of Administration to administer the Estate were granted to the 1st Respondent.

On 4th March ,1987 the 1st Respondent took out an Originating Summons in the high Court seeking inter alia an order that the property subject matter of this Appeal at 22, Sibthorpe Street be sold by public auction or private treaty.

The High Court ordered on 2nd February, 1988 that the land and house at 22, Sibthorpe Street, Freetown be sold by private treaty rather than by public auction.

2. That the Master and Registrar do appoint an independent valuer to assess current value of the estate comprising land and house at 22, Sibthorpe Street, Freetown and report to the Court.

There was no Appeal against that Order. The Order appealed against is the order dated 7th June, 1989 although the Notice of Appeal refers to it as Judgment dated 8th June, 1989.

The Order of the Court dated the 7th day of June, 1989 is as follows:

1. That both the Plaintiff and all the Defendants being beneficiaries the Estate of Henrietta James (Deceased) are entitled equally to the Estate of Henrietta James (Deceased) viz: House and land situate known as No. 22, Sibthorpe Street, Freetown.

2. That the property comprising of the said Estate situate at No. 22, Sibthorpe Street, Freetown be sold by private treaty.

[p.48]

3. That the current value of Le 100,000.00 as assessed by the Independent Valuer be the reserved price below which Estate MUST NOT be sold.

4. That the Administrator of the Estate of Henrietta James Deceased is hereby empowered to sell the said property to the highest bidder, and to prepare the conveyance and convey to the successful purchaser.

5. That the proceeds of sale be distributed amongst the beneficiaries of the Estate after deduction of all expenses (including the Le500.00) charged by the Independent Valuer incidental thereto.

6. That the costs of the proceedings be borne by the Estate such costs to be taxed.

Being dissatisfied the Appellant appealed and the Two Grounds of Appeal filed are as Follows:—

1. That the Learned Trial Judge erred in failing properly to evaluate all the evidence before the court before arriving at his decision for the property to be sold by private treaty simpliciter, without giving the 2nd Defendant/Appellant or any other beneficiary first refusal to purchase the property, or the opportunity to match the bid of the highest bidder before selling the property to any outsider.

2. That the Learned Trial Judge erred in ordering that the property be sold by the Administrator of the Estate of Henrietta (Deceased) and also to prepare the Conveyance and convey to the successful purchaser, having regard to the facts that as disclosed in the evidence [p.49] that the said Administrator is also the Plaintiff in the action, a beneficiary of the Estate and therefore an interested party, this being contrary to the maxim "Memo Judex insua causa" of the one cardinal rules of Natural Justice.

The Reliefs Sought

(i) That the judgment of the Lower Court be set aside in so far as it orders that.

(a) The property to be sold by private treaty.

(b) That the sale be conducted and conveyance prepared by the Administrator of the Estate of Henrietta James (Deceased).

(ii) That this Court orders that the 2nd Defendant/Appellant do have the first refusal to purchase the property at a price not less than the value stated by the Independent Valuer i.e. Le100,000.00

Or

in the alternative

That the 2nd Defendant/Appellant do have the first refusal to purchase the property if he can match the highest bid made at the close of bidding, otherwise the property will be sold to the highest Bidder.

(iii) That the Court Order that the sale be conducted by any competent person or authority other than any or the parties to the action.

(iv) That the costs in the court below and in the court be borne out of the Estate.

(v) Any further or other relief which to the court may seem just and equitable.

On behalf of the Appellant J.B. Jenkins-Johnston Esq., cited many authorities in support of the two grounds of appeal filed. The pith and substance of his argument is that the Appellant ought to have been given the opportunity to purchase the property and the property having been sold to an outsider the sale as ordered by the Court should be set aside. O.O. Nylander Esq. contended that the sale should not be set aside on the grounds that his client was a bona fide purchaser for value without notice.

In my considered opinion, this case should be judged in accordance with the general principles of law governing alienation by personal representatives and not by considering any hardship or hurt to one's pride or sentiments.

The general principle is that a personal representative is presumed to be acting fairly in the execution of his duty. Except the person seeking to impeach the validity of a transaction can prove like in the instant case that the purchaser had actual notice of the true state of facts, a purchaser from a personal representative obtains a good title despite irregularities in administration of Estate(Corser v, Courtwright (1873) L.R. 8 Ch. 971 per James L.J. at Page 976. The decision of Butler-Lloyd Ag. C.J. in Camarah v. Marcauley (1920-36) A.L.R. 150 at Page 153 is also in point. In that case the evidence before the court did not show that the purchaser acted collusion with the Administrator who sold. Butler-Lloyd Ag. C.J. at Page 153 concluded: thus.

"I am of the opinion that the sale by the Administrator to the defendant gave the latter a valid and unimpeachable title. The action was dismissed. I think I should do the same as there is no iota of evidence that the purchaser — Aminata Bangura [p.51] (4th Respondent) was aware of any irregularities complained of. In that case the plaintiff brought an action against the defendant for recovery of land which had formed part of her deceased father's estate. The plaintiff heard of the sale contending that since her consent to the sale had not been obtained, the conveyance to the defendant was invalid and she was therefore entitled to recover' the property. The defendant contended that she was not aware of any irregularity. As stated earlier the court held that the defendant had an unimpeachable title.

The evidence revealed that the 2nd Respondent who was the Administrator of the Estate applied and successfully obtained the Order of the High Court approving of sale to Madam Aminata Bangura at the reserve purchase price fixed at Le300, 000.00. I am aware of the provisions of Section 70(1) of the Conveyancing and Land Act 1881 which provides that the Order of the Court is conclusive and that any sale ordered by the Court shall not be invalidated on the ground of wants of jurisdiction or wants of any concurrence, consent, notice or service whether the purchaser has notice of any such wants or not. The inevitable conclusion reached is that this appeal is dismissed. Each party to bear his costs.

SGD.

MR. JUSTICE S.A. ADEMOSU, J.A

I agree.

SGD.

MRS. JUSTICE S. BASH TAQI, J.S.C

I agree.

SGD.

MR. JUSTICE E.E ROBERTS J.A.

CASES REFERRED TO

1. Corser v, Courtwright (1873) L.R. 8 Ch. 971 per James L.J. at Page 976.

2. Camarah v. Marcauley (1920-36) A.L.R. 150 at Page 153

RICHARD OWIREDU v. BEIJING URBAN CONSTRUCTION

[MISC: APP. 4/2008] [p.66-70]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 18 JULY 2008

CORAM: MR. JUSTICE S.A. ADEMOSU J.A.

MR. JUSTICE N.C. BROWNE-MARKE J.A.

MRS. JUSTICE A. SHOWERS J.

BETWEEN:

RICHARD OWIREDU — APPELLANT/ APPLICANT

AND

BEIJING URBAN CONSTRUCTION

GROUP LIMITED — 1ST RESPONDENT

(CARRYING ON BUSINESS AS BINTUMANI HOTEL)

CLARENCE

S.M. SESAY ESQ. FOR APPLICANT

R. JOHNSON ESQ. FOR RESPONDENT

DELIVERED ON THE 18TH DAY OF JULY 2008

RULING

ADEMOSU, J.A

By a Notice of Motion dated 5th May 2008 the applicant prayed Inter alia for an order that execution of the judgment of the High court dated 25th day of January 2008 and all subsequent proceedings be

stayed pending the hearing and [p.67] Determination of Appellant/Applicant's appeal to the Court of Appeal for Sierra Leone.

The application is supported by the affidavit of Richard Owiredu Appellant/applicant and exhibits thereto attached. The application was opposed on behalf of the 1st Respondent but only technical on grounds which we have already rejected. Although R. Johnson Esq. in his argument maintained that this application should not be granted because in his opinion special circumstances have not been shown by the Appellant/Applicant.

Turning to the substance of the application it is necessary to see whether or not this Court ought to grant the application for stay of execution of the judgment. Counsel for the applicant has urged that the Court should grant the application because of the reasons deposed to in the supporting affidavit and the exhibits attached. The reasons advanced that are not in dispute are:

1) That Appellant/Applicant stood for bail for the 2nd Respondent at Aberdeen Police Station on condition that he produced him the next day.

2) That he produced the 2nd Respondent as required after which the case file and the 2nd Respondent were transferred to Congo Cross Police Station for further investigation and the Appellant/Applicant had nothing to do with the case again.

[p.68]

3) That Ghanaian High Commissioner even verified what he has deposed to but action was taken against him

The contention of counsel for the Applicant is that the document the 1st Respondent relied on as a guarantee for the debt of the 2nd Respondent was discharged when the Applicant produced the 2nd Respondent to the Police. Counsel for the 1st Respondent's argument is that the guarantee still stood. Whether or not the guarantee still stood is an issue which would be fully considered by the Court of Appeal. For now, we are content to say that the Applicant has shown prima facie good grounds of appeal. What remains for us to consider is whether special circumstances have been shown to warrant a stay. In his affidavit the Applicant states inter alia that the judgment of the High Court has a potential of devastating his business completely if not stayed. By the way the amount involved is U$23,975/87 plus interest on the said sum at the rate of 15% per annum and costs assessed at Le4, 500, 000. 00 That the basis of the 1st Respondents claims pursuant to the judgment of the High Court was founded on the said guarantee to which he had 'already complied by producing the 2nd Respondent to the Police at Aberdeen Police Station. What I can consider to be a serious averment is the one where the Applicant states that he carries on business here and the judgment debt and costs will paralyze his business because it would eat into his capital base and force him to layoff some of his staff. He has stated that he is prepared to enter into a Bond to abide the outcome of his appeal.

[p.69]

The granting of stay of execution is based on proof of exceptional or special circumstances Radar V Jaber (1950-56) ALRS L 115. In Tuck V Southern Counties Deposit Bank (1889) 42 Ch.D. 471; 61 L.T. 348 it was held that the court should consider all the facts before deciding whether they constitute proper facts for its discretion to be exercised.

As this Court has said before it is not every ground of law that qualifies as a special circumstance for a stay of execution. For a ground of law to so qualify it ought to be shown it is substantial; that a decision on it one way or the other will affect the substratum of the whole case and the applicant has some chance of success. I am satisfied that an issue of law has been raised on which the compelling right of the parties depend so that is desirable to resolve it in the Court of Appeal. The result is, I feel that justice of the case demands that a stay be granted.

In the premises, a stay of execution of the judgment dated 25th January 2008 is hereby granted as prayed but on condition that the Applicant do pay costs under the judgment to the solicitors for the 1st Respondent on their undertaking to return them if the appeal is successful.

[p.70]

HON. MR. JUSTICE N.C. BROWN-MARKE

I agree.

HON. MR. JUSTICE A. SHOWERS

CASES REFERRED TO

1. Radar V Jaber (1950-56) ALRS L 115.

2. Tuck V Southern Counties Deposit Bank (1889) 42 Ch.D. 471; 61 L.T. 348

SIERRA LEONE SHIPPING CO. LTD v HUSSEIN HAMOUD

[CR. APP. 43/2006] [p.10-14]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 3 JUNE 2008

CORAM: MRS. JUSTICE S. BASH-TAQI, JSC (PRESIDING)

MR. JUSTICE S. A. ADEMOSU, JA

MR. JUSTICE N. C. BROWNE-MARKE, JABETWEEN:

SIERRA LEONE SHIPPING CO. LTD — APPELLANTS/RESPONDENTS

AND

HUSSEIN HAMOUD — RESPONDENT/APPLICANT

Barristers

Alhaji M. Kamara, Esq. for the Applicant

E. Kargbo, Esq. for the Respondent

RULING

S. BASH-TAQI, JA

This is an application for Stay of Execution of the Judgment of the Court of Appeal dated 11th December 2007 pending the hearing and determination of an Appeal against the said Judgment to the Supreme Court of Sierra Leone. The application originally came before the full panel of the Court as an Ex parte application in which the Applicant sought two orders namely (1) an Interim Stay of Execution of the said Court of Appeal Judgment pending the hearing and determination of the application and (2) a similar Order as in (1) above pending the hearing and determination of an Appeal against the said Judgment to the Supreme Court.

When the motion came before us on 18th March 2008 we ordered the application to proceed inter parties and directed that Counsel for the Appellants/Respondents be served with the Motion papers. At the adjourned hearing, on 19th March 2008, due to the Easter Vacation and the absence of one of the Judges of the panel, the application came up for consideration before a single Justice of the Appeal Court, who dealt with the first order prayed for and granted the Applicant an interim Stay of Execution pending hearing of the substantive application before the full panel.

It is this substantive application for a Stay that is now before the full panel of the Court of Appeal and which is being considered in this Ruling.

BACKGROUND

A brief background of this application is that the Appellant/Respondents (hereinafter referred to as" the Respondents") were and are still the owners of premises located at Scan Drive, Wilberforce, Freetown comprising of four (4) flats. The Respondent/Applicant (hereinafter referred to as "the Applicant") in this application was the Defendant in the Court below and he leased the said premises from the Respondents [p.11] by a Lease Agreement dated 28th August 2002 for a term of sixteen years starting from 1st January 2002 at the yearly rent of Eight Thousand United States Dollars (US$ 8,000). It was expressly agreed that the rent should be paid yearly in advance on the 2nd day of January in every year. The Lease was conditional upon the Applicant refurbishing the premises at an agreed amount not exceeding US$ 99,722.55, and not to assign, sublet or otherwise part with the possession of the premises without the prior written consent of the Respondents. The Respondents alleged that Applicant

defaulted in payment of rent and breach the condition against subletting without their prior written consent.

On the 23rd January 2003, they brought the action in the High Court claiming, inter alia, possession of the property upon forfeiture for breaches of fundamental covenants of the Lease, Arrears of the rent, and Damages for breach of covenants. On the 17 May 2006, the High Court, (Nylander J), in delivering the Judgment of the Court, adjudged that he was "constrained to record an equitable judgment", by which he ruled that he could not entertain the relief against forfeiture and breaches of covenant, but ordered the Applicant to pay all arrears of rent due to the Appellants/Respondents in not more than two installments and interest at the rate of 4% per annum from 1/1/03 until judgment....

On 25th July 2006, the Respondents, being aggrieved by the said judgment, appealed to the Court of Appeal, and on 11th December 2007, the Court of Appeal allowed their appeal; set aside the High Court Judgment of 17th May 2006, and ordered the Applicant to pay the mesne profits of US$ 8,000.00 assessed from 23rd January 2003, (the date of the Writ), until possession of the demised premises is delivered to the Respondents. On the 17th December 2007, the Respondents proceeded to levy execution by issuing out a Combined Writ of Possession and Fieri facias for the amount of the Judgment debt and possession of the premises. There was some confusion as to whether execution was completed before the filing of this Motion. Be that as it may, on the 20th February 2008, the Applicant paid the Respondents the sum of US $ 4,000.00, being half of the mesne profits ordered by the Court of Appeal. Following receipt of this amount, on 28th February 2008, the Respondent wrote to the existing tenants of the premises notifying them of the Judgment and giving them an option to contact the MD of the Respondent Company within one week, should any of them wished to continue to reside in the premises. On the 7th March 2008, the Applicant filed a Notice of Appeal to the Supreme Court against the Court of Appeal Judgment of 17th December 2007.

The Applicant has now come to this Court pursuant to Order 60 R. 2 of the Supreme Court Rules 1982, seeking a Stay of Execution of the Judgment of the Court of Appeal, pending the hearing and determination of his Appeal to the Supreme Court.

The application is supported by the Affidavit of Hussein Hamoud sworn on 13th March 2008 filed together with exhibits "H.H 1-12C", and a Supplemental Affidavit sworn on 3rd April 2008 by Mustapha Santigie Turay attached to which is post dated cheque, Exhibit "M.ST 1", drawn on Pro-Credit Bank, in favour of the Respondents for the sum of Le 12,000,000.00 representing the Leone equivalent of the remaining US $ 4,000.00 mesne profits ordered in the Court of Appeal Judgment.

The Applicant relied on both Affidavits in Support and especially, on paragraphs 4, 5, 6, and 7. Counsel for the Applicant acknowledged that this Court will not, as a rule, deprive a successful litigant of the fruits of his judgment. He, however, went on to submit that a [p.12] stay of execution is usually granted where an applicant convinces the Court that special circumstances exist which warrants a stay. In support of this principle, Counsel referred to certain facts deposed to in the two supporting affidavits, and I have endeavoured to state these in detail as follows:— that the Applicant had expended considerable sums to repair the premises which were in a dilapidated condition; that the Respondents

knew that the Applicant's business is to lease premises for the purpose of subletting the same to tenants, and that it was based on this knowledge he rented the premises to certain diplomats and experts; that he had paid part of the mesne profit ordered by the Court of Appeal and that by giving a post-dated cheque for the balance of US$4,000.00, he has shown good faith and an intention to pay the judgment sum; that having regard to the status of the occupants of the premises in this country any execution of the judgment will not only seriously affect the country's international relations with the tenants' countries of origin, but will also give a bad name to Sierra Leone; that contrary to what the Appellant deposed to in his Affidavit in Opposition, the premises subject matter of the action, are not the only assets of the Respondents; that a Stay of Execution will not create any hardship on the Respondents. He relied on the decisions in the following unreported Court of Appeal cases: —

Commercial Enterprises Ltd v. Witaker's Property & Other, Misc. App. 12/91; Africana Tokey Village v. John Obey, Civ. App.31/81;

Lucy Deeker & Others v Goldstone Deeker.

Mr. E. Kargbo for the Respondent vigorously opposed the application. He relied on his Affidavit sworn of 4th April 2008 attached to which are five (5) exhibits including the Combined Writ of Possession and Fieri Facias, Exhibit "EK3", and the returns to the Writ by the Under Sheriff of the High Court, Exhibit"EK6", evidencing that execution of the Judgment has been completed. He submitted that no special or exceptional circumstances had been shown to warrant this Court exercising its unfettered discretion in favour of the Applicant and granting a Stay of Execution; that the reasons proffered in the affidavits in support are only an attempt to buy time for Applicant's tenants whose monies he had collected as rents. He reminded the Court of the principle of law that a successful ought not to be deprived of the fruits of litigation; further that payment by post dated cheque is not compliance of the Court's order and is no guarantee on the part of the Applicant of his willingness to pay; moreover, Counsel submitted, there is no agreement between the parties for the tenants to continue to remain in occupation of the premises; that far from these tenants being expatriates and diplomats, they are businessmen and a journalist respectively as shown on the business cards exhibited to his Affidavit; that a stay of execution will create undue hardship on the Respondents who rely on the proceeds from these premises to pay the salaries of their several workers; hence the Respondents need the property in order to continue in business; that no international issue is of importance when considering an application for a Stay of Execution, therefore the Court must balance the competing interests of the parties in considering an application of this nature. He submitted finally that the Respondents are willing to sign an undertaking to refund all expenses and costs of the Appeal in the event of its being successful. He urged the Court to dismiss the application. He relied on the unreported C. A. decisions in:—

Yusuf Bundu v. Mohamed Bailor Jalloh, Misc. App.23/2004; Desmond Luke v Bank of Sierra Leone Misc. App. 22/2004; Ibrahim Basma v Adnan Wanza Misc. App. 53/2005; Patrick Koroma v Sierra Leone Housing Corporation and Dolcie Beckley Misc. App.9/2004; and African Tokeh Village v John Obey.

It seems to us that in coming to a decision, the crucial issue is whether the Applicant has shown convincing special or exceptional circumstances to enable this Court to grant a stay. The principle of 'special circumstances' is the underlying principle of every application for a stay of execution. Therefore before coming to a conclusion as to whether or not the Applicant has adduced evidence of special circumstances, we must first of all examine the reasons advanced in the supporting affidavits to ascertain whether these or any of them amount to 'special or exceptional circumstances' to warrant the granting of a Stay. The reasons relied on according to Counsel for the Applicant in his submissions, are contained in paragraphs 12, 13, 16, 17, 18 and 19 of the Affidavit in support of the application.

Reading through these paragraphs starting with paragraph 12, it seems that the Applicant's first concern for wanting a Stay is that he had spent a considerable amount of money in refurbishing the premises in accordance with the Lease Agreement; then at para. 13. that he has sub-let the premises to diplomats and expatriates; that Respondent attempted to levy execution, but stayed action when the applicant paid part of the mesne profits ordered; that he had already paid the sum of US $ 4,000.00 pursuant to the said .Judgment (see para.17); that the Respondent notified the Applicant's sub-tenants of their intention to levy execution within 7 days (see para. 18), and "that having regard to the status of the occupants in this country some of whom are diplomats and expatriates, any such execution on them will seriously affect the country's international relation with their country of origin and obviously give a bad name and taint the image of this country."(see para. 1 9).

The question to be determined is: Do the above reasons amount to Special or exceptional circumstances justifying the grant of a Stay. In our judgment, having examined the reasons, we are of the view that most of the matters relied on in the Affidavits in support as 'special circumstances' relate to the issues in the pleadings which we believe had been dealt with in the course of the trial or if not, will be dealt with in the appeal. I shall here attempt to refer to a few; the issue whether or not the Applicant expended considerable amount of money to carry out the necessary repairs to the premises in accordance with the Lease Agreement, is matter in the pleadings, being a condition precedent in the Lease Agreement; that the Applicant had already paid the mesne profits ordered by the Court of Appeal, which seems to us to mean that he would not have paid the rent if he had not been so ordered; that the premises are occupied by diplomats and expatriates. Surely it was not part of the Lease agreement that the Applicant should rent the premises to diplomats and expatriates. The use to which the premises were put was purely a matter for the Applicant and had nothing to do with the Respondents. In any case, we do not believe that any international issue is of such importance when considering an application for a stay of execution, to deprive a successful litigant of the fruits of his judgment. Similarly, the fact that the Respondents levied execution while negotiations were going on between the parties cannot be a circumstance that is special in the present case, simply because the Respondents having obtained judgment in the matter, it is within their right to recover the judgment.

We note from the affidavit evidence, the case concerned the delivery up of possession of premises which are in the possession of the Applicant, and for which, from all indications, no rents had been paid to the owners since 2002, the date of the Lease, even though from the receipts exhibited by the Applicant himself, the rents he received from [p.14] subletting the premises to three of the so-called expatriates, amounted to a total of US $21,000,00 for the current year, Furthermore, the Writ of

Summons for forfeiture of the Lease was issued on 23rd January 2003 and since that time the Applicant has continued to sublet the property up to the date of the Court of Appeal Judgment of 17th December 2007, It is with full knowledge that Judgment had been entered against him that he continued to rent the premises in December 2007 for the current year; this means that he was prepared to take the risk since he must have known that there is a possibility that he will be dispossessed. The likely hardship therefore envisaged by the Applicant in this case cannot be termed "special or exceptional circumstances" justifying the grant of a stay of execution.

The Applicant has referred us to the Notice of Appeal filed in the Supreme Court against the Court of Appeal Judgment and urged us that the appeal contains substantial grounds. In considering this issue, we reminded ourselves of what Sir John Muria, .JA (as he then was) had lo say in the case of Yusuf Bundu v Mohamed Bailor Jalloh, when considering similar issue in an application for a stay of execution:

"A person against whom a judgment or order to deliver up possession has been issued, needs to show in the affidavit "special circumstances" justifying a stay of execution against him beyond simply filing of a notice of appeal". (Emphasis added)

We adopt the above principle for the purpose of this ruling. Although prima facia good grounds of appeal may in some circumstances be a reason to grant a stay, we do not think that it is sufficient by itself alone. There must be, as has been pointed out, proof of special circumstances, The onus is on the Applicant to show by affidavit evidence that the two requirements exist, bearing in mind the fundamental principle that the successful litigant should not be deprived of the fruits of the judgment in his favour (See Firetex International Co. Ltd v Sierra Leone Telecommunications and Anor 6th August 2003 C.A. Misc. App. 19/2002.

In conclusion, having reviewed the affidavit evidence and Counsel's various submissions, we dismiss the application for stay of execution. The Applicant is to pay the cost of this application assessed at Le 3,000,000.00 (Three Million Leones)

SGD.

S. BASH-TAQI, JSC

SGD.

S.A. ADEMOSU J.A

I agree.

SGD.

N.C. BROWNE-MARKE, J.A

CASES REFERRED TO

1. Commercial Enterprises Ltd v. Witaker's Property & Other, Misc. App. 12/91

2. Africana Tokey Village v. John Obey, Civ. App.31/81

3. Lucy Deeker & Others v Goldstone Deeker.

4. Yusuf Bundu v. Mohamed Bailor Jalloh, Misc. App.23/2004

5. Desmond Luke v Bank of Sierra Leone Misc. App. 22/2004

6. Ibrahim Basma v Adnan Wanza Misc. App. 53/2005

7. Patrick Koroma v Sierra Leone Housing Corporation and Dolcie Beckley Misc. App.9/2004

8. African Tokeh Village v John Obey

9. Firetex International Co. Ltd v Sierra Leone Telecommunications and Anor 6th August 2003 C.A. Misc. App. 19/2002 (Unreported)

SHARBEL ABRAHIM MILHEM HARPUN & ANOR. v. ALPHA ABDUL WAHID SALLU & 2 ORS.

[CIV. APP 28/2006] [p.41-45]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 20 JUNE 2008

CORAM: MS JUSTICE U.H. TEJAN-JALLOH, J.S.C

MS JUSTICE SALIMATU KOROMA, J.A

MR JUSTICE A.N.B. STRONGE, J.A

BETWEEN:

SHARBEL ABRAHIM MILHEM HARPUN — 1ST APPELLANT

JOESPH ABRAHIM MILHEM HAROUN — 2ND APPELLANT

AND

ALPHA ABDUL WAHID SALLU — 1ST RESPONDENT

KELFALA SESAY — 2ND RESONDENT

MOHAMED KOROMA — 3RD RESPONDENT

HEARING DATE: 7TH JUNE, 2007.

JUDGEMENT: 20TH JUNE, 2008.

ADVOCATES: AMADU KOROMA ESQ, FOR THE APPELLANT

E.E.C. SHEARS-MOSES ESQ, FOR THE RESPONDENTS

JUDGEMENT

TEJAN-JALLOH - J.S.C.

By a writ of summons dated the 15th June 2004 the plaintiffs in this matter instituted this action against the defendants claiming.

1. Declaration that the fee simple title to the land hereditaments of all that piece or parcel of land and hereditaments situate lying being [p.42] and known as No 10. Regent Road, Wilberforce, Freetown in the Western Area of the Republic of Sierra Leone is vested and belong to the plaintiffs herein.

2. An order expunging from the Registrar Book of statutory Declarations kept in the office of the Registrar-General, Roxy Building Walpole Street, Freetown Sierra Leone, the joint statutory Declaration Establishing possessory title of Alpha Abdulai Wahid Sallu, 1st Defendant herein sworn to on the 29th day of December 2003 and registered as No. 96 at page 78 in volume 81 on the Grounds of Fraud.

3. General Damages for trespass to plaintiff's land and hereditaments at 10 Regent Road Wilberforce, Freetown aforesaid.

4. Costs of this action.

There is on record an affidavit of personal service on the defendants sworn to by one Ibrahim Kuyateh on the 29th day of June 2004.

On the 8th day of July F.M. Carew Esq. swore to an affidavit of search stating that no appearance had been entered by any of the defendants and seeking leave to sign judgment against all the defendants. Meanwhile on the 13th of July 2004 appearance was entered on behalf of all the defendants by E. E. Shears Moses Esq. By then judgment in default of appearance which had been applied for since on the 8th July 2004 was not signed until 15th day of July 2004 two days after the late appearance on behalf of the defendants. There can be no argument that the judgment signed was irregular. But pursuant to that judgment F.M. Carew Esq. wrote to the administrator and Registrar-General exhibiting the judgment in default of appearance and this Culminated in expunging the statutory declaration of the 1st Respondent from the Record Books of Statutory Declarations page 43 of the records confirming the evidence of the 1st Respondent that the 1st Respondent Statutory Declaration was cancelled [p.43] and/or expunged. The learned trial Judge has cause to put on his record as follows: Court records show the document was expunged from the records.

The 1st Respondent Alpha Abdulai Sallu is recorded to have said in inter alia:

"I was never send (sic) with an order cancelling my Statutory Declaration".

This shows that at the time of the trial of the action the Statutory Declaration had been expunged and the judge without ensuring that the original Statutory Declaration was produced she allowed the 1st Respondent to continue to give evidence using the photocopy of a document which legally speaking no longer existed. This is to say, the least, palpably wrong — procedurally. Strictly speaking, what has been expunged from the records cannot be admissible evidence or made use of unless there is an order to reinstate it. In this case there was no such order. The legal consequence of this is that the court was not clothed with jurisdiction at the time it is purported to be trying the case.

The judgment in default of appearance dated 15th day of July 2004 reads as follows:—

1 "NO APPEARANCE having been served by all the 1st 2nd and 3rd Defendants in this Action., IT IS THIS DAY ADJUDGED that the plaintiffs are declared the fee simple owners and do recover possession of all that piece or parcel of land and hereditaments situate lying and being at no. 10, Regent Road, Wilberforce, Freetown the Western Area of the Republic of Sierra Leone.

2. That the joint Statutory Declaration Establishing possession title of Alpha Abdulai Wahid Sallu, 1st Defendant herein and others sworn to on the 29th day of December 2003 and registered as no 96 at page 78 in volume 81 in the Book of statutory Declaration kept in the office of the Administrator and Registrar-Genera/'s Office No. 8, Walpole Street, Freetown be expunged there from on the Grounds of Fraud.

[p.44]

3. That plaintiffs do recover general damages from defendants for trespass to land such damages to be assessed.

4. That Plaintiffs do recover all costs from Defendants. Such costs to be taxed".

Order of court

Signed: Kamara

Ag. Master and Registrar

Certified true copy

Signed Kamara

Ag. Master and Registrar

I think it is pertinent to state that any judgment entered prematurely i.e. before actual default had been made by defendant, whether failing to enter appearance or service of defence entitled defendant to have such judgment set aside exdebito Justitae C. Anlaby V Praetorious (1888). 20 QBD 764. It has also been the duty of the defendant to apply to. set it aside for irregularity "within" a reasonable time and before he has taken "any fresh steps after he becomes aware of the irregularity. (see Singh V Atombrook Ltd) 1989 1 WLR 810; (1989) 1 ALL E.R. 385 C.A. In the instant case the Respondents solicitor cannot be

heard to say that he was unaware of the above default judgment. If he claimed to be ignorant of it, the question would be asked' what did he do when his client testified about the cancellation of his statutory declaration.

The Law is settled that jurisdiction is fundamental in any Judicial process. As it has been clearly demonstrated above, any Judgment however irregularly obtained stands until it is set aside. In this case the irregular judgment was not set aside or vacated at the time the matter went to full trial. As stated early the learned trial judge should have stopped the case when she discovered that the Statutory Declaration had been expunged from the records. In the premises, it is fruitless going into the merits of this appeal.

[p.45]

You cannot have 'two contradictory judgments in one action. In Hotby V Hodron (1889) 24 QBO 103 at page 107, Lord Esher said that judgment takes effect from the date of the entry and it is an effective judgment from that date.

I think it is appropriate to recall the words of Lord Denning in Macfoy V UAC Ltd (1962) A.C, 152 where he said "you cannot put something on nothing, It will fall". As the judgment in default of appearance dated 15th July 2004 is not yet set aside. I hold that it still stands.

We order that costs paid by Appellant to Respondent in High Court be refunded to the Appellant.

SGD.

HON MS JUSTICE SALIMATU KOROMA, J.A.

I agree.

SGD.

HON MR JUSTICE STRONGE, J.A.

I agree.

CASES REFERRED TO

1. C. Anlaby V Praetorious (1888). 20 QBD 764.

2. Singh V Atombrook Ltd 1989 1 WLR 810; (1989) 1 ALL E.R. 385 C.A.

3. Hotby V Hodron (1889) 24 QBD 103 at page 107

4. Macfoy V UAC Ltd (1962) A.C, 152

SOLUKU JERMILL BOCKARIE v. THE STATE

[CR APP 7/2000] [p.112-128]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: APRIL 2008

CORAM: MR JUSTICE BODE RHODES VIVOUR, JSC

MR JUSTICE P.O HAMILTON, J A

MR JUSTICE N.C. BROWNE-MARKE, J A

SOLUKU JERMILL BOCKARIE — APPELLANT

AND

THE STATE — RESPONDENT

Solocitors/Counsel

R A Caesar Esq for the Appellant

S A Bah Esq for the Respondent

DELIVERED ON THE .....DAY OF APRIL, 2008

JUDGMENT

BROWNE-MARKE J.A

INTRODUCTION

1. This is an appeal brought by way of Notice of Appeal dated August, 2000 by the Appellant, SOLUKU JERMILL BOCKARIE against his conviction and sentence for the offence of Larceny contrary to Section 17(2)(a) of the Larceny Act, 1916, by the High Court sitting in Freetown, The Hon Mr Justice S.A. ADEMOSU, presiding, on August, 2000. The Notice contains five grounds of appeal. Later, another, three grounds were added; and in January this year, ground 9, was added on.

2. The grounds of appeal essentially relate to misdirections on the burden and standard of proof; failure to adequately consider the case presented by the Appellant; that the aggregate sum of money which the Appellant was convicted of stealing could not have been the property of the Government of Sierra Leone, in that it was money obtained from Bank; that the Indictment was bad in law in that it did not charge the Appellant with stealing any particular sum of money between certain stated dates; and that the verdict was unreasonable and cannot be supported having regard to the evidence.

THE TRIAL

3. On 25 August, 1999 The Hon. Mr Justice L B 0 Nylander, High Court Judge, gave his consent in writing for the preferment of a one count Indictment for the offence of Larceny by Servant contrary to Section 17(1)(a) of the Larceny Act, 1916 against the Appellant. He also Ordered that the Accused be arrested [p.113] by Warrant. On 26 August, 1999 the Appellant appeared before the said Learned Judge; he was identified as the person named in the Indictment; and his date of trial was fixed for 17 September, 1999

3. The Indictment read as follows

STATEMENT OF OFFENCE

LARCENY CONTRARY TO SECTION 17(2) (a) of the larceny Act 1916.

PARTICULARS OF OFFENCE

SOLUKU BOCKARIE on a day unknown between 1st and 30th June, 1999 at Freetown in the Western Area of Sierra Leone, being Clerk or Servant to the Government of Sierra Leone stole the sum of Le294,433,411/00 from the said Government of Sierra Leone.

4. There is no indication in the Record, the number of witnesses listed at the back of the Indictment, but a perusal of pages 6-19 of the Record shows that there were about 10 additional witnesses, the respective summaries of whose evidence, appeared in these pages. The brevity of these summaries, (save for at least two, which were copies of statements obtained from these witnesses by the Police), apparently filed in pursuance of Section 188 of the Criminal Procedure Act, 1965 when contrasted with the length of evidence led from these same witnesses, provides considerable food for thought as to whether the prosecution quite knew what its case was at its commencement, or whether it merely wished to 'ambush' the Defence. This practice, or rather 'ambush tactic' though not unlawful, in my judgment, detracts from the cohesiveness and consistency of the prosecution's case and has the tendency to way-lay the prosecution.

5. Though the trial date was fixed for 17 September, 1999, the Record does not show that any proceedings were taken that day. The case was first mentioned for hearing on 21 September, 1999 before the Hon Mr. Justice M O TAJUDEEN now deceased. No plea was taken on this date, nor on the 9 other adjourned dates, until 2 March 2000 when the Appellant pleaded Not Guilty to the Indictment before the same Judge. The matter was again adjourned at the request of the prosecution to another date, and to other dates until 30 May, 2000 when the said Judge noted at the bottom of Page 25 of the Record, that he was 'disabling himself from this case as from now.' No reasons for so doing were given. The case was adjourned to 8 June, 2000.

6. On 8 October, 1999 the then Attorney-General & Minister of Justice filed an Application pursuant to section 144(2) of the Criminal Procedure Act, 1965 for

[p.114]

7. On 8 June, 2000 the Appellant appeared before The Hon Mr Justice S. A. ADEMOSU, then High Court Judge. The charge was again read over to the appellant and he pleaded Not Guilty to the same. The

prosecution began leading evidence on that day. 14 witnesses in all were called by the prosecution. The prosecution closed its case on 8 August, 2000. On 11 August, 2000 after his rights had been explained to him, the Appellant elected to rely on his statement to the Police. He had no witnesses. The matter was adjourned for addresses. The then DPP addressed the Court on behalf of the prosecution on 17 August, 2000; and the Appellant's Counsel, R. A. CAESAR Esq on 21 August, 2000. Judgment was reserved for 30 August, 2000 on which date it was delivered.

ISSUES

8. The first matter which has exercised my mind, is the charge in respect of which Mr. Justice Nylander gave his consent on page 2 of the Record. The charge, there is Section 17(1) (a) of the Larceny Act, 1916. The Application for trial by Judge alone, also refers to Section 17(1) (a) of the same Act, The Indictment filed, and which appears on page 1 refers to Section 17(2) (a). The Judgment at page 133 also refers to Section 17(2) (a). At page 35 of the record DPP applied for the Indictment to be amended so that 17(1) (a) should be read as 17(2) (a). The Application was granted. But no consequential amendments were made, so that the Order for Trial by Judge Alone which governed, the conduct of the trial applied only to a trial for an offence under Section 17(1)(a). The question which arises here is, could the Appellant be lawfully convicted of an offence in respect of which no consent was given by a Judge, and in respect of which he had not been committed for trial, notwithstanding Section 148 of the CPA165? Also could he lawfully be tried by Judge alone, notwithstanding the absence of an Order authorized him to be so tried in respect of the amended charge? If the answer to these questions is no, then it would seem the trial was a nullity.

THE CHARGE

9. Notwithstanding the query I have posed above, I propose to deal with the substance of the appeal. I shall start off with the charge. The charge refers to a lump sum of Le 294,433,411/00 which the Appellant is alleged to have stolen on a day unknown between two days. As this is an aggregate amount, the question arises whether it is proper to charge the larceny of a lump sum in one count, or in other words, whether it is proper for the prosecution to bring a charge where there has been a general deficiency of monies. The subject [p.115] matter of the charge is the proceeds of the encashment of 35 cheques. On the evidence, it is clear that 24 of these cheques are dated 3 June, 1999 and the remaining 11, 4 June, 1999. Two of these cheques, GSL153945 — pages 263 & 264 of Volume II of the Record, and GSL153936 — pages 273 & 274 of the same volume, were encashed on 9 June, 1999 by PW5 FRANCIS JOHNNY TOMA; and the others were encashed by PW6 ALLIE KHADAR on 8th, 9th, 10th, 11th, 14th, 18th, and 23rd June, 1999 respectively — see pages 263-297 of the same volume, These cheques were drawn for specific amounts of money. Clearly, the offence of Larceny was committed on several days and not, as was canvassed by the Prosecution, and held by the Learned Trial Judge (LTJ) on a day unknown between two days. The substance of the prosecution's case is not that the Appellant received these monies on a particular day, but on different days after the same had been collected by PW5 4 PW6 respectively. The evidence led, was thus at variance with the charge.

10. Rule 3(1) of our Indictment Rules which are to be found in the 1st Schedule to the CPA.1965, tells us that "....where more than one offence is so charged....each offence shall be set out in the information or indictment in a separate paragraph called a count. "Archibald 30th Edition tells us at paragraph 1738 that" It is not sufficient to prove a general deficiency of money; some specific sum must be proved to have been embezzled, in like manner as a larceny some, article must be proved to have been stolen." In paragraph 1738 it is stated further that" Where the Indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election and must confine himself to one sum and one day". But if it had been the duty of the employee to render an account and hand over all monies received on a certain day, he could be charged with embezzling the whole amount on the day he was due to render such an account. This was certainly not the case here. It is stated further, that where it is possible to trace the individual items and to prove an embezzlement of individual property or money, it is undesirable to include them in a count alleging a general deficiency. R v TOMLIN [1954] Vol. 2 All ER 272. C.A. is sufficient authority for this proposition of Law, though on the facts of that case, the individual amounts embezzled could not be traced There PEARSON, J stated at page 274 para. A "Where separate offences can be charged in separate counts the court regards as improper an "omnibus" count in an indictment charging an aggregate of fences over a long period." The Court approved the reasoning along the same lines of LYNSKEY, J in R v LAWSON [1952] Vol. I AIIER 804 at page 808.

[p.116]

11. BLACKSTONE'S CRIMINAL PRACTICE 1992 Edition also deals extensively with this issue under the rubric of Duplicity and Quasi-Duplicity. At Paragraph 08.16 page 1134 the Editors state that "if the evidence called at the trial in fact establishes more than one offence, then, subject to amendment of the indictment, if possible, the accused will be entitled to an acquittal, not because the count was bad, but because the prosecution have failed to prove him guilty of the precise offence charged in the count even though they may have proved him guilty of some other offence." In the instant ease, the prosecutions have alleged that a day unknown between two dates, the Appellant stole a specific amount of money, whilst the evidence led at the trial was to the effect that several amounts of money were stolen on different dates. It is not the case here as it was in JEMMISON v PRIDDLE (1979) 69 Cr App R 83 at pp 86-78 where LORD WIDGERY in the QBD Div Ct held that".... what it means is this, that it is legitimate to charge in a single information one activity even though the activity may involve more than one act." There the activity was shooting deer without a gaming licence, and the issue was whether the firing of several shots by the Appellant was one activity or several activities. The instant case appears to me to sound more of Quasi-Duplicity than Duplicity simpliciter. Once evidence had been led from PW5 &. 6, it is my considered opinion that the prosecution should have been called upon, if that were possible at that stage, to sever the Indictment into several counts, reflecting the dates the several cheques were encashed.

POINT NOT CANVASSED

12. I have noted that this point was not canvassed by the Defence at the trial, and it may be argued that that being the case, the Appellant may not have suffered any injustice, and that this Court should apply

the proviso. I would be most willing to do so where the circumstances to so permit. But in order to do so, I should have to do considerable violence to our criminal jurisprudence, and I do not wish to embark on such a perilous course. It seems to me, that where the Court below went wrong, was in its focus on the Appellant's explanation of what he did with the proceeds of the cheques. It appears to me that the LTJ was put off by the allegations made by the Appellant in his statement to the police, and by Counsel in his cross-examination of the then Minister of Education, Dr Alpha Wurie, PW13, that some of the monies so received were passed on to him. In that statement, the Appellant had clearly admitted that the proceeds of the several cheques were indeed received by him, and that he disbursed the same in a particular manner. This was clearly criminal conduct of most reprehensible kind, coming as it did, so soon after the bloody rebel invasion of Freetown. But a Court of Law should not allow itself to be swayed by righteous indignation, but by sound principles of Law. The LTJ has considerable [p.117] experience in trying criminal cases, but he appears to have cast aside this reservoir of knowledge as a result of such indignation. His frequent references to the above allegation during his Judgment, provides evidence that his mind was greatly exercised by this apparent calumny, than by the propriety and efficacy of the prosecution's case.

BURDEN .AND, STANDARD OF PROOF

12. It led also to his summary dismissal of Defence Counsel's submissions on the burden and standard of proof. That the principle enshrined in WOOLMINGTON's case applies to all criminal cases, is without doubt. It applies much more strongly, where the Judge is both Judge of Law and fact. The LTJ erroneously, in my view, confined that principle to cases of murder or manslaughter only at page 146 of the Record. The Sierra Leone cases confirming this principle are numerous, and I shall only cite those which have been reported: HALL v R [1964-66] ALR SL 189; LABOR-JONES v R [1964-66] ALR SL 471; KOROMA v R [1964-66] ALR SL 542; BOB-JONES v R [1967-68] ALR. SL 267; AMARA v R [1968-69] ALR SL 220; KARGBO v R [1968-69] ALR SL 1354; SAHR BOMBAY Cr App 1/76 C.A was unreported. All of these cases confirm that the legal burden of proof in a criminal case always rests on the prosecution, and that it never shifts; and that the burden lies on the prosecution to prove every element of the offence with which an accused person has been charged beyond a reasonable doubt. Could this Court hold that the prosecution in the Court below proved beyond a reasonable doubt that on a day unknown between the 1st and 30th day of June, 1999, the Appellant stole the aggregate, sum of Le294,433,411/00? I opine not. The evidence points in the opposite direction. There is credible evidence that the Appellant did, in his capacity as an employee of the Government of Sierra Leone, receive the various amounts of money exhibited at pages 263-297 of Volume II of the Record. But rather unfortunately, he is not charged with the larceny of these individual amounts. I consider this omission a grave error on the part of the prosecuting authorities, and I consider it also rather unfortunate that right up to the end of the case, the error was riot brought home to them, and thus rectified.

ARGUMENTS OF COUNSEL

13. I have read through the written submissions filed and presented by Counsel for the Appellant and for the Respondent respectively. I note that Counsel for the Respondent, in that written submission, has not seriously contested the issues raised by the Appellant. Nor did Counsel who appeared in this Court on

behalf of the State. The Appellant argued further, that the money stolen was not the property of the Government of Sierra Leone, but that of the Government's Bank, the Bank of Sierra Leone, in that the monies were on the [p.118] several dates, collected from the Bank by PW5 & PW6, and brought to the Appellant in his office. That may be true where the person accused has not reduced the money, nor the valuable security, into his employer's possession through his own hands, or the hands of a co-employee. Here, the evidence clearly shows that whenever the cheques were encashed, the proceeds thereof were handed over to the Appellant by these two witnesses, and the same was misappropriated by the Appellant. Such conduct amounts to stealing the Government of Sierra Leone's money within the meaning of Section 17(2)(a) of the Larceny Act, 1916. It proscribes stealing money "entrusted to, or received or taken into possession by a person by virtue of his employment." Counsel also relied on the old case of SOLOMON v R (1920-36) ALR SL 59. There, the money alleged to have been stolen was never reduced into the possession of the accused person's employer. The money was paid over by Genet, at the accused person's behest, to his wife, who then paid the same over to one Betts. Though Solomon's employer was the eventual loser, since he had to repay Genet the money he had paid over to Solomon's wife, the facts of the case had stronger affinity with the offences of obtaining money by false pretences and fraudulent conversion of property, rather than with Larceny. Mr. Justice Purcell's direction to the jury on the intent to defraud at page 62 LL15-17 bears this out.

CONCLUSION

14. Had it not been for the view I have taken in paras 11-12 above, and had this Court the power to sever the Indictment into its several parts as the evidence led at the trial so demands, I should have had no hesitation in holding that the money stolen belonged to the Government of Sierra Leone.

15. In the result, I hold that the Indictment as it stands, is insupportable in law, and cannot ground a conviction for Larceny under the Larceny Act, 1916. I do not think this an appropriate case in which to apply the proviso. It follows that the Appellant's appeal is allowed. His conviction and sentence are SET ASIDE and an ACQUITTAL AND DISCHARGE substituted in their stead.

SGD.

HON MR. JUSTICE N. C. BROWNE-MARKE

JUSTICE OF APPEAL

HAMILTON, J.A

I have had the opportunity of reading before hand the draft judgment of my learned brother Honourable Justice N.C. Browne-Marke and the dissenting judgment of my learned brother Honourable Justice Bode Rhodes- Vivour.

I agree entirely with the conclusion reached and the reasons therefore of my learned brother Honourable Justice N.C. Browne-Marke. I have nothing useful to add to his conclusion. I do concur with the decision reached by him therefore that the appeal be allowed, the conviction and sentence set aside and an acquittal and discharge be substituted.

SGD.

HON. JUSTICE P.O HAMILTON

Justice of the Court of Appeal

[p.120]

BODE RHODES- VIVOUR JSC

DISSENTING JUDGMENT OF HON. JUSTICE BODE RHODES- VIVOUR JSC

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice N. Browne-Marke and regret that after full consideration of the issues involved in this appeal, I find myself unable to agree with his conclusions. At the trial fourteen prosecution witnesses gave evidence. Evidence led showed that the appellant stole the sum of Le294, 423,411/00. The said sums were salaries for teachers in the Southern Province for the period April and May, 1999 and at the time the offence was committed the appellant was the Permanent Secretary in the Ministry of Education, Youths and Sports.

After the prosecution closed its case this is what transpired.

DEFENCE

Accused is informed of his rights. He elects to rely on his statement to the Police and calling no witness.

The appellant did not give evidence or call any witness in defence of the charge; rather he relied on his statement to the Police. The contents of this statement is alarming. It reads in part:

"…….. From time to time I gave cheques to Allie Khadar who was a ward to me to encash the said cheques at the Bank of Sierra Leone to meet the Ministries demand. In this way the total value of the thirty five Government of Sierra Leone cheques drawn in favour of teachers salaries in Bo for the months of April and May 1999 was [p.121] expended. Like I had always said such unauthodox arrangements are never recorded not witnessed and are built on confidence between the parties, i. e. the Minister and I. I now regret that 1 trusted him only to find that he was using me as a scape goat to divert attention away from himself……".

PW5 is Francis Johnny Toma. In his sworn testimony in Court he said he gave 35 cheques to the appellant. PW6 is Allie Khadar. He agrees with the statement above, that the appellant gave him cheques to encash and he encashed them and handed the money to the appellant.

The case for the appellant is that he stole the said sum for the then Minister of Education, Youths and Sports. He and his Counsel apparently forgot that stealing/larceny is a strict liability offence. The appellant has to answer for his acts. That is why the learned trial judge in a well considered judgment found as follows:

"In my judgment and on the authorities earlier cited I hold that the accused bears full responsibility for all the proceeds of the thirty five cheques he encashed through PW5, Toma and PW6, Allie Khadar.

Without any iota of doubt in my mind I am satisfied enough to say that the guilt of the accused has been proved by the prosecution beyond any shadow of doubt. For all the forgoing reasons I find the accused guilty as charged……".

The reasoning and conclusion above is based on the clearest and most compelling evidence. The appellant was found guilty and sentenced to seven years imprisonment.

[p.122]

According to my learned brother the appellant was charged with stealing a lump sum of Le294,423,411/00 on a day unknown between two days. Since the subject matter of the charge is the proceeds of the encashment of 35 cheques, there ought to be 35 counts. The evidence led, was thus at variance with the charge.

The ipsissima verba of the charge reads:

STATEMENT OF OFFENCE

LARCENY CONTRARY TO SECTION 17(2)(a) of the Larceny Act 1916

PARTICULARS OF OFFENCE

SOLOKOR JEHMIL BOCKARI on a day unknown between 1st and 30th June 1999 at Freetown in the Western Area of Sierra Leone being Clerk or Servant to the Government of Sierra Leone stole the sum of Le294, 423,411/00 from the said Government of Sierra Leone.

The well laid down position of the law is that charge(s) for any offence(s) may be joined in the same indictment if those charge(s) are founded on the same fact or from or are a part of a series of offences of the same or similar character. That is to say all charge(s) of the same character can be lumped together. See

Rv. Tavlor 1925 18Cr. App R.P. 25, R v. Clarke 1925 18 Cr. App R.P. 166. In this case PW6 was instructed by the appellant to encash the said cheques. He encashed them and gave the money to the appellant. In my view if there were 35 counts the evidence to prove them would be the same or similar in [p.123] character. In the instant case the charge is not even defective, but assuming that it is defective, the law is that a defective charge could in appropriate cases be cured. It is settled law that a defect in a charge which does not render it bad in law cannot nullify a conviction so long as an offence known to law is disclosed in the charge. In the Particulars of the offence the appellant as servant to the Government of Sierra Leone, which he was as Permanent Secretary stole the sum of Le294,423,410. An offence known to law is very clearly disclosed in the charge. The second rule to apply in criminal appeal is to consider whether the conviction is right. To my mind the conviction is right.

In R v Thompson 1911-1913 ALL ER Rep Ext 1394 Hearing date 20 December 1913

The indictment charged the appellant with having on divers days between February 1909 and 4th October 1910 unlawfully had carnal knowledge of his daughter. A second count charged him with a similar offence on divers days between 4th October 1910 and the end of February 1913.

Objection was taken to the indictment on the ground that the two counts referred to were bad as charging more than one offence in fact an indefinite number of offences in each count. The objection was not sustained and the appellant was convicted.

On appeal it was held that the indictment was irregular in form ……. but that as the appellant had not been embarrassed or prejudiced in any way, the Court would act under and give effect to section 4 of the Criminal Appeal Act 1907, and dismiss the appeal.

In Maurice Cohen 1909 3 Cr App R.P 180

The Court came to the conclusion that an amendment to an indictment ought not to have been made but there being no miscarriage of justice the proviso to section 4 of the Criminal Appeal Act 1907 came into operation, and their Lordships dismissed the appeal.

In John Harris 1910 5 Cr App R. 285

The decision was based upon the view that the indictment was bad, and the Court held, assuming that the indictment was bad, that the case came within the proviso of section 4(1) of the Criminal Appeal Act 1907, inasmuch as the jury had convicted on the clearest evidence and there was no appeal on the merits, and they found it impossible to say that any actual miscarriage of justice was occasioned.

In Rex v Asiegbu 3 WACA P.142

Both counts were open to objection on grounds of duplicity. The appeal was dismissed. The reasoning of the West African Court of Appeal was that since no objection was made in the trial Court to the charge, the Court of Appeal is therefore satisfied that the appellant was not prejudiced in any way and that no miscarriage of justice has resulted.

The old form of procedure was for the accused person not to object to a bad/defective charge at the trial Court. Allow the trial to proceed to conclusion and be convicted, then raise the issue of the charge being bad and then get off on appeal. Several accused persons got off on appeal, despite clear evidence. This prompted Parliament in England to promulgate the proviso of section 4 of the Criminal Appeal Act 1907. The intention of [p.125] Parliament was that no purely technical point should succeed. The test is whether the appellant was prejudiced in the trial.

Once the appellant was not embarrassed or prejudiced and no miscarriage of justice had occurred the appeal would be dismissed. In this case, the appellant pleaded not guilty to the charge, and was represented by Counsel right through the trial by Mr. R.A. Caesar. If the appellant was in any way prejudiced or embarrassed by the way in which the charge was framed objection could and should have been taken. See Rex v. N. Asiegbu (supra).

There was no objection to the charge rather the acts constituting the offence were admitted. The facts proved established the guilt of the appellant beyond reasonable doubt. The appellant was convicted on the clearest and most compelling evidence.

Miscarriage of justice is a failure of justice. It means failure on the part of the Court to do justice. It is justice misapplied, misappreciated. It is an ill conduct on the part of the Court which amounts to injustice. By no stretch of imagination can it be said that there was miscarriage of justice in the trial Court.

One of the objects of Section 4(1) of the Criminal Appeal Act 1907 is to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. It reads:

"Provided that the Court may notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour [p.126] of the appellant, dismiss the appeal, If they consider that no substantial miscarriage of justice has actually occurred ".

Allowing this appeal by my learned brother is on a mere technicality and very peripheral. As long ago as 1907 the Courts have been departing from technicalities to doing substantial justice. Indeed in the Commonwealth of which Sierra Leone is a proud member, Courts of Law are more concerned with doing substantial justice. Courts of Law and Equity ought not to follow arid legalism or technicalities to the extent that justice in the matter is not done to the parties. Rules of Court must at all times be interpreted to prevent undue adherence to technicalities. Reliance on mere technicality to defeat the cause of justice will at all times be rebuffed by the Courts because for quite a long time now they are enjoined to do substantial justice. The days of technicality which sadly my learned brother relied on to allow the appeal are now in the remote past.

I must digress at this stage to say a thing or two about Counsel.

A Counsel retained to conduct a case has general authority to decide in his discretion how to conduct the case. Once a Counsel is retained, the client is bound by his conduct of the case. If the client is dissatisfied with the way Counsel conducts the case he can withdraw the case from him. It follows that a Counsel who has been briefed and has accepted the brief and indicated to the Court that he has instructions to conduct the case, he is to conduct the case in the manner proper to him. He can even compromise the case. He can submit to judgment. He could filibuster if he considers it necessary for the conduct of his case. The only thing open to the client is to withdraw [p.127] instructions from the Counsel, or if Counsel was negligent, sue in tort for professional negligence. Such are the powers but such are also the risks.

On 8/6/2000 the charge was read and explained to the appellant (see page 26 of the Record of Appeal). The appellant pleaded not guilty without a qualification of his plea that the charge as couched was ambiguous or unintelligible. Mr. R.A. Caesar represented the appellant throughout the trial. At no time did the appellant or his Counsel complain that he did not understand the charge. Rather his defence was his statement which is abundantly clear that the appellant stole the sum of Le294,423,411/00. When the charge as laid which avers that the appellant stole the sum of Le294,423,411/00 is read against the

background that the appellant offered no sworn testimony, and no objection to the charge as couched, then any complaint of the charge being defective becomes hollow. To my mind is a mere storm in a teaport.

If the appellant was in some confusion as to the real purport of the charge his Counsel, Mr. R.A. Caesar should have so indicated by way of objection. He did not do so. That is not all. Learned Counsel for the appellant neither raised the issue during trial nor at final address. This to my mind clearly shows that the appellant was not misled, embarrassed or prejudiced by the charge and no miscarriage of justice occurred. On page 36 of the Record of Appeal after the trial judge ordered amendment of the charge inter alia to read Le294, 423,411/00 and not Le175, 093,000/00, this is what Mr. R.A. Caesar learned Counsel for the appellant had to say:

[p.128]

"I have no objection to the application for this amendment being sought but only to warn that I hope other amendments would not be made that might embarrass ".

Learned Counsel knew when his client could be embarrassed. As far as he was concerned the appellant was never embarrassed. It is clear the appellant was never embarrassed. The main and dominant issue in this appeal is whether the charge was sustainable. The charge is the substance of this appeal as quite rightly pointed out by my learned brother. Other points raised are trivial, not worth commenting on as anything said cannot improve this appeal.

The position of the law then and now is that since the appellant was not misled by the charge, no embarrassment or prejudice had been suffered, and there had not been a substantial miscarriage of justice the appeal would be dismissed. This is an appeal which is dismally devoid of merit. I hereby dismiss the appeal for lack of substance.

SGD.

HON. JUSTICE BODE RHODES-VIVOUR

JUSTICE OF THE SUPREME COURT

REF:BRV/HJ

CASES REFERRED TO

1. R v Tomlin [1954] Vol. 2 All ER 272. C.A.

2. R v Lawson [1952] Vol. I AIIER 804 at page 808

4. Jemmison v Priddle (1979) 69 Cr App R 83 at pp 86

5. HALL v R [1964-66] ALR SL 189

6. Labor-Jones v R [1964-66] ALR SL 471

7. Koroma v R [1964-66] ALR SL 542

8. Bob-Jones v R [1967-68] ALR. SL 267

9. Amara v R [1968-69] ALR SL 220

10. Kargbo v R [1968-69] ALR SL 135

11. Sahr Bombay Cr App 1/76 C.A

12. Solomon v R (1920-36) ALR SL 59

13. R v. Tavlor 1925 18Cr. App R.P. 25

14. R v. Clarke 1925 18 Cr. App R.P. 166

15. R v Thompson 1911-1913 ALL ER

16. Maurice Cohen 1909 3 Cr App R.P 180

17. John Harris 1910 5 Cr App R. 285

18. Rex v Asiegbu 3 WACA P.142

STATUTES REFERRED TO

1. Section 17(1)(a) of the Larceny Act, 1916

2. Section 144(2) of the Criminal Procedure Act, 1965

3. Criminal Appeal Act 1907

THE DIRECTOR OF LANDS & SURVEY v. ALHAJI AMANDU WURIE JALLOH

[CIV. APP. 34/2007] [p.71-80]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 29 SEPTEMBER 2008

CORAM: JUSTICE N.C. BROWNE-MARKE, J.A.

JUSTICE S.A. ADEMOSU, J.A.

MRS. JUSTICE A. SHOWERS, J.

BETWEEN:

THE MINISTER OF LANDS, HOUSING COUNTRY PLANNING AND THE ENVIRONMENT

THE DIRECTOR OF LANDS & SURVEY — DEFENDANTS/APPELANTS

AND

ALHAJI AMANDU WURIE JALLOH — PLANTIFF/RESPONDENT

ADVOCATES:

DELIVERED ON THE 29TH DAY OF SEPT 2008

JUDGEMENT

ADEMOSU J.A.

BACKGROUND

By a generally indorsed Writ of Summons dated 16th February, 2004 the plaintiff instituted an action against the Defendants for the following relief?

1. A declaration that the Deed of Conveyance dated 25th November 1988 expressed to be made between the plaintiff and Samuel Olatilewa John covering an area of 84. 7265 acres registered as No. 529/88 in Volume 420 at page 120 of the Books of Conveyances is valid and did convey to the plaintiff freehold title.

2. A declaration that the Deed of Conveyance expressed to be made between the same Vendor and the plaintiff in respect of land at the [p.72] same Regent Road off Hill Station Regent Village registered as No. 156/91 at page 67 in Volume 446 of the Books of Conveyances is valid and did convey to the plaintiff the freehold title to 20.4723 acres.

3. A declaration that the Deed of Conveyance dated 21st day of April 1999 expressed to be made between the same Samuel Olatilewa John and Marcus Macauley and the plaintiff in respect of land at Regent Road, off Hill Station, Regent Village is valid and did convey to the plaintiff the freehold title to 409.1482 acres.

4. Perpetual injunction restraining the Defendants and each of them from signing any survey plans or leasing or in any way alienating any land contained in any of the 3 (three) recited conveyances.

5. Order for immediate possession for any already sold or leased.

6. Canceling and revoking any Deed of Conveyance or lease made by the defendants.

7. Damages for trespass.

8. Any further order

9. Costs.

The plaintiff has pleaded that by virtue of the 3 recited conveyances he acquired the free hold title to the respective pieces of land totaling 514.3388 acres.

The plaintiff filed a Statement of Claim. For the purposes of this judgment the salient averments are contained in paragraphs 5,6 and 7 and which are in these terms:

5) The plaintiff avers that all of the land above referred to and purchased by him was part of a total of 560 acres of Forest Reserve Land released by the Ministry of Agriculture, Natural Resources and Forestry to the Ministry [p.73] of Lands, Housing and Environment to be utilized for Residential Development and the records in the relevant Ministries would clearly substantiate and confirm this.

6) The plaintiff avers that to his consternation he discovered sometime in 1999 that Government Surveyors and other officials from the Defendants Ministry were busy trespassing on his land dividing it up and apparently selling or leasing parts of the said property to private individuals as if it were state land. It was suggested that part of the plaintiff's land should be utilized to create a "Land Bank" for the Government.

7) The plaintiff further avers that more recently, a huge chunk of his land has been given to the British Forces in Sierra Leone and it would appear that they have built on it and now in occupation thereof.

In the Joint Defence filed, the defendants denied paragraphs 2, 3 and 4 of the plaintiff's Statement of Claim and put the plaintiff to strict proof. The defendants further denied paragraph 5 of the Statement of Claim. Thereafter the defendants pleaded inter alia that the 560 acres of Forest Reserve Land released to the 1st defendant/appellant was done in response to a request from that Ministry for use as State Land for Government to lease to individuals for private residential development and further averred that no records exist at both the Ministry of Lands Country Planning and Environment and the Ministry of Agriculture, Natural Resources and Forestry that such an enormous acreage of land was ever released to the plaintiff/respondent or any of his predecessors in title.

The defence is closed with the general traverse.

The matter eventually went to trial. The plaintiff testified as to how he bought the land. He identified the 3 (three) recited conveyances which were executed in his favour. In support of his case the 3 recited conveyances were produced and tendered by one Ekundayo Pratt from Registrar-General's Office as exhibits A, B and C respectively. One Foday Jibba Anthony testified to the effect that he was [p.74] the licensed surveyor who prepared and signed the survey Plans in exhibits A and C. One James Morlai Bangura who was also a Licensed Surveyor deposed that the plaintiff engaged his services to prepare a composite plan incorporating all his properties at Regent Road, Hill Station and which he did and signed. It is in evidence as exhibit L.

I think it is significant to note that under cross-examination of the plaintiff, the plaintiff told the court inter alia.

"I cannot recollect off head now the total acreage of the land I bought but I do agree it is over 500 acres.

Presently I can remember 6 (six) off head of what is left of the land that is with me. There is a portion that has not been taken by the defendants. There are portions that I have sold long ago. I never know that this property had been under the control of Forestry nor was I ever told about it. All the beacons I had on the land were broken and State Land beacons are on it. They are claiming the entire land. I do not agree the said property is State Land. All the reliefs I am now claiming should be given to me as I am the real owner of this property".

This is briefly the evidence adduced in support of the plaintiffs/Respondent's claim against the defendants/appellants.

Evidence was called by the defendants/appellants side in support of their contention that the land was State Land.

After Counsel's addresses the learned trial judge reserved his judgment.

On the 12th of July, 2006 the learned trial judge entered judgment for the plaintiff/respondent and granted the following orders:

[p.75]

1. Declaration of title to the land in the 3 recited conveyances.

2. Perpetual injunction

3. Immediate possession of any portion that may have been leased or sold by the defendants.

4. Canceling or revoking any Deed of Conveyance or lease made by the defendants.

5. Damages for trespass assessed in the sum of Le 15,000,000.00

6. Order to reclaim land already acquired by any person or persons.

7. Costs to be taxed if not agreed.

Being dissatisfied with the decision the defendants have appealed to this Court. Six grounds of appeal were filed among which is the omnibus ground that the judgment is against the weight of the evidence.

The most remarkable aspect of the case is that while the plaintiff/respondent pleaded in his statement of claim that all of the lands in the 3 (three) recited Conveyances purchased by him were part of a total of 560 acres of Forest Reserve land released by the Ministry of Agriculture, Natural Resources and Forestry to the Ministry of Lands, Housing and Environment to be utilized for Residential Development and going on further to assert that the records in the relevant Ministries would clearly substantiate and confirm this.

It is observed that what happened at the trial was a complete departure from the above pleadings. The 3 (three) recited conveyances exhibits A, B, and C show that the lands which were conveyed to him were private lands through and through. It is trite learning that parties are bound by their pleadings and that any evidence adduced outside the pleadings goes to no issue.

[p.78]

That is why the law says that each party must plead all the material facts on which he means to rely at the trial otherwise he is not entitled to give any evidence of them at the trial.

Where the evidence at the trial established facts different from those pleaded by the plaintiff/respondent which constitutes a radical departure from the case pleaded by him the action will be dismissed. See Waghorn v. George Wimpey & Co. Ltd (1969) 1 W.L.R. 1764. More-over, if the plaintiff/respondent succeeds on findings of fact not pleaded by him like in the instant case, the judgment will not be allowed to stand and the Court of Appeal will either dismiss the action or order a new trial. See Lloyds V West-midland Gas Board (1971) 2 All E.R. 1240 C.A.). The learned trial judge based his findings on the three recited Conveyances expressed to be made between Samuel Olatilewa John and the plaintiff in respect of two of the conveyances and the third one between Samuel Olatilewa John and Marcus Macaulay on the one hand and the plaintiff on the other hand. The plaintiff was adjudged to be freehold title owner of the lands mentioned and described in those conveyances.

Whereas the learned trial judge did not avert his mind to the recitals in the said conveyances. For instance, the recitals in the conveyance (exhibit A) between Samuel Olatilewa John and the plaintiff indicate that one James Akie John died seised of a certain piece or parcel of land at Regent Road off Hill Station, Regent Village and the letters of Administration were taken out on 1/9/88 by Samuel Olatilewa John. That on 17.11.88 a Vesting Deed was executed in favour of plaintiff's vendor. It is noted that the plaintiff did not produce either the aforementioned letters of Administration or the Vesting Deed referred to in Exhibit A which would have revealed whether or not James Akie John died possessed of 84.7265 acres of land shown in survey plan LS597/85 attached to Exhibit A. dated 14th June 1985. Instead of proving that James Akie John died possessed of 84.7265 acres of land the Valuation certificate accompanying the letters of Administration reveals that James Akie John died possessed of 21/2 acres of land to convey to the plaintiff (nemo dat quod non habet).

[p.77]

Turning to exhibit B the conveyance between Samuel Olatilewa John and the plaintiff dated 23rd January 1991, the recitals are to the effect that the plaintiff's vendor Samuel Olatilewa John became seised of the property in exhibit B by virtue of conveyance dated 28th December 1990 which was not produced in evidence.

I think it is worthy to note that the plaintiff pleaded conveyance dated 10th July 1991 which was not produced or tendered in evidence. The long and short of this is that the plaintiff did not show that his vendor had title to 20.4723 acres which he purportedly passed to him.

Finally, as regards exhibit C dated 21st April 1999 between Samuel Olatilewa John and Marcus Macaulay on one hand and the plaintiff on the other hand, the situation here is even worse. The vendors claimed to be "Joint Owners". There was no document before the court indicating that they were Joint Owners of even one plot of the land conveyed in exhibit C showing a total of 409.1382 acres. They could not and were not Beneficial Owners of the properties which they purportedly conveyed to the plaintiff/respondent. At best they were personal representatives as it was only in that capacity they could have acted because the properties were not vested in them.

The law is settled that the recitals in a title deed are presumed to be evidence of the truth of the facts recited therein. It is nevertheless not conclusive proof of them and cannot operate as estoppel against a party who is able to show that he has a better title than the person named in the recitals. It is beyond argument that the plaintiff failed woefully to prove his case as pleaded.

The document (Conveyances) on which he founded his claim are far removed from his pleadings. The learned trial Judge should have stopped the plaintiff's case when the evidence being adduced was different from the pleadings. In the instant case without amending plaintiff's pleadings the matter proceeded on to judgment resulting in the learned trial judge pronouncing judgments on documents not pleaded. The law is that such a serious irregularity cannot be [p.78] waived by acquiescence on the part of counsel for the respondent. To me this seems to be a case of something being put on nothing. It is bound to fall.

The plaintiff failed to produce evidence that the Forest reserve lands he pleaded in his statement of claim had been released as pleaded by him and that there was some nexus between such released land and his conveyances upon which he based his title to the land he is claiming. Yet the learned trial judge declared that the conveyances were valid and did convey freehold title to the plaintiff.

The issue of boundaries is most crucial in a case of this nature identifying the land with certainty as well as credible evidence describing and establishing the origin of the title down to the plaintiff. It is always the duty of the plaintiff who seeks the decree of declaration of title to land to produce an accurate plan of the land sought to be so declared. Such a plan must also show clearly the dimensions of the land, the boundaries thereof and other salient features appertaining to the said land. See Akinola Baruwa v Ogunshola & Ors. 4 WACA 159; Kwadze v Adjei 10 WACA 274. England v Official Administrator (1964-66) A.L.R. SL 315 In Bittar v Baoma Tribal Authorities (1957-60) A.L.R. S.L. 123, it was held that it is important in drafting a summary in an action for ejectment or declaration of title that the area in question should be clearly defined and the test to be applied in determining this is whether a surveyor, from the record of the proceedings could produce a accurate plan of the land in dispute. In Udekwe Amata v Modekwe & ors 14 WACA 580 which was a claim for a declaration of title to land, a plan had been put in by consent. The defendant complained that the evidence of the boundaries was inadequate and that the boundary in dispute was undefined. Held that the precise boundaries were necessary particularly on the site in dispute but that the plan exhibited was inaccurate and the evidence so unsatisfactory that no judgment should be founded upon it.

In the plaintiff's statement of claim there is no description of the lands being claimed by him under cross examination and only told the court inter alia that he could not remember the amount of land he bought or what was left after what was taken away by the defendants. That he had sold portions of the land in [p.79] question to the National Insurance Company, MAGIC. Hon Justice Thompson Davies; Alhaji Baba Allie and others. There is no evidence indicating the portions he had sold to the above people.

It has been laid down as far back as 1935 that a plaintiff seeking a declaration of title to land must establish to the satisfaction of the court by evidence brought by him that he is entitled to such a declaration. Kondinye v Odu 2 WACA 336 at 337. The mere production of conveyance is not a proof a fee simple title. He must go further and prove that his predecessor in title had title to pass to him. See Seymour Wilson v Musa Abess (1981) Civ. App. 5/79 S.C. (unreported) per Livesey-Luke C.J.

In this appeal the plaintiff's case reveals two irreconcilable stories. One is that the land used to be part of Forest Reserve. The other is that the land was a private land owned by certain people who are unconnected with those the Forest Reserve was released to. Apart from tendering the conveyances, no evidence was produced to show how his predecessors-in-title came to possess the lands. This is fatal to the plaintiffs case. See Seymour Wilson supra at page 82. The issue about Estoppel raised by J.B. Jenkins-Johnson Esq. does not in any way help the plaintiff in discharging the heavy burden laid upon him by the law. The law is well settled that in an action for a declaration of title no burden lies on the defendant except when he puts up a counterclaim. There is no counterclaim in this case. The question about Estoppel is therefore of no moment.

I wish only to point out that as far as the facts of any given case are concerned the address of counsel is supposed to deal only with the evidence before the court. The mere mention of a matter in the course of such address is never a substitute for the evidence that has not been led nor can it supplement the inadequacy of the evidence already given at the trial. This goes for most of the submissions made by Counsel for the respondent.

In all the circumstances, I am satisfied and I hold that there was no sufficient evidence adduced to justify the granting to the plaintiff/respondent the reliefs [p.80] sought by him. For all the foregoing reasons, the judgment is set aside completely together with the order for costs. Costs of this appeal to the Appellant and such costs to be taxed if not agreed. Costs in the ……..and here to be taxed.

SGD.

JUSTICE S.A. ADEMOSU, J.A.

SGD.

JUSTICE N.C. BROWN-MARKE, J.A.

SGD.

JUSTICE A. SHOWERS, J.

CASES REFERRED TO

1. Waghorn v. George Wimpey & Co. Ltd (1969) 1 W.L.R. 1764.

2. Lloyds V West-midland Gas Board (1971) 2 All E.R. 1240 C.A.).

3. Akinola Baruwa v Ogunshola & Ors. 4 WACA 159

4. Kwadze v Adjei 10 WACA 274

5. England v Official Administrator (1964-66) A.L.R. SL 315

6. Bittar v Baoma Tribal Authorities (1957-60) A.L.R. S.L. 123

7. Udekwe Amata v Modekwe & ors 14 WACA 580

8. Kondinye v Odu 2 WACA 336 at 337

9. Seymour Wilson v Musa Abess (1981) Civ. App. 5/79 S.C. (unreported)

THE STATE v. BOCKARIE KAKAY & 4 ORS.

[CR. APP. NO. 1/2000] [p.90-111]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 28 MARCH 2008

CORAM: MR. JUSTICE M.E TOLLA THOMPSON, JSC.

MR. JUSTICE A.N.B. STRONGE, J.A.

MR. JUSTICE S.A. ADEMOSU, J.A.

BETWEEN:

THE STATE — APPELLANT

VS

BOCKARIE KAKAY

(TRADING AS MARIAMA & SONS) — RESPONDENT

CR.APP.NO.2/2000

THE STATE — APPELLANT

VS

HARRY WILL — RESPONDENT

CR.APP.NO.3/2000

THE STATE — APPELLANT

VS

LAMINA FEIKA — RESPONDENT

CR.APP. NO. 4/2000

LAMINA FEIKA — APPELLANT

VS

THE STATE — RESPONDENT

CR. APP. NO.512000

HARRY WILL — APPELLANT

VS

THE STATE — RESPONDENT

S.E. BEREWA ESQ. ATTORNEY-GENERAL AND B. KEBBIE ESQ. FOR THE STATE — RESPONDENT/APPELLANT

BANDA THOMAS ESQ — FOR 1ST APPELLANT/1ST RESPONDENT

R.A. CAESAR ESQ. — FOR 2ND APPELLANT/2ND RESPONDENT

N.D. TEJAN COLE ESQ. — FOR 3RD RESPONDENT

DELIVERED ON THE 28TH DAY OF MARCH 2008

JUDGMENT

[p.91]

TOLLA THOMPSON, JSC.

My Lords,

The defendants Harry Will, Lamina Feika and Bockarie Kakay (Trading as Mariama & Sons) were charged before Taju-Deen J. at Freetown on an Indictment containing inter alia ten Counts alleging conspiracy to defraud contrary to law on the 1st Count and nine other Counts of Causing Money to be paid to another and Obtaining Money by False Pretences Contrary to Secs. 32 (1) of the Larceny Act 1916.

PARTICULARS OF THE OFFENCE:

Count 1: That the defendants between 1st day of June 1998 and the 31st July 1999 at Freetown in the Western Area of Sierra Leone with Intent to Defraud: conspired together with other persons unknown to defraud the Government of Sierra Leone by causing the said Government to incur great liability and expenses than was warranted by means of the false representation oral and written made by the said Dr. Harry Will, Lamina Feika and Bockarie Kakay; trading as Mariama and Sons relating to the time of supply CIF Freetown to the said Government by the said Bockarie Kakay trading as Mariama and Sons of 1000 metric tons of good quality seed rice from Ghana and also by means of oral and written false representation made by them relating to the cost price of the said 1000 metric tons of the said seed rice and the urgency and need for procuring the same from outside Sierra Leone.

Count 2: That the two defendants Dr. Harry Will and Lamin-Feika on or about the 3rd day of July 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum of $270,000 to be paid from the Agricultural Section Support Project (ASSP) to the account of Bockarie Kakay trading as Mariama & Sons by falsely pretending that the cost price of 1,000 metric tons of seed rice to be supplied to the Government of Sierra Leone within three to four weeks CIF Freetown from Ghana by the said Bockarie Kakay trading as Mariama and Sons to the Government of Sierra Leone was $1,350,000 at the rate of $1,350 per metric ton; that the said $270,000 was advance payment in respect of the said $1,350,000 at the said rate per ton; and that the said Bockarie Kakay trading as Mariama and Sons was entitled to be paid the said sum of $270,000 being advance payment for the said sum of $1,350,000 which was the cost price for the said 1,000 metric tons of seed rice at the said rate per ton to be supplied by him to the said Govenment of Sierra Leone.

Count 3: That the defendant Bockarie Kakay trading as Mariama & Sons on or about the 3 rd day of July 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud obtained from the Agricultural Sector Support Project (ASSP) the sum of $270,000 by falsely pretending that the cost price of 1,000 metric tons of seed rice to be supplied by him for the Government of Sierra Leone from the Republic of Ghana: within three to four weeks CIF [p.92 Freetown as $1,350,000 at the rate of $1,350 per metric ton that the said $270,000 was advance payment in respect of the said $1,350,000 at the said rate per ton and that the said Bockarie Kakay trading as Mariama & Sons was entitled to be paid by the Government of Sierra Leone the said sum of $270,000 being advance payment for the said sum of $1,350,000 which was the cost price for the said 1,000 metric tons of seed rice at the said rate per metric ton to be supplied by him to the said Government of Sierra Leone.

Count 4: That Bockarie Kakay trading as Mariama and Sons on or about the 3rd day of July 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum of $270,000 to be paid to the account of Mariama & Sons for his benefit from the Agricultural Sector Support Project

(ASSP) by falsely pretending that the cost price of 1,000 metric tons of seed rice to be supplied by the said Bockarie Kakay trading as Mariama & Sons from Ghana to the Government of Sierra Leone with three to four weeks CIF Freetown was $1,350,000 at the rate of $1 ,350,00 per metric ton; that the said $270,000 was advance payment in respect of the said $1,350,000 at the said rate per ton and that the said Bockarie Kakay, trading as Mariama & Sons was entitled to be paid by the Government of Sierra Leone the said sum of $270,000 being advance payment for the said sum of $1,350,000 which was the cost price for the said 1,000 metric tons of seed rice at the said rate per metric ton to be supplied by him to the said Government of Sierra Leone.

Count 5: That Dr. Harry Will and Lamina Feika on or about the 1st day of October 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum of $607,500 to be paid from the Agricultural Sector Support Project (ASSP) to the account of Mariama & Sons Ltd. For the benefit of Bockarie Kakay trading as Mariama & Sons by falsely pretending that the said Bockarie Kakay trading as Mariama & Sons on or about the 1st day of September 1998 supplied to the Government of Sierra Leone 450 metric tons of good quality seed rice, the said 450 metric tons being made up as follows:

150 metric tons supplied from Ghana and 300 metric tons supplied from Ivory Coast That the said 450 metric tons of seed rice were part of the quantity of 1,000 metric tons of good quality seed rice the said Bockarie Kakay trading as Mariama & Sons contracted on the 3rd day of July 1998 to supply to the Government of Sierra Leone from Ghana within three to four weeks CIF Freetown, that the cost price of the said 1,000 metric tons of seed rice was $1,350 per metric ton he had by the 1st day of October, 1998 supplied the said 450 metric tons of seed rice under the said contract and that the said Bockarie Kakay trading as Mariama & Sons was entitled to be paid by the said Government of Sierra Leone the s aid sum of $607,000 as the cost price of the said [p.93] 450 metric tons of the said good quality seed rice supplied by him to the said Government of Sierra Leone.

Count 6: that Bockarie Kakay trading as Mariama & Sons on our about the 1st day of October 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum of $607,500 to be paid to the account of Mariama & Sons Ltd. for his benefit from the Agricultural Sector Support Project (ASSP) by falsely pretending that he Bockarie Kakay trading as Mariama & Sons on our about the 1st day of September 1998 supplied to the Government of Sierra Leone 450 metric tons of good quality seed rice; the said 450 metric tons of seed rice being made up as follows:

150 metric tons of supplied from Ghana and 300 metric tons supplied from Ivory Coast, that the said 450 metric tons were part of the quantity of 1,000 metric tons of good quality seed rice the said Bockarie Kakay trading as Mariama & Sons contracted on the 3rd day of July 1998 to supply to the Government from Ghana within 3 to 4 weeks CIF Freetown that the cost price of the said 1000 metric tons of seed rice was $1,350 per metric tons that he had by the first day of October 1998 supplied the said 450 metric tons of seed rice to the Government of Sierra Leone under the said contract and that the said Bockarie Kakay trading as Mariama & Sons was entitled to be paid by the said Government of Sierra Leone the sum of $607,500 as the cost price of the said 450 metric tons of the said good quality seed rice at the said rate supplied by him to the said Government of Sierra Leone.

Count 7: that Bockarie Kakay trading as Mariama & Sons on or about the 1st day of October 1998 at Freetown in the Western Area of Sierra Leone with intent to defraud obtained the sum of $607,500 from the Agricultural Sector Support Project (ASSP) by falsely pretending that he the said Bockarie Kakay trading as Mariama & Sons on or a bout 1st day of September 1998 supplied to the Government of Sierra Leone 450 metric tons of good quality seed rice the said 450 metric tons of seed rice being made up as follows:

150 metric tons supplied from Ghana and 300 metric tons supplied from Ivory Coast, that the said 450 metric tons were part of the quantity of 1000 metric tons of good quality seed rice. The said Bockarie Kakay trading as Mariama & Sons contracted on the 3rd day of July 1998 to supply to the Government from Ghana within 3 to 4 weeks CIF Freetown that the cost price of the said 1000 metric tons of seed rice was $1,350 per metric tons that he had by the first day of October 1998 supplied the said 450 metric tons of seed rice to the Government of Sierra Leone under the said contract and that the said Bockarie Kakay trading as Mariama & Sons was entitled to be paid by the said Government of Sierra Leone the sum of $607,500 as the cost price of the said 450 [p.94] metric tons of the said good quality seed rice at the said rate supplied by him to the said Government of Sierra Leone.

Count 8: That Dr. Harry Will and Lamin Feika on or about the 20th June 1999 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum of $472,500 to be paid from the Agricultural Sector Support Project (ASSP) to the account of Mariama & Sons Ltd. For the benefit of Bockarie Kakay trading as Mariama & Sons by falsely pretending that he the said Bockarie Kakay trading as Mariama & Sons had supplied to the Government of Sierra Leone 550 metric tons of good quality seed rice that the said 550 metric tons of seed rice were part of the quantity of 1000 metric tons of good quality seed rice the said Bockarie Kakay trading as Mariama & Sons contracted on the 3rd day of July 1998 to supply to the said Government of Sierra Leone from Ghana within 3 to 4 weeks CIF Freetown, that the cost price of the said 1000 metric tons of seed rice was $1,350 per metric tons that he had supplied the said 550 metric tons of seed rice under the said contract that he Bockarie Kakay trading as Mariama & Sons was entitled to be paid $742,500 as the cost price of the said 550 metric tons of the said good quality seed rice at the said rate supplied by him to the Government of Sierra Leone and that the said $472,500 was balance of the said $742,500 outstanding in his favour as part of the cost price for the said 550 metric tons of the said good quality rice supplied by him under the said contract.

Count 9 That Bockarie Kakay trading as Mariama & Sons on or about the 20th day of June 1999 at Freetown in the Western Area of Sierra Leone with intent to defraud caused the sum $472,500 to be paid from the Agricultural Sector Support Project (ASSP) to Mariama & Sons Ltd for his own benefit by falsely pretending that he Bockarie Kakay trading as Mariama & Sons had supplied to the Government of Sierra Leone 550 metric tons of good quality seed rice, that the said 550 metric tons of seed rice were part of the quantity of 1,000 metric tons of good quality seed rice the said Bockarie Kakay trading as Mariama & Sons contracted on the 3rd day of July 1998 to supply to the said Government of Sierra Leone from Ghana within 3 or 4 weeks CIF Freetown; that the cost price of the said 1000 metric tons of seed rice was $1,350 per metric ton; that he had supplied the said 550 metric tons of seed rice under the said contract, that he the said Bockarie Kakay trading as Mariama & Sons was entitled to be paid $742,500 as the cost price of the said 550 metric tons of the said good quality seed rice at the said rate

supplied by him to the said Government of Sierra Leone and that the said $472,500 was balance of the said $742,500 outstanding in his favour as part of the cost price for the said 550 metric tons of the said seed rice supplied by him under the said contract.

Count 10 That Bockarie Kakay trading as Mariama & Sons on or about 20th day of June 1999 at Freetown in the Western Area of Sierra Leone with intent to defraud obtained from the [p.95] Agricultural Sector Support Project (ASSP) the sum of $472,500 by falsely pretending that he had supplied to the Government of Sierra Leone 550 metric tons of seed rice were part of the quantity of 1,000 metric tons of good quality seed rice the said Bockarie Kakay trading as Mariama and sons contracted on the 3rd day of July 1998 to supply to the Government of Sierra Leone from Ghana within 3 to 4 weeks CIF Freetown. That the cost price of the said 550 metric tons of seed rice was $1,350 per metric ton, that he had supplied the said 550 metric tons of seed rice under the said contract. That he Bockarie Kakay trading as Mariama & Son was entitled to be paid $747,500 as the cost price of the said 550 metric tons of good quality seed rice supplied by him to the said Government of Sierra Leone and that the said $472,500 was the balance of the said $742,500 outstanding in his favour as part of the cost price for the said 550 metric tons of the said seed rice supplied by him under the said contract.

The trial of the defendants was by Judge alone — The Honourable Mr. Justice M.O. Taju-Deen (deceased). At the end of the trial he found the 1st and 2nd defendant guilty of Conspiracy to Defraud in Count 1, the 3rd defendant not guilty. On the nine other counts he found all three defendants not guilty and acquitted and discharged them. He sentenced the 1st and 2nd defendants on the first count, to a fine of Le500, 000 each.

BRIEF FACTS

In May/June 1998 the Ministry of Agriculture required seed rice for supply to farmers in Sierra Leone, presumably this was as a result some arrangement with the World Bank as they the World Bank were to finance the venture. The late Mr. P.O. Palmer, then deputy Director General, mindful of obtaining the seed rice from the West African sub region of Nigeria, Ghana, Ivory Coast and Guinea, solicited Profoma Invoice from businessmen to facilitate the supply of the said seed rice on the 26th June 1998 the 3rd accused Bockarie Kakay trading as Mariama & Sons submitted a Proforma Invoice through Mr. Abdul Cole Sales Manager in the 3rd accused business with the following details:—

The supply of 1000 metric tons of seed rice at $1,350 per metric tons - Le l, 350: supply should be completed between three to four weeks. The source of the supply was to be Ghana and was to be CIF Freetown.

The 3rd accused was invited to the Ministry of Agriculture and subsequently on the 3rd July 1998 a contract emboding all the terms and condition in the Profoma Invoice Exh. A was reproduced in a contract signed by the 1st accused 1st appellant Harry Will then Minister of Agriculture on behalf of the government and witnessed by the 2nd accused/2nd appellant [p.96] Lamina Feika the then Director General. The 3rd accused/respondent also signed the contract. Mr. Abdul Cole, Sales Manager of the 3rd accused business enterprise also signed the contract as a witness.

It is this contract which is the subject matter of the action brought by the State against Harry Will 1st accused, Lamina Feika 2nd accused and Bockarie Kakay trading as Mariama & Sons, 3rd accused culminating in the indictment against them for conspiracy etc.

THE RIGHT OF APPEAL

The 1st and 2nd accused/appellant Harry Will and Lamina Feika respectively appealed to the Court of Appeal against their conviction and sentence on Count 1. The State cross appealed on a question of law against the acquittal of the 3rd accused Bockarie Kakay on Count 1, 3, 4, 6, 7, 9 and 10 against 1st and 2nd accused on Counts 2, 5, and 8.

The appeal is brought pursuant to Secs. 57a and 57b of the Courts Act 1965 No.31 of 1965 as amended and Sec. 6 of Act No. 21 of 1966 which state as follows:

S.57(1) "A person convicted by the Supreme Court now High Court may appeal to the Court of Appeal against the conviction on any ground of appeal which involves a question of law alone

(b) and with leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is just case for appeal against conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be sufficient ground of appeal."

(c) "With the leave of the Court of Appeal against sentence passed on his conviction unless the sentence is one fixed by law."

S.57(1) "Any person aggrieved by the acquittal or discharge of an accused or defendant before the Supreme Court (now High Court) may appeal against such acquittal or discharge."

Sec. 129 of the Constitution; Act No. 6 of 1991 also gives the Court of Appeal power to hear and determine appeals from the High Court.

Sec. 129 states:

"The Court of Appeal shall have jurisdiction throughout Sierra Leone to hear and determine, subject to the provisions of this section and of this constitution appeals from any judgment [p.97] decree or order of the High Court of Justice or any justice thereof and such other appellate jurisdiction as may be conferred upon it by this Constitution or any other law."

And any such appeal from the High Court lies as of right to the Court of Appeal. See Sec. 129(2) of the Constitution.

The powers of the Court of Appeal on an appeal on a question of law is spelt out in Sec. 58 (a) and (b) of the Courts Act No.31 of 1965 as amended, by sec. 7 of the Act No.21 of 1966 which states:

58a on an appeal against acquittal or discharged of the accused or defendant the Court of Appeal notwithstanding that it is of the opinion that the question of law raised in the appeal might be decided

in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(b) Subject or without prejudice to the provision of paragraph (a) the Court of Appeal may affirm or alter the decision appealed against.

(ii) Except in cases where an accused has been acquitted of a criminal offence punishable by death, reverse the decision appealed against.

(iii) Order a retrial of accused or defendant.

(c) In every such case the Supreme Court now High Court may give such consequential direction as it may deem fit."

GROUNDS

The grounds of appeal of the 1st appellant is as follows:

1. The learned trial Judge erred in law in failing to properly consider the ingredients of the offence of Conspiracy to defraud and consequently failed to consider whether the essential ingredient of the offence were proved by the Prosecution.

2. That the learned trial Judge erred in law in failing to properly relate the law to the facts and to properly evaluate the evidence and thereby effectively denied the appellant the prospect of being acquitted of the offence of conspiracy to defraud as charged in the indictment.

[p.98]

That the verdict is unreasonable and cannot be supported having regard to the evidence adduced.

The grounds of appeal of the 2nd Appellant Lamina Feika are as follows:

1. That the learned trial Judge's verdict is unreasonable and cannot be supported having regard to the evidence.

2. That the learned trial Judge (the trial being by Judge alone) misdirected himself in that he failed or failed adequately consider the case or at all the case put forth by the defence.

3. The learned trial Judge misdirected himself in arriving at a verdict of guilty on Count One.

When the appeal came up for hearing in the Court of Appeal Mr. R.A. Caesar Learned Counsel for the 2nd Appellant successfully applied for an amendment to his ground of appeal by the addition of the following particulars:

Particulars of Errors of Facts

4(a) In the review of the evidence of the 2nd accused (2nd appellant) the learned trial Judge said inter alia "After the 1997 coup we had a lot of problems distributing on our production area. Distribution of

40% production. 40% till now. In 1998 the level of destruction has not yet been measured. I have seen the 2nd page of Exh. T the second paragraph. According to Exh. T the production capacity has been destroyed 60%-70 %.

There is clear contradiction between the learned trial Judges conclusion inter alia in his judgment at page 594 at lines 17-25. Page 595 lines 1-5 said: if the contract was signed there is no evidence that there was rice in the country. Yet the learned trial Judge found that "I believe the evidence of this witness seed rice was available during this period.

(b) P.W. 8 Korteque under examination in chief said he signed the document regarding the loan. If he was not satisfied that the correct procedure had been adopted, see page 208 line 13 onwards.

[p.99]

Under cross-examination by Counsel for the appellant the said P.W. 8 said:

I signed the application forms. I signed Exh. U because the correct procedure had been adopted. I would not here signed it 208 lines 7 onwards."

As I said earlier the state appealed against the acquittal of the 1st and 2nd appellant on the other ground and the 3rd accused the other Counts including Count 1 on which he was acquitted.

The Grounds (cross Appeal)

Harry Will — 1st Respondent

1. That the learned trial Judge erred in law in failing to consider adequately or at all the role played by the respondent Harry Will and the legal effect and consequence of that role in relation to the transaction in respect of which the said respondent Harry Will was charged with the offence of causing money to be paid to another by false pretences and thereby he erred in law in acquitting and discharging the said Harry Will of the several charges of causing money to be paid to another by false pretences preferred in the indictment against him.

2. That the learned trial Judge erred in law in failing to consider and/or apply adequately or at all and accurately the correct and appropriate legal principles relating to the offence of "Causing money to be paid to another by false pretences" contrary to Sec. 32(1) of the Larceny Act of 1916 and the said legal principles applied to the said offences with which the Respondent Harry Will was charged and thereby he erred in law in holding that the several charges of the said offence preferred against the said Respondent in the several counts in the indictment had not been proved beyond reasonable doubt by the prosecution and in consequence he erred in law in acquitting and discharging the said Respondent of the said offences.

3. The Learned trial Judge erred in law in failing to evaluate the evidence as adduced against the Respondent Harry Will in respect of the counts preferred against him and to apply the appropriate law to such evidence as he had a duty in him to do but merely read and recited the address of Counsel

without any analysis of the appropriate law and into application to such evidence as adduced at the trial and thereby erred in law by evincing a [p.100] total lack of appreciation of both the appropriate law and the evidence adduced in support of the charges preferred against the said respondent.

4. Having regard to:

(a) The charge of conspiracy to defraud as laid against the respondent Harry Will and two other persons to wit Bockarie Kakay trading as Mariama and Sons and Lamin Feika.

(b) The finding of the learned trial Judge that the falsity of the representation made by the said Harry Will and Lamina Feika in the said charges of conspiracy to defraud was proved beyond reasonable doubt against the said respondent Harry Will and Lamina Feika.

(c) The finding of the learned trial Judge that the money to the account of Mariama & Sons in the several counts of Causing money to be paid to another by false pretences preferred against the respondent Harry Will and the said Lamina Feika were made as a result of the said false representation found to have been made by the said respondent Harry Will and Lamina Feika.

The learned trial Judge in the premises erred in law in arriving at an inconsistent and or absurd decision when he acquitted and discharged the respondent Harry Will of several charges of causing money to be paid to another by false pretences contrary to section 32(1) of the Larceny Act 1916.

I note that the grounds in the cross appeal with regards to Lamina Feika the 2nd respondent is the same as the ground pertaining to the 1st respondent which I have already recited in this judgment. Therefore there is no need for me to record the ground of cross appeal pertaining to 2nd respondent and whatever I say in this judgment relating to the 1st respondent is applicable to the 2nd respondent.

The other grounds relate to Bockarie Kakay trading as Mariama & Sons the 3rd respondent. The state being dissatisfied with the acquittal of Bockarie Kakay trading as Mariama & Sons and whose address is 21 Charlotte Street, Freetown do hereby give you Notice of Appeal against the acquittal and discharge of the said Bockarie Kakay [p.101] trading as Mariama & Sons (the particulars of which here after appear) to the Court on a question of law, that is to say the question of law on which the state desires to appeal. In that the learned trial Judge erred in law in failing to consider and or apply adequate or the correct legal principle relating to the offence of conspiracy to defraud with which the respondent Bockarie Kakay trading as Mariama & Sons in the transaction which formed the subject matter of the charge of conspiracy to defraud preferred against the respondent, Bockarie Kakay trading as Mariama & Sons and others in consequence where of he held that the said Bockarie Kakay trading as Mariama & Sons was not guilty of the said offence of conspiracy to defraud.

That having regard to:

(a) The offence of conspiracy to defraud as charged against the respondent Bockarie Kakay trading as Mariama & Sons and two other persons to wit Harry Will and Lamina Feika.

(b) That the findings of the learned trial Judge that conspiracy to defraud charged was proved against the said two other accused person.

(c) The object of the said conspiracy to defraud as found out by the learned trial Judge.

(d) The role played by the respondent Bockarie Kakay, trading as Mariama & Sons in the said transaction as found by the learned trial Judge."

The learned trial Judge erred in law in arriving at an inconsistent and/or absurd decision in respect of the said count and thereby erred in law in acquitting and discharging the said respondent of the said offence.

3. That the learned trial Judge erred in law in failing to consider adequately or at all the legal effect and consequence of the role played by the respondent Bockarie Kakay trading as Mariama & Sons was charged with the offence of Causing money to be paid to him by false pretence.

4. That the learned trial Judge erred in law in failing to consider and/or apply adequately of at all the law relating to the offence of Causing money to be paid to another by false pretences contrary to Sec.32(1) of the Larceny Act 1916 with which the respondent [p.102] Bockarie Kakay trading as Mariama & Sons was charged and thereby erred in law in holding that the charge of the same offence preferred against the said respondent in the several counts said against him had not been proved beyond reasonable doubt by the Prosecution and in consequence he erred in law in acquitting and discharging the said respondent of the said offence.

5. That the learned trial Judge erred in law in failing to consider and/or apply adequately or at all and accurately the law relating to the offence of obtaining money by false pretences contrary to Sec. 32(1) of the Larceny Act 1916 with which the respondent Bockarie Kakay trading as Mariama & Sons was charged and thereby erred in law in holding that the charges of this offence preferred against the said respondent in the several counts of the indictment had not been proved beyond reasonable doubt by the Prosecution and in consequence erred in law in acquitting and discharging the said respondent of the said offence.

6. That the learned trial Judge erred in law in failing to consider adequately or at all the correct or proper legal principles as they apply in respect of each of the several charges preferred in the indictment against the Respondent Bockarie Kakay trading as Mariama & Sons and as consequence he erred in law in holding that as a matter of law the said charge had been proved beyond reasonable doubt by the Prosecution and thereby acquitting and discharging the said respondent of each of the said counts.

7. That the learned trial Judge erred in law to evaluate adequately or at all the evidence as adduced against the respondent Bockarie Kakay trading as Mariama & Sons in respect of several counts preferred against him and to apply the appropriate legal principles to such evidence as he had a duty in law to do but merely or generally read or recited the address of counsel and the evidence without any analysis of the appropriate law and its application to such evidence as adduced at the trial and thereby emoting a

total lack of appreciation of both the appropriate law relating to the case in relation to the evidence adduced in proof of the said charges preferred.

Count 1:

Statement of Offence: — Conspiracy to defraud

[p.103]

Particulars of Offence: Dr Harry Will, Laimina Feika and Bockarie Kakay trading as Mariama & Sons on divers days between the 1st day of June 1998 and the 31st day of July 1999 at Freetown in the Western Area of Sierra Leone with intent to defraud (together with other persons unknown) the Government of Sierra Leone by causing the said Government to incur greater liability and expenses than was warranted by means of false representation oral or written by the said Dr Harry Will, Lamina-Feika and Bockarie Kakay trading as Mariama and Sons relating to the time of supply CIF Freetown to the said Government by the said Bockarie Kakay trading as Mariama and Sons of 1000 metric tons of good quality seed rice from Ghana, and also by means of oral and written representation made by then relating to the cost price of the said 1000 metric tons of the seed rice and the urgency and the need for procuring the same from outside Sierra Leone.

THE LAW OF CONSPIRACY:

Conspiracy is defined in Barons Dictionary of legal terms as “a combination of two or more persons to commit an unlawful act or to commit a lawful act by unlawful means” Unless two or more persons are found to have combined there can be no conviction for conspiracy see R. v Plumner 1902 2 K.B. 328. The agreement is an advancement of the intention to commit the crime of conspiracy. If the act or the design rest with the intention only, it cannot be a conspiracy, see Mulcahy R. 1868 WR 34. The offence is complete when there is an agreement to do the substantive act. R. v Aspinall 1876 2 OBD 48

It is a common law offence and common law is usually defined as the common sense of the community, crystallized and formulated by ancestral sages. Blackstone refers to the common law as "the cornerstone of the laws of England which is a general and immemorial custom or common law from time to time declared in the decisions of the court of justice which decisions are preserved among our public court, explained in our reports and digested for general use in the authoritative writings of the venerable sages of the law."

Generally it is laid down by the decisions of the courts as opposed by statute law or laws enacted by Parliament.

The Prosecution to succeed on an indictment for conspiracy to defraud it must prove the following:

The existence of a conspiracy or circumstances from which the court may presume that the accused person were engaged in a conspiracy see R. V. Murphy 1837 E.q. Volume 23, It must be shown that the accused person pursuance of a criminal purpose. See R. v Griffith 42 CAR Page 279.

[p.104]

That the unlawful acts are done in pursuance of the same objective - it makes no difference whether the unlawful acts are started by one and completed by the other.

The acts done in pursuance of the agreement are merely evidence to prove the fact of the said agreement. The agreement presupposes that it may be expressed or implied, to achieve the common purpose. The act done must be within the ambit of the common purpose, see R. Smith 3 AER 597. It is the general rule that once the agreement is proved, the act or statement of the accused persons involved are admissible evidence against a co-conspirator. The agreement is not always proved by direct evidence, by looking at what the accused person said and did. These are commonly called the overt acts, see DPP v Doot 1973 1 AER 946 at 1943, but also by circumstantial evidence. However in cases in which conspiracy is alleged to have been committed in the course of a transaction as in this case under my pen, in which each accused has his own duty to perform it is vital for the prosecution to lead evidence of participation by each accused to the conspiracy in order to prove concert, consistent and overt act on the part of each accused person calculated to bring into fruition the offence of conspiracy.

Where the conspiracy is to commit a substantive offence as in this case "with intent to defraud". The prosecution must prove fraud. In R. v Sinclair 1968 WLR 1246 the court said that in proving such fraud the prosecution must establish that the conduct of the accused was deliberately dishonest and the test of such dishonesty is subjective.

THE ISSUES

The object of the contract between the 1st appellant and the 3rd respondent was for the supply of 1000 tons seed rice to the Ministry of Agriculture for the contract price of $1, 350 per metric ton. It seems clear to me that the prosecution is saying that the means of achieving this objective was unlawful. This being the case and before I proceed further, it is of some relevance if is dwell a little on the word "unlawful" in the indictment.

"Unlawful" is defined in Barons Dictionary of legal terms as "an act performed without the bounds of the law or authorized by the law and which gives rise to an activity which is illegal and contrary to public policy."

Can it then be said that when the 1st appellant entered into the contract with the 3rd respondent for the supply of seed rice, he was acting unlawfully? I opine not.

Sec. 53(1) of the 1991 Constitution states:—

"Subject to the provision of the Constitution the executive powers of Sierra Leone shall rest on the President and may be exercised by him directly or [p.105] through member of his Cabinet, Ministers, Deputy Minister or Public Officers subordinate to him."

There is no dispute that up to the time the 1st appellant was indicted for the offence of conspiracy etc. he was a Minister in the Government of Sierra Leone. Section 56 (1) of the same Constitution states:

"There shall be in addition to the office of Vice President such other office Minister and Deputy Minister as may be established by the President."

It is also not in dispute that the Ministry of Agriculture was established by the President and the 1st appellant appointed to that Ministry as the Minister of Agriculture.

Sec. 62 of the Constitution also states:—

"Where any Minister has been charged with the responsibility for a department of Government he shall exercise general direction and control, the department shall be under the supervision of a Permanent Secretary whose office shall be a Public Office."

It seem clear to me that the combined effect of Sec. 53 (1) and 56(1) gives the President the power to create a Ministry and appoint a Minster who will assist him in carrying out the duty and functions of Government. One such appointment was the 1st appellant to take charge of the Ministry of Agriculture and when such appointment is made Sec. 62 of the Constitution makes it clear that, that person is charged with the responsibility of controlling and supervising the department. Therefore when the 1st appellant entered into the contract for the purchase of seed rice he was carrying out his function within the limit or ambit of his ministerial powers.

In my view entering into such a contract on behalf of the government per se cannot be regarded as an unlawful act. Moreover the World Bank who was to finance the Project had given the go ahead to the Ministry.

The next point I wish to raise is the issue of cost price in the particulars of the offence in the indictment. I shall quote the relevant portion:

" ……the said sum $1,350,000 which was the Cost price of 1000 metric tons of seed rice."

I shall also refer to the contract document Exhibit L. For ease of reference, I will quote the relevant passage.

"Whereas the purchaser (the Ministry) is desirous that certain Goods and ancillary services should be provided by the supplier viz. 1000 tons of low land rice and has accepted a bid supplier for the goods [p.106] and services in the sum of US$1,350,000.00 (One million three hundred and fifty thousand dollars) CIF Freetown (hereinafter called the contract price."

It is obvious, from the two quoted excerpts (from the indictment and the contract) that the description of the prices are different. The indictment refers to cost price and Exh. L the contract refers to contract price. The Attorney General addressing the court refers to the price as the cost price of the seed rice bought in Ghana and went on to say that "it shows that purchase of rice abroad shows that the cost price was much less than the contract price even when you are to add all the expenses incurred." Of course it has to be so. The Attorney General concluded" In that regard there is a false misrepresentation as to the cost price as stated in the contract."

With the utmost respect to the learned Attorney General Exhibit L did not say anything about cost price, it mentioned "contract price" of the seed rice which was $1,350,000 for 1000 metric tons of seed rice. It is the indictment which mention "cost price". Therefore the comparison with the cost price of the seed rice in Ghana is of no moment. The submission is completely irrelevant to the issue. In my opinion this is a case which can be aptly described by the latin phrase of ab ovo. It was flawed from the beginning i.e from the drafting of the indictment.

Undaunted I shall continue, having earlier on stated the brief facts of the case, the law applicable, and some touching comments on some aspect of the case I must now proceed to consider the grounds of appeal and the cross appeal if need be.

The grounds of appeal in my view can be conveniently entertained under the usually over worked ground of appeal in criminal cases — That the verdict is unreasonable and cannot be supported having regard to the evidence. When an appeal is anchored on this ground the appellant is in effect inviting the Court of Appeal to review and evaluate the evidence that was adduced at the trial.

I have perused the record of proceedings, in particular the judgment of the learned trial Judge; but first let me at this point agree with the Attorney General, when he said in his cross appeal that the learned trial Judge "merely read and recited the address of Counsel without any analysis of the appropriate law". I shall go one stage further and say, the learned trial Judge did not only stop there, but rewrote the evidence in extenso in his judgment which he had earlier on recorded during the trial. This cannot with respect be regarded as a review of the evidence.

[p.107]

I repeat the trial was by Judge alone, it therefore gives the learned trial Judge the added responsibility and duty to review and evaluate the evidence emphasizing the salient features of the evidence in order to arrive at a just and imperverse verdict. Failing which, if there is an appeal the responsibility is thrust on the appellate court to forage through the transcript of the Record for the salient features of the evidence to decide the point on appeal and give a decision accordingly.

Let me at this stage say I am fully conscious of the duty of an appellate court when it comes to considering a decision based on the facts as in this case. I am guided by the principle that an appellate court should not lightly differ from the decision of the lower court, bearing in mind that the learned trial Judge or the lower court had the advantage of seeing and hearing the witnesses and observing their demeanour. It should also not be easily lost on the appellate court that a review of the evidence is generally based on the transcript of the record which is not the same as hearing and seeing the witnesses first hand.

The gist of the prosecution's case is that the contract between the appellant representing the government of Sierra Leone and the 3rd respondent in the cross appeal had a conspiratorial flavour — there is an element of conspiracy to defraud the government of Sierra Leone by oral or written misrepresentation such misrepresentation being false, as to the cost price of 1000 metric tons of seed rice, delivery time, insurance policy etc. The prosecution to substantiate this allegation led both

documentary and oral evidence in support of this allegation against the 1st and 2nd appellant and the 3rd respondent.

I note however that the evidence adduced contained many irregular and irrelevant materials which ran contra to the general principle on admissibility of evidence. Relevant evidence must be admissible though it matters not how obtained — not irrelevant evidence. See Karuma v R. 1956 AC 203. On this point Lord Goddard had this to say:—

"It matters not how you get it if you steal it even it will be admissible."

In my judgment the admissibility of these irrelevant materials must have blurred the issue and the evidence in support of the charge against the 1st and 2nd appellant, rendering the trial unsatisfactory.

In view of what I have said, my evaluation will be specifically confined to the evidence which refers and support the conviction of the 1st and 2nd appellant. The evidence in the main is the evidence of P.W. 5 Wilfred Borbor Kargbo, acting Project Manager, Seed Multiplication Project and Ex. N the status Report of the seed Multiplication Project which showed that seed [p.108] rice was available in Sierra Leone, when the 1st appellant wrote to the World Bank stating that the Ministry of Agriculture had "explored and exhausted" all the seed rice in Sierra Leone. P.W. 5 confirmed what he had written in Ex. N. He said:

"I received the letter in Kambia on the 23rd of April 1998 at 6 p.m. I reacted on the 24th of April 1998. In the Kambia area before my status Report we had 8500 bushel of seed rice received from the contract farmers As loan recovery there was prospect of buying up to 1000 bushel of seed rice from farmers in the Kambia area ..... After submitting Ex. N I have no reaction from the Ministry of Agriculture. At the time I was writing Ex. N the seed rice was available is the same rice that could be distributed country wide."

As I said the learned trial Judge used Ex. N and the viva voce evidence P.W. 5 to support the conviction of the 1st and 2nd appellants. This is how he used it. I refer to the passage in his judgment, It reads:—

I believe the evidence of this witness (referring to P.W. 5) seed rice was available during the period but the 1st and 2nd accused preferred the seed rice instead from the sub region for reason best known to themselves of the case for the prosecution that seed rice was available in Sierra Leone at the time and this was not made known to the 3rd accused.

In my view and from the evidence adduced in court the answer is no. After going through the entire evidence it is my judgment that there is a cogent and convincing evidence on the charge of conspiracy against the 1st and 2nd accused respectively no evidence of conspiracy against the 3rd accused.

With the utmost respect to the learned trial Judge seed rice was not procured from abroad "for reasons best known to themselves".

Ex. W the voluntary statement of the 1st appellant which I dare say was unchallenged speaks clearly of an agreement between the Ministry of Agriculture and the World Bank as far back 1997/98 as to the

procurement of seed rice abroad which statement was never considered by the learned trial Judge. The relevant passage reads:—

"The whole concept of the emergency programme under the [p.109] Agricultural Sector Support Project was discussed with the World Bank while we were exiled. In the year 1997/98 and this was to commit funds for Agricultural Development aspect to an emergency programme was part of the arrangement. It was agreed to procure seed including rice seed from external sources particularly from the West African region. As a rule to undertake any procurement in an emergency programme the Ministry has got to get the concurrence of the World Bank. In this particular instance we agreed to proceed with procurement of seed rice from either Ivory Coast or Ghana. However when we returned from exile the Ministry discovered some amount of seed could still be obtained in Sierra Leone. We then decided to do the major part of the procurement in Sierra Leone and a limited procurement from Ivory Coast or Ghana."

Ex. E the statement of the 2nd appellant was in similar vain more or less re-echoing what the 1st appellant said on this point.

To my mind Ex. N and the evidence of P.W. 5 and juxtaposing the statement of the 1st and 2nd appellant raise a doubt as to the intention and actions of the 1st and 2nd appellant, culminating in the agreement with the 3rd respondent to procure seed rice from Ghana. It does not seem to me that the procurement of seed rice from Ghana was a deliberate and dishonest act from which the 1st and 2nd appellant derived any benefit. I agree it might have caused the government greater liability than warranted but that is not to say that the 1st and 2nd appellant intended to defraud the government of Sierra Leone. See R. v Thompson, 1966 50 criminal App. 1 which was quoted with approval in The State v During and 6 others C.A.13/74 unreported.

The prosecution made much play of the Status Report Exh. N and the letter Ex. 0 written by the 2nd appellant to the World Bank on the 28th June before the contract Ex. L was signed, in which the 1st appellant said "internal sources of seed rice had been explored and exhausted". Exh. O was written some three and a half months after Exh.N was compiled. It may well be at the time Exh. O was written to the World Bank seed rice was hard to come by locally. Afortiori Ex. N was only a probability that seed rice will be available locally to accommodate the required procurement need. These are matters which in my opinion the learned trial Judge ought to have taken into consideration in arriving at his verdict.

[p.110]

Let me here hasten to say that the Judge who tried this matter had been a Judge in a court of first instance for a considerable number of years before he was elevated to the Court of Appeal. He had a wealth of experience on criminal cases. He knows what the law is nevertheless the use of the unfortunate phrase "best known to themselves" without any supporting evidence, if this was a jury trial can easily be labeled a misdirection. In my judgment he did not consider other evidence in particular the statement of the 1st and 2nd appellant which would raise some doubt as to the guilt of the 1st and 2nd appellant. Therefore I am content to hold that to say the 1st and 2nd appellant "preferred to procure seed rice instead from the sub region for reasons best known to themselves" was erroneous as the statement cannot be supported by any evidence.

One point which I would like to highlight at this penultimate stage of this judgment is the acquittal of the 3rd respondent and how the law looks at it in relation to the conviction of the 1st and 2nd appellants. I shall refer to the case of R. v Anthony 1965 49 CAR P. 104:

"It was held that where on a charge of a defendant with a named co-conspirator and with other persons unknown and the named co-conspirators have been acquitted the jury should be warned that they cannot convict the persons unless they are satisfied that there were other persons concerned in the conspiracy with whom the prisoner did in fact conspire.

In this case the trial was by Judge alone: and so he was a Judge of both the law and fact. In Count 1 the 1st and 2nd appellant where not only indicted for conspiring with the 3rd respondent, but also with persons unknown. On the authority of R. v Anthony supra the learned trial Judge must be satisfied that the unknown persons in the indictment were also concerned with the conspiracy. How should it be done? In my view there must be hard and compelling evidence that the 1st and 2nd appellant conspired with these persons unknown. I find no such evidence in the record. In the result the learned trial Judge erred in law when he convicted the 1st and 2nd appellant for the said offence.

On the whole let me say that this is a matter which has no place in our criminal justice system, if anything, any action should have been pursued by a civil claim, for the so-called alleged breaches of the contract. In the light of what I have said above I find no merit in the grounds of the cross appeal. The cross appeal is dismissed.

CONCLUSION

In conclusion I hold that the conviction is unsafe and unsatisfactory. The appeal of the 1st and 2nd appellant is allowed. The conviction and sentence are set aside.

[p.111]

I order that a verdict of acquittal be entered in the case of each appellant - Harry Will and Lamina Feika respectively. Fines if already paid be refunded to the 1st and 2nd appellant. Order accordingly

SGD.

HON. JUSTICE M. E. TOLLA THOMPSON, JSC (PRESIDING)

HON. JUSTICE A.N.B. STRONGE, JA

I agree.

SGD.

HON. JUSTICE S A ADEMOSU, JA

CASES REFERRED TO

1. R. v Plumner 1902 2 K.B. 328

2. Mulcahy R. 1868 WR 34.

3. R. v Aspinall 1876 2 OBD 48

4. R. V. Murphy 1837 E.q. Volume 23

5. R. v Griffith 42 CAR Page 279

6. R. Smith 3 AER 597

7. DPP v Doot 1973 1 AER 946 at 1943

8. R. v Sinclair 1968 WLR 1246

9. Karuma v R. 1956 AC 203

10. R. v Thompson, 1966 50 criminal App. 1

11. The State v During and 6 others C.A.13/74 unreported

12. R. v Anthony 1965 49 CAR P. 104:

STATUTES REFERRED TO

1. Sec. 129 of the Constitution; Act No. 6 of 1991

2. Sec. 58 (a) and (b) of the Courts Act No.31 of 1965 as amended, by sec. 7 of the Act No.21 of 1966

3. Section 32(1) of the Larceny Act 1916

VANDI JOHNSON v. THE STATE

[CR. APP. 10/2004] [p.141-145]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 2008

CORAM: MR. JUSTICE JON KAMANDA, J.A. (Presiding)

MRS. JUSTICE S. BASH-TAQI, JA.

MR. JUSTICE S.A. ADEMOSU, JA.

BETWEEN:

VANDI JOHNSON — APPELLANT

AND

THE STATE — RESPONDENT

E. KARGBO ESQ. FOR APPELLANT

S.A. BAH ESQ. PRINCIPAL STATE COUNSEL FOR THE RESPONDENT

JUDGMENT

S.A. ADEMOSU JA.

At the High Court Kenema presided now by Hamilton J.A. sitting with a jury on the 20th day of October 2003 the appellant was charged with the offence of murder of one Sorie Kamara. On the 13th of May 2004 he was found guilty by the unanimous verdict of the jury and sentenced to death. He has appealed against his conviction on the following grounds.

1. That there was no substantial evidence before the Court to support the charge against me.

2. The learned trial judge exercised power by passing sentence on me even though my case clearly indicates that I am innocent.

3. That the sentence is manifestly excessive.

Pursuant to the order of this Court Elvis Kargbo Esq. filed two grounds of appeal

The new and amended grounds of appeal as can be gleaned from the records are:

(a) That the judgment is unreasonable and cannot be supported having regard to the evidence.

(b) That the learned trial judge failed to put or direct the jury in his summing up the possible defence open to the appellant which is very vital in Criminal Law.

The case for the prosecution was that the appellant and Sorie Kamara (deceased) were together at Buima market, Tongo Fields on 21st July 2002. Whilst there a quarrel ensued between them culminating in a fight. Whilst they were fighting one Fatmata Kamara who was the sister of the [p.142] deceased went and informed one Mohamed Bangura about the fight. Mohamed Bangura and others rushed to the scene and separated them.

The prosecution's side alleged that after the separation of the two parties the appellant went his way and the deceased too went his own way. That the accused went and removed a fence stick with a nail on it and rushed at the deceased and hit him heavily on the head at the point where the nail was. The deceased collapsed and the appellant wanted to run but was apprehended, with the stick and taken to the Police Station. The deceased was taken to Kenema Government Hospital where he was admitted and died the following day. This was the version of the prosecution's case which was put to the jury:

At the trial the prosecution called four witnesses but only one was a witness of fact whilst one of the three others was the Doctor who performed the autopsy. One Dr. David Fatta Sesay was the doctor. In his testimony he said he found a deep laceration meaning a big wound caused by a sharp object which poisoned the blood. He explained that the may be caused by a nail.

One Mohamed Bangura was P.W. 1. He deposed that on the material day and time he was at where he was doing his business when the deceased's sister came and informed him about the fight. He said he went there and met the deceased and the accused fighting, and separated them. He further told the court that after the parties went their separate ways. The appellant collected a stick with which he hit the deceased on the head. That the stock had a nail on it and the deceased fell to the ground. The appellant was apprehended whilst he was trying to run away. The deceased became unconscious with blood flowing from the head. He was taken to Kenema Government Hospital where he later died. The witness could not tell where the appellant got the stick. The other two witnesses were Police Officers; one of them was the Exhibit Clerk who produced and tendered the stick with a nail, the other was the investigator who obtained caution statements from the appellant.

At the close of the prosecution's case the appellant relied on his statements to the Police and called no witnesses. The accused's statement on which he relied as far as relevant is briefly as follows:

"On the 21st of July year 2002 at about 2 p.m. I was at my brother Mohamed market table Labour market, Tongo field selling for him ready made shirt and trousers including watches. Whilst there I was playing a workman which I borrowed from one of my friend called Gibrilla. All of a sudden the deceased came and slapped me on my both jaw together with a comment (Borbor you de enjoy — o) meaning I am enjoying.

Added further saying I have many girl covers because I am now doing business for somebody which in fact he made me to eye fitted them, After which he steps forward to go to his market table wherein, I then remarked telling him that since he had taken in palm wine and behaved to me in such a manner he must do same thing to other people in the market. Immediately I told him this, he returned and gave me a hot slap on my right jaw in an attempt to blow me again I held him tightly pleading to him not to beat me again. Sooner I released him he left me telling me that I do not regard his position as Watch Seller Chairman eye fitting him so he is going to call his boys which he did. He returned with two people Mohamed Bounzing and Yarroh I was then collared (sic) by Mohamed Bounzing without asking me to explain what transpired between me and their brother (deceased). At this point there was a scornful (sic) with them three of them started beating me all over my body. Mohamed Bounzing took a stone hit me with it on right jaw as a result I sustain injury. The stone which fell near me I also took it sent it to Mohamed Bounzing but he escaped it so the stick hit on the head of Sorie Kamara (deceased). After which I saw blood oozing from his head where the stone landed. Because of that people came and held me took me to the Police Station both of us explained" See exhibit B dated 23/7/02. I shall now turn to the grounds of appeal.

Ground 1 In arguing this ground Mr. Kargbo referred to the evidence of Mohamed Bangura, the only eye witness. He drew the Court's attention to the records which show that there was no evidence of how

the incident started. He referred also to the statement of the appellant in which he explained how the fight started. He expressed the view that the prosecution should rely on the statement of the accused to which there is no contrary evidence. He submitted that the evidence reveals provocation and self-defence. He argued that the issue of provocation should have been put to the jury. In support of this proposition, he cited the case of Koroma V Regina (1964-66) A.L.R. S.L. 542. In that case the appellant was convicted of murder by the Supreme Court (High Court). The case arose out of a fight which handing to the appellant was provoked by the deceased. The prosecution called no eye-witness to the occurrence to give evidence but relied entirely for their case on an alleged confession made by the appellant to the police. The appeal was allowed and the conviction was quashed on the grounds that the trial judge did not direct the jury in the manner he ought to have done.

In this matter the records show that the learned trial judge simply read the statements made by the appellant to the Police. He inadvertently failed to direct the jury specifically to acquit the appellant if his explanation left them in doubt. The learned trial judge should have put the appellant's case adequately to the jury and draw their attention to the law which is that while the prosecution must prove the guilt of the prisoner there is no such burden laid on the prisoner to prove his innocence and [p.144] that he is not bound to satisfy them of his innocence. See Woolmington V. D.P.P. (1935) 25 Cr.App. R.72 at page 95.

As I have already stated the learned trial judge simply glossed over the appellant's statements which constituted his defence. For instance, the appellant said it was a stone he threw at Mohamed Bounzing who had stoned him on his right jaw that hit the deceased on the head. In his summing up the learned trial judge in referring to the stick with the nail, also said:

"The accused in using the stick to hit the deceased is a cruel act from which implied malice can be implied."

I think that by the foregoing passage the learned trial judge must have left the jury with the impression that the prosecution had satisfactory proved the essential ingredients of the offence of murder.

The question whether the prosecution had proved the elements of the offence charged was one of fact for the jury to determine and in my view the learned judge was therefore not justified in usurping that function. While a judge is entitled to express his own views and express then strongly he must go further and tell them that they are not bound to accept his own because the decision on facts is theirs. See R v O Donnel (1917) 12 Cr. App. R 219 at p.221.

It is now trite law that it is the duty of a trial judge to put specifically to the jury the essential aspect of the defence however weak or stupid that defence may be. See R v. Barima 1945) II WACA 49. It has been held in a long line of cases in which it has been consistently held that such an omission will be fatal. See R V. Mills (1955) 25 Cr. App. 138; R v. Murtagh (1955) 39 Cr. App. R.72.

The appellants' statements to the police on which his defence is based raised the issues of self defence and provocation. The law is settled that where self-defence is raised the burden of proof is on the

prosecution Chan Kan v. R. (1955) A.C. 206; R v Lobell (1957) I All E.R. 734 and R v Porritt (1961) 3 All E.R. 463. The onus is never upon the accused to establish this defence-Chan-Kan v. R (supra)

On the issue of provocation the law on this point was clearly stated by Lord Goddard in Kwaku Mensah V R. (1946) A.C. 83 at pages 91 - 92. He said inter alia:

"But if on the whole evidence there arises a question whether or not the offence might be manslaughter only on the ground of provocation as well as on any other ground the judge must put that question to the jury etc etc. In Koroma V. Regina (supra) an appeal against Conviction for murder was [p.145] allowed because the trial judge omitted to put a defence of accident or misadventure to the jury. Held that this was a fatal error.

After a very careful consideration of the whole evidence. I am satisfied that there was sufficient material on which it might fairly be taken that there was-provocation which was likely the appellant being beaten by three people was likely to deprive the appellant the power of self control in the circumstances in which he found himself. Consequently, I hold that the learned trial judge erred in dismissing the issue of provocation. As I have already started, the learned trial judge, failed to put the defence of the appellant fully and fairly to the jury.

For all the reasons I have stated above, I quashed the sentence of death, set aside the finding that the appellant is guilty of murder and substitute a finding of manslaughter. The appellant to a sentenced to 5 years imprisonment.

The conclusion I have reached above makes it unnecessary to consider other inconsequential points raised by counsel for the appellant.

SGD.

HON. MR. JUSTICE S.A. ADEMOSU, JA

SGD.

HON. MRS. JUSTICE S. BASH-TAQI, JA

I agree.

SGD.

HON. MR. JUSTICE JON. KAMANDA, J.A.

I agree.

CASES REFERRED TO

1. Koroma V Regina (1964-66) A.L.R. S.L. 542

2. Woolmington V. D.P.P. (1935) 25 Cr.App. R.72 at page 95.

3. R v O Donnel (1917) 12 Cr. App. R 219 at p.221.

4. R v. Barima 1945) II WACA 4

5. R V. Mills (1955) 25 Cr. App. 138

6. R v. Murtagh (1955) 39 Cr. App. R.72.

7. Chan Kan v. R. (1955) A.C. 206

8. R v Lobell (1957) I All E.R. 734

9. R v Porritt (1961) 3 All E.R. 463

10. Kwaku Mensah V R. (1946) A.C. 83 at pages 91

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AGIP v. ABASS ALI & ANOR.

[CIV. APP.10/72] [p.1-67]

COLE, C.J.

My Lords, the portion of land in dispute in this appeal is situated at Bo in the Kakua Chiefdom in what was in the old days the Protectorate, but now, the provinces of Sierra Leone. The site was of great

commercial value or at least had great potential commercial value. I shall hereafter refer to it as "the land". Being situated in the Provinces the land was and is still subject to the provisions of the provinces land Act. Cap. 122 of our laws. I shall hereafter refer to it as "the Act". By Section 2 thereof, the Act should be read and construed as one with the Provinces Act, Cap. 60. I have mentioned this because of the fact that both the appellants and the first respondent are non-natives. The expression "non-native" is defined in Section 3 of the Interpretation Act, 1961 (No. 46 of 1961 – which is the Act relevant to this appeal) to mean —

“any person other than a native”

The same Interpretation Act by that same section defines “a native’ as being

“any person who is a member of a race tribe or community settled in Sierra Leone (or the territories adjacent thereto) other than a race, tribe or community—

(a) which is of European or Asiatic origin; or

(b) whose principal place of settlement is in the Western Area".

The Provinces Act, Cap. 60, does not define the expression "non-native", but it does define the expression "native". That definition which is contained in Section 2 (1) thereof state that—

"native" means any member of the aboriginal races or tribes of African ordinarily resident within the Provinces or within the territories adjacent thereto outside Sierra Leone".

Under the Act all land in the provinces is vested in the Tribal Authorities who hold such land for and on behalf of [p.2] Authority” to mean

"paramount Chiefs and their councillors, and men of note, or sub-chiefs and their councillors, and men of note".

The second respondents fall within this definition.

By Section 3 of the Act a non-native cannot occupy land in the Provinces unless he first obtains the consent of the Tribal Authority as well as the approval of the District Commissioner to his occupation of such land. As a matter of law no non-native can occupy land in the Provinces except under and in accordance with the Act. Let me here and now state that it is my considered view that from the whole tenor of the Act the legislature intended to confer just as great a benefit on non-natives who wish to hold land in the Provinces as on the Tribal Authorities who, as I have already stated, hold such lands on trust for the native communities. On a proper construction of the Act I hold the view that non- natives holding land of the Tribal Authorities under and by virtue of the Act are meant to have their tenancies not only regulated but also made secure. At the same time the Act protects Tribal Authorities against unlimited squatting.

By a lease dated the 16th day of July, 1962, the second respondents leased to trill first respondent —

"All that piece or parcel of land situate at Bo in the Kakua Chiefdom of the Bo District of the Protectorate of Sierra Leone the boundary whereof commencing at a Property Beacon marked AA1 which beacon is 130.ft. on a bearing of 150 degrees 45 minutes to Property Beacon marked AA2; thence on a distance of 87.0ft. on a bearing 240 degrees 45 minutes is property Beacon marked AA3; thence on a distance of 130.0ft. on a bearing 328 degree 06 minutes to property Beacon marked AA4; thence on a distance of 93.0 ft. with a bearing of 60 degrees 40 minutes to Property? Beacon marked AA1 which is the point of commencement thus enclosing the area of 0.2685 acre of the sane several dimensions little more or loss as the same premises or more particular delineated and shown edged RED on the Cadastral plan No. LS/471/58 attached, which piece or parcel of land for great clearness and so as not to restrict or enlarge the description [p.3] hereinbefore contained is delineated on the plan attached here to and thereon colored RED together with the buildings and other fixture and fittings now the room and specified in the schedule hereto TO HOLD the said premises hereby unto the format from the 16th day of May 1962, for the Term of the seventy five years yielding the paying therefore during the said term the yearly rent of Le65.00 (Le130) in the manner hereinafter set forth".

I shall hereafter refer to it as "the lease". The lease is Exhibit B. No question arises here that the lenses was not obtained will the prior consent of the Tribal Authority and the prior approval of the District Commissioner. Although the term demised is said to be seventy five years yet by virtue of Section 4 of the Act the first respondents tenancy could not exceed a torn of fifty years. I do not think that the term stated in the lease by exceeding the statutory term in any way affects the validity of the lease and is o hold. In any case this point was never at any stage raised nor was it over made on issue.

It was amongst other things mutually agreed between the parties to the lease that if the lease was not registered within sixty days of its execution in the office of the Registrar-General in Freetown then the lease was voidable at the option of either party.

Section 9 of the Act provides as follows:—

"Every deed creating a tenancy of land shall be voidable by either party, unless it—

(a) is executed in the presence of two witnesses by the lessor before the District Commissioner of the district in which the land is situated; and is executed in the presence of two witnesses by the lessee or his attorney or his agent before a Magistrate; and

(b) has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the Magistrate before when it was executed; and

(c) provides that the lessee shall not sublet or assign him interest thereunder except [p.4] with the comment of the Tribal Authority with approval n writing of the district commissioner, provided that such consent shall not be unreasonable withholds; and

(d) contains stipulations with regard to all the matters set out in rule 3 to the Schedule to this Act; and

(e) is registered within sixty days in the office of the Registrar-General".

It should at once be noted that what both the Act and the lease confer is the right of avoidance of the lease in certain specified circumstances. It is quite clear that the Act does not make a lease void ab initio or invalid if the provisions of Section 9 of the Act are not complied with.

To go back to the facts. The lease, though executed on the 16th day of May, 1962, was due to some technical reasons concerning the plan to be attached to the lease, not registered within sixty days as required by Section 9(e) of the Act nor did it comply with Section 9(a). The lease was infact registered on or about 27th November, 1962". According to Exhibit J which is dated 28th December, 1962, the District Officer acknowledge receipt of a registered copy of the lease. At that date he must or ought to have been aware that certain provisions of Section 9 of the Act had not been complied with. It is my considered view that knowledge of the District Officer (formerly District commissioner) of any non-compliance with the provisions of the Act was in the circumstance also knowledge of the second respondents. I of the opinion that the whole structure not only of the Act but also of the Provinces Act, Cap. 60 (with which, as I have already pointed out, it should be rend as one) shows that the District Officer (formerly District Commissioner) is legally the main pivot on which the whole of the administration of the districts in the provinces and all that went with them revolves.

With this knowledge of non-compliance by the first respondent not only the second respon-[p.5]dents allowed the first respondent to take possession of the land and to spend considerable sums of money on its improvement but they also received rents in respect of the land of the years 1962 and 1963. I am satisfied on the evidence that the second respondents did receive the full rent stipulated in the lease for the years 1962 and 1963 in spite of the fact that the commencement date of the lease was 16th may, 1962.

By Exhibit V2 dated the 20th January, 1964, the second respondents wrote to the first respondent as follows—

NOTICE OF RE-ENTRY

TO ABESS ALLIE Lebanese Trader and Ex Diamond Dealer of Bo Kakua Chiefdom Bo District, South Western Province Sierra Leone

OR.

His Attorney NAYEF ABESS of 22 Kissy Street, Freetown

OR

Other interested persons.

WE the undersigned chief and members of the Tribal Authority Kakua Chiefdom for and on behalf of the Paramount Chief and Tribal authority for the said Kakua Chiefdom Bo District give you notice as follows:—

1. The lease dated the 16th day of May, 1962 registered as No.168 in value 50 at Page 5 in the Register of Lenses kept in the Registrar General's office in Freetown and made between the Paramount Chief and Tribal Authority of Kakua Chiefdom aforesaid of the one part and YOURSELF of the other part under which you hold a piece plot or parcel of land situate lying and being at the angle of Bo Bye Pass and Fanton Roads in Bo Town Kakua Chiefdom aforesaid contains a proviso as follows:—

"Provided always that if this indenture is not registered within SIXTY days of its execution in the office of the Registrar-General in Freetown then the said deed shall be voidable at the option of either party to the same".

2. You have failed to register the said lease within sixty days of its execution and have so committed a breach of the said Proviso or condition contained in the said lease.

[p.6]

3. YOU have also failed. to execute the aforesaid Lease

4. In view of the matters stated above we the said lessor have decided to avoid and determines the said lease and have therefore this day exercise our right to re-entry on the land in respect of which the said lease was made and henceforth the said lease shall determine.

Dated the 20th day of January, 1964.

(Sgd.) Abu Baimba III Paramount Chief Kakua Chiefdom

(Sgd.) Mr. Mokuwa 1st Speaker Kakua Chiefdom

(Sgd.) Lahai Magao 2nd Speaker Kakua Chiefdom approved

(Sgd.) D. K. Jenkins District Officer".

Exhibit V2 was issued after the second respondent had received rents although the lease had not been avoided and was therefore va1id and subsisting. Mr. Gelaga-King concedes that at least up to 20th January, 1964 (the date of Exhibit V2) the lease, was still valid. I shall deal with what I consider to be the legal effect of this at a later stage. Proceeding on with the facts, on that same date, i.e. 20th January, 1964 the first respondent by letter bearing that date, Exhibit H, forwarded to the District Commissioner, Bo, a cheque covering payment of rent for the land as well three others. The cheque was returned. No reason was given for its return.

In the meantime the appellants had come into the picture because I find that by a letter dated 28th January, 1964, Exhibit V1, the District Commissioner was forwarding to the appellants for information and for record purposes a copy of Exhibit V2. Also on the 31st January, 1964, the second respondents by Exhibit W leased certain land s at Bo in the Kakua Chiefdom to the appellants. Those lands included the area leased to the first respondent. From the evidence it clear that the appellants had been involved in the land long before January 1964. It is interesting to note that this lease to the appellants,

Exhibit W, contains a provision regarding [p.7] registration similar to that contained in Exhibit B. I find the District Commissioner on the 30th June 1964. writing Exhibit T to the appellants in these Terms—

"Dear Sir,

LEASE OF LAND TO AGIP (S.L.) LTD

I have to refer to the above subject and to forward herewith original and copy for lease duly registered for your retention.

2. Please acknowledge receipt"

It is reasonable to conclude that the District Commissioner registered or caused to be registered the lease granted to the appellants. Why then did he not registrar or cause to be registered the lease to the first respondent?

In pursuance of Exhibit W the appellants took possession of the area called for by Exhibit W which, as I have said, included the land in question as well as all the improvements which the appellants found thereon.

The first respondent then consulted a solicitor and on the 13th July, 1996, the first respondent commenced legal proceedings in the High Court.

Although the lease Exhibit B which was the subject matter of the action and of the appeal was granted to Abess Allie we find the writ of summons was issued in the name of

"Abbas Ali Mohamed Edmask by his Attorney Adnan Nayef Abbaas A1 Allie"

as plaintiff. The relevant Power of Attorney was put in evidence at the trial. It was Exhibit A and was made at Beiruit on the 19th April, 1996. On perusal thereof it would be seen that the person appointing Adnan Nayef Abbas Al Allie as his Attorney was not Abess Ali as described in Exhibit B as the lease but one Abbas Ali Mohamed Edmask. Learned Counsel for the appellants tried to make the point before us that the Abess Ali described in Exhibit B as the lessee could not be one and the same person as Abbas Ali Mohamed Edmask referred to in [p.8] the Power of Attorney and in whose name the action was brought. In effect eh was saying that the first respondent had no locus standi in this matter. We stopped him from pursuing the point as we felt it was too belated. The action as well as the trial had proceeded on the footing that Allie Abbess and Abass Ali Mohamed Edmask were one and the same person. The position appeared to have remained the same before the Court of Appeal. That disposes of the point.

By his amended statement of claim the first respondent claimed against the appellants and the second respondents possession of the land. As against the appellants he claimed damages for trespass to the land for inducing a breach of contract between the second respondents and himself. He also claimed against respondent damages for breach of covenant for quiet enjoyment.

There was at not time any claim for special damages.

The learned trial judge after reviewing the evidence found—

(i) that the lease between the first and second respondents was valid subsisting lease which had not been avoided or terminated according to lay;

(ii) that the failure to register the lease entitling the second respondents to claim that the lease was voidable was waived by the second respondents receipt of rents due under and in terms of the said lease.

The learned trial Judge then proceeded to make the following awards—

(a) damages for breach of covenant for quiet enjoyment — Le2,500.00

(b) refund of expenses during negotiations, shake hand and refund of two years rent Le6,260.00

(c) damages for trespass — Le20,000.00

(d) damages for inducing a breach of contract — Le5,000.00

(e) damages in lieu of recovery of possession — Le9,000.00

[p.9]

Against this judgment the appellants appealed to the court of Appeal. That court (Sir Samuel Bankole Jones, P., G. F. Dove-Edwin and J.B. Marcus-Jones JJ.A) hold that the learned trial Judge was wrong in law in coming to the conclusion that the lease was a valid subsisting lease which had not been avoided or terminated according to law. Accordingly they held that the first respondent was not entitled to possession or damages in lieu thereof. By a majority decision of two to one (Dove-Edwin, J. A., as he then was, dissenting) that Court agreed with the findings of fact by the learned trial Judge that the appellants induced a breach of contract between the first and second respondents "albeit a voidable one". The Court of Appeal awarded exemplary damages of Le30,000 thereby varying the award under this head of the High Court. The Court of Appeal also awarded special damages of Le15,390 which again was a variation of the damages awarded 'by the learned trial Judge. Dove-Edwin J.A., naturally, in view of his opinion, award no damages but allowed the appeal. It is against the judgment of the learned trial Judge as well as that of the majority decision of the Court of Appeal that this appeal arises.

There is also a cross-appeal by the first respondent as to recovery of possession. It is the contention of the first respondent in this regard that if the proposition that the lease was not avoided or terminated according to law as the learned trial Judge found, was right in law, then the first respondent was entitled to an order for recovery of possession.

It is therefore of the essence of this appeal that one of the first questions that should be disposed of is whether the lease Exhibit B was properly terminated or avoided according to law.

In this regard it should be remained that all that Section 9 of the Act confers in a right be avoid at the [p.10] option of either party. It follows therefore that until a lease made under the provisions of the Act is avoided in accordance with law such a lease remains valid and subsisting.

The Imperial Statutes (Law of Property) Adoption Act Cap. 18 of our Laws came into force on the 1st January, 1933. It was an Act passed to adopt and apply to Sierra Leone certain Statutes of the British Parliament relating to real and personal property, and to make provisions for amending the law of real and personal property. This Act applied to the then Colony of Sierra Leone, amongst others, certain sections of the Conveyancing and Law of Property Act, 1881. One of the sections so applied is Section 14 which imposes restrictions on, and relief against, forfeiture of leases. The lease in question was made in May, 1962. It is clearly stated in Section 11 of the Interpretation Act, 1961 (No. 46 of 1961) as follows—

"11 No Act passed before the 1st day of July, 1953 shall apply to the Provinces unless it is so provided by the Act itself or is extended thereto by an Act".

Since the Imperial Statutes (Law of Property) Adoption Act Cap. 18 at the material time did not apply to the Provinces, the provisions of section 14 thereof cannot be relied upon. I do hope the authorities will look into this matter within the near future because in the present constitutional set-up such a situation would appear highly discriminatory.

The next point I think that should be considered is the question of waiver. Where a person entitled to anything expressly and in terms gives it up, it is said to be express waiver. It is implied when the person entitled to anything does acquiesce in something else which is inconsistent with that to which he is so entitled. One of the main questions in this appeal therefore is whether there [p.11] was waiver in law. I hold the view that the second respondents' acceptance of rent with knowledge of the breaches complained of in exhibits V2 effected in law a waiver. I consider the propositions of law set out with approval in this regard in the case of CENTRAL ESTATES V. WOOLGAR (No.2) (C.A.) (1972) 1. W.L.R. 1048 sound and I would adopt and apply them. At pages 1051 and 1052 Lord Donning, M. R., said, inter alia:—

"The cases on waiver are collected in the notes to Dumper's case (1603) 4 Co. Ref. 1196 in Smith's Leading Cases, 13th ed. (1929), pp. 39-44. These note show that the demand and acceptance of rent has a very different effect according to how the question arises. If it is sought to say there is a new tenancy by acceptance of rent; for instance, after a notice to quit has expired the question always is, as Lord Mansfield said: "Quo animo the rent was received and what the real intention of both parties was". See DOE D. CHENY V. BATEN (1775) 1 Cowp. 243, 245 and CLARKE V. GRANT (1950) 1 K.B. 104.

But if it is sought to say that an existing continues in existence by waiver of forfeiture, then the intention of the parties does not matter. It is sufficient if there is an unequivocal act done by the landlord which recognises the existence of the lease after having knowledge of the ground of forfeiture. The law was well stated by Parker, J. In MATHEWS V. SMALLWOOD (1910) 1 Ch. 777, 786, which was accepted by this Court in OAK PROPERTY CO. LTD. V. CHAPMAN (1947) K.B 886, 896: It is also, I think reasonably clear upon the case that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decided and therefore it is not open to a lesser who has knowledge of the breach to say 'I

will treat the tenancy as existing and I will receive the rent, or I will take advantage of my power as landlord to distain; but I tell you that all I shall do without prejudice to my right to re-enter, which I intend to reserve'. That is position a position which he is not entitled to take up. If, knowing of the breach he does distrain or does rent, then by law he waives the breach, against the law will avail him anything".

I known Harman J. in CHERRY V. SUMMERSELL AND FLOTHRIDE & CO. LTD. (1949) Ch. 751, said that in waiver of forfeiture "the question …..tins quo animo was the act done". But [p.12] that statement was explained by Megaw J. in WINDMILL INVESTMENTS (LONDON) LTD. V. MILANO RESTAURENT LTD. (1962) 2 Q. B. 373. He said that at p. 376, that it meant only that — 'It is n question of fact whether the money tendered is tendered as, and accepted as rent … Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequences as a waiver is a matter of law'.

Similarly Sachs J. in SEGAL SECURITIES LTD. V. THOSEBY (1963) 1 Q. B. 887 said, at page 898: 'It is thus a matter of law that once rent is accepted a waiver results. The question of quo animo it is accepted in forfeiture cases is irrelevant in relation to such acceptance'.

So we have simply to ask: Was this rent demanded and accepted by the landlords' agents with knowledge of the breach? It does not matter that they did not intend to waive. The very fact that they accepted the rent with the knowledge constitutes the waiver".

Claims, L.S., at page 1056 puts it this way:—

"I agree that the demand for and acceptance of rent by the landlords did effect a waiver of the forfeiture. It is clear on the authorities that an unequivocal act is required to bring about a waiver. When money is demanded as rent after the land lord knows of the facts giving rise to the forfeiture and is paid as rent and accepted as rent, and then the law regards the demand and acceptance as an unequivocal act.

I regard this proposition as established by MATHEWS V. SMALLWOOD (1910) 1 Ch. 777, approved in this Court in OAK PROPERTY CO. LTD. V. CHAPMAN (1947) K. B. 886 and I consider that if the decision of Harman J. in CRERLY V. SUMMERSELL AND FLOWERDEW & CO. LTD. (1949) Ch. 751 can be supported, it must be on the basis suggested by Megaw J. in WINDMILL INVESTMENTS (LONDON) LTD. V. MILANO RESTAURANT LTD. (1962) 2 Q. B. 373. This being so, the state of mind of the Landlord is irrelevant; an if he acts through an agent who has actual or ostensible authority to demand and receive the rent, it does not seem to me that the state of mind of the agent can be enquired into".

That being the legal position, in my view, when the second respondents accepted rents as is clearly shown by Exhibits C1 and C2 and D with knowledge of the breaches complained of as Exhibit J indicates they waived any and all such breaches. Here the rents were paid and accepted whilst there was in existence a valid subsisting lease.

[p.13]

The question of quo animo the rents were accepted does not therefore arise. The learned Trial Judge in my view came to the correct conclusion in this regard. To hold otherwise would, in my view, be repugnant to natural justice, equity and good conscience. Nor do I seriously think that such a finding is incompatible either directly or by necessary implication with the Imperial Statutes (Law of Property) Act Adoption to which I have already referred or any other Act applying to the Provinces. It should not be forgotten that the Act more or less (with the emphasis on more) by Section 9 imported, without limitations as to the circumstances in which waiver can be exercised, certain English legal and equitable notions into the land law of the Provinces. In construing the Act therefore this indisputable fact has clearly to be borne in mine. I am satisfied that my construction does not run contrary to the Act.

Before I deal with the consequences that flow from my finding in regard to the legal position I would at this stage like to dispose of what I consider to be another very important issue in this appeal, namely, whether there was inducement on the part of the appellant of the breach of contract contained in Exhibit B. In this connection I am of the view that the propositions of law and practice laid down in the case of SRIMATI BIBHABATI DEVI VS. KUMAR RAMENDRA NARAYAN ROY (1946) A. C. 508 relating to concurrent findings of fact contain good sense and I have no reason to depart from or modify or vary them. These pro-positions, by way of reminder, are stated in these words:—

"From a review of previous decisions of the Judicial Committee of the Privy Council the following propositions are do rived as to the present practice of the Board to decline to review the evidence for a third time where there are concurrent judgments of two courts on a pure question of fact, and as to the nature of the special circumstances which will justify a departure from the practice:—

[p.14]

(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member the appellant court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law of procedure. That miscarriage of justice means such a departure form the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to effect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cost-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve question of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court".

[p.15]

In the present appeal I find no special circumstances, namely, any miscarriage of justice or any violation of some principle of law or procedure nor do I consider it a case of an unusual nature on this particular question, to justify a departure from this well-established practice. There is evidence in support of the concurrent findings of both the Trial Court and the Court of Appeal on the issue of inducement. I would not disturb these concurrent findings. As regards the issue of damages I shall give due consideration to it later.

Having stated these propositions of law I now come to the question of the remedies sought. I shall deal with the first which is recovery of possession. It having been established that the lease was and is still valid and subsisting the first respondent had and still has a legal estate in the land prior in time to that created to the appellants. The appellants took subject to that legal estate. The first respondent is in those circumstances entitled to possession of the land. The first respondent has shown in law a better title to that of the appellants. Furthermore, because of the concurrent finding of fact, supported by law, that the appellants induced a breach of contract, which finding, as I have stated, I will not disturb, the appellants cannot invoke equity to its aid. He who comes to equity must come with clean hands. The learned trial Judge therefore erred in awarding damages in lieu of an order for recovery of possession. The first respondent was entitled to possession of the strength of his title. I would therefore award the first respondent his claim for recovery of possession of the land the area of which I have already set out in the course of this judgment. I would vary the judgment accordingly and set aside the damages awarded.

I now turn to the question of damages. In this [p.16] connection it is my opinions that were an appellate court finds that an award is either erroneous or excessive or based on wrong principles of law or because of any other good and sufficient reasons such as award ought to be varied or set aside, that Court should and must interfere. Of course where an appellate court varies an award such a variation must be based on its own estimate of a proper award.

With regard to special damages I hold the view that the Court of Appeal went astray in awarding this item.

It was never pleaded as it should have been done and the fact that no objection was raised does not in any view cure this defect. Furthermore it was never an issue raised before the Court of Appeal. In these circumstances I would disallow this item awarded by the Court of Appeal.

As regards the award od Le30,000 in respect of inducement by the Court of Appeal I do feel that it is most excessive. The learned trial Judge's award of Le5,000 is in my view exemplary enough. I would set aside the award of Le30,000 made by the Court of Appeal and restore the trial Judge's award, in the regard, of Le5,000.

The learned trial Judge awarded a return by the second respondents of the customary shake-hand of Le6,000 as well us the two years rent of Le260. In view of the fact that I would order recovery of possession of the land I would disallow those two items and the learned trial Judge's judgment is hereby varied accordingly.

I now come to the award of the trial Judge of Le20,000 as damages for trespass. He did not give any reason why he awarded such an enormous amount. Maybe he was greatly influenced by the fact that recovery of possession was not being ordered. Since I am of the view that the first respondent is in law entitled to recovery of possession, this award needs some reconsideration.

[p.17]

I agree that the trespass here is a continuing trespass and that the first respondent has been on kept away from the use of the land for over nine years. I also take into consideration the fact that because of the provisions of the lease granted by the second respondents to the appellants, Exhibit W, as well as the oral evidence before the learned trial Judge, the character of the land has substantially been changed. I am aware that in order to perform the covenants stipulated in the lease, Exhibit B, the first respondent would, because of the order for possession, have to expand money in reconstructing the land. I also take into consideration the point of law that the object of an award of damages is to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. I have also considered the proposition that the appellants' conduct have been calculated to make a profit for itself and that in such a case it is the object of the law to teach the appellants that tort does not pay. This, in my view, is certainly not a case where this court can say to the first respondent "you are technically right, but morally wrong". Taking all the circumstances into consideration, however, I would reduce the award of Le20,000 to Le10,000. The learned trial judge's award in the regard is hereby varied accordingly.

With regard to the question of interest missed under section 4 of the Law reform (Miscellaneous Provisions) Act, Cap. 19, it is my considered view that it is a matter which should have been raise before the court of trial. I do not think we can at this stage properly interfere.

In my judgment the final results of this appeal should therefore be as follows:—

[p.18]

(i) The judgment of the Court of Appeal is hereby reversed and set aside. The cross appeal succeeds.

(ii) The judgment of the High Court is upheld and affirmed subject to the following:—

(a) The order of the learned trial Judge awarding the first respondent damages in lieu of un order for recovery of possession is hereby sot aside und an order for recovery of possession of the land in favour of the first respondent against the appellants and the second respondents substituted therefore for the residue of a tern of fifty years from the 16th day of May 1962.

I would ardor that if the sum of Le9,000 awarded by the High Court has been paid it should be refunded.

(b) The order of the learned trial Judge ordering the return by the second respondents to the first respondent of the customary shake-hand of Le6,000 as well as the two years rent paid of Le260 is hereby set aside and, if already paid, should be refunded.

(c) The order of the learned trial Judge awarding Le20,000 for damages for trespass is hereby varied to Le10,000.The difference, if already paid, should be refunded.

SGD.

C. O. E. COLE

CHIEF JUSTICE

[p.19]

FORSTER J.S.C.:

My Lords, the facts of this case are set out in the judgment of my brother the Honourable Chief Justice which I have had the advantage of reading and I need not repeat them. I agree with him that the appeal should be allowed. I also agree with him that the cross-appeal succeeds, but wish to add something about one issue which, in my opinion, is of great interest and importance in the case; that is the doctrine of waiver.

Lord Aitkins, in UNITED AUSTRALIA LTD., V. BARCLAYS BANK LTD., (1941) A.C. 1, at 29 and 30, Said:

"It is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights…… if a man is entitled to one of two inconsistent rights, it is fitting that when, with full knowledge, he has done an unequivocal act, showing that he has chosen the one, he cannot afterwards pursue the other which, after the first choice, is by reason of the inconsistency no longer his to choose".

Thus a lessor who has brought ejectment proceedings by way of forfeiture for breach of covenant cannot afterwards sue for rent — see JONES V. CARTER (1844) 15M & W.M 718. Anything therefore, which exhausts or extinguishes one of the causes of action, destroys the other also.

Counsel on both sides referred us to the case of SEGAL SECURITIES LTD., v THOSEBY (1963) 1 All E.R., 500, on different points, but the relevance of this case in the appeal before us, in my opinion, [p.20] is confined to limiting the effect of the waiver to breaches occurring prior to the issuing of the Notice, Exhibit V2, dated 20th January, 1964, inter alia, that,

"the demand for rent, by letter dated June 25, 1962, although written 'without prejudice', operated as a waiver of any right of forfeiture for the defendant's breach of the covenant up to the tine when the Notice of June 8, 1962 was issued, but did not operate as a waiver of the later breach continuing between July 6, when the time set for the Notice expired, and August 7, 1962, when the writ was issued……."

The breaches complained of in Exhibit V2, took place before 28th November, 1962, the day after the Lease, Exhibit B, was registered. Rent for both 1962 and 1963 under the said Lease was tendered and received by the 2nd Respondents on the 7th March, 1963 as evidenced by Exhibits C1 and C2 respectively.

The case of CENTRAL ESTATES (BELGRAVIA) LTD., v. WOOLGAR (2) C.A. (1972) 3 All E.R. 610, not cited or referred to by any counsel before us, has been considered and applied quite correctly, in the judgment of my brother, the Honourably Chief Justice. I wish to mention another case, much older and one which, I think, merits more than cursory reference here. It is the case of DAVENPORT v THE QUEEN, 37 L. T. (N.S.) 727. It went up on appeal from the Supreme Court of Queensland to the Judicial of the Privy Council in 1877. In that case, the appellant predecessor in title became lessee of [p.21] crown lands under the Agricultural Reserves Act, 1863, and the Leasing Act, 1866, but failed to cultivate and improve his allotment as required by the former Act. Section 8 of the Agricultural Reserves Act, 1863, provides that:

"if any person selecting lands in Agricultural Reserve shall fail to occupy and improve the same, as required by sec. 7 of this Act, then the right and interest of such selector to the land shall cease and determine."

Section 8 of the Leasing Act, 1866, also states—

"Land in Agricultural Reserves, if taken up on lease, shall be subject to the same conditions ……as to cultivation, etc. as if they were selected by purchase."

After becoming aware of the non-improvement, the Government received rent for the allotment, but a Notice was issued to the effect that 'Rent which may be received upon selections as may have been forfeited by operation of law shall be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Agricultural Reserves Act, 1863, on that behalf'. In an action brought to recover the land, it was held,

(reversing the judgment of the court below) that, notwithstanding the Notice. The receipt of rent operated as a waiver of the forfeiture. In disposing of the Davenport case, the Judicial Committee [p.22] considered and applied the case of CROFT v. LUMLEY.6 H.L., 692, cited to us, incidentally, by counsel for 1st Respondent. In that case, the facts were much more favourable to the contention that there was no waiver than in the Davenport case. The tenant there, tendered and paid rent due on the lease after the landlord had declared that he would not receive it as rent under the existing lease, but merely in compensation for the occupation of the land. The opinion of all the judges except one, was that the receipt of the money under these circumstances operated as a waiver. One of the learned judges, Williams J., gave his opinion thus:

"It was established as early as Pennant's case,3 Rep. 64A, that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to the affirmance of the lease, and a dispensation of the forfeiture. In the present case, the facts, if think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative as he had no right at all to take the money unless he took it as rent: he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them".

In the Davenport case, as already stated, the rent was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. The Judicial Committee said that it was not necessary for it to [p.23] invoke this opinion of Williams J. to its full extent in the case before them, but it was enough for them to say that where money was paid and received as rent under a lease, a mere protest that it was accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the face of such receipt.

I join the Honourable Chief Justice in his hopeful pleas for a more uniform system of land ownership in our unified sovereign independent state of Sierra Leone, and finally, I am in agreement with the order proposed by him. First Respondent's legal title to the land was never extinguished and the findings of the learned trial judge that the appellant both trespassed on that land and induced the 2nd respondents to terminate Exhibit B, for which finding, in my opinion, there was abundant evidence, make it inequitable, to say the least, for any other than an order for recovery of possession to be made in favour of the 1st Respondent. It may be that the 1st Respondent will find himself saddled with a White Elephant or a Trojan Horse, but be it what it may, quiquid plantatur solo, solo cedit.

SGD.

S. J. FORSTER.

JUSTICE OF THE SUPREME COURT

DAVIES, J.A.

I have had the advantage of reading the judgment of His Lordship the Chief Justice (Mr. C.O.B. Cole) with whose reasoning and conclusions I agree. I, however, wish to add a few words of my own.

Negotiations for the lease began as long ago as 1961. The lease (Ex. B.) was not executed until the 16th May, 1962. On the 14th December the first respondent forwarded to the District Officer Bo, a copy of the duly registered lease and this was acknowledged by the District Officer one D. K. Jenkins, by letter dated 28th December, 1962 (Ex. J.). Sometime in 1964, the second respondents sought to determine the lease (Ex. "B") on the ground that it has not been registered within the prescribed period of 60 days. The First respondent by his solicitor, Mr. J.E.R. Candappa, wrote to the District Officer as follows (Ex. Z dated 13th February, 1964):—

"Dear Sir,

Your letter L/3/263 dated 25th January, 1964, addressed to Mrs. Abbass Allie c/o Abess Brothers and Sons Limited, Freetown together with what has been called a notice of Re-entry addressed among others, to Mr. Naïf Abess has been handed to me for reply.

Perusing both the Notice of Re-entry and the lease, I find that the registration for the Lease dated 16th May, 1962, in face took place on the 27th November, 1962, technically in breach of section IX (e) of the Provinces Land Act, Chapter 122 but under the following circumstances.

The plan attached to the Deed which the Tribal Authority signed and therefore is an intrinsic and necessary part of the Deed itself, was a plan which does not bear the counter signature of the Director of Surveys and [p.25] Lands as is required by Section 15 of Ordinance 14 of 1960 amending Section 25(1) of the Registration of Instruments Ordinance Cap. 256. When this deed was presented for registration, it was rejected on this score and the plans were sent to the Director of Surveys and Lands for the counter signature. This took time hence the delay in registration, due to an unforeseen and supervening impossibility. You will agree that if the document had been prepared by a Solicitor instead of in the office of the Tribal Authority, this would not have arisen. The document having been prepared by the Tribal Authority I do not see how they could complain on this score.

As for the failure of Abbas Allie to sign lease the Tribal Authority is no doubt aware that although the Agreement for the Lease had been entered into and payments including shake hand had been received by the Tribal Authority it was physically impossible to get Mr. Abbass Allie to sign the Lease as at the time the lease became available for signature, Mr. Abbass Allie had been deported from Sierra Leone, leaving Mr. Naif Abbess as His Attorney.

In law, this would not be a defect making the lease void or even voidable because the Lease itself was drawn up in pursuance of an Agreement for which payment had been received.

That such an Agreement was not only entered into but acted upon is clear from the fact that throughout the material period since before and after execution of the lease and up to date and including the whole of 1964, payments of rent due on the lease have been received by the Tribal Authority via the

appropriate receiving authority. In these circumstances, the Tribal Authority is bound in equity by the covenant.

I trust this matter could be settled without re-course to law.

Yours faithfully

(Sgd.) J.E.R. Candappa."

By this time, the second respondents had entered into negotiations with the Appellants for the lease of the said land. On the 28th January, 1964, the District Officer, Bo [p.26] wrote to the Appellants (Ex. "V1" II dated 28th January, 1964) in the manner following:—

"Gentlemen,

" I am requested by the Kakua Tribal "Authority to forward to you for your "information and for record purposes the "attached notice of the Tribal Authority "of re-entry in respect of the piece of "land held under lease made to Abbass "Allie, now in Lebanon.

" I am, Gentleman,

" Your obedient servant

" (Sgd.) D.K. Jonkins

Ag. District Officer"

Three days after the District Officer's letter to the, appellants, i.e. on the 31st day of January, 1964, the second respondents demised the same piece or parcel of land with a little over to the appellants.

There is no doubt, as Marcus-Jones, J.S.C. observed in his judgment, that the appellants are a wealthy petrol company with large financial backing. Had they not intervened, the second respondents would never have sought to avoid the lease (Ex. "B"). I am beginning to wonder why it became necessary to forward to the appellants for information or for record purposes a copy of the "Notice of the Tribal Authority for re-entry in respect of the piece of land held under lease made to Abbass Allie, now in Lebanon." The only reason which presents itself to me very forcibly is that it was in pursuance of a pending deal between the appellants and the second respondents aided by the District Officer. In his judgment already referred to, the learned Chief Justice said "..... the District Officer (formerly District Commissioner) is legally the main pivot on which the whole of the administration of the Provinces and all that went with it revolves." I agree [p.27] with the learned Chief Justice absolutely. I should have though that what a prudent and .....to District Officer would have done after the receipt of Mr. Candappa's letter (Ex. "Z") was to refer the matter to the Law Officers for legal advice. This he never did. ..... All he offers to be concerned about was to send a copy of the Notice of Re-entry to the appellants as if to say" we have cleared the way. We may now complete the deal". As I have already stated, three days after the letter forwarding the notice of Re-entry, the land was demised to the appellants.

The learned trail judge in his judgment found as follows:—

"I am satisfied that the Plaintiff (i.e) "first respondent in this Court) had "adduced sufficient evidence to support "para. 7 of the Statement of Claim.

"(a) That the lease between the Plaintiff and the second defendants was a valid subsisting lease which had not been avoided according to law.

"(b) that the alleged failure to register entitling the second defendants to claim that the lease was voidable was waived by the second defendants by receipt of rent due under and in terms of the lease."

I agree with the findings of the learned trial Judge. It has been established that the lease was and is still valid and subsisting and that the first respondent had and still has a legal estate in the land prior to that created in favour of the appellants. The appellants took subject to that prior legal estate. In the circumstances, the first respondent is entitled to possession of the land.

Justice of Appeal.

[p.28]

LIVESEY LUKE J.S.C.

By virtue of the Provinces Land Act Cap, 122 of the Laws of Sierra Leone, Chiefdom Councils in the Provinces, may with the consent of the District Commissioner, grant leases of land in their Chiefdoms to "non-natives" for periods of up to 50 years under the terms and conditions laid down in the Act.

On 16th May, 1962, the Paramount Chief und the chiefdom Councillors of Kakua Chiefdom, Bo District, (the 2nd respondents in this Appeal) granted a lease of land situated at Bye Pass Road, Bo to Abess Allie (the first respondent in this Appeal for a period of 75 years (hereafter referred to as the Abess Lease). The Abess lease was by deed and was executed by the Paramount Chief and the principal men of the Chiefdom. The consent of the District Commissioner was duly endorsed thereon. But the lease was not executed. On the 27th November, 1962, the Abess lease was registered at the office of the Registrar General, Freetown. By Notice dated 20th January, 1964 and served on the agents of Abess Allie, Kaku Chiefdom purported to avoid and determine the Abess lease in exercise of powers under the proviso to Clause 4 of the Abess lease, on the grounds that Abess Allie had failed to execute the Lease and had failed to register it within 60 days from the date of execution. Prior to the service of the Notice, the leasee executed some works on the land.

On 31st January, 1964 the Paramount Chief and the Chiefdom Councillors of the said Chiefdom, with the consent of the District Commissioner, granted a lease of the said land together with another small piece of land to Agip (Sierra Leone) Limited [p.29] (the Appellants in the Appeal) for the term of 21 years (hereafter referred to as the Agip Lease). The Agip lease was by deed and was executed by the Paramount Chief and Principal men of the Chiefdom and the consent of the District Commissioner was endorsed thereon. The lease was registered in the office of the Registrar-General, Freetown on 19th February, 1964.

The parties will be referred to hereafter as "Kakua Chiefdom", "Abess" and "Agip."

Thereafter Agip proceeded to construct a petrol filling station on the land. On 28th May, 1965, while the construction was in progress, the agent of Abess wrote Agip informing them that they were trespassing on Abass land. But Agip continued with the construction. On 13th July, 1966, Abess issued a Writ of Summons against Agip and the Kakua Chiefdom claiming damages for trespass against Agip and damages for broach of covenant for quirt enjoyment against Kakua Chiefdom. An order for amendment of the Writ was made on 6th May, 1968. In the Amended Writ Abess claimed recovery of possession of the land, damages for trespass to land and damages for inducing a breach of contract against Agip and damages for breach of covenant for quiet enjoyment against Kakua Chiefdom.

The action was tried by Browne-Marke, J. According to the pleadings, the main issues at the trial were

(i) whether Kakua Chiefdom had properly and vividly avoided the Abass Lease;

(ii) whether Kakua Chiefdom had waived their right to avoid the Abess lease by acceptance of rent and

(iii) whether Agip had induced a breach by Kakua Chiefdom of the Abess Lease.

[p.30]

Browne-Marke, J. reserved judgment on 1st May, 1969 and after an inexplicable delay of some 14 months gave judgment on 16th June 1970 for Abess. On the issue of the avoidance of the lease, Browne-Marke, J. held that the Abess lease was a valid lease and that it had not been avoided or terminated. On the issue of waiver, he held that the right to avoid the Abess lease had been waived by Kakua Chiefdom by the receipt of rent. On the issue of inducement of a breach of contract, he held that Agip had induced a breach of the Abess lease by Kakua Chiefdom. The Learned Judge accordingly made the following order:

(i) Damages for breach of covenant for quiet enjoyment Le2500.

(ii) Refund of expenses during negotiations and shake hand Le6,000.

(iii) Refund of mo yours rent Le.260.

(iv) Damages for Trespass by Agip Le 20,000

(v) Damages for inducing breach of contact Le. 5,000.

(vi) Damages in lieu of recovery of possession Le9,000

Agip appealed to the Court of Appeal against the decision, complaining against the findings of trespass and inducement and the measure of damages awarded. Kakua Chiefdom also appealed complaining against the finding of breach of covenant for quiet enjoyment and the order for refund of Le6,000 expense. Abbess also cross-appealed, complaining against the failure of the Judge to order recovery of possession and the measure of damages awarded.

[p.31]

Thus all the parties to the action were in one way or another dissatisfied with the decision of Browne-Marke, J. The appeal was heard by the Court of Appeal consisting of Sir Samuel Bankolo Jones, P., Dove-Edwin, J.A. and Marcus-Jones, J.A. on 1st March, 1971 and subsequent days. Judgment was delivered in 30th July, 1971 varying the order of Browne Mark J. (Dovo-Edwin, J.A, dissenting). In the majority judgment delivered by Marcus-Jones, J.A. it was held that the Abess lease had been properly avoided and terminated and that the right of Kakua Chiefdom to avoid the Abess lease had not been waived by acceptance of rent. The majority of the Court of Appeal also held that Agip had induced a breach of contract by Kakua Chiefdom. The Court (majority) refused on order for possession and varied the award of Damages to the extent:—

Damages for inducing a breach of contract — Le30,000

Special Damages — Le15,390

No damages were awarded for breach f contract or breach of covenant for quiet enjoyment. This is not surprising in view of the finding of the majority that Kakua Chiefdom had not committed a breach of Contract by terminating the Abess lease.

Dove-Edwin, J.A. agreed with the majority that the Abess lease had been properly avoided and terminated and that Kakua Chiefdom had not waived their right to avoid the Abess lease. He however disagreed with the majority on the question of inducing a breach of contract. He held that Agip had not committed any inducement of breach of Contract. He accordingly allowed the appeal, set aside the judgment of Browne-Marke, J. and dismissed Abess's claim.

[p.32]

The main issues in the appeal are

(i) whether Kakua Chiefdom had lawfully avoided the Abess lease.

(ii) whether the right to avoid a lease conferred by Section 9 of Cap. 122 can be waived.

(iii) if the right to avoid existed, whether in fact Kakua Chiefdom had waived their right to avoid the Abess lease.

(iv) whether Agip had induced a breach by Kakua Chiefdom of the Abess lease.

(v) whether possession of the land should be granted to Abess.

(vi) whether the damages awarded were excessive or inadequate.

The right to avoid a lease is conferred by section 9 of Cap. 122. The section roads: —

"9. Every deed creating a tenancy of land shall be voidable by either party, unless it.

(a) Is executive in the presence of two witnesses by the Lessor before the District Commissioner of the district in which the land is situated; and is executed, in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate; and

(b) Has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the Magistrate before whom it was executed; and

[p.33]

(c) provides that the lessee shall not sublet or assign his interest thereunder except with the consent of the Tribal Authority with the approval in writing of the District Commissioner, provided that such consent shall not be unreasonably with-held; and

(d) contains stipulations with regard to all the maters set out in rule 3 to the schedule to this Act; and

(e) is registered within 60 days in the office of the Registrar-General."

The proviso to Clause 4 of the Abess lease also conferred a right, of avoidance in those terms:—

"Provided always that if this indenture is not registered within sixty days of its execution in the office f the Registrar General in Freetown then the said deed shall be avoidable at the option of either party to the same."

The question arises, how is the right to avoid thus conferred exercisable? The answer would depend on, first whether or not section 9 of the Act or the proviso to Clause 4 created a condition, secondly whether or not the section or the proviso conferred a right of re-entry. The importance of the distinction is this: breach of a covenant by a tenant does not entitle the lessor to resume possession by re-entry upon the premises, unless an express stipulation to that effect is contained in the lease. On the other hand, a stipulation which [p.34] is framed, not as a mere covenant, but as a condition, carries with it at common law a right of re-entry if the condition is broken.

A condition is defined at p.424 of Cheshire's Modern law of Real Property 11th Edition as follows:

"A clause which shows clear intention on the part of the landlord, not merely that the tenant shall be personally liable if he fails in his contractual duties, but that the lease in his contractual duties, but that the lease shall determine in the event of such a failure."

In my opinion, none of the sub-sections of section 9, nor the proviso to Clause 4 of the lease make the lease determinable on the failure of the lessee in his contractual duties. In my judgment therefore neither section 9 nor the proviso to Clause 4 create a condition.

Turning now to the right of re-entry, it is perfectly clear that what section 9 confers is a right to avoid and not a right, to re-enter. Also it is quite clear that the proviso to Clause 4 does not confer a right of re-entry.

The position therefore is that neither section 9 of the Act nor the proviso to Clause 4 constitutes a condition or confers the right of re-entry. Consequently Kakua Chiefdom did not have a right to re-entry on the land.

In my opinion, since the, proviso to Clause 4 is not a condition and does not confer a right of re-entry, its inclusion in the Abess lease does not in any way add to or subtract from the right of avoidance conferred on both parties by section 9 of the Act. The parties would still have had the right to avoid under section 9 of the Act for non-registration, within 60 days even if the proviso to. Clause 4 had been omitted. In my judgment therefore the proviso to Clause 4 is surplus age.

[p.35]

The question then arises, how is the right to avoid conferred by section 9 of the Act exercisable? Kakua Chiefdom purported to exercise the right by service of a notice on Abess. The notice was headed "Notice of Re-entry" and it stated inter alia:—

"4. In view of the matters stated above, we the said lessors have decided to avoid and determine the said lease and have therefore this day exercised our right of re-entry on the land in respect of which the said lease was made and henceforth the said lease shall determine."

It was contended on behalf of Abess that notice was not sufficient to avoid the lease. Mr. Cotran submitted that the proper mode of exercising the right of avoidance by a lessor was for the lessor to give the lessee reasonable notice followed by an action of ejectment. He cited no authority for this proposition. Mr. Gelaga King submitted that all that a lessor has to do to avoid a lease is to do some act evidencing his intention to determine the lease and that the act must be a final and positive act which cannot be retracted. Mr. Davies submitted that a leasor could avoid the lease by re-entry or by leasing to some other person. He relied on a passage in Cheshire's Modern Law of Real Property, 11th Ed. p.425 which reads:—

"However clearly the proviso may state that the lease shall be void on breach of condition, it has been held in a long series of decision that its only effect is to render the lease voidable. It is at the option of the landlord whether the tenancy shall be determine or not, and it is only if he does some act which shows his intention to end it that the [p.36] 1 case will be avoided. Thus an actual entry by the landlord or the grant of a lease to a now tenant works a forfeiture, but the usual practice at the present day is to sue for the recovery of possession instead of making a re-entry etc."

It seems to me that this statement of the law is applicable to cases where there is a proviso conferring a right of re-entry, us clearly indicated in the opening words of the passage. It does not apply where the lesser does not have the right of re-entry.

In my judgment the right to avoid a lease is exercised by the person having the right doing some unequivocal act indicating the intention to avail himself of the option conferred on him to avoid the lease. But the unequivocal act would depend on whether or not a right of re-entry exists.

The position with regard to leases where there is a right of re-entry was stated by Parke, B. in JONES V. CARTER 15 M. &. W. 718. He said at p.724:

"In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option give to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered void, it could not again be set up. An entry, or ejectment in which entry is admitted, would be necessary in the case of a chatted interest, where the terms of the lease provided that it should be avoided by re-entry."

Thus if a party has a right of re-entry, he may exercise his right of avoidance by re-entry, by granting a lease to a new tenant or by action for ejectment. But if a party does not have a right of re-entry it would be unlawful for him to exercise his right of avoidance by re-entry or by granting a lease to new tenant. In my judgment the unequivocal act in [p.37] a case where the party avoiding the lease does not have a right of re-entry is the issue and service of a Writ of Summons for recovery of possession: See CANAS PROPERTY CO. LTD. V. K. L. TELEVISION SERVICES LTD. (1970) 2 ALL E.R. 795.

In my judgment therefore the purported determination of Abess lease by Kakua Chiefdom was unlawful and constituted a breach of contract and of the covenant for quiet enjoyment.

The next question is whether Kakua Chiefdom still has the right to avoid the lease when they purported to exercise it. The case of Abess is that Kakua Chiefdom had waived their right to avoid the lease by acceptance of rent after knowledge of the cause of avoidance and whether such acceptance of rent amounted to waiver in law.

The undisputed evidence is that on or before 28th December, 1962 the District Commissioner Bo had received the registered Abess lease. Indeed he acknowledge receipt of it by letter dated 28th December, 1962. It is also not disputed that the District Commissioner was the agent for Kakua Chiefdom. So it must be accepted that Kakua Chiefdom received the registered Abess lease on or before 28th December, 1962. On that date they know or out to have known of the defects in the registered Abess Lease of which they later complained i.e. late registration and non-execution by the lease or his attorney. Yet with that knowledge Kakua Chiefdom, according to the evidence, took no steps to avoid the lease for several months. In the meantime, on 7th March, 1963, Abess paid rent for two years to the Accountant General, Bo. Admittedly, according to Clause 2(5) of the Abess lease the rent should be paid "into the office of [p.38] the District Commissioner." But the payment of rent to the Accountant General instead of "into the office of the District Commissioner" was not complained of by Kakua Chiefdom, nor was it made an issue in this case. Indeed, payment of rent to the Accountant General instead of "into the office of the District Commissioner" was not mentioned in the notice of 20th January 1964 as one of the grounds on which Kakua Chiefdom purported to determine the lease. So nothing turns on the payment of rent of the Accountant General. According to the evidence, the District Commissioner made an entry of the receipt of the rent paid by Abess in the Kakua Chiefdom lease Decree book kept by him. In my opinion the entry in the Decree book by the District Commissioner clearly evidenced a receipt and

acceptance by the District Commissioner, acceptance by the Kakua Chiefdom? The answer to this question is provided by Clause 2 (5) of the Abess lease which stipulates inter alia

“The receipt of the District Commissioner shall be sufficient discharge for the payment of such rent.”

The District Commissioner was thus the agent for the receipt of rent for and on behalf of Kakua Chiefdom, and it follows that acceptance of rent by him is equivalent to acceptance of rent by the Kakua Chiefdom. I therefore hold that Kakua Chiefdom accepted rent from Abess in March, 1963.

What then is the legal effect of the acceptance of rent by Kakua Chiefdom with knowledge of the cause of avoidance?

In my opinion it is well-settled that acceptance by a landlord of rent accrued due after the cause of forfeiture (or avoidance) with knowledge of the cause of forfeiture (or avoidance) constitutes a waiver of the right of forfeiture [p.39] (or avoidance). A comprehensive and what has been accepted as an authoritative statement of the principles governing this field of law is to be found in the judgment of Parker, J. in MATHEWS V. SHALLWOOD (1910) 1 Ch. 777. He said at p.786

"Waiver of a right of re-entry can only arise where the lesser, with knowledge of the facts upon which his right of re-entry arises, does some unequivocal, act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise the continued existence of the lease, unless at the time when the act was done, he had knowledge of the facts under which, or from which, his right of entry arises. Therefore, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think reasonably clear upon the cases that whether the act coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say: 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain but I tell you all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is the position which he is not entitled to take up. If knowing of the breach he does distrain, or does receive rent, then by Law he waives, and nothing he can say by way of protest against the law will avail him anything.

"Logically therefore, a person who relies upon waiver ought to show, first an act unequivocally recognizing the subsistence of the lease, and secondly, the knowledge of the circumstances from which the right of re-entry arises at the time that act is performed.”

I would not have considered it necessary to refer to any other authority on this point, but for a submission made by Mr. Gelaga King to the effect that the important question always is "Quo animo was the act done? In the case of payment of rent "Quo animo was the rent accepted." The question of [p.40] quo animo has been considered by the English Courts in a number of cases. The principal laid down in these cases is that the intention or motive of the landlord in doing the act relied on a waver is irrelevant. Thus is SEGAL SECURITIES LTD. v THOSEDY (1963) 1. Q.D 887 at p.898 Baahs, J. said

"It is thus a matter of law that once rent is accepted a waiver results. The question of quo animo it is accepted in forfeiture cases is irrelevant in relation to such acceptance."

In the recent case of CENTRAL ESTATE (DELEGRAVIA) LTD. V. WOODGAR (No. 2) (1972) 1. W.L.R. 1048, Lord Denning M.R. said at p.1052—

"So we have simply to ask: Was this rent demanded and accepted by the landlord's agent with knowledge of the breach? It does not matter that they did not intend to waive. The very fact that they accepted the rent with the knowledge constitutes the waiver."

and he continued in the same page—

"I Know that the judge found that the agents had no intention to waive, and finds also that the tenant knew they had no intention to waive. That seems to make no difference. The law says that if the agent stated in terns "we do not intend to waive", it would not have availed them, if an express statement does not avail a landlord, nor does an implied one."

Buckley, L.J. also said at p.1054

"In my judgment, the effect of an act relied on as constituting a waiver of a right to forfeit a lease must be considered objectively, without regard to the motive or intention of the landlord or the understanding or belief of the tenant."

Applying the above-stated principles, I hold that the intention or motive with which the District Commissioner accepted the rent paid by Abess and the understanding or belief with which Abess paid the rent are irrelevant. In my judgment, the rent having been accepted with knowledge of the cause of evidence the right of Kakua Chiefdom to avoid the lease was waived and [p.41] the lease was thereby confirmed and ratified. Therefore the right to avoid the lease under section 9 of Cap. 122 was non-existent on 20th January, 1964 when Kakua Chiefdom purported to exercise it. In the circumstances, I hold that the purported avoidance of the lease by Kakua Chiefdom was unlawful and consequently constituted a breach of contract and of the covenant for quiet enjoyment.

It was in the forefront of Mr. Gelaga King's and Mr. Davies' arguments that the provisions of section 9 of Cap. 122 are mandatory and for the public good and as such they cannot be waived. Reliance was placed on the decision of the Privy Council in EDWARD RAMA V. AFRICAN WOODS LTD. (1960) 1 All E.R. 627 where it was held that a concession of timber rights to land in Ashanti, Gold Coast under the Gold Coast Concessions Ordinance was invalid because the words in S.12 and S. 13 (11) of the Ordinance were clearly imperative, being designed to protect the grantor in the public interest, and there could be no waiver of any of the conditions laid down in S. 12. Section 12 of the ordinance lays down certain conditions which an applicant for a concession should comply with and certain steps which certain officials should take and then 13 (11) provides—

"13. No concession shall be certified as valid…

(11) Unless, in the case of a concession granted in respect of an area of land of which either the whole or the greater part is situated in Ashanti, the concession has been obtained in accordance with the provisions of S.12."

Delivering the judgment of the West African Court of Appeal, Sir Hanley Cossey, P. said inter alia—

"It is true that there are no negative words in the sections referred to but the affirmative words are absolute, explicit and peremptory and when you find in an ordinance only one particular made of effecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes are essential and imperative. To render the purpose of S.12 unmistakable, sub s. (4) provides that the terms of the agreement can only be embodied in a concession after they have been agreed upon before the official named. The policy of the law clearly insits upon strifct observance of the steps already alluded to before there can be a concession. Section S.12 and S. 13 (11) are so clearly designed to protect the grantor in the public interest that in my opinion the learned judge erred in holding that a waiver is possible of any of the conditions of S. 12 and that the grantors had waived them. The accede to this proposition would be to entirely ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance".

The Privy Council agreed with this statement of the law.

In my opinion the provisions of sections 12 & 13 of the Gold Coast Ordinance are quite different from the provisions of section 9 of Cap. 122. The Gold Coast Ordinance provides that if certain conditions are not complied with or if certain steps are not taken the concession shall be invalid, whilst section 9 of Cap.122 provides that if certain things are not done or certain provisions are not included in the loose, the lease shall be "voidable by either party." Section 9 or Cap. 122 confers on either party the right to avoid the lease at his option, and if neither party chooses to exercise the right of avoiding the lease, it remains a valid lease. In my opinion, if the right to avoid is left to the option of either party, that right, being a right which neither party is obliged to exercise, could be waived by non-exercise of it or by other means. Quite clearly it could not be said in relation to S.9 [p.43] of Cap. 122. — "The policy of the law clearly insist upon strict observation of the step already alluded to before there can be a concession."

In judgment the provision of S.9 of Cap. 122 are not mandatory and strict observance of them cannot be insisted upon. I therefore find the submission of Messrs Gelaga King and Davies untenable and I held that the rights conferred by S.9 of Cap. 122 can be waived.

I now turn to the question of inducing of breach of contract. I have already held that Kakua Chiefdom committed a breach of contract by purporting to determine the Abess lease. But it was contended on behalf of Abess that there need be no breach of contract for the Plaintiff to be entitled to succeed in an action for damages for inducing a breach of contract. The Court of Appeal (majority) seems to have accepted this contention, because having held that Kakua Chiefdom had not committed a breach of contract by determining the Abess lease, they proceeded to hold that Agip had committed the tort of including a breach of contract. the contract, the breach of which Agip was found to have included, was found to have induced, was the Abess lease, which the Appeal Court (majority) held had not been

breached. The question then arises, does a plaintiff in an action for damages for inducing a breach of contract have to prove a breach of contract in order to succeed?

In my judgment the necessary ingredients of the tort of including a breach of contract are—

(i) Knowledge (actual or constructive) of the existence of the contract by the defendant and intention to induce its breach

(ii) that the defendant induced the breach of contract.

[p.44]

(iii) breach of the contract by the person induced

(iv) that the breach of contract was the necessary consequence of the inducement.

(v) that the plaintiff has suffered damage or at least that damage can be inferred from the circumstances.

Jenkins, L.J. stated the ingredients of the tort in his judgment in D.C THOMPSON & Co. LTD. V. DEAKINS & ORS. (1952) 2 All E.R. 361. He said at p.379:

"But while admitting this form of actionable interference in principle, I would held it strictly confined to cases where it is clearly shown, first, that the person charged with actionable interference know of the existence of the contract and intended to procure its breach, secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to breach their contracts of employment with the intent I have mentioned, thirdly, that the employees so persuaded, induced or procured did in fact breach their contract of employment; fourthly, that breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment."

That was a base dealing with breach of contract of service, but in my opinion, the principles therein stated apply to inducing the breach f contracts generally. Mr. Cotran urged us to accept the idea of "liability, breach or no breach," relying on the dictum of Lord Denning, M.R. in EMERALD CONSTRUCTION CO. LTD. V. LOWTHIAN & ORS. (1966) 1 ALL E.R. 1013. Lord Denning said at p.1017

"Some would go further and hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach. The point was left open by Lord Reid in J.T STRATFORD & SONS LTD. V. LINDLEY. It is unnecessary to pursue this today. Suffice to that the intention of the defendants was to get this contract terminated at all events, breach or no [p.45] breach, they were prima facio in the wrong."

Mr. Cotran submitted that even if the contract is lawfully terminated, if the other elements of the text are present, the person "interfering" with the contract is liable. I think that the dangers inherent in the acceptance of such a proposition are considerable. It would kill lawful competition in business. I think

that the answer to Mr. Cotran's submission was provided by the House of Lords as long ago as 1897 in ALLIEN V. FLOOD (1898) A.C. 1 LORD Macnaughten said at p.151—

“I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other in entitled to do or to abstain from during at his own will and pleasure, whatever his real motive may be, has a remedy against a third part, who by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it would be inquired into was without justification or excuse.

“The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty and amounts to an interference with legal rights.”

Lord Shand said at p.167

"The employer's act in dispensing with the services of the plaintiff at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about the action fails."

And Lord Davey said at p. 172 —

“To persuade a person to do or abstain from doing what that person is entitled at his own will to do or abstain from going is lawful and in some cases meritorious, although the result of advice may be damage to another."

[p.46]

And Lord James said at p179

"Every man’s business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference, "and yet it is in the interest f the community that it should exist. A new invention utterly ousting an old trade would certainly "interfere with" it. If, too, this language is to be held to represent a legal definition of liability, very grace consequences would follow."

In my judgment therefore a breach of contract is a necessary ingredient of an action for damages for inducing a breach of contract. So if a contract is lawfully terminated there can be no liability in an action for damages for inducing a breach of that contract.

It seems to me that a distinction should be drawn between cases in which a breach of contract has actually occurred, where the action is for damages for inducing a breach of contract, and cases in which a breach has not occurred but is merely threatened, and the action is for a guia timet injunction. In my opinion, in the first class of cases, it will be necessary for the plaintiff to prove an actual breach of

contract. for the simple reason that a breach has not taken place, the purpose of the action being to prevent a breach taking place.

It is important to note that in EMERALD CONSTRUCTION CO. LTD. V. LOWTHIAN & ORS. supra, the court was concerned with the question whether or not an interlocutory injunction should be granted to restrain the defendants from procuring a breach of contract. In the present case, the plaintiff (Abess) pleaded actual breach [p.47] of contract in the Amended Statement of Claim. He must therefore, in my opinion, prove that an actual breach of contract resulted from the inducement by Agip. I have already held that Kakua abstain Chiefdom committed a breach of contract by determine the Abass lease.

On the issue of inducement, Mr. Cotran submitted that there were concurrent findings of fact by the High Court and the Court of Appeal and consequently the findings of the two courts should be accepted and the evidence ought not to be reviewed a third time. He relied on SRIMATI BIBHABAIT DEV V. KUMAR RAMENDRA NARAYAN ROY (1946) A. C. 508, already referred to by the Hon. The Chief Justice, which was a decision of the Privy Council. The learned trial Judge found that Agip knew that the land was under lease to Abess and then he went on to say "I hold that the plaintiff had proved his claim for (1) ……. (2) Damages for inducing a breach of contract with the plaintiff by the 2nd defendant." The learned judge did not make any finding as to what acts of Agip amounted to inducement. In Davi's case, Lord Thankerton in stating the exceptions to the general rule said inter alia at p.521 —

"The question whether there is evidence on which the Courts could arrive at their finding is a question of law."

It seems to me therefore that in the absence of any finding by the trial Judge as to what evidence amounted to inducement, I am entitled to review the evidence for the purpose of I determining whether in fact there was any evidence to support that finding.

In my opinion the evidence of inducement by Agip is the fact that they paid "shake-hand" to the Paramount Chief after they had known of the Abess lease, and the fact that they went on the land and surveyed it in November, 1963 after they had [p.48] knowledge of Abess Lease. This evidence, in my opinion, encountered to inconsistent dealing with knowledge of the existence of the contract. It is well settled that inconsistent dealing with a contract breaker by a third party begun or continued, after the third party has notice of the contract constitutes the tort of inducing a breach of contract. In D.C. THOMPSON & CO. LTD. V. DEAKIN & ORS supra at p.378 Jenkins, L.J. stated the principle in these words: —

"But the contract breaker may himself be a willing party to the breach, without any 'persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and other, has dealings with the contract breaker which the third party knows to be inconsistent with the contract he has committed an actionable interference: see for example, BRITISH INDUSTRIAL PLASTICS LTD. V. FERGUSON where the necessary knowledge was held not to have been brought home to the third party; and BRITISH MOTOR TRADE ASSOCN. V. SLAVADOR. The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced

without knowledge by the third party for the contract thus broken, but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him."

In view of the foregoing, I hold that there was evidence before the trail judge on which to base a finding of inducement of breach of the Abess lease by Agip. In my judgment all the ingredients of the tort of inducing a breach of contract were present in this case and I see no good reason to disturb the judgment of the trial judge against Agip in this regard.

Abbess claimed recovery of possession in the Amended Writ. But the trial judge refused an order for possession and granted instead damages in lieu of possession. He based his order on equitable principles, because at the end of his judgment he said:—

[p.49]

"This is a case in which I consider it equitable to grant damages against the defendants in lieu of recovery of possession etc."

The Court of Appeal also refused an order for recovery of possession.

Unfortunately neither the trial judge nor the court of Appeal stated on which equitable principle or principles he or they relied in refusing an order for possession. I am aware that the superior courts have a general equitable jurisdiction. But it seems to me that it is in exceptional cases that the court exercises that jurisdiction. Find on exceptional circumstances in this case and none has been urged in this court. In cases where a trespasser has built and expended money on the land of another the Courts have applied the principles stated by Lord Crawnworth, L.C. in RAMSDEN DYSON (1866) L.R. 1. H.L. 129. He said at p.140.

“If a stranger begins to builds on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him mistake, abstain from setting him right, and leave him to persevere in his error, a court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my averse title and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that the raised such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity, which would prevent my claiming the land with the benefit of all the expenditure made on it.

[p.50]

There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.”

It seems to me that the important questions in such a situation are, (i) has the trespasser expended money on the land under the mistaken belief that eh land was his? (ii) has the landowner "stood by" i.e. knowing of the trespasser's mistaken belief, permitted or encouraged the trespasser to build either directly or by abstaining from asserting his legal right?

Without going into the question of mistaken belief, there is undisputed evidence that Abess wrote to Agip on 28th May, 1965 informing them that they were building a Abess land. Agip ignored this warning and completed the building in not be said, in my judgment, that Abess "stood by" while Agip built on the land.

In my opinion having taken the risk to continue building after they had been warned, Agip must suffer the consequence of their folly and they are not, in such circumstances, entitled to the protection of equity.

On the question of damages, I agree with the learned Chief Justice that the award by the Learned Trial Judge of Le20,000 as damages for trespass was excessive and ought to be reduced. The Learned Chief Justice also mentioned the Trial Judge probably took into consideration the fact that recovery of possession was not being ordered. It is also probable that the Trial Judge took into consideration the highly speculative claims amounting to Le84,423,240, made by Abess which were itemized in a document headed "Cost and [p.51] Expenses of land of Abess" (Ex. F). Possession of the land "with all that goes with it" in being granted to Abess. A petrol filling station built at a cost of over Le37,000 is one of the things that goes with the land to Abess. Even if Abess has to demolish the petrol filling station, he would still take the installations and fittings on the land. Taking all the circumstances into consideration, I think that the figure of Le10,000 awarded by the Learned Chief Justice is excessive. In my opinion an award of Le2,500 would be fair, reasonable and adequate compensation to Abess and I would award that amount.

In all other respects, I agree with the order proposed by the Honourable Chief Justice. For the reason given by the Learned Chief Justice and those I have myself expressed I would allow the Appeal and the Cross-Appeal to the extent stated by the Honourable Chief Justice, subject to what I have said on the question of damages for trespass.

SGD.

E. LIVESEY LUKE

JUSTICE OF THE SUPREME COURT.

[p.52]

TEJAN, J.A:

The facts in this case have been fully 'stated in the Judgment of the Honourable the Chief Justice and they need not be repented in detail. The appeal in this case concerns Land in Bo in the Kakua Chiefdom, Southern Province of Sierra Leone. The land was leased by the second respondents to the first

respondent on the 16th day of May, 1962 under the provisions of the Provinces Land Act Cap. 122. Under the provisions of Section 3 of Cap. 122, provincial land cannot be occupied by a non-native unless he has first obtained the consent of the Tribal Authority and the approval of the District Officer.

Paragraph 4 of the lease created in favour of the first respondent and which is Exhibit "B" contains a provision by mutual agreement that the lease was to be voidable if it was not registered within sixty days of its execution in the office of the Registrar General in Freetown. Section 9 of Cap. 122 provides that "every deed creating a tenancy of land shall be voidable by either party, unless it:

(a) is executed in the presence of two witnesses by the lessor before the District Officer of the District in which the land is situated; and is executed, in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate; and

(b) is registered within sixty days in the office of the Registrar General.

The proviso contained in paragraph 4 of Exhibit [p.53] "B" and section 9 of Cap. 122 do not make a lease void if the provisions of section 9 are not complied with. They only create the right of election to void and determine a lease.

Exhibit "B", the lease, was executive on the 16th day of May 1962. Owing the some technical defects in the plan, the registration of the lease was refused, and accordingly the plan had to be submitted to the Director of Surveys and Lands for his signature. As explained by Mr. Candappa in Exhibit "Z", this procedure took some time with the ultimate result that the lease could not be registered within sixty days as required by section 9 of Cap. 122. The lease was registered on the 27th day of November, 1962, and the District Officer acknowledged receipt of the copy registered lease by Exhibit "J", a letter dated the 28th day of December, 1962. Assuming that the second respondents had no knowledge of the breaches, the District Officer, who was responsible for the administration of the province particularly in respect of provincial land, as can be seen from the powers conferred on him by the Provinces Land Act, must be taken to have known of the breaches on receipt of the copy registered lease at the latest on the 28th day of December, 1962. The District Officer, no doubt, was and still is the recognised agent or representative of the Tribal Authority with regard to provincial land, [p.54] and the general rule is that the knowledge of an agent is the knowledge of the principal. Accordingly, the Tribal Authority must have had imputed knowledge of the breaches on the 28th day of December, 1962. The second respondents, having knowledge of the breaches, permitted the first respondent to take possession of the land and to spend money on it. The second respondents then went further to accept rents as evidenced by Exhibits C1 and C2. No oral evidence was given as to what period the acceptance of rents covered but a document was tendered in evidence. This document which is Exhibit "J", a letter written by Mr. Candappa to the Acting District Commissioner states in paragraph 6 as follows:

"That such an agreement was not only "entered into .but acted upon is clear "from the fact that throughout the "material period since before and after "execution of the Lease and up to the "date and including the whole of 1964, "payment of rent due on the lease have "been received by the Tribal Authority "via the appropriate authority."

I am satisfied that on the 7th day of March, 1963, the Tribal Authority accepted rents for 1963, and 1964.

On the facts, I have no doubt that the lease Exhibit "B" was a subsisting lease on the 20th day of January, 1964, the day on which the second respondents served a notice of re-entry on the first respondent. The proviso contained in paragraph 4 of the lease Exhibit "B" was quoted in the notice of re-entry which is Exhibit "B" was quoted in the notice of re-entry which [p.55] is Exhibits V².

The proviso is as follows:

"Provided always that if this indenture "is not registered within sixty days of "its execution in the office of the "Registrar General in Freetown then the "said deed shall be voidable at the "option of either party to the same".

Paragraphs 2, 3, and 4 of the notice of re-entry read as follows:

2. “You have failed to register the said "lease within sixty days of its executions "and have so committed a breach of the "said proviso or condition contained in "the said lease.

3. “You have also failed to execute the "aforesaid lease.

4. “In view of the matters stated above, "We the said Lessor have decided to "avoid and determine the said lease "and have therefore this day exercised "our right to re-enter on the land in “respect of which the said lease shall "determine".

Section 9 of Cap.122 also stipulates that a lease created under the Provinces Land act shall be voidable by either party if the lease is not executed by the lessee, and if it is not registered within sixty days in the office of the Registrar General.

I have said earlier that these provisions do not make a lease void. Instead they merely render the lease voidable if certain requirements are not complied with. In the circumstances any breach of the provisions can be waived. I think it is necessary to draw a distinction between the words “void and voidable”. I agree with Lord Denning, when, in distinguishing the two words in the case of MACFOY V U.A.C. LTD [p.55] (1962) A.C. 152 he said, "The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived”.

Section 9 of Cap. 122 provides for a voidable lease and so is the proviso contained in paragraph a of the lease (Exhibit "B"). It therefore follows that the covenants contained in Section 9 are capable of being waived.

There are many ways of avoiding and determining a lease. The second respondents elected to avoid and determine the lease by re-entry. Paragraph 2 of the lease contains certain covenants on the part of the first respondent with the following proviso:

"Provided always that if any part of the rent hereby reserved shall be in arrear for twenty-one days (whether demanded or not) and if any covenant or stipulation on the tenant's part herein contained [p.57] shall not be performed or observed and a written statement to the effect has been deposited with the district Officer then and in any of the said cases, it shall be lawful for the Tribal Authority at any time thereafter to re-enter upon any part of the demised premises in the name of the whole and thereupon this demise shall determine".

The expressions "herein contained" and "then and in any event" on their true construction apply only to covenants contained in paragraph 2 of the lease (Exhibit "B"). They do not apply to either Section 9 of Cap. 122 or the proviso contained in paragraph 4 of the lease (Exhibit "B") under which the lease was avoided and determined by re-entry by the second respondents. The second respondents would have been entitled to avoid and determine the lease by re-entry if there has been an express stipulation to that effect. Cheshire on Modern Real Property, 6th Edition at page 183 clearly says that a breach of covenant by a tenant does not entitle the lessor to resume possession by a re-entry upon the premises, unless an express stipulation to that effect is contained in the lease.

Woodfall on Landlord and Tenant, 27th Edition at page 877 also says that a lease may be determined by entry or ejectment for a forfeiture incurred either by (1) breach of a condition in the lease or (2) for a breach of any covenant in case (and in case only) the lease [p.58] contains a condition or a proviso for re-entry for a breach of such covenant.

Section 9 of Cap. 122 contain covenants and not conditions. A right of re-entry cannot be implied in a covenant but can be implied in a condition since a condition carries with it at common law a right of re-entry if the condition is broken. The present practice, even in the case of conditions, is to sue for recovery of possession. This practice will, however, give the tenant the opportunity of applying to the Court for a relief against forfeiture. It is unfortunate that Section 14 of the Conveyancing Act, 1881, is inapplicable to the Provinces by virtue of the Imperial Statutes (Law of Property) Adoption Act, Cap. 18 under Section 14 a land lord is allowed neither to re-enter nor to bring an action for recovery of possession of the premises until he has served on the tenant a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring him to remedy it and in any case requiring him to make compensation in money.

Section 8 of Cap. 122 contains merely covenants without a proviso for re-entry, and I think, that the second respondents cannot avoid and determine the lease (Exhibit "B") by means of re-entry, and by doing so, I hold that the re-entry was unlawful.

[p.59]

Section 9 of Cap. 122 provides that the lease shall be voidable by either party unless certain stipulations are complied with. This however, confer a right on the second respondents to avoid and determine the

lease (Exhibit "B") for non-observance of any of the stipulations. According to Section 9 of Cap.122, the first respondent was required to execute the lease and to register it within sixty days of its execution otherwise the lease would be voidable. The lease was made on the 16th day of May, 1962, and registered on the 27th day of November, 1962, the late registration being due to some technical defect in the plan. When the lease was registered, a copy was sent to the District Officer, who on the 28th day of December 1962, acknowledged receipt of the lease. The District Officer, then knew of the breaches complained of. His knowledge as representative and agent of the second respondents was also knowledge of the second respondents. On the 7th day of March 1963, the second respondents accepted rents for the leased land for 1964 and 1964. The second respondents was also knowledge of the second respondents. On the 7th day of March 1963, the second respondents accepted rents for the leased land for 1963 and accept rents for the leased land for 1963 and 1964. The question is, was the acceptance of rents a waiver of their right to avoid and determine the lease.

In waiver, the Landlord should be aware of the commission of the act of forfeiture by the tenant, and he should do some positive act which is a recognition of the tenancy.

In this case the second respondents had knowledge [p.60] of the brouches now complained of not later than the 28th day of December, 1962. With this knowledge they accepted rents as evidenced by Exhibits C1 and C2. The common law rule is that acceptance of rent accrued due after the landlord's knowledge of the tenant's breach is regarded as inconsistent with an election to avoid the lease and consistent with an election to avoid the lease and consistent only with its recognition. The act of acceptance of rent is an unequivocal act that will disentitle the landlord to avoid the tenancy even if he qualifies his acceptance. The common law rule has been consistently followed by several English Authorities. In CRFERY V. SOMMERSELL (1949) Ch. 751, after the lessor had become aware of facts entitling him to forfeit, his clerk, in ignorance of the facts, sent a routine demand for rent. Harman, J. held that had been no waiver, saying that the question in such a case is quo animo, the demand is made and that such question is rather one of fact than of law. This was an exceptional case on special facts and does not affect the general principle that the law will, where the lessor or his duly authorized agent has with knowledge done some unequivocal act, presume an intention to waive the forfeiture whatever the lessor's actual intention may be: see also SEGAL SECURITIES V. THOSERBY (1963) 1 Q. B. 887. Waiver was also dealt with by Megaw, J. in the case WINDMILL INVESTMENTS (LONDON) LTD. V MILANO RESTAURANT LTD. [p.61] (1962 2 Q.B.375. After reviewing the facts in this case, His Lordship held that (1) the plaintiff's knowledge at the latest by the end of February, 1959, was sufficient in law to constitute knowledge of the breach; and (2) the plaintiff's subsequent acceptance of rent was a waiver of the breach.

Before coming to this conclusion, Megaw, J. referred to some authorities with regard to waiver.

He said:

"I was at one time during the argument oppressed with the difficulty that there appeared some authority for the proposition that the question whether or not an acceptance of rent amounts to a waiver in Parker, J. in MATHEWS v. SMALLWOOD (1910) 1 Ch. 777,786 clearly says that it is a question of

law — a question, as he puts it, which the law decides. On the other hand, in CROFT v. LUMLEY (1858) 6 H.L.C. 672, Lord Wensleydale (who, with Lord Cranworth; decided the appeal in the House of Lords, after hearing the advice of the Judges) in an obiter dictum said, by way of postscript of to his speech which he had already delivered: what I stated upon this subject was guard against the supposition that I entirely concurred in the argument used by the learned judges who though that there was a waiver. It seems to be a matter of fact, rather than that I should have come to the conclusion that the money was received as rent, or that that was the effect that ought to be ultimately ascribed to the transaction".

Again, in CREERY V. SOMMERSELL, HARMAN, J. said:

"The opinions, however, of the judges in CROFT v. LUMLEY, show that it is not the demand nor even the receipt of rent which will of themselves waive a forfeiture. These acts are merely evidence to show that the lessor has elected not to avoid the lease.

[p.62]

The question remains quo animo was the act done. No doubt given must be held responsible for the conveances[sic] consequences of his acts, and the question is rather one of fact than of law, as Lord Wensleydale pointed at the end of the hearing of CROFT v. LUMLEY……..

The explanation is that it is a question of fact whether the money tendered is terdered as, and accepted as, rent, as distinct, for example, from money tendered and accepted as damages for trespass. That is a question of fact. Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequence as a waiver is a matter of law".

Again, in the case of CENTRAL ESTATES V. WOOGLAR (No. 2) C.A. Lord Denning after the reviewing the facts and relevant authorities said, "So we have simply to ask:— Was this rent demanded and accepted by the Landlord's agent with knowledge of the breach? It does not matter that they did not intend to waive. The very act that they accepted the rent with knowledge constitutes the waiver".

Considering the legal propositions with regard [p.63] to waiver, and I accept these propositions as being very sound, I hold that the second respondents, having accepted rents after knowledge of the breaches, waived their right of re-entry if they had any. The lease was a valid subsisting lease and the question of quo animo does not arise, and I agree with the learned trial judge that the lease between the first respondent and the second respondents was a valid subsisting lease which had not been avoided or terminated according to law, and that the breaches complained of had been waived by the second respondents by receipt of rent due and in terms of the said lease.

The first respondent cross-appealed and asked for a variation of the order for damages in lieu of possession. I have found that the lease (Exhibit "B") was and is still valid and subsisting, and in such a case the first respondent had and still has a legal estate in the land prior to that created to the appellants. The appellants then took subject to the legal estate. I am quite aware that eh appellants had expended money on the land; there is sufficient evidence given by their own witnesses Jacob Kojo Jokoto [p.64] and Papa Bakolo that the appellants ought to have known that the land belonged to

somebody. Instead they disregarded this fact and expended money on the land and built a petrol station on it. The fact that the appellants had expended money on the land in my view, should not deprive the first respondent of possession of the land. In the words of Lord Cranworth in the case of RAMSDEN V. DYSON (1866) L.R. 1, H.L. 129 at page 141, "if a person builds on the land of another knowing him to be the owner of thereof there is no principle of equity which would prevent the owner from claiming the land with the benefit of all the expenditure on it". I think the learned trial judge ought not to have given damages in lieu of possession. I would therefore make an order for recovery of possession of the land by the first respondent, that is, the area of land leased to him.

The appellants also appealed against the findings of the learned trial judge and the Court of Appeal that the appellants induced the second respondents to breach their contract with the first respondent.

The first respondent, or the other hand, [p.65] submitted that since there were concurrent findings of fact, he was entitled to judgment, relying on the principles laid down in SRILATI BIBHABATI DEVI V. KUMA RAMENDRA NARAYON ROY (1946) A.C. 508. The principles laid down in his case were followed in the cases of YACHUK AND ANOTHER v. OLIVER BLAIS CO. LTD. (1949) A.C. 386 and in the STOOL OF AYNABINA vs. CHIEF KOJO ENYIMADU (1953) A.C. 207

I have read the entire evidence at the hearing, and in my opinion, it would be hopeless to contend that there was not sufficient evidence to support the findings. The learned trail judge might not have given all the reasons on which he arrived at his finding, but the evidence taken as a whole, in my view, fully substantiates the conclusion at which both the trial Judge and the Majority of the Court of Appeal arrived at the findings. In the circumstances, I would not disturb the concurrent findings of fact. Since it has now been established that the appellants induced the breach of contract, equity cannot under the circumstances render any assistance to them. The maxim is, "he who comes to equity must come with clear hands".

[p.66]

I cannot usefully and anything to the judgment of the Honourable the Chief Justice with regard to damages. I entirely agree with his finding. But I have this to say with regard to special damages awarded by the learned trail judge and the majority of the Court of Appeal. The Honourable Chief Justice has rightly said in his judgment that special damages ought not to have been awarded because they were not pleaded. Sometimes plaintiffs confuse general damages with special damages. General damages are damages which the law will presume to be the direct natural or probable consequence of the act complained of. Special damages, on the other hand, are damages which the law will not infer from the nature of the act. They do not follow in the ordinary course, and therefore they must be claimed specifically and proved strictly.

In this case, the plaintiff put in evidence a document showing his expenses incurred. This is not sufficient. Lord Goddard in the case of BONHAM CARTER v. HYDE PARK HOTEL (1948) T.L.R. 177 makes the position clear. He said that, "Plaintiffs must understand that if they bring actions for damages it is for them to [p.67] prove their damage; it is not enough to write down the particulars, and so to speak, through then at the head of the Court, saying, "This is what I have lost; I ask you to give these damages".

SGD.

O.B.R. TEJAN

JUSTICE OF APPEAL

CASES REFERRED TO

1. Central Estates v. Woolgar (No.2) (C.A.) (1972) 1. W.L.R. 048

2. Doe D. Cheny v. Baten (1775) 1 Cowp. 243, 245

3. Clarke v. Grant (1950) 1 K.B. 104

4. Mathews v. Smallwood (1910) 1 Ch. 777, 786,

5. Oak Property Co. Ltd. v. Chapman (1947) K.B 886, 896

6. Cherry v. Summersell and Flothride & Co. Ltd. (1949) Ch. 751

7. Windmill Investments (London) Ltd. v. Milano Restaurent Ltd. (1962) 2 Q. B. 373

8. Segal Securities Ltd. v. Thoseby (1963) 1 Q. B. 887

9. United Australia Ltd., v. Barclays Bank Ltd., (1941) A.C. 1, at 29 and 30

10. Jones v. Carter (1844) 15M & W.M 718

11. Davenport v The Queen, 37 L. T. (N.S.) 727

12. Croft v. Lumley.6 H.L., 692

13. Canas Property Co. Ltd. v. K. l. Television Services Ltd. (1970) 2 All E.R. 795

14. Edward Rama v. African Woods Ltd. (1960) 1 All E.R. 627

15. D.C Thompson & Co. Ltd. v. Deakins & Ors. (1952) 2 All E.R. 361

16. Emerald Construction Co. Ltd. v. Lowthian & Ors. (1966) 1 All E.R. 1013

17. J.T Stratford & Sons Ltd. v. Lindley.

18. Allien v. Flood (1898) A.C. 1 Lord

19. Srimati Bibhabait Dev v. Kumar Ramendra Narayan Roy (1946) A. C. 508

20. British Industrial Plastics Ltd. v. Ferguson

21. British Motor Trade Assocn. v. Slavador.

22. Ramsden Dyson (1866) L.R. 1. H.L. 129

23. Macfoy v U.A.C. Ltd (1962) A.C. 152

24. Croft v. Lumley (1858) 6 H.L.C. 672

25. Yachuk And Another v. Oliver Blais Co. Ltd. (1949) A.C. 386

26. Stool Of Aynabina vs. Chief Kojo Enyimadu (1953) A.C. 207

27. Bonham Carter v. Hyde Park Hotel (1948) T.L.R. 177

STATUTES REFERRED TO

1. Interpretation Act, 1961

2. Provinces Act, Cap. 60

3. (Law of Property) Adoption Act Cap. 18

4. Conveyancing and Law of Property Act, 1881

5. Section 15 of Ordinance 14 of 1960 amending Section 25(1) of the Registration of Instruments Ordinance Cap. 256

6. Provinces Land Act Cap, 122 of the Laws of Sierra Leone

GEORGE BERRESFORD COLE v. SAHR MENDEKIA

[CIV. APP. 2/73] [p.167-196]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 29 OCTOBER 1974

CORAM: MR. JUSTICE S.C.W. BETTS, JSC (PRESIDING)

ACTING CHIEF JUSTICE

MR. JUSTICE E. LIVESEY-LUKE, JSC

MR. JUSTICE N. E. BROWNE-MARKE, JSC

MR. JUSTICE C A HARDING, JSC

MRS. JUSTICE A. V. A. AWUNOR-RENNER, JA

BETWEEN:

GEORGE BERRESFORD COLE — APPELLANT

AND

SAHR MENDEKIA — RESPONDENT

Dr. W.A. Marcus-Jones for the Appellant

G. Gelaga-King Esq. for the Respondent

JUDGMENT

S.C.W. BETTS, JSC

On the 13th October, 1970, the Plaintiff, Sahr Mendekia, (whom I hereinafter refer to as the Respondent), issued a Writ of Summons accompanied by a Statement of Claim against George Beresford Cole, (whom I shall hereinafter refer to as the Appellant), for breach of a written contract dated 3rd December, 1968. The written contract provided, inter alia, that the Appellant would construct a two-storeyed building of four-self contained flats for the sum of Le24,000 (twenty-four thousand leones) within a maximum period of six (6) months, that is to say by June, 1969. The Respondent paid the appellant an advance of Le14,000 (fourteen thousand leones), and agreed to pay the balance on or before the 28th of February, 1969. As a matter of fact, the balance of Le10,000 (ten thousand leones) was paid on the 16th December, 1968. After the expiration of the time for the performance of the contract, the Appellant, according to the Respondent's evidence, asked for one more months to complete the building, that is to say, in July 1969. The Respondent said he [p.168] accepted. The building however was till incomplete at the end of July, 1969.

Litigation started by a Writ of Summons which was filed on the 13th October, 1970, followed by a Statement of Claim. The Appellant filed a Statement of Defence and counter-claim on the 28th April, 1971. By leave of the court, an amended Statement of Claim was delivered and filled on the 3rd of November, 1971. The Respondent claimed damages — general and special — for breach of contract. The action was tried by Ken During, J, (as he then was) who gave judgment ton the 10th April, 1972, dismissing both the Respondent's claim and the Appellant's counter-claim. The Respondent appealed against that judgment and the Court of Appeal (Percy R Davies, JA, O B R Tejan, JA and Rowland Harding, J,) allowed the appeal on the 11th July 1973, and ordered the Appellant to pay the Respondent Le14,085 (fourteen thousand and eighty-five leones) as general damages; Le500 (five hundred leones) as special damages and costs of the action in the high Court and the Court of Appeal.

The present appeal is against the judgment of the Court of Appeal and the following issues were raise.

(a) Was the Appellant a gratuitous Agent of the Respondent?

(b) Was Exhibit 'B' a contract or a receipt?

(c) If it was a contract, was there a breach of it?

(d) Was the Respondent entitled to the damages he was awarded or to any damages at all?

It will be useful at this stage to set out Exhibit 'C' as it relates significantly to the answers to be given to the issues raised.

EXHIBIT 'C'

RECEIVED THE SUM OF LE14,000 (FOURTEEN THOUSAND LEONES) FROM SAHR LEBBIE MENDEKIA, ESQ. FARMER of 27 Yaradu Road, Koidu Town, Kono District, in the Eastern Province of Sierra Leone, being part payment of the sum [p.169] of Le24,000.00 (TWENTY FOUR THOUSAND LEONES) for the costs of construction of TWO STOREYED BUILDING WITH BOYS, QUARTERS AND CAR PORT on 1.907 acre of land situated off Kissy Bye Pass Road, Kissy Village as more fully described and delineated on the Director of Surveys and Land Plan LS 1070/68 dated 28th November, 1968 to be built and constructed with the best labour and materials available within a maximum period of (6) six calendar months from the date hereon; the said structures to contain the following:—

TWO STOREYED BUILDING: 4 (FOUR SELF-CONTAINED

GROUND FLOOR: No 1 — Lounge Cum dining room Two bedrooms. One bath and water closet.

Estimated Unit Cost Le4,400.00 Flat No 2 — Lounge cum dining room

Three bedrooms

One bath and water closet. Kitchen Estimated Unit cost — Le6,600.00

FIRST FLOOR: Flat No 3. — LOUNGE CUM DINING ROOM

Two bedrooms

One bath and water closet. Kitchen

Estimated unit cost Le4,400.00

FLAT NO 4: Lounge cum dining room, three bedrooms

one bath and water closet. Kitchen

Estimated unit cost — Le6,000.00

BOYS' QUARTERS AND CAR PORT: BOYS' QUARTERS:—

Two bedrooms One water close and Shower

CAR PORT: — Covered accommodation for four cars

Estimated unit cost — Le2,200.00

Exigen ies — 800.00

TOTAL COST Le24,000.00

I Sahr Lebbie Mendokia aforesaid for myself my heirs and Successors in title do hereby contract and agree with my agent, George Beresford Cole, real Estate, Agent, of 23 Liverpool [p.170] Street, Freetown, Sierra Leone, to pay to him the balance of Le10,000.00 (ten thousand leones) in full on or before the 28th February, 1969, for the fulfillment of the purposes hereinbefore contained.

Dated in Freetown this 3rd day of December, 1968.

(sgd) George Beresford Cole

Real Estate Agent

Read over and fully explained to Sahr Lebbie Mendekia by KAI MOSSAY No 27 Yaradu Road, Koidu, Trader. When he, Sahr Lebbie Mendekia seemed perfectly to understand the same before inscribing his mark and or thumb print hereon.

(sgd) R.T.P

Sahr Lebbie Mendekia

Having set out Exhibit 'C' I propose to construe it to determine whether its intention was to appoint the Appellant as an agent or to create an agony. If one or the other kind of relationship can be ascribed to the document as a result of the construction, then that is the end of the matter, in regard to the agent or agency excluding other incidents. But if not, Exhibit 'C' will be subject to further construction to determine if it is a contract or a receipt. It is accepted that the word 'agent' is capable of being used in a number of ways and in these proceedings it was sought to use it by the Appellant's counsel as a 'conduit pipe' merely to effect the transportation of the terms of agreement between the Respondent and some other third party. Halsbury's 3rd Edition, Volume I at page 146 and paragraph 351, states that an agent has been defined as a "person primarily employed for the purpose of placing the principal in contractual or other[p.171] relations with a third party and it is essential to an agency of this character that a third party should be in existence or contemplated". Wilson v Short (1848) 6 dare 366, refers.

There are other definitions but that is the one relevant to our present purpose. It may however he necessary to refer to the distinction between the conduct and exercise of the functions of an independent contractor and an agent. The distinction between an independent contractor and an agent is clearly stated in Halsbury's 3rd edition at page 146, paragraph 350 Volume I as follows, "an independent contractor, on the other hand, is entirely independent of any control of interference, and merely undertakes to produce a specified result, employing his own means to produce that result". . . "An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct contract or supervision of the principal." I think this is a point to be kept in mind in construing Exhibit 'C'. the above examples indicate that two roles are contemplated — one whose only duty is the production of a specified result without any control and the other in which lawful restrictions may be imposed during the performance of the object to be achieved. It cannot be denied that the Respondent attached his

right thumbprint to Exhibit ‘C’ and that such act was as a legal accompanied by other legal requirements to make it effective. Exhibit ‘C’ also contains a paragraph which reads:—

"I, Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors in title do hereby contract with my agent George Beresford Cole, Real Estate Agent of 23 Liverpool Street, Freetown, Sierra Leone”, and signed, “George Beredsford Cole, Real Estate Agent".

[p.172]

Appellant’s counsel argued that because George Beresford Cole was referred to as ‘my agent’ in the passage quoted above, and because of other references to him the appellant as ‘Real Estate Agent’, there is sufficient evidence to show that his duty as an agent was to bring the principal and the third party together, and that his was particularly so because he, the Appellant, was receiving no payment for his service.

The first general rule of construction of a written document is that the language of the instrument is to be understood in its ordinary and natural meaning, notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out. This view was expressed in the case of Lee v. Alexander (1883) 8 App Cas 853 at pages 869 and 870. One of the cardinal rules of construction is that words must be construed as they stand. In the case of Throckmerton v Tracey 75 ER page 222; Staunford, J., laid down the rule that “words shall be construed according to the intend of the parties and not otherwise”. In determining the intent of the parties, the document in question should be construed as a whole. In an instrument of the kind we are considering, Wilson v Short already quoted requires it as essential to an agency that a third party should be in existence or contemplated. In Exhibit ‘C’ there was only one reference to the words ‘my agent’, from which one could arrive at the sense in which the word, ‘agent’ was used. The words ‘Real Estate Agent’ are merely descriptive of what I may call — the primary occupation of George Beresford Cole. In construing Exhibit ‘C’ it is necessary to examine the sense in which ‘my agent’ is used. Does it imply the existence or contemplation of a third party when considered along with various other portions of the document? A passage of the document reads, “I, Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors in title do hereby contract and [p.173] agree with agent, George Beresford Cole, Real Estate Agent of 23 Liverpool Street, Freetown, Sierra Leone, to pay to him the balance of Le10,000 (ten thousand leones) in full on or before the 28th February, 1969, for the fulfillment of the purposes hereinbefore contained”. The purposes hereinbefore contained are set out in another section of the same document — ‘for the costs of construction of a two-storeyed building with boys, quarters and car port; to be built and constructed with the best labour and materials available; within a maximum period of six calendar months; from the date hereon, that is when the document was signed between the Appellant and the Respondent. The words, ‘do hereby contract and agree’ are significant as also the words, ‘for the fulfillment of the purposes herein before mentioned. One would ask, what do the words, ‘my agent’ really signify. Do they imply a mere conduit pipe or are they of much greater importance? Do they create a situation in which the principal could exercise his authority by giving lawful instruction to the agent or do they indicate that the principal is only interested in the production of a specified result. Put in this way, the answers are obvious. The role of the Appellant in these

circumstances is incompatible with either bringing the principal and a third part together or binging himself under the direction or control of the principal. I believe that the words, 'agent' and 'agency', as argued by Counsel for the Appellant, do not have any relevance to the Appellant or to his relationship with the Respondent for at no time was a third party mentioned by name or description nor was there any suggestion in Exhibit 'C' that a third party was in existent or contemplated. I do not agree with the argument canvassed by counsel for the Appellant that Appellant was a gratuitous agent. From all the material which could be gathered [p.174] in the word 'agent' in my opinion used an Exhibit 'C' showed that the relationship between Appellant and Respondent was that of Principal and an independent contractor; and also that the use of the word 'agent' has not changed the nature of that relationship.

One of the issues which emerged as a result of the argument of Counsel for the Appellant was that Exhibit 'C' was not a contract. He submitted that it with a receipt. I propose to deal with that submission as it was strongly canvassed.

In the course of his argument, counsel for the Appellant said that, the object of Exhibit 'C' was to acknowledge the receipt of money and not as the Court found, a contract to erect buildings on the land'. The whole of Exhibit 'C', by that I mean, its entire content, is called in question. When read and appraised as a document relevant in its entirety to the subject matter of this appeal, could it be said that it evokes only an impression of-acknowledgement of money received? Before referring to the component sections of the exhibit in some detail it will be useful to outline the main characteristics of a 'receipt', and then attempt to discover whether the contents of Exhibit 'C' would match the constituent elements of a receipt as defined by law. Stroud's Judicial Dictionary Volume IV, 4th edition, beginning at page 2278, defines 'receipt' as requiring 'no particular form of words necessary to constitute a receipt. The word 'settled' or 'paid', or any other word purporting to give a discharge, together with signature of the creditor, or his more signature on a document specifying the amount due without any words indicating payment, is sufficient (R v Martin) 7 C & P 549: Spawforth v Alexander. 2 Espinasse 621; R v Boardman 2 Moore & R 147 In Jowitt's Dictionary of English Law, a receipt is defined as 'an acknowledgement in writing of having received a sum of money, which is prima facie but not conclusive evidence or payment', Skife v Jackson (1824) 3 B and C. 421. In Webster's New World Dictionary, 'receipt is a written acknowledgment that some [p.175] thing, as goods, money, etc, has been received'. In the light of these definitions, it could be concluded that the essential elements of a receipt are that it is an acknowledgement; it is in writing; it is a mere admission of a fact that money or some other form of valuable has been received. In none of these definitions is it even mildly suggested that any further information is required, while in Strand's Judicial Dictionary already referred to, it is stated that a mere signature on a document specifying the amount without; any words indicating payment is sufficient' R v Harbin.

The Appellant is entitled to raise the question that if the other parts of the document are expunged, could Exhibit 'C' not be regarded as a receipt? If it is argued that that should be the proper approach, then Exhibit 'C' would inevitably be acknowledged to be a fragmentary document. But this is not so.

It takes into account a whole range of connected incidents and fuses them into a distinctly discernible pattern in such a way that each section is linked up with the preceding and subsequent one. The topics

specified that the Respondent was paying, at the time the document was drawn up, the sum or Le1l4,000.00 for a particular type of building at a named, site as delineated on Director of Surveys and Lands Plan LS1070; the buildings to be completed in six (6) months The buildings were treated on a unit basis and an attempt was made to set a price for each unit. The Respondent then went on to contract and agree with the Appellant for himself, heirs and successors to pay a balance of Le10,000 by the 28th February, 1969. These to my mind do not suggest that the document was a mere acknowledgement of money received. It did not simply acknowledge a receipt of money, it made provisions as to the fulfillment by the Appellant of specific obligations and also created binding legal, duties for the Respondent, his heirs and successors.

[p.176]

Having disposed of this, I come to counsel's strong contention that Exhibit 'C' was a contract stressing that there was no 'ad idem' that is, 'a mutual understanding between the parties as to the exact type of buildings to be constructed'. The plan approved for the buildings, Exhibit 'B', was produced on the 11th December, 1960, and counsel argued that if a contract Exhibit 'C' had been signed on the 3rd December, 1968, the approved plan could not necessarily have been the same plan the parties had in mind when Exhibit 'C' was executed. In the case of Falok v Williams. (1900) A C 176 P C where the same words were used with different meanings, it was said that the parties were not at one and therefore there was no consensus ad idem. The facts in this case are different and distinguishable. Both sides conducted negotiations together before the project was decided upon. The layout and general character of "the; project wore determined and these resulted. In the production of an approved plan on the 11th December, 1968. On the 16th December, 1968, the approved plan was seen by the Respondent after it had been prepared on the instruction of the Appellant. There was no question at this time that the parties were not of the same mind. In the instant case, the Appellant was solely responsible for all constructional arrangements and Exhibit 'C', which, as I have already mentioned was drawn up by the Appellant. It will sound very harsh in the month of the Appellant to say that in the month of December, 1968, the Respondent and himself did not have a mutual understanding of the kind, nature and quality of building was agreed and contracted to construct. Even concealing that Exhibit 'B' was to be the basis on which Exhibit 'C' was to be constructed, when it did turn up, apart from the details in measurements which were included, was there any substantial difference at all in the basic ideas [p.177] incorporated in the two documents: I say no. Further, since the Respondent paid on the 16th December, 1968, that is, after the Appellant had seen Exhibit 'B', which was in his possession, would his conduct not amount to an adoption of the two documents? How then could it be said that there was no consensus? Counsel for the Appellant leant heavily on the case of Scammell v Ouston (1941) 1 All E R page 14. Lord Wright quoting Lord Dunedin said, "however, as Lord Dunedin said in May & Butcher, Limited v R (5) (reported in a note to Foley v Classique Coaches Limited (6) at page 21:

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties".

This passage very succinctly puts the case for the Respondent against the Appellant. Exhibit ‘C’ did leave certain things out but these things were not dependent on a further agreement between the parties. In counsel for the Appellant’s own words, I quote, "there were many areas in which agreement should be reached such as, how the buildings were to be erected was a subsequent term to be considered; and that there was no decision about who was going to be the building contractor or surveyor or costs". The most cursory of examination will show that these were not matters dependent on agreement between the parties as all the indices leading to a concluded bargain had already been embodied in Exhibit 'C’. The cases cited Hutton v Watling (1948) Ch 398 at p 403/405; Caddick v Sikdmore (1857) 44 E K 907: and Penn v Simmonds (1971) 3 A C R 327/240 by the Counsel for the Appellant did not do anything; to improve the inconsequential vein of thin particular submission.

[p.178]

I have read with interest the case referred to above and observe that the former two were cited by the counsel for the Appellant in support of his submission that a good contract is one which has settled everything necessary to be settled between the parties leaving nothing for future determination between them; whilst the latter was a submission that in construing written agreements only evidence of factual background should be received. All these cases in my opinion, do not effect this issue. It is significant that Hutton's case was referred to by Counsel for the Appellant. I shall read out a portion of the judgment of Lord Greene, M R, he said, and I quote, "the first thing we have to do, as I have said, is to construe that document. The true construction of a document means no more than that the Court puts upon it the true meaning being the meaning which the other party, to whom the document was handed or who is relying upon it as an ordinary intelligent person construing the words in a proper way in the light of relevant circumstances". It, goes on to say, "what then would the purchaser when she received the document have thought it meant as an ordinary reasonable person intelligently understanding the English language and construing it in the light of the relevant circumstances? She could only have understood that the vendors were deliberately and solemnly recording the terms of an agreement into which they were prepared to enter, or indeed, into which they had entered". It continues, "I should have thought it quite impossible for the vendors to turn round now and say, 'although the document which we handed to you on 6 September, 1937, quite clearly purports to record the agreed terms between us . . . . . there was no consideration’. With a slight change of words the situation could easily be that in the instant case. Of course, the appeal was dismissed. The reference in this case to the absence of consideration is also [p.179] apposite. As the principles involved are similar to those in the instant case, and as they have been accurately analysed and the law properly applied, I adopt and apply them. Exhibit ‘C’ has been examined fragmentally as well as cohesively and the examination has revealed hat there was a concluded bargain between the parties and this constituted a valid contract. It should be particularly borne in mind that it was the Appellant who drew up Exhibit ‘C’.

Counsel or the Appellant questioned if it was conceded that Exhibit 'C’ was a contract whether the Respondent should be entitled to both the Le6,000 which he had spent out of pocket and the Le14,085, the amount estimated to complete the buildings after the Le24,000, the agreed amount in the contract had been spent? With regard to the Le6,000, the trial Judge had this to say. "As regards the Defendant's counter-claim although he alleged therein that he spent an extra sum of Le6,000 of his own

money thereon with the concurrence and at the request of the Plaintiff, there is abundant evidence before this Court that the allegation is not true". Those are strong words and the Court of Appeal rightly did not pursue the matter. Counsel also submitted that the award of Le14,085 would amount to an unjust enrichment as that vast sum would be supplemental to the ownership of the buildings or whatever else the Respondent had acquired from them. He cited the case of Nathaniel Stuart v Lawrence Pardoe (1963) 1 WLR p 677. Chalmers's case was based on an oral agreement of land in Fiji which could not be leased without the permission of the Native Land Trust Board. The said land was leased and a building erected thereon. Before an application for the Board's consent was made the Appellant and Respondent fell foul of each other. No consent was in fact obtained though the building had been erected. Sir Terence Donovan delivered the judgment of the Privy Council and advised Her Majesty that the appeal should be dismissed. It is [p.180] pertinent to point out that that case related, to the application of the doctrine of equitable estoppel. This principle does not arise in this case. The question here is based on contract. Had the Appellant any authority to vary or break the terms of Exhibit 'C' without reference to the Respondent? The outstanding questions now are — was there a breach? If there was, was the Respondent entitled to the quantum of damages he was awarded?

In considering whether the conduct of the Appellant amounted to a breach account should be taken of the performance of his promise, if these were executed in the manner and the time agreed upon. In the case of Hawkins v Rogers (1951), 85 1 T R 128, "a race horse had been sold with its engagements; after the sale the vendors, in whose name the engagements stood, without consulting the purchaser cancelled the engagements. The High Court of Eire held that such cancellation was a clear interference with or violation of the purchaser's contractual rights and was intended to and did injure him. The purchaser was entitled to damages, which wore assessed at £750". Any breach of contract of one party gives the other party an immediate cause of action for damages. Usually time is not of the essence in contracts involving work and labour, but where the contract so provides time becomes of essence. In the case of Charles Richards v Oppenhaim (1950) 1 K B 616 C A (following Crawford v Toogood (1879) 13 BP 153 and ------- Hymans (1920) 3 K B 475) the facts are that "in August, 1947, the Defendant placed an order with the Plaintiffs for the building of a body on to the Chasis of a motor car on the footing that the Plaintiffs could obtain it within six months, or, at most seven months". From March, 1948, onwards the Defendant kept pressing for delivery. On 28 June, 1948, the Defendant wrote the Plaintiffs, "I regret I shall be unable to accept [p.181] delivery after 25th July". When the Defendant learnt from the Plaintiffs that the body of the car would not be ready by that date, the Defendant cancelled the order. The Plaintiffs completed the car on 18th October, 1948, but delivery was refused by the Defendant. The Plaintiffs thereupon brought an action claiming the price of the body of the car Lord Denning delivering the judgment said,

"If this had been originally without any stipulation as to time and, therefore, will only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract; but in my opinion, the case is very different when there was on initial contract, mailing time of the essence of the contract; within six or at the most, seven months".

Exhibit 'C' contained the terms of the contracts which stipulated among other things that a "two storey-building with Boys' Quarters; and car port was to be constructed on 1907 acre of land situated off Kissy

Bye Pass Road within a maximum period of six (6) calendar months from the date hereon, that is the 3rd day of December, 1968. There is no contention that the building as described was incomplete to six or even seven months after; also that the building was not ready either for occupation or rental. The original provision was inscribed in the contract, Exhibit 'C' and had not been performed in the manner and time agreed upon, then on the basis of the cases cited, a breach had been committed for which the Respondent was entitled to take action for damages. This means that his right of action for damages had therefore accrued. The facts of this case reveal that Exhibit 'C' was signed on the 3rd December, 1968. The Appellant entered into an agreement to carry out the purposes inscribed in Exhibit 'C' for the sum of Le24,000. On the 10th December, 1960, Exhibit 'B' had been produced. This was handed over to Malhab, Defendant's 1st witness, some time during [p.182] that month for an estimate to be prepared. In that same month, the estimate was prepared and found to be Le36,209.95 cents. This was before the commencement of construction of the building. These facts were never reported to the Respondent until the 11th June, 1969, when the completed building should have been delivered up. Assuming that Malhab's figures were correct, then the Appellant was taking on an obligation voluntarily and deliberately entering into a contract he knew it was impossible for him to fulfill. This could not release him from his liability to pay damages. Before going on to deal with Appellant's contention, I should refer to the effect of a building contract which is absolute. An extract from Halsbury's Laws of England 3rd Edition Volume 3 at p 444 Paragraph 843, reads as follows:

"If the contract to build or erect works is absolute (which this is), 'and unrestricted by any condition expressed or implied, and it impossible to do the work and the contractor does not complete it, he will not be excused from the consequences of not fulfilling the contract or from a liability to pay damages. In the case of Jones v St John's College, Oxford, (1870) L R 6 Q B 116 at page 127, Hawner, J., said, 'In that case a contractor undertook unconditionally to perform a contract within a specified time, including any extras which might be ordered; and extras were ordered, which made completion impossible within the contract time; the contract was held liable to pay damages for the delay'.

The Court of Appeal ordered as follows:

(1) That the Respondent pay to the Appellant the sum of le14,085.00 as general damages;

(2) That the Respondent pay to the Appellant the sum of le500.00 as special damages; and

(3) That costs on the claim in the High Court, costs of appeal in this Court and costs on the Respondent's notice be paid by the Respondent

[p.183]

The basis on which damages under the first head were fixed was the evidence of John Thompson, a Chartered Surveyor, who, in January, 1971, estimated the value of the work required to complete the buildings as Le17,450.00. From the amount, the Court deducted Le3,370 leaving the sum of le14.085. Counsel for Appellant forcefully contested this award. He referred to the case of Philips v Ward (1956) 1 All E R 874 C.A (Denning, Morris, Roamer L J J), and quoted a principle which he alleged emanated from Lord Denning. The alleged principle was "that where cost of completion or reinstatement is widely

disproportionate to the advantages of undertaking such work, the measure of damages is to be assessed by calculating the diminution in the value of the property caused by the breach of contract". I am sorry to say those words were not used in my report. The major finding of that Court of Appeal was based on the dictum of Viscount Haldane L C in British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Rys Company of London Limited (1912) A C at p. 689. The Court of Appeal in fact held that—

"The measure of damages was the difference between the fair value of the property if it had been in the condition described in the Defendant's report (£25,000) and its value in its actual condition (£21,000); accordingly the amount recoverable in damages was £4,000".

In the course of his judgment, Lord Denning did say, I take it to be the clear law that the proper measure of damage if is the amount of money which will put the Plaintiff into as good a position au if the surveying contract had been properly fulfilled'; and also, 'the proper criterion is to take the difference in value between the premises as they ought to have been delivered up in repair, and the value of the premises they are delivered out of repair. The difference is the measure of the damages to which the landlord is entitled'. I am [p.184] afraid I am at a loss as to what the alleged principle quoted really means but I will accept it could mean the difference between the actual and the assessed prices. That is near enough to the finding in that Court of Appeal, I do not however accept that the principle by which damages were determined in Philips case is applicable in the instant case. The basis on which damages in the Philips case was founded was in negligence and damages were measured to satisfy the requirements of a liability in tort as per the dictum of Viscount Haldane in the British Westinghouse Electric case supra. What is being considered in this case is damages in respect of a breach of contract. The Incase of Mertons v Home Freehold Company Limited (1921) 2 KB 526 gives an admirable exposition of the proposition in such a case. In the course of his judgment in that case Lord Sterndale, M R said:

"I think the right measure is correctly stated in Hudson on Building Contracts, 4th edition, Volume I, p 491, on the authority of an American case: Hirt v Hahn". 'B agreed to erect for the plaintiff according to plans for a certain day. The defendants were B's sureties. After partly completing, B ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable B by the plaintiff had B completed the house at the time agreed by the terms of his contract'. It is true that that is an American case. Though I cannot put my finger on them for the moment, I feel satisfied that there are English cases which fix the same measure of damages".

This, in my opinion, is the principle applicable and I find nothing wrong with the measure or damages awarded. The second [p.185] leg of the finding in Philips v Ward was, "that the damages should, be assessed at the date the damage occurred, viz, 1952, and accordingly, allowance she not be made for the increase of the coat or executing the requisite work of repair between that time and the date of bearing of the action". Whilst I agree with this statement as an underlying principle it must however be actively borne in mind that occasions could arise when individual tests are necessary. In this case, the conduct of the Appellant made it impossible for any assessment to be done before action commenced. I

would therefore hold that the proper time that assessment could have been made here is when the keys were obtained considering all the circumstances of the case.

As there is no contention that the building was not completed in the time agreed I would have to consider whether circumstances had changed so fundamentally that made it impossible for the contract to be performed. In building contracts, hardships, inconvenience for material loss are not grounds for the frustration of contracts. In the case of Davis Contractors Limited v Fareham U D C (1956) A C 696 729, the Plaintiff agreed to build seventy-eight houses for the Defendant for a fixed price, the work to be concluded in eight months. As a result of weather, shortage of labour, the work took twenty-two months to complete at an extra cost of £17,000. It was claimed for the contractors that the intervening circumstances over which they had no control had frustrated the contract. The House of Lords held unanimously that the circumstances did not frustrate the contract.

In the instant case, also, such an argument cannot be supported by the facts as the Appellant had voluntarily contracted terms which turned out to be onerous. He had with him the estimate submitted by Malhab and if he was so minded he could have informed the Respondent and or sought a revision of the [p.186] terms of Exhibit 'C' during the currency of the contract. This he failed to do. Liability to damages is the legal consequence for a breach of contract and in view of all the circumstances of this case, I find no justification to interfere with the awards made. The appeal is therefore dismissed with costs to the Respondent in this Court and the Courts below. Costs to be taxed.

SGD.

Presiding

I agree.

W. MARK J. S. C.

I agree.

HARDING

I agree.

G AWUNOR-RENNER

LIVESEY LUKE J.S.C.

I agree that this appeal should be dismissed. I would, however, like to make a few observation of my own.

1. Contract or Receipt

Counsel for the appellant submitted with considerable force that Ex. C (hereafter referred to as the document) was not a contract but a mere receipt. In order to determine the soundness of that submission it is necessary to construe the document in order to understand its nature and purpose. The

general principle upon which the Court acts in construing documents is well settled. The primary purpose of construction is to ascertain the intention of the parties having regard to the words used in the whole document and to the circumstances under which it was made. In this connection the words of Lord Greene M.R. in HUTTON v. WATLING (1948) 1 Ch. 398 are appropriate. He said at p.403:—

"The true construction of a document means no, more than that the Court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. This document, on the face of it, intended to be handed to the purchaser, and it is produced by the purchaser. Indeed, the whole tenor of the document indicates that it is to be purchaser's document. What then would the purchaser when she received the document has thought it meant as an ordinary reasonable person, intelligently understanding the English Language and construing it in the light of the relevant circumstances? She could have understood that the [p.188] vendors were deliberating and solemnly recording the terms of an agreement into which they were prepared to enter, or, indeed into which they had entered."

I now propose to analyze several portions of the document which I consider significant, in order to ascertain the nature and purpose of the document. The document starts off with the words "Received the sum of Le.14,000 from Sahr Lebbie Mendekia, Esq., Farmer of 27, Yaradu Road Koidu Town, Kono District in the Eastern Province of Sierra Leone being part payment of the sum of Le.24,000." In my opinion this is quite clearly an acknowledgement by the appellant (George Beresford Cole) of the receipt of the sum of Le.14,000 from the respondent (Sahr Lebbie Mendekia) as part payment of a total sum of Le.24,000. My understanding of a receipt is that it is an acknowledgment in writing of the receipt of money, chattel etc. In my opinion therefore the above quoted portion of the document if signed by the appellant would have constituted a sufficient receipt by the appellant of the sum of Le.14,000. But the document goes on to make further and detailed provisions relating to the purpose of the payment of the Le.14,000. After the receipt portion quoted above the document continues "for the cost of construction of a Two Storey building with Boy's Quarters and Car Port on 1907 Acre of land situate off Kissy Bye Pass Road, Kissy Village as more fully described and delineated on Director of Surveys and Land Plan I.S 1090/68 dated 28th November, 1968 to be built and constructed with the best, labour and materials available within a maximum period of (6) six calendar months from the date hereon". In my view, this portion states that the money was paid for the construction of a two storey building etc. (hereinafter called the building), specifies the land on which the building was to be built, makes stipulations as to the quality of workmanship and materials and stipulates the period for the completion of the building. These are terms which are common in building contract. The document then goes on to spell out the specifications and costing of the various sections of the building. I do not think that it can be seriously contended that a mere receipt for money received would make such detailed provisions. In my opinion these provisions point [p.189] unequivocally to the fact that the document is a building contract, The document then goes on to provide that "I Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors and title do hereby contract and agree with my agent George Beresford-Cole, Real Estate Agent of 23, Liverpool Street, Freetown, Sierra Leone to pay to him the balance of Le.10,000 in full on or before but not later than 28th February, 1969 for the fulfillment of the purposes hereinbefore

contained By this provision, the respondent solemnly bound not only himself but also his heirs and successors in title to pay the balance of the contract price for the fulfillment of the purposes of the contract i.e. the construction of the building. By this provision, the appellant also took steps to protect himself by ensuring that the respondent entered into the obligation not only on his own behalf but also on behalf of Ids heirs and successors in title.

Another significant aspect of the document is that it was signed by both the appellant and the respondent. If the document was a mere receipt, one would expect that only the appellant who received the money would have signed it. In my opinion the fact that it was signed by both parties is a clear indication that it was more than a receipt and that it contained obligations binding on both parties.

It is important to state that the document was prepared by the appellant, was type-written and was stamped with a fifteen cents stamp. What then was the nature and purpose of the document? In my opinion having regard to what I have sad above, it was a contract entered into between the appellant and the respondent for the appellant to construct a building etc. at Kissy Bye Pass Road, Kissy Village in accordance with the specifications stated in the document and to complete the same within 6 months in consideration of the respondent paying to the appellant the sum of Le.14,000 on the date of the execution of the document and the sum of Le.10,000 on or before 28th February, 1969. Quite clearly that was the meaning put upon the document by the responder as an ordinary reasonable and intelligent person in Sierra Leone, and not surprisingly he regarded it ma a solemn document, for apart from fulfilling his initial obligation by paying the sum of Le14,000 on the [p.190] date of the execution of the document, he fulfilled his other part of the bargain by paying the balance of le.10,000 well in advance of the date stipulated in the document.

In coming to this conclusion, I am guided by words of Lord Wright in SCAMMELL v. OUSTON (1941) 1 All E.R. 14, H.L. He said at pp. 25-26

"The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deferred by difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. There are many cases in the books of what are called illusory contracts — that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the Court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

In this case, the parties took the trouble to reduce their contract into writing. But it is necessary to emphasize, in view of certain arguments Advanced by learned Counsel for the appellant, that the contract need not have been in writing, the reason being that since it was a contract to be performed within a year, it is not required by Section 4 of the Statute of Frauds 1677 (which the relevant Statute applicable in Sierra Leone) to be in writing. And even assuming that it was a contract required by the

Statute to be in writing, the document satisfied all the requirements of the Section. It contains the names of the parties i.e. George Beresford Cole and Sahr Lebbie Mendekia; it states the subject matter of the agreement i.e. the construction of a building etc, at Kissy Bye Pass Road; it states the consideration for the work i.e. le.24,000; and it was signed not only by the party to be charged i.e. George Beresford Cole, but also by the other party. With respect, it is therefore idle to argue that there was not a concluded or enforceable contract "between the appellant said the respondent.

[p.191]

Learned Counsel for the appellant laid much emphasis. On fact that a building plan had not been prepared when the document was signed. In fact the building plain dated 11th December 1968 — eight days after the signing of the document. Learned Counsel submitted that in view of this fact, there was not a concluded contract between the parties. But an examination of the facts would reveal that the submission is misconceived. It is important to emphasize that the building plan was prepared on the instructions of the appellant, with full knowledge of the terms of the document including the specification, the unit costs and the total cost of the building. So one would expect the appellant as a reasonable business man to prepare a plan that would comply with the specification and at the same time keep within the unit cost state and within the total cost of the building. If he chose to exceed the total figure agreed upon he has only himself to blame. Learned Counsel relied on PENN v. SIMMONDS (1971) 1 W.L.R. 1381 H.L. for his submission. In that case it was held inter alia that in construing a written agreement evidence of negotiations or of the parties intentions ought not to be received by the Court, and that evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'general and objectively the "aim" of the transaction. In my opinion that decision does not support the case for the appellant. The evidence adduced before the Court in the instant case was the document signed by both parties and evidence of the "genesis" of the transaction. No evidence was adduced of any negotiations or of the intention of the parties. In fact no such evidence was necessary in the case, because the result of any negotiations and the intention of the parties were reduced into writing and clearly set out in the documents.

2. Consideration

Learned Counsel for the appellant also submitted that no consideration flowed from the respondent to the appellant. With the greatest respect, I do not think that this submission has any merit. One is bound to ask what did the appellant receive the sum of Le24,000 for? If it was not is consideration of constructing the buildings, what was it for? Quite [p.192] clearly, the Le.24,000 was the consideration flowing from the respondent to the appellant for the construction by the appellant of the building. I think that the position is so clear that any excursion into the law relating to consideration will be an unnecessary academic exercise.

3. Agency

It was also contended on behalf of the appellant that on a proper construction of the document the relationship between the respondent and the appellant was that of principal and agent, and not that of

employer and contractor. Learned Counsel for the appellant submitted that the appellant was an agent of the respondent to secure the services of some third party independent contractor to execute the work provided for in the contract. A reference to the pleadings would show that this submission is the result of an afterthought. In the Defence and Counterclaim the appellant averred inter alia:—

"1. The Defendant denies the allegations contained in paragraph 1 of the Statement of Claim, but say that following verbal negotiations, he agreed with the plaintiff on a friendly basis to help him with the construction of the said building as described. The Defendant on the 3rd December, 1968, gave the plaintiff a receipt for the cum of Fourteen Thousand Leones (Le.14,000) and contracted and agreed to pay the balance on or before the 28th February, 1968.

. . . . . .

6. The Defendant says that the plaintiff has failed to pay the necessary extra amount required to complete the building and has rendered it impossible for the defendant to do so."

In my opinion what the appellant was alleging in the two paragraphs quoted above was, first, that he agreed with the respondent to help with the construction of the building and secondly that the respondent had failed to pay the extra money required by him (the appellant) to complete the building and that the respondent had rendered it impossible for him (the appellant) to complete the building. There was no suggestion in those paragraphs, or indeed anywhere in the Defence and Counterclaim, of any agency, or that some third party, and not the appellant, was the contractor. The question of agency was raised for the first time in the final stages of the address of learned Counsel for the appellant before the learned trial judge. The learned trial Judge found that on a proper [p.193] interpretation of the document and on the evidence, the relationship between the respondent and the appellant was that of principal and agent. With, respect, the learned trial Judge went astray. Agency was not an issue before him. Besides, in paragraphs 1 & 6 of the Defence and Counterclaim, the appellant accepted that he, and not some third party, was to build the building for the respondent. But even assuming agency was an issue at the trial, the finding of the learned Judge was, in my opinion, erroneous, I have already stated what I consider to be the proper construction of the document. But in view of the finding of the learned Judge it is necessary to emphasize certain points Admittedly, the word 'agent' was used in the body of the document, but in my opinion that was a mere description of the occupation of the appellant and not a statement of the capacity in which the appellant was making the transaction. At the very beginning of the document it is stated that the appellant received the sum of Le14,000 as part payment for the construction of a two storey building to be built and constructed within a maximum period of six months, and no where in that part of the document, or indeed any other part, is it stated, or even suggested, that a third party was contemplated. And if a third party was not contemplated, the reasonable conclusion is that-the appellant was the person under an obligation to construct the building. With regard to the evidence, I think that even the evidence adduced on behalf of the appellant overwhelmingly disproves any case of agency. I need refer to only two pieces of evidence. First, in a letter dated 11th June, 1969 (Ex, E) written by the appellant to the respondent, the appellant demanded the payment of extra money to, in his own words, "enable me to complete construction as scheduled". (The emphasis is mine). Secondly, the appellant said in evidence that the independent third party

engaged in the construction of the building was one Turner, The appellant tendered a file (Ex, P1-181) which he claimed contained records of his expenditure on the building. But when the file is examined it is discovered that all the invoices for materials supplied were issued in the name of the appellant and not in the name of Turner, Furthermore the monthly wages sheets of the appellant show quite clearly [p.184] that far from being an independent contractor, Turner was employed by the appellant as a daily waged artisan at Le.2.25c a day. It is also important to state that the records show that Turner was not employed throughout the period of construction. In my judgment therefore, both on the construction of the document and on the evidence, the appellant was not an agent but the contractor who contracted to construct the building for the respondent.

4. Damages

The appellant did not complete the building within the time stipulated in the contract (i.e. 2nd June, 1969). He applied for and was granted a month's extension of time within which to complete the building. But up to the date of the issue of the writ of summons (i.e. 1.3th October, 1970), and up to the time of the trial, the building had still not been completed. In my judgment the failure of the appellant to complete the building by 2nd July, 1969 (i.e. the extended period) constituted a breach of contract. The Court of Appeal awarded the respondent the sum of Le.14,085 as general damages and the sum of Le.500 as special damages for breach of contract. The Court of Appeal based their assessment of the general damages on a valuation of the coat of completion of the building made in January, 1971 by John David Thompson a Chartered Quantity Surveyor. Mr. Thompson gave evidence at the trial. Learned Counsel for the appellant attached the award of general damages on several grounds. He submitted that the Court of Appeal erred in failing to take into consideration the fact (as alleged by the appellant) that in addition to the sum of Le.24,000 paid to him by the respondent, he had expended some Le.6,000 of his own money on the building, what then is the proper measure of damages in such circumstances? In my opinion the proper measure is the cost of completing the building in accordance: with the contract in a reasonable manner, and at a reasonable time. What is important is not the value of the building in its present state or the amount of money actually expended on the building, but the cost of completing the building. So even if the claim of the appellant that he had expended some Le.30,000 on the construction of the building is true, he would still be liable in damages measured according to the cost of [p.195] completing the building. If the appellant had in fact expended Le.30,000, it was his misfortune for which the respondent should not be made to suffer. Ridley J. stated the law correctly in H. DAKIN & CO. LIMITED v. LEE (1916) 1 K.B. 566 when he said at p. 571:—

"..... that where there is a contract to do work for a fixed sum you are not simply to measure and value the work actually done; the proper course is to deduct from the contract price the cost of the work which has not been done."

Learned Counsel for the appellant also submitted that the Court of Appeal erred in basing their assessment on January 1971 costs. He said that the assessment should have been based on the costs in July, 1969 the time of the alleged broach. With respect, I do not agree with Counsel's submission. A similar argument was advanced to and accepted by the English Divisional Court in MERTENS v. HOME FREEHOLDS CO. The question in that case was whether the measure of damages for breach of a building

contract should be fixed in the year 1916 when the breach took place, or in the year 1919 when the employer was allowed to complete the work and by which time the price of all building materials, work, wages and labour had increased enormously. The Court of Appeal reserved the decision of the Divisional Court: see (1921) 2 K.B. 526. Dealing with the question of the proper time for fixing the measure of damages, Lord Sterndale M.R. said at p. 534:

"The Official Referee has given to the plaintiff the amount that it cost him when he was allowed to do 'the " work in 1919. The defendants say that either he is entitled to nothing, or that if he is entitled to anything the measure of damages ought to be fixed in the year 1916. The Divisional Court have adopted the defendants' contention. I cannot agree with them. The first particular in which I differ from them is that I do not think they ever looked at the contract in the right way. They have considered the contract as if it were one to deliver goods in September, 1916 — a contract to deliver a roofed house on the ground In September, 1916 — and what they have said is, that all that the plaintiff is entitled, to is the difference between the price of the work, in fact, done by the defendants through Lawrence and .the price of a roofed house in September, 1916. That is to say, they have treated the contract as if it were one for the sale of goods and have held that the measure of damages is the difference between the market price of the day of what the plaintiff ought to have had and what he got. In [p.196] my humble opinion that in on entirely wrong way of looking at the contract. There is no contract to deliver goods, and there is no market price for a roofed house.

And he continued at p. 535

"But the building owner must set to work to build his house at a reasonable time and in a reasonable manner, and is not entitled to delay for several years and then, if prices have gone up charge the defaulting builder with the increased price."

And Warrington, B. H said at pp. 58-539

"The Divisional Court has substituted for the measure of damages adopted by the Referee what, with all respect, appears to me to be an incorrect measure of damages — namely, they have treated the contract as if it were one for the sale of goods and have held that the plaintiff is entitled to the difference between the value of the thing he got ft the material time — that is so say, when the breach was committed — and the value of the thing which he would have got if the defendant; had done his duty. In my opinion that is not the true measure of damages in a contract of this kind."

I think that these dicta state the right measure of damages the proper time at, which the damages should be measured in contracts such the one in the instant case. Of course, what is reasonable time in which the employer should complete the work would depend on the circumstances of each case. What then were the circumstances in the Instant case? The breach occurred in July, 1969 but the appellant refused to hand over the keys of the building, and consequently the respondent could he gain access to the building. According to the evidence, up to October, 1970 the keys were still in the possession of the appellant (See Ex. N) and up to 8th February, 1972 when the appellant was being re-examined h admitted that some of the keys were still with him. It is not revealed it by the evidence when some of the keys were handed to the respondent.

But even assuming all the keys had been handed over in October, 1970, three months (i.e. up to January, 1971) would in the circumstances be a reasonable time within which to complete the building. In my judgment the Court of Appeal applied the right measure of damages, and therefore this Court should not interfere with the award.

(SGD)

E. LIVESEY JUSTICE OF SUPREME COURT

CASES REFERRED TO

1. Lee v. Alexander (1883) 8 App Cas 853 at pages 869 and 870.

2. Throckmerton v Tracey 75 ER page 222;

3. Wilson v Short

4. R v Martin 7 C & P 549

5. Spawforth v Alexander. 2 Espinasse 621

6. R. v Boardman 2 Moore & R

7. Skife v Jackson (1824) 3 B and C. 421

8. R v Harbin

9. Falok v Williams. (1900) A C 176 P C

10. Scammell v Ouston (1941) 1 All E R page 14

11. Hutton v Watling (1948) Ch 398 at p 403/405

12. Caddick v Sikdmore (1857) 44 E K 907

13. Penn v Simmonds (1971) 3 A C R 327/240

14. Nathaniel Stuart v Lawrence Pardoe (1963) 1 WLR p 677.

15. Charles Richards v Oppenhaim (1950) 1 K B 616 C A

16. Crawford v Toogood (1879) 13 BP 153

17. Hymans (1920) 3 K B 475)

18. Jones v St John's College, Oxford, (1870) L R 6 Q B 116 at page 127

19. Philips v Ward (1956) 1 All E R 874 C.A

20. Viscount Haldane L C in British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Rys Company of London Limited (1912) A C at p. 689

21. Mertons v Home Freehold Company Limited (1921) 2 KB 526

22. Davis Contractors Limited v Fareham U D C (1956) A C 696 729

23. Penn v. Simmonds (1971) 1 W.L.R. 1381 H.L.

24. H. Dakin & Co. Limited v. Lee (1916) 1 K.B. 566

ROYAL EXCHANGE ASSURANCE LTD. v. TOUFIC DAZZY

[CIV. APPEAL NO. 1/72] [p.80-146]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 17 OCTOBER 1973

CORAM: MR. JUSTICE S.C.W. BETTS, J.S.C.

MR. JUSTICE PHILIP BRIDGES, C.J., GAMBIA

MR. JUSTICE E. LIVESEY LUKE, J.S.C.

MR. JUSTICE S. J. FORSTER, J.S.C.

MR. JUSTICE N. E. BROWNE-MARKE, J.A.

ROYAL EXCHANGE ASSURANCE LIMITED — APPELLANTS

AND

TOUFIC DAZZY — RESPONDENT

JUDGMENT

Cyrus Rogers-Wright Esq.)

S.H. Harding Esq.) For the Appellants

S.N.K. Basma Esq.)

J.H Smythe Q.C.) For the Respondent

Miss Olive Taylor)

A.L.O. Metzger Esq.)

[p.80]

JUDGEMENT ON THE 17TH DAY OF OCTOBER 1973

BETTS, J.S.C.:

This is an appeal from the Court of Appeal against the judgment of that court (Cole, C.J., Harding and Davies — J.J.A) confirming a grant of an award of Le9,490.41 cents (damages and costs) together with interest of 6% per annum form the date of the accident, 14th July, 1966 to 21st August, 1970 the date of judgment. This action arose from a motor traffic case which started in the Magistrate's Court, Kono, in which Sahr Kissi Kondewa was charged with several offences including driving a vehicle "without first obtaining a licence to do so". He pleaded guilty to that charge and was fined Le100 or three months imprisonment in default. After Kondewa's conviction Toufic Bazzy who was injured as a result of the accident brought an action for damages against one Sorie Mansaray, the insured, and the driver Kondewa in the High Court then Supreme Court. On the date of the accident 14th July1966, the vehicle WU 809 was insured with the Royal Exchange Assurance Company Limited. Judgment was given for the Plaintiff in the sum of Le6,500 (Six Thousand Five Hundred Leones) with costs which were taxed at Le2,990.41 (Two Thousand Nine Hundred and Ninety Leones and Forty-one cents) and interest. The Plaintiff notified the defendants about the judgment against the insured and the driver. The judgment remaining unsatisfied, the Plaintiff thereupon successfully sued the Royal Exchange Assurance Company [p.82] Limited for the recovery of the judgment debt. The Royal Exchange Assurance Company Limited appealed to the Court of Appeal which dismissed the appeal. It is this decision that the Royal Exchange Assurance Company Limited appealed against to this Court. The Appellants/Defendants argued that the Court of Appeal was wrong in law in their construction of Sections 9 and 11 of the Motor Vehicle (Third Party Insurance) Act, Chapter 133 of the Laws of Sierra Leone. They argued in effect that in the particular circumstances of the accident, they are not obliged in law to satisfy the judgment in favour of the Respondent. Chapter 133 of the Laws of Sierra Leone (hereinafter referred to as the Act) makes provision for a Third Part who suffers death or injury as a result of a motor vehicle accident, or the dependants in the former case, to seek redress, if necessary in the Courts of the land against the owner of the vehicle and/or an insurance company. The provision is entitled "An Act to make provision against third part risks arising out of the use of motor vehicles."

The effect of the argument on behalf of the Appellants/Defendants is that on a proper interpretation of Section 9 of the Act, the Respondent/Plaintiff should not have been causgt5 by the condition contemplated by Section 9 and therefore ought to be outside the scope of the policy under this Act and no entitled to the benefits arising out of an independent right of action against the Appellants/Defendants' Company, contained in Section 11(1), [p.84] covering its was the policy should be issued by a recognised insurer, and a cognisable person or classes of person to be covered by the policy. The policy required under the Act is not, quite prudently, left exclusively with the insured and the insurers, some restraints being statutorily brought to bear on their normal capacity to contract. One of the conditions is set out in Section 9 of the Act. It is of great moment in this case and I think it is

necessary to set it out in extensor. It states that "Any condition in a policy or security issued or given for purposes of this Act, providing that no liability shall arise under the policy or security or that any liability shall so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall, in respect f such liabilities as are required to be covered by a policy or security issued for the purposes of this Act, be of no effect."

Counsel for the Appellants/Defendants strenuously argued against the interpretation given to this section y the Court of Appeal which help that "Any condition in a policy or security whether considered as precedent or subsequent if caught within the ambit of that section, Section 9, shall be of no effect." The judgment of the Court of Appeal went on to spell out the material portions of the section and ended with the words "In other words."

[p.85]

The Act provides is Section 3 (1) "that no person shall use, or cause of permit any other person to use a motor vehicle unless there is in force in relation of the user of that motor vehicle by such person or such other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the provisions of this Act." The Act imposes a criminal section for a contravention of this provision in order to impress the imperative and comprehensive character of its specific requirement. Imperative conditions are also set out in Section 7(1)(a) and (b) of the Act. (a) Provides that the Insurer must be approved by the President and (b),which is more immediately relevant to the issue states that, for the purpose of this act, the insurance policy must "insure such person or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle covered by the policy",. This is a statutory mandatory condition and I think it is relevant to point out here that impliedly the law empowers the insurers to exercise a right of restricting the persons or classes of person they would cover. To achieve the purpose of the Act there are certain fundamentals necessary. These outlined are:— No motor vehicle is to be used on the highway without an insurance policy [p.86] the section in my view embraces two separate and distinct types of conditions, namely, those which have the effect of negativing liability ab initio upon the breach of a condition and those which made the negativing of the condition conditional upon the doing or omitting to do some specified thing after the happening of the event giving rise to a claim under the policy or security". Obviously the construction applied is disjunctive with each type of condition being independently "of no effect" and completely ignoring the appropriate time when that provision should take effect.

It is important at this stage to enquire what effect such a construction will have on Sections 10 and 11(1) of the Act. Section 10 lists certain events which is included in a policy purporting to restrict the insurance of a person insured should be considered of no effect were a certificate of insurance has been issued. Section 11(1) while conferring a right on third parties to institute independent action against insurers that right can only be exercised after judgment is obtained against the insured. According to the construction referred to before, any condition in a policy of insurance will be absolutely void (and Section 10 giving specified exceptions would be necessary.) if this construction was correct Section 11(1)

would not have made it obligatory on insurers to satisfy a judgment only after a successful action against the insured.

[p.86]

Counsel for the Appellants/Defendants argued that the construction which ought to be given to Section (should be conjunctive. The words "Any condition in a policy or security issued or given for the purpose of this Act providing that no liability shall arise under the policy or security" and "that any liability so arising shall cease in the event of some specified thing being done or omitted to be done," should be controlled by the words "after the happening of the event giving rise to a claim under the policy or security". Construed in this way one particular class of events, if included in the policy will be avoided statutorily. That class of events, is all conditions arising "after the event giving rise to a claim". In point of time those conditions become operative only after the accident and have no reference to events occurring either before or contemporaneously with the event giving rise to the claim. There also appears grammatical support. Black's Law Dictionary, 4th Edition at p.334 defines a comma as "A point used to mark the smallest structural division of a sentence, or a rhetorical punctuation mark indicating the slightest possible separation in ideas of construction." As against similar legislation in Kenya and the United Kingdom the use of the comma in Section 9 is most restrictive coming for the first time after the words "or security shall" suggesting not even the slightest separation in ideas or construction as conceivable in [p.87] the Kenya and United Kingdom Legislations. This view is supported by McGillivray on insurance Law, Vol. 2 5th Edition p.1010 paragraph 2080. It is stated at p.1011 "in the event of some specified thing being done or omitted" apply to "no liability shall arise" as well as to "any liability to arising shall cease." See Gray v. Blackmore (1934) 1 K.B. 95.

In the United Kingdom legislation there are three commans whilst there are four in the Kenya. For further support I make reference to the case of Appeal, Ghana — Civ. Appeal No. 165/71. Adjoa Pokuia — Plaintiff/Appellant v. State Insurance Corporation, Kumasi, Defendants/Respondents. I borrow the words of A.N.E. Amissah J. A. used in the course of his judgment, on the construction of Section 8 of their Act which is similar to our Section 9 of the Act. He stated "HARDY V. MOTOR INSURERS' BUREAU (1964) 2Q. B. 745 teaches us no more that this that where the user of the vehicle is covered by compulsory insurance a victim of an intentional criminal act any recover under the policy even though the perpetrator of the act himself cannot as a matter of public policy take advantage of his act. "He goes on to say that "Hardy's case does not, and cannot be taken to say that where the user is not covered, as it was not in the instant case, the third party can get on to the Insurance Company. Our duty in this case calls for the construction of an act, not a non-existent agreement (Motor Insurance Bureau [p.88] in England)". Further along he said "There is, no reason why the legislature should not choose to distinguish between conditions excluding liability dependent on occurrences after an accident on the one hand and those where the occurrences are before the event, takes place." Later he said" I am convinced that this simple distinction determines the approach of Section 8 of the Act — (our Section 9 of Chapter 133) to the issue. It must be remembered that though the objects of the Act as set out is to make provision for the protection of third parties against risks arising out of the use of motor vehicles and for purposes incidental thereto" it did not in fact provide a comprehensive cover for third parties in all cases.". In addition Halsbury's Laws of England 3rd Edition Vol. 22 at P. 372 paragrpah 763

states that “Accordingly it was provided that certain conditions in the assured’s policy were to be of no effect in relation to claim by a person to whom an assured was under a compulsorily insurable liability. The conditions to that extent avoided are any condition providing that no liability shall arise, or that any liability which has arisen shall cease, in the even of some specified this being done or omitted to be lone, after the occurrence of the event giving rise to the claim.” Halsbury goes on to say that “If, therefore my admission of liability is made after an accident contrary to a condition in the policy or if contrary to any coalition in the policy, [p.89] proper notice of the accident is not given to the insurers, the injured party is not affected so far as his claim is concerned. REVEL V. LONDON GENERAL INSURANCE COMPANY (1934) All E, R p.744.” these references indicate that the construction given to Section 38 of the R.T.A. (1930) of the United kingdom which is similar to Section 9 of the Act tends to stress a continuity instead of a separation of ideas. In the circumstances it would seem to me more appropriate in view of the logical — in terms of the relationship and sequence of the provisions- grammatical and textual support that such a construction should be the one applicable to all and any conditions which do not occur after the happening of the event giving rise to a claim. I am inclined to accept the reasoning and construction founded upon it.

Counsel for the Respondent/plaintiff contended that with regard to section 9, the argument advanced by the Appellants/Defendants was that “Any condition in a policy issued etc. “was not a definition but what it says a condition — and in that case would be caught by Section 9. He relied on the dictum of the learned Chief Justice in the instant case and the case of NEW INDIA INSURANCE COMPANY v. CROSS (1966) E.A.L. Report page 90, and particularly on the judgments of Newbold V.P. and Crabbe J.A. He further argued that this section should not be given a narrow construction but one which will accord with the intention of the legislature.

[p.90]

With respect I have already stated that I accept and adopt the reasoning advocated on behalf of the Appellants/Defendants and therefore I do not support the constructions put on the section by the learned Chief Justice. It is my opinion that the construction advanced by both Newbold V. P. and Crabbe J. A. are substantially based on a complete disregard of the history of the development of the Insurance (motor vehicle Third Party Risks) provisions. It appears to me that the several United Kingdom acts dealing with the problem — 1930, 1934, 1946 and 1960 constitute a gradual progressive improvement of the rights of third part and corresponding incursions into the preserves of a sector of the commercial world. The several acts are in fact an admission of the inadequacy in providing an omnibus set of legislation for the protection of third parties which will at one and the same time afford a reasonable measure of contractual freedom for investors and those engaged in the business of insurance. It is obvious that hose acts are not absolute and in the nature of the circumscribing circumstances they cannot be disinclination to grapple with the fundamental questions which arise. These are, if the provision of the third party risks are not absolute in the sense that they cover every and any liability incurred by the use f mother vehicles on the highway, how for a short are they from affording complete protection for third parties? What compulsory rights will be awarded insurance companied [p.91] for their total surrender?’ The Answered, in my opinion, are matters for the legislature. The duty of the Courts is to construe? Acts as they find them and not to substitute their

considered opinion for the intention of the legislature however deserving and humanitarian the cause may be.

Having determined the construction of Section 9 in this way I should now proceed to examine Section 11(1) in order to discover to what extent, if at all, that section ensures to the benefit of third parties. Counsel for the Respondent/Plaintiff in the course of his address in reply to Counsel for the Appellants/Defendants observed that his learned friend did not attempt to construe Section 11(1) of the Act. In spite of the observation he himself did not attempt to construe Section 11(1) of the act. In spite of the observation he himself did not over-reach his attempt to do so. He however said that to get at the real meaning of Section 11(1) it should read together with subsections 5 of the same section. Reproduced 11(1) says "if after a certificate of insurance has been issued favour of a person by whom a policy has been effected or a certificate of security has been issued in favour the person whose liability is covered by such security judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of the Act, being a liability covered by the terms of the policy or security, is obtained against any [p.92] person insured by the policy or whose liability is covered by the security, as the case may be, then notwithstanding that the insurer or giver of the security, as the case may be, the insurer of giver of the security shall, subject to the provisions of this section, pay to the persons entitled to benefit of such judgment any sum payable there under in respect f costs and any sum payable by virtue of any law in respect of costs and any sum payable by virtue of any law in respect of interest on that sum or judgment." Sub-section 5 says: "In this section liability covered by the terms of the policy or security' means a liability which is covered by the terms of the policy or security' means a liability which is covered by the policy or security" means a liability which is covered by the policy or the security; as the case may be, or which would be so covered were it not that the insurer or the giver of the security' means a liability which is covered by the policy or the security as the case may be, or which would be so covered were it not that the insurer or the giver of the security is entitled to avoid or cancel or has avoided or cancelled the policy or the security, as the case may be."

To my mind Section 11(1) is extremely important; so important that it can be maintained to be the focal point of the Act. It turns on practically every functional aspect connected with the act. For example 7(b) ensures that "such person or classes of person as may be specified in the policy must be insured against any liability which may be incurred by his or them. The liabilities of course arise from the terms and conditions which may be incurred by him or them. The liabilities of course arise from the terms and conditions which together with other requirements constitute the aggregate of the policy.

[p.93]

7(b) would therefore cover those liabilities in respect of the death or bodily injury caused by a designated person or designated class of persons specified in the policy and whose vehicle is covered by the policy as well. It is however not usual that despite this mandatory demand of the sub-section some policies issued contained provisions limiting these to whom the privilege of the designation or class extend and thus attempting to frustrate the intention of the Act. As a result, the courts have had to be resorted to determine whether these exclusion clauses should be construed subject only to the intention of the Act or, when the occasion arises, independently of it. Some Courts have favoured

deciding that such exclusion clauses should not frustrate the intention of the legislature in the case of NEW GREAT INDIA ASSURANCE v. CROSS while others have approached it as a simple contractual arrangement between the parties. There are two cases from Ghana holding the latter view. This state of uncertainty is very disturbing especially as it vitally effects the rights of the innocent third party. There is no doubt that the legislature has done practically every thing to protect him from the wiles of the insurers but the calamity which could befall him could as in this case come from the other end of the spectrum — the insured, and generated by, one could say, a not un-natural human factor.

Section 11(1) contemplates also other provisions contained in the act and fuses all the various elements making them functional. The section makes and as reference to the [p.94] Act in relation to the satisfaction of a judgment. It says — "the person whose liability is covered by such security, judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of the Act." The Section then goes onto the liability covered by the terms of the policy and also refers to those matters which are "subjects to the provisions of this Section." The liability as is required to be covered by a policy or of security issued for the purposes of the Act and that covered by the terms of the policy are both subject to provisions of avoidance and cancellation. The similarity however ends there. Liability arising under the provisions of the Act are fixed and unreliable, concept of course by legislation and avoidance or cancellation is generally applicable. A liability which arises under the terms of the policy on the other hand would necessitate a distinction between a liability to which the words "subject to the provisions of this section", does apply. We find that whenever a liability arising under the policy to which the words "subject to the provisions of the section" apply such a liability could be avoided or cancelled. Where for instance, some arrangement is made between the insured and the insurer by which the jurisdiction of the Court to enforce the rights conferred on Third parties by this section is ousted, such agreement, being [p.95] in violation on the provisions of the section, could be declared void. The court has a duty to satisfy judgment obtained by persons duly insured against third party risks. Any condition therefore contained in a policy, to deprive a third party from obtaining a judgment by the court of injury or death suffered would be liable to be avoided or cancelled and could even be avoided or cancelled if the agreement had taken effect. On the other hand we find some claims giving rise to liabilities not caught within the scope of this section which though they are made on a party and party basis are not restricted by the section but are allowed to be construed in the same way as any ordinary contract. I am of opinion that though Section 11(1) empowers the third party as distinct from the insured, to institute an independent action, this right is subject to conditions already stated which impose a reasonable amount of restriction on the exercise of the right. If there is no limit in any manner as to how the vehicle is used, or in other words if there is no condition governing the kind of liability which might arise out of the use of the vehicle as there was in the case of IN RE Williams (Deceased, Konneh (Deceased) v. Official Administrator, Williams, Kargbo and Caledonian Insurance Company, reported in 1964-1966 A.L.R. S.L. 511 at p.516, in which Sir Samuel Bankole-Jones, President Court of Appeal, held that the Caledonian Insurance Company was not liable where the driver was driving outside of the scope of his employment [p.96] as continued in the policy. If this were not so the liability of the insurer will be inescapable. This to my mind is obviously not the intention for the section which seeks to provide order and not chose in the community.

It was conceded by both sides that a certificate of insurance was in fact issued to the insured although it was not produced at the trial. There is no contention on that point. A judgment has also been obtained against the insured and the usual notification to the insurers. Those conditions having been satisfied the Third Party under the Act has acquired an independent right of action against the insurers. The Appellants/defendants have argued, quite rightly in my opinion, that before a liability for which a judgment has been obtained arising sunder this section can be sustained, two conditions he nature of conditions precedent must be fulfilled (a) satisfaction of the conditions as required by the Act (b) satisfaction of the conditions of terms of the policy. While Section 11(1) highlights the conditions under the Statute, Sub-section 11(5) stresses those under the policy by defining them. It appears to me that this distinction advocated above by the Appellants/Defendants is inherent in the Act and much difficulty might have been avoided by looking at the Act itself. The case of SULAIMAN SEISAY v. WHITE CROSS INSURANCE (1961) S.L.L.R. p. 162 at p. 164 was citied in support of this proposition. It was further urged [p.97] that this section should be read together with Section 7(1) (b) to ascertain those who are covered by the policy. The case for JUBILIEE ASSUANCE CO.LTD. v. OHBAKE Civil Case 548 of the Kenya High Court based on Sections 8 and 10 of their insurance (Motor Vehicle Third Party Risks) Act, reveals that the provisions of these sections are similar to our Sections 9 and 11 respectively. In the course of his judgment Farrell J. supported the proposition advocated by the Appellants/Defendants. He said "such being the facts, the issued which arise fall to be decided in the light of the construction to be given to the terms of the policy and to the provisions of the Act." In that case obtaining a judgment, as under Section 11(1) of our Act is a pre-condition to the settlement of by liability which might arise under the Act. The Plaintiffs settled the claim without a judgment having been obtained when there was no compulsion on them to pay the third party and the Plaintiffs had no right under the policy to settle the third party's claim after repudiating liability to the Defendant. I would draw particular attention to the ultimate portion of Ferrell J.'s judgment that "the plaintiffs had no right under the policy to settle after repudiating liability to the defendant." The Appellants, in this case, have consistently denied liability on the ground that the insured was in breach of a term of the policy. According to the construction which I have placed on Section 11(1) and Subsection 11(5) the conditions in the policy visa-a-vis the parties must be [p.99] that could be the result of strict interpretation of Section 207(1) of the United Kingdom Road Traffic Act (1960). As we have no provision whatsoever acting as a palliative in this respect the insured may sometimes be exposed to the inflexibility of the construction which could be put on our 11(1) of the Act. Kenya and Ghana suffer the same disability as Sierra Leone because none of us enjoy the coverage offered by the Motor Insurance Bureau of the United Kingdom. Our Legislations (the three mentioned states), dealing with third party risks, emanate from the same source and are similar among themselves and with the original. Sections 8 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act of Kenya and Sections 8 and 10(1) of the Motor Vehicle (Third Party Insurance) Act of Ghana are similar to our Sections 9 and 11(1). I have already referred to the case Jubilee assurance Co. Ltd. v. Ombake in which it was held that the "plaintiffs had no right under the policy to settle after repudiating liability to the defendants'. In Ghana, quoting a reference made by Amissah, J.A in his judgment in the case of Adjoa Pokua v. state Insurance Corporation 165/71, he cited the State insurance Corporation v. Afua Mensah, (civil appeal No. 76/67). He said in the course of his judgment, "the liability must in fact be covered by the terms of the insurance policy but for the fact that the insurers are entitled to avoid or cancel or have avoided or cancelled the policy. If [p.100] though the liability is one which should be

covered by insurance it is not in fact so covered no insurance company is liable." The passages of the decisions referred to, do support the submission advocated by Counsel for the Respondent/Plaintiff.

In further support of his argument he again referred to the case of New Great India Assurance Co. and cited the case of John T. Ellis v. Hinds (947) 1 A.E.L.R.. pp. 337 and 338 to establish that his submission is and had been for some time in the past viewed with approval by the Court. In my view that case has not a complete applicability to the instant case. The dominant considerations in that case were the criminal aspect and the application f constructive knowledge. In the instant case the question is whether or not the policy covered a driver not holding a current driving license. The user of the vehicle was never a point of contention as was in the case cited. I am of opinion that where a policy has been obtained covering the use of a vehicle on the highway, prudence would dictate that the insured having determined the manner in which he intends to use his vehicle should take out a policy to cover that particular use. Branson J. observed in GRAY v. BLACKMORE "I see nothing in the statute which prevents an under-writer and an assured from agreeing to a policy with any conditions they choose; but if the assured takes the car upon the road in breach of these conditions it cannot throw a greater obligation upon the under-writer.

[p.101]

To my mind the construction which the respondent/Plaintiff seeks to put on Section 11, that if the statutory provisions in favour of a person whose liability as covered by a policy or security for the purposes of the Act, already referred to, are satisfied, then the insurers are obliged to make payment for that judgment together with costs and incidentals, cannot be maintained. McGillvray on Insurance Law 5th Edition Vol. 1 at page 340 states "Policies of Insurance are to be construed like other written instruments. There are not peculiar rules of construction applicable to the conditions and clauses in a policy which are not equally applicable to the terms of other contracts. The conditions are to be construed fairly between the parties, and the Court will endeavour to ascertain their meaning by adopting the ordinary rules of construction. HART v. STANDARD MARINE (1889) 22.Q.B.D. 499, 501."

Halsbury's laws of England, 3rd Edition Vol. 22 at page 212 reads, para. 401.

"It is not the function of the Court to make for the parties, by a process of construction, a reasonable contract which they have not made for themselves. If the words are clear, precise, and unambiguous, effect must be given to them, however unreasonable the result may be."

It cities the case of Joel v. Law Union and Crown Insurance Company (1908) 2.K.B. 863 in support. Bearing these basic requirements in mid I am to observe that four conditions emerge as a result of the construction of the Act. By condition I mean whatever the Act requires and whatever is agreed between the parties to be [p.102] incorporated in the policy. They are:—

(1) The conditions contemplated by Section 9 of the Act, that is liability arising after a event giving rise to claim, excluding conditions precedent or contemporaneous.

(2) Conditions void ab anitio arising under Section 10 of the Act, which restrict but do not avoid the policy.

(3) Conditions in the policy which are not caught by (1) and (2). These are those conditions which the law does not preclude from being made on a party and party basis and not subject to the provisions of Section 11(1), including conditions precedent or contemporaneous.

(4) A policy which is inter-party and subject to the provisions of Section 11(1) and may be conditions precedent or contemporaneous."

The provisions contained in Conditions (1), (2) and (4) above have been examined. These coming under condition (3) will now be considered.

The policy produced at the trial, Exhibit "B', prepared in the usual form, contains, as part of the policy and which comes under (3) above, a schedule with a proviso stating who a driver is. Driver therein is (a) "The insured; the insured may also drive a motor car not belonging to him and not hired to him under a hire purchase agreement. (b) any other person who is driving on the policy-holder's order or permission — provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the motor car or has been so permitted in accordance with the licensing or other laws or regulations to drive the motor car or has been so permitted and is no disqualified in that behalf from driving such motor car." Counsel for the Respondent/Plaintiff argued that the provision of a disqualification having been included in the exclusion clause in the policy all the various alternatives must [p.103] be proved before the avoidance could come into operation. This is a point which has arisen ex improvise and was taken at the latest possible stage of the proceedings. It could have been canvassed at an earlier stage of the proceedings but even then I am inclined to doubt its efficacy in the civil sector. What to my mind is important is that up to the Supreme Court Stage the case had been fought on the basis that the driver was unlicensed; a fact which had been conceded by the Counsel for the Respondent/Plaintiff himself. It is significant that the attitude adopted by Counsel for the Plaintiff both at the High Court and Court of Appeal was that there was no contention that the driver was unlicensed and I would think that it is not only too late to change stances before the Supreme Court but rather unfair to all concerned.

What is commonly referred to in policies as avoidance clause in unusually found in that portion where the law does not forbid an exercise of contractual freedom between the parties, that is under condition (3) referred to above. As a result of the interpretation given by me to Section 9 of the Act, I have excluded as applicable any condition which gives right to a liability either precedent to or contemporaneous with an event not happening after the occurrence which gives right to a claim. It is however necessary again, in relation to this construction, to refer to the case of NEW GREAT INDIA [p.103 INSURANCE CO. v. CROSS in which both Newbold V.P. and Crabbe J.A. gave a wide interpretation to, "Any condition in a policy or security etc. as being independent of the qualifying phrase "after the happening of the event giving rise to a claim etc." The effect of such a construction was to give efficacy to "Any condition" which would in fact included the avoidance clause and render the insurance company liable even though the driver was unlicenced. That case originally came up for hearing in

Nairobi on the 17th and 18th June and the 30th July, 1965. Crabbe F.A. was then uncompromising in his attitude. He said "I agree with the conclusion of the learned Vice President but as there is a difference of opinion among us on a matte of such public importance, I feel I ought to state my reasons in my own words." What he says next is very important. "The sole point turns entirely on the exception clause in the policy." He concluded by saying, "Therefore since the use of the car on the road in the particular circumstances of the case was a user covered by a policy of insurance in respect of third party risks which complied with the requirements of the Insurance (Motor Vehicle Third Party Risks) Act, I think that the relevant exception clause does not relieve the defendant company from the liability of satisfying a claim brought under Section 10(1). There is no doubt that the use of a [p.105] vehicle uninsured under the Act is almost sacrosanct but it is, in my view, amazing that conditions governing that use can be so constantly overlooked as a result of our Section 11(1). What is most significant is the complete change of attitude of Crabbe J.A., who in 1971 was Acting Chief Justice, Ghana. This change of attitude is manifested in the decision of the Court of Appeal, Ghana in the case of Thomas Sosu (2) Madam Yaa Akyaa, Plaintiffs/Respondents and Another. The Plaintiffs were passengers on a bus traveling from Manpong to Kumasi. The vehicle ran off the road, landed in a ditch and the two plaintiffs were injured. The trial judge found the 2nd defendant who was the driver of the said vehicle negligent — that he drove to fast into the middle of the road. On seeing a vehicle, the driver, one Kwame Ampofo, coming from the opposite direction, he served suddenly and applied his brakes. The vehicle as a result ran off the road and landed in a ditch. The two plaintiffs were injured. The first defendant in the suit was the owner of the vehicle. Judgment was given against the 1st and 2nd Defendants jointly and severally. The 1st Plaintiff was awarded damages in the sum of ¢1200 and the 2nd Plaintiff ¢2400. By an originating summons brought under Section 10(1) of the vehicles (Third Party Insurance) Act, 1958, the Plaintiffs/Respondents sough to recover the damages awarded by the Court from the Defendants/Appellants as insurers [p.105] of the bus in question. There was an agreement for the hire-purchase of this vehicle between one Kwasi Addae who was insured with the Defendants/Appellants and one Kwame Ampofo. The purchase price had been paid less ¢10. The Defendants/Appellants did not know of this agreement neither did they know or had any contractual relationship with Ampofo. Under the policy the only person entitled to drive was Kwasi Addae. The Insurers repudiated liability and said that they were responsible only when Kwasi Addae was driving. The Court held that the Plaintiffs/Respondents could recover under the policy only when Kwasi Addae was driving and referred to HERBERT v. RAILWAY PASSENGERS ASSURANCE COMPANY (1938) All E.R. p.650. the Court went on to point out that the learned trial judge failed to consider that the owner's right under the policy ceased once the vehicle, which was the subject matter of the policy, was sold. See also ROGERSON v. SCOTISH AUTOMOBILE AND GENERAL INSURANCE CO. LTD. L.T.R. Vol. 146, p. 25 and p.27. The judges who sat over that case were Crabbe Ag. C.J., Lassey J.A. and Juagge J. A. The decision was unanimous and as far as Crabbe Ag. C.J. was concerned his outlook had completely reversed. McGillvray on Insurance Law 5th Edition Vol. 2p. 1001 put the position very clearly at paragraph 2065 as follows: "Motor Vehicle policies frequently contain clauses restricting the liability of insurers in various ways; e.g. the indemnity afforded may be limited by reference to the driver of the vehicle or [p.106] the purposed----[sic] for which it is used. After some conflict of opinion it has now become clear that such a policy complies with the Act pro tanto; that is to say, that provided that the liability provided against is that specified by the Act, the vehicle my lawfully be used within the limits laid down by the policy, although an offence will be

committed by any one who uses it, or causes it to be used outside those limits." The portion I would like to stress is "provided that the liability provided against is that specified by the Act, the vehicle may lawfully be used within the limits laid down by the policy." In the course of his judgment A.N.E. Amissah, J.A. cited the recent cases of OWUSU v. ROYAL EXCHANGE ASSURANCE AND STATE INSURANCE CORPORATION v. AFUA MENSAH, both of which I have not had the privilege of reading, and THOMAS SOSU & ANOTHER v. ROYAL EXCHANGE ASSURANCE of 4th May 1970. The case in which these citations were made was ADJOA POKUA v. STATE INSURANCE CORPORATION of 20th December, 1972. The appellant in an action for damages against one Bandoh had obtained judgment for ¢2600. At the time he had an insurance policy issued by the respondents, the state Insurance Corporation, covering the use of the vehicle. The appellant, as in this case, sued the respondents for the payment of the ¢2600 awarded against Bandoh. The Respondents disclaimed liability on the ground that the vehicle was being driven at the time of the accident by some person other than Bandoh's driver, Kwame Amoah [p.108] who was the named driver in the policy. Judgment was given by the Circuit Court of the respondents. The point at issue was that the policy was inoperative if the term a driver was not observed. In the Court of Appeal, Ghana, as against the judgment of Bentsi-Enchill J.S.C. both Ammissah J.A. and Sowah J.A. confirmed the decision of the Circuit Court. In the instant case there has been a breach of a term included in the schedule to the policy by permitting an unlicenced driver to be the driver of the Vehicle WU 809 at the time when the accident occurred; and which gave rise to the liability the subject matte of this claim. In the case ADJOA POKUA v STATE INSURANCE COMPANY referred to before, the Court held that the policy involved was rendered inoperative as the vehicle was being driven at the time of the accident by some person other than Bandoh's driver Kwame Amoah who was the named driver in the policy. In the Pokua case and also in the instant case the underlying principle is that a broach of an exclusion or exception clause had occurred resulting eventually in an action in each case. As a result of the breach in the Pokua case the policy was declared inoperative. I am of opinion that decision should be followed in this case and my opinion is further strengthened by the decisions in the cases of REVELL v. GENERAL COMPANY LTD. (1954) 1 A.E.R. p. 573 Jones v. Kenyon (1952) 2 All E.R. p. 726 and Passmore v. Vulcan 1956) L.T.R. The Appellants/Defendants were urging this appeal [p.109] on the ground that the award to the Respondent/Plaintiff of damages, cost and interest amounting to Le9,490.41 cents was wrong because the insured was in breach of a term of the policy by allowing an unlicenced driver to drive the vehicle WU 809 which was involved in an accident as a result of which Toufic Bazzy was injured. I agree and for reasons already stated would allow the appeal, and reverse the judgment of the Court below with costs in this Court below with cost in this Court and the Courts below to be taxed against the Respondent/Plaintiff.

I would wish to observe that this is no indication of lack of sympathy or even or harshness towards the Respondent/Plaintiff. It is in my opinion that no legislation, however generously devised, can provide total and absolute protection for third parties. The insurance business is one which in characterized considerably by the element of chance. When once that clement is removed by the introduction of an Act which is absolute then the whole exercise becomes nugatory and the humanitarian service which the legislature intends to provide will be completely destroyed. This, I think, is the conclusion arrived at in the United Kingdom where the Motor Insurance Bureau has been created to relieve hardship in the nature of that which has currently engaged the attention of our Supreme Court. I do not think it could

be over emphasized that if the present position requires improvement the remedy lies with the Legislature and not with the Judiciary.

[p.110]

SGD.

SINGER C.W. BETTS

JUSTICE OF THE SUPREME COURT

I AGREE

(SGD) SIR PHILIP BRIDGES CHIEF JUSTICE OF THE GAMBIA (CONCURRING)

I AGREE

(SGD) E LIVESEY LUKE JUSTICE OF THE SUPREME COURT

I AGREE

(SGD) S.G. FORSTER JUSTICE OF THE SUPREME COURT

I AGREE

(SGD) N.G BROCHURE KARKE JUSTICE OF THE SUPREME COURT

[p.111]

LIVESEY LUCA J.S.C.

The issues raised in this appeal are of considerable importance to Insurers, Insured and the general public.

The Appellant Company are approved Insurers for the purposes of the Motor Vehicles (Third Party Insurance) Act, Cap. 133 (hereafter referred to as "the Act"). One Sorie Mansaray insured his Motor Car WU 805 (hereafter referred to as "the car") with the appellants for the period 6th December 1965 to 5th December, 1966 against inter alia "accident cause by or arising out of the use of the Motor Car against all sums including claimants costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person." The terms and conditions of the insurance were act out in a Policy of Insurance dated 4th January, 1966. The car was involved in an accident in Koidu Town, Kono on 14th July, 1966 as a result of which Toufic Bazzy the respondent sustained bodily injuries. At the time of the accident the car was being driven by one Sahr Kissi Kondowa. It is agreed by both parties that at the time of the accident Sahr Kissi Kondowa was an "unlicensed driver". On 30th April, 1968, the respondent instituted proceedings against Sorie Manasarya and Sahr Kissi Kono was claiming damages for the injures sustained in the accident and on 21st August, 1970 the High Court gave judgment in favour of respondent for Le6,500 damages and cost which word later taxed at Le2,990.410. Having

failed to recover the judgment debt from Sorie Mansaray and Sahr Kissi Kondewa, the respondent issued a write of summon against the appellants on 22nd June, 1971 claiming the judgment debt plus interest. In [p.112] their Defense, the appellants disputed liability on the ground that Sahr Kissi Kondewa was a liability on the ground that Sahr Kissi Konowa was an "unlicensed driver" and therefore the liability was not covered by the terms of the policy. The action was trial by Tejan J. (as he then was). The learned Judge gave judgment for the respondent and he gave what appears to be a summary of his reasons at the end his lengthy judgment. He said

"In the present case, the driver had no driving licence but at the time he drove the vehicle which injured the plaintiff, there was a policy of insurance which covered the use of the vehicle. Since the use of the vehicle in the particular circumstances of this case was a user covered by a policy of insurance in respect of third party risks which complied with the requirements of the Motor Vehicles (Third Party Insurance) Act, Cap. 133 (An Ordinance to make provision against third party risks arising out of the use of Motor vehicles) and following the principles in the authorities cited and particularly the case of THE NEW GREAT INSURANCE CO. OF INDIA LTD. v. LILIAN CROSS AND ANOTHER. I think that the "B" i.e. The Insurance Police does not relieve the defendants company from the liability of satisfying the claim under section 11 of Cap. 133."

The appellants appealed to the Court of Appeal against the decision of Tejan J. The appeal was heard by the Court of Appeal (Cole C.J., C.A. Harding J.A. and P.R. Davies J. A.) and judgment was delivered on 19th May, 1972 dismissing the appeal. The judgment was delivered by the learned Chief Justice and the other two Justices agreed with him.

The Court of Appeal held that at the time of the accident the car was being driven by a person (i.e. Sahr Kissi Kondowa) "caught within the ambit of the proviso to the definition of "Driver" in the schedule [p.113] to Ex. B…….. in that the driver was an unlicensed driver", but that the proviso was a condition, that section 9 of the Act inter alia rendered "any condition in a policy providing that no liability shall arise under the policy" of no effect, that the proviso was such a condition and wherefore the proviso was of no effect. Put succinctly, the Court of Appeal said in effect that although Sahr Kissi Kondowa was caught by the proviso yet the appellants could not rely on the proviso to repudiate liability because the proviso was a condition rendered of no effect by section 9 of the Act.

The important issues in the Appeal may be summarized thus:—

(i) Whether all conditions in a Policy of Insurance whether relating the events accruing before or after the happening of the event giving rise to a claim under the Policy, for death or bodily injury caused by or arising out of the use of the motor vehicle covered by the policy, are of no effect as against third parties.

(ii) Another a third party claimant against an Insurer for the recovery of a judgment debt obtained against the Insured in respect of death or bodily injury caused by or arising out of the use of a motor vehicle covered by the Policy which also covers liability in respect of death or bodily injury, is entitled to succeed irrespective of the terms of the policy.

Compulsory Third Party Insurance of Motor vehicles was introduced in Sierra Leone in 1951. The legislation introducing it, the Motor Vehicles (Third Party Insurance) Act Cap. 133, was passed in 1949 but it did not come into force until 1st April, 1951. The act incorporated certain provisions of two British Acts of Parliament i.e. the Road Traffic Act, 1930 and the Road Traffic Act, 1934 (hereinafter referred [p.114] to as "the 1930 Act" and "the 1934 Act" respectively). The answer to the first question formulated above turns on the construction of section 9 of the Act, which is in the following terms:—

"Any condition in a policy or security issued or given for the purposes of this Act providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall, in respect of such liabilities as are required to be covered by a policy or security issued of the purposes of this act, be of no effect:

Provided that noting in this section shall be so constructed as to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the insured or the giver of the security may have become liable to pay under the policy or the security and which have been applied to the satisfaction of the claims of third parties."

This section is substantially the same as section 38 of the 1930 Act. The material difference between the two sections is that in the British section there are commas after the word "ACT" where it first appears, and after the word "cease".

The contention of the respondent is that the provision in the policy, that liability shall only be covered by the policy if the car was being driven at the time of the accident by the Insured or by a driver as defined in the policy, is a condition rendered of no effect by section 9 of the Act. According to this argument, all conditions in a policy are rendered of no effect by the section. On the other hand it was argued by Council for the appellant that in the first [p.115] place the said provision relating to the driver of the car was not a condition within the terms of section 9 but classification of persons insured within the terms of section 7(1) (b) of the Act, and that, in any case, section 9 of the Act related only to a thing done or omitted to be done after the happening of the event giving rise to a claim under the policy.

The question then arises, is the provision relating to the driver of the car a condition? It is provided in section III of the Policy under the heading "General Receptions" that:—

"The Company shall not be liable under this Policy in respect of

(1) . . . . . .

(2) . . . . . .

(3) any accident loss or damage and/or liability caused sustained or incurred whilst any motor car in respect of or in connection with which insurance is granted under this policy is

(a) . . . . . .

(b) being driven by any person other than a driver."

It is also provided in section II (headed "Liability to Third Parties"), clause 3 as follows:—

"in term of and subject to the limitations of the indemnity which is granted by this section to the Insured the Company will indemnify and Driver who is driving who Motor Car on the Insured's order or with his permission provided that such Driver"

(a) is not entitled to indemnity under any other policy

(b) shall as though he were the Insured observe fulfill and be subject to the terms exceptions and conditions of this Policy in so far as they can apply."

[p.116]

And "Driver is defined in the schedule (which, it is not disputed, forms part of the policy) as follows:—

"Any of the following:—

The Insured.

The Insured may also drive a Motor Car not belonging to him and not hired to him under hire-purchase agreement.

Any other person who is driving on the policy holder's order of with his permission.

Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the motor car or has been so permitted or is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving such Motor Car."

I shall deal first with Mr. Rogers-Wright's argument relating to classification and for that purpose it is necessary to act out the relevant provision of section 7(1)(b) of the Act. The relevant act of the section which is copied from section 36 of the Road Traffic Act, 1930 reads—

"7(1) a policy of Insurance for the purposes of this Act must be a policy which

(a) . . . . . .

(b) insures such person or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle covered by the policy,"

Mr. Roger-Wright's argument is that the provisions in the policy (including the schedule) relating to the driver of the car merely specifies the "person or classes of person" insured within the meaning of section 7(1) (b) and is not a condition. While clearly the "person or classes of person" insured by the policy are (1) the [p.117] Insured and (ii) any other person who is driving on the Policy holder's order or with his permission, provided that person is not caught by the restrictions laid down in the proviso to

the definition of “Driver” Clause. And the liability covered by the policy, according to section II Clause 1 of the Policy, includes “liability in respect of death or bodily injury to any person” in the event of accident caused by or arising out of the use of the motor car, which in my judgment is the liability required to be covered by section 7(1)(b) of the Act. I agree therefore that the combined effect of the clause headed “General Exception” quoted above, Section II Clause 3, the definition of “Driver” in the Schedule to the policy and Section II Clause 1 of the Policy is to specify the person or classes of person insured by the policy, to use the words of the sub-section, “in respect of the death of or body injury to any person caused by or arising out of the use of the motor vehicle.” But that is not the end of the matter, because to say that a provision in a policy specifies the “person or classes of person” insured by the policy does not mean that that provision is not condition of the policy. Mr. Rogers-Wright denied a condition as “a term of a contract which qualifies a primary obligation,” and submitted that the provision in the policy specifying the “person or classes of person” insured does not qualify the primary obligation under the policy and therefore that provision is not a condition. I do not think that it is necessary to go into the question of whether or not the provision “qualifies the primary obligation”, because in my opinion, the definition of “condition” urged by [p.118] Mr. Rogers-Wright is too restrictive. I agree that “condition” is sometimes used in that sense, but it is frequently used in a less restrictive sense. In the recent case of L. SCHULER S.C v. ICKMAN MACHINE TOOL SALES LTD. (1973) 2 W.L.R. 683 LORD Morris of Borth-y-Cost Said p. 694,

“Just as the word “warranty” may have differing meanings according to the context so may the word “condition”. The words “condition precedent “may have a specific meaning. But the “conditions” of a contract may be no more than its terms or provisions. A condition of a context be a term of it or it may denote something to be satisfied before the contract comes into operation or it may denote something basic to its continuing operation.”

I think that it is the right approach and I adopt it. In my opinion, the word “Condition” in section 9 of the Act means no more than a “term” or a “provision” of the policy. Viewed in this light, the provision in the policy relating to driver is, in my opinion, a condition. It is a condition specifying the “person or classes of persons” insured by the policy.

I now turn to the question whether or not section 9 of the Act renders all conditions in a policy ineffective or affects only conditions relating the acts done or omitted to be done “after the happening of the event giving rise to a claim under the policy.” The Court of Appeal construed who section disjunctively and held that the section rendered all conditions in a policy of no effect as against a third party. The learned Chief Justice who delivered the judgment said inter alia:—

[p.119]

"This brings us to a construction of section 9 of the Act. In construing this section I think it is immaterial whether a condition falling within its ambit is precedent or subsequent; for whether it is precedent or subsequent so long as it is caught within the ambit of that section it is of no effect . . . . . .

. . . . . .

Let me now spell out the way I read the material portion of section 9 of the Act.

I read them in this way—

Any condition in a policy or security issued or given for the purposes of this Act providing—

(i) that no liability shall arise under the policy or security;

(ii) That any liability arising under the policy shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security.

In other words the section in my view embraces two separate and distinct types of conditions, namely, those which have the effect of negativing liability an initio upon the breach of such a condition and those which make the negativing of the liability conditional upon the doing or omitting to do some specified thing after the happening of the event giving rise to a claim under the policy or security. The section deals with conditions in a policy which seek to prevent liability from arising on the one hand and those which seek to avoid a liability which has arisen on the other. That I think is the only reasonable and proper construction that can be put to section 9 which will not render it either non-sensical or, stronger still, which will not result in defeating the object of the Act, namely the protection of third parties using the highway against death or bodily injury by the use of a motor vehicle on the highway."

My Smythe, learned Counsel for the respondent, urged us to accept the construction put on the section by the Court of Appeal and also relied on the case of THE NEW GREAT INSURANCE COMPANY OF INDIA LTD. v. LILIAN EVERLYN CROSS & ANOTHER (1966) Fast African Law Reports 90. The facts of that case are in many respects similar to those in the present case. The respondent was injured [p.120] in a motor accident and recovered judgment against the owner of the car, the user of which the Insurer (the appellant) had covered by a third party policy. The driver, who had the insured's permission to drive was at the time disqualified from holding a driving licence. The policy contained an Exceptions clause excluding liability of the Insurer "in respect of any claim arising whilst the motor vehicle is being driven by ……. any person other than the Authorise Driver." The Schedule to the policy defined an "Authorized Driver" as "any person driving on the insured's order or with his permission provided that (he has a licence) and is not disqualified ……. from driving." The respondent sued the Insurer. The insurer's defence was that they were not liable because the driver, being disqualified, was not an authorized driver. The West Africa Court of Appeal (Newbold V.P. and Crabbe J.A. Lestrang J. A. dissenting) gave judgment for the respondent.

Dealing with section 8 of the Kenya Act (which is substantially the same as our section 9 — except for the positioning of commas), Newbold V.P. said at p.97 –—

"The section in the Act differs from the British section, which appears as the Road Traffic Act, 1930 s.38, in that in the Kenya Act the Comma appears after the word "policy" instead of after the word "cease". Grammatically the words in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim" can, with the comma where it is in the Kenya Act, apply only to the words "any liability so arising shall cease" and not to the words "no liability shall arise".

. . . . . .

I accept that the rule of construction in Britain in relation to old statutes was that the Courts did not have regard to punctuation in interpreting a section. The reason for this was that until about 1850 the punctuation of sections was inserted after the legislation had been enacted, with the result that the [p.121] punctuation had received no legislative authority. Whether that role of construction would apply in Britain in relation to modern statutes is open to doubt. However, whatever may be the position in Britain, I have no doubt whatsoever hat in West Africa the Courts should in construction of a section, have regard to the punctuation of the section just as much as they should have regard to any other part of it. The reason for this is that the section as enacted by the legislature contains punctuation. Indeed, there are a multitude of examples of amendments to sections containing amendments to the punctuation. In any event I cannot see how it is possible to attach the words "in the event of some specified thing being done…… after the happening of the event giving rise to a claim…." To the words "no liability shall arise" for the simple reason that liability shall arise" for the simple reason that liability would already have arisen before the event; therefore, those words clearly attach and attach only to the words "any liability so arising shall cease." This logical construction is merely reinforced by the positioning of the comma in the Kenya Act. . . . . .

The effect, therefore, of the section is that a conditioning a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under s.5 (b) of the Act and in so far as any such condition is prayed in aid to avoid liability to a third part who has been injured. Insofar, however, as the relationship of the insurer and the insured is concerned, then by virtue of the proviso to the section, if the policy contains a provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third part in circumstances in which the condition applies, such a provision is perfectly valid".

In view of fact that the West African Court of Appeal attached so much importance to the commas in the section, it will be useful to set out the relevant part of the section of the Kenya Act. It reads:—

"Any condition in a policy of insurance, providing that no liability shall arise under the policy, or that any liability so arising shall come in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities [p.122] as are required to be covered by a policy under s.5 of this act, be of no effect."

It is important to note that the punctuation of the Kenya section is quite different from the punctuation of ours. In the Kenya section, there are no less than four commas, whilst in our section there are only two commas. I share the view that punctuation marks in a statute may be called in aid in construing the statute. But I would add that they are only aids and as such they should not be allowed to override the clear and unambiguous meaning of a statute when read as a whole. In view of the difference of the punctuation between the Kenya section and ours and in view of the importance attached to the punctuation of the Kenya section by the East African Court of Appeal, we cannot, in my opinion, derive must assistant from the decision in the NEW GREAT INSURANCE COMPANY CASE in construing our section 9.

How then is our section 9 to be construed? The construction put on the section by the Court of Appeal amount to this:— all conditions relating to something happening before or after the event given rise to the claim are of no effect. To my mind this construction means that all conditions in a policy are of no effect, because in my opinion all conditions in a policy of Insurance must relate to something done or omitted to be done either before of after the happening of the event. If an unauthorized person drives the vehicle, and an accident occurs that will be something done before the happening of the event (i.e. the accident). If the insured fails to report the accident to the Insurers, that will be something omitted to be done after the happening of the event. It is an important rule of construction of [p.123] statues that statute must be read as a whole and the intention of the legislature must be gathered from the statute as a whole, each section throwing light on the rest. Applying this rule, it is quite clear that it was not the intention of the legislature to render all conditions in policies of Insurance ineffective. The Act itself recognizes that it is perfectly permissible to inset conditions in policies Sections 7 and 10 of the Act put this beyond any doubt.

Section 7(3) provides:

"A Policy shall be of no effect for the purpose of this act unless and until there is issued by the approved insurer in favour of the person by whom the policy is effected a certificate (in this Act referred to as a "Certificate of Insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of such other matters as may be prescribed."

In my opinion, if it was the intention of the legislature to put a ban[sic] on all conditions in policies of Insurance, the words "such particulars of any conditions subject to which the policy is issued," would not have been inserted in the sub-section. Quite clearly those words indicate in no uncertain terms that an insurer may issue a policy subject to specified conditions. Such specified conditions may include conditions relating to something to be done or omitted to be done before the happening of the event. The relevant part of section 10 of the Act is in the following terms—

"10.Where a certificate of insurance has been issued in favour of the person by whom a policy has been effected or where certificate of security has been issued in favour of the person whose liability is covered by such security so much of the policy as purports to restrict the insurance [p.124] of a person insured thereby, or, in case of a security, such conditions attached thereto as purport to restrict the liability of the giver of the security in respect of any of the following matters —

(a) The age or physical or mental condition of persons driving the motor vehicle; or

(b) The condition of the motor vehicle; or

(c) The number of persons that the motor vehicle carries or;

(d) The weight or physical characteristics of the goods that the motor vehicle carries; or

(e) The times at which or the area within which the motor vehicle is used or

(f) The horse-power or cylinder capacity or value of the motor vehicle; or

(g) The carrying on the motor vehicle of any particular apparatus; or

(h) The carrying on the motor vehicle of any particular means of identification other than any means of identification required to be carried under the provisions of the Road Traffic Act,

shall in respect of such liability as are required to be covered by a policy or security issued for the purposes of this Act, be of no effect."

In my opinion the intention of this section is to specify certain conditions, which if inserted in a policy, would be ineffective against third parties. If the intention of the legislature in enacting section 9 was to render all conditions ineffective, then it would not have been necessary to enact section 10. This conclusion is reinforced by the fact that the equivalent provision in Britain to our Section 10 Was first enacted in 1934 by section 12 of the Road Traffic Act, 1934. It seems to me that if section 38 of the 1930 Act, (our section 9) had rendered all conditions in a policy ineffective it would not have been necessary for the legislature to enact section 12 of the 1934 Act providing [p.125] that certain specified "conditions" in a policy were ineffective. In my opinion, most, if not all, of the matters set out in section 10(a) to (h) are matters relating something done or omitted to be done before the happening of the event. If therefore section 9 affected conditions relating to something done or omitted to be done before the happening of the event section 10 would not have been necessary.

In my judgment the intention of the legislature in enacting section 9 was to prevent Insurers defeating claims by injured persons or by the dependants of persons killed as a result of an accident, by relying on conditions in the policy providing that there shall be no liability if some thing is done or omitted to be done after the accident.

For the sake of clarity, I shall spell out the way I read the section. It is:—

Any condition in a policy or security issued or given for the purposes of this Act providing

(a) that no liability shall arise under the policy or security

or

(b) that any liability so arising shall cease

In the event of some specified thing being done of omitted to be done after the happening of the event giving rise to a claim under the policy or security

Shall

in respect of such liabilities as are required to be covered by a policy or security issued for the [p.126] purpose of this Act

Be of no effect.

In my opinion therefore the words "in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security" govern the

words “no liability shall arise under the policy or security” as well as the words “ any liability so arising shall cease.”

In my opinion this is the logical, grammatical and common sense construction of the section. I am fortified in this opinion by the fact that this has been the construction put on the equivalent section (section 38 of the 1930 Act) by the English courts and Text Book writers. The English Divisional Court considered section 38 of the 1930 act in BRIGHT v. ASHFOLD (1932) 2 K.B. 153. Lord Howarth C.J. put the point of the decision succinctly AT P.158. He said—

This case I think is really to clear for argument. The policy referred to did not cover use whilst carrying a passenger unless a side car was attached to the motor cycle. In these circumstances, which were the circumstances in the present case, there was no policy of insurance in force in respect of third party risks. Reliance was placed by the respondent upon S.38 of the Road Traffic Act, 1930, but I think it is quite clear that section has no relation to a condition such as a contained in this policy

This was a condition which circumscribed the operation of the policy from the beginning. There was, therefore, the policy of insurance against third party risks at all in force in relation to the use of the motor cycle by the respondent, where a passenger was being carried otherwise than in the side-car.”

This GRAY v. BLACKMORE (1934) 1 K.B. 95, Branson J. said at p.105-107 (and I respectfully adopt his reasoning):—

[p.128]

“Then comes S.8, which is relied upon by the plaintiff in this as doing away with the provision of the policy under which it is agreed that the policy shall not cover the car when it is being used otherwise that for private purposes…. The argument is that a provision in a policy that the car shall not be covered if it is being used for a certain purpose is rendered of no effect by this clause. It is said that the clause must be read without a comma in it and, as I understand it, in the following way:

“Any condition (a) that no liability shall arise or (b) that any liability so arising shall cease in the event etc shall be of no effect.” How, it seems to me that is an impossible construction to put upon this clause whether you put a comma after “cease” or not. The motion seems to me to be perfectly clearly expressed as it stands and to provide that any conditioning the policy providing that no liability shall arise under it in the event of some specified thing being done etc” apply equally to the words “that no liability shall arise ……” as they do to the words, “that any liability no arising shall cease” I think the matter may be tested by leaving out one of the suggested alternatives, and dealing with the other by itself. So treated, the section, according to the plaintiff’s argument, would read “Any condition providing that no liability shall arise under the policy shall be of no effect” which is obviously a provision which the statute never meant to enact; and the attempt to break up the words of the section seems to me to be a nonsensical provision in the statute. It said that there is no logical difference between the enactment which parliament obviously intended, that the failure to observe conditions as to something to be done or omitted after the happening of an accident should not be allowed to affect the under-writers’ liability in cases of third party claims, and an enactment that, no matter what the parties agreed

in the policy, if the car did an injury to a third party the underwriter should have to pay; but it seems be that there is all the difference in the world between the two positions. A man may agree to have certain cover and he goes forth upon the road covered according to that agreement, before an accident happens, what offence has he committed? He has got a policy which for all that he has hitherto done covers hi, and he is saved from s.35; and yet if the policy contain conditions as to something which he must not do after an accident has [p.128] happened, a failure on had part in that restrict may enable the underwriter who was on trial at the time when the accident happened to escape, and one can well understand the legislature saying that that shall not be permitted.

If all was in order between the assured and the underwriter when the accident happened, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured so as to make him less able to compensate the person who has been injured. But it would be an entirely different matter for the legislature to go back to the time before the accident had happened and to say that, if anyone chooses to underwrite a policy in connection with a motor-car, no .imitations as to the time during which or as to the persons by whom, or as to the manner in which, that vehicle can be used can have any avail to save the underwriter from liability."

The English Court of Appeal also construed the section in CROXFORD v. UNIVERSAL INSURANCE CO. LTD., NORMAN v. CROSHAM FIR AND ACCIDENT INSURANCE SOCIETY LTD. (1936) 2. K.B. 233. Sleaser L.J. delivered the leading judgment. He said at p.68

"It will be notice that the conditions which are not be exempt the insurance company from liability to a third party, even if they be broken by the assured, in 3.38 are limited to reason of "some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy" in other words, the fact that in assured fails, for example, under the conditions of a policy to give notice of the accident, which might otherwise, as between he assured and the insurance company he a sufficient answer for the insurance company not to pay, shall not avail as against the third party; but it will be noticed that the protection of the third party notwithstanding the fact hat the assured has not complied with all the conditions, which is giving by section 38, is limited to things done or omitted to be done after the happening of an event giving rise to a claim"

In MANGILIVRAY ON INSURANCE LTD 5th Edition Vol. 2 it is stated at p.1010 para.2080:

[p.129]

"Conditions in a policy issued under Part VI of the Act, relieving the insurers from liability by reason of some act or omission by the insured after the happening of the event giving rise to a claim under the policy, are of no effect against third parties.

The words "in the event of some specified thing being done or omitted" apply to "no liability shall arise" as well as to "any liability so arising shall cease." The effect of the section is that if all was in order between the assured, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured."

In HALSBURY'S LAW OF ENGLAND 3rd Edition Vol. 22 it is stated at p.373 para. 764:—

"A motor policy normally contains a large number of restrictive conditions, qualifications and provisos describing and limiting the scope of the insurance. The only conditions, however, which, as against an injured third party with a compulsorily insurable claim, were rendered void by the foregoing enactment i.e. S. 38 of the Road Traffic Act 1930 were conditions relating to something being done or omitted after the accident."

To take another example, in Bingham's motor Claims cases, 6th Edition p.635 in a note on section (206) (2) of the Road Traffic Act, 1960 (which is the same as our section 9 and s. 38 of the 1930 Act) it is aid that:—

"This section relates to breaches of policy conditions after accident, such a failure to report an accident, but does not affect breaches before or at the time, such as not having a driving licence in force."

And coming nearer home, the Ghana Courts have hold in a number of cases that section 8 of their Motor Vehicles (third Party Insurance) act, 1958 (which is the equivalent of our section 9) applies only to conditions relating to something done or omitted to be done after the happening of the event giving rise to a claim under the policy.

[p.130]

In ADJOA POKUA v. THE STA[sic] CORPORATION

Civil appeal (Ghana) No. 16571 decided in December, 1972 Amissah J.A. in the course of his judgment said:—

"It seems to me that if the intention of the legislature had been be avoid all conditions excluding liability as is suggested by section 8, section 9 (the equivalent of our section 10) which avoids restrictions in particular causes would not have been inserted. All the restrictions set out in section 9 are in that case already safely incorporated in the ban in section 8. Not only is section 9, in that case unnecessary, the insertion is certainly impliedly contradictory. The enactment of section 9 and especially coming immediately after the section alleged to impose a total ban, strongly argues that that construction put on section 8 is mistaken."

And in the same case, Sowah J.A. said inter alia:—

It was also argued by Mr. Smytho that the policy of the Act is to protect third parties using the highway against injuries or death by the negligent use f the highway by users of motor vehicles on the highway. It was said that that policy may be gathered from the long title of the Act and from section 3(1) or the Act. In pursuance of the policy, so the argument went, the legislature by section 6 intended to prohibit as against third parties all conditions in a policy relating to something done or omitted to be done by the insured before or after the accident; otherwise the intention of the legislature would be frustrated. That argument was accepted by the Court of Appeal, for the learned Chief Justice said in [p.131] the courage of his judgment:—

“It is beyond dispute that the Act was passed principally for the protection and benefit of third parties using the highway. A close and careful study of the whole structure and provisions of the Act clearly shows this. That being the case, I share most strongly the view that people should be entitled to feel assured, as they walk along the streets or make any other lawful use of the highway that the legislature has protected then against the hazards of motor accidents. It becomes the duty of the Courts therefore to construe the Act in such a way as to suppress all manoeuvres which tend to frustrate the spirit and policy of the Act.”

Let the first deal with the argument based on the long title of the Act. The long title is in the following terms:—

"An act to make provisions against third party risks arising out of the use of motor vehicles."

In my opinion the Act did achieve that object. The Act did make provision for compulsory third party insurance and went on to make provision relating to how may issue Insurance Policies, the risks to be covered by the policy, the person to be insured, what may be specified in the policy, conditions which shall not be effective against third parties, a direct cause of action by third party against the Insurer etc.

The legislature chose to achieve its object stated in the long title by the various provisions made in the body of the Act, in plain and unambiguous language. I do not agree that the legislature did not achieve its stated object. We shall be standing the words of the long title if we were to say that the object of the legislature was to make provision against third party risks irrespective of the terms of the policy and irrespective of the circumstances of the accident. In my opinion, the Act [p.132] itself shows quite clearly what the intention of the legislature was, and our duty as a Court of law is to interpret the words used in the Act. But even if the long title had the wide meaning attributed to it by learned Counsel for the respondent, it must be remembered that what we have to interpret are the words used in the act. If the words are ambiguous, the long title may be looked at the resolve the ambiguity. But if the words are plain and unambiguous, the long title may not be used to modify or control the meaning. It is a not always that Parliament achieves its stated object by the words actually used in the body of the statute.

I turn now to the argument based on section 3(1) of the Act which provides as follows:—

“3(1) subject to the provisions of this Act no person shall use, or cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of that motor vehicle by such person or such other person, as the case may be such a policy of insurance of such a security in respect of third party risks as complies with the provision of the Act.”

This section was copied from section 35(1) of the 1930 Act. Section 3(2) of our Act provides for a penalty in case of contravention of section 3(1). Mr. Smythe submitted that what section 3 (1) required the owner of a vehicle to cover by a policy of Insurance was the use of the vehicle on the road and not the person using the vehicle. He relied for that submission on the case of JOUN T. ELLIS LTD. v. WALTER T. HINDS (1947) 1 K.B. 475 which was a decision of the English Divisional Court. I agree with the submission. But Mr. Smythe went further and submitted that since section 3(1) required only the use of the vehicle to be covered and not the [p.133] person using the vehicle any conditions in a policy limiting

the use of the vehicle to a named person or to particular class of persons were of no effect as against third parties. With respect, that submission fails to appreciate the object of section 3(1) of the Act. In my opinion, what section 3(1) does is to provide what cover a vehicle owner must take out if he is to escape the consequences of section 3(2). The vehicle owner must cover by Insurance the use of the vehicles on the road if he is to escape the consequences of section 3(2). The section does no provide for and says nothing about the liability of Insurers to third parties. In my opinion, when section 3(1) is read with another sections of the Act, it is quite clear that the legislature intended to make provision against third party risks arising out of the use of motor vehicles on the road, but on conditions, not specifically rendered ineffective by the Act, specified in the policy including conditions relating to the "person or classes of person" insured by the Insurer and in respect of whose liability the insurer undertakes to be liable in the event of an accident resulting in death of or bodily injury to any person.

The argument based on the policy of the Act is not new. It was advanced by Counsel for the respondent in BRIGHT v. ASHFOLD (see (1932) 2 K.B. at p. 157) but was rejected by the Court. In his judgment in GRAY v. BLACKMORE Branson J. had this to say at p. 105:—

"That is sought in this case is a construction of the section (i.e. S. 35 of the 1930 Act) which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle whenever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the [p.134] Statute says anything of the sort. It is defining the protection which a man must have if he is to escape the consequences of S.35. That that is so, appears from the provisions of S.36, Sub-S.5 relating to the certificate of insurance, that the policy may contain conditions the nature of which is left completely open. So it clearly contemplates that the policy may be issued subject to certain conditions and unless they are to be conditions limiting the liability of the underwriter what possible reason can there be for their inclusion in the certificate, the object of which is to make clear to whom it may concern the conditions, if any, subject to which the policy has been issued."

In my judgment the provision in the policy relating the "driver" is a perfectly valid condition and it is not rendered ineffective by section 9 of the Act. The argument of Counsel for the respondent based on section 9 therefore fails.

I turn now to the other important question raised in this Appeal. The answer to that question turns on the proper construction of section 11 of the Act, which is copied from section 10 of the 1934 Act. Section 11(1) and (2) provide as follows:—

"11(1) If after a certificate of insurance has been issued in favour of the person by which a policy has been effected or a certificate of security has been issued in favour of the person whose liability is covered by such security judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of this Act, being a liability covered by the security, as the case may be, then, notwithstanding that the insurer or the giver of the security may be entitled to avoid or cancel or may have avoided or cancelled the policy or the security as the case may be the insurer or the giver of the security shall, subject to the provisions of this section, [p.135] benefit of such judgment any payable

there under in respect of the liability including any sum payable in respect of costs and any sum payable by virtue of any law in respect of interest on that sum or judgment.

"(2) No sum shall be payable by an insurer or the giver of a security under the provisions of sub-section (1)

(a) in respect of any judgment unless before or within fourteen days after the government of the proceedings in which the judgment was given the insurer or the giver of the security had notice of the …… bringing of the proceedings, or;

(b) in respect of any judgment so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if before the happening of the event, which was the cause of the death or bodily injury giving rise to the liability, the policy or security was cancelled by mutual consent or by virtue of any provision contained therein and either—

(i) Before the happening of such event the certificate of insurance or the certificate of security, was surrendered to the insurer or the giver of the security, as the case may be, or the person to whom such certificate was delivered made a statutory declaration stating that such certificate had been lost or destroyed and so could not be surrendered; or

(ii) After the happening of such event but before the expiration of fourteen days from the taking effect of the cancellation of the policy or of the security the certificate of insurance or the certificate of security, as the case may be, was surrounded to the insurer or the giver of the security or the person to whom such certificate was delivered into a statutory declaration that such certificate had been lost or destroyed and so could not be surrounded; or

[p.136]

(iii) either before or after the happening of the event, but within a period of fourteen days from the taking effect of the cancellation of the policy or the security the insurer or the giver of the security had commenced criminal proceedings under section 15 of this Act in respect of the failure to surrender the certificate of insurance or the certificate of security, as the case may be."

Mr. Smythe contended that when once a certificate of insurance has been issued, if judgment is obtained against any person insured by the policy in respect of liability for death or bodily injury and if the policy covers liability in respect of death or bodily injury the only defence upon to an Insurer in an action by a third party under section 11(1) or the Act are those provided by section 11(2)(a)(b) and (c) and section 11(3). Section 11(3) provides that the insurer shall not be liable to pay the judgment debt if before or within three months after the commencement of the proceedings in which the judgment was given he has obtained a declaration that apart from any provisions contained in the policy, he is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of material fact or by misrepresentation or if he had avoided the policy on that ground that he was entitled to do so apart from any provision contained in it.

The argument amount to this: that unless the Insurer can avail himself of one of defences provided in section 11(2)(a), (b) and (c) and 11(3) (what Mr. Smythe termed "Statutory Defences") he is liable to pay the judgment debt irrespective of the terms of the policy. In my opinion there is nothing in section 11 which supports the view that the Insurer is limited to only the so-called [p.137] statutory defences. In construing the section it must be remembered that the third party's rights against the Insurer are maintainable under the section not on the basis of contract, but on the basis of an Insurance Policy in force. If there is no Insurance Policy in force there will be no claim against the Insurers. In my opinion, in a case based on a policy of Insurance, the third party must prove (i) that a certificate of insurance has been issued in favour of the person by whom the policy was effected (ii) that judgment has been given in his favour in respect of such liability as is required to be covered by a policy (iii) that the liability is in fact covered by the terms of the policy (iv) that the judgment is against any person insured by the policy. there is no dispute that a certificate of Insurance was issued in favour of Sorie Mansaray, or that judgment was given in favour of the respondent in respect of bodily injury which is a liability required to be covered by a policy or Insurance by virtue of Section 7(1) (b) of the Act, or that the judgment was given against a person insured by the policy i.e. Sorie Mansaray. The only dispute is as to whether the Insurer is liable irrespective of the terms of the policy. Mr. Rogers-Wright submitted that the terms of the policy must be looked at for the purposes of determining whether the liability to the respondent is naturally covered by the "terms of the police".

Section 7(1) (b) provides for the insurance of a "person of classes of person" specified in the policy against liability for death or bodily injury to any person.

[p.138]

The "person or classes of person" insured by the policy is this case against liability for death or bodily injury Sorie Mansaray and any other person coming within the definition of "Driver" in the Schedule to the Policy. In my opinion if Sahr Kissi Kondowa did not come within the definition of "driver" he was not a person insured by the Policy and therefore liability for death or bodily injury when the car was being driven by him was not covered by the "terms of the Policy".

I derive support for this opinion from a number of English decisions, text book writers and Ghanaian decisions. In ADMIN v. ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO. LTD. (1945) 1 All. E.R. 316, a decision of the English Court of Appeal, Lord Greene N.R. stated his views forcefully at p.319. He said —

"There is no question of contract. It is question of a document which, by virtue of a statute, confers a benefit on a third party. How that third party can pick and choose and pick out that part of the document which suits him and omit that part of the document which does not suits him and omit that part of the document which does not suit him, I am at a loss to understand. He must take it or leave it as he finds it, and, if he claims the benefit, he must suffer the burden."

In my opinion, this statement should be read subject to the provisions of section 38 of the 1930 Act (our section 9) and of section 12 of the 1934 Act (our section 10).

In HERBERT v. RAILWAY PASSENGERS ASSURNCE CO. (1938) 1 All E.R. 650, Wilkinson was insured with the defendant Company against third party risks in respect of a side-car and the policy provided that the defendant company should not be liable in respect of my accident incurred while any motor cycle was being driven by or was for the [p.139] purpose of being driven by him in charge of any person other than the insured. Wilkinson, while driving with a friend, fell ill, and allowed the friend to drive the side-car. While being so driven the side-car collided with a lorry with the result that the plaintiff was injured. In an action against Wilkinson the plaintiff recovered damages and then sought to recover them from the Insurance Company. Judgment was given for the Insurance Company. In the course of his judgment Porter J. (as he then was) said at p.652.

"First of all, with regard to the question as to whether the company are protected because they only insured Mr. Wilkinson, their assured, while he was driving himself, I think that they have made a general exception which in sufficiently clear terms indicates that they will cover their assured only if he is driving himself. So far as his knowledge is concerned, if that is material, or so far as the proposal form is concerned, if that is material, that plainly indicates that he only intends to drive it himself. That, of course, even with the incorporation of the proposal form, could not be fatal, unless the exception says that the company do not cover him except when he was driving himself. When say that, I do not say that as necessarily applying to all cases. In motor-traffic cases, one has to consider the provisions of the Act. In this case, taking the wording of the policy alone, and nothing else, I do not think that one can fairly construe it as meaning anything other than that the insurer shall not be liable while the motor in being driven by any person other than the insured, or is, for the purpose of being driven by him in the charge of any person other than the insured."

And he continued at p. 653

"I did raise the question, and Mr. Elkin raised it before no, as to whether there might not be a claim under section 36(1)(b), in that the wording of that section was so wide that it included any case where the assured was liable owing to the use of any motor on the road, and in that section 10 of the Act of 1934 imposed a liability upon the insurers where the assured was liable and could not pay. [p.140] But Section 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case there are is an apparently valid policy covering the liability, which yet they could have avoided or cancelled because of some misrepresentation or conclusion on the part of the assured."

It is also stated in RECGLILIVRAY ON INSURANCE LAW 5th Ed. Vol. 2 para. 2065 at p. 1001 that

"Motor-vehicle policies frequently contain clauses restricting the liability of the insurers in various ways e.g. the indemnity afforded may be limited by reference to the driver of the vehicle or to the purposes for which it is used. After some conflict of judicial opinion it has now become clear that such a policy complies with the Act pro tento; that is to say, that provided that the liability insured against is that specified by the Act, the vehicle may law-fully be used within the limits laid down by the policy, although an offence will be committed by anyone who uses it, or causes or permits it to be used, outside those limits."

That was the construction given to section 10 of the 1934 Act before 1946. It is also the construction given by the Ghana Courts to the equivalent section of their Act (see ADJOA POKUA v. THE STATE INSURANCE CORPORATION (super). I think that that is the proper construction and the construction which, in my opinion, we should give to section 11 of our Act.

The Road Traffic Acts of 1930 and 1934 introduced revolutionary changes in British Law to the extent that they inter alia made provision for compulsory insurance of motor vehicles, gave the injured third party a direct cause of action against the insurer in certain circumstances and imposed restrictions in the conditions an insurer may insert in a policy of Insurance. But the changes were not as revolutionary as some people had imagined. The changes did not solve the problem of the [p.141] driver whom from one cause or another, was not insured at all or was not covered by a policy in force in respect of the vehicle he was driving. In this connection the words of Goddard J. (as he then was) in JONES v WELSH INSURANCE CORPORATION LTD. (1937) 4 all E.R 149 are appropriate. He said at pages 152-153:—

"The result is that the action fails, and must be dismissed, though I come to this conclusion with as much regret as a judge may properly feel when he gives effect to what he decides are the legal rights of the parties. For this adds another to the growing list of cases which show that in spite of the statutory provisions for compulsory insurance, persons injured by motor cars through no fault of their own may be left with no prospect of obtaining compensation, a position to which the late Swift J. not long since called attention in vigorous and pointed language. The public believe, and with reason, that the Road Traffic Acts insure that, if they have the misfortune to be killed or injured by a driver's negligence, there will at least be compensation for themselves or their dependants, knowing nothing of the pitfalls which still abound in policies, in spite of Sec. 12 of the Act of 1934. No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium
…….....……

……..……

No legislation can guard against the criminal who willfully drives an insured car, but it is just as well that it should be realized that, though there may be a policy in force, and an unauthorized person is driving the car which causes injury, there is no certainty that liability will attach to the insurers."

It was to solve that problem that an Agreement was entered into between the British Minister of Transport and the Motor Insurers' Bureau on 17th June 1946. The object of that Agreement was to secure compensation to third party victims of road accidents in cases where, notwithstanding the provisions of the Road Traffic Acts relating to compulsory insurance, the victim was deprived of compensation by the absence of insurance, or of effective [p.142] insurance.

Clause 1 of the said Agreement provides as follows:—

"1. If judgment in respect of any liability which is restricted to be covered by a policy of insurance or a security (hereinafter called "a contract of insurance") under Part II of the Road Traffic Act, 1930 is obtained against any person or persons in any court in Great Britain whether or not such person or persons be in fact covered by reason only of the provisions of subsection 4 or section 35 of the said Act

is in fact covered by a contract of insurance and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given then the motor Insurer Bureau will…….pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment was given any sum payable or reaming payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the aforesaid liability) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment."

I need hardly say that, being an agreement, the Motor Insurers Bureau Agreement did not, and indeed could not, in any way amend the provisions of the Road Traffic Acts 1930 and 1934. The provisions of these Acts remained in tact. These provisions were replaced by Part VI of the Road Traffic Act, 1960 which has recently been replaced by Part VI of the Road Traffic Act 1972, but no material change in this breach of the law was affected by other of the Acts just referred to.

It is evident from the provisions of the said Agreement, that it is not necessary now in Britain, for a third party victim of road accident, to claim the judgment debt recovered by him from the Insurer of the vehicle involved in the accident. He may claim directly from the [p.143] Motor Insures Bureau. If the English Law Reports are sufficient evidence to go by, we result is that since 1964 very few, if nay, claims based on Section 10 of the 1934 Act (or section 207 of the Road Traffic Act, 1960 which replaced it) have come before the English Courts. This fact, I think, emphasizes the importance and relevance of pre-1964 cases like HERBERT v. RAILWAY ASSURANCES CO. (super).

A comparison of Section 10 of the 1934, Act (our Section 11) and the said Agreement would reveal that whilst under the Section it is essential for the third party claimant to prove that the liability in respect of which the claim is made is a liability covered by the terms of the policy, the Agreement stipulation no such requirement. So under the said Agreement the third party claimant my succeed in a claim against the Motor Insurers Bureau irrespective of the terms of the policy and even if there is not policy in force. In my opinion therefore, decisions based on claims under the said Agreement are of little relevance or assistance to us in construing our Section 11. Mr. Smythe relied on such case i.e. IVEDY v. MOTOR INSURERS BUREAU (1946)2 All E.R. 742, which was a decision of the English Court of Appeal. That case was based on a claim against the Motor Insurance Bureau under the said Agreement. There was no Insurance Company involved, and there was no Insurance Policy to be construed. Suffice it to any that the construction of section 207 of the Road Traffic act, 1960 (the equivalent of section 10 of the 1934 Act) was not necessary for the Court's decision and the court certainly did not decide that the terms of the policy must be disregarded [p.144] in claims based on section 207 of the Road Traffic Act, 1960. In my opinion therefore that decision is of little relevance or assistance to the solution of the problem with which this Court is faced.

Mr. Smythe submitted before us that the appellants did not prove at the trial that Sahr Kissi Kondowa was not a "driver" within the meaning of the definition clause in the Schedule. That may be so. But it was alleged in the Defence that he was an unlicensed driver" and that the liability which arose was not covered by the terms of the policy. Mr. Smythe himself conceded at the trial that Sahr Kissi Kondowa was an "unlicensed driver". That term was taken by the Trial Judge to mean that he had never had a

licence and that as such he was not a driver within the definition. The Court of Appeal also accepted that Sahr Kissi Kondowa was not a driver within the definition. That was the whole basis on which the case proceeded at the trial and before the Court of Appeal. Indeed far from saying that it was not proved that Sahr Mr. Smythe submitted before the trial judge and before the Court of Appeal that the word "knowingly" should be implied in the proviso to the definition clause. It would, in my opinion, be without justification and contrary to precedent for this court of depart from the basis on which the case proceeded in the High Court and the Court of Appeal. In the circumstances I think that it is too late to raise the point, even assuming it has any merit.

Mr. Smythe submitted before us that the word "knowingly" should be implied in the proviso to the definition clause. He made the same submission before [p.145] the trial judge and the Court of Appeal, but neither court considered it. I do not think that a convincing case has been made for implying the word in this case and the submission accordingly fails.

It has been said that people are entitled to feel assured, as they walk along the streets or make any other lawful use of the highway, that the legislature has protected them against the hazards of motor accidents. That may be desirable and progressive policy, but in my opinion, it is certainly not the policy of the Road Traffic Act (Cap.133). As Judges, we should always bear in mind, that however much we may sympathize with a certain policy, we are not entitled or justified to strain the words of a statue so as to accord with that policy, our function is to interpret the law as we find it. To do otherwise would be usurping the function of the Legislature. As I said earlier in this judgment, our Act has given some protection to third party victims of read accidents. That protection may not accord with what we consider desirable in the public interest. But it is not for us to decided whether what we consider desirable is politic. In the final analysis it is for parliament and/or the Government, in their wisdom, to decide whether to adopt that policy and how to put it into effect. They may decide to make some arrangement with the local Insurance Companies or with the National Insurance Company, similar to the Agreement between the British Minister of Transport and the Motor Insurers Bureau, or they may decide to amend the Road Traffic Act (Cap. 133) to provide in unmistakable term that a third party victim of road accident shall be entitled to recover in any event, [p.146] irrespective of the terms of the Policy or of the non-existence of a Policy. They my find some other solution. When such a policy is adopted and made law in whatever form, then it will be our duty as Judges to interpret and apply the law as we find it then. But until then third party victims of road accidents must be content with the rights and benefits given to then by the Road Traffic Act (Cap. 133) and by the other laws of the land.

For these reasons, I would allow the appeal

SGD.

E. LIVESEY LUKE

JUSTICE OF THE SUPREME COURT

SGD.

S.C.W. BETTS, J.S.C.

I agree.

SGD.

S.J. FORSTER, J.S.C.:

I agree.

SGD.

N. G. BROWNE-MARKE, J.S.C.

CASES REFERRED TO

1. Gray v. Blackmore (1934) 1 K.B. 95.

2. Adjoa Pokuia - Plaintiff/Appellant v. State Insurance Corporation

3. Hardy v. Motor Insurers' Bureau (1964) 2q. B. 745

4. Revel v. London General Insurance Company (1934) All E, R P.744

5. New India Insurance Company v. Cross (1966) E.A.L. Report page 90

6. Sulaiman Seisay v. White Cross Insurance (1961) S.L.L.R. p. 162 at p. 164

7. Jubiliee Assuance Co.Ltd. v. Ohbake

8. State Insurance Corporation v. Afua Mensah, (Civil Appeal No. 76/67)

9. Hart v. Standard Marine (1889) 22.Q.B.D. 499, 501

10. Joel v. Law Union and Crown Insurance Company (1908) 2.K.B. 863

11. Herbert v. Railway Passengers Assurance Company (1938) All E.R.

12. Rogerson v. Scotish Automobile and General Insurance Co. Ltd.

13. Owusu v. Royal Exchange Assurance

14. Thomas Sosu & Another v. Royal Exchange Assurance

15. Revell v. General Company Ltd. (1954) 1 A.E.R. P. 573

16. Jones v. Kenyon (1952) 2 All E.R. p. 726

17. Passmore v. Vulcan 1956) L.T.R

18. The New Great Insurance Co. of India Ltd. v. Lilian Cross and Another

19. L. Schuler S.C V. Ickman Machine Tool Sales Ltd. (1973) 2 W.L.R. 683

20. Bright v. Ashfold (1932) 2 K.B. 153.

21. Croxford v. Universal Insurance Co. Ltd.

22. Norman v. Crosham Fir and Accident Insurance Society Ltd. (1936) 2. K.B. 233

23. Joun T. Ellis Ltd. v. Walter T. Hinds (1947) 1 K.B. 475

24. Admin v. Zurich General Accident and Liability Insurance Co. Ltd. (1945) 1 All. E.R.316

25. Jones v Welsh Insurance Corporation Ltd. (1937) 4 all E.R 149

26. Ivedy v. Motor Insurers Bureau (1946)2 All E.R. 742

STATUTES REFERRED TO

1. Mangilivray on Insurance Ltd 5th Edition Vol. 2

2. Halsbury's Law of England 3rd Edition Vol. 22

3. Recglilivray On Insurance Law 5th Ed. Vol. 2 para. 2065 at p. 1001

SIERRA LEONE OXYGEN FACTORY LIMITED v. P. B. PYNE-BAILEY

[CIV. APP. 1/73] [p.147-166]

SIERRA LEONE OXYGEN FACTORY

LIMITED — PLAINTIFFS/APPELLANTS

AND

P.B. PYNE-BAILEY — DEFENDANT/RESPONDENT

JUDGMENT DELIVERED ON FRIDAY THE 10TH DAY OF MAY, 1974.

JUDGMENT

BROWNE-MARKE, J.S.C.

This appeal is from the judgment of the Sierra Leone Court of Appeal dated the 25th day of May, 1972, dismissing an appeal an Order of the High Court dated 30th November, 1971, ordering that the judgment in default of appearance obtained on the 14th day of June, 1971 be set aside.

The proceedings were commenced by a writ of Summons accompanied by a Statement of claim and dated the 24th day of March, 1971. The appellants claimed on the said write, damages for breach of

contract and for wrongful detention of goods. In the statement of claim signed by their Solicitor the appellants alleged the following:—

"On or about the 26th day of October,1969 the Defendant collected from the Plaintiff for rewinding one (1) 85 Horse Power Electricity Motor No. 027490 made by Enrico Bazzi of Milan in 1965 which the Defendant examined and agreed to rewind at the sum of cost of One thousand three hundred and Fifty leones (le1,350.00). The Plaintiff paid to the Defendant the whole of the sum of Le1,350.00 in advance at the Defendant's request on the 7th November, 1969.

2. It was an implied term of the contract that the machine would be properly and efficiently re-wound and the defendant impliedly represented and held out of the Plaintiff that he had the necessary skill and knowledge to do so.

3. The motor was being used at the Plaintiff's premises in the manufacture of oxygen and time was of the essence of the contract.

4. After a considerable delay and in early 1970, the Defendant returned the motor to the Plaintiff, but the work had been so inefficiently carried out that the inductor wire would not even fit in the case and the motor was unusable. The Plaintiff there upon forthwith informed the Defendant who after a few days inspect the motor and subsequently collected it for re-winding.

5. Up till the 31st August, 1970, the defendant neither repaired the motor nor refunded this sum of Le1,350 notwithstanding several requests by the Plaintiff for the Defendant to do so.

6. In the result the Plaintiff incurred considerable loss while the machine was in the possession of the Defendant and had to secure a replacement motor to enable it to execute its contract.

The Plaintiff has suffered loss and damage thereby.

[p.148]

7. On or about the 19th day of August, 1970, the motor was collected by the Plaintiff and repaired by another firm at the cost of Le548.

Particulars of less and damage

(a) Cost of obtaining another motor	Le3,000.00
(b) Loss of Sales of manufactured products	Le1,500.00

8. The Plaintiff therefore claims

(a) Special damages of Le.4,500.00

(b) A refund of the deposit of Le.1,350.00

And the Plaintiff claims general damages.

The affidavit of service sworn by one David Momoh on 11th June, 1571 states that the writ of Summons was served on the respondent at his place of business Sierra Engineering Agencies, 14, Pademba Road, Freetown, on the 25th march, 1971. The said David Momoh swore to a second affidavit of search on the same date which states that no appearance had been entered by or on behalf of Respondent.

Judgment in default was obtained as to part of the claim on 14th June, 1971, for Le1,350.00, damages to be assessed and costs to be taxed. The judgment was signed by Mr. William Johnson, Master and Registrar.

On the 25th day of October, 1971, the Solicitor for the appellants made an application for a Writ of Fieri Facias endorsed to levy Le5,850.00 and interest thereon at the rate of Le10.00 per cent per annum as from 14th June, 1971. The Deputy Master and Registrar signed the writ of Fieri Facias on behalf of the Master and Registrar to levy execution for Le5,850.00 with interest at 4 percent per annum.

By notice of motion dated 2nd November, 1971, Mr. N.O. Mackay applied to the High Court on behalf of the Respondent for an order that the judgment in default of appearance dated the 14th day of June, 1971, be set aside and execution there-under be stayed for the reasons shown on the affidavit of the Respondent sworn on the same date. Further that the statement of Defence exhibited by the respondent be filed and served on the appellants Solicitor.

The application came up before Ken During, J. on 8th November, 1971, but Mr. Mackay on behalf of Respondent/Applicant requested an adjourned date was 9th November, 1971, on which date Dr. Marcus-Jones appeared for Appellants/Respondents and Mr. Beckay on behalf of Respondent/Applicant.

After hearing Counsel for both parties and reading the affidavit filed in support by the Applicant/Respondent the application was refused. No mention was made of the Statement of Defence which was exhibited.

On 10th November, 1971 Mr. Mackay entered an appearance in the Master's Office on behalf of the Respondent. On the same date he filed another notice of motion for an Order that for the reasons shown in the affidavit of the Respondent/Applicant which was also filed, the writ of Fieri Facias and the whole proceedings be set aside on the ground of irregularity.

On the 12th day of November, 1972, the said motion came before Tejan J., Mr. Rogers-Wright with Mr. Mackey appeared on behalf of Respondent/Applicant. Council for Appellants/Respondents raised a preliminary objection that the motion was short served and Tejan, J., ordered an interim stay of the writ of Fieri Facias.

On 30th November, 1970, the said motion came before Tejan, J., and the and after hearing counsel for both portion, the learned judge ruled as follows:—

"I have considered the agreement of both Counsel. Where is no doubt a breach of the ruled has been considered. In the interest of Justice, I allow the application to net aside the judgment. Cost in the cause."

On 10th December, 1971, Tejan, J. granted on application by Counsel for Appellants/Applicants for leave to appeal against the interlocutory judgment of the 30th November, 1971. The application was supported by an affidavit sworn by the Solicitor for Appellants on 7th December, 1971.

The ground of appeal as recorded was

"That the Learned Trial Judge had no jurisdiction to entertain the Respondent's Notice of motion dated 10th November, 1971, by reason of the fact that on the 9th day of November, 1971, the High Court of Sierra Leone by an order of the Hon. Mr. Justice ken O. During had dismissed a similar application made by the Notice of motion dated 2nd November, 1971, which said order remains in full force and effect."

[p.150]

The appeal was heard by the Sierra Leone Court of Appeal on 24th and 25th May 1972. The judgment of the Court (Cole, C.J., Harding and Davies JJ/A) was as follows: —

"In the interest of Justice we feel that the matter should go to trial. We therefore invoke our powers under Rule 36 of the Court of Appeal Rules and dismiss the appeal. He order as to costs."

Counsel for Appellants applied to that Court for leave to appeal from its judgment of 25th May, 1972 dismissing the appeal of Appellants. Conditional leave to appeal to the Supreme Court was given on 30th June, 1972 and Final leave on 13th July 1972.

In the case of Appellants the principal question raised were

(i) That the judgment of Ken During J., of 9th November, 1971, was regular and that the High Court in exercising its undoubted discretion found no merit in the application to set it aside and properly refused leave to the Respondent to defend action. That in the circumstances a further application to the same tribunal was inappropriate and untenable except by way of leave to appeal.

(ii) That the effect of the Order of Tejan, J., was to reverse the decision Ken During J., although the Respondents' Counsel had specifically stated that it obtained on 14th June, 1971, on the grounds of irregularity.

That the ground of irregularity alleged with respect to the judgment of 14th June, 1971, were neither set out in the motion dated 10th November, 1971, as regarded by order 50 rule 3, nor as any shown in the argument of Counsel, nor any specified by Tejan, J., as justifying his order to set aside.

(iii) That the remedy, if any, open to the Respondent was to apply for a stay of the writ of Fieri Facias (Order 30 Rule (16a) or to appeal to the Court of Appeal from the Order of During, J.

(iv) That judges of equal jurisdiction could not reverse each other whether on a matter involving exercise of discretion or otherwise.

Counsel for Appellants submitted:—

That since the appeal before it was from the judgments or order, of Tejan, J., the Court of Appeal could not properly or validly have exercised its powers under Rule 36 of the Court of Appeal Rules.

[p.151]

In the case for the Respondent the principal questions raised were:—

(i) Whether the Deputy Master and Registrar on 25th October, 1971, had jurisdiction to sign a writ of Fieri Facias for the sum of Le5,850.00 when the judgment of 14th June, 1971, referred to in the said Writ was for the sum of Le1,350.00

(ii) Whether the application before Ken During, J., was the same as that before Tejan, J.

It must be stated at this point that the application by Respondent dated 2nd November 1971, was for an order that the judgment in default of a appearance dated 14th June 1971, be set aside and execution thereunder stayed for the reasons stated in the affidavit. The second application was for an order that for the reasons shown in the affidavit of the Respondent sworn on the 10th November, 1971, the writ of Fieri Facias and the whole proceeding be set aside on the round of irregularity.

The Deputy Master and Registrar on behalf of the master and Registrar signed a writ of Fieri Facias on 25th October, 1971, but no mention was signed a writ of Fieri Faciase on 25th October, 1971, but no mention was made of it in the notice of motion dated 2nd November, 1971.

By order 23 rule 15 of the High Court rules "Any judgment by default whether under this order or under any other of these rules, may be set aside by the Court upon such terms as to costs or otherwise as such Court may think fit." By order 50 rule 3 "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or Notice of Motions." The application before ken During J. of the 2nd November, 1971, did not question the regularity of the judgment; although the writ of Fieri Facias had already been issued, the respondent only requested that the statement of defences exhibited be filed and served on appellant's solicitor. Ken During J. in his order gave no reasons for refusing the application and one cannot speculate that he considered the intended statement of defence before deciding in this application respondent relied on Order 23 Rule 12 which provides that "any verdict or judgment where one party does not appear at the trial way be set aside." It is not clear as to whether this rule led Ken During J., to refuse the application. The appearance entered on 10th November, 1971 was unconditional. The application before Tejan J. was made on the same date.

[p.152]

In it the respondent requested "that for the reasons shown on his affidavit sworn on the 10th day of November, 1971, and filed, the writ of Fieri Facias and the whole proceeding be set aside on the ground of irregularity."

It seems from the second application that the complaint was not concerning the regularity of the judgment of Ken During, J. but instead that the whole proceedings including the writ of Fieri Facias was irregular.

No further action was taken after the judgment of 14th June 1971, for a writ of Fieri Facias and no action was taken to amend the amount claimed although it was palpably incorrect.

The appellant being dissatisfied with the judgment and order of Tejan J. appealed to the Sierra Leone Court of Appeal to have the judgment set aside. Section 56 of the Courts act No. 31 of 1965 provides:—

Subject to the provisions of this section, an appeal shall lie to the court of Appeal—

(a) from any final judgment, order, or other decision of the Supreme Court given or made in the exercise of its original, prerogative or supervisory jurisdiction in any suit or matter; and

(b) by leave of the judge making the order or of the Court of Appeal, from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid:

In my view both a applications were based on different fact and although the rules provide that the irregularities complained of must be specified the Court cannot close it eyes to a patent irregularity in the proceedings by which a greater amount was claimed than that for which judgments was obtained.

It is settled law that in certain circumstances a Court can vacate its own judgment.

In Thynne vs. Thynne reported in (1955) 3 All E.L.R. 129, Moris, D.J. in the course of his judgment said at page 145

“I respectfully agree with what was indicated by Livershed, L.J. in Meier v. Meier (19) (1948) p. at p.95):

'I prefer not to attempt a definition of the extent of the court’s inherent jurisdiction to vary, modify or extend its own orders if, in the view, the purposes of justice require that it should do so.'

[p.153]

"Without in any way purporting to categorise and certainly without indicating any limits, a few illustrations in regard to the court’s powers may be mentioned. (a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C Ord. 28, ----, 11, and also under the powers which are inherent in the jurisdiction of the court. (b) if there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, R. 11, and under the court’s inherent powers. (c) if the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In lawrie v. Less (10), Lord Ponzance said (7 App. Cas. At p. 34):"

‘I cannot doubt that under the original powers of the court; quite independent of any order that is made under the judicature Act, every court has the power to vary its own orders of the court to vary them in

such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.'

"To the same effect were the judgments in the Swire (15). Lindley, L.J., said (30 Ch. D. at p. 246)."

"……if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right……. It appears to me, therefore, that, it is once made out that the order, whether paused and entered or not, does not express the order actual made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.

At page 146 Morris, L.J. Continued.

"A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment."

Again in the case of Attah-Quarshie vs. Okpots reported in (1973) 1. G.L.R (59) the following principle was laid down at page 60.

"(3) Tradition has sanctioned three areas where the court generally invokes its inherent powers. First, where the exercise of the powers is necessary for the maintenance of the court's dignity and independence, such powers include the power to punish for contempt and enforce obedience to its mandates and judgments and orders. Secondly where the powers are necessary to ensures the control of its officers (including lawyers) the power to hold its officers to a proper accountability and any default or misfeasance in the execution of its process. Thirdly powers to prevent wrong or injury being inflicted by its own acts or orders or judgments including the power of vacating judgments entered by mistake and of relieving judgments procured by fraud, and a power to undo what it had no authority to do originally.

Hayfron-Benjamin J. in the course of his judgment in the same case said at page 65

"Having found that the provisions of Order 9, R. 17 are words of ------[sic] it is now necessary to consider whether or not the submission counsel that the court has an inherent power to vacate its own----[sic] [p.154] invalid orders is well founded. Inherent power is an authority not derived from any external source, possessed by a court. Whereas jurisdiction is conferred on courts by constitutions and statues, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the court and its due functioning. They spring not from legislation but from the, nature and constitution of the court itself. They are inherent in the court by virtue of its duty to do justice between the parties before it. The scope of inherent powers however cannot be extended beyond its legitimate and circumscribed sphere. The safest guide lines are precedents".

Unfortunately the judgment of the Appeal Court did not provide any guide lines on which this court may arrive at its decision but there appears to be two important issues which must be considered.

(1) Is it proper for a second application to be made before Tejan, J. the first application having been refused by Ken During, J.

(2) Is the amount for which judgment was obtained on 14th June, 1971 liquidated or unliquidated damages.

With regard to (1) having found that the applications before both judges I were not the same, I hold the view that is was proper for the Court to vacate the judgment in default in the light of the authorities cited above.

On the second point if the amount claimed was for liquidated damages then execution could be levied for the amount for which final judgment was obtained. If, on the other hand, the amount claimed was for liquidated damages then execution could be levied for the amount for which final judgment was obtained. If, on the other hand, the amount claimed should in fact be for unliqudated damages then it is subject to assessment by the court. From the particulars in the statement of claim it could easily be deduce that there was some consideration moving from the premise.

Paragraphs 4, 5 and 7 already recited refer.

According to appellants, the work was inefficiently carried out but not that no work was in fact done.

I am of the opinion that this matter should proceed to trail for the following reasons:

1. Judgment in default was for liquidated damages which was not supported by the statement of claim, and as I have held that the claim was for unliquidated damages, such damages must be assessed.

2. Despite the requirements of order 50 rule 3, of the High Court Rules, Order 50 rule 1 provides as follows:—

“Non-compliance with any of these rules, or with any rule of practice for the time being in forced, shall not render any proceedings void unless the court shall [p.155] so direct, but much proceedings or may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit.

Who appeal is hereby dismissed. Costs to the respondent in this court and the High Court.

SGD.

N.E. BROWNE-MARKE

JUSTICE OF THE SUPREME COURT

LIVESEY LUKE, J.S.C.

On 20th March, 1971, the Sierra Leone Oxygen Factory Limited (hereinafter referred to as the Appellant Company) issued a writ of summons against P.B. Pyne-Bailey, carrying on business under the name of Sierra Engineering Agencies, (hereinafter referred to as the Respondent) claiming damages for Breach of Contract and for wrongful detention of goods. The writ was accompanied by a Statement of Claim which has already been set out by my learned brother Browne-Marke, J.S.C. The writ and the statement of claim accompanying it were served on the Respondent on 25th March, 1971. The 8 days limited for entering appearance expired without the Respondent entering an appearance, and up to 11th June, 1971 the respondent had still not entered an appearance. On that date the Appellant Company by their Solicitor applied to the Master and Registrar to enter judgment in default of appearance for the sum of Le5,850, damages to be assessed and costs to be taxed. The Master and Registrar refused to sign the judgment on the ground that the Appellant Company could not sign judgment for Le5,850. The Master and Registrar accordingly informed the Appellant Company's Solicitor that no mention of the sum of Le5,850 should be made in the judgment. Three days later however (i.e. on 14th June, 1971), the Appellant Company's Solicitor again submitted the judgment in default in an amended form of to the Master and Registrar for signature and on this occasion it was signed and entered by the Master and Registrar. Judgment was entered for Le1,350, damages to be assessed and cost to be taxed.

No further steps were taken by either party until 25th October, 1971 when on the application of the Appellant Company's Solicitor, the Deputy Master sealed a writ of Fieri Facias to levy execution against the Respondent in respect of the judgment dated 14th June, 1971. The writ of Fieri Facias was for the recovery of le5,850 and interest thereon at the rate of Le4 per centum per annum from the 14th day of June, 1971, "by a Judgment of our said Court bearing the date 14th day of June, 1971 adjudged to be paid by the said P.B. Pyne-Bailey to the Sierra Leone Oxygen Factory together with certain cost in the said judgment mentioned." It is pertinent to recall that the judgment dated 14th June, 1971 was for Le1,350, damages to be assessed and [p.157] costs to be taxed. And it is important to note that the damages had not been assessed nor the costs taxed. It is therefore curious, to say the least, that the writ of Fieri Facias was issued for Le5,850, an amount not sanctioned by the judgment which it was intended to enforce and especially as the Master and Registrar had declined to sign judgment for that same amount a few months earlier. Be that as it may, execution was levied against the Respondent, albeit without much success.

By Notice of Motion dated 2nd November, 1971 the Respondent, by his Solicitor, applied "for an order that the Judgment in Default of Appearance dated the 14th day of June, 1971 be set aside and execution thereunder be stayed". The motion was supported by an Affidavit sworn by the Respondent. In his affidavit, the Respondent explained the reason for his failure to enter appearance to the Writ of Summons and ended by saying that he had a good defence to the action. He also exhibited a copy of his draft Defence. Suffice it to say that neither in the Notice of Motion nor in the affidavit did the Respondent allege any irregularity in the Judgment in default. So, obviously the Respondent was putting himself at the mercy of the Court and asking that in the exercise of its discretion the court may set aside the judgment. The application came before Ken During, J. (as he then was) for hearing on 9th November, 1971. Counsel for the Respondent stated inter alia that the default of the respondent had been due to inadvertence on the part of the respondent and referred to the draft Defence. Counsel for

the appellant Company on the other has opposed the application on the ground that the respondent did nothing for several months after the service of the Writ of Summons on him and in the meantime execution had been levied and that in the circumstances, the application was too late. It is quite clear therefore that the argument before Ken During J. preceded on the basis that the judgment was a regular judgment. At the end of the argument the learned Judge refused the application without assigning any reasons.

On the following day (i.e 10th November, 1971), a Solicitor entered appearance to the Writ of Summons on behalf of the Respondent, and on the same day he took out a Notice of Motion on behalf of the client applying for an order that the whole proceedings be set aside on the ground of [p.158] irregularity. The motion came before Tejan J. (as he then was) on 12th November, 1971. It was adjourned on the ground that it was short-served but the learned Judge however granted an interim stay of execution of the writ of Fieri Facias. The motion was heard by Tejan J. on 30th November, 1971. Counsel for the respondent stated inter alia that the application was for an order to set aside the judgment obtained on 14th June, 1971 on the ground of irregularity. Counsel for the Appellant Company stated that the same application had been made before Ken. During J. and that the learned Judge had dismissed it. In reply counsel for the respondent said inter alia that the application was not based on the same facts which Ken. During J. had deliberated upon, and that the irregularity was discovered after the application to ken. During J. the ruling of Tejan J. was short. He said:—

"I have considered the arguments of both counsel. There is no doubt a breach of the rules has been committed. In the interest of justice, I allow the application to set aside the judgments. Costs in the cause."

The Appellant Company appealed against that order to the Court of Appeal on one ground, namely:—

"That the learned Trial Judge had no jurisdiction to entertain the Respondent's Notice of Motion dated 10th November, 1971 by reasons of the fact that on the 9th day of November, 1971 the High Court of Sierra Leone by an Order of the Hon. Mr. Justice Ken O. During had dismissed a similar application made by the Notice of Motion dated 2nd November, 1971 which said order remains in full force and effect."

The Appeal was heard by the Court of Appeal on the 24th and 25th days of May 1972. After listening to two days of argument by counsel for both parties the Court gave the following judgment on 25th May, 1972:—

"In the interest of Justice we feel that the action should go to trial. We therefore invoke our posers under Rule 36 of the Court of Appeal Rules and dismiss the Appeal. No order as to costs."

[p.159]

It is against that judgment that the Appellant Company have appealed to this Court.

The main issues in this appeal may be stated thus: —

(i) Whether Tejan J. had jurisdiction to entertain the application to set aside the judgment in default after a similar application had been dismissed by Ken. During J.

(ii) Assuming that Tejan J. had jurisdiction, was his decision to set aside the judgment in default right?

(iii) Whether the Court of Appeal were right in dismissing the Appeal.

Dealing with the first issue stated above, Dr. Marcus-Jones, learned Counsel for the Appellant Company, submitted that in view of the fact that Ken. During J. had dismissed respondent's application to set aside the judgment in default, neither Ken During J. nor any other judge of the High Court had jurisdiction to entertain any other application to set aside the judgment and that the only remedy of the respondent was by way of appeal. In order to determine the soundness of this submission it is necessary to consider the power of the High Court to set aside such judgments is contained in Order 10 Rule 10 of the High Court Rules which is in the following terms:—

"Where judgment is entered pursuant to any of the preceding rules of this order it shall be lawful for the Court to set aside or vary such judgment upon such terms as may be just."

It is well settled that in exercising the power conferred by this rule the court should draw a distinction between a regular judgment and an irregular judgment. In the case of a regular judgment the judge has a discretion, having regard to all the circumstances as to whether to set aside the judgment or not. But in the case of an irregular judgment, the judgment set aside Ex debito justitiae which in ordinary language means that he is entitled to have it set aside as of right. In the words of Upjohn L.J. [p.160] (as he then was) "This means no more than that, in accordance with settled practice, the Court can only exercise its discretion in one was namely, by granting the order sought." (See In re Pritchard deceased (1993) 2 W.L.R. 685 at p.696 C.A.).

In this connection, it is pertinent to quote also the words of Fry L.J. in Anlaby v. Practerious (1888) 20 Q.B.D. 764 C.A. He said at p.768

"In such a case the right of the defendant to have the judgment set aside is plain and clear. The court acts upon an obligation, the order to set aside the judgment is made ex debito justitiae, and there are good ground why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possible to an action of trespass."

and he said at P.679

"There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set if aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting the defendant relief."

As I stated earlier, neither in the notice of Motion which was heard by Ken During J. nor in the argument before him was any allegation of irregularity of the judgment made. The whole proceedings proceeded on the basis that the judgment was regular. On the other hand, and as I pointed out earlier, irregularity

was alleged in the Notice of Motion which was heard by Tejan J. and Counsel for the respondent stated that the application was to set aside the judgment on the ground of irregularity. So whilst Ken During J. was asked to exercise his discretion to set aside the judgment, Tejan J. was asked to exercise justitiae to set aside the judgment. I therefore cannot accede to the view, urged upon as by Dr. Marcus-Jones, that the application dealt with by Tejan J. was the same as the one which had been disposed of by Ken. During J. it is therefore erroneous to contend that Tejan J. constituted himself into a Court of Appeal over the exercise of [p.161] discretion by Ken. During J. In my judgment Tejan J. had jurisdiction to entertain the application.

Learned Counsel for the Appellant Company relied on the case of In re Nazaire Company 12 Ch. D. 88 C.A. in support of his submission.

The head note of that case reads: —

"Under the system of procedure established by the judicature Acts no judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal."

In my opinion, the simple answer tot hat submission is that Tejan J. did not rehear or even purport to rehear the order of ken. During J. as I have pointed out earlier the application which was dealt with by Tejan J. was quite different from that dealt with by Ken During J. in this connection I would adopt the words of lord Atkin in Evans v. Barthlam (1937) A.C. 473 at p.480 H.I. He said:—

"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

See also Craig v. Kenseen (1943) 1 All E.R. 108, C.A

But quite apart from what I have just stated, there is an added reason why Tejan J. had jurisdiction to entertain the application, and that is that the applicant before Ken. During J. had no locus standi. As stated earlier, the respondent entered appearance to the writ of summons for the first time on 10th November, 1971 ------ i.e. the day after the application had been dismissed by ken. During J. So the Solicitor who filed the Notice of Motion and the papers which constitutes the application before Ken. During J. was not o the record as Solicitor acting for the respondent or anyone at all. He was a stranger to those proceedings and the learned Judge should have taken no cognizance of any papers filled by him. Presumably that was why [p.162] the learned Judge dismissed the application although he did not state any reasons. In contrast, when the other application came before Tejan J. the position was completely different. The respondent entered appearance on 10th November 1971. This he was entitled to do, in my judgment. Order 9 R. 13 of the High Court Rules provides that a defendant my enter appearance at any time before judgment. Judgment in default had already been entered, but it is settled and accepted practice under the rule that appearance entered after judgment would sand in the event of the judgment being set aside. It stands to reason therefore that since the intention of the respondent was to set aside the judgment, his first proper step was the entry of appearance. Thereafter

the respondent filed the notice of Motion which was eventually heard by Tejan J. In view of the foregoing, I am of the opinion that was the only application to set aside the judgment properly made. In the circumstances Tejan j. clearly had jurisdiction to entertain it.

The next question is whether Tejan J. was right in setting aside the judgment. The answer would depend on whether or not the judgment was regular or irregular. But Dr. Marcus-Jones submitted that this court should not consider this question because the application to set aside the judgment did not comply with order 50 R. 3 of the High Court Rules which reads as follows:—

"Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

It was conceded by Counsel for the respondent that not objections were stated in the Notice of Motion. The Notice of Motion merely alleged irregularity without specifying it. In those circumstances, should the court of Appeal or this Court set aside Tejan J's order on that ground?

In my opinion, the answer is No. The substance of the complaint is the non-compliance with a rule (i.e. 0.50 R. 3). The Rule making body in its wisdom has made provisions for dealing with cases where there has been non-compliance with the Rules order 50 R.1 of the High Court Rules provides as follows:—

[p.163]

"Non-compliance with any of these rules, or with any rule of practices for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

This rule empowers the Court to disregard irregularities and to decide on the material question. The court is thereby enable to do justice without placing undue premium on technicalities.

Counsel who represented the Appellant Company before Tejan J. did not take a preliminary objection to the Motion based on the ground of non-compliance with 0. 50 R. 3. He allowed the Motion to go on without pointing out the irregularity to the judge. In my opinion, in those circumstances, he is deemed to have waived the objections. See Re Macrae (1884) 25 Ch. D. per Cotton L.J. at p. 19 C.A. Moreover, Tejan J. having entertained the motion in the irregular form, it is reasonable to presume that he invoked his powers under 0. 50 R. 1 and decided to disregard the irregularity and decided the material questions.

Having disposed of the technical point raised by Dr. Marcus-Jones, I shall now turn to the substantial point as to whether the judgment in default was regular or irregular. The Appellant Company's claim was for damages for Breach of Contract and for wrongful detention of goods. The statement of claim also gives particulars f loss and damages suffered by the Appellant Company including the sum of Le1,350. The rule under which the Appellant Company purported to enter judgment in default is 0.10 R. 7 of the High Court Rules which is in the following terms:—

"Where the writ is indorsed with a claim for damages only or for detention of goods with or without a claim for pecuniary damages and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appeal to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing [p.164] to appear, and interlocutory judgment of the value of the goods and damages, or the damages only as the case may be, and proceeding rules of this order as may be applicable."

The Appellant company entered final judgment for the sum of Le1,350, and interlocutory judgment for damages. It is not surprising that they did not enter interlocutory judgment for the value of the goods, because according to paragraph 7 of the Statement of Claim the motor alleged to have been detained was returned to the Appellant Company on or about 19th August, 1970 i.e. before the issue of the Writ of Summons. In the circumstances the claim for "wrongful detention of goods' was unwarranted.

The question which calls for decision therefore, is whether the claim for Le1,350 was a liquidated demand entitling the Appellant company to enter final judgment for that amount. What then is a "liquidated demand"? In my opinion it means a claim for an amount which can be ascertained by calculation or fixed by any scale of charges or other positive data. A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of liquidated demand. On the other hand when the amount depends upon the circumstances of the case and is fixed by opinion or by assessment for by what may be judged reasonable, the claim is generally unliquidated. I quote, with approval, the words of Barrowclough C.J. in the new Zealand case of Paterson v. Wellington Free Kindergarten association Inc. (1966) N.Z.L.R. 468, at p. 471:—

"In my opinion there can be no doubt that, in deciding whether a demand is liquidated, important factors are that it be capable of arithmetical calculation and that no investigation of the amount claimed should be necessary other than inquiry as to well established scales or charges etc.

According to the Appellant Company's Statement of Claims, the Respondent agreed to execute the work for Le1,350 and that amount was paid to him but that when the respondent returned the motor to the Appellant Company the worked had been "So inefficiently carried out" that the motor was unusable and that the Appellant Company delivered the motor to another --------[sic] which [p.165] repaired it at a cost of Le548. The sum of Le1,350 was clearly money paid to the respondent for a consideration. But had the consideration failed? In my opinion, it had not because it was admitted in the Statement of Claim that the respondent had done some work, Albert inefficiently. It was not a case where the workman gave himself out as possessing some skill which he did not possess or where he had done no work at all. In my opinion this was a case where the Court would have to assess the value of the work done by the respondent and arrive at the amount payable to the Appellant Company as refund and also as damages for breach of contract. It was not a case where the plaintiff was entitled to a refund of the whole amount. In those circumstances the claim for Le1,350, was, in my opinion, not a claim for a "liquidated demand," but for unliquidated damages. In my judgment therefore the Appellant Company were not entitled to sign final judgment for that amount, the judgment was irregular. This conclusion is supported by a number of English cases. In Muir v. Jenks (1913) 2 K.B. 412 C.A. it was held that where a plaintiff signs judgment in default of appearance for a sum in excess of that which is due to him the

defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduce. In Hughes v. Justin (1894) I Q.B. 667 C.A. it was held that where a writ of summons is indorsed for a liquidated demand, which is reduced by payment after writ issued, judgment in default of appearance ought only to be entered for the amount actually due at the time when such judgments is entered, and the defendant has a right to have any judgment entered for a larger amount set aside.

It is settled law that where a plaintiff proceeds to sign judgment in default he must comply strictly with the rules empowering him to do so, and that failure to comply strictly with the rules would render the judgment irregular. This principle was stated by Vaughan Williams L.J. in Hany-Adams v. Hall (1911) 2 K.B. 942 at p. 944 C.A. in these words:—

"Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliances with the rules"

[p.166]

And Buckley L.J. in the same case stated it as follows at p. 945

"Where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules, that is a matter strictissimi juris."

In my opinion the judgment in default signed by the Appellant company was not in compliance with 0.10 R. 7 and the judgment was therefore irregular. In my judgment, on the principle laid down in Anlsay v. Praetorius (supra) the respondent was entitled to have the default judgment set aside ex debito justitiae.

In my judgment, therefore, Tejan J. was justified in setting aside the judgment in default and the Court of appeal were also justified in dismissing the appeal. I would dismiss the appeal.

SGD.

E. LIVESEY LUKE

JUSTICE OF THE SUPREME COURT

CASES REFERRED TO

1. Thynne vs. Thynne reported in (1955) 3 All E.L.R. 129

2. Meier v. Meier (19) (1948) p. at p.95)

3. Attah-Quarshie vs. Okpots reported in (1973) 1. G.L.R (59)

4. In re Nazaire Company 12 Ch. D. 88 C.A.

5. Evans v. Barthlam (1937) A.C. 473

6. Craig v. Kenseen (1943) 1 All E.R. 108, C.A

7. Re Macrae (1884) 25 Ch. D.

8. Paterson v. Wellington Free Kindergarten association Inc. (1966) N.Z.L.R. 468, at p. 471

9. Muir v. Jenks (1913) 2 K.B. 412 C.A.

10. Hughes v. Justin (1894) I Q.B. 667 C.A.

11. Hany-Adams v. Hall (1911) 2 K.B. 942

THE ADMINISTRATOR-GENERAL v. ALHAJI ABDUL WAHID BICKIEU

[SUP. CA. NO. 2/72] [p.68-79]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3 JULY 1973

BETWEEN:

THE ADMINISTRATOR-GENERA L — APPELLANT

AND

ALJHAJI ABDUL WAHID BICKIEU — RESPONDENT

Cyrus Rogers-Wright, Esq. for the appellant

Dr. W.S. Marcus-Jones for the Respondent

JUDGMENT DELIVERED ON 3RD DAY OF JULY, 1973.

LIVESEY LUKE J.S.C.

This is an appeal against an order as to cost only. It will however be convenient at the outset of this judgment to give a brief history of this case.

Kultumi Abayeh died intestate on 23rd December, 1954 seised in fee simple is possession of a house and land situate and known as 27 Dan Street Freetown and survived by a legitimate and only child Zainabu Fatmata Sankoh. Kultimu Abayeh (hereafter referred to as “the deceased”) was a Mohammedan. At the time of the death of the deceased, Zainabu Fatmata Sankoh was an infant. The respondent in this appeal, Alhaji Abdul Wahid Biokieu is the brother of the deceased and on the death of the deceased he became the guardian of Zainabu Fatamata Sankoh and he took possession of the property. Sometime after Zainabu Fatmata Sankoh had attained her maturity, she asked the respondent to give her possession of the property but he refused. There after sometime in 1969, Zainabu Fatmata Sankoh

[p.69] issued a writ to summons against the respondent claiming inter alia a declaration that the deceased died seised of the said property in fee simple in possession and possession of the said property. In his Defence the respondent denied that the deceased died seised of the said property in fee simple and alleged that the deceased had sold the property to him sometime in 1951 and he counterclaimed for a declaration that he was the fee simple owner of the property having bought it from the decease for £800 (Le1600). The trial judge dismissed the claim of Zainabu Fatmata Sankoh on the ground that the property of the deceased vested in the Administrator-General by virtue of Section 2(1) of the Administration of Estates Act, (Cap. 45) and not in Zainabu Fatmata Sankoh and therefore she was not entitled to sue for recovery of possession. The trail judge also dismissed the counter claim on the ground that the respondent had failed to prove the alleged sale of the property to him.

Both Zainabu Fatmata Sankoh and the respondent appealed to the court of appeal against that decision. The Court of Appeal consisting of Dove Edwin Ag. P., Marcus-Jones J.A. and Tambiah J.A. delivered judgment on 23rd April, 1970 dismissing both appeals.

Dealing with the appeal of Zainabu Fatmata Sankoh, Dove-Edwin Ag. P. said inter alia

"I agree with the learned Judge's decision. This matter should have gone to the official administrator in the first place and plaintiff was wrong in suing as she did. The fact that she is a Mohammedan did not alter the position in my opinion. I would dismiss her appeal holding that the matter be taken up by the Administrator-General".

[p.70]

Inter alia:—

"In y view, the respondent's counter-claim must fail on it evidence which he did produced. He relies to a great extent on a document marked Exh. B5. This document is a receipt which the defendant claimant suggested he got from the deceased when to bought the property in Dan Street. It was supposed to be signed by the deceased who made her thumb mark on it. The judge believe that at the time the receipt was made deceased could sign her name. An important witness whose name appears on Exh. B5 and was said to be alive and somewhere in Sierra Leone was not called……

……

He (i.e. the respondent) was in the position after the plaintiff's mother died to take over all the properties available, that is deeds, etc. and no one was in a position to challenge him. There is evidence that he took more than decent advantage of his power over his own niece by his relationship with her."

In his judgment Tambiah J.A. said inter alia:—

"The learned Judge in a careful judgment has chosen not to accept the defendant's version that there was a sale of this property to him by Kultumi Abayoh. He has held that the property forms part of the estate for the deceased…….. In other words the learned judge has held that the receipt is a forgery although he has used euphemistic language."

It would appear that in the same month that the Court of Appeal judgment just referred to was delivered (i.e. April, 1970) Zainabu Fatmata Sankoh gave writer information to the Administrator General, in accordance with Section 10(1) of Cap. 45, that her mother Kultumi Abayeh (the deceased) had died intestate leaving estate within the jurisdiction of the court.

Sometime thereafter (the records do not disclose when) the respondent applied to the Master and Registrar of the High Court for the grant of Letters of Administration of the estate of Kultumi Abayeh. The Administrator-General thereon entered a caveat. As a result of the entry of the caveat, the respondent issued a writ of summons against the Administrator-General on the 5th of November, 1970 [p.71 estate of Kultumi Abayeh. In his statement of claim the respondent averred that he was the lawful brother of the deceased according to Mohammedan law and that Zainabu Fatmata Sankoh was the illegitimate daughter of the deceased and therefore that she had no interest in the estate. In his Defence the Administrator-General disputed these averments and denied that the respondent had any right or prior right of administrate to him. The Administrator General also counterclaimed for a grant to him of letter of Administration to administer the estate of the deceased. The administration action was tried by Ken-During J. the judgments of the Court of Appeal delivered on 23rd April, 1970 were tendered in evidence at the trial. The learned judge delivered judgment on 30th November, 1971. In his judgment the learned judge found that the respondent "was the lawful elder brother of the deceased." The learned judge held that "the Court had a discretion in granting letters of Administration of the estate of the deceased, in law, equity, inherently and on ground of public policy.' In exercise of that discretion he refused a grant of letters of Administration to the respondent and ordered that letter of Administration of the estate be granted to the Administrator-General on application to the high court. In the result the learned judge dismissed the respondent's action with costs and ordered that the respondent pay the costs of the counter-claim.

On the 24th of February, 1972 the respondent lodged an appeal against the decision of Ken During F. The Appeal was heard by the Court of Appeal on the 13th and the 14th days of June, 1972.

[p.72]

At the close of argument by counsel, the court, there and then, make an order allowing the appeal and adding 'the court will give its reasons later when counsel will be heard on costs."

The court of Appeal gave its reasons for its decision on 23rd June, 1972 and also made an order in these terms.

"Costs to be paid by the Administrator-General personally on Solicitor and Client basis here and in the court below."

It is against that order that the Administrator General has appealed to this court. On 10th October, 1972 the Court of Appeal granted the appellant conditional leave to appeal and on 3rd November, 1972 that Court granted him final leave to appeal.

The main issue in this appeal to whether the Court of Appeal was right in ordering the Appellant to pay cost personally instead of out of the estate. In their judgment the court of Appeal said inter alia:—

"In the process of administration of the estate of a deceased intestate of the Mohammedan Faith, one Kultumi Deen (nee Abayeh), arose a series of errors for which we hold the respondent officially liable."

The person there referred to as respondent is the present appellant. I have searched the record for any evidence to support this statements by the court of Appeal. I regret to say, with respect, that my search has been in vain and that there is no evidence to support of warrant such a bold assertion by the Court of Appeal. Indeed, in my opinion, the evidence is to the contrary. It is pertinent to recall that the appellant was informed by Zainabu Fatmata Sankoh that Kultumi Abayeh had died intestate leaving estate within the jurisdiction [p.73] of the court. The machinery for obtaining an order for a grant of Letters of Administration of the estate of the deceased was thus set in motion. Section 10 of Cap. 45 sets out the stops to be taken by the Administrator-General after receiving the prescribed information. It is not necessary for the purposes of this judgment, to reproduce the section, but suffice it to say that it provides that

(i) The Administrator-General shall serve notice on the widow or widower, next-of-kin and others and publish the notice in the Gazette and any other public paper calling upon the widow or widower and next-of-kin etc. Within one month of such services or publication to show cause why an order should not be made for him to administer the estate, and

(ii) If no cause is shown to the satisfaction of the High court within one month the Administrator General shall position the High Court for an order grating him letters of Administration of the estate.

It was after the appellant had received the said written information and the machinery for obtaining a grant by him had been put in motion, that the respondent applied for a grant to him of Letters of Administration of the estate of the deceased. According to section 9(2) of Cap. 96, the respondent was only entitled to a grant of Letters of Administration in preference to the Appellant if he was

"(a) the oldest son of the Intestate if of full age according to Mohammedan Law, or

(b) The eldest brother of the intestate, if or full age according to Mohammedan Law."

[p.74]

The respondent claimed to be the lawful brother of the deceased according to the modern Law. It is patently clear that such a claim by the respondent did not entitle him to grant of letter of Administration of the estate of the deceased. According to section 9(2) of Cap. 95, to be entitled to a grant of letters of Administration, the respondent had to prove that he was the "oldest brother" of the deceased and not only merely that he was the "lawful brother of the deceased." Therefore, in my opinion, on the basis of the claim of the respondent alone, if on no other ground, the Appellant was entitled and justified to dispute and oppose the grant of Letters of Administration of the estate of the deceased to the respondent. And in addition the court of Appeal had said in a considered judgment delivered on 23rd April, 1970 inter alia:—

"This matter should have gone to the Official Administrator in the first place and plaintiff was wrong in suing as she did. The fact that she is Mohammedan did not alter the position in my opinion, I would dismiss her appeal holding that the matter to be taken up by the Administrator-General."

Without going into the question of whether or not the judgment of the Court of Appeal constituted sufficient written information under section 10(1) of Cap. 45, the Court of Appeal by the above quoted statement and other statements in the judgments, had clearly indicated that the appellant was entitled to Letters of Administration of the estate of the deceased in preference to the respondent.

In the circumstances I am of the opinion that the appellant was justified in entering a caveat to a grant of Letters of Administration to the respondent, if for no other reason but for the respondent prove to the satisfaction of the Court [p.75] of deceased according to Mohammedan Law but was also the oldest brother of the deceased according to Mohammedan Law and thereby entitled to a grant of Letters of Administration for the estate of the deceased in preference to the appellant.

It was contended by Counsel for the respondent that the order appealed against is justifiable on the ground that the appellant was guilty of culpable neglect of duty by his failure to investigate adequately or at all the respondent's claim or entitlement to a grant. But what was the respondent's status which he claimed entitled him to a grant? It was, as stated in paragraph 1 of the Statement of Claim, that he was the "Lawful brother according to Mohammedan Law and one of the persons entitled to share in the Estate of Kultumi Deen (nee Abayeh) etc." Is this claim that deserves investigation? In my opinion, it is not, for the simple reason that the proof of such a claim would not entitle the respondent to a great of Letters of Administration under Section 9(2) of Cap. 96. And even assuming that the appellant investigated the claim and found it to be true, the appellant would still be justified in resisting the claim to a grant of Letters of Administration because, as I have said before, the proof of such a claim would not entitle the respondent to a grant of Letters of Administration. In my judgment the finding of the learned trial Judge that the respondent was "the elder brother" and not the oldest brother of the deceased indicated the appellant's action in challenging the claim of grant of Letters of Administration by the respondent. Indeed there was no evidence before the learned [p.76] judge that the respondent was the oldest brother of the deceased and Dr. Marcus-Jones, learned Counsel for the respondent, conceded that before us.

In view of the forgoing I am of the opinion that the Appellant was not liable officially or otherwise for errors, if indeed there were any, which might have been committed in the administration of the estate of the deceased.

But even if the Appellant had been guilty of errors in connection with the administration of the estate of the deceased, could he be held personally liable? Counsel for the respondent answered this question in the affirmative replying a section 6 of Cap. 45, the relevant part of which (as amended) provides:—

"6. Neither the Administrator and Registrar-General nor any agent shall be personally liable to any person in respect of assets in the possession at the time of his death of any person, whose estate shall be administered by the Administrator and Registrar-General and generally neither the Administrator and Registrar-General nor any agent shall be liable for any act done bona fide in the supposed and

intended performance of their duties, unless it shall be show that such act was done not only illegally but willfully or with gross negligence."

Dr. Marcus-Jones submitted that the appellant had acted mala fides, willfully and with gross negligence. I, for my part do not think that his submission has any merit because there is no evidence that the appellant acted "mala fides or willfully or with gross negligence." The submission also ignores the very important words in the section "not only illegally." In my judgment, if the Administrator-General has done any act willfully or with grows negligence but bona fides, in the supposed and intended performance of his duties, he is not personally liable unless he had also acted illegally. Similarly, if he has acted illegally he is not personally liable unless he had also acted willfully or with gross negligence. There [p.77] is no evidence and indeed no suggestion by ……. for the respondent that the appellant acted illegally. In my opinion, section 6 of Cap. 45 and similar statutory provisions are for the protection of public officers in the public interest. The appellant was indisputably public officer and public policy dictates that such officers acting in bon fide and honest performance of their actions. To ignore this principle would be putting public officers in an intolerable and unenviable position.

It was suggested on behalf of the respondent that the appellant should be made personally liable for the costs because there was some irregularity in his appointment as "Official Administrator." But with respect, the appellant did not appoint himself and I do not think that there is any principle of law or justice which would make him personally liable in such circumstances. If indeed there was any irregularity in his appointment, and we are not called upon decided that issue, it has been rectified by the Administration of Estate (Amendment) act, 1972 (act No. 19 of 1972 which was made retrospective to 14th May, 1964. The Amendment Act substituted the words "Administrator and Registrar-General" for the words "Official Administrator" wherever the latter words appear in the Administrator of Estates Act (Cap.45) and make the Administrator and Registrar-General a Corporation sole.

In my opinion the manifestly erroneous view of the Court of Appeal that the Appellant was "officially liable" for certain errors in the [p.78] administration of the estate of the deceased, which presumably was the basis for the other costs, is a sufficient grown for disposing of the appeal in favour of the appellant. But Dr. Marcus-Joes further contended that the Court of Appeal had exercised a discretion in ordering the appellant to pay the costs personally and that in the circumstances this court should not interfere. I agree that as a general rule costs are in the discretion of the Court. But his rule is subject to certain well-established exceptions and to the over-riding principle that the discretion must be exercised judicially. Mr. Rogers-Write submitted that by virtue of section 15 of Cap. 45, the appellant is a trustee and that he was thereby entitled to the payment of his costs out of the estate by virtue of order 46 rule 1 of the High Court Rules. Section 15 of Cap 45 as amended provides as follows:—

"The Administrator and Registrar-General and every administrator appointed under this act shall be deemed a trustee will in the meaning of any Imperial Statute or local Act, now or hereafter to be in force, relating to trusts and trustees

and the relevant part of 0.46 R.I reads:—

"Subject to the provisions of any Act and there rules the costs of and incident to all proceedings in the High Court including the administration of estates and trusts shall be in the discretion of the Court:

"Provided that noting herein contained such deprive an executor, administrator, trust mortgage who has not unreasonably instituted or carried on or resisted any proceedings, of any rights to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the law court of Justice in England."

I do not think that it is disputed that the Rules of the High Court have statutory effect. Dr. Marcus-Jones' Contention was that the appellant acted unreasonably in resisting the claim by the respondent for a grant of Letters of Administration. With [p.79] unreasonably. In my opinion all the evidence point unequivocally to the conclusion that the appellant acted reasonably in resisting the respondent's claim. In my judgment therefore the Court of Appeal noted erroneously in depriving the appellant of the costs out of the estate.

I share the view that when it is shown that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, that is sufficient ground for allowing an appeal as to costs (see Donald Campbell & Co. Ltd. V. Pollak (1927) A.C. 732). For the foregoing reasons I would allow the appeal and set aside the order of the Court of Appeal relating to costs. I would order that the appellant's costs in the Court and the courts below be paid out of the estate.

With regard to the respondent's costs, I think that the learned trial judge had ample justification on the basis of the evidence before him for depriving him of his cost out of the estate. A piece of the respondent's evidence referred to by the learned Judge in the judgment is not only curious but telling.

The respondent said:—

"I am of the opinion that it is desirable for Letters of Administration to be granted to me instead of the Administrator-General in the light of previous court proceedings I have referred to. It is because although I bought property from the deceased she did not transfer the same to me that I am of the opinion that is desirable for Letters of Administration to be granted to me."

I, for my part, taking all the circumstances into consideration, would deprive the respondent of his costs out of the estate and order that he become his own costs in this court and the courts below:—

SGD.

E. LIVESEY LUKE

JUSTICE OF THE SUPREME COURT

CASE REFERRED TO

1. Donald Campbell & Co. Ltd. V. Pollak (1927) A.C. 732)

STATUTES REFERRED TO

1. Order 46 rule 1 of the High Court Rules

2. Section 15 of Cap 45

1975 - 1979

ORIGINAL CIVIL JUDGMENTS

SUPREME COURT OF SIERRA LEONE 1975 - 1979

INDEX

TITLE OF CASE

ALPHABETICAL LISTING

ALLIE BUNDU v. GRANT SALLU BUNDU KAMARA

[Civil Appeal No. 2/76] [p.103-121]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 25 OCTOBER 1977

CORAM: CHIEF JUSTICE C.O.E. COLE -PRESIDING

MR. JUSTICE E. LIVESEY LUKE, J.S.C.

MR. JUSTICE C.A. HARDING, J.S.C.

MR. JUSTICE K.B. DURING, J.S.C.

MR. JUSTICE C.S. DAVIES, J.A.

Allie Bundu	-	Appellant	}
VS			} for judgment
Grant Sallu Bundu Kamara	-	Respondent	}

T. M. Terry, Esq. Solicitor for the Appellant

T. S. Johnan Esq. Solicitor for the Respondent

J U D G M E N T

C. A. Harding J. S. C.

The Respondent herein, Grant Salu Bundu Kamara, on 4th March, 1961, mortgaged his freehold property No 21D Elk Street, Freetown to the Development of Industries Board (D.I.B for short) to secure the repayment of a loan of Le2,000 with interest at the rate of 4 per cent per annum payable on 4th March, 1965; the mortgage was effected by a conveyance of the said property to the Mortgage subject to a proviso for redemption. On 22nd July 1964, i.e. before the date fixed for redemption, one Allie Bundu (the Appellant herein) a judgment creditor of Grant Sallu Bundu Kamara (the Mortgagor) in execution of the judgment debt, purported to purchase the Respondent's equity of redemption in the mortgaged property at an auction sale by the Sheriff of Sierra Leone made under Section 5 of the Execution Against Real Property Act, Cap. 22.

[p.104]

On 18th November 1969, Allie Bundu as execution creditor took out an Originating Summons in which the Mortgage (i.e. the D.I.B) and the Sheriff were the Defendants/Respondents, praying for an Order that the D.I.B. (the Mortgage) do sign a Deed of Release of the mortgaged premise to his favour upon payment by the Sheriff to the D.I.B of the balance of the mortgage debt and interest due and owing in respect thereof, this summons was supported by an affidavit sworn to by the applicant. The Mortgagor, i.e. the Respondent herein, was not made a party to those proceedings.

The matter came up before Dobbs, J. on 21st January, 1966, and no objection having been made by the Solicitor-General who at the time represented both the D.I.B and the Sheriff, an Order, as was prayed, was made accordingly. On 2nd May, 1966, the D.I.B in compliance with the said Order duly executed a Deed of Release of the mortgaged premise in favour of the Appellant. In that same year the Respondent who had been in possession of the premises was evicted therefrom by the Appellant who thereupon entered into possession.

Subsequently, in 1970, the Respondent instituted proceedings in the High Court against the D.I.B, and on 5th October 1977 Browne-Marke J. (as he then was) made Order as follows:—

1. Release of Mortgage dated 2nd May 1966 by the Defendant (i.e. D.I.B.) to one Allie Bundu of the Plaintiff's mortgaged property situate at Freetown on 21D Elk Street Freetown is bad in law and null and void.

2. The grant conveyance transfer of the legal fee simple of he plaintiff's said mortgaged property by the defendant to one Allie Bundu by way of a purported Release of Mortgage dated 2nd May, 1966 is set aside.

3. The Defendant to re-convey to the plaintiff the plaintiff's said mortgaged property premises and land situate at and known as 21D Elk Street, Freetown.

[p.105]

Actually enough the appellant was not made a party to those proceedings even though the respondent was fully cognizant of the fact that the Appellant was then in possession of the premises.

It is therefore not surprising that the Respondent found it necessary, in 1973, to institute further proceedings against both the D.I.B. and the appellant claiming a reconveyance to him of the mortgaged property and such further or other relief. The case was heard by Warne J. (as he then was) and he, on 25th January 1974, gave judgment dismissing the respondent's claim with costs. On appeal by the Respondent to the Court of Appeal (Coraii: Rejan J.S.C. Awunor-Renner J.A. and S.B Davies J.A.) the judgment of Warne J. was set aside and an Order made for the Respondent (the appellant therein) to have half the costs both in that Court and in the High Court. Against this decision the Appellant therein has appealed to this Court.

In his statement of claim filed in the High Court, the Respondent averred not only the judgement of the Browne-Marke J. (above mentioned) but also the execution by him of the Mortgage Deed of 4th March 1961 in favour of the D.I.B (who was the first defendant in that action) and the subsequent release on the 2nd May, 1966 of the said mortgage to the Appellant without his (Respondent's) consent. He further alleged that the D.I.B did not at any time between the said 4th day of March 1961 and the said 2nd day of March 1966 exercise any of its rights under the said mortgage including the right to foreclose; on the contrary, the D.I.B continued to receive from him installment repayments of the loan up to and including November, 1965. [Among the receipts tendered in support of such repayments was one dated 27th January, 1965]

The D.I.B. in their Defence filed, merely admitted the execution of the said mortgage and the subsequent release thereof to the Appellant.

The Appellant (the 2nd Defendant in the action) in his amended Defence denied that the Respondent was entitled either in law or in equity to a reconveyance of the premises ad stated that the Respondent's “equity of redemption” was sold by public auction under due process of law to satisfy a judgment debt against the Respondent and that by such sale the Respondent lost his right to redeem

the property and that the Appellant as purchaser for value thereof became subrogated to, or in [p.106] substitution of, the rights of the Appellant to redeem the mortgaged property. He also pleaded the Order of Dobbs J. dated 21st January, 1966, ordering the D.I.B to sign a Deed of Release of the mortgage in his favour on payment by the Sheriff to the D.I.B. of the mortgaged debt and interest then due and owing. He further stated that in compliance with the said Order the D.I.B duly executed the Deed of Release and that he was in possession of the property under a bona fide title and that he was legally entitled to remain in possession and that the Appellant's claim was unfounded and that the action was frivolous vexatious and an abuse of the process of the Court.

The Learned trial Judge in dismissing the action said inter alia:—

“Whether the Court presided over by the learned Judge Browne-Harke J.S.C had jurisdiction to review the Order of 21st January 1966 is doubtful; suffice it to any that one shall consider whether the 2nd Defendant has a good title to the property and if the plaintiff as a result of the purchase lost his “equity of redemption” of the said property.

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The 2nd Defendant went into possession by the Deed of Release executed in 1966 in pursuance to the Order referred to herein made on the 21st January 1966. Counsel for 2nd Defendant contends that 2nd Defendant became an assignee of the plaintiff/mortgagor as a result of the operation of law – that is to say when he purchased the property in execution of the judgment debt herein before mentioned and therefore had a right to redeem the mortgaged property. I agree with counsel for 2nd Defendant. 2nd Defendant became entitled to the property 2D Elk Street Freetown under section 5 of Cap. 22 of the Laws of Sierra Leone.

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“The plaintiff cannot be heard to say he had no notice of the sale, because I find as a fact that he had notice [p.107] of the sale. There was nothing at law preventing 2nd Defendant from purchasing the estate. His relation with the plaintiff was not the same as that of the trustee and cestui que trust where the trustee is prohibited from buying the trust property from the cestui qui trust.

By this sale the plaintiff lost the “equity of redemption”. The plaintiff could have exercised his right to redeem before the sale. In my view, by his conduct he waived his right to redeem and indeed abandoned his rights of redemption.

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“No. 21D Elk Street was in fact seized in satisfaction of the judgment debt and was sold by Public auction. The 2nd Defendant having acquired the said property purchased at the public auction became entitled to the "equity of redemption" heretofore vested in the plaintiff.

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The 2nd Defendant obtained judgment for a debt owed to him by the plaintiff, there was due execution of this judgment. The judgment having been fulfilled gave the 2nd Defendant a right to the "equity of redemption" of the mortgage to the 1st Defendants. The 2nd Defendant has acquired a good title to the property situate at 21D Elk Street, Freetown both in law and in equity. The plaintiff, having lost his right to redeem in law there is no state to re-convey to him both by the 1st Defendants and the 2nd Defendant."

As has been stated this judgment was set aside on appeal to the Court of Appeal. The main grounds of the appeal were:—

"1. The Learned trial judge erred in law when he stated that by the purchase of the [p.108] mortgaged property by the 2nd Defendant, at the time when the legal estate thereof was vested in 1st Defendant, the 2nd Defendant thereby became an assignee of the plaintiff mortgagor.

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3. The Learned trial Judge erred in law when he concluded that by the sale of the mortgaged property by the Sheriff the plaintiff lost the "equity of redemption."

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5. With a valid subsisting and enforceable judgment and Order of the High Court against the 1st Defendant/Respondent in favour of the plaintiff/appellant in respect of the same transaction, the Learned trial Judge erred in law in delivering an opposite or contradictory judgment as between the plaintiff/appellant and the 1st Respondent."

The Court held (1) "that since the 2nd Respondent (i.e. Allie Bundu) had paid the mortgage debt to the 1st Respondent (i.e. the D.I.B) the Appellant's (i.e. Grant Sallu Bundu Kamara) obligating to redeem his property is simply to pay what he owed to the 2nd Respondent" and (2) "that the mortgage is still subsisting notwithstanding that it was paid off without the knowledge of the Appellant (i.e. the Mortgagor Grant Sallu Bundu Kamara)."

The Cases relied upon by the Court for so holding included:—

(i) Parker & Another vs. Jackson & Another (1936) 2A.B.R.281

(ii) Monks vs. Whiteley (1911) 2 Ch.D. 461

(iii) Butler vs. Rice (1910) 2 Ch.D. 277

(iv) Chetwynd vs. Allen (1899) 1 Ch. 353

(v) Ghana Commercial Bank vs. D.T. Chandiran & Anor.(1960) 3 WLR 328: (1960) G.L.R. 178

[p.109]

The Court of Appeal in the course of its judgment stated:—

“Whether the judgment of Browne-Marke J. as he then was, was in accordance with legal procedure in the absence of an appeal, this court is not prepared to inquire into what the amazing situation in this case is that after the judgment of Browne-Marke J. and instead of adopting the various steps to execute or enforce the judgment, the Appellant instituted proceedings praying for an Order for a reconveyance of his Mortgaged property to him. In my view, this is the substance of the case before Warne J. as he then was.

- - - I think that the pith and narrow of the case is whether a court can be called upon to execute a judgment, this being the case before Warne J. (as he then was)

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Warne J. by setting aside the judgment of Browne-Marke J. and giving judgment for the 2nd Respondents, constituted himself without the slightest justification and contrary to all legal judicial and statutory authorities an appeal to Judge, and this being the case his judgment is set aside for lack of jurisdiction."

After dwelling for a while on the difficulties of effecting execution and enforcement of Browne-Marke's J. Orders as they stood the Judgment continued:—

“Surely the Orders made by Browne-Marke J. do not truly represent the decision which he intended to make. It is the view of this court that a Judgment should be made clear and easy of enforcement, and in this case it is not only sufficient to declare the release of the mortgage null and void and to set aside the transfer of the mortgaged property to the 2nd Respondent. We think that a further Order to the effect that the deed of conveyance to the 2nd Respondent be expunged from the Registrar of Conveyances, and that failure of the 2nd Respondent to convey the property to the Appellant within [p.110] a specified time, the Master and Registrar was to convey would have made the Judgment capable of easy enforcement.”

The grounds of appeal now before us are as follows:—

“(1) That the Court of Appeal was wrong in law when it held that a release of a mortgage can only be effected by the mortgagor himself to the mortgage.

(2) That the Court of Appeal was wrong in law when it held that because the Mortgagor was not a party to the action for the release of the mortgage to the 3rd party, the latter could not take subject to the right which the Mortgagor had against the Mortgagee.

(3) That the Court of Appeal was wrong in law to Order that a motion could be taken before the High Court to perfect Browne-Marke's J. judgment as the effect of such an Order if carried out would be to effect the Defendant/Appellant (Allie Bundu) who was not a party to the proceedings before Browne-Marke J.

(4) That consideration was never given to the following submissions of Counsel:—

(i) That by sale by the Sheriff by public auction of the Respondent's equitable interest in the property No. 21D Elk Street, Freetown for the payment of the Respondent's debt at which the said sale the appellant bought subject to the mortgage, the Respondent thereby lost the right to redeem the mortgage.

(ii) That by the sale as foresaid the Appellant as purchaser for value thereof became subrogated to, or in substitution of, the rights of the Respondent to redeem the said mortgage, and by operation of law became the Assignee of the Equity of Redemption [p.111] under the Mortgage Deed and a person entitled to redeem the mortgage.

(iii) That on the sale of the said premises at No. 21D Elk Street, by the Sheriff to the Appellant a Conveyance of the same was issued to him, that Section 8 of Cap. 22 provides that even if the judgment under which execution was levied is reversed (which is not the case here) such reversal shall not effect the purchaser.

(iv) That at the time the release of mortgage was executed by the D.I.B in compliance with the Order of the Court the Respondent had not fully repaid the mortgage debt and had lost the right to redeem by lapse of time and also by breach of the conditions of his contract loan."

Counsel for the appellant contended that there were two separate transactions in issue, viz; the first involving a loan granted by the D.I.B. to the Respondent in respect of which he executed a legal mortgage of his property situate at 21D Elk Street, Freetown, and the second, the subsequent purchase of the said property by the appellant in execution of a judgement debt.

With regard to the second transaction the Learned trial Judge made the following findings:—

(i) That the appellant was a Judgement Creditor of the Respondent:

(ii) That 21D Elk Street was seized in satisfaction of the judgment debt and sold by Public Auction;

(iii) That the Respondent had notice of this sale;

(iv) That the Appellant became entitled to the property 21D Elk Street, Freetown under Section 5 of Cap. 22 of the Laws of Sierra Leone;

(v) That Appellant had acquired a good title to the property situate at 21D Elk Street, Freetown both in law and in equity.

[p.112]

With regard to (i) and (iii) there can be no quarrel with the Learned trial Judge who also held that there was nothing to prevent the Appellant from purchasing the property i.e. the Respondent's equity of redemption.

Where there is no fiduciary relationship as in the present instance – between the parties, there is nothing to preclude the Judgement Creditor from purchasing the Judgement Debtor's property under a writ of fieri facias, and provided that there is no conflict of interest, no collusion, no fraud, the Courts will not interfere. This is a long established principle.

In Stratford vs. Twyman (1822) 37 B.R. Ch. 908 where the contention was that upon a sale under an execution, the creditor suing it out ought not to become the purchaser, Sir Thomas Plumor M. R. said (at page 909):—

“The point, therefore to be contended for must be that if the creditor would at law be permitted to purchase, yet that in a Court of Equity it cannot be permitted. But on what principle is that to rest? The case of trustees is quite different; with respect to them the principle is, that the same person shall not be buyer and seller. But here the Sheriff is the seller. In the case of a trustee there is a conflict of duty and interest, and the Court therefore says that he shall not be trusted to purchase unless he has divested himself of his character of trustee. The case of mortgagor and mortgagee alluded to stand again on a different principle, that the court will not allow one man to take advantage of the necessities of another. But here the party is proceeding adversely against his debtor, not by any private dealing, but by the public process of the law; and he is not the person who is to sell; that is the duty of the Sheriff; and what injury can arise from the creditor attending at the sale and bidding? I cannot find any principle for saying that he cannot purchase.”

[p.113]

Again, in Ex parte Villars In re Rogers (1874) 9 Ch. Ap.432, Hellish, L.J. held that there was nothing to restrain the Sheriff from selling to the creditor, who cannot be in a worse position than any other purchaser.

With regard to the seizure and sale of the mortgaged property, Section 2 of the Execution Against Real Property Act, Cap.22 states as follows:—

“The houses, lands and other hereditaments and real estate situate or being within any part of the Colony, belonging to any person whatsoever indebted, shall be liable to, and chargeable with, all just debts-, dues and demands, of what nature or kind soever, owing by, or due from any such person to Her Majesty, or any of her subjects, and shall be and are hereby made chattels for the satisfaction thereof, in like manner as personal estates within the Colony are seized,[CIS] extended, sold or disposed of for the satisfaction of debts”.

Under this provision the words “houses lands and other hereditaments and real estate” have been construed to include “the equity of redemption” which by the same Section “shall be and are hereby made chattels for the 'satisfaction” of a Judgment Debtor's debts, “in like manner as personal estates are seized, extended, sold or disposed of for the satisfaction of debts

It should be pointed out that the effect of this section is not to make the mortgaged premises i.e., 21D Elk Street a "chattel" but to make the Respondents (i.e. the Mortgager’s) equity of redemption of that

property a "chattel" for the purposes of execution, (See Porter vs. Khoury A.L.R., S.L. Series 193/-49 p.126).

Section 5 of the Act provides for the sale by Sheriff under a writ of fieri facias of the premises and for the execution and registration of the deed of conveyance to the purchaser after which "the purchaser shall be, and is hereby declared to be, vested in as good and perfect on estate as the owner of such houses, lands, hereditaments or other real estate was seized of, or entitled unto at or before the sale thereof as aforesaid, and [p.114] as fully to all intents and purposes as if the person, against whom such writ of execution shall be granted, had sold such lands and premises to such purchaser and signed, sealed and delivered a good deed for the same and received the consideration money himself". Now what estate was the Respondent (i.e. the Mortgager) seized of or entitled to at the tine the Sheriff sold? On the execution of the Mortgage the legal estate had been conveyed to the mortgage (i.e., the D.I.B) and the only right, interest or estate which the Mortgager had left was the equity of redemption which undoubtedly must be an equitable estate. Thus at the time the Sheriff purported to sell the premises the legal estate was vested in the D.I.B and the equitable estate i.e. the equity of redemption (which was the only interest that could have been sold under the act) was vested in the Respondent herein. The writ of ferri facias could not have attached the legal estate of the mortgage premises which was then vested in the D.I.B. Hence whatever price was paid by the appellant was only for the equity of redemption which in itself is a valuable asset which can be disposed of by the Mortgagor either by sale, by gift inter vivos, or by will), and not for the whole for simple estate. By utilizing the proceeds of sale to pay not only himself on his execution debt but also to obtain for himself a release or conveyance of the legal estate which at the time was vested in the D.I.B) (and as such could never have been levied upon in an execution against the Mortgagor) the Appellant purported to purchase both the equitable as well as the legal estate in the mortgaged premises.

In the affidavit in support of the Originating Summons praying for an Order that the D.I.B do sign a Deed of Release of the mortgaged premises upon payment by the Sheriff of the balance of the mortgage debt and interest the appellant deposed inter alia:—

"1. I am the Purchaser of the premises situate at and known as 21D Elk Street, Freetown.

2. The said premises were on the 22nd day of July, [p.115] 1964 sold, by Public auction by the Sheriff of Sierra Leone (2nd Defendant here in) under due process of law executed against the property of Grant Salu Bundu.

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7. At the sale of the said Mortgaged premises (subject to the mortgaged aforesaid) the 2nd Defendant herein obtained the price of Le3,560.00 sufficient to pay off the balance of the mortgage debt and interest and also the Judgment debt.

8. The 2nd defendant herein has by Deed conveyed to me this deponent the said premises No. 21D Elk Street, Freetown subject to the mortgage aforesaid.

9. There is now sufficient amount in the hands of the 2nd defendant herein to pay off in full the balance of the mortgage debt and interest now due and owing to the 1st defendant herein.

10. This affidavit is made in support of an application to the Court for an Order that the 1st defendant herein do sign a Deed of release of the said mortgage herein in my favour upon payment of the balance of the mortgage debt and interest now due and owing to him.

11. The application to the Court became necessary because the 1st defendant herein has refused to accept payment of the balance of mortgage debt and also to sign a Deed of Release in my favour."

As has been stated previously the Respondent (i.e., the Mortgagor) was not made a party to the proceedings and it is recorded that the Solicitor-General who represented both the D.I.B and the Sheriff at the hearing, had no objection to the application.

[p.116]

It is the duty of the Sheriff after seizure and sale of the debtor's goods to satisfy the Judgment debt and his own expenses after which to pay over the residue to the Judgment debtor. This procedure was not followed here and instead we find the Sheriff holding on to the residue for well over a year when application was made to the Court by the Judgment creditor (i.e. the Appellant herein) for payment out thereof by the Sheriff to the D.I.B (the mortgagor) who was then to sign a Deed of "Release of a Mortgage held by then and to which the Appellant was a complete stranger. Is it any wonder than, that the D.I.B at first "refused to accept payment of the balance of mortgage debt and also to sign a Deed of Release in his (i.e., Judgment creditor's) favour.

The Sheriff could not have conveyed the legal fee sidle in the premises to the Judgment creditor - only the "equity of redemption" which by virtue of Section 2 of Cap.22 of the Laws of Sierra Leone has been made a "Chattel".

The only interest which the Appellant could have purchased was the equitable estate which was retained by the Respondent. What the Appellant purported to have purchased, as could clearly be evinced from his conduct, was both the equitable and legal estate. It is pertinent to state that the Respondent did not receive any of the proceeds of sale which he was legally entitled to receive. Moreover, it was not proved that the conditions precedent to sale as contained in Section 7, 9, and 10 of the Execution against Real Property Act, Cap.22, were complied with by the Sheriff before he purported to sell the property in question. In such circumstances; I am not satisfied that the sale was bona fides. In my view the sale should be set aside. This also affects the release which was improperly obtained and which also should be set aside. In consequence of this the legal estate reverts to the D.I.B What in

effect the transaction has amounted to is that the Appellant has utilized money he paid for acquiring the equitable estate only to pay for the legal estate as well and to depriving the Respondent of the residue of the proceeds of the sale legally due him.

[p.117]

The Learned trial Judge was clearly wrong when he held that “2nd Defendant (i.e. the Appellant herein) become entitled to the property 21D Elk Street Freetown under Section 5 of Cap.22” and also that "2nd Defendant has acquired a good title to the property…….. both in law and in equity”.

Having held that the sale by the Sheriff as well as the Release should be set aside it follows that the Respondent's right to redeem the mortgage had never been extinguished or lost. The Respondent is entitled to a reconveyance of the mortgaged property.

The Appellant is bound to account to the Respondent for all rents and profits received by him or which might or ought to have been received in respect of the mortgaged property since he has been in possession thereof, i.e., since the date of the Release, less of course, all outgoings such as rates, insurance, repairs and reasonable improvements.

Taking all the circumstances of this case into consideration I would make the following Orders:—

1. The appeal is dismissed

2. The Order of the Court of Appeal is hereby varied as follows:—

(a) The D.I.B within one month from date hereof or within one month after being so requested by the Respondent execute a reconveyance to the Respondent, at the expense of the Respondent, of property No.21D Elk Street, Freetown.

(b) The Registrar of the Supreme Court do take an account of the rents and profits received by the Appellant or which might have been so received in respect of property No.21D Elk Street, Freetown since the date of the Release, i.e. since 2nd May, 1966, as well as all reasonable outgoings and file same in this Court within three months from date hereof for necessary action by this Court.

[p.118]

(c) The Respondent pays to the Appellant the purchase price that Appellant paid to the Sheriff plus interest at the rate of 4 per dentun per annum as from date of sale to the date of such payment less the costs of Execution and less any balance in the hands of the Sheriff.

(d) The Sheriff pays to the Appellant any balance remaining in his hands out of the proceeds of sale.

3. Costs of this Appeal and costs in the Court of Appeal and in the High Court to the Respondent

4. Liberty to apply.

[p.119]

Ken During J.A.

I have had the opportunity of reading the separate Judgments of my brothers Harding J.S.C. and Luke J.S.C. respectively and have come to the conclusion that this Appeal should be dismissed.

The facts of this case have substantially been stated in the separate Judgments of my Learned brothers.

Reference has been made to the Execution against Real Property Act Cap.22. The Appellant in his pleadings averred that the sale to him of the said property was valid and in my view the burden was on him to prove the same and the presumption of regularity could not be invoked in this connection by him. The conditions precedent to the sale must be complied with where property is put up for sale under the provisions of Cap.22. The question as to whether the sale was bona fide or mala fide will only arise when conditions precedent have been complied with and as I have already stated the burden of proof was on the Appellant. Indeed, it was squarely on the Appellant. I agree with my brother Harding J.S.C. that there has not been sufficient proof that conditions imposed by the Act were complied with and in my view therefore the purported sale of the said property could not be regarded as a bona fide sale under the provision of the Execution against Real Property Act. Cap. 22.

What the appellant could have bought was the Equity of redemption. It is pertinent to note that before the date fixed for redemption, the Appellant purported to purchase the Respondent's Equity of Redemption; repayment of the loan of Le.2,000 with interest at the rate of 4 percent per annum was payable on the 4th of March, 1965.

[p.120]

The Order of Dobbs J. on the 21st of January, 1966 that the Development of Industry Board do execute a Deed of Release in favour of the Appellant in my view ought not to stand in that the basis on which the Trial Judge made the order was that the sale by the Sheriff was bona fide one under the Execution against Real Property Act. In my view also the Order of Dobbs J. was not binding on the Respondent in that ha was not a party to the proceedings before the Learned Judge. Justice surely demands that before such an Order was made, considering that the Board at first refused to execute a Release, that the Respondent should have been made a party so that he could be in a position to at least state whether or not he was then indebted to the Board.

My Learned brother Luke J.S.C. in his judgment considered the legal position when it is clear from the evidence that the respondent's money was in fact used to pay off Mortgage debt as a result of which the Development Industries Board executed the Release to the Appellant. I agree with my Learned brother that the surplus in the hands of the Sheriff belongs to the Respondent and that neither the Board nor the Appellant was entitled to it. Luke J.S.C. went further to consider the equitable doctrine of Tracing and is of the opinion that the Respondent could follow the money in its converted form in the hands of the Appellant and that the Appellant hold the legal estate as constructive trustee of the Respondent. I do agree with him. It will be iniquitous, unfair, unjust for the Appellant to hold on to the

beneficial, interest in the legal estate when the Respondent's money was the consideration for which the release was made to him. This Court certainly will not allow the Appellant to hold such interest and I agree that the Deed of Release should be set aside. Even if sale of the Equity of Redemption was one which could be upheld as bona fide [p.121] under the Execution against the Real Property Act, I, for reasons I have stated above and those in the Judgment of Luke J.S.C. will set aside the Deed of Release and apply the equitable doctrine of Tracing.

My Learned brother Luke J.S.C. dealt with cases on Constructive Trust in his Judgment. He referred to what was said by Edmund L.J. (as he then was) on the subject, Constructive Trust in Carl Zeiss Stiftung vs. Herbert Smith & Co. No. 2 (1969) 2 L. Ch. 276 at p. 300 &. 301 respectively.

On the question as to whether or not the Appellant was a Constructive Trustee in coming to a conclusion I have applied the principle laid down by the Learned Lord Justice in that case.

I would make the Orders mentioned in the Judgment of my brother Harding J.S.C. and dismiss this appeal.

[Sgd.]

Ken O. During, J.A.

CASES REFERRED TO

1. Parker & Another vs. Jackson & Another (1936) 2A.B.R.281

2. Monks vs. Whiteley (1911) 2 Ch.D. 461

3. Butler vs. Rice (1910) 2 Ch.D. 277

4. Chetwynd vs. Allen (1899) 1 Ch. 353

5. Ghana Commercial Bank vs. D.T. Chandiran & Anor.(1960) 3 WLR 328: (1960) G.L.R.

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6. Stratford vs. Twyman (1822) 37 B.R. Ch. 908

7. Porter vs. Khoury A.L.R., S.L. Series 193/-49 p.126).

8. Constructive Trust in Carl Zeiss Stiftung vs. Herbert Smith & Co. No. 2 (1969) 2 L. Ch. 276 at p. 300 &. 301

STATUTE REFERRED TO

1. Real Property Act, Cap.22

AYO WILSON v. JAMES SAMURA & ANOR.

[Civil Appeal No. 3/74] [p.1-24]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 3 JUNE, 1975

CORAM: C.O.S. COLE, CHIEF JUSTICE PRESIDING)

S. C.U. BETTS, JSC

E. LIVESEY LUKE, JSC

S. J. FORSTER, JSC

S. BECCLESS-DAVIES, JA

AYO WILSON - APPELLANT

Vs.

JAMES SAMURA)

PA KOROMA) - RESPONDENTS

S. Hudson Harding for the Appellant

G. Okeke for the Respondents

JUDGMENT

Cole, C.J.

For wall over thirty-nine years Mr. Luc Genet was the fee simple owner of a certain piece of land which he disposed of to the appellant by deed of conveyance dated the 17th day of August, 196l. That deed was put in evidence as Exhibit "A" in the trial Court, namely High Court. In it the piece of land in question was said to be at Kingtom in Freetown at Hand Street, off Hennessy Street. Both in the High Court and in the Court of Appeal as well as in this Court there appears to be no dispute between all concerned regarding the identity of this piece of land. I shall therefore hereafter refer to it as "the said land".

The respondents had been on the said land for a number of years - the first respondent since sometime [p.2] in 1955 and the second respondent since sometime in 1956. When they went on the said land Mr. Lucien Genet was still the owner in fee simple. The dispute regarding the said land relates to the

question whether the respondents were merely monthly tenants of the said land up to and after the 17th August, 1961 (the date of the disposition to the appellant) or whether the respondents had acquired such interest in the said land as to raise the equitable doctrine of proprietary estoppel binding on the appellant. As regards the latter question it is but proper to mention that at no time was Mr. Lucien Genet ever sought to be made a party to the action.

The appellant issued her writ of summons on the 18th day of September, 1970, claiming a declaration that she is entitled in fee simple in possession of the said land; possession of the said land and mense profits from November, 1965 until possession is given up. In her Statement of Claim, after alleging that she was the fee simple owner absolute in possession of the said land it having been conveyed to her by Mr. Lucien Genet her predecessor in title she further claimed that the respondents were tenants of Mr. Lucien Genet on the date of the deed of conveyance. The respondents, on the other hand, denied these averments. The first respondent alleged—

"3. Further and in answer to paragraph 4 of the Statement of Claim, this defendant says that the said Lucien Victor Genet and his wife Mrs. Genet gave him permission to build on the said land in 1955. He did build on the said land between 1955 and 1956 and has been in possession of the [p.3] said land and building from the said date till now.

4. This defendant admits paragraph 5 of the Statement of Claim and says that the plaintiff on several occasions from 1965 onwards took action for ejectment against him in Magistrate's Court No.4 but on each occasion, over four times, the plaintiff's claim was dismissed.

5. Further this defendant says that if in fact the said land was conveyed to the plaintiff as alleged in paragraph 3 of the Statement of Claim, the plaintiff had notice of this defendant's interest in the said land and took subject to the defendant's interest."

The second respondent also alleged—

"3. Further and in answer to paragraph 4 of the Statement of Claim, this defendant says that the said Lucien Victor Genet and his wife Mrs. Genet gave him permission to build on the said land in or about 1955. He did build on the said land in or about 1956; and has been in possession of the said land and building from the said date till now.

4. This defendant does not admit paragraph 5 of the Statement of Claim.

5. Further, this defendant says that if in fact the said land was conveyed to the plaintiff as alleged in paragraph 3 of the statement or Claim, the plaintiff had notice [p.4] of this defendant's interest in the said land and took subject to this defendant's interest.

6. Further or in the alternative, this defendant will object in law that the plaintiff's alleged claim is barred by the Limitation Act."

At the close of the pleadings it would appear that the main issues to be determined by the High Court were

(a) Was Lucien Genet, previous to the 17th August, 1961 the fee simple owner absolute in possession of the said land?

(b) If so, did he effectively in law pass that interest to the appellant?

(c) What was the nature of the interests of the respondents in the said land?

(d) Were their interests such as to encumber the said land legally or equitably as alleged in their respective defences?

(e) If so, did the appellant have notice in law of any such encumberance?

(f) Did any of the Statute of Limitations apply?

It is clearly apparent from the record of proceedings both of the High Court and of the Court of Appeal that the defence set up by the second respondent based on "the Limitation Act" was never pursued.

The learned trial judge after an exhaustive review of the evidence and after consideration of the legal authorities applicable, said as follows:—

[p.5]

"Considering the entire evidence of the case with all its surrounding circumstances, I hold that the defendants (respondents) are the tenants of the plaintiff (appellant) in respect of the land in dispute and that she has successfully established her claims.

I will give judgment for the plaintiff (appellant) and I make the following orders:—

(a) That the plaintiff (appellant) is the owner of the land.

(b) That the defendants (respondents) give up possession of the land within three months from the date of this judgment.

(c) That the 1st defendant (respondent) pay as mense profit to the plaintiff (appellant) the sum of Le. 5.00 monthly from December 1965 until possession is delivered.

(d) That the 2nd defendant (respondent) pay as mense profits to the plaintiff (appellant) the sum of Le. 3.00 monthly from December, 1965 until possession is delivered."

The burden of proof was on the appellant to move that she was the fee simple owner of the said land and that she bought without notice, actual, constructive or in……. of any legal or equitable encumberance which would prevent the fee simple ownership in the said land legally passing on to her.

The appellant without objection produced her registered deed of conveyance Exhibit "A". She called as a witness her predecessor in ……. Mr. Lucien Genet [p.6] before her acquisition of the said land, the respondents

were monthly tenants of the said land of Mr. Lucien Genet - the first respondent paying a monthly rent of Le.2.00 since 1955 and the second respondent paying a monthly rent of Le.2.00 since 1956.

There was abundant evidence before the learned trial judge of this fact both on the side of the appellant and of the respondents. The first respondent was for sometime a tyreman working in the tyre factory of Mr. Lucien Genet. The second respondent was for quite sometime a cook employed by Mr. Lucien Genet. Mr. Lucien Genet categorically denied that it was with his permission that the respondents built on the said land. c/bit

The appellant gave evidence which was corroborated by Mr. Lucien Genet that on a Sunday in 1962, after the acquisition of the said land from Mr. Luoien Genet, Mr. Lucien Genet called both respondents and herself at his 13 Mandalay Street Kingtom residence where in the presence of the appellant he told the respondents that he had sold the said land to the appellant and that ho was no longer the owner of the said land. She enquired of the respondents what rents they were paying. The first respondent said he was paying Le.3.00 monthly. The second respondent said he was paying Le.2.00 monthly, The appellant there and then increased the rents to Le.5.00 and Le.3.00 respectively. The respondents not only agreed to pay, but in fact paid, the increased rents. This incident was however denied by the respondents.

The respondents on the other hand gave evidence that. Mr. Lucien Genet and wife gave the said land to them to build on and told them then, that after paying ten years rent starting from the completion of the buildings, [p.7] the said land in question would become theirs absolutely. Relying on these arrangement they proceeded to build on the said land and paid what the second respondent described as ground rent.

The first thing of particular interest to note is that in spite of the case for the respondents as to the existing arrangements between them and Mr. Lucien Genet I find the following answers being given by Mr. Lucien Genet to learned Counsel for the respondents:—

“I did not tell them (respondents) that if they paid rent for eight years, I would convey the property to them.”

Later on in answer to learned Counsel for the respondents Mr. Lucien Genet said:—

“It is not true that I arranged with the1st defendant (respondent) that I would convey the land to him after he had paid rent for about eight years.”

The second respondent in answer to his own Counsel said:—

“I said that I was paying rent for land. Mr. Genet told me that, after ten years he would give me a document and that the land would belong to me. I built a house in 1956. I started to pay rent in 1951. I paid rent up to 1967”.

In answer to the Court this respondent said:—

"The agreement was to pay rent for ten years. I started to pay rent in 1951. I paid rent up to 1967".

In that very unsatisfactory state of the evidence relied on by the respondents how could any reasonable [p.8] Court have held that the alleged arrangements between Mr. Lucien Genet and the respondents, other than that of a monthly tenancy simpiliciter was proved.

The second thing about the case as the evidence was before the High Court is this. Evidence was led that the appellant took the respondents before the Magistrate under summary ejectment proceedings on three occasions after the acquisition of the said land by her. If there was any semblance of truth in the story of the respondents one would have thought that they would have taken such appropriate steps as to give effect to the arrangements alleged by them. There is no evidence that they took any such steps not even at that late stage when proceedings commenced in the High Court.

Taking the totality of the evidence before the High Court which I have carefully considered, the learned trial judge came to the right conclusion of fact in not believing the respondents but rather in accepting the case for the appellant. I shall consider the legal position later.

From the decision given by the learned trial judge (which decision was against the respondents) the respondents appealed to the Court of Appeal on the following grounds:—

"I. The Learned trial judge misdirected himself in law in distinguishing the case Inwards v. Baker (1965) 2 W.L.R. 212.

II. On the facts to witt:—

(a) that the defendants were given permission to build on the land by P.W.2, Lucien Genet.

[p.9]

(b) that they did build on the land on or about 1956.

(c) that the appellants had spent substantial sums of money in putting up their buildings as per evidence of J.G.E. Valentine-Cole and

(d) that the respondent knew at the time the purported conveyance was made to her that the appellants had built on the land and were in possession of the lands:

The appellants had established an equitable right to remain in occupation of the property and the respondent, if at all, should take subject to the appellant's interest.

III. The learned trial judge was wrong in law in that he failed to take into consideration the fact that P.W.R Lucien Genet said on oath that the respondent did not pay any money for the land.

IV. That the judgment of the learned trial judge was wrong both in law and in fact and was unjust and inequitable and the decision was against the weight of the evidence."

The Court of Appeal heard arguments on the 14th, 15th and 16th days of November, 1973. On the 16th day of November 1973 the appeal was "adjourned to a later date for decision."

The record of proceedings before the Court of Appeal discloses that the appeal came up before that Court on that date and the record of proceedings for that day, signed by all three Justices, reads:—

[p.10.]

"Court notifies parties that in the interest of justice the Valuation Officer of the Freetown City Council be called upon to produce the Record of Rate. Demand Note or Rate Valuation Roll of the property in dispute from the year 1950 to 1970. Counsel on either side to render the Valuation Officer all necessary assistance.

N.B. Both Counsel state that they have no objection. Court accordingly so orders. Adjourned to 19th December, 1973."

On the 19th December, 1973 the appeal was adjourned to the 22nd January 1974. On that date Mr. Frederick Eusobius Ngozika Kawallay, Valuer, Freetown City Council gave evidence as a witness of the Court. In view of the observations I shall make later it would be in place to set out, inextenso, the evidence this witness gave. He said—

"I have in my custody the Valuation Lists for 6A Handel Street, Kingtom for as far back as 1949/50. The owner is Musa Kamara and the assessment was Le.6.00 then per annum in 1949/50. He is also owner of No. 6. Was then Le.12.00 per annum. From my records property No. 6 Handel Street which was demolished in 1959. No change of ownership is shown in respect of No. 6A up to present date but the assessment has been increased to Le.74. as from 1968/69. There is no No. 6C at Handel Street. In respect of Hennessy Street there is a record in [p.11] respect of No. 6 and 6A as far back as 1949/50 and 1950/51. The owner for this period was Violet R. Smith. For the period 1951/57 the owner was still Violet R. Smith. From 1957-62 the owner was still Violet R. Smith. 6A was demolished during this period- no assessment. From 1962-68 Violet R. Smith was still owner of No. 6 - no assessment for No. 6A . Owner of 6B Hennessy Street from 1953-57.was.L.V. Genet. The first time this property was assessed was 1953/54. I can say that it was a new structure. Ownership changed in 1962 from L.V. Genet to Sierra Leone Enterprises Ltd. Speaking from my personal knowledge 6B was formerly the Tyresole Factory. It is now owned by Sierra Leone enterprises. 6C was first assessed in 1959/60 – was built around November 1958. There was no owner stated then in the Assessment List; however in the Survey File, Lucien V. Genet appeared as owner, from 1960/on to 1967/68 no name appeared on the Assessment List as owner. Prom 1968/69 to 1973, the name A. Koroma appears as owner. I became Valuer in 1966. No. 6C is adjacent to 6B and they have a common boundary wall. 6B is almost at the boundary wall and 6C is about 20 feet from the boundary wall. There are two structures in 6C. The smaller one is about 27 feet from the wall and the larger one about 20 feet from the wall.

[p.12]

Cross-examined by S.H. Harding: From the Survey File, when survey was done in 1958 both buildings in 6C wore constructed of C.I. Sheets roof and of C.I. sheets walls - the smaller one being made of old 44 gallons drum sheets. On 6th April, 1962 Mr. Lucien Genet wrote to the Town Clerk regarding change of ownership in respect of 6 Hennessy Street to Sierra Leone Enterprises Ltd. Properties 6A and 6C are two independent properties on the same plot of land- - that is, according to the Survey File, but in spite of this both have been assessed under 6C.

Cross-examined by Mr. Gelaga-King. I went with members of my staff after receipt of the subpoena to have a look at the property. I see this Demand Note for the year 1958/59 addressed to Mr. Amara Koroma for property No. 6 Hennessy Street. The property must have been assessed for the year 1958/59 at least. Demand Note tendered - marked exhibit 'A'. Mr. S. Hudson Harding is the City Solicitor. I have a site Plan in respect of No. 6C Hennessy Street. I see this Receipt for payment of City Council Rates for No. 6C Hennessy Street by Amara Koroma in I960 for the year 1959/60 - tendered marked exhibit B. I see this Demand Note from City Council for 1973/74 to A. Koroma in respect of 6C Hennessy Street - tendered marked exhibit C. When I visited the property in December last [p.13] year I observed that, that larger building is on a concrete base and the walls were painted yellow."

At the end of his evidence there appears this note—

"Both Mr. Hudson Harding and Mr. Galaga-King agree that the property the subject of this dispute is the same as that which the witness (the valuation Officer) has testified to be No. 6C Hennessy Street.

Adjourned to a later date for decision"

The judgment of the Court of Appeal was delivered on the 5th day of April, 1974. The Court allowed the appeal and set aside the judgment of the learned, trail judge. They ordered that plaintiff/respondent (now appellant) pay to the defendant/appellants (now respondents) the present day value of both buildings viz: Le.3,640.00 and Le.5,160.00 respectively or nailing that, the defendant/appellants (respondents) be allowed to retain possession of the said building for the rest of their respective lives. The Court of Appeal based their valuation on certificates dated the 10th July, 1972 given by a witness for the defence. It is interesting to note in passing that these valuations were done after the appellant had closed her case before the High Court and the 1st respondent had started giving evidence. That was after the 22nd June 1972 when the case stood adjourned to the 5th July 1972.

In the course of their judgment the Court of Appeal had this to say—

"Applying all the authorities quoted above to the facts in this case there is no doubt [p.14] that Genet allowed the appellants to build on the land in question. This can be gathered from the evidence adduced in the trial court, and also here in this Court. Janet first of all said that the appellants asked him to have the use of his land in the 1950's as it was near their place of work. He never asked them as any reasonable man would have done what they wanted to do with it. In short what connection has the land got to do with where they work unless it was for them to live there. He further said that when he let them have the use of the land that there was a shed there he himself never said that this shed was empty in fact he said that at the time he was using it to stock materials for his factory. There is no

evidence that the appellants ever lived in the shed. In fact the evidence of kawallay throws a different light on this altogether. Finally Genet at first said that he only knew that buildings had been erected on the land in 1962, then he said 1961 then he said it was earlier than that he knew they were staying on his land in what he did not say. On the whole there is ample evident before this court to show that Genet must have known of the existence of the buildings on the land before he purported to part with the land in question to the plaintiff/respondent. We believe that he allowed them to build on the land without any objection from him."

[p.15]

My first comment here is that Mr. Genet was never made a party to these proceedings. Secondly, with respect, I fail to see how payment of rates affected the issue of proprietary estoppel for by Section 95 of the Freetown Municipality Act (Cap.65) as amended by section 3 of the Freetown Municipality (Amendment) Act 1964(No. 31 of 1964) the occupier is equally liable as the owner in respect of payment of rates. That section reads:—

"95. (1) If the City Bailiff acting as aforesaid finds no goods, or if the amount realised by any sale as aforesaid is insufficient, the Mayor is hereby empowered to authorise the City Bailiff in writing to demand from the occupier payment within fourteen days of any amount owing, less any poundage or other costs of levy upon the goods of the owner, and if at the end of such period of fourteen days as afore said, the occupier has not paid such amount, the City Bailiff is hereby authorised to direct, payment to the said City Bailiff by the said occupier of any rent due or accruing due to the owner, to the extent of the amount due to the Corporation in respect of the City rate, and every such payment shall be a valid discharge to the occupier of the rent to the extent of the amount so paid.

(2) If an occupier shall refuse or neglect to pay the rent as aforesaid to the City Bailiff when so required, the Mayor is hereby empowered to issue a [p.16] warrant under his hand and the seal of the Corporation directed to the City Bailiff requiring and commanding him to levy the amount due to the Corporation in respect of the City rate on the goods and chattels of such occupier in the like manner as is provided in section 93 and 94 for levying on the goods and chattels of a defaulting owner.

(3) An occupier may deduct any sum paid by him under this section from the amount of rent payable by him to the owner and should a levy have been made on the goods and chattels of such occupier he may also deduct from such rent the poundage and cost of such levy."

If the issue regarding "the Limitation Act" was being canvassed perhaps the relevance of the additional evidence would have been appreciated. That issue was, however, not pursued. It is my considered view that the additional evidence of Kawallay did not put the case for the respondents higher than it was when judgment was given for the appellant by the High Court. On the contrary, as Mr. Hudson Harding rightly pointed out before us, the whole tenor of this additional evidence tends to give additional strength to the appellant's case.

The position as regards findings on question of facts therefore in my view reverts to the position they were when judgment was given by the High Court. I would here and now re-iterate what this Court had

laid down as guide-lines to the Court below in cases were that Court thinks it fit to disturb the findings of facts by the High Court. This is what we said on this question in [p.17] the yet unreported case of EL NASR EXPORT AND IMPORT CO. L.TD. vs. MOHIE EL DEEH MAMSOUR Civ. App. No. J/73 judgment delivered on the 25th April, 1974.

He said, inter alia—

"It is true that Rule 21 of the Court of Appeal Rules 1973 (Public Notice No.28 of 1973) gives very wide and swooping powers to the Court of Appeal even to the extent of re-hearing the whole case. At the same time it is settled law and good sense that it should be in the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding, that the trial judge had formed a wrong opinion. In this connection I quote with approval the words of Lord Thankerten in WATT or THOMAS v. THOMAS (1947) A.C. at page 487 referred to in the House of Lords case of BEEMAX v. AUSTIN MOTOR CO. LTD. (1955) 1 A.E.R. 326.

'1. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, and appellate court which is disposed to come to a different conclusion, on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

2. The appellate court may take the view that, without having seen or heard the witnesses it is not in apposition to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, because it unmistakably [p.18] so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

I also cite in support and with approval the older cases of KPONUGLO v. KODADJA (1933) 2 W.A.C.A. 24 and KIZIDGU v. DOMPREH (1937) 2 W.A.C.A. 281, decisions of the Privy Council. In the former case it was held that it was trito law that not possessing the advantages of the judge of first instance, a Court of Appeal should be chary of over-ruling his opinion on pure question of credibility. In the latter case it was held that an appeal in a case tried by a Judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is a re-hearing. Nevertheless, before the Appellant Court can properly reverse a finding of fact by a trial Judge who has seen and heard the witnesses and can best judge not merely by their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is presumption of its correctness which must be displaced."

As I have stated earlier on, the state of the evidence before the learned trial Judge justified the findings of facts at which he arrived. I agree with these findings. Applying the relevant principles of law I am not satisfied that Court of Appeal had [p.19] good or reasonable grounds for disturbing these findings.

We all take cognisance of the fact that equity has still not past the age of childbearing and that one of her progeny, not necessarily the latest, is the doctrine of proprietary estopped. This equitable doctrine has from time to time been clad with a coat of many colours. In DILLWYN v. LLEWALYN (1862) 6 L.T.

878 the coat took the colour of operating through providing valuable consideration which in the circumstances of that particular case established a contract. The next one following as the privy council case of PLIMMER v. MAYOR OF WELLINGTON (1884) 9 App. Cas. 699. There the doctrine took the colour of making a revocable license irremovable. Then followed The House of Lords case of RAMSDEN v. DYSON (1865) L. R.L.H.L. 129 where, at page 140, the then Lord Chancellor (Lord Cranworth) said—

"If a stranger begins to build on my land supposing it to be his own and I, perceiving his mistake abstain from getting him right, and leave to persevere in his error, a court of law will not allow me afterwards to assert my title to the land on which he has expanded on the supposition that land was his own. It considers, that, when I saw the mistake into which he had fallen, It was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

[p.20]

As the learned authors of Snell's Principles of Equity 27th Edition (1973) at page 566 put it, this colour of the coat is based "on unconscionable behaviour or fraud".

The authors add—

'"knowledge of the mistake makes it dishonest for him to remain willfully passive in order afterwards to profit by the mistake he might have prevented. The knowledge must accordingly be proved by "strong and cogent evidence".'

I adopt this passage. In the instant case there was no allegation of mistaken belief in the defence of the Respondents, nor was there any evidence to that effect.

The most recent of the authorities in this line Cited before us is INWARDS v. BAKER (1965) 1 All. E.R. 446. That was an English Court of Appeal case. In that case there was a definite finding of fact on the evidence before the Court of first instance that there was a request or encouragement on the part of the father to his son to build.

The pith and marrow of the respondents' case before us is that the respondents, on the evidence before the learned trial judge and the justices of the Court of Appeal, were licencees by estoppel and their interests were therefore protected even as against the third parties. The legal authorities establish the principle that licencees by estoppel are protected against third parties taking with notion; but contractual licencees" are not. The protection based on estoppel will be essential if the licensor has transferred the property to a third party.

[p.21]

That brings me to this point, namely, that facts must be established for the equity to arise. The right of the parties must be determined upon the proper construction of the contract or arrangement, Lord Diplock in the English House of Lords case of GISSING v. GISSING (1971) A.C. 886 at p. 906 puts it this way—

"As in so many branches of English law in which legal rights and obligations depend upon the intention of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by the party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct."

Each case must depend upon its own facts Learned Counsel for the respondents canvassed before us the question that the burden of proof of notice as to the nature of user of the said land was upon the appellant. I entirely agree with this proposition. Such a notice in law may be actual, constructive or implied. Actual notice is the simple case where the purchaser knew of other legal or equitable interests existing prior to his purchase. It is constructive where such knowledge [p.22] would have come to him if he had made all such enquiries as a prudent purchaser would have done. Implied notice covers actual or constructive notice to the purchaser's agent who was acting as such in the transaction in question. This burden is discharged where the purchaser showed by evidence that he or she took all reasonable care made enquiries and that having taken that care and made the necessary enquiries he or she received notice of any legal or equitable encumberance which affected the said land. The totality of the evidence before the learned trial judge justified a finding of fact that the only notice the appellant had was that of the respondents being merely monthly tenants of Mr. Lucien Genet and that on the Sunday in October 1962 when the meeting time of Mr. Lucien Genet, the appellant and the respondents took place at Mr. Lucien Genet's residence they attorned tenants to the appellant by not only agreeing to pay the increased rents but in fact paid the increased rents. That tenancy the appellant quite lawfully determined. In coming to this conclusion I have taken into consideration the fact that the burden of proving tenancy is on the party setting it up. In the west African Court of Appeal case of KATAH v. K. CHELLARAH & SONS reported in 1957-60 ALR.S.L. 7 that Court had this to say at page 10—

"It is in each case a question of fact as to whether in the particular circumstances it is shown to have been the intention of the parties to create such a tenancy or whether the facts to show that there was no such intention. It is, of course, upon the party setting up the tenancy to prove its creation and if the question [p.23] is upon the facts left in doubt he has failed to discharge the onus laid upon him."

In this case the learned trial judge's findings on this point are loud and clear in favour of the appellant. There is abundant evidence in support of such a finding. Counsel for the respondents has quite rightly drawn our attention to the fact that the law we have to apply in this case is that of the laws of all civilized nations". He relied on the dictum of Lord Chancellor Campbell in the case of CAIRNCROSS v. LORIMAR (1860) 5 L.T. 120 at page 123 quoted with approval in the West African Court of Appeal case of G.B. AMANGIO SANTOS v. IKOSI INDUSTRIES AND EPE NATIVE ADMINISTRATION (joined by Order of

Court) reported in 8 WACA 29. I certainly agree with this proposition of law. Indeed it is the law I have applied in this case and I fervently hope it is the law that will be applied in the Courts of this Republic

The end result is that in my judgment this was a Case where the respondents were originally monthly tenants of the said land with Mr. Lucien Genet as landlord; that it was not established that the respondents built on the said land under any special circumstances that they subsequently became tenants of the appellant who on the 17th August, 1961, acquired the fee simple ownership of the said land and that she quite lawfully determined the tenancy. I would apply the principle of law laid down by the then Lord Chancellor (Lord Cranworth) in the case of RAMSDSN v. DYSON (1886) L.R. 129 at page 141, where he said—

"If any tenant builds on land which he holds under me, he does not thereby, in [p.24] he absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

I would allow the appeal, set aside the judgment of the court of Appeal and restore the judgment and order of the high court.

[SGD.]

C.O.E. COLE, CHIEF JUSTICE

I agree

[SGD.]

G.C.W. BETTS

JUSTICE OF THE SUPREME COURT

I agree

[SGD.]

E. LIVESEY LUKE

JUSTICE OF THE SUPREME COURT

I agree

[SGD.]

S. J. FORSTER

JUSTICE OF THE SUPREME COURT

I agree

[SGD.]

S. BECCLES DAVIES

JUSTICE OF APPEAL

CASES REFERRED TO

1. Inwards v. Baker (1965) 2 W.L.R. 212.

2. El Nasr Export and Import Co. L.Td. vs. Mohie El Deeh Mamsour Civ. App. No. J/73

3. Watt Or Thomas v. Thomas (1947) A.C. At Page 487

4. Beemax v. Austin Motor Co. Ltd. (1955) 1 A.E.R. 326

5. Kponuglo v. Kodadja (1933) 2 W.A.C.A. 24

6. Kizidgu v. Dompreh (1937) 2 W.A.C.A. 281,

7. Dillwyn v. Llewalyn (1862) 6 L.T

8. Plimmer v. Mayor Of Wellington (1884) 9 App. Cas. 699.

9. Ramsden v. Dyson (1865) L. R.L.H.L. 129

10. Gissing v. Gissing (1971) A.C. 886 At P. 906

11. Katah v. K. Chellarah & Sons reported in 1957-60 ALR.S.L. 7

12. Cairncross v. Lorimar (1860) 5 L.T. 120 At Page 123 13.

13. G.B. Amangio Santos v. Ikosi Industries And Epe Native Administration (Joined By Order Of Court) Reported In 8 Waca 29

14. Ramsdsn v. Dyson (1886) L.R. 129 at page 141

STATUTE REFERRED TO

1. Freetown Municipality (Amendment) Act 1964

DANIEL K. CAULKEN v. KOMBA KANGAMA

[Civil Appeal No. 2/74] [p.25-34]

DIVISON: THE SUPREME COURT OF SIERRA LEONE

DATE: 18 JUNE, 1975

CORAM: C.O.E. COLE, CHIEF JUSTICE (PRESIDING)

S.C.W. BETTS, JSC; A. LIVESEY LUKE , JSC

S.J. FORSTEY, JSC

C.A. HARDING, JA

DANIEL K. CAUKER - APPELLANT

AND

KOMBA KANGAMA - RESPONDENT.

Dr. U.S. Marcus Jones with him

Garvas Betts, Esq., for the Appellant

Doe Smith, Esq., for the Respondent.

JUDGMENT

COLE, C.J.

This is an appeal from the judgment of the Court of Appeal for Sierra Leone dated the 11th day of April, 1974 allowing the appeal from the judgment of Warne, J., dated the 16th day of March, 1973, in an action in which the respondent in this Court was plaintiff and the appellant was defendant. The subject matter of the action touched and concerned certain premises at one time known as one time known as 41 Kainkordu Road, Keidu Town, Kono District, but later came to be known as 83 Main Kainkordu Road. There is no dispute between the parties as to the identity of the premises in question. I shall, therefore in this judgment hereafter refer to it as "the said premises."

[p.25]

By a specially indorsed writ of Summons dated the 17th day of March, 1972, the respondent claimed possession of part of the said premises, mesne profits at the rate of Le.4O per month and damages for trespass. In his Particulars of Claim, he alleged, amongst other things, that at all times material to this action, he was the owner of the said premises and the appellant was in occupation of part of the said premises that despite several demands by the respondent since April, 1964, for the appellant to quit the said premises, the appellant refused to do so.

The appellant by his amended Defence disputed the Ownership by the respondent of the said premises and averred in effect that he was the owner by purchase of the said premises. To this the respondent joined issue.

It is clear therefore that at the close of the Pleadings, one of the main issues which had to be determined by the trial Judge was ownership of the said premises. This naturally involves the question of title to the said premises.

The trial came to an end on the 16th day of March, 1973, when the learned trial Judge delivered his considered judgment dismissing the respondent's claim on the main ground that the evidence of the respondent did not support the pleadings. It should be noted in passing that there had been previous litigation between the said parties regarding the said premises before the High Court in 1968, the record of proceedings of which case was tendered in evidence in the present case and marked exhibit 'A'. In the former case, the appellant was plaintiff and the respondent was defendant. The respondent in that case raised the question of jurisdiction of the High Court to try that case but was [p.27] overruled by the learned trial Judge. The learned trial Judge, however, after hearing evidence, dismissed both the claim of the appellant and the count reclaim of the respondent. There was no appeal against the judgment in that case. For the purpose of this present appeal these facts are not very material, except, perhaps, regarding the issue of cases.

From the judgment of Warne, J, dated the 16th March, 1973, the respondent appealed to the Court of Appeal for Sierra Leone on three grounds, namely—

"1. The learned trial Judge misdirected himself as to the nature of the appellant's counterclaim in the previous action between the same parties above and which is exhibit 'A' in this action.

2. The learned trial Judge was wrong in law when he said the appellant was indirectly using his Court as an appellate Court.

3. The judgment is against the weight of evidence."

The Court of Appeal for Sierra Leone in their judgment dated the 11th day of April, 1974, said, inter alia—

"We allow the appeal and set aside the decision of the Court below dismissing the appellant's action with costs. We order that the respondent within 30 days do deliver possession of the 2 rooms occupied by him in the premises formerly known as 41 Kainkordu Road, [p.28] Kono district, and now known an 83 Kainkordu Road, Koidu Town, that the respondent do pay to the appellant mesne profits at the rate of Le.28 per mensom from the date of issue of the writ of summons herein."

The appellant being dissatisfied with this judgment and order has appealed to this court on a number of grounds. The first principal question posed for our consideration is —

"Whether the High Court of Sierra Leone had any jurisdiction to entertain this suit in view of the fact that the matter between the parties which the Court had to determine was a question of title to in the provinces, and whether the proper forum ought not to have been the local court in the Kono District."

It should be observed at the outset that on examination of the record of proceedings before the Courts below this question of jurisdiction was never raised. I am of the view, however, that since the pleading,

before the learned trial Judge disclose sufficient material on which the issue of jurisdiction can be based, this Court can properly entertain the question in spite of the fact that it was not raised in the Courts below. I wholeheartedly adopt the views expressed in the Privy Council case of CHIEF KWAME ASANTE v. CHIEF KWAME TAWAI (l949) W N 40 at page 41 that—

"If it appeared to an appellate court that, an order against which an appeal was brought had been made without [p.29] jurisdiction, it would never be too late to admit and give effect to the plea that the order was a nullity."

I shall not confine this legal doctrine to orders only but would extend it to cover judgments or other decisions of any court. This ought to be the case for, in my considered view, jurisdiction is not only the legal authority but it is also the extent of the power of a court or judge to entertain an action, petition on or other proceeding. Due consideration ought to be given to it at any stage – particularly so where that jurisdiction is conferred or taken away by statute.

Now, what is the gravamen of this principal question of jurisdiction raised by learned Counsel for the appellant? It is this. He contends, amongst other things that, in the first place, from the pleadings it is clear that the said premises was land situated in the provinces; secondly, that the pleadings disclose that one of the main issues Warne, J., had to determine was the title of either party to the said premises; thirdly, that no question of any title to a leasehold granted under the Provinces Land Act (Cap. 122) arose; and lastly that therefore the jurisdiction of the High Court ousted by virtue of the provisions of section 21(a) (i) of the Courts Act, 1965 (No. 31 of 1965). These contentions automatically call for the construction of sections 18 (1) and (2) and 21 (a) (i) of the Courts Act, 1965 for the purposes of this appeal. Those, three subsections are as follows:

"18. (i) The High Court shall exercise the jurisdiction and powers conferred [p.30] upon it by the Constitution and any other enactment.

(2) Except as provided in subsection (2) of Section 7 and Section 19 or its jurisdiction is expressly excluded by an enactment, the High Court shall exercise unlimited original and supervisory jurisdiction in all causes and matters in the same manner and with the same powers and authorities and immediately before the commencement of this Act."

"21. Nothing in this Act shall be deemed to invest the High Court with jurisdiction in regard to—

(a) any action or original proceedings—

(i) to determine the title to land situated in the Provinces other than title to a leasehold granted under the provinces Land Act."

Those three subsections should be read together. It is my considered opinion that section 18 is subject to Section 21. Therefore, where in any action any question arises for determination relating to title to land situated in the provinces, unless, of course, the question related to title to a leasehold granted under the provinces Land Act (Cap 122), the jurisdiction of the High Court is ousted. No question arises for consideration in the present appeal of any leasehold granted to either party of the said premises

under the provinces Land Act. Both parties wore each claiming ownership of the said premises which was disputed by the other side.

[p.31]

The High Court therefore, had to determine and In fact determine this issue.

The expression “title to land” is not defined in the Courts Act, 1965. It is also not defined in the provinces Land Act nor in the Interpretation Act, ---- (No. 8 of 1971). But the expression “land” is defined in Section 4 of the Interpretation Act, 1971. ------ includes —

“land” covered by water, any house, building or structure whatsoever and any estate, interest or right in, to or over land or water”.

In the circumstances, I interpret the expression “title to land” for the purpose of this appeal to mean this namely, which of the two parties to this appeal is entitled to the ownership of the said premises. This interpretation in my view, clearly called for determination by the High Court of the question of title to land situated in the Provinces. This question both the High Court and the Court of appeal did determine. It is my considered view that another court had any jurisdiction under the afore-mentioned provisions of the Courts Act, 1965 to have determined this question nor did the High Court have any jurisdiction in law to have tried the action.

The legal position being such as I have found it to be, it is not surprising that Mr. Doe Smith, learned counsel for the respondent, with his usual can candour had to concede to this principal question. He should be commended for this. As I mentioned earlier, he himself had in the previous action in 1968 raised the issue before the High Court but he was overruled.

[p.32]

It might be of interest to compare the present section 21 (a) (i) of the Courts Act, I965s with the provision of Section 11 of the Courts Act (Cap 7) which latter Act was repealed and replaced by the Courts Act, 1965. Section 11 of the Courts Act (Cap 7) as far as this appeal is concerned reads as follows:—

"11. In addition to the jurisdiction conferred by this or any other Act, the High Court shall, within Sierra Leone and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities, which are vested in or capable of being exercised by her Majesty’s High Court of Justice in England:

Provided further that nothing in this Act shall be deemed to invest the Court with jurisdiction in regard to—

(a) any question arising exclusively between natives—

(i) involving title to land situated within the Province.”

The Courts Act, 1965 which, as I have already said, repealed and replaced the Courts Act (Cap 7) came into force on the 7th October, 1965. It would be seen that, in comparison, up to the 6th October, 1965, for the jurisdiction of the High Court in matters involving title to land situated within the Provinces to be ousted such matters must also arise exclusively between "natives". The present legal position in relation to the High Court's jurisdiction relation to the High Court's jurisdiction regarding title to land situated in the Provinces appears to be [p.33] rather all-embracing. The main questions to be considered as the law stands at reset are, in my view—

(a) To the land in question situated in the Provinces, and if so,

(b) Does the action relating to the said land raise for determination by the High Court the issue of title to such land other than title to a leasehold granted under the Provinces Land Act?

If these questions are answered in the affirmative, then the jurisdiction of the High Court is ousted. This is exactly the position in the present case.

I held that the whole trial before Warne, J., was a nullity because of want of jurisdiction. Having so hold it follows that the judgment and orders of the Court of appeal are consequently null and void. In the circumstances, it is unnecessary for me to consider the other principal questions raised in this appeal,

I would allow the appeal and set aside the judgment and order of the Court of Appeal as well as the judgment and order of the high Court.

I now turn to the question of costs. It is true that costs should follow the event and that the appellant having succeeded in his appeal should have his costs. In view, however, of the peculiar circumstances of this case where the very question of jurisdiction on which the appellant now succeeds before us had previously been raised by the respondent in the 1968 action before Browne-Larko, J, as he then was, but was strongly opposed by this very appellant, I would hereafter in the name of equity that each party [p.34] Bears his own cost in this Court, in the Court of Appeal and in the High Court. Any costs which may have been paid in either of the Courts below by either party should be refunded. In this connection, I would give liberty to apply.

[Sgd.]

C.O.E. Cole - Chief Justice

I agree

[Sgd.]

S.C.W. Betts

Justice of the Supreme Court

I agree

[Sgd.]

E. Livesey Luke

Justice of the Supreme Court

I agree

[Sgd.]

S.J. Forster

Justice of the Supreme Court

I agree

[Sgd.]

C.A. Harding

Justice of Appeal

Hon. Justice Betts

In the main, I agree with the conclusion arrived at by the Chief Justice.

I have only this to add: that there are certain factors which one must take into consideration and these he has already outlined.

First section 11 (1) of the Act –Section 6 of the Act Cap 143 and Rule 10 of the Act but also what I think is the most important and I think has been referred to by my brother Justice Luke is the case of Royal Exchange Assurance Ltd. versus Toffic Bassil Civil Appeal Ho. 172 unreported.

In that case it was established at least it was said that the Insurance policy at the time that the accident occurred should have been in existence. I do not agree with the principle of strict interpretation against the whole tenor of the Act which provided for. Apart from that I agree in the main with the Lord Chief Justice's Judgment.

I would allow the appeal.

Hon. Justice Awunor-Renner:

I agree with the conclusion arrived at by the Learned Chief Justice and I would allow the appeal.

30th April, 1976 .

CASES REFERRED TO

1. Chief Kwame Asante v. Chief Kwame Tawai (L949) W N 40 at page 41

STATUTES REFERRED TO

1. Provinces Land Act (Cap. 122)

2. Courts Act, 1965

3. Section 4 of the Interpretation Act, 1971

DUNSTANT E. JOHN & REUBEN L. MACAULEY v. WILLIAM STAFFORD, ALFRED GEORGE, NATHANNIEL COLE & JOHN EDDIE TAYLOR

[Civil Appeal No. 1/75] [p.71-87]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 13TH JULY, 1976

CORAM: C.O.E. COLE, CHIEF JUSTICE (PRESIDING)

S.C.W BETTS, J.S.C.

E. LIVESEY LUKE, J.S.C.

A.V. AWUNOR-RENNER, J.A.

S.C.E. WARNE, J.A.

DUNSTANT E. JOHN & REUBEN L. MACAULEY - Plaintiffs/Appellants

And

WILLIAM STAFFORD, ALFRED GEORGE

NATHANIEL COLE & JOHN EDDIE TAYLOR - Defendants/Respondents

J.H Smytho, Esq., Q.C., with him

Mrs. H. Ahmed for the appellants

A.J. Bishop-Gooding, Esq., with him

G.J. Betts, Esq., for the respondents

JUDGMENT

BETTS, J.S.C.

On the 21st January, 1975, the Court of Appeal delivered judgment dismissing an appeal from the High Court, judgment of which Court was dated the 6th December, 1973. The pith of that judgment was that the case of the plaintiffs/appellants was based on such unreliable foundation that it would be unsafe to make the declaration and orders sought. The Court of Appeal in affirming that judgment said inter alia —

"The various authorities cited before him" (the learned trial Judge) "were reviewed by him and he came to the right decision in dismissing the action as the burden [p.72] of proof cast on the plaintiffs/appellants was never discharged by them."

It is against the judgment that the following grounds of appeal were lodged.

(i) The Court of Appeal is wrong in law in upholding the judgment of the High Court with reference to that Court's rejection of the evidence of the 4th Defence Witness Mr. McEwen who had tendered Ex. W because it was prepared while the case was in progress.

(ii) That the Court of Appeal as was constituted was ultra vires the Constitution in that one of the Judges the Honourable Justice Ken. O. During, J. A. who heard the appeal had given a ruling in the matter in the High Court.

(iii) That the Court of Appeal was wrong in law in upholding the judgment of the High Court with reference to the ruling of Honourable Ken. During dated 27th April, 1972, refusing an application to strike out the defence of the 1st and 3rd defendants on the grounds that they violated the rules, principles and practice of pleading.

(iv) That having regard to the evidence and the law applicable the judgment is unsatisfactory.

(v) The Court of Appeal was wrong in law and acted contrary to all known principles of law and practice in merely accepting the findings of the trial Judge with- out even attempting to review the law and the facts.

For the purposes of this appeal counsel for the plaintiffs/appellants notified the Court that he was not arguing grounds 2 and 3. The grounds on which he was basing his arguments were 1, 4 and 5. These he proposed to deal with under five heads. Before arguments started however counsel for the defendants/respondents applied for an amendment to his case. Let me dispose of it at this point.[p.73] He drew the attention of the Court to the fact that consistently counsel for the plaintiff and plaintiff/appellants in the High Court and in the Court of Appeal endeavoured to obtain the rejection by the Courts of Ex. W and that in the Supreme Court counsel for the same parties has adopted a completed different line of approach by inviting the Court to consider Ex. W – a plan of the entire area including the portion allegedly trespassed. He argued, that if this approach is conceded then this Court might be called upon to assess and evaluate fresh matters. To support this argument he cited the case of EXPARTE REDISH III – IE-ALTOU (1877) 5. Ch. 1.882; and NORTH STAFFORDSHIRE vs EDES (1920) A.C. 254 et I. 263. [The highlighted in yellow is not legible in the original]

In the “JII EDDISIS” case, the situation was equivocal and at the hearing it was the fraudulent conduct of the plaintiff that was more strongly urged than that of the defendant. This was not a defence in the opinion of the Chief Judge but a new case being set up. It was a question of who had behaved fraudulently and to whom. Even if it is conceded that Ex. W – an exhibit could have some bearing on the case – it was not of such a nature as to affect its basic character. In that case “III REDDISH” and the subject matter cannot be compared. In the case of “NORTH STAFFORDSHIRE” already cited I would quote a portion of Lord Birkenhead’s judgment and then make a further distinction between what can be gathered from it and the submission of counsel:—

“The appellate system in this country is conducted in relation to certain well known principles and familiar methods. The issues of facts and law are orally presented by counsel. In the course of his argument it is the invariable practice of appellate [p.74] tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and authority of the Court of Appeal and, especially of the final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered those matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below.”

From observations on the conduct of this case the counsel in the Courts below have made repeated submissions which drew the attention of the learned trial Judge to Ex W. even if it was only to reject it. The crucial point here however is that the rejection or admission of Ex. W as part of the evidence was unavoidably cast on the trial Judge. The distinction, to my mind, is that whatever decision on the point is arrived at by the trial Judge, that decision would be of a voluntary nature on the one hand and an involuntary one on the other. It was, at the worst, rather an obvious attempt by counsel to be unduly persuasive, and it cannot be said that a new matter was being advocated. With respect, I do not think the learned trial Judge was justified in excluding Ex. W from consideration before he had decided whether the plaintiffs/appellants were entitled to a declaration. The plaintiffs/appellants attached great prominence to the fact that the learned trial Judge withdrew Ex. W from his consideration. He argued that failure to consider the plan had adversely affected the learned trial Judge's view as otherwise his clients would have been adjudged entitled, to at least, 1.7 acres of land accepted [p.75] therein to have been trespassed upon. Counsel argued that the reason that the plan was prepared during the progress of the trial advanced by the Judge was untenable as the case on which he relied did not contemplate that specific contingency. JACKER v THE INTERNATIONAL CABLE COMPANY LTD. (1888-89) Vol. V LTR 13 carries a head-note, Appeals — Evidence improperly received in Court below — Duty of the Court of Appeal. This obviously was guidance for the Court of Appeal and not the Court of first instance but the case of BOWKER v WILLIAMSON (1808-1089) Vol. V L.T.R. 383, showed that the Court of first instance could reject from consideration, in certain circumstances as where there was a deliberate attempt to conceal the real terms of an agreement, evidence it had already received. No parallel was suggested in Bowker's to fit the case here. Counsel for the plaintiffs/ appellants realising that the failure of the trial Judge to ascribe an acceptable reason for the rejection of evidence does not automatically entitle Ex. W to consideration, even if admissible, referred to S.3(3) of the Evidence (Documentary) Act, Cap.26, 1926. The text is “Nothing in this section shall render admissible as evidence any statement made by a person

interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." After a document has been admitted S.4(l) of the same Act dictates how that statement is to be evaluated as to weight.

I have already referred to the fact that Ex. W was excluded from consideration by the learned trial judge.

[p.76]

This, in my opinion and with respect; was without a Satisfactory foundation in law. In determining whether D.W.4 was a person interested and whether Ex. W which he prepared could be admitted in the first place, and when admitted, secondly, ought to be considered, certain guide lines are necessary. When a person is interested his statement or document would be inadmissible under S.3(3) of the Evidence (Documentary) Act, Cap. 26,1926 in Sierra-Leone while in England the same effect would be produced by virtue of S.1(3) of their Evidence Act, 1938 and where the expression has come up for interpretation in a long and impressive line of cases. But let us begin with 'person'. It means 'any person whatsoever' as in BARKWAZ v SOUTH WALES TRANSPORT CO. (1949) 1 K.B. 54; and 'person interested' means a person interested in the result of the proceedings, pending or anticipated; thus a servant of a company is interested in the proceedings of the company where it is to his advantage for the company to succeed (PLOMIEN FUEL ECONOMISER COMPANY v NATIONAL MARKETING BOARD. (l94l) Ch. 248. So also a domestic servant where her reputation for care as a child-minder was in issue EVON AND EVON v NOBLE (1940) 1 K.B. 222 or (1948) 2 All E.R. 987. As the character and subject matter of the proceedings and the relation thereto of such person must be considered, all servants are not necessarily persons interested as in the case of IN RE HILL. BRAHAM v HASLEWOOD (1948) 2 All E.R. 490, in which a solicitor's clerk-was declared a person not interested. In two cases the word 'interest' was dealt with. FRIEND v. WALLMAN (1946) All E.R. 634, Somervell, L.J. said—

[p.77]

"Interest clearly means personally interested in the result of the proceedings."

and Delvin L.J. in BEARMANS LTD. V METROPOLITAN POLICE DISTRICT ……(1961) ……634, [….missing words] said —

"The word "interest" is not a word which has any well defined meaning and anybody who was asked what it meant would at once want to know its context in which it was used before he could venture an opinion. It may mean a direct financial interest on the one hand or on the other hand it may mean nothing more than the ordinary interest which everybody has in the outcome of proceedings in which he is likely to be a witness."

In order to arrive at a decision on whether D. W. 4 Mr. McEven was an interested person would have to ask myself whether he could conceivably have any personal interest in the outcome of the proceedings, whether D.W. 4's professional or financial interests were in issue, whether his conduct had been dictated by himself or whether he was under the control of some other person and whether he had the skill to execute the work for which he was engaged and what was his relationship with his employer.

These questions embrace in my opinion a reasonable examination of the circumstances; the contents of the document concerned; the factors which would establish the purpose why the document was made, and clearly, if the maker had a personal interests in the result of the proceedings. Applying these tests I can safely say I am satisfied that D.W. 4 Mr. McEven is not a person interested under the Act and Ex. W. has properly been admitted and ought to have been considered if the circumstances so required.

Counsel for the plaintiff/appellants treated the [p.78] statement of defence as an admission of trespass to the extent of 1.7. acres of land. He grounded his right to a judgment to that extent on the evidence of D.W. 4; Ex W; and the statement of defence. Counsel for the defendants/respondents strongly protested that he made any such admission and that his use of the word "overlap" should not and does not convey any such intention. In the case of CHRISTIAN YAO KISIEDU & OTHERS V DUOMBUAH DONPREY & OTHERS 2 W.A.C.A. 273 involving trespass to land in the Gold Coast (then) the word "overlap" was used in the course of the judgment. It reads

"There are many points which bear out this view that the area of Kisiedu's grant did not 'overlap' the area claimed by the appellants. The most striking is that Kisiedu's settlement and cultivation were entirely north of the road. This it should be noted was a case of trespass to land. The respective claims are shown on a plan Ex. A in the case, Kisiedu's claim being edged green and Dompreh's yellow. The trial judge decided in favour of Kisiedu's side and gave him £100 damages with costs to him and his associates, and granted an injunction against Dompreh and his associates, their agents or servants trespassing on the land"

I do not see how I can come to any other conclusion than that the word 'overlap' used in this way in connection with land is equivalent to the use of the word trespass. I must make it clear that I do not mean that trespass has been proved, what I have considered here is terminology instead of proof.

The core of the judgement of the Court below is contained in the words—

"I find the plaintiff's case to be based on such unreliable foundation that it would be unsafe to make the declaration and orders sought."

[p.79]

Before embarking on a detailed examination it is worthwhile to observe that there has been a considerable shifting of ground with regard to the acreage in this matter. The statement of claim, paragraph 2 states—

"The said Sarah Macaulay (herein- after called the testatrix, was at the time of his death seized in possession of and otherwise well entitled to ADD THAT piece of land situate lying and being at Barbardori, in Lamley Village aforesaid, commonly known as Barbardori Grass Fields, containing an area of 38 acrean."

In her own statutory declaration she described her entitlement as "38 acres more or less." In the petition of appeal before this court at paragraph A, counsel pleaded—

“That the case involves title to 26 acres of land at Lamley Village value about Le. 52,000.”

But in paragraph 4 in his case for the Appellants, Counsel sets down “The evidence of the ownership of the disputed land was given by P.W.1. P.W.2, P.W.3, P.W. 4. P.W. 5 a licenced surveyor gave evidence as to the encroachment or overlapping of the land of the plaintiff and gave the extent of the encroachment as 6.371 acres. In Court counsel was saying that he could at least have had judgment for 1.7 acres which he seemed willing to accept. That immediately revealed the indeciveness of the claim as regarding declaration of title. The plaintiffs/appellants therefore were faced with the difficulty of proving title to the whole 38 acres of land or of establishing possessory title thereto. If either of these was achieved then proof of title to 25 acres of land would be unnecessary as would be proof of the 6.971[p.80] acres. In that case if ownership of 38 acres is established in favour of the plaintiffs/appellants, then it would follow that they were entitled to a declaration for the 1.7 acres.

In order to resolve the uncertainties which beset the learned trial Judge he followed the principle outlined in the case _____ V_____ [ineligible in original text] 336 which states that “the onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought before him to a declaration of title” and also the well know case of _____ V _____ [ineligible in origal text] which says the “the burden is on the plaintiff to prove his right to a title and other relief by independent means”. After giving due consideration to the law and facts before him the learned trial Judge found he could not make the declaration. In the case of WALTER RIDDLE V SAMUEL NICOL (1971) Court of Appeal (S.L.) – unreported, in which the case of _____ and _____ [ineligible in orig text] an appeal from the provincial Commissioner’s Court, cited in _____ [ineligible in orig text]it was held that before a declaration of title is given the land to which it relates must be ascertained with certainty, the test being whether a surveyor can from the record produce an accurate plan of such land. There is also the case of _____ V _____ [ineligible in orig text]_____ this quotation follows—

“In _____[CIS] V ADJEI, already cited, the West African Court of Appeal laid down the test to be applied as regard the delimitations of land in dispute.” Though this is an action for declaration of title the principles laid down by the Court as to the necessity for defining with certainty the area in dispute would, in my opinion, apply to an [p.81] action for ejectment. The Court of Appeal, along other things said: “The acid test is whether a surveyor, taking the record could produce a plan showing accurately the land to which title has been given”.

I would also refer to the aft repeated legal principle that they plaintiff must decide on the strength of the case not the weakness of the defendants contain in the case of ……. V…….. (1968-69) …… 399 and in …… v …… (1968-69) …… 326.

Applying these principles to this case it seems to be that the judge was justified in coming to the conclusion he did regarding, the declaration of title. I have to make a comment at this point to what might otherwise be considered to amount to a conflict. In an earlier portion of this judgment I came to a conclusion that I did not think the learned trial judge was justified in excluding Ex. …….. from consideration. I must not be taken to mean that the trial Judge was obliged under any circumstances to

consider Ex …….. but that the exhibit was entitled to consideration in and when the necessity arose. This is completely different from a total denial of consideration, which appeared to have been the case.

Although the claim among other things was for trespass as well as a declaration, the trial Judge and the Court of Appeal dealt exclusively with a declaration. The declaration sought was for title to 38 acres of land. As a legal concept a claim for declaratory title demands a much higher degree of proof than that required for a claim for trespass; and though usually they are claimed together they can be considered as separate and distinct issues.

[p.82]

2 W.A.C.A. (1934-33) P. 339, Carey, J., gave a declaration in favour of the plaintiffs in respect of a piece of land at Ikot Esion of the value of £50. The plaintiffs had also claimed damages for trespass by collecting palm nuts etc., on the said land, but the trial Judge awarded no damages, the alleged trespass being in his opinion trifling and he stated that this part of the claim was not persisted in. It could be inferred that Carey, J. adverted his mind to the question of trespass quite separate and apart from the question of declaration. The core of this aspect of the complaint is that the learned trial Judge never treated the trespass to 6.371 acres as a separate issue.

In a claim for trespass the plaintiff need not prove title as stated in the case of GOSLYN v WILLIAMS (1720) Fortes. Rep. 378. Possession alone is indeed sufficient to sue in trespass as against a wrong-door, but it must be clear and Exclusive possession , (stress mine) as Best, C.J. said in REVETT v BROWN 5 Bing .7. In the case of CHIEF KOJO BOSOR v CHIEF KEBBIE there was a claim for £100 for trespass on the plaintiffs' land. The learned trial Judge found as a fact that the plaintiff had failed to prove possession of the land upon which the alleged trespass took place. The submissions and arguments made before this Court would, if either title or possession to the whole area or to the 6.371 acres had been established had been sufficient. In the case of McDOUGAL v McDOUGAL (1915) 49 N.S.R. 101, the facts were that plaintiff in trespass claimed under deed which gave him colour of title and in addition established a long, series of acts of possession on the part of his father [p.83] and himself, including working the property, and the as of the locus, the beach in front of the property, as a place for shipment of timber and produce and as a best landing, and the taking from ……. Sand, gravel, or other material of that nature they required. Held, the occupation ……. Coupled with the deed giving colour of title, constituted a title in the plaintiff which will enable him to maintain trespass against the defendant. Here again it comes out that the possession, in spite of the documentary assistance, must be clear and exclusive. Here, there was documentary help but the possession was neither clear nor exclusive.

The Court of Appeal's judgment was rather short and curt. That Court, from the arguments, concluded that there was no substance in any of the grounds of appeal. The Court went on to give a reason and this was—

"The various authorities cited before him were received by him and he came to the right decision in dismissing the action as the burden of proof cast on the plaintiffs was never discharged by them."

There, rightly or wrongly, the Court had arrived at the decision that the whole appeal was without merit as lacking in substance, and indication of the principal reasons ought to have been given. All it might have done was to have given this Court an opportunity of acquainting itself with their opinion (as per Lord Birkenhead). Perhaps a cautions advice to the Court of Appeal would be in place.

However in view of what I have already said I would affirm the judgment of the Court of Appeal with regard [p.84] to the ……..

[Sgd.]

S.E. Betts – J.S.C.

[Sgd.]

E. Livesey Luke – J.S.C.

[Sgd]

A. W. Awunor-Warne- J.A.

[p.85]

COLE, C. J.

I have had the privilege of reading to readite judgment of the Honourable Mr. Justice S.C. Betts in this case. With his final conclusion I very much agree. This case must go back to the High Court for a re-hearing.

Let me make, for the guidance of the court below, two points quite clear.

The first is this. The legal authorities, which have been referred to, show quite clearly that applying them to the evidence led before the High Court, the Learned trial Judge as well as the Court of Appeal was justified in dismissing the claim for declaration of title. That part of the appeal therefore fails.

The second point is this. I am clear in my mind that the claim for trespass was not considered either by the Learned trial Judge or the Court of Appeal. Even if this was done, neither court applied for the correct principles of law set out in the established authorities on this point so ably discussed in the judgment of my learned Brother Justice S.C.W. Betts. It is these circumstances that I would allow the appeal as regards the claim for trespass and would remit the case to the High Court for re-hearing as regards trespass and damages for trespass.

[Sgd.]

C.O.E Cole - Chief Justice

[p.86]

WARNE, J. A.

I have had the opportunity and privilege of reading the painstaking judgment of my learned brother, Betts, JSC. I entirely agree with his conclusion.

The legal authorities are very revealing. I hope they will serve as a reminder that there is a clear distinction between title per se and possession. The authorities show that even though a claim for a declaration for title fails, if a claim for trespass is sought, the courts should consider the evidence, to see if possession has been proved to found a claim for trespass

I agree that the case be remitted to the High Courts for re-hearing regarding the claim for trespass.

[Sgd.]

S.C.E. Warne – J.A.

[p.87]

I have had the advantage of reading in draft the judgment of my learned brother Betts J.S.C. I agree with his conclusion. I too would, allow the appeal and remit the case to the High Court for a re-trial on the issue of trespass.

[Sgd.]

E. LIVESEY LUKE - J.S.C.

CASES REFERRED TO

1. Reddish, Ex p, Re Walton (1877) 5 Ch 822, CA2. North Staffordshire

3. Jacker v The International Cable Company Ltd. (1888-89) Vol. V Ltr 4.

4. Bowker v Williamson (1808-1089) Vol. V L.T.R. 383

5. Barkwaz v South Wales Transport Co. (1949) 1 K.B. 54;

6. (Plomien Fuel Economiser Company v National Marketing Board. (L94l) Ch. 248.

7. Evon And Evon v Noble (1940) 1 K.B. 222 Or (1948) 2 All E.R. 987

8. In Re Hill. Braham v Haslewood (1948) 2 All E.R. 490

9. Friend v. Wallman (1946) All E.R. 634

10. Christian Yao Kisiedu & Others v Duombuah Donprey & Others 2 W.A.C.A. 273

11. Oslyn v Williams (1720) Fortes. Rep. 378.

12. Revett v Brown 5 Bing .7

13. Chief Kojo Bosor v Chief Kebbie

14. Mcdougal v Mcdougal (1915) 49 N.S.R. 101

STATUTES REFERRED TO

1. Evidence (Documentary) Act, Cap.26, 1926

GBASSAY KAHARD v. SALLY WALLACE

[MISC. APPL. 2/78] [124-127]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 2ND MAY, 1978

CORAM: MR. JUSTICE C.O.E. COLE, CHIEF JUSTICE

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MRS. A. AWUNOR-RENNER, J.S.C.

BETWEEN:

GBASSAY KAHARA - - DEFENDANT/APPLICANT

AND

SALLY WALLACE - PLAINTIFF/RESPONDENT

T.S. Johnson Esq. for the Applicant

Eke A. Halloway Esq. for the Respondent

RULING

COLE, C.J.

In this application, for special leave to appeal to this Court, Mr. T.S. Johnson for the applicant, amongst other things, sought the leave of this Court to amend his Motion Paper by substituting the expression "28th day of October, 1976" for the expression "21st day of February, 1978" contained in line 7 of the Motion Paper on the ground that the "21st day of February, 1978" was a typographical error.

Mr. Halloway on the other hand objected to the application on two grounds. The first is that the amendment applied for went to substance. The second is that the Motion Itself is out of time since it was not brought within the required statutory period.

Let me here and now dispose of the second ground.

Rule 10 of the Supreme Court Rules 1976 (P.N. No.9 of 1976) states as follows:—

"An application for special leave shall be filed within one month of the date of the judgment from which Leave to appeal is sought or of the date on which leave to appeal to the Supreme Court is refused by the Court of …[p.125] Court of Appeal.

According to Section 4(1) of the interpretation Act 1971 (Act No. 8 of 1971) "month" means a Calendar month.

Rule 1 of the Supreme Court Rules 1976 also gives the same definition to the word "month".

According to the Affidavit filed in support of the Motion, which has not been challenged, the Court of Appeal in its Ruling given on the 21st day of February 1978, refused leave to appeal to the Supreme Court against the judgment of that Court dated the 28th day of October 1976. The question now arises - did the applicant make his application for special leave to appeal to this Court within a month after the refusal of leave by the Court of Appeal? Here it should be noted that the Motion Paper is dated, and was filed on , the 21st March 1978. This question turns on what Calendar month means.

The authorities seem to establish that in considering what is the length of a Calendar month it is sufficient when the months are broken, whatever be the length of either [CIS] to go from one day in one month to the corresponding day in the other month - See "FREEMAN VS. READ - 1863, 32 L.J.M 226; RADCLIFFE V. BARTHOLOMEW 1891-1894 A.E.R. Reprint page 829: "GOLDSMITH CO. VS. WEST METROPOLITAN RAILWAY, 1904 1 K.B., 1 at page 5; in the latter case where all the authorities were exhaustively reviewed by the English Court of Appeal.

I share the view that where a period of time from or after a given date or e event is prescribed as the period within which an act is to be done, the day of that date or event is to be excluded in the computation of the period and the act is to be done on or before the last day of the period. This seems to be the view shared by our Legislature when it stated in Section 39 (1(a) of the Interpretation Act 1971 (Act No. 8 of 1971) as follows:

"(1) In computing time for the purposes of any Act—

(a) a period reckoned by days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done:"

I agree that the expression used in that subsection reads "a period reckoned by days"; but I would construe that expression to mean "within a specified period". Taking all the circumstances into consideration I am of the opinion that this Motion was filed within a month of the date on which the Court of Appeal refused leave to appeal, that is, 21st February, 1978, which is an excluded day. I would therefore overrule Mr. Halloway's objection on this point.

With regard to the other point of objection, I think, this Court can properly deal with it within the ambit of Rule 5(2) of the Supreme Court Rules 1976 which states as follows:—

"(2) Where no provision is expressly made by these Rules regarding the practice and procedure, which shall apply to any appeal or application before the Supreme Court, the Supreme Court shall prescribe by means of practice directions such practice and procedure as in the opinion of the Supreme Court the justice of the appeal or application may require.

In the opinion of this Court I would like it to be stated as a practice direction that this Court has power within the ambit of Rule 5(2) of the Supreme Court Rules 1976 to consider applications for amendment and grant same if the justice of the case so requires. Taking all the circumstances of this case into consideration I [p.127] would grant the amendment sought since the evidence in support of the Motion shows clearly that the expression "21st day of February 1978" instead of "28th day of October 1976" was inserted in the Motion Paper in error.

This amendment, however, is being granted on terms as to costs.

[Sgd.]

C.O. E. Cole

C. J .

I agree

[Sgd]

O.B.R. Tejan

Justice of the Supreme Court

I agree

[Sgd.]

A. V. Awunor-Renner

Justice of the Supreme Court

CASES REFERRED TO

1. Freeman vs. Read - 1863, 32 L.J.M 226

2. Radcliffe v. Bartholomew 1891-2. 1894 A.E.R. Reprint Page 829

3. Goldsmith Co. vs. West Metropolitan Railway, 1904 1 K.B., 1 at page 5

STATUTES REFERRED TO

1. Rule 10 of the Supreme Court Rules 1976 (P.N. No.9 of 1976)

2. Section 4(1) of the Interpretation Act 1971 (Act No. 8 of 1971)

3. Section 39 (1(a) of the Interpretation Act 1971 (Act No. 8 of 1971)

4. Rule 5(2) of the Supreme Court Rules 1976

HILDA PRATT v. ANITA JOHN & ORS

[SUP. CT. CTV. APP. NO.1/76] [p.88-102]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

HILDA PRATT - APPELLANT

AND

ANITA JOHN & ORS. - RESPONDENTS

Berthan Macaulay Q.C. with him Dr. W. S. Marcus Jones,

M.J. Clinton and Berthan Macaulay Jr. for the Appellant.

S. Hodson Harding for the Respondents.

JUDGMENT

LIVESEY LUKE J.S.C.

Hilda Pratt and Anita O. John are sisters by the same mother Mabel Ijorma Nicols. The former is a legitimate daughter and the latter illegitimate daughter of their mother.

Mabel Ijorma Nicols died testate in Freetown on 2nd September 1970. Probate of her will dated 25th August, 1970 was granted by the High Court on 1st January, 1971 to Anita O. John and William B.G. Faux (the executors named in the will). Mabel Ijorma Nicols (hereafter referred to as "the testatrix") was survived by inter alia Anita O. John and Hilda Pratt both of whom are beneficiaries under the Will. The testatrix was predeceased by a natural daughter Helen Marke who died intestate in Freetown on 25th August 1969. The only specific devise in the Will of the testatrix is in the following terms:—

"I give and devise my house and land situate at King Street, the Maze, the property of my late natural daughter Helen Marke which devolved upon me on her death intestate, to my natural daughter Anita Oseh John for the term of her natural life and after her death to her children Filinda Olabisi John and

Beverly Olujara John for the term of their natural lives as tenants in common and after their deaths to their children as tenants in common absolutely."

[p.89]

According to this devise the testatrix claimed that the property of Helen Marke at the Maze devolved upon her on the death of Helen Marke. Indeed, that property was among the assets in respect of which probate was granted to the executors of the testatrix. According to the evidence, sometime after the death of Helen Marks, Hilda Pratt moved the Administrator General to administer the estate of Helen Marks. The date on which the Administrator General was moved was not given in evidence nor was it disclosed whether it was before or after the death of the testatrix. But in my opinion that does not affect the position. What is significant, is that on 17th March, 1972 the Administrator General wrote to Dr. W. S. Marcus Jones, Solicitor for Hilda Pratt in the following terms:—

"Dear Sir,

ESTATE OF HELEN MARKE (DECEASED)

I have to refer to previous correspondence on the above subject-matter and to inform you that Anita John has produced a Deed of Conveyance dated 28th February, 1972 executed by the Government of Sierra Leone (Minister of Lands and Mines) convey the freehold of property No. 5 King Street, The Maze, Wilberforce Village to her. This Deed is registered as No. 134/72 at Page 77 Volume 251 of the Books of Conveyance in my Registry.

It would therefore now appear that this property cannot form part of the estate of the above named deceased.

Would you let me have full particulars of the car allegedly belonging to the deceased so that I can investigate its whereabouts.

Yours faithfully,

(Sgd)? ? Williams

Administrator General

Presumably acting under Section 10 the Administration of Estates Act, Cap.45, the Administrator General published a Citation in the Gazette on 13th April, 1972 in respect of the estate of Helen Marke.

[p.90]

So it would appear that the Administrator General proposed to proceed with the administration of the states of Helen Marke but that as far as he was concerned the property at the Maze did not form part of that estate. The Administrator General's letter seems to have prompted Hilda Pratt (hereafter called "the Appellant") to take Court action. On 7th July, 1972 she took out and Originating Summons asking for the determination of the following questions:

“1. Whether on a true construction of Section 9 and 10 of the Administration of Estates Act Cap.45 of the Laws of Sierra Leone, 1960, the dwelling house and premises standing on plot 8, at King Street, the Maze, Wilberforce belonging to Helen B. Marke, deceased, Intestate, now devolve upon the Administrator- General, the third defendant herein.

2. If the answer to 1 above is in the affirmative, whether the same property without more, can form part of the Estate of Mabel Ijorma Nicols, deceased

3. Further, whether it was competent for the said Mabel Ijorma Nicols deceased, to devise the same property by her Will to Anita John, the first defendant for life, with remainder over to her children as tenants-in-common.

4. How the costs of this application are to be provided for. And for all necessary and proper consequential Directions and Orders as in the circumstances may be just.”

The defendants to the Originating Summons were Anita O. John and William B.G. Faux (as executors and Trustees of the Will of Mabel Ijorma Nicols) and the Administrative General (representing the Estate of Helen Marke deceased and as Administrator thereof). It is important to state that the Originating Summons was taken out in the estate of Mabel Ijorma Nicols. The Summons was supported by and affidavit sworn by the appellant deposing certain material facts and exhibiting the Will of the testatrix, the Probate and the letter of the Administrator General dated 17th March 1972.

[p.91]

Anita John (hereafter called "the respondent) swore to and filed an affidavit in opposition in which she deposed inter alia, that she was the fee simple owner of the property at the Maze by virtue of the conveyance referred to in the letter of the Administrator General and exhibiting her Conveyance. The appellant swore to and filed an affidavit in reply, inter alia exhibiting a lease of the property at the Maze from the Governor of Sierra Leone to Helen Marke.

The action was tried by Lawrence-Hume Ag. J. Both the appellant and the respondent gave oral evidence, notices of intention to cross examine having been previously served by their respective Solicitors on the other side. In a considered judgment the Learned Judge answered the first question on the Summons in the affirmative, the second and third questions in the negative, and made the following consequential pronouncements directions and orders:—

1. I hereby pronounce that the purported Conveyance plot No. 8, the Maze Wilberforce to Mrs. Anita Oseh John by the Government of Sierra Leone on the 28th day of February, 1972 is null and void and of no legal effect whatsoever.

2. I hereby order that the records kept by the Surveys and Lands Department be corrected and amended to show that the piece or parcel of land known as Plot 8, the Maze, Signal Hill in Wilberforce Rural Area in the Western Area of the Republic of Sierra Leone to Miss Helen Bertha Marke, deceased, first day of January, 1961 is now held by implication as a lease from year to year as from the first day of January, 1964, until the fee simple in the said plot of land shall have been conveyed to the Administrator

and Registrar General for the benefit of the estate of Miss Helen Bertha Marke, deceased, as hereinafter ordered.

3. I further order that Mrs. Anita Oseh John do forfeit to the Government of Sierra Leone and for and on account of the estate of the late Miss Helen Bertha Marke all moneys duly paid by her (the former) to the said Government in respect of and in connection with the purported purchase of this property.

[p.92]

4. I also further order that all moneys already paid by Mrs. Anita Oseh John, the first defendant herein, to the Government of Sierra Leone in respect of and in connection with this property pursuant to having the same conveyed to her in fee simple do stand and continue to remain in the records of the Surveys and Lands Department, and be made to appear as if the same had been paid by the Administrator and Registrar General, the third defendant herein, for the purpose of having such fee the estate of Miss Helen Bertha Marke, deceased.

5. I order that the Administrator and Registrar General, the third defendant herein, do take immediate steps to obtain in the usual manner a grant of letter of Administration in respect of the estate of Miss Helen Bertha Marke, deceased, who died intestate on the 26th day of August, 1969, leaving property.

6. I hereby direct that in accordance with Clause 3(2) of he lease and for the purpose of administering in its fullest entirety the estate of the late Miss Helen Bertha Marke, the Administrator and Registrar-General, the third defendant herein, do apply to the Government of Sierra Leone (Minister of Lands and Mines) to have the fee simple in the demised premises conveyed to him for the benefit of the estate of Miss Helen Bertha Marke, deceased, in consideration of the arrears of rent and the stipulated sum of Le.54 which have been duly paid by Mrs. Anita Oseh John and which now stand forfeited to the Government of Sierra Leone for and on account of the estate of the late Miss Helen Bertha Marke as herein before ordered.

[p.93]

7. I further order that Mrs. Anita Oseh John, the first defendant herein, not later than the 28th day of February, 1973 do prepare and submit to the Administrator and Registrar-General the third defendant herein a full and comprehensive account of all moneys received by her as rent and profits prior to, if any, and from the 28th day of February, 1972, in respect of the said property less any lawful and reasonable outgoings, and also to pay over the balance therefrom in full to the said Administrator and Registrar-General for and on account of the estate for Helen Marke deceased.

And he made the following order as regards costs:—

“I finally order that the first defendant herein, namely, Mrs. Anita Oseh John do personally pay the plaintiff's costs, to be taxed. That the second name defendant herein William B.G. Faux, be not called upon to pay any costs in these proceedings. That the Third defendant's costs be borne by the estate of Miss Helen Bertha Marke deceased.”

The respondent appealed to the Court of Appeal against the decision of the Learned Judge on the following grounds:—

1. That the Learned trial judge erred in law in deciding issues not before him and made orders on matters not in issue before him.

2. That there is no evidence to support the Learned trial Judge's finding that the property in question belongs to the estate of Helen Marke.

3. That the learned trial Judge's finding that the Government of Sierra Leone had no legal right to convey the freehold of the property to Anita John offends the rules of Natural Justice.

4. That in any event, the Learned trial Judge's order directing the Director of Surveys and Lands to correct their Records to the effect "That the land is now held on yearly lease as from 1964 until the freehold is thereof is conveyed to the Administrator-General for the benefit of Helen Marke's estate" is impossible of performance legally.

[p.94]

It should be noted that neither the Administrator General nor William G.B. Faux appealed to the Court of Appeal.

The Appeal was heard by the Court of Appeal on the 16th and 17th days of October, 1973. Judgment was delivered on the 18th day of January, 1976 allowing the appeal, setting aside the orders made by Learned trial Judge and dismissing the originating Summons.

The main issues raised in this Appeal may be formulated thus:—

(i) Whether action by Originating Summons was the proper procedure to adopt to determine the questions raised by the Appellant in the Originating Summons.

(ii) Whether the Learned trial Judge was right in making the Consequential Orders he made.

Before dealing with these issues it is pertinent to state that the Court of Appeal based their decision on the view that the procedure adopted by the appellant in the circumstances of the case was not proper and that the action should have been commenced by Writ of Summons and not by Originating Summons.

With regard to the first issue, the Court of Appeal said inter alia "An Originating Summons is the appropriate procedure to be used where the main point at issue is one of construction of a document or statute and declarations of the right of the person interested thereto, or is one of pure law. It is inappropriate to commence proceedings by such a procedure where there is likely to be a substantial dispute of facts – unless it is obligatory to do so under the provisions of some rule or an act.

It was wrong where there is any choice in the matter to bring proceedings by Originating Summons if it is known that the facts are disputed.

The issue of ownership is disputed and is a complicated one which cannot be determined merely on the basis of affidavit filed by the parties.

[p.95]

Order XLII (10) provides for the determination of any question arising under a deed, Will or other written instrument and declaration of the rights of the persons interested, but there is an important proviso viz:

"Provided that a Judge shall not be bound to determine any such question of construction if, in his opinion, it ought not to be determined on Originating Summons." It ought to have been abundantly apparent to the Learned Judge who heard the Summons that there are substantial dispute as to facts and that it was most desirable for the matter to have gone on trial."

Mr. Berthan Macaulay Q.C. Learned Counsel for the appellant submitted that the Court of Appeal erred in holding that the method by which the High Court was approached i.e. Originating Summons, was wrong. He submitted further that the method of approaching the High Court are various and none of them is mandatory except in these cases where one or other of the methods is specified. Learned Counsel referred to various rules of the High Court Rules starting with Order 1 Rule 1 where "action" is defined as meaning "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the State."

He submitted that a civil proceeding commenced by Originating Summons is one "such other manner" prescribed by the Rules of the High Court, referring to orders 41, 42 and 45 of the High Court Rules.

It is important to note that the respondent did not complain in her Grounds of Appeal to the Court of Appeal about the procedure adopted in commencing the proceedings. Learned Counsel for the respondent conceded that before us. Indeed Learned Counsel for the respondent candidly stated that he had no complaint against the answers given to the four questions raised in the Originating Summons. He said that his complaint before the Court of Appeal and before this Court is against the consequential orders made by the Learned Judge. But the Court or Appeal nevertheless dismissed the Originating Summons holding in effect that the four questions raised could not be determined in a proceeding commenced by Originating Summons. So the question is whether the Court of Appeal was right in this view.

[p.96]

Learned Counsel for the Appellant, in my opinion, rightly submitted that civil proceedings in the High Court may be commenced by Writ of Summons or by other method prescribed by the rules of Court, including an Originating Summons. Hence an Originating Summons is defined in Order 1 Rule 1 of the High Court Rules as:

"every Summons other than a Summons in a pending cause or matter"

An originating Summons initiates or originates proceedings whilst what is known as a "Judges Summons" is issued in proceedings which are already pending. In this connection the words of Cotton L.J. in Re Fawsitt (1985) 30 Ch. D.231 are relevant. He said at p.233:—

"I do not understand that as saying that no proceedings but what are mentioned in that rule are to be called actions. But even if that were the case, an Originating Summons is a civil proceeding and a civil proceeding commenced otherwise than a writ in manner prescribed by the rules is an action. I read Order II Rule 1 as meaning that every action is to be commenced by writ of Summons except otherwise provided by the rules. Then we have rule 3 of Order IV, providing that certain civil proceedings shall be commenced by Originating Summons instead of by writ of summons; and we find in Rule 1 or Orders LXXI and Originating Summons defined as a summons by which proceedings are commenced without writ. Taking that definition in connection with Section 100 of the Judicature Act, 1873 we must treat an Originating Summons as a civil proceedings commenced otherwise than by writ in manner prescribed by one of the rules of court, and consequently as falling within the definition of an action."

The High Court Rules prescribe many matters which may be commenced by Originating Summons. It is not necessary to refer to all of them. A reference to a few should suffice.

Order XLII provides

"The business to be disposed of in Chambers by Judges, shall consist of the following matters, in addition to the matters which under any other rule or by statute may be disposed of in Chambers –

(1) applications for payment or transfer to any person of any cash or securities standing to the credit of any case or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or the birth, marriage, or death of any person;

[p.97]

(2) - - - -

(3) - - - -

(4) - - - -

(5) - - - -

(6) - - - -

(7) applications connected with the management of property

(8) - - - -

(9) such other matters as the Judge may think fit to dispose of in chambers;

(10) the determination of any question of construction arising under a deed, Will, or other written instrument and declarations of the rights of the persons interested:

Provided that a Judge shall not be bound to determine any such question of construction if, in his opinion, it ought not to be determined on Originating Summons”

In my opinion this Order provides for the issue of an Originating Summons or an Ordinary Summons depending whether there is a pending action or not. If there is a pending action then a Judge's Summons can be issued, but if there is no pending action, then an Originating Summons is the proper method to employ. I shall return to this Order later.

Order XIV, so far as relevant, provides as follows: —

“1. The executors or administers of a deceased person or any of them, and the trustees under a deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin or heir-at-law or customary heir of a deceased person or as cestui que trust under the trust of any deed or instrument, or is claiming by assignment or otherwise under such creditor or other person aforesaid, may take out, as of course, an Originating Summons returnable in Chambers for such relief of the nature or kind of following, as may by the Summons be specified and as the circumstances of the case may require (that is to say) the determination, without an administration of the estate or trust, of any of the following questions or matters:—

[p.98]

(a) any question affecting the rights or interests or the person claiming to be creditor, devisee, legatee next-of-kin, or heir-at-law or cestui que trust;

- - - -

(e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executives or administrators or trustees;

- - - -

(g) the determination of any question arising in the in the administration of the estate or trust.

The court of appeal based their decision on Order XLII (10) emphasizing that the rule provides for the determination of any question of construction arising under a deed, Will or other written instruments and declarations of the rights of the persons interested”

With respect, that was not the relevant rule. A reading of the questions raised for determination in the Originating Summons shows quite clearly that no question of construction of the Will of the testatrix or of any deed or other instrument was raised. Put simply, the question raised are that having regard to the provisions of Sections 9 & 10 of Cap. 45, whether the property at the Maze which was stated in the Will to belong to Helen Marke devolved upon the Administrator General on the death of Helen Marke, or whether it devolved upon the testatrix upon the death of Helen Marke (as claimed in the Will) and therefore formed part of the testatrix's estate and whether it was in the power of the testatrix to devise the said property. In my opinion, none of these questions raised any question relating to the

construction of the Will. In the final analysis the simple issue was whether the property devolved upon the Administrator General or upon the estate of the testatrix on the death of Helen Marke.

It was important before the executors of the testatrix proceeded with the administration of the estate and distribute in accordance with the Will to determine whether or not the property at the Maze formed part of the estate of the testatrix.

[p.99]

If it was part of the estate, then the executors could distribute it in accordance with the Will. But if it was not, they could not deal with it. In my opinion, these were questions arising in the administration of the estate of the testatrix and therefore in my judgment questions falling within the scope of Order 45 Rule 1(g) (already quoted).

The competence of the appellant to take out an Originating Summons under Order 45 Rule 1 has not been questioned. She is a legatee under the Will of the testatrix and as such she was entitled to take out "as of course" an Originating Summons for the determination of any questions or matter falling within any of the sub-heads (a) to (g) of the Rule: see Re Davies (1888) 38 Ch. D. 210.

Another reason given by the Court of Appeal for allowing the appeal was that it was wrong where there is any choice in the matter to bring proceedings by Originating Summons if it is known that the facts are disputed. That may be so. Support for this view can be found in some reported case.

In Re Suteliffe (1942) 3 All E.R. 296 Bennet J said at p.28

“[B]ut there is this further objection against proceedings by Originating Summons against persons who are said to have become legal personal representatives de son tort, that they may give rise to a disputed question of fact, and an Originating Summons is not The procedure by which decision on disputed questions of fact ought to be obtained.”

In Re Halleway (1894) 2 Q.B. 163, Lord Esher M.R. referred to the history and stated the object of Originating Summons. He said at p.166:

“It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a Summons originating proceedings in Chambers, which in the course of time came to be called an "Originating Summons". The procedure was invented for the purpose of quickly determining simple points.”

So the questions arise was there any dispute as to the facts, were any complicated issues in the summon?

From the fact recited earlier it is quite clear that there was no dispute as to the facts. There was no dispute that Helen Marke was the illegitimate daughter of the testatrix, that Helen Marke had a leasehold property from Government at the Maze on which she had built a house, [p.100] that Helen

Marke died in Freetown intestate without issue in August, 1969, that letters of Administration of the estate of Helen Marke had not been granted to anyone, that the testatrix died in Freetown in September, 1970, that the testatrix made a Will dated 15th August, 1970, that in her Will the testatrix stated that the property at the Maze belonged to Helen Marke, that in her Will the testatrix claimed that the property at the Maze devolved upon her on the death of Helen Marke intestate, that the respondent and William G. B. Faux were the executors named in the Will and that they had taken out probate of the estate of the testatrix. In view of these indisputed facts the simple but important question that the appellant sought an answer to was whether having regard to Sections 9 and 10 of Cap. 45, the property at the Maze devolved upon the Administrator-General or upon the testatrix on the death of Helen Marke intestate. In my opinion there was nothing complicated about the question, and a reference to Section 9 of Cap. 45 should demonstrate that point.

Section 9 provides as follows:—

"9(1) The estate of every person dying intestate after the date of operation of this Act shall devolve upon the official Administrator:

Provided that, upon the grant of letters of administration under the provisions of the Act, the estate shall devolve upon the Administrator General.

Provided that, upon the grant of letters of administration under the provisions of this Act, the estate shall de delivered from the Administrator General and be vested in the person or persons to which letters of administration have been granted as aforesaid.

All the assets of a deceased person shall be administered for the payment of all just debts of such person whether he died testate or intestate."

There could be no argument that according to the provisions of the Section the estate of Helen Marke devolved on the Administrator-General on the death of Helen Marke and not on any other person or authority including the testatrix. And according to the undisputed facts no other person including the testatrix has taken out a grant of letters of Administration of the estate of Helen Marke which by virtue of the second proviso to the Section would have divested the Administrator-General of the estate of Helen Marke. So Helen Marke's estate still remains where it was on her death i.e. vested in the Administrator General, and at no times has it been vested in the testatrix.

[p.101]

Indeed counsel for the respondent conceded that in his address in the High Court and he made the same concession before us. In my Judgment therefore the questions raised in the Originating Summon could properly be determined in proceedings commenced by Originating Summons. The Court of Appeal therefore erred in dismissing the Originating Summons.

With regard to the Second issue formulated above on the subject of the consequential orders made by the Trial Judge, the Court of Appeal expressed the view that the Learned Judge made pronouncements on issues he was not called upon to determine by the Originating Summons and concerning parties not

before him. I share the view so far as most of the consequential orders are concerned. Indeed Mr. Berthan Macaulay readily conceded that the Learned Judge erred in making the consequential orders numbered 2, 3 and 4.

In my opinion with the exception of the Order numbered 5, all the consequential orders made are objectionable on several grounds.

In the first place, it must be conceded that a judge who has ordered an Originating Summons has power to any directions relative to, or consequential on, the matter of such application: See Order 11 rule 13. But in my opinion Orders 1, 2, 3, 4, 6 and 7 could not be said to be relative to or consequential on the matter of the application which related to the simple question of the devolution of the estate of Helen Marke on her death. For instance, pronouncing the conveyance of the respondent null and void as the Learned Judge purported to do in his Order I, could not be said to be consequential on his decision that Helen Marke had a leasehold interest in the property at her death and that the leasehold interest devolved upon the Administrator-General upon her death. I must not however be understood to be saying that the respondent's conveyance was valid. All I am saying is that the Learned Judge should not have adjudicated on the validity or otherwise of the conveyance in the proceedings before him.

Secondly, the orders affected persons who were not parties to the action i.e. – The Government of Sierra Leone, and the Surveys and Lands Department. Quite clearly these orders could not bind the Government or the Surveys and Lands Department. In my Judgement therefore the Court of Appeal was right in setting aside Orders 1, 2, 3, 4, 6 and 7.

[p.102]

I now turn to the Order numbered 5 which reads as follows –

“I order that the Administrator and Registrar-General, the Third defendant herein, do take immediate steps to obtain in the usual manner a grant of letters of Administration in respect of the estate of Miss Helen Bertha Marke, deceased, who died intestate on the 26th day of August, 1969 leaving property.”

It is pertinent to recall that the Administrator General had not moved to administer the estate of Helen Marke and that he had in fact published a Citation in the Gazette on 13th April, 1972. It should also be mentioned that on 17th March, 1972 the Administrator General had written a letter to the effect that the property could not form part of the estate of Helen Marke.

It should also be recalled that the Learned Judge found that Helen Marks had a leasehold interest in the property at the time of her death and held that her estate devolved on the Administrator General. It should be noted that according to the definition of estate in Section 2 of Cap. 45, a leasehold interest is an estate within the meaning of Section 9 of the Act. In my opinion, in view of the answer given to the first three questions raised in the Originating Summons, the evidence and the findings of the Judge, it was necessary to order the Administrator General to proceed with the administration of the estate of Helen Marke. This, in my view, is a consequence flowing from the answer to the first question raised in

the Originating Summons. In my judgment therefore, Order 5 (quoted above) is a consequential order and should stand, and the Court of Appeal was wrong in setting it aside.

For these reasons I would allow the appeal.

CASES REFERRED TO

1. Re Davies (1888) 38 Ch. D. 210

2. Re Suteliffe (1942) 3 All E.R. 296

3. Re Halleway (1894) 2 Q.B. 163

STATUTES REFERRED TO

1. Section 10 the Administration of Estates Act, Cap.45

2. Section 9 and 10 of the Administration of Estates Act Cap.45 of the Laws of Sierra Leone, 1960

3. Section 9 of Cap. 45

MOTOR & GENERAL INSURANCE CO. LTD. vs. P.C. 431 ARKURST & P.C. 173 SANTIGIE

[Civil Appeal No. 2/75] [p.35-70]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 30 APRIL, 1976

CORAM: C. O. E. COLE, Chief Justice

S. C. I BETTS, JSC

E. LIVESEY LUKE, JSC

A. AWUNOR – RENNER, JA

S. C. E. WARNE, JA

MOTOR & GENERAL INSURANCE CO. LTD. - APPELLANTS

VRS

P.C. 431 ARKURST

&

P.C. 173 SANTIGIE - RESPONDENTS

M.R.O. Garber, Esq., (with him M.J. Clinton,Esq.) for the Appellants

S.N.K. Basma, Esq., (with him U. W. Coker, Esq.,

Mrs. Christine Harding and G. Betts Esq.) for the Respondents

JUDGEMENT

Livesey Luke. J.S.C.

On 1st August, 1971 two motor vehicles (a taxi car WU 6303 and a Landover WU 8075) were involved in a road accident. As a result of the accident the respondents who were passengers in the landrover at the material time suffered personal injuries. In due course the respondents instituted proceedings in the High Court against M.E.A. Thompson (hereafter referred to as the defendant) the registered owner of WU 6303 claiming damages for personal injuries. On 5th December, 1972 the High [p.37] Court delivered judgment against the defendant awarding damages as follows: the 1st respondent Le.1125.50c and the second respondent Le.1795.50c costs to be taxed (hereafter referred to as the judgment debt). Armed with this judgment, the respondent instituted proceedings in the High Court against the appellants (who are approved Insurers under the Motor Vehicles Third Party Insurance Act Cap. 133) on 9th December, 1972 claiming payment of the judgment debt pursuant to Section 11 of Cap. 133.

In their Statement of Claim the respondents alleged inter alia that on the day of the accident the appellants were the insurers of the defendant against third party risk in respect of taxi car WU 6303 (hereafter referred to as the taxi car). In their defence, the appellants denied that at the material time they were the insurers of the defendant against third party risk in respect of the said taxi car. The issue thereby raised by the pleadings was whether the appellants were the insurers of the defendants against third party risk in respect of taxi car WU 6303 On 1st August, 1971. That was the main issue that went to trial. And it is important to state that the burden of proof on that issue was clearly on the respondents.

The action was tried by Ken During J. (as he then was). The respondents called two witnesses. The first witness was the Senior Register, High Court who produced the case file of the action against the defendant. His evidence is not relevant for the purposes of this appeal. The second witness was one Elija Emmanuel Coker, a Police Sergeant attached to the Licensing Office, Freedom. He produced and tendered an index card in respect of the [p.38] taxi car. The index card was admitted in evidence and marked Ex. B. He said inter alia “on the 1st of August, the card show that the vehicle was insured with Motor and General Insurance Co. Ltd.”. The appellants called one witness namely Muctaru Mohamed Kamara, the General Manager of the appellant company. Mr. Kamara said inter alia that the vehicle was insured with his company from 2nd June, 1970 to 1st June, 1971 and that from 1st June, 1971 to 1st August, 1971 when the accident took place the vehicle was not insured with his company. Ken. During J. delivered judgment on 19th June, 1973 dismissing the respondents' claim. In. his judgment the learned judge said inter alia

"In fact there is no evidence before this Court that the defendants were insurers against Third Party risks of Mr. Thompson at the material time the accident took place."

The respondents appealed to the Court of Appeal against that judgment. The Court of Appeal (C.A. Harding, Tejan, JJ.A, (as they then were) and Beccles Davies J.A.) heard the appeal on the 23rd, 30th and 31st days of May, 1974. Judgment was delivered on 16th April, 1975 allowing the appeal and adjudging that the appellants pay the judgment debt to the respondents. The judgment was delivered by Tejan J.A., the other two learned justices concurring. The Court held that the learned trial judge was wrong when he said that there was no evidence that the appellants were the insurers against Third Party risk of the defendant in respect of the taxi car at the time the accident look place. The Court [p.39] further hold that there was some evidence, and that the evidence was provided by the evidence of Police Sergeant Coker and Ex. B. The Court then proceeded to draw the inference that the taxi car was insured with the appellants on 1st August, 1971 i.e. the date of the accident. The Court also held that the appellants were estopped by their conduct from disputing liability. It is against that judgment that the appellants have appealed to this Court.

The issues that arise in this appeal may be formulated thus:—

(i) Whether there was some evidence that a certificate of insurance in respect of a policy of insurance effected by the defendant and issued by the appellants in favour of the defendant in respect of vehicle WU 6303 was in force on 1st August, 1971, and if so whether the Court of Appeal properly evaluated that evidences.

(ii) Whether the appellants were estopped by their conduct or otherwise from denying liability.

The first issue is formulated in the way it is, because the respondents' claim was based on S. 11 (I) of Cap. 133 which reads as follows:—

"If after a certificate of insurance has been issued in favour of the person by whom a policy has been effected or a certificate of security has been issued in favour of the person whose liability is covered by such security judgment in [p.40] respect of any such liability as is required to be covered by a policy or security issued in favour of the person whose liability is covered by such security judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of this Act, being a liability covered the terms of the policy or security is obtained against any person insured by the policy or whose liability is covered by the security, as the case may be then notwithstanding that the insurer or the giver of the security may be entitled to avoid or cancel or may have avoided or cancelled the policy or the security, as the case may be, the insurer or the giver of the security shall, subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability including any sum payable thereunder in respect of the liability including any sum payable in respect of costs and any sum payable by virtue of any law in respect of interest on that sum or judgment."

For a plaintiff to succeed in an action based on this section he has to prove inter alia that a certificate of insurance has bean issued by the defendant insurer in favour of the person by whom a policy has been

effected and that the policy was in force at the time the liability [p.41] arose. See ROYAL EXCHANGE ASSURANCE LIMITED v. TOUFIC BAZZY S.C. Civ. App. No. 1/72 unreported. So in the instant case the respondents in order to succeed had to prove inter alia that an insurance policy had been effected by the defendant with the appellants in respect of the taxi car, that the appellants had issued a certificate of insurance in favour of the defendant in respect of the taxi car and that the policy was in force on the day of the accident.

Mr. Basma submitted that there was evidence that a certificate of insurance had been issued by the appellants in favour of the defendants in respect of the taxi car and covering the date of the accident. He maintained that the evidence was provided by the evidence of Police Sergeant Coker and Ex. B. Mr. Garber conceded that there may be some evidence, but that it was worthless evidence. The Court of Appeal, as stated earlier, held that there was some evidence and then drew their inference that the taxi car was insured with the appellants on the day of the accident. It is therefore necessary to examine and evaluate the evidence relied on by the respondents.

Police Sergeant Coker's evidence was brief. It will be useful to quote it in full. It reads:—

"Elija Emmanuel Coker. I live at 12, Syke Street, Freetown. I am Police Sergeant No.218 attached to Licence Office in Freetown. I have in my custody Index Card in respect of vehicle WU 6301 which I produce -tendered - no objection - admitted and marked B. On the 1st of August the card show that the vehicle was insured [p.42]with Motor and General Insurance Co. Ltd. Before licence is issued Certificate of Insurance must be produced by applicant to Licence Authority. I do not make the entry. On the 13th December, 1972, I received a letter from the Commissioner of Police written by the plaintiff's solicitor and produce copy of the said letter dated 13th December, 1972 – tendered - no objection - admitted and marked "C". I know one Metzger -Sub—Inspector. She is in our Department. XXD by Garber: Licence Office does not make out a copy of cover note or Policy before licence is issued.

By the Court: S. I. Metzger is supervisor in the licence office."

From this evidence, there are certain matters which are beyond dispute viz: - (i) That Ex. B was produced from proper custody, (ii) that Police Sergeant Coker did not make the entries on Ex. B (iii) that Police Sergeant Coker's evidence that the taxi car was insured with the appellants on 1st August, 1971 was based on Ex. B and (iv) that before a licence is Issued a Certificate of Insurance must be produced by the applicant to the Licensing Authority.

The practice stated in (iv), is in accordance with Section 6 of the Motor Vehicles (Third Party Insurance) Act (Cap. 133) and Rule 10 of the Motor Vehicles (Third Party Insurance) Rules. Section 6 of Cap. 133 reads:—

"Notwithstanding anything in any law contained, no licence for a motor vehicle shall be issued under the Road Traffic [p.43] Act, until there has been produced to the licensing authority proof in such form as may be prescribed that on the date when the licence comes into operation there will be in force a policy of insurance or a security valid for the purposes of this Act in relation to the user of the motor vehicle by the applicant for the licence or by other persons on his order or with his permission or that the user of

such vehicle is not required to be covered by any such policy or security by reason of the provisions of Section 5 this Act."

By virtue of powers conferred on the Governor in Council by Section 20 of Cap. 133, the Motor Vehicles (Third Party Insurance) Rules (hereinafter referred to as the Rules) were made to come into force on the same day as the Act (Cap. 133) i.e. 1st April, 1951.Rule 10 thereof prescribed the form of proof contemplated by Section 6 of the Act. Rule 10 (so far as relevant) reads:—

"In accordance with Section 6 of the Act, the person applying for a licence for a motor vehicle shall produce to the licensing authority—

(a) his certificate of insurance or of security in respect of such motor vehicle or;

(b) ……..

(c) …….

to show that on the date on which the licence comes into operation there will [p.44] be in force a policy or security in respect of such motor vehicle or that such motor vehicle will be exempted from the provisions of Section 3 of the Act."

It is evident that the combined effect of Section 6 of the Act and Rule 10 of the Rules is to create a presumption that an applicant who has been issued with a licence once for a motor vehicle produced to the licensing authority a certificate of insurance in respect of such motor vehicle to show that on the date on which the licence comes into operation there will be in force a policy of insurance in respect of such motor vehicle. The presumption, however, is rebuttable.

I now proceed to examine Ex. B with a view to assessing its evidential value. Ex. B. is headed "Form A - Register of Motor Vehicles and Trailers - Reg. 3", and particulars are entered thereon under various headings and columns. The register of Motor Vehicles and Trailers is kept by virtue of Section 3(4) of the Road Traffic Act, 1964 which reads as follows:—

"The Principal Licensing Authority shall the central registrar of all motor vehicles and trailers and of all licences. He shall keep the prescribed registers and shall register therein in the prescribed manner all licences issued under this Act and the particulars of every motor vehicle and trailer registered by him or by Licensing Authorities on his behalf. Such registers shall, during normal working hours, be open to inspection [p.45] by the public on the payment to the Principal Licensing Authority of a fee of fifty cents." (Emphasis mine).

By virtue of the second proviso to Section 65 of the same Act, the regulations now in force are the Road Traffic Regulations, I960. Those regulations inter alia prescribe the "prescribed registers" provided for by Section 3 (4) of the Act, Regulations 3 and 4 provide as follows:

"3. Every licencing authority shall keep a register for the registration of motor vehicles as in Form A set out in The First Schedule.

4. (1) Every person who applies to register a motor vehicle shall lodge with the licensing authority an application duly completed as in Form B or C, as the case may be, set out in the "First Schedule".

I now propose to examine forms A and B in some detail. It is not convenient to set them out, but it would suffice to state the particulars prescribed in them. The following particulars are proscribed in Form A:— registered number of vehicle; name of owner; date of change of ownership (if any) and G.N.R. number; description of vehicle including the make, year and model number of letter, horse power, number of cylinders, engine number, chassis number, type of body, weights including net weight cwts, freight weight cwts, gross weight cwts; axle weight including front cwts and rear cwts; tyre sizes of the front, middle and rear giving the rim diameter and the width in each case; class of vehicle; date of registration; [p.46] renewal of licences stating the licence number, date and period of licence in respect of each renewal. The particulars prescribed in Form B include the full name and usual address of the applicant; the make of the vehicle, its year of manufacture, model number or letter, horse power and capacity, number of cylinders, engine number, classis number, type of body, date of purchase, country of origin of vehicle, net weight, axle weight of front, middle and rear axle, number of wheels, size of front, middle and rear tyres giving in each case the rim diameter and the width. A comparison of the particulars prescribed in Forms A and B, would reveal that most of the particulars prescribed in each form are identical. When an applicant for the registration of a motor vehicle lodges his application in Form B, he would have filled in the particulars there prescribed. It is from the completed Form B that the licensing Authority obtains most of the particulars that are entered in the register of Motor Vehicles and Trailers (Form a). The Registrar acts on the information supplied by another person. He has no personal knowledge of the facts. Most of the particulars stated in the register of Motor Vehicles and Trailers are therefore hearsay, and in normal circumstances the register would be inadmissible in evidence as offending the rule against hearsay. Thus in MYERS v. D.P.P. (1964) 48 Cr.App.R. 348 it was held by the House of Lords that car manufacturers' records of engine block numbers, proved by employees charged with keeping of records, but who had not actually compiled them were not admissible, not being public documents, they did not fall within any recognized exception to the rule against the admissibility of hearsay evidence. Some of the speeches in that case are [p.47] instructive, and it will be useful to refer to them. Lord Reid said at pp. 362-363:—

"It was not disputed before your Lordships that to admit these records is to admit hearsay. They only tend to prove that a particular car bore a particular number when it was assembled if the jury were entitled to infer that the entries were accurate, at least in the main; and the entries on the cards were assertions by the unidentified men who made them that they had entered numbers which they had seen on the cars. Counsel for the respondent were unable to argue that these records fell within any of the established exceptions or to adduce any reported case or any text book as direct authority for their admission."

And Lord Morris of Borth-y-Gest said at pp. 367-368—

"The card has no probative value unless it is used to prove that what it records is true. The sole purpose of introducing the card would be to prove that a particular motor car when manufactured did in truth have certain stated particular numbers attached to it. However alluring the language of introduction

may be phrased, the card is only introduced into the case so that the truth of the statements that it records may be accepted. There is, in my view, no escape from the conclusion that, if the cards are admitted, [p.48] unsworn, written assertions or statements made by unknown, untraced and unidentified persons (who may or may not be alive) are being put forward as proof of the truth of these statements, Unless we can adjust the existing law, it seems to me to be clear that such hearsay evidence is not admissible,"

There are however many exceptions, both statutory and at common law, to the hearsay rule, One important exception I at common law is statements contained in public documents which, subject to certain qualifications are in general prima facie evidence of the truth of the facts recorded therein. Having regard to the provisions of Section 3 (4) of the Road Traffic Act, 1964 the Register of Motor Vehicles and Trailers (Form a) would appear to possess all the elements of a public document. But it is not necessary to decide in this appeal whether it is a public document. Suffice it to say that the legislature has taken care of the situation by enacting Section 6l(l) of the Road Traffic Act, 1964 which is in the following terms:—

"In any cause or matter relating to a motor vehicle or to any licence, permit, certificate or other document, issued under this Act or any regulation made hereunder, the production of a document purporting to be, a copy of an entry in a register or a copy of a licence, permit, certificate or other document as aforesaid by, or from the records of the Principal Licensing Authority or a Licensing Authority or any officer deputed by such authority for that purpose, shall be prima facie evidence of [p.49] any matter, fact or thing stated or appearing thereon."

This sub-section therefore creates a statutory exception to the hearsay rule. But it has been held that such enactments which alters the law of evidence must be construed strictly. Thus in NORTHAND v. PEPPER 10 L.T. 782, Erie C.J. said at pp. 782-783—

"An enactment altering the law as to evidence and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly. The law of evidence as it stands, is intended to maintain truth; any alteration of that law for a particular purpose is intended to maintain the truth in a better manner as far as that particular purpose is concerned and no further; otherwise the alteration would have been carried further."

Applying this strict rule of construction, it has been laid down in a long line of cases that there must be a statutory duty to make the entry (in the case of registers). But the rule also applies to other documents, the contents of which are hearsay, but which have been made admissible by statute. Examples of such documents are surveys, inquiries and reports. In some cases the statute makes the contents of the document "prima facie" evidence, in others it makes them "conclusive evidence". But whatever the document, and whether it constitutes prima facie or conclusive evidence, the principle is the same. There must be a statutory duty to make the entry, inquiry or report as the case may be. If there is no such duty then [p.50] the entry, inquiry or report, as the case may be, does not qualify as "prima facie" or "conclusive evidence" under the -relevant statutory provision. A few authorities should illustrate this

point. With regard to registers, it is stated in Chapter 29 of Phipson on Evidence l1 Ed. (a Chapter dealing with the position both at Common Law and by Statute) at para, 1130 that —

“A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence. Thus, entries made by an incumbent of parish burials reported to, but not performed by him, are admissible, so, of entries of births and deaths under the Births and Deaths Registration Act 1953 S.34. But entries of matters which it was not his duty to record are inadmissible.” (Emphasis mine).

In Halsbury's Laws of England 3rd Ed. Vol. 15 P. 331 para. 678 it is stated:

“Entries in the register of births, marriages or deaths, certified copies of those entries and certified copies of the registers are prima facie, though not conclusive, proof of the particulars of all the matters required by statute to be therein,” (Emphasis mine).

In Re STOLLERY, WEIR & OTHERS v. TREASURY SOLICITOR (1926) All E.R. Rep. 67 C.A. a case dealing with certificates of birth and of death under the Births and Deaths Registration Acts 1836 and 1874, (S.38 of the 1836 Act providing that the certified copies of entries [p.51] “shall be received as evidence of birth, death or marriage, to which the same relates.”) Lord Hanworth, M.R. said inter alia at p. 75:—

“Therefore, I should agree with. the view which was taken in the next three common law cases by Phillmore J., Sir Francis Jeune P and McCardie J,— that in the absence of any special statutory provision, those particulars in the certificate, which it was the statutory duty of the registrar to inquire into and learn, and state as a result of his inquiring and learning in the certificate are admissible evidence, although subject to contradiction by other evidence of the facts therein stated.” (Emphasis mine).

And Sergeant L.J. said inter alia at pp. 79-80

“I think that observation is of particular value when one comes to the fourth certificate in question here, the certificate of the death of one of the children of the union, Harriet Ellen Brown. In that she is described as being the daughter of John Brown, a jeweler deceased. What the Act requires to be entered, and what the registrar has to make inquiries about, is the rank or profession of the deceased., You find the statement in the register of something which is not a part of the rank or profession of the deceased, namely, [p.52] that she is a daughter of John Brown, a jeweler. It seems to me that as to that, it is very doubtful whether the register or the certified copy of the register is any evidence at all, because it is something which was not inserted in the register by the officer as part of his duty under the Act. The register does not make any provision for showing who are the parents of the deceased person.” (Emphasis mine).

With regard to inquiries and reports, two cases (NORTHARD V. PEPPER (Supra) and A.G. v. ANTROBUS (1905) 2 Ch.188) illustrate the principle. NORTHARD v. PEPPER (Supra) related to an action for a collision between two ships. The defendants' counsel, in order to show that the plaintiff's ship was in fault, proposed to put in evidence the statement of the plaintiff's captain made on oath, under the

Merchant Shipping Act, I854, before a receiver of wreck. It was held that such evidence was inadmissible, notwithstanding that a section of the Act enacted that such examination shall be admitted in evidence in any Court as prima facie proof of all matters contained therein, as the question as to which ship caused the damage to the other was not a matter which the receiver had power to examine into under the Act.

Erie C.J. who gave the leading judgment said inter alia at p. 783:—

"I think his report is only evidence as to the matters into which it was his duty to inquire, and the part of the hull supposed to be struck in the [p. 53] collision is not one of those matters..... Upon this review of the statute, I think the rules of law relating to evidence are altered only for a specified purpose, and that the sections are drawn with great legal knowledge confining each alteration, to its appropriate purpose; and on this construction of the Act the examination of the captain was not admissible as substantive evidence that in the collision the starboard bow of the plaintiffs ship was struck." (Emphasis mine).

And Williams J. said inter alia at p. 783—

"It was argued by Mr. Brett that the evidence was improperly rejected, and that the language of the 449th Section is given without any restriction whatever, that the examination taken in writing in pursuance of the 448th Section shall be admitted in evidence in any court of justice, as prima facie proof, as proof of all matters contained in such written examination. Now it is clear that these general words must necessarily to some extent be controlled. It never was meant that matters contained in the examination were matters spoken to by a witness without having power to speak of his own knowledge; in other words, that this matter received in evidence is not to mean any matter contained in such examination. I think it necessary [p.54] to put some limit upon the generality of the words, and it seems to me contrary to the good sense and meaning of the words to impose any other limit than that the matters contained in such written examination into which the receiver might inquire. According to the ordinary rules of law that would be so, otherwise he might inquire into matters which it was not part of his duty to make an inquiry into." (Emphasis mine).

In ATTORNEY GENERAL v. ANTROBUS (1905) 2 Ch. 188 the defendant's counsel proposed to put in a map and award made in 1847 by the Tithe Commissioners under The Tithe Act 1836. According to Section 64 of the Act, "every recital or statement in a map or plan .....shall be deemed satisfactory evidence of the matters therein recited or stated or of the accuracy of such plan". In giving his ruling Farwell J. said inter alia at p. 194:—

"I must not be understood as deciding that, in my opinion, the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview of the authority of the Commissioners who made it. I think they have to attend to their own business and I guard myself against being supposed to say that I should hold that the tithe map was evidence of something it was not their business to ascertain". (Emphasis mine).

[p.55]

I now return to Ex. B. It contains the particulars prescribed in form A and more. It contains particulars like the registered number of the vehicle (i.e. WU 6303) the date of registration, the name of the owner (i.e. M.E.A. Thompson) the address of the owner, description of the vehicle including the make (i.e. Peugeot 204), engine number, classic number and renewal of licences. There is no doubt that all these particulars constitute prima facie evidence by virtue of S. 61(1) of the Road Traffic Act, 1964.

But Ex. B also contains particulars about Income Tax and Insurance Policy. The question then arises: do these additional particulars constitute prima facie evidence by virtue of S.61 (1) of the Road Traffic Act, 1964. As far as I am aware the Road Traffic Regulations, 1960 have not been amended to provide that Form A should include these particulars. So there was clearly no statutory duty on the Licensing Authority to enter particulars about Insurance policy and income tax on the register. And if there was no statutory duty to make the entries on the basis of the principles stated above, those unauthorized entries do not constitute prima facie evidence under S.61 (1) of the Road Traffic Act, 1964. Similarly if particulars about the colour of the vehicle had been entered on the register that entry would not constitute prima facie evidence of the colour of the vehicle because the colour of the vehicle is not one of the particulars prescribed in Form A. In my judgment therefore the entries in Ex. B relating to Insurance Policy are not prima facie evidence of the matters "therein stated or appearing thereon". And these were the entries relied on by the respondents to prove that a certificate of insurance in respect of a Policy of [p.56] insurance effected by the defendant and issued by the appellants in favour of the defendant in respect of the taxi car was in force on 1st august, 1971. In my opinion the entries were of no evidential value and sergeant Coker's evidence based, as it was, on them was worthless. It may be desirable to amend the Road Traffic Regulations to provide that particulars relating to the name of the insurer, the date of commencement of the insurance, the date of expiry of the insurance and the serial number of the certificate of insurance be stated in the Register of Motor Vehicles and trailers (Form A). The licensing authority would obtain these additional particulars from the certificate of insurance produced when application for licence is made, because they, and other particulars, are all stated in the certificate of insurance (see the prescribed certificate of Insurance in form A of the schedule to the cap.133 Rules). Those additional particulars would then, and only then, in my view, constitute prima facie evidence under S.61 (1) of the Road Traffic Act, 1964. Such an amendment would certainly, in my view, facilitate proof and lighten the burden on third-party claimants under S.11 (1) of cap. 133.

But let me assume that the entries in Ex. B relating to insurance Policy constitute prima facie evidence. What then is the position? I will set out the relevant entry. It is

		Renewal of Licence			
		Period		Insurance Policy	
Year	Licence No.	From	To	No.	Closing Date
1971	529	27/8	31/12	Z	3.8.71

In my opinion this entry would constitute prima facie evidence that a licence numbered 529 was issued in1971 in respect of the period 27 August to 31st December, [p.57] 1971 and that a Policy of Insurance

numbered Z was in force but expiring in 3rd August, 1971.It should be noted that what is entered in the register (Ex. B.) is the number of the Insurance Policy and not the name of the insurer. Indeed in the register (Ex. B.) is the name of the Insurer stated. So there is no evidence on Ex. B. of the name or identity of the Insurers issuing the Policy of Insurance or the Certificate of Insurance. How then could it be said that any entry on Ex. B. constitutes prima facie of the name of the insurers? I fail to see how.

Let me assume that "Z" is a code indicating the identity of the Insurers. But in the first place no evidence of any code was give. Secondly, Sergeant Coker, not having made the entry, could only tender the document. He could not give evidence of the truth of its contents, for the simple reason that he could not vouch for the accuracy of the entry. See MYERS V. D.P.P. (Supra). The document speaks for itself. I concede that if the maker of the entry had been called, he could have given evidence based on his recollection that he saw a valid Certificate of Insurance before making the entry and that the Certificate of Insurance was issued by a particular insurer. And for this he may have refreshed his memory from the entries in Ex. B. relating to Insurance Policy. See BRYANT & DICKSON 31 Cr, App, R. 146.

On closer examination of the entry it shows that a licence was issued on 27th August.1971 and the Insurance Policy on the strength of which that licence was issued expired on 3rd August, 1971. In other words the Insurance Policy had expired some 24 days before the licence was issued. According to Rule 10 of the Rules an applicant [p.58] for a licence should produce to the licensing Authority his Certificate of Insurance "to show that on the date which the licence comes into operation there will be in force a policy". According to the entry the licence came into operation on the 27th August, 1971. So a Certificate of Insurance to show that there will be in force a policy on that date should have been produced to the licensing authority. If no such Certificate of Insurance (what I would call an operative Certificate of Insurance) was produced, then in accordance with S.6 of Cap.133 no licence should have been issued. Section 6 of Cap.133 imposes a prohibition against issuing a licence for a motor vehicle until an operative Certificate of Insurance has been produced to the licensing authority as prescribed by Rule 10 of the Rules. The entry shows quite clearly that an operative Certificate of Insurance was not produced to the licensing authority in respect of the relevant renewal of licence. Consequently a licence should not have been issued. And if no licence should have been issued, no entry should have been made. The entry was therefore unauthorized and therefore no cognizance should be taken of it. Also the presumption raised by Rule 10 of the Rules that an operative Certificate of Insurance was produced to the licensing authority is rebutted. Furthermore the prima facie evidence (which I assumed to be provided by the entry under Section 61(1) of the Road Traffic Act, 1964) is also rebutted by the entry itself.

In the end, whichever way one looks at Ex. B, the result is the same. The entry relied upon by the respondents is of no evidential value and Sergeant Coker's evidence based on it worthless.

The Court of Appeal relied heavily on Ex. B and [p.59] Sergeant Coker's evidence in drawing the inference that the said taxi car was insured with the appellant company on the date of the accident and that the appellant company had issued a Certificate of Insurance in respect of the policy. That basis having collapsed, could the inference founded on it stand? Of course if the inference was founded only on that material, it would inevitably collapse along with its foundation. But the Court of Appeal also

referred to the evidence of Muctaru Mohamed Kamara, the appellants' witness in drawing their inference. So the question is, could the evidence of Kamara alone support the inference? The answer must be "No" in view of the categorical evidence of Kamara that

"I, after looking my records came to the conclusion that Policy held by the Insured expired on the 2nd August, 1972 which commenced on the 3rd August, 1971. Accident took place before the vehicle was insured. Previous insurance which commenced on 2nd June, 1970 expired on 1st June, 1971. From 1st June, 1971 to 1st August, 1971 when accident took place the vehicle was not insured with our company."

In my judgment therefore the Court of Appeal drew the wrong inference from the evidence.

It only remains to consider the second issue formulated above i.e. estoppel. The evidence relied on by the respondents in support of the estoppel is that the appellants engaged a solicitor to defend the defendant and undertook the defence in the action in the High Court [p.60] by the respondents against the defendant. The Court of Appeal held this conduct of the appellants to amount to an estoppel. Learned Counsel for the appellants submitted that the conduct relied on was due to a mistake of fact, that the respondents were strangers to the estoppel and that in any case estoppel was not pleaded. This issue can be disposed of briefly. The parties to the estoppel were the defendant and the appellants. The respondents were not parties to the estoppel, they were strangers to it. It is a well established principle of law that a stranger to an estoppel cannot rely on it.

In VANDEPITTE v. PREFERRED ACCIDENT INSURANCE CORPORATION OF NEW YORK (1933) A.C. 70, the appellant obtained a judgment in British Columbia against one Mr. Berry's daughter for damages for personal injuries caused by her negligence while driving her father's motor car with his permission. Execution issued, but nothing was recovered. Mr. Berry had effected in respect of his car an insurance in his own name with the respondents, and they had taken charge of the defence of the action. By the policy the respondents agreed to indenmify the insured against third party risks, and that the indemnity should be available to any person operating the car with the permission of the insured. The appellant sued the respondents to recover the amount of the unsatisfied judgment. It was held inter alia by the Privy Council that the fact that the respondents conducted the defence of the action did not raise an estoppel available to the appellant. Learned counsel for the respondents referred us to the case of THEOPHILUS GREENE v. NEW INDIA ASSURANCE CO. LTD. Civ. App. 15/71 unreported, a decision of the Court of Appeal, in support of his submission that estoppel arises in the instant case. But the facts of that case show quite clearly that the decision is not applicable to the facts [p.61] of the instant case. The facts of that case briefly were that the insurers instructed a solicitor to represent the insured in an action instituted against the insured by third parties for personal injuries. The third parties obtained judgment against the insured. The insured then instituted action against the insurer claiming indemnity in respect of the judgment debt. The Court of Appeal held that the insurer was estopped by their conduct in defending the insured in the action instituted by the third parties from denying liability. With respect that decision is in accord with the principle stated earlier. The parties to the estoppel were the Insurer and the insured, so that the insured cold raise and rely on the estoppel. But it would have been a different matter if the third parties had raised the estoppel in subsequent action by them against the

insurance company. They were not parties to the estoppel and therefore they could not have raised it. In the insurance circumstances the issue of estoppel raised by the respondents fails.

I have great sympathy for the respondents. They have a judgment debt which still remains unsatisfied. I hope that all is not lost. However, I would regrettably allow the appeal.

[Sgd.]

E. LIVESEY LUKE – J.S.C.

Cole, C.J.

My Lords, I have already had the benefit and pleasure of reading before- hand the erudite judgments of my Learned brother, the Hon. Mr. Justice E. Livesey Luke, as well as that of the Honourable Mr. Justice S.C.E. Warne. Let me straightaway make it clear that with the final conclusion of the Honourable Mr. Justice Luke I have no assent.

There is one significant point, however, in the course of the reasoning of the Honourable Mr. Justice Luke with which I do not quite agree. It relates to that portion of his judgment in which he dealt in extensor with Exhibit 'B'.

With the greatest respect, taking into account his reasoning, I do feel that in this particular instance this ---- can be distinguished from the cases he has quoted. I agree that it may not have been expressly started in our relent Acts that the Motor Traffic Licensing Authority has a duty to ---------- record in writing the pre-requisite requirements that an [p.63] operative Certificate of Insurance should be produced to them either before or at the time a licence was issued. I do feel, however, that taking into consideration all the statutory provisions to which my learned brother Justice Luke has already referred — and I will not tire you by referring to them in detail again — there seems to me an implied duty imposed on the Motor Traffic Licensing Authority to place on some kind of record the details of the relevant Certificate of Insurance presented to that Authority as required by law. Such a Licensing Authority may wish to keep separate books for recording those details before evidence for a particular vehicle is issued.

I would however endorse the procedure now carried on the Motor Traffic Licensing Authority as disclosed by Exhibit 'B' as ------ appropriate in the circumstances of this case.

In my view, this neither renders Exhibit 'B' invalid or worthless or valueless. It has some evidential value which ought to be taken into account by both the High Court, the Court of Appeal ------ ourselves in considering the case of the parties concerned. In ------, I have done ------ in coming to my final decision. If my learned brother Luke's view is accepted on this point it will mean that, ---------- apart from the sociological jurisprudential value which opounds that Courts should endeavour where possible to make the law in their society work, where a defendant mulcted in damages and costs the High Court refuses for good and sufficient reasons to produce the trial before the High Court his or her third party certificate of insurance to satisfy the provisions of Section 111 of the Motor Vehicles (Third Party

Insurance) Act (Cap. 133) (which shall hereafter refer to as 'Te Act') and the insurer refuses [p.64] to do same or gives excuses that he does not keep proper records, the public will have nowhere to turn to.

In my view the main purpose of the combined effect of section 11 of the Act – the basis of the claim before the High Court – and Section 6 of the Act was well as Rule 10 of the Habor Vehicles (Third Part Insurance) Rules (Cap. 133) hereinafter referred to as 'The Rules') is that what is required to be produced to the Motor Traffic Licensing Authority and what, in my view, should be entered in the records of that Authority amongst other things, is a Certificate to show that on the date on which the licence comes into operation there will be in force – and I stress the expression 'there will be in force' – an operative policy in respect of the motor vehicle which is being licensed.

The evidence before us prove the contrary in my view. For, according to Exhibit 'B' the relevant license came into force on the 27th August 1971 which there appears to be no operative Certificate of Insurance in force.

In sum, what I am endeavoring to say shortly and simply, is this. Section 11 of the Act should quickly be amended establishing effective provisions in our laws to enable members of the public who have been given judgment by the superior courts of our Republic to be lawfully indemnified by insurers regardless of the fact that the evidence a the trial points to the fact (as in this case) that notwithstanding that the required proof produced to the Motor Traffic Licensing Authority at the relevant time shows that on the date when the licence comes into operation there will not be in force a policy of insurance, in spite of the fact that there is conclusive evidence pointing to the fact that on the date of the accident there is a valid operative policy covering third parties. This is of obvious and utmost importance because, if as the law stands at present the provisions of Section 6 of the Act as well as Rule 10 of the Rules are not complied with, then Section 11 of the Act is in-operative. It is sincerely hoped that legislative insures regarding the whole question [p.65] of Motor Vehicles Third Party Insurance in Sierra Leone will be quickly reviewed in order to avoid hardship to the public as in this case with particular reference to victims of Motor accidents.

Finally, on the question of estoppel I do agree with the views expressed by my learned brother Luke that the principles of law expressed in Vandepitte's case propound very sound doctrines of law on the subject and I will adopt and apply them.

I do not think any useful purpose will be served in remitting this case to the High Court for a re-trail because Exhibit 'B' speaks for itself most eloquently. It is my sincere hope that the particular circumstances of this case, the appellants would not take gross advantage of legal technicalities. I say no more than this; that they will be properly and suitably advised in the public interest by their legal representative.

I would allow the appeal.

[Sgd.]

C.O.E. Cole

Chief Justice

Awunor-Renner, J.A.

My Lords, I have had the opportunity and pleasure of reading the erudite judgment of my Honourable and Learned brother Luke, J.S.C. I wish to express my gratitude and great appreciation for the industry he had exerted and the lucid reasoning has advanced in giving at his final conclusion. However, with the greatest respect for him, I do not agree with this reasoning nor the final conclusion. Consequently, My Lords, I shall treat the cause before us in this way.

The facts of the case have been clearly stated by my learned brother Luke, J.S.C. and the course the cause has traveled to this …… I entirely agree with him on what is to be proved by the respondents as required by S. 11(1) of Motor Vehicles (Third Party appearance) Act Cap. 133 of the Laws of Sierra Leone (hereinafter called …….. Act"). I shall not tire you with a repetition of what my [p.67] Learned brother has already stated.

It is my considered judgment that the claim of the respondents under section 11(1) of the act is Absolute. The respondents are not parties to the contract between the insurer and the insured, nonetheless this section gives the Respondents the right to make the claim. See sub-section 11(1) beginning at "not withstanding"……to end.

I agree with the matters which, my learned brother said are beyond dispute with regard to police sergeant Coker's evidence. Under (iv), I feel the requirements stated therein, in accordance with S. 6 of "The Act" and Rule 10 of the Motor Vehicles (Third party Insurance) Rules deal with the issue of road licence for the vehicle. This has nothing to do with third party under "The Act" except in so far the expiry date of the policy of insurance is concerned vis a vis his claim under S.11(1) of "The Act"

My Lords, I do not think it is necessary for this Court, in the instant case, to construe the provision of S.6 of "The Act" since the issue of a valid road licence for car WU.6303 does not arise. In order to sustain their claim, the resemblance did not have to prove whether the vehicle had a valid road licence or not.

What is the evidential value of Exh. "B"? I will concede that the Principal Licensing Authority entered more particulars of Ex "B" than was required by Law. Did this render the entry valid or no evidential value? I do not think so.

I will examine the provision of law which made Exh. "B" receivable in evidence S.61 (1) Road Traffic Act, No 62 of 64 had cured the infraction of what would otherwise be hearsay evidence.

S. 61(1) reads:

"In any cause or matter relating to a motor vehicle or to any licence, permit certificate or other document, issued under this Act or any regulation made hereunder, the production of a document purporting to be a copy of any [p.68] entry in a register or a copy of a licence, permit certificate or other document as aforesaid by or from the records of the al Licensing Authority or a Licensing Authority, or

any officer deputed by such authority for that purpose, shall be prime facie evidence of any matter, fact or thing stated or appearing thereon."

It is therefore evident that the entries on Exh. "B" are prima facie evidence of what is stated thereon, provided the entries are ones required to be made according to law.

See Lyell V Kennedy 14App. Cas. 437 at 449

However a clear distinction must be drawn between the cases referred to by my Learned brother and myself supra, from the instant case. This Hon, Court has never been called upon to interpret the entries on the Register of Motor Vehicles And Trailers, nor has it ever given an opinion on their evidential value. In a long line of cases it has been held that what is not required to be entered according to law cannot be admissible in evidence as proof of such entry. It should be noted, however, that these cases have dealt primarily with registration of births, deaths, baptisms, marriages, and pedigree. In a cause of this nature, it is my considered view that the principle is not applicable.

As my Learned brother has clearly pointed out the relevant entry on Exh. "B" is:

RENEWAL OF LICENCE

PERIOD				INSURANCE POLICY	
Year	Licence No.	From	To	No.	Closing Date
1971	529	27/8	31/12	z	3.8.71

The entries about insurance on Exh. "B" appear not to be those that should have been on it, but this was a document which ought to be produced under S.6 of the Act to the Licensing Authority, to obtain road licence. I think the Principal of [p.69] Licensing Authority had an implied duty to record which union of the Certificate Insurance so produced on Exh. "B". My Lords, the provision S.6 would be defeated if this were not done. Indeed the object in the Act would be nullified and the interest of Justice would not be promoted. In my opinion, this entry of the certificate of Insurance constitutes prima facie evidence, that Policy of Insurance identified "Z" expired on 3rd August, 1971.

One cannot go beyond what is on Exh. "B" S. 61 (1), which refers: also evidence is rebuttable but this has not been done.

This is the evidence the respondents relied on to prove their claim against Appellant, that on the 1st August, 1971 when the accident took place, the vehicle WU.6303 was insured with the Appellants company.

In any case, Ken During J. in making his findings did not rely only on this evidence, and rightly so. He considered the entire evidence before him. He relied also on the evidence of Muctarr Mohamed Kamara the witness for the Appellants.

The Learned Judge had this to say:

“In fact there is no evidence before this Court that the defendants were Insurers against Third Party risks of Mr. Thompson at the material time the accident took place.”

In the Court of Appeal, the Court found that there was some evidence before the High Court and they proceeded to evaluate and draw the necessary inference; the Court went further and dealt with the issue of estoppel in view of the evidence. The evidence of Police sergeant Coker has been stated in the judgment of my Learned brother. The evidence of Muctarr Kamara is pregnant with facts which the respondents could not have known or given in evidence.

My Lords, I am of the opinion that the Court of Appeal, after careful consideration of the evidence before the Lower Court drew correct inference that WU. 6303 was inspired with the Appellant [p.70] Company on the 1st August, 1971. The Court had this to say: “I think from this evidence it would have been proper to draw that the inference that the vehicle was insured on the 1st August 1971.”

My opinion is fortified not only by entry of the expiry date of Certificate of Insurance on Ex. "B", but also by the evidence of Kamara that “H.B.A”. Thompson has a fleet policy with us. Payment Exh. D ’F would be taken into account when it comes to payment of premium in respect of fleet policy; WU.6303 is part of fleet policy held by her. I cannot say whether the fleet taken in more than the two vehicles I have mentioned. She has more than 2 vehicles insured with us under fleet policy. Provided I am instructed I actually renew policy even though premium not paid. I have previously renewed on instruction M.E.A. Thompson policy in respect of vehicle insured with us.”

I will only add this point to what my learned brother has said about the issue of estoppel. That is to say, estoppel must be pleaded at the first opportunity. This, the respondents failed to do. They therefore cannot avail themselves of the issue of estoppel.

My Lords, in view of what I have said supra, I would dismiss the appeal. The appeal is accordingly dismissed.

S. C. E. Warne

Justice of appeal

CASES REFERRED TO

1. Royal Exchange Assurance Limited v. Toufic Bazzy S.C. Civ. App. No. 1/72 unreported

2. Myers v. D.P.P. (1964) 48 Cr.App.R. 3483. Northand v. Pepper 10 L.T. 782

4. A.G. V. Antrobus (1905) 2 Ch.188)

5. Attorney General v. Antrobus (1905) 2 Ch. 188

6. Bryant & Dickson 31 Cr, App, R. 146

7. Vandepitte v. Preferred Accident Insurance Corporation Of New York (1933) A.C. 70

8. THeophilus Greene v. New India Assurance Co. Ltd. Civ. App. 15/71

9. Lyell V Kennedy 14App. Cas. 437 at 449

STATUTES REFERRED TO

1. Section 6 of the Motor Vehicles (Third Party Insurance) Act (Cap. 133) and Rule 10 of the Motor Vehicles (Third Party Insurance) Rules. Section 6 of Cap. 133

2. Section 3(4) of the Road Traffic Act, 1964

3. Halsbury's Laws of England 3rd Ed. Vol. 15 P. 331 para. 678

4. Re Stollery, Weir & Others v. Treasury Solicitor (1926) All E.R. Rep. 67 C.A.

WINIFRED E. HARRIS v. ROXY J. HARRIS

[SUP.CT.MISC.APP. 1/77] [122-123]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

BETWEEN

WINIFRED E. HARRIS - APPELLANT,

AND

ROXY J. HARRIS - RESPONDENT

RULING

On 19th December, 1977 the Court of Appeal refused the applicant herein leave to appeal to the Supreme Court against an order of the Court of Appeal dated 12th July, 1977 dismissing the applicant's appeal against an order of the High Court dated 4th May, 1976. By Notice of Motion dated 21st December, 1977 the applicant has applied to this Court for Special leave to appeal to the Supreme Court.

Learned Counsel for the applicant raised the following questions of law, which he submitted ought to be submitted to the Supreme Court for determination:-

(i) Whether Section 56(l)(b) of the Courts Act, No. 31 of 1965, fetters in any way or contains any pre-condition for the exercise of the discretion of a Judge of the High Court in granting leave to an applicant to appeal against his interlocutory Order. If there is no such fetter, and if there is no pro-condition imposed by the said sub-section before granting leave, IN THE ABSENCE OF AN APPEAL, HAS THE COURT OF APPEAL any jurisdiction to call in question the exercise of the Judge’s discretion in granting leave to appeal?

(ii) Where the High Court or a Judge thereof has granted leave to appeal pursuant to an application made by an aggrieved party by virtue of Section 56 (l)(b) of the Court Act, and the Order drawn up, perfected, filed and acted upon, IN THE ABSENCE OF AN APPEAL AGAINST SUCH AN ORDER, has the Court of Appeal any jurisdiction to inquire into the validity or otherwise of the said Order and refuse to assume jurisdiction and hear the appeal?

(iii) Where the High Court or a Judge thereof in granting leave to an applicant to appeal against his own ruling, and in doing so, acted within the powers conferred upon him by section 36(1)(b) of the Courts Act, 1963, and moreover did nothing directly contrary to Rule 10 of the Court of Appeal [p.123] Rules, or assumed to himself new power which expressly taken away from him by the said Rule 10 or any other enactment, is the Order granting such leave to appeal void so as to deprive the Court of Appeal of any jurisdiction to entertain the appeal? If not has the Court of Appeal any right to ignore the existence of the Order even though there has not been an appeal against It?

(iv) In the instant case, the Court of Appeal having entertained and determined an appeal against the Order of Williams J. dated the 11th day of May, 1976 wholly setting aside his own order dated 5th May 1976 which had granted the appellant leave to appeal against his (Williams J) interlocutory order of 4th May, 1976, can it thereafter say it had no jurisdiction to entertain the appellant's appeal against the substantive order of 4th May 1976 in the same matter?

In our opinion the questions raised are of general importance. We accordingly grant the applicant special

leave to appeal against the Order of the Court of Appeal dated 12th July, 1977 in respect of the four questions law raised.

[Sgd.]

E. Livesey Luke

Acting Chief Justice

[Sgd.]

C. A. Harding

Justice of the Supreme Court

[Sgd.]

Agnes Awunor-Renner

Justice of the Supreme Court

STATUTE REFERRED TO

1. The Courts Act, No. 31 of 1965

WINIFRED E. HARRIS v. ROXY J. HARRIS

[S.C. APP. NO. 1 OF 78] [p.128-135]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 16TH FEBRUARY 1979

CORAM: MR. JUSTICE E. LIVESEY LUKE, Ag. CHIEF JUSTICE.

MR. JUSTICE C.A. HARDING, J. S. C

MR. JUSTICE O.E.R. TEJAN, J. S. C.

MRS. JUSTICE A.V.A AWUNOR-RENNER, J. S. C.

MR. JUSTICE S. SUCCESS-DAVIES, J. A.

BETWEEN: —

WINIFRED E. HARRIS - APPELLANT

AND

MARY J. HARRIS - RESPONDENT

Mr. T. S. Johnson for Appellant

Mr. M.R.O. Garber and with him Mr. S. Hudson-Harding and

Mr. B.A.C. Johnson for Respondent.

JUDGMENT DELIVERED

Tejan, J. S. C.

The events leading to this appeal can be briefly summarized as follows:- On the 24th day of March, 1976 the Respondent filed a petition against the petitioner for dissolation of marriage. A conditional appearance was made to set aside the petition for some violation of the Matrimonial Causes Rules on the 4th day of May, 1976. This application was dismissed by Williams J. The appellant, on the 5th day of May, 1976, on an ex parte application by summons applied for leave to appeal against the dismissal of his application. Leave was granted and on the same day, the appellant filed the order granting leave and also filed a notice of appeal in the Registry of the Court of Appeal. Shortly after the filing of the notice of appeal, the Respondent applied to the same Judge to set [p.129] aside his order of 5th May, 1976. The Judge having heard counsel for the Respondent in the absence of Counsel for Appellant, by Order dated

11th May, 1976, set aside the Order of 5th May, 1976. The Appellant becoming aware of Order of 11th May, 1976 applied to the Court of Appeal for an extension of time within which to appeal. The application was granted by the Court of Appeal on the 22nd June 1976 and the Court ordered that all proceedings be delayed until the Appeal against the Order of 4th May, 1976 be heard and determined. On the 18th March, 1977, and appeal against the Order of 11th May, 1976, was heard and determined by a differently constituted panel of the Court of Appeal. The Court allowed the appeal and made the Order in these terms:

"We order that the order made herein on the 11th day of May, 1976 setting aside the order herein made on 5th May, 1976, granting leave to appeal be set aside."

In passing, I think it is necessary to comment on this order of the Court of Appeal since there had been no application challenging the correctness or otherwise of that order. I would have thought that the urge to challenge the order was irrestible. However, since there had been nor application to challenge that order, it follows that the order of 5th May be restored and is therefore subsisting.

On the 25th March, 1977, the appeal against the order of 4th May, 1976 came before the Court of Appeal, and the Respondent raised a preliminary objection, notice thereof dated 16th March, 1977 having been given and filed. On the 6th day of July, 1977, the Court of Appeal delivered its ruling and the relevant portion reads:—

"I do not agree with Mr. Johnson that the words in section 56(1) (b) of the Courts Act by leave of judge making the order shall [p.130] be taken to mean that an applicant should go by summons and not by motion. An applicant can go by motion or summons depending on the rule applicable and the procedure laid down. Even if it was proper to go before the judge who made the order by summons, justice would demand that he should not do so ex parte unless the Judge for good cause so directs. The other side ought to be heard. Rule 10(1) specifically states the procedure to be followed when an applicant applies for leave to appeal to this Court and this rule in my opinion must be strictly followed. The Rule making Committee in my view in their wisdom made this rule there being no other rule laying down the procedure to be followed when an applicant asks leave to appeal to this Court against an interlocutory order. I do not agree with Mr. Johnson that the order was properly obtained to entitle us to assume jurisdiction, notwithstanding the order has not been set aside or appealed against the respondent. I would hold that we cannot entertain the appeal, that is to say assume jurisdiction and hear the appeal and would dismiss the appeal."

It is against that ruling the appellant has appealed to this court. There are four grounds of appeal but I do not consider it necessary to set them out. The following is a summary of the submissions which the appellant made in support of his appeal:—

(a) Whether jurisdictional power is conferred on the Judge who made the order of 5th May, 1976 giving leave to appeal;

(b) Whether an application for leave to appeal can properly be made by summons;

(c) If the application cannot properly be made by summons, what is the effect of an order obtained by an application by summons.

[p.131]

Mr. Johnson submitted that once a judge has made an order granting leave to appeal, that order stands whether or not the application was made by summons or motion. Mr. Garber on the other hand submitted that a Judge can only properly exercise his discretion to grant leave to appeal if the application is made under Rule 10 (l) of the Court of Appeal Rules, and that if the application was made otherwise than by motion, the discretion is not properly exercised judicially and the order is invalid. Section (l) of section 40 of the Courts Act has been repealed and replaced by section 2 of the Courts Amendment Act, No. 2 of 1972. This section enacts that "Subsection (l) of section 40 of the Principal Act is hereby repealed and replaced by the following new subsection—

(1) Subject to the provisions of this Part, the Rules of Court Committee established by section 22 may make rules of Court regulating the practice and procedure of the Court in the exercise of its jurisdiction, and, in connection with appeals brought to the Court, the practice and procedure of any Court from which appeals are brought.

Section 56 (1) provides that "subject to the provisions of this section, an appeal shall lie to the Court of appeal

(a) …….

(b) by leave of the Judge making the order or of the Court of Appeal from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid.

Provided that no appeal shall lie, except by leave of the Court or Judge making the order or of the Court of Appeal.

(i) from an order- made ex parte, or

(ii) from an order as to costs only, or

(iii) from an order made by the consent of the parties.

[p.132]

It is not necessary to set out the composition of the Rules of Court Committee established by section 22 of the Courts Amendment Act No. 2 of 1972. Suffice it to say that the Committee was empowered by section 2 of Act No.2 of 1972 to make rules affecting the practice and procedure of the High Court, Court of Appeal and the Supreme Court.

I now come to the submissions made by Mr. Johnson and Mr. Garber set out earlier in this judgment. The important question is 'Did the Judge have jurisdiction to grant leave to appeal? According to section 56 of the Courts Act, the Judge clearly had jurisdiction to grant leave to appeal. Admittedly the

procedure adopted to seek leave to appeal was irregular, but in my opinion that did not affect the jurisdiction conferred on the Judge by section 56 of the Courts Act. The next question, is "was, the order obtained on the application by summons a nullity ? In my judgment, the order would only he a nullity if the Judge had no jurisdiction to make it.

It was submitted by the appellant that the expression "by leave of the Judge making the order" in Section 56(1)(b) requires that the application must be made by summons. He further submitted that rule 10 (1) of the Court of Appeal is silent as to the procedure to be adopted when an application for "leave of the Judge" is required and that therefore rule 10(1) is applicable. It was conceded by both Counsel that the Court of Appeal Rules were made in pursuance of the Courts Act (As amended by Act No. 2 of 1972), and one of the objects of the rules was to regulate the practice and procedure to be followed by the Court in the exercise of its jurisdiction. Section 56 is what confers jurisdiction and Rule 10(1) is the provision laying down the practice and procedure in all cases where leave is required under section 56 of the Courts [p.133] Act, and that is, by notice of motion. The expression "leave by the Judge making the order" simply means that the application is to heard by the Judge who made the order.

Having regard to sections 1 and 2 of the Courts (Amendment) Act, 1972, and rule 10(l) I am at a loss to appreciate how the Court of Appeal arrived at the decision that "leave by the Judge making the order" can be either by summons or motion depending on the particular case. In every case, application for leave to appeal must be made by notice of motion. So quite clearly, the application made was irregular on which the order of 5th May, 1976 was obtained

What is required to be determined is whether the order of 5th May, 1970 was a nullity or a mere irregularity. The solution of this issue demands upon whether the order was void or voidable. The question now arises whether the Judge had the jurisdiction to make the order. I have stated out earlier that the procedure applied by the appellant to seek leave to appeal was irregular, but the irregularity did not affect the jurisdiction conferred on the Judge by section 56 of the Courts Act.

Lord Denning delivering the judgment in the case of Macfoy v. U.A.C. Ltd. (1962) A.C. l52 at 159 dealt with non compliance of the Rules of Court. In this particular he was dealing with order 50 Rule 1 to 4 of the Rules of the High Court of Sierra Leone. His Lordship said: This rule would appear at first sight to give the Court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, and not to proceedings which are nullity: for those are automatically void and a person affected by them can apply to have them set aside ex debito justified in the inherent jurisdiction of the Court without going under the rule: See Anlaby v. Practorious (1858) 200 B.D. 746; 4 P.L.R. 439 C.A.

[p.134]

The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullit [CIS] and not a mere irregularity. This is the same, as saying that it was void and not merely voidable. The distinction, between the two has been repeatedly drawn. If an act is void then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to

set it aside. It is automatically 'null and void without more ado, though it is sometimes convenient to have the Court to declare it to be so. And very proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has discretion whether to set it aside or not. It would do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

No Court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after

knowledge of it, could he afterwards, in justice, complain of the flaw? Suppose for instance, in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? could he afterwords [CIS]have applied to dismiss the action for want of prosecution? [p.135] asserting that no statement of claim had been delivered? clearly not. That shows that the delivering of the statement of claim in long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In this case, the statement of claim not being avoided, it took effect, at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiff signed judgment in default of defence that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the Court whether it should be set aside or not".

On the basis of the principles which I have just stated, I am of the view that the application made by summons instead of by a notice of motion rendered the order of 5th May 1976 voidable. The order was a mere irregularity and cannot in my opinion be said to be a nullity. Therefore the order was subsisting when it came before the Court of Appeal on 25th March 1977 and the/of Appeal was bound to take cognisance of it.

As set out earlier, the respondent sought to challenge the validity of the order by way of preliminary objection. But I am of the view that since it is a subsisting order, the only way it could have been challenged is by way of cross-appeal. If an appeal is incompetent, the respondent should cross-appeal, and not wait till the hearing, to object to its competency.

In this judgment, the Court of Appeal was clearly wrong in entertaining the preliminary objection and in refusing to assume jurisdiction to hear the appeal. The appeal is still pending and the appellant is entitled to have his appeal heard and determined by the Court of Appeal.

For these reasons I would allow the appeal and order that the appeal be remitted to the Court of Appeal for hearing.

CASE REFERRED TO

1. Macfoy v. U.A.C. Ltd. (1962) A.C. l52 at 159

STATUTE REFERRED TO

1. Amendment Act, No. 2 of 1972

1980

JUSTICES OF THE SUPREME COURT

Hon. Mr. Justice E. Livesey Luke	Chief Justice
Hon. Mr. Justice C. A. Harding	Justice of the Supreme Court-
Hon. Mr. Justice O. B. R. Tejan	Justice of the Supreme Court
Hon. Mrs. Justice A. V .A. Awunor-Renner	Justice of the Supreme Court
Hon. Mr. Justice S. Beccles Davies	Justice of the Supreme Court

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IDRISSA CONTEH VS. ABDUL J. KAMARA

JESSIE R.H. GITTENS-STRONG VS. SIERRA-LEONE BREWERY LTD.

THE STATE VS. I.M. ISCANDARI

THE STATE VS. I.M. ISCANDARI

ALPHABETICAL LISTING

ALHAJI FODAY SAWANEH v. ALHAJI MURRAY BAYOH

[SC. CIV. APP.6/79] [p.50-59]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3 JULY 1980

CORAM: MR. JUSTICE B. B. DAVIES

MR. JUSTICE E. LIVESEY LUKE

MR. JUSTICE O. A. HARDING

MR. JUSTICE O. B. R. TEJAN

MR. JUSTICE A. AWUNOR-RENNER

BETWEEN:

ALHAJI FODAY SAWANEH — APPELLANT

AND

ALHAJI MURRAY BAYOH — RESPONDENT

Mr. Ade Renner-Thomas for Appellant

Mr. T.S Johnson for Respondent

RULING

TEJAN J.S.C.

By an agreement dated 6th day of February 1974 the respondent agreed to sell premises situate and lying at 33A Kainkordu Road, Koidu Town in the Kono District of the Eastern Province of the Republic of Sierra Leone for the sum of Le8,200,00 to the appellant of No.14 Section 11 Koidu Town in the Kono District in the Eastern Province at Sierra Leone. The agreement stipulated that the respondent was to remain possession of the said premises for a period of six months without payment of rent and that the said period was to end on the 31st day [p.51] of July, 1974. It was witnessed by several witnesses who thumb-printed it. The appellant then paid the agreed sum of Le8, 200.00 to the respondent.

After the 31st day of July 1974, the respondent neither gave up possession nor conveyed the premises to the appellant who then instituted proceedings against him by the issue of a Writ of Summons dated 18th day of April, 1975, claiming a decree of specific performance of the contract of sale, vacant possession of the premises and mesne profits from the 1st day of August 1974 to the date of giving vacant possession.

The respondent admitted in receiving the sum of Le8,200.00 but asserted that the sum of Le8,200.00 was received by him by way of a pledge or mortgage on the house which was a family property. The Respondent, however, agreed to pay into Court the full amount of Le8, 200.00.

On the 22nd day of January, 1976, the case came before Thompson-Davies J. for trial, and who after having heard the evidence and arguments on both sides, delivered on the 13th day of July, 1977, judgment in the following terms:—

"For all these reasons I find myself unable to grant the relief sought by the plaintiff. The plaintiff is entitled to have his money since to my mind exhibit "A" seems spurious and incomplete.

I cannot find my way clear to award [p.52] any damages. While refusing the plaintiff's request for specific performance I would order that the defendant do refund the sum of Le8, 200.00 to the plaintiff and that he pay the costs of this action. Such costs to be taxed."

In support of his conclusion, he relied on the passage in Halsbury Laws of England 3rd Edition.

Vol. 36 paragraph 359 at page 263 which reads thus:—

The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. The remedy is special and extraordinary in its character and the Court has a discretion to grant it, or to leave the parties to their rights at law. The discretion is however not an arbitrary or capricious discretion; it is a discretion to be exercised on fixed principles in accordance with the previous authorities. The Judge must exercise his discretion in a judicial manner. If the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as a matter of course, even though the Judge may think it involves hardship."

[p.53]

The Trial Judge referred to paragraph 389:

"Where it is sought to enforce specific performance of a contract, the Court must be satisfied.

(1) That there is a concluded contract in fact;

(2) that the contract so concluded is not incomplete by reason that the parties have failed to agree expressly or by implication on some essential matter, or by reason that it fails to comply with statutory requirements relating to contract;

(3) that the contract is precise and certain or in other wares, that although all essential matters may have been dealt with, there is not such uncertainty and vagueness that exact performance cannot be ordered."

In the course of his judgment, the Learned Trial Judge said:

"Now the contract relied on by the plaintiff is contained in Exhibit "A" which without doubt speaks against the Illiterates Protection Act Cap. 104 Laws of Sierra Leone: that being so it is not sufficient to transfer any interest in land. Taking a closer look at the said document it seems to me that it was never

signed by the defendant, that is the party to be charged, or his agent; [p.54] this is in clear breach of the statutory requirements — Section 4 of the Statute of Frauds 1677. It is true that the name of the Defendant is type-written on the document but on the thumb-print against which his name is typed is the name Alhaji Mohamed Saccoh (R.T.P.).

This makes it doubtful as to whose thumb-print is affixed to it. Since the said exhibit "A" fails to comply with these statutory requirements I would submit that 'the alleged contract is incomplete".

It is against the judgment that the appellant appealed to the Court of Appeal on the following grounds:—

(1) That the Learned Trial Judge erred in holding that a breach of the Illiterates Protection Act, Cap. 104 of the Laws of' Sierra Leone bars the transfer of any interest in hand.

(2) That the Learned Trial Judge was wrong in law in refusing to award damages to the plaintiff' in substitution for specific performance.

(3) That the judgment is against the weight of the evidence.

On the 6th day of July, 1979, the judgment of the Court of Appeal was delivered by Navo J.A. The Court of Appeal, after having agreed with Counsel's contention in ground 1, then proceeded to consider ground 2.

[p.55]

It seems to me that the wording of ground 2 is quite clear, and that no other meaning could be attached

to it then that there is a clear appeal against the refusal of the Trial Judge to award damages.

But the Court of Appeal, instead of dealing with ground 2 as stated in the grounds of appeal went exhaustively into the law relating to specific performance and then made the following orders:—

(i) In the absence of evidence of the value of the property at the date of the judgment, we order the respondent to pay to the appellant his deposit of Le8,200.00 plus 5% interest per annum thereon from 1st August 1974 to date.

(ii) We order the respondent to pay to the appellant the sum of Le4,000.00 damages for loss of his bargain.

(iii) That the amount on this judgment be met within two months from today’s date, in default of payment, we order specific performance of the contract entered into on the 6th day of February 1974 that the respondent do deliver vacant possession and convey to the appellant the property referred to and known as 33A Kainkordu Road, Koidu in the Eastern Province of the Republic of Sierra Leone.

(iv) We award the appellant the costs of this action in this Court and in the Court below, such costs to be taxed.

[p.56]

When the appeal came before this Court, Mr. Johnson raised a preliminary objection that the appellant should not be allowed to argue paragraph 5 of the notice of appeal. This paragraph which falls under the reliefs sought reads:

"(i) That the judgment of the Court of Appeal to the extent that it awarded damages instead of specific performance be set aside and reversed.

(ii) That judgment be entered for the appellant for (a) Specific Performance, (b) Possession (c) Mesne Profits.

Counsel's contention is that Mr. Renner-Thomas, Counsel for the appellant cannot base any argument on the reliefs sought since there has been no appeal before the Court of Appeal against the refusal of the Learned Trial Judge to grant a decree of specific performance, and that the appeal before the Court of Appeal was against the refusal of the Trial Judge to award damages. In effect, the appellant's Counsel would be introducing new matter which was never argued before the Court, of Appeal. This Court upheld Counsel's contention and decided to give a ruling later.

There is a long line of well-established authorities which support the contention of Respondent's Counsel. See: — North Staffordshire Railway Company v. Edge (1920). App. Cas. 254; Thom v. Bigland 8 Ex. 725; Connecticut Fire Insurance Co. v. Kavenegh (1892) A.C. 473. The Tasmania, (1890) 15 App. Cas. 223 and 225.

[p.57]

However, Rule 9 (6) of the Court of Appeal Rules clearly states that "notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

"Provided that the Court shall not rest its decision on any ground not set forth by the appellant unless the parties have had sufficient opportunity of contesting the case on that ground."

There is nothing on the record to how that the parties argued before the Court of Appeal on the issue of specific performance. However, Mr. Renner-Thomas in reply, conceded that he could find no material to enable him to invoke Rule 9(6) of the Court of Appeal Rules. Indeed, if the Court of Appeal decided to deal with the issue of specific performance, the Court could have invited both Counsel to address it on the issue, but according to the record this was not done. But the Court of Appeal, contrary to well-established principles and in particular to Rule 9(6) of the Court of Appeal Rules went on to deal exhaustively with the issue of specific performance, and making references to irrelevant authorities which I think would be futile to mention.

This Court in the case of Idrissa Conteh v. Abdul J. Kamara S/C Civ. App. No. 2/79 dealt with a

similar matter, and Livesey Luke C.J. in his judgment said:—

"In my opinion, in the circumstances just related, the Court of Appeal should have adverted its mind to Rule 9(6) [p.58] of the Court of Appeal Rules 1973 and invited argument on special damages".

This Court therefore upholds the submission of the Respondent's Counsel.

Having disposed of the issue of specific performance, there are two matters which I think I have to consider particularly with regard to the orders made by the Court of Appeal.

The first is whether the Court of Appeal was right, having come to the conclusion that an award of damages would meet the ends of justice, to limit the time within which the amount awarded should be paid. I have made exhaustive researches in this aspect but I have not been able to find any authority to support the order made by the Court of Appeal. Even in the absence of authority but from my own experience there are remedies provided by law to enable a successful litigant to recover an award of damages. Some of these are by way of the issue of judgment debtor summons and writ of fieri facias. In my opinion therefore this order of Court of Appeal was untenable.

The next point is whether the Court of Appeal was right in awarding damages and then in default specific performance. Mr. Renner-Thomas attacked this order on the ground that it was wrong for the Court of Appeal to do so.

Specific performance is an equitable remedy, given by the Court to enforce against a defendant the duty of doing what he has agreed by contract to do.

Damages in breach of contract is a common law remedy, and it is my view that when the law states damages [p.59] may be awarded in lieu of specific performance, it does not mean that the remedies may be awarded in thee alternative. I uphold Mr. Renner-Thomas' argument on this point that the Court of Appeal was wrong to award damages, in default of payment thereof the alternative of specific performance.

Learned Counsel for the appellant submitted that in view of the erroneous order, particularly, order (111) by Court of Appeal the appeal should be allowed and on order for specific performance made because he contented that the Court of Appeal must have come to the conclusion that this was suitable case for an order for specific performance. In my opinion, that cannot be so. Because the Court of Appeal in their judgment clearly came to the conclusion that this was a proper case where an award of damages rather than an order of specific performance would meet the end of Justice. Therefore in my opinion, any reference made by Court of Appeal in its order to specific performance was mere surplusage. This Court has ample power to amend orders of Lower Courts, and by virtue of those powers I propose that we amend the orders of the Court of Appeal by deleting order (111).

Subject to this, I would dismiss the appeal.

SGD.

O.B.R. TEJAN, J.S.C.

I agree

SGD.

E. LIVESEY LUKE, J.S.C.

I agree

SGD.

C.A. HARDING, J.S.C

I agree

SGD.

A.V.A AWUNOR-RENNER, J.S.C.

I agree

SGD.

S.B. DAVIES, J.S.C.

CASES REFERRED TO

1. North Staffordshire Railway Company v. Edge (1920). App. Cas. 254

2. Thom v. Bigland 8 Ex. 725

3. Connecticut Fire Insurance Co. v. Kavenegh (1892) A.C. 473.

4. The Tasmania, (1890) 15 App. Cas. 223 and 225.

5. Idrissa Conteh v. Abdul J. Kamara S/C Civ. App. No. 2/79(Unreported)

STATUTES REFERRED TO

1. Court of Appeal Rules 1973

BATA SHOE CO LTD. v. ANTHONY J. NAVO

[CIV. APP.4/79] [p.36-49]

DIVISION: THE SUPREME COURT FOR SIERRA LEONE

DATE: 3RD DAY OF JULY 1980

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.

MR. JUSTICE C.A. HARDING, J.S.C.

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MRS. JUSTICE A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. B. DAVIES, J.S.C.

BETWEEN:

BATA SHOE CO LTD — APPELLANT

AND

ANTHONY J. NAVO — RESPONDENT

J.H. Smythe Esq. Q.C. (with Manly-Spaine) for Appellant

J. T. Massaquoi Esq. for Respondent.

DAVIES J.S.C.

The plaintiff Mr. Anthony Jacob Navo entered the employment of Messrs Bata Shoe Co, the defendants on 14th August 1961. He started off as a salesman. He entered into a fresh written agreement of service with the defendants after every completed year of service. He continued in the defendants employment until his services were terminated on 30th April 1976.

The plaintiff was dissatisfied with the termination of his services by the defendants. He sued them claiming (a) damages for wrongful dismissal, (b) damages for wrongful deprivation of the benefit of earning commission and (e) damages for wrongful reduction of [p.37] salary. The defendants resisted his claim.

The action was tried by Williams, J. who apart from awarding the plaintiff his earned commission from! the week 36/75 (which would be about the second week in September 1975) to 30th April 1976, virtually dismissed the claim.

The plaintiff then appealed to the Court of Appeal. His complaints were that Williams J had refused to award (a) damages for wrongful reduction of salary (b) damages for wrongful dismissal and (c) general damages.

The Court of Appeal heard the appeal and allowed it. Cole J.A. delivering the unanimous judgment of the Court summed it up in these words:—

"In the main I have come to find that the termination of the Appellant was wrongful, the cancellation of his earned commission and the reduction of his salary were also wrongful.

The total amount of damages the Appellant is entitled to having regard to settled authorities are as follows. The difference between one month's salary which the Appellant should have received.

Loss of earned commission from weeks 25–36, 37, 38, 39/75 and on to 30th April 1976.

Loss of salary at the rate of Le14.00 per week as from week 51/75 on to the 30th April 1976 ....."

[p.38]

It is that judgment which has given rise to the present appeal.

The arguments before this Court fall under three topics.

Firstly, were the plaintiff’s services wrongfully terminated'? As I had said earlier in this judgment, the plaintiff and defendants entered into a fresh contract in writing at the expiration of every completed year of the former's services. The agreement at the date of termination of the plaintiff's services contained a clause relating to its termination. It is contained in Clause 9. It stipulates—

"Either party may terminate this agreement at any time and without cause by giving not less than one month prior notice in writing of such termination, and if such notice be given, this agreement shall terminate on the date specified in the notice. During the period after the giving of any such notice and before the effective date of the termination, the Company may at its election discontinue the pay until the effective date of termination." (Emphasis mine)

According to the terms of clause 9 therefore, the plaintiff or the defendants had the right to terminate the agreement between them "at any time and without cause" for such termination. This brings me to an examination of the defendants' letter to the plaintiff terminating the latter's services under the agreement It reads—

[p.39]

"30th April 1976

Mr. A. J. Navo

C/o Sales Department

Bata Shoe Company (S.L.) Ltd Freetown.

Dear Mr Navo.

We write to inform you that Management has decided to terminate your appointment with the Company as from Saturday 1st May 1976. You will be settled as follows in respect of final Claims on the Company:—

(a) 1 Month Salary in lieu in Notice

(b) Any wages due you

(c) Leave entitlement plus allowance

(d) Balance on Personal Account as at Week 18/76

(e) Interest on Personal Account as at Week 18/76

(f) Provident Fund Contributions

(g) Less Income Tax

Settlement of this amount will be in accordance with Clause 21(c) Page 8 of the Supervisory Conditions of Employment by which you are bound. You are requested to report to the Assistant Accountant on Friday 7th May 1976 at 10 a.m. to collect all benefits due you.

We thank you for your past services and should you request a testimonial we shall be too pleased to give you one.

The Management takes the opportunity of [p.40] wishing you the very best in the future.

Yours faithfully,

BATA SHOE COMPANY (S.L.) LTD.

(U. N. S. JAH)

PERSONNEL OFFICER."

The defendants letter stipulated no cause for the termination of the plaintiff's services under the agreement. The plaintiff claimed that he had been wrongfully dismissed (that is to say that he had been dismissed without just cause or excuse) in consequence of that letter. Paragraph 7 of the plaintiff's statement of claim contained the allegation of wrongful dismissal. It reads—

"7. The defendants on the 30th April, 1976, gave the plaintiff one month's salary in lieu of notice, to quit his employment, and wrongfully dismissed the plaintiff without reasonable and/or proper notice and/or cause."

The defendants refused to be drawn into any contention as to whether there was reasonable and/or proper cause necessitating their termination of the plaintiff's services without cause, under the agreement. The defence stated inter alia —

"6. The defendants deny that they wrongfully dismissed the plaintiff.

"7. The defendants will contend that the plaintiff's appointment with them was terminated by letter dated 30th April 1976 according to Clause 9 of [p.41] the Agreement of employment between the

plaintiff and the defendants. The issue when the matter went to trial was whether the plaintiff's services had been wrongfully terminated having regard to Clause 9 of the agreement between the parties.

At the hearing Counsel for the plaintiff tendered in evidence certain correspondence between the parties relative to the plaintiff's discharge of his duties. The last of such correspondence was dated 16th December 1975. It became clear during the closing speech of the plaintiff's Counsel that one of the purpose for which the correspondence was put in evidence, was to suggest to the Court that the defendants reason for terminating the plaintiff's services was heir claim that his services were satisfactory Counsel said—

"I submit that up to the time of his dismissal the plaintiff's services were never unsatisfactory. It is for the defendants to prove that his services were unsatisfactory."

That argument did not find favour with Williams J.

The same argument was apparently put before the Court of Appeal. In dealing with the point Cole J.A. said—

"Let me hasten to state that in the instant case the respondent did not give any reason for terminating the appellant's services. This is in keeping with Clause 9 of the agreement."

[p.42]

The learned Justice was quick to add the following statement—

"However it is my view that Exhibit 'M' dated 30th April 1976 is by implication the culminating effect of Exhibits 'C', D', 'E,'F' 'J' and etc."

There was no justification for the learned Justice's attempt in furnishing a cause for the termination of the plaintiff's' services.

The defendants in my view had acted within the provision of Clause 9 of the agreement relative to termination without cause.

Secondly, 'was the notice terminating the plaintiff's services adequate in this particular ease'?

The defendants had given the plaintiff a month's salary in lieu of notice. Clause 9 of the agreement dealt with notice of termination. It enjoined whichever party wishing to terminate the agreement to give to the other "not less than one month prior notice in writing".

Counsel for the plaintiff contended that the duration of the notice to be given was uncertain. It had a minimum period and that the maximum period was uncertain. He argued that it could be anything over a month depending on what was reasonable in the circumstances. The trial judge came to the conclusion that a month's notice was adequate and reasonable. Counsel for the plaintiff repeated his argument in the High. Court before the Court of Appeal. The Court of Appeal accepted Counsel's

submission and held that reasonable notice in the circumstances should be six months. The issue on this point turns on the construction of the phrase 'not less than one month'.

[p.43]

The phrase 'not less than' in the computation of time has been the subject of judicial construction.

See Chambers v Smith (1843) 12 M & W 2, In Re Railway sleepers Supply Co (1885) 29 Gh D. 204. In R. v. Turner 1910 1 K.B. 346 at 359 in construing the phrase Channell J. said—

"Section 10(4)(b) of the Prevention of Crime Act 1908 provides that not less than seven days notice must be given to the proper officer of the Court and to the offender. The question whether the words 'not less than seven days' mean clear days is a troublesome one to answer as there have been decisions upon similar words which are not exactly in accord. Those decisions depend upon particular statutes and may therefore all be right and yet bring about apparently conflicting results. We have come to the conclusion that; the decision most nearly' in point is that in Chambers v." Smith, referred to by Chitty J. in In Re Railway Sleepers Supply Co. where he reviewed the authorities. In Chambers v. Smith the words were 'not' being less than fifteen days, and the court in the first instance held that what I may call the ordinary rule applied, namely, that where a certain number of days are specified they are to be reckoned exclusive of one of the days and, inclusive of the other unless clear days are expressed. But [p.44] although that is the rule, the difficulty is to ascertain whether clear days are expressed by the language of the particular statute. In Chambers v. Smith the court after having in the first instance thought that the words 'not less than fifteen days" were to be construed according to what I have called the ordinary rule namely inclusive of one of the days and exclusive of the other, on re-consideration came to the conclusion that they were to be construed as meaning fifteen clear days. The words upon which that decision was based are the nearest to be found in the authorities to those which we have to construe in the present case, and we therefore come to the conclusion that the provision that 'not less than seven days' notice has to be given means 'seven/clear days' notice and we so answer the question."

'Not less than' so many days or weeks means 'clear' days or weeks, as the authorities indicate since Chambers v. Smith. That construction of the phrase in the statutes is equally recognised in the construction of deeds and other writings. See NORTON ON DEEDS 2nd Edition at page 185. A period of 'not less than' a month's notice accordingly means a period of one month excluding the day from which it ran and the day on which the notice expired. Where the parties to a document use terms which have an established meaning in law, they will usually be taken to have used them in that established meaning.

[p.45]

The proper length of terminating the agreement under review is one clear lunar month's notice, because at common law 'a month' means a lunar month. In my opinion there was no uncertainty as/to the duration of notice to be given. The matter was put beyond argument when the defendants on 30th April gave the plaintiff a [sic]/calendar months salary in lieu of such notice. Indeed the plaintiff admitted this in paragraph 7 of his defence. In my judgment the plaintiff' was only entitled to alunar month’s notice

and not six months as found by the Court of Appeal. The defendants therefore acted within the provision of clause 9 of the agreement relative to the length of notice for its termination.

Thirdly, 'was there a breach of the rules of natural justice'? It was during the course of Counsel for the plaintiff's closing speech in the High Court that the issue of the breach of the rules of natural just1ce was first raised. It emerged from the evidence that the plaintiff's commission had been cancelled on two occasions during September 1975 and that he had been reduced in rank from being in overall supervision of the Reserve and General Goods Stores to Storekeeper with a corresponding change in salary and Counsel's submission was that he had not afforded an opportunity of stating his case before the decision was taken to cancel his commission and to reduce his rank and salary.

The defendants' reason being the plaintiff's unsatisfactory performance of his duties. The High Court held that the rules of natural justice had not been breached. The learned trial judge however [p.46] approached the matter on the basis that the plaintiff's services had been terminated without having had an opportunity of proffering an explanation in that behalf. That with respect was not Counsel's ease. Counsel's submission related to the matters I have stated earlier. The Court of Appeal on the other hand put the submission in its proper perspective and proceeded to hold that the rules of natural justice had been breached. Now Clause 13(b) of the agreement between the parties provides—

"The employee covenants and agrees that in case of unsatisfactory performance of his duties the company reserves the right after due warning to transfer him from one schedule of duties to another with corresponding change in salary structure."

The plaintiff was transferred from one schedule of duties to another in consequence of which there was a reduction in his income. The defendants had addressed two letters to the plaintiff warning him of the consequences of his failure to improve the performance of his duties in their establishment. These letters were tendered in evidence by the plaintiff himself. Considerable light was thrown on this issue by yet another letter tendered in evidence by the plaintiff. It was a letter dated 24th December 1975 addressed by the Managing Director to the plaintiff. The relevant portions of that letter state—

"Dear Mr. Navo

I have received your letter dated 17th December 1975 listing down points for [p.47] my attention and an appeal for a review of our letter dated 16th December 1975 regarding change of status with corresponding income ……."

Before I proceeded on Annual leave on 25th August 1975, I had personally counselled you several times regarding your apparent lack of control and supervision of the Retail Store.

During the visit of Mr. Kucera an inspection of your store was conducted and he caught a member of your staff sleeping. This was much of an embarrassment. Also in the fact that 12 empty cases were missing from the store and that investigation could not hold any one responsible. You will agree with me that these cases could not have just vanished in the air.

It is also understood. Management offered you personal advices for your improvement and you took them in a different spirit until the situation became worse and uncontrollable. As a result of which Management decided to reorganise the Retail Store and split it into 3 stores each with a storekeeper ……." (Emphasis mine)

The above letter was a reply to that addressed by the plaintiff to the managing Director. He concluded that letter by referring to the Managing [p.48] Director in these words.

"You being the pillar holding the administrative influence of this establishment and well known for fair play and justice, I am therefore humbly submitting this of mine for favourable consideration ……"

Most of the reported cases deal with wrongful dismissal arising out of a failure on the part of the employer to observe the rules of natural justice. It is unnecessary to deal with those cases here. I am concerned with a servant whose income and status were reduced and who continued in the service of that employer after such reduction in status and income. I propose to approach the issue on the broad principle that since some proprietary interest was involved, then the rules of natural justice had to be observed. Were they observed in this case? I think they were. The Court of Appeal said that there should have been written charges. The strict rules of procedure and evidence in a Court of law do not necessarily have to be observed in a case such as this. The Managing Director had spoken to the plaintiff 'several times' regarding the unsatisfactory manner in which the latter discharged his duties. The Management had also proffered advice as to how he could improve the performance of his duties. He was not amenable to advice. Warning letters were addressed to him. The letter intimated that serious consequences would arise if he failed to improve his performance. He offered no explanation.

[p.49]

I suppose the reason for this is his description of himself in his letter for a review of his education in status. He described himself in his petition for a review of his reduction in status as "a man of very slow nature to complain. Not until the worse comes to the worst, as this is now the case, do i put up my case ……." In my judgment the rules of natural justices were not breached in this case.

I would allow the appeal, set aside the judgment of the Court of Appeal, and restore the judgment of Williams J.

SGD.

S.B. DAVIES, J.S.C.

SGD.

E. LIVESEY LUKE, J.S.C.

I agree

SGD.

C.A. HARDING, J.S.C.

I agree

SGD.

O.B.R. TEJAN, J.S.C.

I agree

SGD.

A.V.A AWUNOR-RENNER, J.S.C.

CASES REFERRED TO

1. Chambers v Smith (1843) 12 M & W 2,

2. In Re Railway sleepers Supply Co (1885) 29 Gh D. 204.

3. In R. v. Turner 1910 1 K.B. 346 at 359

GBASSAY KAMARA v. SALLY WALLACE

[SC. CIVIL APPEAL NO. 2 OF 1978] [p.15-27]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 18TH FEBRUARY, 1980

CORAM: JUSTICE E. LIVESEY LUKE, C. J.

JUSTICE C. A. HARDING, J.S .C.

JUSTICE O.B.R. TEJAN, J.S.C.

JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

JUSTICE K.E.O. DURING, J.A.

BETWEEN:

GBASSAY KAMARA - APPELLANT

vs.

SALLY WALLACE - RESPONDENT

HARDING J.S .C.

This appeal came up for hearing as a result of a special leave having been granted by this Court to the appellant on 3rd May, 1978. The events leading up to it are as follows:—

On 12th April, 1976, Sally Wallace (hereinafter referred to as the Respondent) took out a Writ of Summons against Gbaasay Kamara (the appellant herein) claiming

(i) a declaration that she is entitled in fee simple absolute in possession of a certain piece or parcel of land situate at Matilda Taylor Farm via Newton [p.16] described on Survey Plan L.S. 1369/73 enclosing an area of some 16.8941 acres;

(ii) Possession of the said land;

(iii) damages for trespass;

(iv) mesne profits from 1965 up to the date of delivery of possession;

(v) an injunction to restrain the appellant, his servants or agent from entering or remaining or continuing in occupation of the said land.

On 1st May, 1976, Conditional Appearance was entered on behalf of the appellant without prejudice to an application being made within 10 days to set aside the service of the Writ; no such application was ever made and 80 the Appearance became Unconditional. On 4th May, 1976, the respondent's Solicitor delivered and filed a Statement of Claim, to which the appellant's Solicitor delivered and filed a Defence and Counterclaim on 1 at June, 1976. A Reply and Defence to Counter-claim was delivered and filed on 8th June, 1976.

On 17th June, 1976, the respondent's Solicitor gave notice of trial in the following manner:

"Take Notice that the above action has this day been entered for Trial. And that the same will be heard at the Court Hall, Law Courts Building Siaka Stevens Street, [p.17] Freetown on Tuesday the 29th day of June, 1976 at 9 O'clock in the forenoon.

The trial is likely to last for 2 days. Dated the 17th day of June, 1976,"

On the same date the matter was entered for trial as follows:—

"Enter this action for trial Dated 17th day of June, 1976."

The matter came up for hearing on 2nd July, 1976 whereupon counsel for the appellant objected to the matter being heard on the ground that 10 days notice of trial had not been given as provided for by Rules of Court.

Navo J. (as he then was) before whom the objection was taken, overruled it on 8th July, 1976, holding that the entry for trial was proper and that the matter should proceed.

On 21st July, 1976 Counsel for the appellant applied by notice of motion for leave to appeal to the Court of Appeal against the ruling of 8th July.

In paragraph 4 of the Affidavit in support of the Notice of Motion sworn to by Counsel for the appellant on 10th July, 1976 the proposed grounds of appeal were set out as follows:—

"(a) The Learned Trial Judge erred in law in equating Notice of Entry for trail – a precondition for entry for trail — as required by Rules 4 and 5 of Order 25 of the High Court Rules, with Notice of Hearing when he concluded in this said Ruling as follows:—

"The Notice of trail stated that the matter would be heard in Freetown on Tuesday the 29th day of June a clear 12 days after it had been filed."

(b) Notice of Trial having been given in accordance with Rules 4 and 5 above quoted and no Order for a speedy trial having been first obtained in accordance with Rule 9 of Order 25 of the said High Court Rules the Learned Trial Judge erred in law in holding that the matter was properly before the Court for hearing on the said 2nd day of July, 1976."

The Judge declined to entertain the application and ruled as follows:

"Application refused.

[p.19]

It should be made to the Judge and by our Rules application to the Judge means application in Chambers.

This application is not properly before the Court."

An application was then made to the Court of Appeal on the 20th of July, 1976 for leave to appeal against the ruling of the Judge give on 8th July, 1976, but the Appeal Court on 28th October, 1976, dismissed the application on the ground that it was premature.

Leave was then sought from the Court of Appeal to the Supreme Court against the ruling of 28th October, 1976, but it was refused. Counsel for the appellant then applied to the Supreme Court for special leave to appeal from the ruling of the Court of Appeal made on 28th October, 1976, and on the 3rd day of May, 1978 the Supreme Court, inter alia, made the following Order:

"(1) The Court of Appeal has unfortunately not considered and determined the complaints of the applicant. Taking all the circumstances into consideration we would grant special leave in order to enable this [p.20] Court in the public interest to hear and determine the complaints of the applicant. We do feel that the grounds of appeals advanced are in order. Special leave granted accordingly for those grounds to be argued before the full court

When the appeal came before us for hearing on 23rd. January, 1980 it was pointed out to Mr. T.S. Johnson counsel for the appellant that the whole sum and substance of his complaints in his appeal to the Court of Appeal was whether this matter was ripe for hearing when it came up before the High Court on 2nd July, 1976, i.e. whether the "Notice of Trial and "Entry for Trial," both dated 17th June, 1976, given by the respondent in this matter were in accordance with Order 25 of the Rules of too High

Court. Counsel was accordingly directed that it would be most expedient if he confined his arguments to that aspect only of the appeal, At his request we granted a day's adjournment of the hearing.

[p.21]

When the Court resumed sitting on the next day Counsel for the appellant stated that his two grounds of appeal were those set out in paragraph 4 of his affidavit in support of his application for leave to appeal against the Ruling dated 8th July, 1976 of Navo J. (as he the was) sworn to by him on 10th July, 1976, already referred to (supra).

As regards the first ground of appeal Mr. Johnson pointed out that the action was entered for trial on 17th June, 1976 and that notice of trial was also given on that same day and he then referred to Order 25 Rules 5 of the High Court Rules which stipulates that notice of trial shall be given before entering the trial. The Rule states as follows:—

"Notice of trial shall be given before entering the trial, and the trial may be entered notwithstanding that the pleadings are not closed, provided that the notice of trial has been given."

[p.22]

He also referred to Rule 4 of Order 25 which stipulates that 10 days notice of trial Shall be given; the Rules states as follows:

"4. Ten days notice of trial shall be given, unless the party to whom it is given has consented, or is under term or has been ordered to take short notice of trial and shall be sufficient in all cases, unless otherwise ordered by the Court. Short notice of trial shall be four days notice unless otherwise ordered."

He submitted that 10 days notice of trial must be given before entering the action for trial, and further that Rule 8 of Order 25 made it quite clear that the date of Notice of trial and date of Entry for trial cannot be the same day. When he was asked to state in what form the notice was to be given he submitted that the notice should state that:

"The above action will be entered for trial in the High Court, Law [p.23] Courts Building, Siaka Stevens Street, on the 27th day of June, 1976 at 9 O' clock in the forenoon. The trail is likely to last for 2 days. Dated 17th day of June, 1976."

On his second ground of appeal he submitted that notice of trial is not analogous to notice of hearing: notice of hearing is given by the Court; notice of trial is given by the party whose duty it is to see that the matter is entered for trial. He submitted finally that there was no Order — whether exparte or otherwise — for this matter to be given a speedy hearing.

Mr. Halloway, Counsel for the respondent, in reply submitted that the purpose of giving 10 days' notice of trial is not to take the other party by surprise. He stated that anyone looking at the Notice of trial itself Could see that the other party has been given 10 clear days notice of intention to proceed with the trial, and that in fact the notice was served on the same day i.e. 17th June, 1976 on the Solicitor on the

other side, and if there was any irregularity at all steps should have been taken to set it aside under Order 50 of the Rules of the High Court. He referred to Rules 3 and 4 of Order [p.24] 25 of the High Court Rules and also to Order 36 Rule 13 of the English Rules particularly to Form No. 16 in Appendix B Part 11 of the Annual Practice 1957, end submitted that in as much as the Notice had complied with all these provisions it was a valid notice and not a nullity.

As regards the second ground of appeal Mr. Halloway submitted that Order 25 Rule 9 made it clear that "immediately an action has been entered for trial it shall be entered in a Cause List to be kept by the Master and shall come on for trial in its order upon the list unless otherwise ordered.

He stated that this was purely an administrative matter. Finally he submitted that under Rule 8 of Order 25 the matter could be entered for trial on the same date as notice of trial was given and that this in fact had been the long standing practice.

The Record shows that the Notice of Trial and Entry for Trial were filed on the same date.

Rule 8 stipulates:—

"If the party giving notice of trial omits to enter the trial on the day of or day after giving notice of trial the party to whom notice has been given [p.25] may, unless the notice has been counter manned under the last proceeding rule within four days, enter the trial."

Counsel for the appellant has never been able to adduce any reason to justify his suggestion that the action was entered for trial before ever notice of trial was given. Rule 8 makes it abundantly clear that notice of trial and entry for trial can be filed on the same date.

With regard to the form of the notice order 25 Rules 3 states as follows:

"3. Notice of trial shall state whether it is for the trial of the cause or matter or of issues therein and place and day for which it is to be entered for trial. It shall be in the form in use in the High Court of Justice in England on the 1st day of January, 1957, with such variations as Circumstances may require. The notice shall also state whether the trial is likely to take half a day or full day [p.26] or longer, and, if longer, it shall state how many days the trial is likely to take."

The form of Notice (Form No. 16) given in Appendix B Part 11 of the Annual Practice, 1960 which is applicable in the High Court by virtue of Order 52 Rule 3 of our High Court Rules, is as follows:—

"Take notice of trial of this _____

(or of the issues in this _____

ordered to be tried) (or as that the case may be) by a Judge (with a common or special jury)

(as the case may be) in_____ for the.

_____ day of

_____ next

X. Y. plaintiff's Solicitor (or as the case may be).

Dated _____

To Z., defendant’s Solicitor (or as the case may be)"

It is quite evidence from the above that there is no special form of the notice required, but that there may be "such variations as circumstances may require."

[p.27]

The form of the notice given by the respondent's Solicitor complied in all respects with the provisions of Rules 3, 4 and 5 of Order 25 of the Rules of the High Court. "Ten days I notice of Trial" is computed exclusive of the day of service of the notice and the tenth day thereafter (which is the last day of the notice) may be named as the day of hearing. The appellant here in fact had more than 10 days notice of Trial. In my judgment therefore the complaint that the matter was not ripe for hearing when it came up before the Judge on 2nd July, 1976 cannot be supported haring regard to the aforementioned Rules.

I find no merit whatsoever in the appeal and I would accordingly dismiss it.

I agree

[Sgd.]

Hon. Justice C. A. Harding, J.S.C.

I agree

(Sgd)

Hon. Justice E. Livesey Luke, C.J.

I agree

(Sgd)

Hon. Justice O.B.R. Tejan, J.S.C

I agree

(Sgd)

Hon. Justice A.V.A. Awunor-Renner, J.S.C.

I agree

(Sgd)

Hon. Justice K.E.O. During, J. A.

STATUTE REFERRED TO

1. High Court Rules

IDDRISSA CONTEH v. ABDUL J. KAMARA

[SC. CIV. APP.2/79] [p.28-35]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 1ST APRIL, 1980

CORAM: JUSTICE E. LIVESEY LUKE, C.J.

JUSTICE C.A. HARDING, J.S.C.

JUSTICE O.B.R. TEJAN, J.S.C.

JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

JUSTICE M.E.A. COLE, J.A.

BETWEEN:

IDRISSA CONTEH — RESPONDENT

AND

ABDUL J. KAMARA — APPELLANT

Berthan Macauley Jr. for the Appellant.

J.H Smythe Q.C. with him A.E. Manley-Spaine for the Respondent,

JUDGMENT

LIVESEY LUKE C.J.

The appellant is a farmer residing at Malel Village in the Tonkolili District. On 13th June 1975 while travelling as a passenger in a vehicle owned by the respondent the appellant sustained personal injuries as a result of the negligent driving of the vehicle by the respondent's servant' or agent. In May, 1976, the appellant instituted proceedings in the High Court against the respondent for damages for negligence. The respondent did not file a defence to the action. In due course the action came up for

trial. Liability was not issue. The only issue was the quantum of damages. The appellant gave evidence in support of his claim for special and general damages. A surgeon specialist was called on behalf of the appellant. Both parties were represented by Counsel at the trial. The trial judge gave judgment on 24th November. 1977 awarding the appellant the sum of Le4000 as general damages and the sum of Le.2.067 as special damages.

The respondent appealed to the Court of appeal against the award. The appeal was heard on 8th June 1978 and Judgment was [p.29] delivered on 9th February 1979 allowing the appeal and reducing the general damages to Le.4,500 and wholly setting aside the award of special damages. It is against that judgment that the appellant has appealed to this Court.

The issues in this appeal may be briefly stated. They are (i) whether the Court of appeal was right in reducing the general damages awarded (ii) whether the Court of Appeal was right in wholly disallowing the special damages awarded.

In arguing the first issue, Mr. Berthan Macauley Jr. learned Counsel for the appellant submitted that the Court of appeal wrongly applied well-established principles governing the powers of an appellate Court in interfering with an award of damages. Before determining the issues raised, I think that it is necessary to consider whether the Court of appeal has any power to review awards of damages by a judge sitting alone, and if so, in what circumstances. I think that it is important to state that by virtue of rule 9(1) of the Sierra Leone Court of appeal Rules, 1973, and appeal to the Court of appeal is by way of re-hearing.

An appeal against an award of damages is, like appeals generally, by way of re-hearing and therefore the Court of Appeal has power to review the award. But a well established rule bas been accepted over the years as governing an Appellate Court in the exercise of its power to review an award of damages by a judge sitting alone. The rule is that an Appellate Court will not interfere with an award of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts or has made a wholly erroneous estimate of the damages to which the claimant is entitled. The rule was stated with much clarity by Greer L.J. in the English Court of Appeal in Flint v. Lovell (1935) 1 K.B.354. He said inter alia at p. 360:—

"..... I think it is right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages' it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law or [p.30] high or so very small as to make it, in the judgement of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled"

In Owen v. Sykes (1936) 1 K.B. 192 C... Greer L.J. elaborated upon the rule. He said at p. 198:—

"It has been laid down in Flint v. Lovell that this Court does not readily interfere with the estimate of damages made by a learned judge at the trial. An assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and it seems to me that unless we come to the conclusion

that the learned judge took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere."

Lord Wright after expressly approving of the rule as stated by Greer L.J. in Flint v. Lovell (supra) continued his speech in the House of Lords in Davies v. Fowell Duffryn Associated Collieries Ltd. (1942) A.C. 601 at p. 617 as follows:—

"The scale must go down heavily against the figure attached if the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

The rule has been adopted and applied by our Courts in Sierra Leone over the years, and in my view, rightly so.

In delivering the judgment of the Court of appeal in Suleman Lasawarrack v. Raffa Brothers & The Northern Assurance Co. Ltd. (1962) 2§.L.L.R. 196 Bankole Jones Ag. C.J. (as he then was) said inter alia at p. 197:—

"An appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had [p.31] tried the case at first instance. It can only properly interfere if it is satisfied that the judge applied a wrong principle of law or that the amount awarded is either so inordinately high or so inordinately low that it must be a wholly erroneous estimate of the damage."

It will be convenient to consider now the principles applicable in making assessment of general damages in personal injury cases. The most important principle applicable is that general damages, must be fair and reasonable compensation for the damage suffered and that perfect compensation is not possible or permissible. The judge making the assessment must do his best to arrive at a fair and reasonable estimate and for this purpose he may use certain aids by considering the award of damages under various “heads of damage_" The accepted heads are: the bodily injury sustained, the pain and suffering' endured, past, present and future, injury to health, loss of amenities, loss of expectation of life and the present and future financial loss. But the judge is not obliged to state the amount awarded under each head. His duty is to satisfy himself that at the end of the day the total of the sums awarded under the various heads is fair and reasonable:

See Watson v. Powles (1968) 1 Q.B. 596. In this connection the words of Lord Denning N.R. in Fletcher v. Autocar and Transporters Ltd. (1968) 2 W.L.R. 743 C.A are instructive. He said inter alia at p. 748:—

"In the first place, I think he has attempted to give a perfect compensation in money, whereas the law says that he should not make that attempt. It is an impossible task. He should give a fair compensation."

And he continued at p. 749:—

"In the second place, I think that the judge was wrong to take each of the items as a separate head of compensation. They are only aids to arriving at a fair and reasonable compensation …… There is to my mind, a considerable risk of error in just adding up the items. It is the risk of overlapping."

[p.32]

I would also commend to judges and Courts engaged in the task of assessing general damages for personal injuries the words of Lord Morris of Borth-y-Gest in H. West & Son Ltd. v. Shepherd (1963) 2 W.L.R. 1359 H.L. at p. 1368:—

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation."

The next question I propose to consider is whether the court of appeal was right in holding that the award of Le.9,000 as general damages was excessive. I think that it should be stated at the outset that the Court of Appeal did not say or suggest that the learned trial judge applied any wrong principle of law. All that that Court said was that the award of general damages was excessive bearing in mind the quality of the evidence" which was before the trial judge. What then was the evidence before the trial judge on which he based his assessment? The evidence was that the appellant was a man aged about 35 years He was a farmer in a village in the Tonkolili District. He sustained the following injuries as a result of the accident:—

(i) Contusion of the chest wall and

(ii) Fracture of the right humerus complicated by involvement of radial nerve.

The fracture was united but he has been left with a wrist drop. He complained of pains in his chest. He would not be able to use his wrist as a farmer. He would not be able to lift any heavy object. He cannot lift any heavy object. He cannot use his cutlass with his right hand. He cannot grip well with his right hand. He used to grow rice and pepper and his wife used to assist him in the farm. He used to earn Le.800 per annum from his farming. Since the accident he had not been able to carry on farming, and he had not earned any income since then. According to the surgeon specialist the appellant's recovery could not be absolute, his recovery was only partial. He could follow other gainful employment. The surgeon specialist agreed [p.33] that physiotherapy plays an important role in the treatment of such injuries, but that he did not order physiotherapy treatment and that appellant had not received any such treatment. The surgeon specialist assessed the appellant's final residual disability at 12 per cent.

The “quality” of the evidence which appeared to have influenced the Court of Appeal in coming to their decision to reduce the general damages are (i) the evidence of the surgeon specialist that physiotherapy treatment could have played an important role in the treatment of the injury, and yet he did pot refer the appellant for physiotherapy treatment; (ii) there was no evidence from the surgeon as to the residual disability of the appellant.

With respect, it was clearly wrong to say that there was no evidence as to residual disability. That evidence was contained in the medical report prepared by the surgeon specialist and admitted in evidence. I think that undue emphasis was placed on the surgeon specialist's failure to refer the appellant for physiotherapy treatment. My understanding of the evidence of the surgeon specialist is that there was a possibility that such treatment might have improved the condition of the appellant. There was certainly no positive evidence that such treatment would have improved his condition. In my opinion the Court of Appeal misapprehended the evidence in support of the claim for General damages. The proper Course the Court of Appeal should have adopted was to consider the evidence as a whole including the evidence relating to the treatment of the appellant and his residual disability and then decide having regard to the various heads of damage, whether the award made was fair and reasonable.

When the evidence is taken as a whole, the Overall award Le.9000 as general damages may be said to be generous or high, but to say that an award is generous or high is not the same as saying that it is excessive. In my opinion the overall award was not so high as to amount to a wholly erroneous estimate of the damages to which the appellant is entitled. Therefore, in my opinion it can be said that the award was excessive. It may have been helpful if the learned trial judge had given some indication of the awards made under the various heads, but, as stated earlier, he was under no obligation to do that. The important duty of the judge was to ensure that the overall figure awarded was fair and reasonable. I have no doubt that the judge discharged that duty in this case. In my judgment there is no [p.34] valid ground for interfering with the award of the judge in this case. The Court of Appeal therefore erred in interfering with the award of general damages.

The appeal relating to special damages can be disposed of briefly. Judging from the record of the evidence at the trial it would appear that the respondent did not seriously contest the claim for special damages. And according to the records, when learned Counsel for the respondent addressed the trial judge he confined his address to general damages. He made no reference to the Special Damages claimed. Also in the three grounds of appeal relied, on by the present respondent before the Court of Appeal there was no specific ground complaining about the whole or any item awarded as special Damages. In my opinion a proper reading of the three grounds of appeal, the only reasonable conclusion is that all the complaints of the present respondent (i.e. the appellant in that Court) related to the award of general damages. That conclusion is supported by the fact that the recorded submissions of his Counsel before the Court of Appeal in arguing all three grounds were to the effect that the award was “inordinately high and that the trial judge must have used wrong principles.”

In my opinion such submissions are more germane to an attack on a general damages award than to a special damages award

In my opinion, in the circumstances just related, the Court of Appeal should, have adverted its mind to rule 9(6) of the Court of appeal Rules 1973 and invited argument on special damages. In all the circumstances, the Court of Appeal erred, in my judgment, in interfering with the award of special damages. But even assuming that the Court of Appeal could properly have interfered with the award of special damages, the result would have been the same been the because as Mr. Smythe learned Counsel for the respondent rightly and properly conceded there was unchallenged evidence in support of the

items of special damages claimed and the learned judge was entitled to award each item and the total amount he awarded by way of special damages. The Court of Appeal was therefore wrong in holding that the special damages were not proved.

In the result I would set aside the judgment and orders of the Court of Appeal and restore the orders of the High court.

[p.35]

[Sgd.]

E. LIVESEY LUKE, C.J.

SGD.

C.A. HARDING, J.S.C.

I agree

[SGD.]

O. B. R. TEJAN, J.S.C.

I agree

A.V.A. AWUNOR-RENNER, J.S.C.

I agree

[Sgd.]

M. E. A. COLE, J.A.

CASES REFERED TO

1. Flint v. Lovell (1935) 1 K.B.354

2. Owen v. Sykes (1936) 1 K.B. 192 C

3. Davies v. Fowell Duffryn Associated Collieries Ltd. (1942) A.C. 601 at p. 617

4. Suleman Lasawarrack v. Raffa Brothers & The Northern Assurance Co. Ltd. (1962) 2.L.L.R. 196

5. Watson v. Powles (1968) 1 Q.B. 596

6. Fletcher v. Autocar and Transporters Ltd. (1968) 2 W.L.R. 743 C.A

7. H. West & Son Ltd. v. Shepherd (1963) 2 W.L.R. 1359 H.L. at p. 1368

STATUTES REFEREED TO

1. Rule 9(6) of the Court of appeal Rules 1973

JESSIE ROWLAND H. GITTENS-STRONG v. SIERRA-LEONE BREWERY LTD.

[SC. CIV. APP.7/79] [p.60-88]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 17 DECEMBER 1980

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.

MR. JUSTICE C.A HARDING, J.S.C.

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MR. A.V.A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

BETWEEN:

JESSIE ROWLAND H. GITTENS-STRONGE — APPELLANT

AND

SIERRA LEONE BREWERY LIMITED — RESPONDENTS

A.B.N Strong Esq. for the Appellant

Berthan Macauley, Jr for the Respondents

LIVESEY LUKE C.J.:

The appellant entered the employment of the Respondent Company (hereinafter called the Company) on 20th August, 1970 as a Brewer-in-training. The Company are brewers of beer and stout. On 1st June, 1971 the appellant was made an Assistant Manager. The letter informing him of this decision was dated 8th June 1971 and attached to it was "a summary of the terms and conditions of service for Assistant Management." The appellant was required to complete and sign the Service Agreement. That was the first time the parties signed a formal written Contract of Service setting out the terms and condition governing the appellant employment. The appellant was sent to Ghana in 1971 for further training with the Kumasi Brewery. He returned to Sierra Leone or about February, 1972 after the successful completion of his training. In September, 1972 he was sent to Heinekens Brewery in Holland for further training returning to Sierra Leone in or 1973 after the completion of the training. During the latter [p.61] period the Company made arrangements for the appellant to undergo a Management course in Britain. On 1st July, 1973 the appellant was promoted to the post of Brewer/Manager, which according to the

letter (dated 5th June, 1973) communicating the good news to the appellant was of full management status." That letter, apart from informing the appellant of certain improved benefits and facilities to which he became entitled as full manager" did not state were his conditions of service as a full manager. Nor was fresh contract of service setting out his terms and conditions of service as a full manager signed then or at all. There was a misunderstanding between the Production Manager and the appellant in December, 1975 relating to production on 31st December, 1975. This resulted in a written query dated 5th January, 1976 being issued by the Production Manager Mr. A.O Bart-Williams to the appellant. The appellant promptly sent a written reply to the query, and the matter seemed to have ended there. Apart from that isolated incident the relationship between the appellant and his employers seemed to have been satisfactory and cordial. Indeed by letter dated 1st March 1976 the appellant was informed of certain improved benefits and salary to which he became entitled. Everything seemed to have progressed normally and satisfactorily until 5th October, 1976. The appellant reported for duty at 6 a.m. on that day. At about 9.00 a.m. he was summoned by the Acting General Manager. He immediately went to the General Manager's Office where he met the Acting General Manager Mr. Koopmans and the Production Manager Mr. Bart-Williams. He was asked to sit down and then the Acting General Manager proceeded to pronounce these words:

[p.62]

"The Company does not require your services any longer."

In a state of shock and disbelief the appellant retorted "I beg your pardon?" Whereupon the Acting General Manager repeated his previous, pronouncement. The appellant asked Mr. Koopmans whether there was any reason for such action. Mr. Koopmans replied that he had received a complaint a week before from the Head of Security that he had gone round one morning at about 2 a.m. and had found him (the appellant) sleeping whilst on duty, that on the previous Friday morning after he (the appellant) had finished work he had found some bottles of beer in the Bright Beer Cellar and that on that same Friday the security officer had found two casual workers who in his opinion were intoxicated and Mr. Koopmans added that he thought the foregoing allegations amounted to negligence on his (the appellant's) part. Mr. Koopmans further referred to the Production Manager's query of 5th January, 1976 and concluded by saying that the Company did not therefore need his services any longer. Mr. Koopmans suggested to the appellant that instead of having his services terminated or being dismissed, he (the appellant) should adopt an easy way out by tendering a letter of resignation. The appellant replied that he was not prepared to do any such thing. Whereupon Mr. Koopmans said that the appellant could take it that his services had been terminated and that he could go home and await a letter to follow. The appellant subsequently received the promised letter. It was dated 5th October, 1976 and in the following terms:—

[p.63]

"Dear Sir,

I confirm your interview in my office this morning in the presence of the Production Manager. You appear either unable or unwilling to conform, to the Company's requirements of its managers, as

evidenced by the series of disciplinary instances. brought to your attention both verbally and in writing by the Production Manager, the General Manager and myself.

I regret therefore that I have no alternative but to terminate your employment with Sierra Leone Brewery limited with immediate effect.

You will be advised separately of your financial status with the Company, including your outstanding car loan, and your entitlements under Clause 11(a) of the Service Agreement. The Union African Pension Fund will also advise you as to your entitlement.

Yours faithfully,

(Sgd.) C.D.M. Koopmans

Acting General Manager."

A few weeks later the appellant received a letter dated 28th October, 1976 and signed by Mr. Koopmans. That letter referred to the letter dated 5th October, 1976 and proceeded to give details of the appellant's entitlement on termination of his employment including Le89.10 as salary for 1st to 5th October, 1976, Le58.33 as rent allowance for October, 1976 and Le1105 as 2 months salary in lieu of notice. The appellant was requested to call upon the Administratrix Union African Pension Fund, U.A.C. House, Freetown to collect the amount owed to him.

[p.64]

The Appellant was not satisfied with the way in which his services with the Company had been terminated. And so in December, 1976 he issued a Writ of summons against the Company claiming inter alia damages for wrongful dismissal. In his Statement of Claim the appellant inter alia referred to the letter of termination dated 5th October, 1976 and alleged that his dismissal was wrongful. In their Defence the Company pleaded inter alia that the appellant's employment was governed by the Service Agreement dated 1st June, 1971 and that in pursuance of that agreement the Company terminated the appellant's employment and paid him his entitlement including 2 months salary in lieu of notice. In the Reply it was inter alia denied that the appellant's employment was governed by the Service Agreement dated 1st June, 1971.

On the basis of the pleadings, the issues that went to trial may be summarized as follows:—

(i) Was the Service Agreement dated 1st June, 1971 the operative contract governing the employment of the appellant on the date of his dismissal i.e. 5th October, 1976?

(ii) If the answer to (i) above is in the negative what were the terms and conditions governing the appellant's employment on the date of his dismissal?

(iii) If the answer to (i) above is in the affirmative, was the appellant's dismissal in accordance with the terms of the said Service Agreement?

(iv) If the answer to (i) above is in the negative, was the appellant's dismissal in accordance with the terms and conditions as stated in (ii) above?

[p.65]

(v) If the appellant was wrongfully dismissed was he entitled to General Damages and what was the measure of such damages?

(vi) If the appellant was wrongfully dismissed was he entitled to Special Damages?

(vii) Was the appellant entitled to salary for the whole of October, 1976 or for only up to the date of his dismissal (i.e. 5th October, 1976)?

The trial in the High Court was by Williams J. The appellant (plaintiff) gave evidence on oath in the course of which he tendered in evidence relevant correspondence and other documents including the Service Agreement dated 1st June 1971 (marked

Ex. "B"). He did not call any witness. Only one witness was called on behalf of the Company and that was the Chairman of the Board of Directors and General Manager of the Company in the person of John Jeffery Allan Clegg. The learned judge delivered his considered judgment on 22nd December, 1977 dismissing the appellant's claim. The learned judge held inter alia that the appellant's services were terminated 'and he was not dismissed, that the Service Agreement of 1st June, 1971 governed the appellant's employment on the date of termination, that the appellant's appointment had been properly and lawfully terminated by the Company in accordance with the terms of Clause 11(a) of the Service Agreement.

The appellant appealed to the Court of Appeal on two grounds of appeal which were rather vaguely worded. However, the hearing of the appeal proceeded on the basis of those two grounds. The main arguments in the Court of Appeal turned on whether there was a distinction between termination and dismissal and the significance of such distinction and whether the appellant had been properly dismissed under Clause 11 of the Service Agreement.

[p.66]

The learned trial judge's decision that the Service Agreement of 1st June, 1971 governed the appellant's employment on the date of termination appears to have been accepted on all sides. Learned Counsel for the appellant did not challenge it before the Court of Appeal or in this Court. Indeed the judgment of the Court of Appeal proceeded on the basis that that decision was right. However, I think that it is of interest to mention in passing that in the letter dated 8th June 1971 (Ex. "D") forwarding the Service Agreement (Ex. "B") to the appellant, the Service Agreement is referred to in paragraph 2 thereof as "a summary of the terms and conditions of service for Assistant Management ……." (Emphasis mine). If the issue had been raised, it would then have been necessary to consider whether those terms and

conditions of service governed employees of full management status to which the appellant was appointed on 1st July, 1973 by letter dated 5th June, 1973 (Ex. "C"). But that issue does not arise in this appeal and therefore it is not necessary to consider it. The Court of Appeal (consisting of M.E.A. Cole, Navo and Turay JJ.A.) delivered judgment on 25th May, 1979 allowing the appeal, setting aside the judgment of the High Court and substituting judgment in favour of the appellant but awarding no damages or costs to the appellant. In a well reasoned judgment delivered by Navo J.A. and concurred in by Cole and Turay JJ.A. the Court held inter alia that the distinction between "termination" and "dismissal" was of little significance, and that the appellant had been summarily dismissed under Clause 11 of the Service Agreement but that the Company had failed to justify the reasons for the dismissal.

[p.67]

The appellant has appealed to this Court complaining against the refusal of the Court of Appeal to award him General damages, Special damages and costs. The Company has filed a notice of cross-appeal complaining that the Court of Appeal erred in law in holding that there was no legal difference between the words "Termination" and "Dismissal" and in holding that the burden is upon the master to justify the reason for the dismissal of a servant.

The important: issue raised in this appeal on which many other issues stand or fall is whether the termination of the appellant's employment was lawful or wrongful. Both the lower Courts held that the termination was under Clause 11 of the Service Agreement dated 1st June, 1971, but while the High Court held that the termination was lawful, the Court of Appeal took the contrary view. It is therefore necessary to consider the all important Clause 11 of the Service Agreement and the evidence relating to the termination of the appellant's employment.

Clause 11 is in the following terms:—

"11. The Company may terminate the employment of the Employee—

(a) without assigning any reason therefor by giving to the Employee two months' previous notice in writing or without previous notice by crediting him in account in its books with two months' salary or if the Employee shall not have completed two years service with the Company then by one month's previous notice in writing, or without previous notice by crediting him with one month's salary;

[p.68]

(b) summarily at any time and without previous notice if the Employee shall be guilty of any act or omission inconsistent with the due performance of the Employee's obligations under this Agreement, failure to obey orders or any other breach of this Agreement."

The important question then arises, did the Company "terminate the appellant's employment in accordance with Clause 11(a) or Clause 11(b)? The Company's case is that the termination was in accordance with Clause 11 (a) And the argument support of their case proceeds thus: they were not obliged to assign any reason for terminating the appellant's employment under Clause 11(a), if they either gave two months' written, notice, or without previous notice if they credited his account in their

books with two months' salary, the termination was lawful. And that in the instant case they credited the appellant's account in their books with two months salary in Lieu or notice and therefore his termination was lawful. I shall now consider the evidence to determine whether this contention is tenable. It will be recalled that at the end of the interview on 5th October, 1976, Mr. Koopmans said to the appellant that he could take it that his services had been terminated and that he could go home and await a letter to follow. The letter that followed was Ex. "K" dated 5th October, 1976 which has been set out above. That letter confirmed that the appellant's employment was terminated with immediate effect and added "You will be advise separately of your financial status with the Company …… and your entitlements under Clause 11(a) of the Service Agreement." The crucial question that arises is this: Did that letter comply with the limb of Clause 11(a) that the Company is relying on? was there [p.69] any indication in that letter that the Company had fulfilled the condition for the exercise of that power of termination "by crediting him [the appellant] in its books with two months' salary"? The answers to these questions are in my opinion, clearly "No." The next significant event in this sad story is that in a letter dated 28th October, 1976 (Ex. "L") the Company detailed the appellant's entitlements on termination of his employment which included two months' salary in lieu of notice. That was the first intimation the appellant had that his account had been credited with two months' salary in lieu of notice.

Was crediting the appellant's account with the two months' salary over three weeks after his termination, a compliance with Clause 11(a) of the Service Agreement? In my opinion the answer must be "No."

Let me demonstrate my views by reference to termination with notice and termination with salary in lieu of notice.

Take the case of employer A who according to the terms of the Contract of Employment of his employee X has to give X one month's written notice or one month's salary in lieu of notice. On the 15th of the month A invites X to his office and gives him verbal notice of the termination of his service adding that a letter would follow. Five days later X receives a letter from. A dated the 15th and informing him that his services were terminated with effect from the 15th. In my opinion that would not be a valid termination of the employment because it does not comply with the requirement of one month's previous written notice. Similarly if A had told X that his services were terminated with immediate effect and that he would be hearing from him, and five days later he paid X a month's salary in lieu of notice, the position would still be the same. In my [p.70] view such an action on the part of A would not be in compliance with his obligations under the Contract of Service. If according to the terms of the employment, termination must be by written notice or salary in lieu of notice such or such payment of salary must, in my opinion, be contemporaneous with the act of termination.

It seems to me that if an employer dismisses his employee on the 1st of January and pays him his entitled salary in lieu of notice on the 1st of March, he is in breach of the Contract of Employment. So what he is paying on 1st March is not strictly speaking salary in lieu of notice but anticipated damages. Similarly, if an employer is under an obligation to pay salary in lieu of notice into his employee's account on termination of his employment, he is under an obligation to pay it contemporaneously with the

termination. I am of the view that if the payment is made not contemporaneously but weeks later there is a breach and the payment ceases to be payment of salary in lieu of notice and becomes anticipated damages paid in mitigation of damages. Quite clearly, the circumstances contemplated by the first limb of Clause 11(a) are firstly the employer should give two months previous written notice, the notice to take effect from the date of its receipt and the employee is entitled to continue working during the period of the notice: See Addis v. Gramophone Company Ltd. (1909) A.C. 488 H.L. per Lord Loreburn L.C. at pp. 489-490.

Secondly the employer without previous written notice may terminate the employment by contemporaneously crediting the employee's account with two months' salary in lieu of notice. In my opinion the reasonable inference to draw from the letter dated 28th October, 1976 is that it was on that date that the salary in lieu of notice was paid into the appellant's account.

[p.71]

Certainly the Company did not lead evidence or even suggest that it was paid on an earlier date. Contemporaneously does not necessarily mean immediately. But in my opinion, by no stretch of imagination can it mean weeks afterwards.

In this connection it is necessary to remind ourselves that an action for wrongful dismissal is an action for breach of Contract. In this regard it is important to emphasize that in such an action there are two important and separate issues involved, namely breach of Contract and damages for the breech. A. plaintiff may succeed in establishing breach of Contract yet he may recover only nominal damages or no damages at all. The plaintiff's first burden is to prove a breach of the relevant Contract. So in an action for wrongful dismissal the plaintiff first has to establish breach of his Contract of employment. It is only after that that the question of damages would arise.

Was a breach of the Contract of employment established in this ease? According to their own admission, the Company terminated the appellant's employment without notice. They peremptorily terminated his employment on the 5th October, 1976 and it was not until 28th October, 1976 that he had any intimation that his account had been credited with any salary in lieu of notice. It seems to me that such a belated crediting of the appellant’s account could hardly be said to be a compliance of the requirements imposed by Clause 11(a) of the Service Agreement. In my view failure to pay salary in lieu of notice on the date due constitutes a breach of Contract for which an employee can institute immediate legal proceedings for wrongful dismissal. Applying that principle to the facts of this case, failure to credit the appellant’s account with the appellant's account with two months’ salary at the time due constitutes a breach of Clause 11(a) of [p.72] the Service Agreement and therefore a breach of Contract. The appellant was entitled to institute proceedings against the Company for wrongful dismissal from the 5th October, 1976 up to 27th October, 1976. Let us suppose that he had taken such action, what would have been the defence of the Company? They would have had to confess that they had not credited the appellant’s account with the two months' salary. How would they have avoided the consequences of that confession? By pleading that they intended to credit his account with the salary in lieu of notice due him at a later date? In my opinion that would not be a tenable defence to such an

action. Payment of salary in lieu of notice, or in this case, crediting the appellant's account, on a later date than the due date in the circumstances of the particular case does not cure the original breach of Contract. Such late payment, or crediting, could only mitigate damages. I hold the view therefore the Company did not comply with Clause 11(a) in terminating the employment of the appellant.

In their judgment, the Court of Appeal did not consider the position under Clause 11(a) and Clause 11(b) separately. They seemed to have considered them together and then came to the conclusion that the appellant was summarily dismissed and. that the dismissal was wrongful and in breach of the Contract of Service. In other words they held that the appellant's dismissal was in breach of the whole of Clause 11 i.e. 11(a) and 11(b). It may have been neater to consider the sub-Clauses separately. Be that as it may, their conclusion on the Clause taken as a whole was beyond any doubt.

Having considered the appellant's position under Clause 11(a), I shall now proceed, out of deference to the Court of Appeal and in view of the cross-appeal, to consider whether he

[Missing page from p.73-76]

was summarily dismissed under Clause 11(b). It is reasonable to infer from the evidence as to what transpired at the General Managers' office on the morning of 5th October, 1976 and from the letter dated 5th October, 1976 (Ex. "K") that the intention of Mr. Koopmans was to summarily dismiss the appellant. There is no doubt that Clause 11(b) confers a right on the Company to summarily dismiss an employee (including the appellant). But it is important to note that that right is not and cannot be absolute. It is circumscribed within prescribed limits. It is limited only to the following circumstances "if the Employee shall be guilty of any act or omission inconsistent with the due performance of the Employee's obligations under the Agreement, failure to obey orders or any other breach of this Agreement."

I think that it is necessary to point out that the Company did not rely on Clause 11(b) in their Defence, and no evidence was

led to prove that the appellant was guilty of any of the acts or omissions specified in Clause 11(b). So if the intention of

the Acting General Manager was to summarily dismiss the appellant under Clause 11(b), his action was wrongful and in breach of the appellant's Contract of employment. In my opinion, whichever way one approaches the problem, whether considering only Clause 11(a), or considering Clauses 11(a) and (b) separately or considering the whole Clause together, the end result is the same, and that is that the appellant was wrongfully dismissed

by the Company.

Both counsel referred us to the case of McClelland v \ !QE!hern Ireland General Health Services Board (1957)1 w.L.R.594 •.

In that case the appellant was appointed in 1948 to a "permanent and pensionable" post as a Senior Clerk by the Respondent Board,

~ld was shown the terms and conditions of service. These

contained a Clause providing for the dismissal of officers for

"gross misconduct" or if they proved "inefficient and unfit to merit continued employment." There was also a provision for dismissal on failures to, take or to honour the oath of allegiance and another related to termination of employment by reason of

permanent ill-health or infirmity~(There was no provision for dismissal in other circumstances. It was, however, provided that "permanent officers,ll who wished to terminate their employment with the Board, must give one month's notice. In 1953 the Board purported to terminate the appellantls employment on six months notice on the ground of redundancy of staff and without any suggestion of misconduct or inefficiency on her part. It was held by the House of Lords that on the true construction of the terms and conditions of service the express powers of the Board to dismiss an officer were comprehensive and exhaustive and no:

further power could be implied. Accordingly, her service had not been validly terminated. In my opinion the relevant lesson that that case teaches us is that an employer must comply with the' terms stipulated in the Contract of Service for the termination

or dismissal of the employee; otherwise he terminates the employment at his peril. He will then be held, to be in breach and the dismissal will be wrongful. This is in support of the view that I have expressed above that the Company did not comply with the stipulated terms for termination of the employment of the appellant and therefore they were in breach and the dismissal wrongful.

It is also pertinent to recall the words of Lord Maugham in Jupiter Ge~ral Insurance Co.Ltd. v. Shroff (193')') 3 All E.R.67.P.C.

He said inter alia at PP.73 ~ 74:—

/16.000000

"Their Lordships recognise immediate

dismissal of an employee is a strong measure,

.....

On the one hand, it can be in exceptional circumstances only that an employer is acting properly in ~ummarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view:that a single outbreak

of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground fo~ dismissal.1I

I think that this is a convenient stage to deal with the

issues raised by the Respondent Company in their Notice of Cross

Appeal. In their first ground of cross appeal the Company contend that the Court of Appeal erred in law in equating the term ":unlawful dismissal" with "termination" within a Contract in

interpreting the Contra~t of employment between the appellant and the Company. In the course of his judgment Navo J.A. said inter alia:—

III termination of Service is wrongful it gives rise to an action for wrongful dismissalll

. l'1r. J3erthan :Macauley Jr. ±-&ar.Q.e,d. ~11n9~ for the ~ submitted that there is a very important distinction b~e.n

termination arld dismissal. That may be so, but such a di.stin.~n is not relevant to the solution of the issue in this case. The

problem with which we are faced is whether the cessation of the appellant's employment with the Company was lawful or unlawful. 1,fu.ether such cessation is called "termination" or ff dismissalll is

of no importance in this context. If the "termination" is unlawful it gives rise to an action for "wrongful dismissal.1I Similarly if the dismissal is unlawful, it gives rise to an ai:tto.n. .for "laongful dismissal." So the cause of action is the

'""1 same whether the term. used in the Contract of Service or the

notice is "termination" or "dismissal." This statement can be

illustrated by reference to the Service Agreement (Ex. "B") and particularly the now famous Clause 11~ the full text of which has been set out above.' It will be noted that it commences as

follows:—

liThe Company may terminate the employment of the Employee—

(a) (b)

II /Emphasis mine

Nowhere in that all important Clause is the word "dismissal" used. But if the Company unlawfully "terminates" an employee's employment under that Clause, the employee's cause of action will be for "\'lrongful dismissal" and not for "1'-Trongful termination." So although there may be an important distinction between

"termination" and "dismissal," yet the nomenclature which we have inherited from the common ~aw for such causes of action is "wrongful dismissal," and we continue to use it in this jurisdiction. In my opinion therefore Navo J.A. stated the orrect legal position in the passage quoted above.

Another contention in the Cross-appeal is that the Court of Appeal erred in law in holding that the burden of proof of unlawful dismissal is not upon the party alleging unlawful dismissal. What the Court of Appeal held in effect was that the Company having alleged negligence, insubordination and misconduct for the summary termination of the appellant, it was not for the appellant to prove that he had not been negligent etc. but for the Company to prove the negligence, insubordination and misconduct which justified the appellant's dismissal. In my opinion that is the correct legal position.

[p.77]

Having held that the appellant's employment was wrongfully terminated, I shall now proceed to consider his entitlement to damages (if any). I think that it is well settled that a successful plaintiff in an action for wrongful dismissal is entitled to general damages for breach of his Contract of Employment and to special damages if properly claimed and proved. As regards general damages, the measure of damages to be awarded varies according to the circumstances of the particular case. An important distinction is made between cases where a definite period of notice of termination is provided under the contract and cases where there is no such provision. In the former type of cases, the normal measure of damages is the amount the employee would have earned under the Contract for the period of notice. So if the service Agreement provided for 3 months notice of termination, the measure of general damages will ordinarily be 3 months salary and other entitlements if applicable. See Addis V. Gramophone Company Ltd" (supra) "in the letter type of cases, the measure of damages is the salary of wages for the period that the Court considered would constitute reasonable notice of termination of the employment in all the circumstances of the" case.

In this case, as was rightly held by Williams J. and the Court of Appeal the measure of general damages to which the appellant is entitled having regard to the terms of the Contract of Service is two months' salary and allowances to which he was entitled for that period. That he has already received. And as , the Court of Appeal rightly held he is therefore not entitled to any more compensation by way of General Damages. But in my opinion that is not the end of the matter as regards damages. The appellant claimed special damages for loss of income. The question then arises: is he entitled to special damages, and if so for what.

[p.78]

The Court of Appeal did not dispute the appellant's entitlement to special damages, but they seemed to have been of the view that there was not sufficient material before them for the assessment of special damages. In my considered opinion a plaintiff in an action for wrongful dismissal can claim as special damages loss of salary or wages for a reasonable period that he would take to obtain another employment. I derive support for this view from the speech of Lord Atkinson in Addis v. Gramophone Company Ltd. (supra). He said inter alia at p. 49:—

"The damages plaintiffs sustained by this illegal dismissal were (1) the wages for the period of six months during which his formal notice would have been current;

(2) the profits or commission which would, in all reasonable probability, have been earned by him during the six months had he continued in the employment; and possibly (3) damages in respect of the time which might reasonably elapse before he could obtain other employment."

In my opinion such special damages are damages flowing from the breach which having regard to the particular circumstances of the case, the parties should have reasonably foreseen as the probable result of the breach of the Contract of Service. The circumstances may vary from case to case, and whether this principle is applicable would depend on the circumstances of each particular case. Relevant circumstances may be the nature of the employment, the availability of similar or alternative employment in the locality or in the country as a whole, the special skill or training of the employee. Obviously, if a clerk, a typist or a domestic servant is dismissed it is most unlikely that any circumstances would warrant or justify a claim for special damages under this head.

[p.79]

But if an employer wrongfully terminates an employee trained in specialised skills and it is only in the employer is establishment that that skill could be used in a whole country, in my opinion, the employer ought to have foreseen as a probable consequence of his action that it will take some time for the dismissed employee to find alternative employment. This view cannot be said to be an extension of the rule in Hadley v Baxendale (1854) 9 Exch.341 (1843-1860) All E.R Rep. 461. On the contrary it is, in my humble opinion, an application of it. The rule as laid down by the Court of Exchequer in that case states inter alia:—

"Where two parties have made a Contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the, contemplation of both parties at the time they made the contract as a probable result of the breach of it."

In this connection it is pertinent to recall the words of Lord Du Parcq in Monarch Steamship Company Ltd. v. A/B Karlshamns: Oljefabriker AB. (1949) 1 All E.R.1 H.L He said inter alia at p.19:—

"I do not doubt the wisdom of the judges who, in Hedley v. Baxendale and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember ……. that in the end, what has to be decided is a question of fact, and, therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be constructed with some liberality and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or, perhaps, an inadequate, liability on a defendant. The Court must be

careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

I think that it should be made abundantly clear that the special damages which I have said are recoverable under this head are not for the manner of the dismissal or injured feelings, or humiliation embarrassment or loss of reputation. It is well settled that damages cannot be recovered under any of those heads in an action for breach of Contract of employment: See Addis v. Gramophone Company Ltd. (1909) H.L. and British Guiana Credit Corporation v. De Silva (1965) 1 W.L.R. 248.

On the meaning of special damages, I cannot do better than recall the words of Bowen L.J in delivering the Judgment of the Court (consisting of Lord Esher M.R., Bowen and Fry LL.J) Ratcliffe v. Evans (1892) 2 Q.B. 524 at 528:—

"Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage of which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context."

[p.80]

At times (both in the law of tort and of Contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: See Ashby v. White. In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damages. Special damage in such a context means the particular damage (beyond the general damage) which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

There is no dispute that the rule of practice is that particulars must be given of special damages claimed. See Monk v. Redwing Aircraft Company Ltd. (1941) 1 K.B.182 where Lord Greene M.R. said inter alia at p. 185:—

"In his statement of claim the plaintiff claims 'under Para. 8 damages.' It is to be observed that the damage suffered under that head is in its nature special damage, and, in accordance with the ordinary rule, where a plaintiff is alleging special damage he must give sufficient particulars of it"

and he continued at p.186:—

"What, then, is the position of a plaintiff who claims damages in a case such as this? It seems to me that he must specify that it is that he claims, arid in every statement of what he claims by way of special damages there is necessarily [p.82] implicit one of two allegations, either that he has not earned any remuneration in other employment during the relevant period, or that he has done so, and any form of pleading or any particulars given which do not bring to the clear knowledge of the defendant which of those two implicit statements he is going to rely on is, in my judgment, embarrassing. The function of particulars in such a case is to bring out clearly by express language which of those allegations is relied

on, and if it be the latter, sufficient details showing how the figure is arrived at should be given in the particulars."

It should be noted that the rule prescribes no particular form for the particulars. The important requirement is that the particulars should be given in the body of the pleadings. All the relevant particulars need not be contained in one paragraph. They may be stated in two or more paragraphs. And the particulars should be limited to what is really reasonably necessary to enable the party seeking them to know what case he has to meet. See Phipps v. Orthodox Unit Trusts Ltd. (1958) 1 Q.B. 314 per Jenkins L.J. at p. 321. The question then arises; did the appellant in the instant case give sufficient particulars of his claim for special damages for loss of income? For an answer to this question, reference should be made to the Statement of Claim. It should be said at the outset that the Statement of Claim was inelegantly drafted. But on a proper reading of paras. 3 and 4 thereof the following particulars are given:—

(i) That his employment was terminated on 5th October, 1976;

(ii) That his salary at the time of termination was Le6, 630 per annum;

(iii) That he received housing allowance of Le700 per annum;

[p.83]

(iv) That he received a fixed car allowance of Le360 per annum;

(v) That on 12th January, 1977 (the date of the Statement of Claim) he was still unemployed.

In my opinion the above constitute sufficient particulars to bring to the clear knowledge of the Company what case they had to meet. No surprise could possibly have arisen at the trial. So

I do not think that there can be any valid complaint on that score. On the question of evidence, the appellant gave uncontroverted evidence that since the day of his termination up to the day he was giving evidence at the trial on 10th October, 1977, he was unemployed. He also gave uncontroverted evidence of the efforts that he had made to obtain other employment without success and went as far as to produce copies of applications for employment sent to various establishments. In this connection it is pertinent to quote the learned author of Chitty on Contracts (Specific Contracts) 23rd Edition. He states at Para. 745 p. 387:—

"The onus of proof is on the defendant employer to produce evidence to show that the dismissed employee ought reasonably to have obtained alternative employment."

In my opinion there was abundant evidence on which the Special damages claimed could be assessed. The evidence shows that the appellant was unemployed for over a year. I do not think that it would be reasonable to compensate him for the whole period of his unemployment. He is under a duty to mitigate his loss. The Special damages awarded to him under this head should be for what the Court considers a reasonable period having regard to all the circumstances of the case. The circumstances

which I consider relevant and important in this case are that the appellant was [p.84] trained as a brewer and it is common knowledge that the Respondent Companies are the only brewers in Sierra Leone. In the circumstances I think that six months is a reasonable period for which to compensate the appellant under this head of Special damages. I would therefore award the appellant Le3315 for loss of salary, Le350 for loss of housing allowance and Le180 for loss of car allowance, totaling Le3845.

Learned Counsel for the appellant contended that the appellant was entitled to be paid for the whole of October, 1976.

Mr. Berthan Macaulay Jr. Learned Counsel for the Company submitted that the appellant was entitled to salary only for the days worked i.e. 5 days for which he had been paid. He relied for his submission on the Apportionment Act, 1870 which is an English Act of general application applicable in Sierra Leone by virtue of Section 74 of the Courts Act, 1965. Section 2 of the Apportionment Act 1870 provides inter alia that:

"all annuities …… and other periodical payments in the nature of income ……. shall, …….. be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." And Section 5 of the Act expressly includes "salaries" within the meaning of "annuities"

I agree with Mr. Berthan Macaulay's submission and the appellant's claim in this regard therefore fails.

There was some argument on the Court of Appeals failure to award costs to the appellant. Having regard to the result of this appeal and the order we propose making, I don't think that any useful purpose would be served by discussing this subject in any detail in this judgment. Suffice it to say that the well established rule of this Court and of all Courts inferior to it is that the successful party is entitled to his costs unless the [p.85] Court in exercise of its discretion comes to the conclusion that for some special reasons connected with the case he should be deprived of it: See Ritter v. Godfrey (1920) 2 K.B. 47 C.A. Donald Campbell & Co v. Pollak (1927) A.C. 732 H.L. Administrator General v. Biakieu (1972-73) A.L.R. (S.L.) 310 S.C and A.J. Thomas v. J. Val Doherty & Anor. Civ. App. 28/72 C.A. (unreported) judgment delivered on 28th January, 1976.

In my opinion this case has highlighted certain imperfections in our law relating to Employment. The defence of the Company was that they acted in accordance with the Service Agreement by paying two months' salary in lieu of notice into the account of the appellant. If they had made the payment at the time due, that plea would have succeeded and the appellant's would have failed. That is the strict common law Position. According to the common law if an employer gives notice for the prescribed period under the Contract of Employment or pays the equivalent salary in lieu of such notice, the termination is lawful and the employee has no remedy in law. Similarly in a case where no period of notice is prescribed in the Contract of Employment, if the employer gives what the Court considers to, be reasonable notice in the circumstances or pays salary in lieu thereof, the termination is lawful and the employee has no remedy in law. It does not matter how unfair or high-handed the termination was, or for how long the employee had served the employer. If the employer acts in accordance with the terms of the Contract of Employment he is protected. The common law rule is illustrated by innumerable cases in the Law Reports. A Few random examples are Addis vs. Gramophone Company

(supra) Austwick v. Midland Railway (1909) 25 T.L.R. 728, and U.A.C. Ltd. v. Kallay (1960-64) 1 S.L.L.R. 136.

[p.86]

The resulting position according to our present law is that an employee is at the mercy of his employer. An employee who may have rendered many years, may be ten or twenty years, of loyal, faithful and meritorious service, could be dismissed for no just cause, without assigning any reason, by the employer giving him the prescribed notice or salary in lieu thereof in accordance with the terms of the Contract of Employment. The employer may have acted out of spite, malice or other unworthy motives. But according to the common law so long as he complies with the terms of the Contract of Employment he is protected and the employee has no remedy in law. In such a situation no employee feels secure in his employment. There is no security of tenure. A man who has done twenty years of faithful and exemplary service may at the stroke of the pen appended to a valid notice of termination be thrown into the unemployment pool. The seniority of the employee does not matter, so long as the employer complies with the terms of the Contract. And if an employer can act in that way to a senior employee one can only pray "May the Good Lord save the junior employees."

In my opinion the present position reveals a most undesirable state of affairs that should be remedied as soon as possible. Unfortunately, the hands of the Courts are tied. We cannot intervene to remedy the situation by extending the common law to confer new rights or remedies on dismissed employees. The situation calls for statutory intervention. Parliament should enact laws for the protection of employees against arbitrary, high-handed and unfair dismissals. This has been done in other countries. See (U.K) Industrial Relations Act, 1971, (U.K) Trade Union and Labour Relations Act, 1974, (U.K) Employment Protection Act, 1975, [p.87] and (Ghana) Industrial Relations Act, 1965. And there is no reason why it should not be done in Sierra Leone. Such an enactment could confer a right of action on an employee for unfair, as distinct from wrongful, dismissal; prescribe the minimum notice of termination to be given having regard to the nature of the job, the seniority of the employee, the length of his service; specify that the reasons for the termination must be stated in writing and communicated to the employee; limit the causes for which an employee may be terminated after a stated number of years service; and confer on the Courts or other appropriate tribunal power to order the reinstatement of the employee or order compensation or both. Such or allied legislation could also make provision for compulsory minimum pension and gratuity rights of all employees in prescribed establishments e.g. Companies or bodies employing more than 50 persons or with a prescribed share capital or engaged in certain enterprises. Having said all this, it must be obvious that the need and urgency for reform in the field of the law relating to Master and Servant cannot be over-emphasized. It must be recognized that invariably employees are in a less advantageous bargaining position vis-a-vis employers. Most of the time they have no alternative but to accept the terms and conditions presented to them by their employer. It is an attitude of "Take it or Leave it." So if an employer presents a Service Contract to an employee he proposes to engage as a Manager providing for one month's notice of termination, the employee does not have much choice but to accept the terms or return to the employment market. Employees need to be protected by the State from unscrupulous, unreasonable, unsympathetic or oppressive employers. That is one sure way to guarantee the existence of a contented and secure body of workers in the realm.

[p.88]

It only remains for me to express my gratitude to learned Counsel who appeared in this appeal for their assistance and to say that I would allow the appeal and award the appellant Le3845 as Special damages with costs to the appellant in the Courts below and in this Court. I would dismiss the Cross-appeal with costs.

(SGD.)

E. LIVESEY LUKE, C.J.

(SGD.)

C.A. HARDING, J.S.C.

I agree

(SGD.)

D.B.R. TEJAN, J.S.C.

I agree

(SGD)

A. AWUNOR-RENNER, J.S.C.

I agree

(SGD)

S. BECCLES. DAVIES, J.S.C

CASES REFERRED TO

1. Addis v. Gramophone Company Ltd. (1909) A.C. 488 H.L. per Lord Loreburn L.C. at pp. 489-490.

2. Hadley v Baxendale (1854) 9 Exch.341 (1843-1860) All E.R Rep. 461

3. Monarch Steamship Company Ltd. v. A/B Karlshamns: Oljefabriker AB. (1949) 1 All E.R.1 H.L

4. British Guiana Credit Corporation v. De Silva (1965) 1 W.L.R. 248

5. Ratcliffe v. Evans (1892) 2 Q.B. 524 at 528

6. Monk v. Redwing Aircraft Company Ltd. (1941) 1 K.B.182

7. Phipps v. Orthodox Unit Trusts Ltd. (1958) 1 Q.B. 314 per Jenkins L.J. at p. 321

8. Ritter v. Godfrey (1920) 2 K.B. 47 C.A. (unreported)

9. Donald Campbell & Co v. Pollak (1927) A.C. 732 H.L. (unreported)

10. Administrator General v. Biakieu (1972-73) A.L.R. (S.L.) 310 S.C (unreported)

11. A.J. Thomas v. J. Val Doherty & Anor. Civ. App. 28/72 C.A. (unreported)

12. Austwick v. Midland Railway (1909) 25 T.L.R. 728,

13. U.A.C. Ltd. v. Kallay (1960-64) 1 S.L.L.R. 136.

STATUTES REFERRED TO

1. (U.K) Industrial Relations Act, 1971

2. (U.K) Trade Union and Labour Relations Act, 1974

3. (U.K) Employment Protection Act, 1975

4. (Ghana) Industrial Relations Act, 1965

THE STATE v. I. M. ISCANDRI

[SC. CR.APP. 3/79] [p.1-5]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 18 FEBRUARY 1980

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.

MR. JUSTICE C. A. HARDING, J.S.C.

MR. JUSTICE O. B. R. TEJAN, J.S.C.

MRS. JUSTICE A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

BETWEEN

THE STATE — APPLICANT

AND

I. M. ISCANDRI — RESPONDENT

Dr. W. S. Marcus Jones for The State

Mrs. H. Ahmed for the Respondent

AWUNOR-RENNER, J.S.C.

This is an application for leave to amend the official record of the above appeal by the addition to it of the transcript of a tape recording made of the arguments before the Sierra Leone Court of Appeal on Thursday 1st March. 1979.

The application is supported by an affidavit sworn to by Dr. Marcus Jones, Counsel for the applicant on the 8th day of January 1980

The circumstances leading to this application are as follows. “The hearing of the appeal in this matter was fixed for the 25th day of January, 1979. The appeal was dismissed without any hearing on that date because of the non-appearance of counsel for the applicant.

[p.2]

On the same date Counsel for the applicant took out a motion for the appeal to be relisted. The application was granted and the appeal was fixed for hearing on the 20th February, 1979. On the 17th day of February 1979, Counsel for the applicant failed to appear in Court.

After this, the Court ordered his personal appearance on the 23rd February, 1979. Counsel eventually appeared in court on the 1st March 1979. He then stated before us that on account of the nature of the Court's order he took a tape recorder machine to Court that day and made a recording of what transpired in Court. He was now making this application he said because of the scanty nature of the record of the proceedings of 1st March, 1979. That he verily believed that they did not adequately reflect the nature of what happened in Court.

He also stated that he had the tape in his possession and that he had personally checked the transcript with the tape recording and that he believed it to be a true and correct transcript of the proceedings of the 1st March, 1979.

In his argument before the Court, Counsel for the applicant after referring the Court to the various exhibits annexed to his affidavit said that he was making this application because of the scanty notes on page 15 of the record of the Court of Appeal and because of the nature and particularly ground (b) of his appeal which states as follows:—

[p.3]

"That the Court of Appeal failed to allow the appellant herein to put forward its arguments clearly and interrupted the arguments so excessively that it became impossible for the said arguments to be fairly put".

Counsel submitted that it was for this Court to control its proceedings and admit the transcript of the tape recording.

Mrs. Hannah Ahmed for respondent said that she was not objecting in principle to the application but submitted that the proper foundation had not been laid. Certain requirements she said must be fulfilled.

(i) That the applicant must first prove the authenticity of the tape recording transcribed into a transcript.

(ii) Such transcript must be proved from the original tape. She referred the Court to two cases in support to her submission. R. v. Ali reported in (1965) 2 A.E.R. at page 464 and also to the case of R. v. Robson (1972) 1 W.L.R. at page 651.

Let me at this stage say that during the hearing of this application the Court adjourned for sometime to give Counsel for the respondent an opportunity of listening to the original tape recording.

When the Court reconvened after the adjournment she said that although she had listened to the tape recording she could not even recognise her own voice [p.4] although some of the contents of the recording sounded familiar. I must add also that she did not file any affidavit in opposition to the affidavit filed in support of this application.

In the case of R. V. Robson referred to supra evidence of a tape recording was admitted in evidence.

It was held that in admitting the evidence of a tape recording the method of making the recording cannot effect its acceptance by this Court as Counsel for the applicant has told this Court why he did it This Court saw and read the transcript of the tape recording and Counsel for the respondent also listened to the tape recording. One cannot say that any grave injustice would be done in accepting the transcript as the material contained in it is relevant and is the only record of what transpired in Court on that day as the judge's notes were most inadequate.

The justice of the case demands that if ground (b) should be properly argued then the transcript of the recording must be accepted to form part of the record. It must however be emphasized (sic) that each case must be decided on its merits.

In the present case there is no doubt that the record of the proceedings taken on the 1st day of March, 1979 was most inadequate. I have also considered the cases which have been referred to and listened to the arguments of both Counsel for the applicant and respondent and also had the opportunity of reading the transcript of the tape recording and feel that this is fit and proper case for this Court to exercise its discretion and allow the application [p.5] now made before him.

Having said that the application for leave to amend the official record by the addition to it of the transcript of a tape recording made of the proceedings before the Court of Appeal in this case ought to be allowed. I would like to add that this should not be regarded as a general practice as otherwise it would definitely lead to a situation where the Supreme Court and the Court of Appeal in every case would be called upon not only to admit transcripts to tape recordings but also to allow amendment of

their records in this way. It is only in exceptional cases and, for cogent reasons that this Court would entertain such applications.

It is for the above reasons that I concurred in granting the application on the 15th January, 1980.

[Sgd.]

Hon. Justice A. Awunor-Renner, J.S.C.

I agree

[Sgd.]

Hon Justice E. Livesey Luke, Chief Justice

I agree

[Sgd.]

Hon Justice O. A. Harding, J.S.C.

I agree

[Sgd.]

Hon Justice O. Bo R. Tejan, J.S.C.

I agree

[Sgd.]

Hon Justice S. Beccles Davies, J.S.C.

CASES REFERRED TO

1. R. v. Ali reported in (1965) 2 A.E.R. at page 464

2. R. v. Robson (1972) 1 W.L.R. at page 651.

THE STATE v. I. M. ISCANDRI

[SC. CRIM.APP. 3/79] [p.5-14]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 18TH FEBRUARY, 1980

CORAM: JUSTICE E. LIVESEY LUKE, C.J.

JUSTICE C.A. HARDING, J.S.C.

JUSTICE O.S.R. TEJAN, J.S.C.

JUSTICE A.V. AWUNOR-RENNER, J.S.C.

JUSTICE S. BECCLES-DAVIES, J.S.C.

THE STATE — APPLICANT

VS.

I.M. ISCANDRI — RESPONDENT

Dr. W.S. Marcus Jones Esq., for the State

Mrs. Hannah Ahmed for the Respondent

AWUNOR-RENNER J.S.C.

This an appeal from an order of the Court of Appeal made on the 11th day of July, 1979.

The events leading to this appeal started on the 10th September, 1973 when the respondent who was standing trial before the High Court in Freetown was acquitted and discharged after counsel representing him had invoked the provisions of Section 131 (2) of the Criminal Procedure Act number 32 of 1965. In consequence of this the appellant appealed to the Court of Appeal on the 29th day of March, 1974. when the matter eventually came up before the Court of Appeal, the appeal was dismissed for nonappearance by the Appellant. After the dismissal of the Appeal, Counsel for the appellant applied to have the matter restored to the list.

The application was granted and the appeal listed for hearing on the 20th day of February, 1979.

On the 17th day of February, 1979, counsel for the appellant filed a Notice of Abandonment under the provisions of Rule 45(1) of the Court of Appeal Rules 1973. Thereafter counsel for the Appellant did not appear in Court until he was requested to do so. On the 1st March, 1979 he appeared and submitted that he had already filed a Notice of Abandonment. The Court proceeded to hear arguments on the question of costs not-withstanding the filing of the Notice of Abandonment.

I need not go into all the details of what transpired in Court as this is contained in the transcript of a tape recording of the proceedings on that day which now forms part of the record of proceedings. On the 11th day of July, 1979 Judgment was delivered.

[p.6]

The Appeal was dismissed with costs against the State with such costs assessed at Le100.00.

These are the facts in outline.

Counsel for the Appellant has now appealed to, this Court against the said decision on the following grounds.

(a) The Court of Appeal was wrong in awarding Costs against the State of Le.l00.00

(b) The Court of Appeal failed to allow the appellant to put forward its argument clearly and interrupted the arguments so excessively that it became impossible for the said arguments to be fairly put

(c) That the Court of Appeal failed to give any or sufficient consideration to arguments against the award of costs in the circumstances of this case

(d) That the Court of Appeal erred in law in adverting an issue which did not affect the merits of the Appeal namely what is described as the dubious legal representation of the State.

Let me at this stage say that this last ground was abandoned by Counsel for the Appellant.

I now briefly turn to the points of arguments raised by both Counsel for the appellant and for the respondent before this Court.

Counsel for the Appellant argued that as far as the State was concerned there was no time limit within which it should appeal.

[p.8]

He referred the Court to Section 64 of the Court's Act 1965 and also to the amendment of the Courts Act Section 57 by Section 6 of the Courts Amendment Act number 21 of 1966.

In support of his arguments he further said that time does not run against the State unless it is so prescribed.

A statute does not bind the State unless it says so he said, he claimed that the Court was wrong in law in awarding costs against the State.

There has been an abandonment he said as prescribed by rule 45 (1) of the Court of Appeal Rules 1973 and that the appeal was therefore not before the Court. In support of his submission he referred the Court to the case of R.V. Medway (1976) 2 W.L.R. at page 528.

Finally as regards ground (b) Counsel for the appellant merely referred the Court to the case of. Jones V National Coal Board (1957) 2 A.E.R, at page 155 at page 159 claiming that the interruptions were excessive and that he was not given a fair hearing. He further added that the record spoke for itself.

Mrs. Hannah Ahmed counsel for the respondent replying to Counsel for the appellant referred the Court to Section 57(1) of the Courts Act 1965 as amended by Section 6 of the Court’s Amendment Act 1966. This Section she speaks about an aggrieved person which also includes the State.

As regards the more important issue of abandonment under rule 45 (1) of the Court of Appeal Rules 1973. Counsel for the respondent had this to say and I quote:

[p.9]

"The words deemed to be dismissed does not mean that it is the end of the matter or that Once a Notice of Abandonment has been filed that is the end."

With regards, to the question of Costs which has been awarded by the Court of Appeal Rules 1973 which reads as follows:

"On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto the Costs if any shall be at the discretion of the Court."

On the question of the excessive interruptions by the Court of Appeal, Mrs. Ahmed stressed that the interruptions were not excessive and that Counsel was giving an opportunity to be heard and referred to the last two lines at page 13 of the transcript of the tape recording for confirmation on this point.

The only question to be answered in my view as regards the appeal now before this Court is what would be the effect on an application or an appeal pending before the Court of Appeal when once the provisions of Rule 45 (1) of the Court of appeal rules 1973 have been invoked. I think that it is convenient at this stage to recite the provisions of this Rule.

It reads as follows and I quote:

"An appellant at any time after he has duly served Notice of Appeal or of application for leave to appeal or of application for extension of time within [p.10] which such notice shall be given, may abandon his appeal by giving Notice of Abandonment thereof in Form 9 in Appendix C to the Registrar and upon such notice being given, the appeal shall be deemed to have been dismissed by the Court.

As stated earlier Counsel for the appellant had referred the Court to the Case of R.V. Medway Supra. In that case the applicant had applied to a single judge to discharge a detention order made against him under Section 60 of the Mental Health Act 1959. The single Judge had dismissed his application. The applicant then applied to the full Court for leave to withdraw his Notice of Abandonment. Lawson J. in delivering the judgment of the Court at page 533 referred to rule 23 of the English Criminal Appeal Rules 1908 which reads as follows:—

"An appellant at any time after he has duly served notice of appeal or of application for leave to appeal may abandon his appeal by giving Notice of Abandonment thereof in Form 111 in the schedule of these rules to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal."

This rule is more or less couched in the same terms as our Court of Appeal rules 45(1) of the court of appeal Rules 1973.

[p.11]

In continuing his judgment further down at the same page 533 he had this to say.

"The situation under the rules, whether, of 1908 or 1968 is that when a Notice of Abandonment has been given the application or appeal of which it is the subject matter is disposed of whichever formula is applied either that from the rules of 1908 "deemed to have been dismissed" or that from the rules of 1968 "treated as having been dismissed or refused". It follows that after abandonment the Court is functus officio. That being so there is no longer any proceedings extant before the Court in relation to which its jurisdiction can be exercised".

Also in the case of R.V. Essex Quarter Sessions, Ex Parte Larkin (1961) 3 A.E.R. at page 930 and at page 932

Lord Parker C.J. had this to say

"The jurisdiction of any Appellate Court is statutory and in the absence of being seised of an appeal they have no discretion at all. All that an Appellate Court can do in circumstances such as these is to look at the position to see whether there is an abandonment. Once they find that there has been abandonment they can nothing further in the matter."

[p.12]

I now turn to the present case before us. The Notice I now turn to the present case before us. The notice of the Abandonment of the appeal before the Court of Appeal was filed on the 17th day of February, 1979. On the 1st March, 1979 counsel for the appellant informed the Court of this but the Court ignored this information and proceeded to continue with the matter and to award costs. In my opinion I feel it is the intention of the Rule Making Body to put an end to all proceedings when once a Notice of Abandonment has been filed under Rule 45 (1) of the Court of Appeal Rules 1973. I find support for this in the cases mentioned above and in my construction of the said rule. I hold therefore that the Court of Appeal disregarded the provisions of rule 45 (1) and that in effect after rule 45(1) had been invoked that there was nothing before the Court of Appeal.

Having said that there was no proceeding before the Court of Appeal whatever followed was a nullity and therefore they should not have awarded costs against the appellant under the circumstances. I would however wish to add that rule 62 of the Court of Appeal Rules 1973 lays down the following provision as regards the award of costs in that Court.

The rule reads;

"On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto the costs if any shall be at the discretion of the Court. The award of costs is entirely in the discretion of the Court so long as that discretion is not exercised on wrong principles of law."

[p.13]

I know of no provision in our laws which states that costs cannot be awarded against the State.

I would finally like to say, something in passing about the complaint of Counsel for the appellant as regards the excessive interventions of one of the judges in the Court of Appeal which resulted in his not been able to put his arguments fairly.

Let me borrow the words of Lord Justice Denning in the case of Jones v National Coal Board (1957) 2. A.E.R. at page 155 at page l59. Lord Bacon spoke right when he said:

"Patience and gravity of hearing is an essential part of justice, and an over speaking judge is no well tuned cymbal".

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice our keenness may outrun our sureness and we may trip and fall. A judge of acute perception, acknowledge learning and actuated by the best of motive, has nevertheless intervened so much in the conduct of the case that one of the parties has come away complaining that he was not able to put his case properly."

All judges must bear these words in mind as everyone is entitled to a fair hearing in which he or she can put his or her case properly before the Court.

[p.14]

For the reason given above I would allow the appeal accordingly and set aside the order for costs.

[Sgd.]

Hon. Justice A.V.A. Awunor-Renner, J.S.C.

I agree

[Sgd.]

Hon. Justice E. Livesey Luke, Chief Justice

I agree

Hon. Justice C. A. Harding, J.S.C.

I agree

[Sgd.]

Hon. Justice O. B. R. Tejan, J. S. C.

I agree

[Sgd.]

Hon. Justice S. Beccles Davies, J. S.C.

CASES REFERRED TO

1. R.V. Medway (1976) 2 W.L.R. at page 528.

2. Jones V National Coal Board (1957) 2 A.E.R

3. R.V. Essex Quarter Sessions, Ex Parte Larkin (1961) 3 A.E.R.

STATUTES REFERRED TO

1. Section 64 of the Court's Act 196

2. Section 57 by Section 6 of the Courts Amendment Act number 21 of 1966

3. Rule 45 (1) of the Court of Appeal Rules 1973

4. Rule 23 of the English Criminal Appeal Rules 1908

1981

JUSTICES OF THE SUPREME COURT

HON. MR. JUSTICE E. LIVESEY LUKE	-	Chief Justice
HON. MR. JUSTICE C.A. HARDING	-	Justice of the Supreme Court
HON. MR. JUSTICE D.B.R. TEJAN	-	Justice of the Supreme Court
HON. MRS. JUSTICE A.V. A. AWUNOR-RENNER	-	Justice of the Supreme Court
HON. MR. JUSTICE S. BECCLES DAVIES	-	Justice of the Supreme Court

REGISTRAR

E.G. NELSON-WILLIAMS, EAQ. (ACTING)

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ZOUZOUKO DEGUI vs. THE STATE

ALPHABETICAL LISTING

ABU KAMARA AND AMADU GBOYO

[Civ. App. No. 2/80][p.109-119]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 13TH JULY 1981

CORAM: MR. JUSTICE E. LIVESEY LUKE, CHIEF JUSTICE; MR. JUSTICE C.A. HARDING, J. S. C; MR. JUSTICE O.B.R. TEJAN, J. S. C; MRS. JUSTICE A.V.A. AWUNOR-RENNER, J. S. C; MR. JUSTICE KEN E.O. DURING, J.A.

BETWEEN:

ABU KAMARA - APPELLANT

AND

AMADU GBOYO - RESPONDENT

Mr. A.F. Seray Kamal for Appellant

Mr. F.M. Carew for the Respondant

Judgment Delivered This 13th day of July, 1981

TEJAN J.S.C.

On the 22nd day of May 1972 the Yoni Local Court delivered judgment in the ease between Amadu Gboyo

Hereinafter referred to as the Plaintiff) and Abu Kamara (hereinafter referred to as the Defendant), The Plaintiff's claim against the defendant was for unlawfully brushing their land, The Yoni Local Court, after having heard the parties and their witnesses gave judgment in favour of the defendant. The judgment was in the following terms:—

“Verdict of the Court after consulting with members. The Court President (now Chairman) informed the Court that according to the case between Amadu Gboyo of Mayobo and Abu Kamara of Mabilla, the Court had found out that the defendant Abu Kamara of Mabilla has right in the ease, because the Court has found out that the boundry of Pa Sheka Maila which the witnesses described from the river…… [p.110] and Konta and confirmed that this was the boundary which the Mabilla and Masiray people swore for. The reason why I accepted this boundary is because it has taken over ten years. There was no objection that some people were having the land. According to the evidence or the witnesses, Pa Alimamy Koroma was the section chief and he was the one who asked the section people to take the bush after the swearing. Since they had sworn, I did not get any report that somebody had gone in this bush to judge them. The witnesses have told me that the defendants have sworn for this bush but he did not go there…… Being that the witness have told me that Fulamassa came and was present when the boundary was laid and he even sent Pa Kapri Sanka to Represent him while the defendants' people were Sworn for the boundary between them and the Mecca people. All these made me go give Abu Kamara of Mabilla right. If anybody jumps this boundary the said person will pay fine of Le.100 to the Court, he will be punished by the law.

H.R.T.P. _ Abdulai Turay

Court's President”

It is against this judgment of the Yoni Local Court that the plaintiff appealed to the District Appeal Court. The record does not contain the notice and grounds of appeal, but however, the learned Magistrate re-beard the whole ease and heard witnesses called by the parties in pursuance of Section 1 of the Local Courts (Amendment) Act 1966 which enacts that—

[p.111]

“In any such appeal the District Appeal Court shall re-hear the whale case and hear any additional witnesses called by the parties even though they did not give evidence in the Court below.”

The jurisdiction conferred on the Magistrate to hear the appeal is to be found in Section 29(1) of the Local Courts Act 196) which provides that:

“As from the commencement of this Act, there shall be constituted a District Appeal Court which consist of the Police Magistrate for each district sitting with two Assessors selected by him form a list of experts in customary law drawn up by the District Officer:

Provided that in any ease where it appears that no question of customary law will arise the Magistrate may sit without Assessors.”

Section 29(2) of the same Act states that “the Assessors shall advise Magistrate on questions of customary law but the decision shall be vested exclusively in the Magistrate who shall record the reasons for his decisions.”

After having heard the parties and their witness and after careful survey of the evidence the learned Magistrate allowed the appeal set aside the decision of the Yoni Local Court and substituted therefore a declaration of title in favour of the plaintiff.

The defendant gave an oral notice of appeal to appeal against the decision of the learned Magistrate to the Local Appeals Division of the High Court on the following grounds:—

[p.112]

(1) Pa Alimamy Koroma is a relative of the appellant.

(2) It was Pa Alimamy Koroma who forced us to swear on oath.

(3) The appellant's father was a member of the local Court that gave decision in the case between Sheka Maila . and Pa Alimamy Koroma.

At the Local Appeals Division of the High Court, the parties were represented by Counsel. It does not appear from the records that the grounds of appeal were amended but the records show the following grounds of appeal:

(a) That the decision of the Tonkolili District Appeal Court was unreasonable and could not be supported having regard to the evidence.

(b) That the learned Principal Magistrate erred in holding that "it was wrong therefore for the lower Court to conclude that because the respondents (now appellants) succeeded in an action against Pa Alimamy Koroma therefore the land is theirs".

(c) at the learned Principal Magistrate failed to consider the appellant's (then respondent's) defence.

The appeal was heard by Duogu J. sitting with two Assessors. Judgment was delivered on 15th January 1976 setting aside the judgment of the District Appeal Court and restoring the judgment of the Yoni Local Court.

The plaintiff appealed against the judgment of the Local Appeals Division of the High Court. The grounds of appeal are:—

[p.113]

(1) That the learned Appellate Judge was wrong in law in holding that the learned Presiding Magistrate in the Tonkolili District Appeal Court was wrong in holding a re-hearing.

(2) That the learned Appellate Judge was wrong in law in basing his decision on question of Res Judicate and Estoppel even though such principles did not form any part of grounds of appeal before this Court.

(3) That the decision of the Court is unreasonable having regard to all the circumstances of the case.

When hearing started before the Court of Appeal, the third ground of appeal was amended to read: "That the decision was against the weight of evidence".

The Court of Appeal consisting of S.B. Davies (J.A. as he then was) Warne and Navo JJ.A heard the appeal. The judgment of the Court was delivered by Warne J.A. on 23rd April 1980. The Court of Appeal set aside the judgment of the Local Appeals Division of the High Court and restored the judgment of the District Appeal Court.

The defendant has now appealed against the judgment of the Court of Appeal to this Court. Mr. Serry Kamal for the defendant appealed on four grounds. These grounds are: (1) The Court of Appeal was wrong in holding that the trial Judge based his decision on the grounds that appellant should have justified the grounds of appeal before the re-hearing before the District Appeal Court; (2) The Court of Appeal was wrong in law in law in holding that nothing in Section 50 (1) (b) of the Act empowered the district Appeal Court to enquire if proceedings before it had been completed and it was being re-opened;

[p.114]

(3) That the Court Of Appeal was wrong in law in holding that there was no evidence on which the High Court found that Res Judicata applied; (4) That the Court of Appeal was wrong in law in failing to appreciate the effect of the judgment of the Yoni Local] Court 1957.

Mr. Serry Kamal Counsel for the defendant argued grounds 2, 3 and 4.

With regard to ground 2, Section 50(')(b) of the Local Courts Act, 1963 enacts that "no proceedings before any such Court which were finally terminated before the commencement of this Act shall be re-opened but any judgment, order or sentence made or passed in any such proceedings may be enforced in the same way as if this ct; had not come into operation."

Mr. Serry Kamal placed prime reliance on the above provisions to support his submission that on his notice of motion dated the 6th day of December, 1974, praying for an order to call additional evidence and on the granting of his application by the 1earned judge of the Loca1 Appea1s Division of the High Court, he was alloyed to tender in evidence a record of proceedings before the Yoni Native Court in 1957.

Looking at the record of proceedings before the Yoni Native Court 1957, there is nothing to show that any proceedings between the plaintiff and the defendant were finally terminated. The Yoni Native Court in 1957 decided an action between one Sheka Maiia of Maseray and Sanitigie Bangura of Romaka. The learned Principal Magistrate did pot re-open any matter which had been finally terminated by the Yoni Native Court. What the learned principal Magistrate did was to re-hear the whole case between. The plaintiff's and the defendant in accordance with Section 1 of the Local Courts (Amendment) Act 1966 which has already been quoted.

[p.115]

The Learned Principal Magistrate sitting with two Assessors who were experts in customary law heard the parties and their witnesses and arrived at his finding of fact when he said:

“On the totality of the evidence, there is no doubt in my mind, that the claim o£ the appellant (plaintiff) is clear and straightforward. It was satisfactorily proved. The evidence of the appellant's (plaintiff’s) witnesses are consistent and co-herent and very convincing too. This findings of fact of the Learned principal Magistrate who sat with expert assessors ought not to have been lightly interfered with by the learned Judge.

Ground jury raises the question o£ res judicata. Mr. Serry-Kamal used the record of proceeding in the Yoni Native Court in 1957 as a basis for his submission.

The doctrine of res judicata is based on two theories; first, the general interest of the community in the termination of evidence and in the finality and conclusion of judicial decisions; and, secondly, the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may unless curbed by the estoppel, weighed down judicially declared right and innocence. The former is public policy, and latter is private justice. (See Spencer-Bower And Turner on Res Judicata 2nd Ed. At page 10) for res judicata to succeed, there must be identity of the issues involved. Lord Reid in his speech in the case of Carl Zeiss Swiftung v. Rayner & keeler Ltd. No. 2 (1967) 1 A.C. 853 at pp. 910 and 913 said:

[p.116]

“Let me take first the identity of the parties. In this preliminary or interlocutory matter the issue is whether the nominal plaintiff is before the Court at all. If it is decided in favour of the defendant, that establishes that the nominal plaintiff was never before the Court…… Again there is no doubt that the requirement of identity of parties is satisfied if there is privity between a party to the former litigation and a party to the present litigation……..the estoppel requirement for res judicata is identity of the subject matter. As to this, it has become acome to distinguish between case of motion estoppels and issue estoppels.”

In the same case Lori Guest said at page 933:

“The doctrine of estoppels per rem judicatam is relected in two latin maxims (1) interest rei publicae sit finis litium, and (2) nemo debet bis vexari pro una et eadem cause. The former is public policy and the latter is private justice. The rule of estoppel res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, “any party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (Spencer Bower on Res Judicata p.3)

[p.117]

And he continued at p.935:

“The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies……

And at page 946 of the same Report Lord Upjohn said:

“The broader principle of' res judieata is founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts established and reasons given by the Judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account (See Margirson v. Blackburn Borough Council (1939) 2 K.B. 426.”

Where res judicata is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of' the parties are concluded by the earlier judgment, [p.118] which may have involved the determination of questions of law as well as findings of fact. Even though the judgment was pleadable by way of estoppel it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment. See Halsbury Laws of England 4th Ed. Vol. 16 at para. 1527.

In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of pes judieata must show either an actual merger, or that the same point has been actually decided between the same parties. See Halsbury Laws of England 4th Ed. Vol. 16 at para 1528.

It is quite clear in the appeal before us that the action which was before the Yoni Native Court in 1957 was between Sheka Maila v. Santigie Bangura, and that the cause of action was for jumping the boundary laid by Pa Reke Kenke. The case before the Yoni Local Court in 1972 and the District Appeal Court in 1972 was between Amadu Gboyo (the plaintiff) v. Abu Kamara (the defendant) and the cause of action was for unlawfully brushing his bush,

There is no evidence that the parties in the 1957 proceedings were the same as those in the 1972 proceedings or that the action was instituted in a representative capacity to qualify the parties as privies. The 1957 action was instituted by Pa Alimamy Koroma against Santigie Bangura. None of the essential ingredients to raise a plea of res judicata was in evidence in the 1957 proceedings. I therefore agree with the Court of Appeal that there was no evidence upon which the Local Appeals Division of the High Court could find that the plea of res judicata applied.

[p.119]

With regard to ground 4, Mr. Serry-Kamal complained that the Court or Appeal failed to appreciate the effect or the judgment or the Yoni Local Court in 1957. But Counsel did not elaborate on this ground or appeal, and I cannot find any substance or merit it.

I would therefore dismiss the appeal.

(Sgd.) O. B.R. Tejan, J.S.C.

I agree

(Sgd.) E. Livesey Luke, C.J.

I agree

(Sgd.) C.A. Harding, J.S.O.

I agree

(Sgd.) A.V.A. Awunor-Renner, J.S.C.

I agree

(Sgd.) K.E.O. During, J.A.A

CASES REFERRED TO

1. Carl Zeiss Swiftung v. Rayner & keeler Ltd. No. 2 (1967) 1 A.C. 853 at pp. 910 and 913

2. Margirson v. Blackburn Borough Council (1939) 2 K.B. 426

STATUTES REFERRED TO

1. Halsbury Laws of England 4th Ed. Vol. 16 at para. 1527

2. Halsbury Laws of England 4th Ed. Vol. 16 at para 1528

ALIMMY TURAY AND CECILIA KOROMA

[Civ. App. No. 3/80][p.182-231]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 17 DECEMBER 1981

Coram: R. JUSTICE E. LIVESEY LUKE, C.J.; MR. JUSTICE C.A. HARDING, J.S.C.; MR. JUSTICE O.B.R. TEJAN, J.S.C.; MRS. JUSTICE AWUNOR-RENNER, J.S.C.; MR. JUSTICE K.E.O. DURING

Alimamy Turay - Appellant

and

Cecilia Koroma - Respondent

E.A. Thomas, Esq. for the Appellant

E.L. Michael, Esq. for the Respondent

JUDGMENT

LIVESEY LUKE C. J.

The respondent was injured in a motor accident on the Freetown/Bo Road on 17th July, 1975. As a result, action was taken against the appellant for damages for negligence. The respondent was a 13 year old school girl at the time of the accident. She suffered from a fractured pelvis as a result of the accident. She was admitted in hospital from 17th July, 1975 to 8th September, 1975 and continued physiotherapy treatment thereafter as an out-patient. When the Specialist Gynaecologist and Obstetrician examined her on 31st March, 1977 his findings were; the fracture had healed but there was gross deformity of the pelvis canal i.e. the birth canal. The injuries were permanent. As a result of the deformity of the pelvis, future full term pregnancies will have to be delivered by caesarean section operation. This will limit her child bearing to three children. The carriage of a pregnancy will be painful as a result of the bone injuries to the pelvis. She would probably always [p.183] suffer a certain amount of pain and discomfort during sexual intercourse. She will have terrible back-aches and there is a possibility that her menstrual periods will be more painful than before. She will not be able to take part in active sports. She was in Form 2 at the date of the trial. She said that after the accident she has not been able to study well, although she has not failed her exams.

The appellant did not file a defence to the action and so the respondent proceeded in default. The assessment of damages was by Kutubu J. He awarded the respondent Le25,000 as General Damages and Le1J5.50c as Special Damages. The appellant appealed to the Court of Appeal against the award of General Damages. The complaint was that the judge misdirected himself on the question of general damages and that in any case the award was excessive. The appeal was dismissed by the Court of Appeal. The appellant has now appealed to this Court on substantially the same grounds as those before the Court of Appeal.

The judge did not give a breakdown of his award of general damages under headings. As stated by this Court in Idrissa Conteh v. Abdul J. Kamara S/C Civ. App. No.2/79, judgment delivered on 1st April, 1980 (as yet unreported) the accepted hearings under which general damages for personal injuries may be awarded are: pain and suffering i.e. the bodily injury sustained, the pain and suffering endured, past, present and future, and injury to health loss of amenities; loss of expectation of life; and the present and future financial loss. On the evidence in this case, awards could properly have been made for pain and suffering and loss of amenities. The evidence before the judge did not warrant any award for loss of expectation of life or for present and future financial loss. So the judge took those factors into consideration in making his assessment he was wrong. There has been some argument as to whether the judge made an award in respect of “future or prospective loss of earnings.” To resolve this issue,

[p.184] it is necessary to refer to the judgment. After the learned judge had considered and decided on the claim for special damages he proceeded thus:

“I have now to consider plaintiff's future or prospective loss of earnings. I realise that Plaintiff is an infant still attending school and has not yet embarked on any career, and so there is no figure for net annual loss at the date of trial. There is no scale on which I can weigh the injuries of this girl for compensation. I am therefore reduced to a pure guess-work for the circumstances of this kind of case defy anything like a precise arithmetical calculation. I therefore have to take everything into consideration in granting the plaintiff a lump sum, which I consider commensurate enough in the circumstances of her case.”

The learned judge then highlighted certain “salient points” in the medical evidence and then continued:

“I realise in the circumstances, I have to award a lump sum once and for all, which will be considered reasonable and in doing so I have to take into account all the above considerations.”

It should be noted that in the in first passage the learned judge said that he had to consider “the plaintiff’s future or prospective loss of earning.” He also, said that he had to take-everything into consideration in granting the plaintiff a lump sum. “In the second passage the learned judge said that in making a once for all lump sum award he had to take into account all the above considerations.” It seems quite clear to me that one of the “above considerations” the judge was referring to in [p.185] the second passage was the very first “consideration” he mentioned at the beginning of the first passage i.e. “future or prospective loss of earnings.” Therefore, when the two passages are read together, I am left in no doubt that the learned judge took “future or prospective loss of earnings” into consideration in assessing general damages.

I don't think that there is any dispute that the evidence in this case does not warrant the award of any damages in respect of “future or prospective loss of earnings.” Since the judge, in my view, took that head of damages into consideration in making his awards, in my judgment, he thereby erred.

The principles governing an appellate court in appeals against award of damages are well-settled. In Idrissa Conteh v. Abdul J. Kamara (supra) this court said inter alia:—

“But a well established rule has bean accepted over the years as governing an Appellate Court in the exercise of its power to review an award of damages by a judge sitting alone. The rule is that an Appellate Court will not interfere with an award of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts or has made a wholly erroneous estimate of the damages to which the claimant is entitled.”

See also Flint v. Lovell (1935) 1 K.B. 354 C.A. per Greer L.J. at p. 360; and Owen v. Sykes (1936) 1 X.B. 192 C.A. per Greer L.J. at P. 198.

In my judgment the learned judge gave weight to matters that ought not to have affected his mind. He thereby misapprehended the 'facts, resulting in his making an erroneous estimate of the damages to

which the respondent is entitled. In those circumstances, this court has the power and the duty to correct the error by interfering with the award o£ damages.

[p.186]

It is therefore necessary to consider the quantum or general damages to which the respondent is entitled. As stated earlier, the learned judge did not give a breakdown or his award. It is therefore impossible to know the amount that he awarded under the various heads. So this court is left to speculate. As I said in the course of my judgment in Idrissa Conteh v. Abdul J. Kamara (supra) a judge in this jurisdiction is not obliged to state the amount awarded under each head. There is no rule of court requiring him to do so. But as a matter of practice some judges in this jurisdiction have done so in the past. And that practice is common in other Commonwealth jurisdictions. It would be desirable if judges in this jurisdiction endeavour to apportion their awards of general damages for personal injuries between the various accepted heads. Such a practice would have immense advantages, Firstly, it would contribute to the desirable objective of attaining some measure of standardization the assessment of general damages for personal injuries. It is eminently desirable that as far as possible comparable injuries should be compensated by comparable awards. Sea H. West & Sons Ltd. v. Shepherd (1964) A.C. 326 per Lord Morris at p. 346. Secondly, it would certainly assist other judges engaged in the same task (Of assessing general damages) if judges apportioned their awards between the various heads. Thirdly, it would assist the appellate courts to know how the judge arrived at the overall figure. Thereby the Appellate Court would be spared the bother of speculating as to what amount the judge awarded in respect of each head of damages.

The principles applicable in making assessment of general damages in personal injury cases were stated by this Court in Idrissa Conteh v. Abdul J. Kamara (supra). Put briefly, they are that the damages awarded should be a fair and reasonable compensation for the damage suffered and that perfect compensation is not possible or permissible. In this connection it is relevant to recall the words of Lord Pearce in H. West & Sons Ltd. v. Shepherd (supra). He said inter alia at pp. 368 369:—

[p.187]

“It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award.”

On the question of quantum of damages, learned counsel on both sides cited a number of English decisions on what they considered to be comparable cases. I do not consider those decisions helpful. It became obvious during argument before us that there is a dearth of comparable local cases - reported and unreported. That may have accounted for the learned judge's difficulties in arriving at a fair and reasonable figure.

Applying the above stated principles, and taking all the circumstances into consideration, I would assess general damages for pain and suffering and loss of amenities at Le15,000. I consider that overall figure a' fair and reasonable compensation and indeed a generous estimate. I would therefore reduce the general damages to Le15,000.

I would allow the appeal and reduce the general damages to Le15,000.

…….

Hon. Mr. Justice E. Livesey Luke

Chief Justice

17/12/81

HARDING. J.S.C.

This appeal is against the Judgment of the Court of Appeal dated 23rd April, 1980, dismissing an Appeal from the judgment of Kutubu J. (as he then was) sitting in the Bo High Court, dated 27th February, 1978 on the quantum of general damages awarded to the Respondent/Plaintiff for personal injuries sustained as a result of the negligent driving by the Appellant's servant or agent of a motor vehicle owned by the Appellant.

[p.188]

The Respondent is a school girl, and at the time of the accident, 17th July, 1975, was aged about 13 years. On 11th May, 1977, through her next friend Samuel Koroma, she instituted proceedings claiming damages for negligence. The Appellant did not file a defence to the action and so an Interlocutory Judgment in default was entered on 21st July, 1977. As a result of application being made the damages were ordered to be assessed by the taking of oral evidence. After hearing evidence from Samuel Koroma who tendered two Medical Reports and from Dr. Frazer Specialist Gynaecologist and Obstetrician, and from the Respondent herself, the trial Judge awarded Le135.50 special damages and Le.25,000/00 general damages.

An appeal against this award of general damages having been rejected by the Court of Appeal, the Appellant has now come before this Court.

It was contended by Counsel (for the Appellant) that the amount awarded was “not assessed with moderation, is excessive and punitive, and should have been reduced by the Court of Appeal so as to make it a fair and reasonable compensation for the injuries suffered in the light of previous awards in comparable cases, and to secure some measure of' uniformity thereby”.

Counsel for the Respondent on the other hand submitted that there were only two issues for determination before this Court, firstly whether the trial Judge acted on a wrong principle of law or misapprehended the facts or made a wholly erroneous estimate of the damages to which the Respondent was entitled, and secondly whether the Court of Appeal was wrong in refusing to reduce the award of the trial Judge who sat without a Jury.

The rule is that an appeal against the decision of a Judge upon the quantum of damages will not be allowed unless either (i) the Judge has applied a wrong principle of law; or (ii) that amount awarded is

either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

[p.189]

The principles on which an appellate Court will so interfere have been laid down in a long line of cases both English as well as local and if I may here mention a few - FLINT v LOVELL (1935) 1 K.B. 354, OWEN vs. SYKES (19:36) 1 K.B. 192; DAVIS vs POWELL DUFFRYN ASSOCIATED COLLIERIES LTD. (1942) A.C. 601; LASAWARRACK vs RAFFA BROTHERS & THE NORTHERN ASSURANCE ,CO. LTD. (1962) S.L.L.R. 196 and IDRISSA CONTEH vs ABDUL J. KAMARA S.C. Civ, App. No.2 of 79.

In the case of LASAWARRACK vs RAFFA BROTHERS (supra) it was stated, at p. 197, by Bankole Jones (Ag. C.J. as he then was):—

“An appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. It can only properly interfere if it is satisfied that the Judge applied a wrong principle of law or that the amount awarded is either so inordinately high or so inordinately low that it must be a wholly erroneous estimate of the damages.”

It is well established that the courts when making awards of damages should have regard to awards made by other courts comparable cases. In BIRD vs COCKING & SONS LTD. (1951) 2 T.L.R., Birkett, L.J., said:—

“Although there is no fixed and unalterable standard, the Courts have been making these assessments for many years, and I think that they do form some guide to the kind of figure which is appropriate …….. when, therefore, a particular matter comes for review, one of the questions is, how does this accord with the general. run of assessments made over the years in comparable cases.”

[p.190]

Again" in RUSHTON VB NATIONAL COAL BOARD (1953) 1 Q.B. 495. Romer L.J., stated, at p. 502:-

“The only way …… in which one can achieve anything approaching a uniform standard is by considering cases which have come before the Courts in the past and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.”

It was however pointed out in WALDON vs WAR OFFICE (1956) 1 A.E.R. 108, that reference to other cases is entirely at the Judge's discretion; it should not be looked upon and treated as a precedent out merely to seek guidance, each case must be considered upon its own merits.

In SINGH vs TOONG FONG OMNIBUS CO, Ltd. (1964) 3 A.E.R. 925 (an appeal to the Privy Council from Singapore) it was said that comparison should be made with cases “in the same jurisdiction or in a, neighboring locality were Similar social economic and industrial conditions exist.”

Having said all this I now have to consider, what evidence the trial Judge had before him when he made his award. There was no dispute as to liability for negligence and also no dispute as, to the amount of Le.135.50 awarded as special damages. The dispute is against the lump sum of Le.25,000/00 awarded as general damages.

There were two Medical Reports admitted, one from Mr. Forde the Surgeon Specialist who saw and treated the Respondent when she was brought to the Bo Hospital. It was dated 17th October, 1975 and reads as follows:—

[p.191]

Government Hospital

Bo.

Sierra Leone,

17th October, 1975

TO WHOM IT MAY CONCERN

MEDICAL REPORT

RE CECILIA KOROMA

HISTORY:

This school girl was brought to the Bo Hospital on the 17.7.75 after allegedly being involved in a road traffic accident. On Examination, she could not stand due to pain in the right hip joint and she had a number of minor abrasions. There was bony tenderness over the right pubic ramus and all movements of the right hip joint were restricted due to severe pain.

X-rayed confirmed the presence of a fractured pelvis extending through the right pubic ramus at the front, and the sacro-iliac joint at the back.

TREATMENT: consisted of G.V. paint to the abrasions, analgesics, and bilaterial skin traction to the legs. On this treatment, the patient made satisfactory progress with intermittent X-ray monitoring and she was discharged from the ward on the 8.9.75 to continue treatment in the Physiotherapy Department as an out-patient.

After two weeks of physiotherapy she was reviewed in the surgical out-patient's department and found to be walking satisfactorily and without pain.

[p.192]

X-rays showed the fractures to be satisfactorily healed, and the patient was therefore discharged from my care.

CONCLUSION: Cecilia Koroma was treated at the Bo hospital on the 17.7.75 following a road traffic accident in which she sustained a fractured pelvis. She received seven weeks of in-patient and a further two weeks of out-patient treatment at the end of which period she had made a satisfactory recovery from the injury. However, the contour of her pelvis has become altered as a result of her injury, and this likely to cause obstetric problems of a serious nature when she comes to child-bearing.

(Sgd.) M.C.O. Forde, BSC. MB. ChB. FRCS.

Surgeon Specialist."

The other one was from Dr. G.B. Frazer Senior Specialist Obstetrician and Gynaecologist who examined the Respondent on 31st March, 1977 for reassessment of residual permanent disability.

It was dated 7th April, 1977 and reasons as follows:—

"Dr. G.B. Frazer, MD.Ch.B., M.A.C.O.G.

Specialist Obstetrician & Gynaecologist

BO HOSPITAL

Hospital 032 637; 329

Home: 032-572

HEDICAL REPORT

RE: CECILIA KOROMA

Age 15 years Occupation: School Girl Involved in a road traffic accident on 17.7.75 and treated at the Bo Government Hospital where she was hospitalised for a period of 7 weeks.

[p.193]

X-ray on admission to hospital confirmed fracture of the pelvis involving the right pubic ramus and the saco-iliac joint. Patient was re-examined by me on 31.3.77 for reassessment of residual permanent disability.

Clinical and Radiological examination confirmed the presence of healed fractures of the pelvis with gross deformity of the pelvis canal i.e. the birth canal.

Movement of the right hip was painful.

These injuries are permanent and as a result of the deformity of the birth canal, future full term pregnancies will have to be delivered by caesarean operation. Also, the carriage of a pregnancy will be painful to the patient as a direct result of these bony injuries to the pelvis.

There is no place for corrective surgery for these injuries either here in Sierra Leone or abroad."

(Sgd.) G. B. Frazer (Dr.)

M.B., Ch.B., M.R.C.O.G.

F.W.A.C.S

Senior Specialist

Obstetrician and Gynaecologists,

Bo Government Hospital."

Apart from receiving these two Medical Reports Dr. Frazer also gave oral evidence; so did the Respondent and her uncle and next friend.

The trial Judge after reviewing the medical evidence and after making an award for special damages went on to say as follows:—

[p.194]

"I have now to consider Plaintiff's future or prospective loss of earnings. I realise that plaintiff is an infant still attending school and has not yet embarked on any career, and so there is no figure for net annual loss at the date of the trial. There is no scale on which I can weigh the injuries of this girl for compensation. I am therefore reduced to a pure guess work for the circumstances of this kind of case deny anything like a precise arithmetical calculation. I therefore have to take everything into consideration in granting the plaintiff a lump sum, what I consider commensurate enough in the circumstances or her case."

He then went on to highlight a few salient point on the medical evidence"—

"The plaintiffs is a girl, 15 years of age who all things being equal has 40 years ahead of her living with pa1n as a result of the injuries sustained from the accident. I am satisfied that the plaintiff sustained serious personal injuries as a direct result of the accident. Plaintiff is not going to have the normal life of a woman any longer. She cannot have a normal birth; only through a caesarean operation. She said in evidence that this prospect worries her a great deal, so psychologically she has already developed an aversion to this normal method of child delivery."

[p.195]

Plaintiff stated in her evidence that she would like to have many children when she gets married if at all. But in the opinion the medical profession it is not good for any woman to undergo caesarean section more than three times in her life at the most. This consideration is therefore bound to limit the potential size of plaintiff's family to two or three permitted by this method. Plaintiff has therefore lost the joyful expectation of having a large family~ What is more, even the limited number of children that may be permitted in the circumstances of her case, will not be delivered in the normal way. The doctor in his evidence said that in the case of a full time pregnancy plaintiff will have to be in pain for nine months, in

addition to the prospect of oestro-arthritts setting in with its attendant pain and suffering. Plaintiff will in future have painful-sexual intercourse and this to a great extent will affect her marriage prospects. She will have to live with this unpleasant feeling for the rest of her life. There will be much to be desired in her married life since both husband and wife will not have the fullest and uninhibited joy of normal sexual-intercourse due to the attendant pain caused by the injury to her pelvis. Her chances of furthering her education are to some extent hampered by these injuries. It has been said that her back-ache will interfere with her studies due to pain.

[p.196]

Plaintiff can no longer take part in sports; the door is shut to her forever. According to plaintiff those glooming prospects in her young age cause her great displeasure. Dr. Frazer categorically stated in his evidence and I believe him, that there is no place for corrective surgery for this girl anywhere either in Sierra Leone or abroad. Consequently, she will have to live with pain, and not as a normal woman for the rest of her life. In the light of the serious nature of plaintiff's injuries and prospective loss of a predominantly happy life, I am to consider how best money can compensate her. There is nothing which medical science can do to bring this girl back to her former position. I agree both with Dr. Frazer's prognosis and his evidence relating to the normal span of life in this part of the world. According to Dr. Frazer, all things being equal, plaintiff has 40 years more ahead of her living with pain.

I realise in the circumstances, I have to award a lump sum once for all, which will be considered reasonable and in doing so I have to take into account all the above considerations. In this regard I must also bear in mind the fall in the value of money, for our purpose the leone.

x x x x x

Taking all these contingencies into consideration my duty is to award plaintiff what I consider adequate and reasonable."

[p.197]

It was contended by Mr. Thomas, counsel for the Appellant that the trial Judge misapprehended the facts in in assessing damages by placing undue emphasis that the Respondent could only have children by caesarean section. He referred to the case of CULLO vs ANGELL (1969) A.C. 242 where an award of £10,000 general damages was upheld notwithstanding the fact that the Court considered that it was on the high side, but in that ease the plaintiff was a girl aged 5 at the date of the accident and the injures were of a multiple nature and of greater severity than the Respondent's.

It was also argued on behalf of the Appellant that in making the award the trial Judge took into consideration loss of future or prospective earnings. For an award to be made under this head it must be based upon solid facts; there must be some evidence before the Judge to enable him arrive at firm conclusions upon (i) what would the Respondent probably have been able to earn in future, if she had not been injured and (ii) how much (if at all) has her earning capacity been reduced. There is no evidence of loss of earning capacity or of what factors and contingencies have been allowed for. In short

there has been no evidence of any academic or sporting achievement or of any special feature of her pre accident activities. The trial Judge himself stated that he was "therefore reduced to pure guess work". He concluded in this regard by saying "I therefore have to take everything into consideration in granting the plaintiff a lump sum, what I consider commensurate enough in the circumstances". He did not however state what were the facts he took into consideration. whatever, therefore, he must have awarded under this head, must be presumed to be of not very great value taking the lump sum of Le.25,000/00 as a whole.

[p.198]

The Respondent stated in evidence that she "would like to get married when she Leaves school …….. would like to have many children say up to ten and above." Again, this is mere speculation depending on several factors and contingencies. On this aspect of her evidence the trial Judge stated that Plaintiff has therefore lost the joyful expectation of having a large family."

The learned trial Judge in his review of the evidence did not take cognizance of the Report of Mr. Forde, the Surgeon, who examined and treated the Respondent. The Report in brief. stated that following a road accident in which she sustained a fractured pelvis she received seven weeks of in-patient and a further two weeks of out-patient treatment at the end of which period she had made a satisfactory recovery from the injury; she was found to be walking satisfactorily and without pain.

This is to be contrasted with the learned trial Judge's findings:

"…..consequently, she will have to live with pain, and not as a normal woman for the rest of her life. In the light of the serious nature of plaintiff's injuries and prospective loss of a predominantly happy life, I am to consider how best money can compensate her. There is nothing which medical science can do to bring this girl back to her former position. I agree both with Dr. Frazer's prognosis and his evidence relating to the normal span of' life in this part of the world.

According to Dr. Frazer, all things being equal, Plaintiff has 40 years more ahead of her living with pain."

[p.199]

Although we were referred to a few cases dealing with awards of general damages none of them was of local origin except one, IDRISSA CONTEH vs ABDUL J. KAMARA (Supra) which I must say is not a comparable one with the present case. I myself have not been able to come across any comparable local case to look for guidance as to the current levels of assessment but Mere are a few English cases (taken from

MUNKMAN ON DAMAGES 5th Edition and KEMP AND KEMP Vol. 24th Edition) which I shall

now mention but I hasten to say that in doing so I am not unmindful of the caveat in the SINGH vs

TOONG FONG ONIBUS CO, LTD. case (supra) that "such cases should as a rule be those which

have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

(i) HIZETT vs B.T.C. (Sheffield Assizes, Pearson J. Nov. 30, 1956) Girl 18. Shop Assistant. serious distortion of pelvis, would necessitate major operation in case of child birth. Also injuries to chest and leg, scarring of thigh (6 in by 4 in). skin grafting and risk of osteo-arthritis in spine - general damages £4,500.

(ii) HARRIS vs FOWLER, (Q.B.D., Hilbery. J. Nov. 25, 1959. The Times, Nov. 27). Girl 18, Multiple fracture of pelvis; might affect prospect of marriage and child bearing, slight continuing injury of urinatory system, also backache and depression. General Damages £2,100.

(iii) BOSTOCK vs BROWN (Newcastle Assizes, Wrangham J., July 20, 1970) Girl 21. Fracture of left frontal bone with concussion, general bruises and abrassions, cuts to her face and neck requiring 6o stitches, loss of two teeth and damage to four others, fractured pelvis, injury to left heel leaving permanent and disfiguring scar. General Damages £3,250.

[p.200]

In the light of all what I have stated and bearing in mind that there was no evidence of loss of expectation of life or of future are prospective earnings I would say, with respect to the learned trial Judge, that after much consideration, bearing in mind that this Court will only interfere on a pure question of quantum only if satisfied that the trial Judge's award constitutes a wholly erroneous estimate of the plaintiff's loss, that I am satisfied that the award is sufficiently excessive to justify this Court in interfering to reduce it. For my part I would reduce it to Le,15,000. To that extent I would allow the appeal.

Hon. Mr. Justice C.A. Harding

Justice of the Supreme Court

17/12/81.

TEJAN, J.S. C.

The appellant is the owner of vehicle WH. 7116. On the 17th day of July, 1975, the respondent while travelling as a passenger in the vehicle owned by the appellant sustained personal injuries as a result of the negligent driving of the appellant's servant or agent. At the time the respondent who was a school girl, was fifteen years of age.

On the 11 the day of May, 1977, the respondent through her next friend Samuel Morana Koroma instituted proceedings by the issue of a writ of summons. The writ of summons contained a statement of claim. Appearance was entered by Smythe and Co. but no defence was filed and delivered within the time prescribed by law, and on the 21st day of July, 1977 an interloeutory judgment in default of defence was signed against the appellant. On the 3rd of October, 1977, the respondent moved the

Court for an order to assess damages. The motion was heard by Kutubu J. as he then was, on the 7th day of October, 1977 made the following order:—

[p.201]

(a) That instead of a writ of Inquiry the value and amount of damages for which interlocutory judgment was entered on the 21st day of July, 1977 be assessed by this Honourable Court by the taking of oral evidence.

(b) That the said assessment of the damages do take effect next session on a date to be communicated to the parties.

(c) That the costs of this application be the plaintiff's (now respondent),

The issue of assessment of damages came before Kutubu J, as he then was, on the 29th day of November, at the Bo High Court, and after having heard evidence from the next friend, Dr. Fraser a Specialist Gynaecologist and Obstretittian and the respondent herself, the learned Judge awarded a global sum of Le.25,000 as damages.

The appellant, on the 14th day of July, 1978 filed a notice of appeal to the Court of Appeal on the following grounds:—

(1) That the learned trial Judge misdirected himself in law and in fact on the question of general damages.

(2) That having regard to his findings of fact the learned trial Judge erred in law in awarding general damages which were excessive in all the circumstances.

(3) That the decision is against the weight of evidence

The appeal was heard by S.B. Davies J.A. as he then was Warne and Turay JJ,A. The Court of Appeal delivered its judgment on the 23rd day of April, 1980 and dismissed the appeal.

[p.202]

The appellant has tabled before this Court the following grounds of appeal:—

(a) That the Court of Appeal was wrong in law in refusing to reduce the trial Judge's award of general damages which amounted to an attempt to give a perfect compensation and not a fair and reasonable assessment of general damages for the injuries suffered by the Respondent.

(b) That the award of general damages is exclusive in all the circumstances,

(e) That the decision is against the weight of evidence.

In arguing grounds (a) and (b). Mr. Thomas, Counsel for the appellant contended that the trial Judge misapprehended the facts and that the Court of Appeal did not advert its mind to its appellants function and that the learned judge took into consideration loss of earning in assessing the award of damages.

Mr. Michael, Counsel for the respondent, on the other hand, submitted that the issues to be determined are (1) whether the trial Judge acted on a wrong principle of law, (2) whether the trial Judge misapprehended the facts and (3) whether the amount awarded was a wholly erroneous estimate of the damages to which the respondent was entitled.

I have now to consider the principles of law which would entitle a Court of Appeal to interfere with quantum of damages. The award of damages, being question of fact, is the function of the jury and the assessment is Primarily a factual enquiry which leaves very little room for interference by the Court of Appeal, but on an appeal from a Judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all question involved in the action, including quantum of damages. But the Court of Appeal will not reverse the finding of a trial Judge as to the amount of damages simply because it thinks that if it had tried the case, it would have awarded a different amount, To justify reversing the award of amount of damages, the Court of Appeal should convinced either that the trial [p.203] Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. This principle of law is clearly demonstrated in Flint v. Lovel (1934) All. E.R. Rep. 200 at 202 where Greer L.J. said:—

“But though the established rules with regard to appeals in cases tried with juries do not apply to appeals from the decisions of Judges trying cases without the assistance of a jury, I think it is right to say that this Court will be disinclined to reverse the finding of a trial Judge as to the amount of the damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial Judge on the question of the amount of damages damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

In the case of Owen v. Sykes (1936) 1 K.B. 192, where a trial Judge awarded a doctor the sum of Lel0,000 as damages, and the Court of Appeal held that although if they had tried the case in the first instance they would probably have awarded a smaller sum as damages, but yet they would not review the finding of the trial Judge as to the amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of [p.204] law or that the amount awarded as damages was so high as to make it an entirely erroneous estimate of the damage to which the plaintiff was entitled.

The question of quantum of damages came before the Sierra Leone Court of Appeal in Lasawarrack v. Raffa Bros and Northern Assurance Co. Ltd. (1962) 2 S.L.L.R. 196, and Bankole-Jones Ag. P. said:—

“An appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. It can only properly interfere if it is satisfied that the Judge applied a wrong principle of law or that the amount

awarded is so inordinately high or so inordinately low that it must be a wholly erroneous estimate of the damage."

In Owens v Sykes (supra) Greer L.J. said at page 197:—

"……An assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and it seems to me that, unless we come to the conclusion that the learned judge took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere"

The case of the African Press Ltd. v. Dr. Okechuku Ikejiari (1952 to 1955) Selected Judgments of W.A.C.A. at 186, Verity C.J. said at page 389:—

[p.205]

"Whether the members of the Court would, had anyone of us sitting at first instance, have assessed the damages at the figure reached by the trial judge, or more or less, is beside the point. The grounds upon which a Court of Appeal will vary the damages assessed by a judge sitting without a jury have recently been discussed in Nkoku v. Zik Press Ltd. (Selected Judgments January to May 1951 at page 15) and I do not propose to discuss them here. It will suffice to say that I am unable to hold that in the present case the learned Judge applied any wrong principle or proceeded on a wrong basis in assessing the damages or that the sum found by him is so excessive as to disclose an entirely erroneous estimate of the injury suffered by the respondent."

The case of Crawford v. Erection and Engineering Services Ltd. (1953) C.A.. No. 254 at page 684 Kemp and Kemp (2nd. Ed. Vol. 1). Evershed M. R. said:

"……It is, however, well established that this Court does not interfere on that grounds alone, and for obvious reasons, with the award of damages of a judge of first instance. In order to justify interference by the Court, it must be shown that the damages are as excessive or so low as to indicate that some matter of fact has been wrongly included from their computations or putting it generally, that they are so low or so excessive as to [p.206] altogether unreasonable in other words that they are either inordinately high or inordinately low; and as a general rule it may, I think, safely be stated that unless the damages are going to be halved or doubled, as the case may be, the Court would not, as a general rule at any rate interfere"

In the case of Kamara v. Umarco (1970-1971) A.L.R. (S.L.) at 141, Bankole-Jones P. interfered with the award of damages, after having found that the trial Judge adverted his mind to matters which he ought not to have adverted his mind, and then came to the view "that the amount awarded was founded on a wholly erroneous estimate of the damage suffered and therefore inordinately low."

In the case of Sillah Sabally and Others v. Bojan (Civ. App. G.C.A. 15/77 and G.C.A. 2/78 (unreported) Livesey Luke C.J. said:

“There are also matters which the learned trial judge should, in my opinion, have taken into consideration in assessing general damages but which he ignored” and he continued

“In my opinion, having regard to what I have just said, the learned Judge erred not only in giving weight to the evidence that ought not to have affected his mind but in not considering matters that ought to have affected his mind.”

It is necessary to consider the principles upon which the assessment of damages are based. Lord Blackburn laid down the test as to measure of damage in Livingston v. Rawyards Coal Company (1880) App. Case 25 when he said:—

[p.207]

“I do not think there is any difference of opinion as to its being a general rule that, where an injury is to be compensated for by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

This passage of Lord Blackharn has been cited with approval by Viscount Sankey L.C. in Banco de Portugal v. Waterloo and Sons, Ltd. (1932) A.C. 452 at.475 and by Earl Jowith in B.T.C. v. Gourley (1956) A.C. 185 at 197.

It seems to me from the authorities, that among other aspects, an award is measured (1) by the extent of the injury; (2) by the extent of the loss of happiness and (3) by the extent to which money can provide the person who has Suffered, reasonable solace. But it is also clear that the Court cannot order the defendant to provide the leg or eye which the Plaintiff has lost. Mental pain and anguish which the plaintiff has suffered cannot be obliterated. For these reasons, Judges, are in general, hesitant to venture beyond the principle that the task of the Court is to award fair and reasonable compensation. Salmon L.J. in Gardner v. Dyson (1967) 1 W.L.R.

1497 at 150 stated that “damages must be real and amount to what the ordinary reasonable man would regard as fair and sensible compensation for the injuries suffered.”

In H. West and Sons. Ltd. v. Shepherd (1936) 2 W.L.R. 1359 at 1368 Lord Morris or Borth - Y - Gest said:—

[p.208]

“The damages which are to be awarded for a test are those which so far as money can compensate will give the injured party reparation for the wrongful act and for all the natural and direct consequence of the act. The word “so far as money can compensate” point to the impossibility of equating money with human suffering or personal deprivations……. But money cannot renew a physical frame that has been battered and shattered. All that judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure

some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation."

It is apparent from the authorities that no real criterion for measurement of award of damages exists, and the Court must derive guidance solely from the standard level of awards in comparable cases, and the Court of Appeal may interfere if it considers that an ward is totally inconsistent with the general level of awards. But although it is necessary to look for guidance in comparable cases, the decline the real value of money must be taken into account. The authority for this proposition can be found in Rose v. Willey (1951) C.A. No, 221 at page 484 Kemp and Kemp (Vol. 1, 2nd. Ed.) when Cohen L.J. said:—

"…….the value of money (which it is agreed we are entitled to take into account) has changed enormously since 1937 which was the date of the decision in Heaps v. Perrite Ltd,(1937) 2 ALL E.R. 60"

[p.209]

Lord Norman in Glasgow Corporation v. Kelly (1951) 1 T.L.R . 345 said at page 347:—

"……the claim is a claim for lacerated feelings and for the loss of natural support which the deceased afforded or might in future have afforded. Their Lordships in the First Division were unanimously of the opinion that the Lord Ordinary's awards were in keeping with awards which use to be made twenty or thirty years ago when the value of money was considerably higher than it is now and that the change in the value of money ought to have been taken into account. It is not necessary to repeat what was said in Sands v. Devon 145 S.C. 380. I adhere to the opinion that permanent changes in the value of' money must be considered in making awards for solatium."

In Sands v. Devon (supra) Lord Norman said at page 381:—

Since we must perforce measure the damage in money, we must, I think, take account of large and reteative1y variations in the value of money"

Another case in which the value of money became one of the factors in considering assessment of damages is Walker v. McLean and Sons Ltd. (1979) 2 All E.R. 965. In this ease, as a result of the defendants negligence, the plaintiff was injured while riding his motorcycle along an unfinished road. The trial Judge, after having taken into consideration the evidence before him, awarded the plaintiff the sum of £35,000 in respect of pain, suffering and loss of amenity of life, including loss of expectation of life. The defendant appealed against the award, contending that it was too high and out of scale with the current level [p.210] of awards for similar cases of paraplegia……..

"……. It was he Id that damages for non-pecuniary loss, like damages for pecuniary loss, were to be assessed .by reference to the value of money at the date of trial …….. Accordingly, the amount of £35,000 awarded by the trial Judge, though higher than, previous awards for similar injuries, was in all the

circumstances an appropriate award, Cumming-Bruce L.J. reading the judgment of the Court said at page 970:

“We content ourselves with the observation that his award of £35,000 under this head the judge restores a consistency with awards made before 1973 which cannot be found in many awards made since that year. This award of £35,000 should be regarding as a safe guide to the damages appropriate to such a case than the £27,500 which O'Connor J. said as appropriate in 1978.

Mr. Thomas contention was that the learned trial judge laid too much emphasis on the evidence of Dr. Frazer, and that when one considered the injuries suffered by the respondent, the amount awarded as damages was inordinately high. His next attack on the judgment was that the learned trial judge took into account loss of earnings of the respondent when there was no evidence to that effect.

The witnesses who gave evidence before the learned trial judge were the next friend Samuel Murana Koroma, Dr. Frazer and the respondent herself. The respondent who was a school girl at the time of the accident was fifteen years of age. Before the accident, she took active part in games and sports in the school. She played Volley ball, netball and participated in the general athletics of the school. After the accident, she could no longer participate in these games in which she enjoyed taking part.

[p.211]

She was first examined by Dr. Forde, and the record or Dr. Forde revealed that she sustained fractures of the pelvis involving the right pebic ramus and sacro-illiac joint apart from minor abrasions. She was later examined by Dr. Bernard Frazer, a Specialist Gynaecologist and Obstretitian on the 31st day of March, 1977. Dr. Frazer examined her clinically and radio-logically, and he found the presence of healed fractures of the pelvis with gross deformity of the pelvis canal, that is, the birth canal. Clinically, the movement of the right foot was painful. Dr. Frazer's Progmosis are:—

“1. Future full terms pregnancies will have to be delivered by caesarean section operation. This will be necessitated as a result of the deformity to the pelvis caused by the fractures.

2. The carriage of the pregnancy will be painful as a direct result of the bone injuries in the pelvic. It will mean a very painful experience for a person with such injuries to carry a pregnancy for nine months. These are permanent injuries.”

According to the doctor, there is nothing that can be done for the respondent anywhere in this world to correct her injuries the injuries which the respondent has sustained would probably always be attended with a certain amount of pain and discomfort during sexual intercourse; there has been some disturbances in the sacro-illiac joint, and as a result there would probably result osteoarthritis in the future; when osteoarthritis occurs there will be roughing of the joint surface which will cause restricted movements of the joints, which invariably causes pain of various degrees, and that will disable her to a certain [p.212] extent; she will have terrible headaches and it is possible that her menstrual periods will be more painful than before. In the opinion of Dr, Frazer, these injuries might affect her prospects of marriage, and psychologically, might cause depression to her, Dr. Frazer went on to say that medically, it is accepted that a woman who, has to be delivered by a caesarean section successively can only bear three children, It is the view of the doctor that assuming it is a full time child, the respondent cannot deliver naturally but by caesarean section. If the respondent was desirous of having many children, she

had now been deprived of the pleasure of having many children; if the respondent wants to deliver a child she will be given a general anaesthetics; she will naturally need the attention of a Gynaecologist, and in this regard it will be more expensive for someone who has to deliver a child by ceaesarean operation than by normal delivery; when one is put under general anesthetics there is a certain amount of risk involved of life; the respondent has begun menstruation and she is now capable of child bearing} she will not be able to take part in active sports; she cannot play tennis, basket ball or run 100 yards, her studies will to a certain extent be affected when she starts getting pain from the backache and osteo-arthritis; that all things being equal her average span life is 35 years and that she has 40 years ahead of her living in pain.

This is the evidence together with the evidence of Koroma the next friend and the evidence of the respondent that was before the trial judge.

The trial judge having considered carefully the evidence and having taken into account the principles of law applicable to the award of damages, awarded the respondent a global sum of Le25,000. The Court of Appeal agreed with the findings and award of damages.

[p.213]

It has been canvassed before this Court that the learned judge was guilty of error of principle, and I certainly do not take the view that the judgment of the learned trial judge reveals any misapprehension of the effect of the evidence which was before him. It was also contended that the learned trial judge, in making the award, took into the consideration future or prospective loss of earnings. Counsel for the appellant contended that the learned trial judge took into consideration in making the award, future and prospective loss of earning. The sentence in the judgment which Mr. Thomas attached is this “I have to consider the plaintiff future or prospective loss of earnings.” Mr. Thomas vigorously argued that the learned trial judge, in making the award, must have had in his mind, the future and prospective earnings of the respondent, But his argument overlooked several considerations. Immediately after the learned trial judge said he had to consider the future or prospective earnings, he said that he realised that the respondent was an infant attending school and had not yet embarked on any career and there was no figure for net annual loss at the date of trial. This alone is clearly indicative that the learned trial judge had no intention of making provisions for future or prospective loss of earnings. With all respect to the persuasive way in which that argument was presented, I do not think that the judgment viewed as a whole will bear the interpretation put upon the sentence by Mr. Thomas. Indeed the learned trial judge said there was no scale on which he can weigh the injuries and that he was reduced to pure guesswork in the circumstances. What the learned judge was saying was, to use the words of Strentfield J. in Hawkins v. Mendip Engineering Ltd. (1966) lW.L.R. 1341 at 1348. “whatever figure I decide upon will on any view be guesswork, and my guess is as good or bad as anybody else's.”

[p.214]

It is clear that the learned trial judge correctly summarised the effect of the medical evidence that was before him. He also heard the evidence of the next friend and the respondent. He accepted their evidence. He said that he realised in the circumstances that he had to award a lump sum once and for

all, which will be considered reasonable and in doing so he had to take into account all the above considerations.

It is of course, a well established principle that an appellate tribunal will not interfere on the question of mere quantum unless it is satisfied that the sum awarded constituted a wholly erroneous estimate. In this particular case, it is merely a matter of estimate since it has not been shown that the learned trial judge applied any wrong principle of law, that he misapprehended the facts, that he adverted his mind to matters which ought not to have affected his mind and that he left out of consideration something that ought to have affected his mind. The learned trial judge himself said that the circumstances of the case defied anything like a precise arithmetical calculation I agree with the Court of Appeal that the learned trial judge took all the matters necessary into consideration before making the award of damages, and that there was no justifiable reason to disturb the award of damages which the learned trial judge awarded in the light of those considerations. To borrow the words of Scarman J. in Hawkins case (supra) “I would respectfully have thought that the trial judge's guess, so far from being as bad as anyone else's is certainly as good as, if not better than that of an appellate tribunal.”

[p.215]

In my opinion, the award is not only reasonable but moderate in the circumstances, and there is no justification for disturbing the award. Even if the assessment has been made upon a wrong principle of law, the appellate Court may not interfere with the amount of award if it thinks that the amount itself is correct. I would therefore dismiss the appeal.

(Sgd.) Hon. Mr. Justice O.B.R. Tejan.

Justice of the Supreme Court

17/12/81.

AWUNOR-RENNER, J.S.C.

This is an appeal by the Defendant (hereinafter known as the Appellant) against the judgment of the Court of Appeal dated 23rd April, 1980 dismissing an appeal against the judgment of Justice Kutubu dated the 28th day of February, 1978 by which he awarded the Plaintiff (hereinafter known as the respondent) the sum of Le.25,000 by way of general damages for personal injuries caused by the negligence of the appellant, Negligence is not now in issue and this appeal in a nut shell relates only to the damages which the appellant contends are so excessive as to warrant interference by this Court. At this stage however I think that I could not be amiss to state the grounds of appeal as set out by Court for the Appellant which are as follows:—

(a) That the Court of Appeal was wrong in law in refusing to reduce the trial Judge’s award of general damages which amounted to an attempt to give a perfect compensation and not a fair and reasonable assessment of general damages for the injuries suffered by the respondent.

[p.216]

(b) That the award of general damages is excessive in all the circumstances.

(c) The decision is against the weight of evidence .

The facts of the case briefly are as follows:

The respondent was a school girl aged 15 at the material time. The accident happened on the 17th July 1975 when she was travelling as a paying passenger on board the Appellant's, vehicle No, WR 7116 from Freetown to Bo. As a result of the negligent driving of the appellant's servant or agent the vehicle was involved in an accident and she sustained severe personal injuries. She was first seen by a Dr. Forde, a Surgeon Specialist and admitted at the Bo Government Hospital for seven weeks. Later on in March 1977 she was seen and examined by another Doctor, George Bernard Frazer, a Specialist Gynaecologist and Obstretitian who gave evidence as follows:—

"I examined her clinically and also radiologically by that I mean X-ray examination. I found the presence of healed fractures of the pelvis with gross deformity of the pelvis canal, that is, the birth canal. Clinically the movement of the right foot was painful. My findings and those of the record I received were consistent with the plaintiff having been involved in a road accident,

My prognosis are:—

(1) Future full term pregnancies will have to be delivered by caesarean section operation. This will be necessitated as a result of the deformity to the pelvis caused by the fractures,

(2) The carriage of the pregnancy will be painful as a direct result of the bone injuries to the pelvis.

[p.217]

It will mean a very painful experience for a person with such injuries to carry a pregnancy for nine months. These are permanent injuries.

There is nothing that can be done for this girl anywhere in the world to correct her injuries. These injuries which this girl has sustained would probably always be attended with a certain amount of pain and discomfort during sexual intercourse. There has peen some disturbances in the sacroilliac joint. As a result of this there would probably result osteoarthritis in the future. When osteoarthritis occurs there will be roughing of the joint surface which will cause restricted movements of the joint, which inevitably causes pain of varying degrees. That will disable her to a certain extent. She will have terrible backaches and perhaps it is possible that her menstrual periods will be more painful than before. In my opinion these injuries might affect her prospects of marriage."

The Doctor went on to say that the respondent will not be able to have more than three children as she cannot deliver naturally it will all have to be by caesarean section which will involve a certain amount of risk to life when put under general anesthetic. She will not be able to take part in active sports and that her studies too will be affected when she starts getting pain from backache. The sum total of it all was

that since the life span of a male or female in this part of the world was 55 years all things being equal the respondent had 40 years ahead of her living with pain.

[p.218]

As stated earlier judgment was given by the trial judge on the 28th day of February, 1978 awarding the respondent the sum of Le.25,000 as general damages. The appellant appealed to the Court of Appeal and judgment was delivered on 23d April, 1980 disallowing the appeal and it is against that judgment that the appellant has now appealed to this Court oh the grounds stated above.

During the arguments various authorities were referred to by Counsel on both sides. For the appellant. Counsel contended that the amount awarded by the trial judge was inordinately high so as to be an erroneous estimate and that the Court of Appeal should have interfered by reducing it where the trial judge has acted on a wrong principle of law, or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered. The amount he said was not fair and reasonable in the light of previous awards in comparable cases. Some measure of uniformity must be secured.

The misapprehension of facts complained of was that the learned trial judge placed undue emphasis on the fact that the respondent would only give birth by caesarean operation. Finally Counsel argued that in granting the award of general damages, the trial judge took into account the respondent's prospective loss of future earnings and placed

reliance for this on a passage in the judgment which reads as

follows:—

“I have now to consider Plaintiff's future or prospective loss of earnings. I realise that Plaintiff is an infant stilt attending school and has not yet embarked on any career, and so there is no figure for net annual loss at the date of the trial. There is no scale [p.219] on which I can weigh the injuries of this girl for compensation. I am therefore reduced to a pure guess work for the circumstances of this kind of case defy anything like a precise arithmetical calculation. I therefore have to take everything into consideration in granting the Plaintiff a lump sun, which I consider commensurate enough in the circumstances of her case.”

I will deal with this complaint later on,

Counsel for the respondent argued that there were only two issues before this Court, firstly whether the trial judge acted on a wrong principle of law or misapprehended the facts or made a wholly principle of the damages to which the plaintiff was entitled to. Secondly whether the Court of Appeal was wrong in refusing to reduce the award of the trial judge who sat without a jury.

He finally ended up by saying that he thought the award to the plaintiff was fair and reasonable.

The principles upon which an Appellate Court would take into consideration and interfere with an award of damages made by a judge is stated in the well known case of FLINT .v LOVEL (1935) 1 K.B. at page 354 where Greer L.J. in his judgment had this to say.

"I think it right to say that this Court will be disinclined to reverse the finding of the trial Judge as to the amount of damages merely because they think that if tried had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the [p.220] trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

This statement was also approved and adopted in the House of Lords in the case of DAVIES v POWELL DUFFRYN ASSOCIATED COLLIERIES LTD. reported in (1942) A.C. at page 601 at page 616 and 617, where Lord Wright said:—

"Where however the award is that of a judge alone, the appeal is by way of a re-hearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the Appellate Court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in FLINT v LOVELL. In effect the Court before it interferes with an ward of damages should be satisfied that the judge has acted on wrong principles of law, or has misapprehended the facts or has for other reasons made a wholly erroneous estimate of the damage suffered. It's not enough that there is a balance of opinion or preference.

[p.221]

The scale must go down heavily against the figure attacked if the Appellate Court is to interfere, whether on the grounds of excess or insufficiency."

Other eases often relied on are the cases of OWEN v SYKES reported in (1936) 1 K.B. at page 192 where the principle as laid down in FLINT v LOVELL(supra) was applied. In GREENFIELD v LONDON & NORTH EASTERN RAILWAY CO. reported in 1944 2 A. E. R. at page 438. Mackinnon L.J. said at page 440:—

"The principles upon which this Court reviews the assessment of damages both when they are said to be too high or too low are well known. We do not interfere because we might ourselves have given rather more or rather less, but only

(a) If it appears that the judge below has omitted some relevant consideration or admitted some irrelevant consideration or

(b) if we think that the amount fixed is so excessive or insufficient, as to be plainly unreasonable."

A phrase used by Viscount Simon in the case of NANCE v BRITISH COLOMBIA ELECTRIC RLY. (1951) 2 A.E.R. at page 448 was that an Appellate Court would interfere if "the amount awarded is either inordinately low or so inordinately high that it must be an wholly erroneous estimate of the damage." Let me point out that in this case the trial was by a jury and its award was rejected as excessive by Lord Simon who said inter alia:—

"Taking all these considerations into account and basing on that the best estimate they can form their Lordships in satisfied that a jury [p.222] could not reasonably have computed the total recoverable damage at a figure exceeding 22,500 dollars. This figure in their view falls short of the Le35,000 dollars award by a margin wide enough to justify the British Colombia Court of Appeal in rejecting the jury's figure."

At this stage a case worthy of mention which was referred to by Counsel for the Appellant is the case of RUSHTON v NATIONAL COAL BOARD reported in 1953 1 A .E.R. at page 314 in that case Counsel for the respondent had contended that an award of £10.000 was too high in all the circumstances of the ease. The amount was reduced to £7,000. It was however held in that case that in awarding damages for personal injuries that although it is impossible to standardize the amounts awarded for individual cases that the Courts must bear in mind the special facts of the case under consideration, to accord with the general run of assessments made over a period of time in comparable cases. In the case of WALDON v WAR OFFICE (1956) 1 W.L.R. at page 31 Rushton's case (supra) was applied. It was held by the Court of Appeal that while a judge was entitled to hear references to Previous decisions to show amounts which had been awarded by other judges in comparable case it was entirely within the judge's discretion whether he would permit such reference or not. In fact Parker L.J. had this to say:—

"So far as the ruling of the judge is concerned as to whether other cases ought to be looked at, I would only like to say this. In my view it would be calamitous if anything that this Court should impose an additional burden on [p.223] judges of the first instance, and particularly on judges of Assize. It has been suggested that Counsel on either side will come armed in every case of personal injuries with reports or transcripts of other cases. I myself do not think that there is any fear of that, I think that Counsel can be trusted only to refer to other cases sparingly, hearing in mind that each case depends upon its own facts and only rarely can other cases be of real assistance to the judge. And secondly, that the discretion must always be in the judge himself to decide whether in his view the reference to such other cases would or would not assist him.

In view of the above cases referred to it seems to me therefore that before an Appellate Court would interfere with an award of damages made by the trial judge the Court must be satisfied that the award was made upon a wrong principle of law as contained in the judgment or that the trial judge made al entirely erroneous estimate or that the amount awarded was so excessively high or too low. An Appellate Court would not interfere merely for the sake of interfering. An award of damages must in all the circumstances of the case be fair and reasonable. Certain things ought to be taken into account, First the pecuniary loss if any sustained or finally the physical capacity of enjoying life. In short restitution intergrum in it ordinary sense is impossible. In the case of GARDNER v DYSON (1967) 1 W.L.R. at page 1497 and at page 1501, Salmon L.J. said

“Damages must be real and amount to what the ordinary, reasonable man would regard as fair and sensible compensation for the injuries suffered.”

[p.224]

In the case of FLETCHER v AUTOCAR & TRANSPORTERS LTD. reported in (1968) 2 W.L.R. at page 743, the Plaintiff a charted Surveyor had sustained severe injuries in an accident. The judge assessed damages under four heads: special damages £10,477.9.6, Loss of future earnings at £32,000, additional expenses caused by the injuries at £14,000 and damages for pain: suffering and loss of amenities of life at £10000. He rejected the defendant's contention that if the total of the four assessments was an exceptionally high or daunting figure then the total figure should be revised, and he awarded the total figure in damages of £66,447.9.6.

On appeal Lord Denning M.R. had this to say at page 749:—

“In the second place, I think that the judge was wrong to take each of the items separately and then just add them up at the end. The items are not separate heads of compensation. They are only aids to arriving at a fair and reasonable compensation.”

At this stage I think it will be convenient for me to deal with one more issue raised by Counsel for the Appellant He had argued that the learned trial judge had taken into account the prospective loss of future earnings when there was no evidence to support this. The paragraph complained of has been stated supra in full by me.

I do not think that it can be construed as stated by Counsel for the Appellant. In my view I think that the trial judge considered the question of loss of future earnings and then rejected it. My own construction of the paragraph is that he was saying that the appellant was not entitled to any award as regards prospective loss future earnings because the [p.225] appellate was still attending school and had not yet embarked on a career and so there was no figure for net annual loss at the date of trial. He continued by saying that “there is no scale on which I can weigh the injuries of this girl for compensation” emphasis mine. ……”I am therefore reduced to pure guess work for the circumstances of this kind of case defy anything like a precise arithmetical calculation. I therefore

have to take everything into consideration in granting the plaintiff a lump sum which I consider commensurate in all the circumstances of her case.”

After commenting on all the injuries sustained by her, he continued to say:—

“In the light of the serious nature of the plaintiff's injuries and prospective loss of a predominantly happy life, I am to consider how best money can compensate her …. I realise in the circumstances, I have to award a lump sum once and for all, which will be considered reasonable.”

As a result of this the judge awarded the plaintiff a lump sum of Le.25,000.

Let me say here and now that the judge was perfectly right in awarding a lump sum. He was entirely within his rights to do so. He need not award separate sums for each head. Since only if he has broken down his global award and specified the amount given for each item for pecuniary and non pecuniary losses will the appellant entertain some hope of success. See the case of FLETCHER v AUTOCAR & TRANSPORTERS (supra) and also the case of BILLINGHAM v HUGHES & ANOTHER reported in 1949 1 A.E.R. at page 684.

[p.226]

Having specified above the various principles upon which an appellate Court would interfere, I now turn to the present case. I do not think that the trial judge misapprehended the facts of misapplied any wrong principles of law or considerer irrelevant matters. I have already stated above my own construction of Counsel for the appellant's complaint that the judge in awarding a lump sum took into consideration the loss prospective future earnings. In fact in this case the judge never stated how much he was awarding for the various heads of general damage. I do not also think that the trial judge put more emphasis on the fact that the Respondent would only give birth by caesarean operation. I think all he did was to narrate the medical evidence in relation to the injuries sustained, As regard the submission put forward by Counsel for the appellant that the trial judge had made an entirely erroneous estimate of the damage suffered and that the damages awarded was so extremely high. One must look at what the judge said regards the injuries sustained by the respondent, her loss of amenities and the prospective loss of a predominantly happy life and come to the conclusion that the amount awarded was fair and reasonable in all the circumstances of the case.

There is no doubt that the injuries on the whole as state above are serious. It affects the respondent's whole future and her womanhood, starting from painful periods, painful intercourse, painful pregnancy, child, birth and other injuries apart for the rest of her life. The appellant was only fifteen years old at the time the accident took place. Her future as regards all the all the injuries sustained appears to me to be quite bleak. I therefore feel that the amount of Le. 25,000 awarded her was not excessive.

[p.227]

As a result of the views which I have expressed I am of the opinion that the appeal should be dismissed and the judgment of the Court of Appeal affirmed. Appeal dismissed. Costs to be taxed in favour of the respondent.

Hon. Mrs. Justice A.V.A. Awunor-Renner

Justice of the Supreme Court

17/12/81.

DURING. J .A.

The Appellant has appealed to this Court on the ground that the award of Le25,000 made to the Respondent by way of general damage is excessive.

It is well established on what principles an Appellate Court will interfere with an award of general damages where that award is made by a Judge sitting alone in a long line of cases both local and English. I need not refer to the long line of oases some of which have been referred to in the respective Judgment of my learned brothers.

My learned brothers have stated in their Judgments the injuries which on the evidence in the Court of first instance the Respondent suffered, reviewed the evidence of the Specialist Gynaecologist who gave evidence and his prognosis. The learned Trial Judge found that the Respondent's injuries were serious and he accepted both the evidence of the Respondent and the Specialist and stated that he had to "take everything into Consideration when awarding a lump sum". The learned Trial Judge considered the loss of amenities of life, what is sometimes called a diminution in the pleasure of living. In my view the learned Trial Judge made a proper review of the evidence before him and did not take into consideration any unwarranted fact in coming to a conclusion as to what amount he would award.

[p.228]

In the case COOKSON v KNOWLES (H.L.) 1978 2 W.L.R. 978 at 988 Lord Salmon said inter alia:—

"There is one matter that I should like to emphasis, namely that in my view it is impossible to lay down any principles of law which will govern the assessment of damages for all time. We can only lay down broad guidelines for assessing damages in cases where the facts are similar to those of the instant cases and when economic factors remain similar to those now prevailing."

In my view in assessing general damages regard has to be had as to the socio-economic factors prevailing at the time of assessment for example fall in value of money and as Sellers L.J. said in WARD vs JAMES [1965] 1 All E.R. 563 at p. 576:—

"We have come in recent years to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases."

Our Courts in considering comparable cases should consider those in our Society in my opinion.

In the case ALIMU JALLOH v. WONDE SAMURA an Infant suing by father and next friend Foday Samura Civ. App. 30/73 Court of Appeal, Judgment delivered 8th March, 1974 unreported, the Appellant appealed against an award of Le.15,000 made by the High Court as general damages for personal injuries. Counsel for the Appellant in the Court of Appeal argued that the trial Judge ought not to have awarded a global sum of general damages and that the award was excessive. The Court Tejan, Agnes Macaulay then JJ.A. and During J.A. said inter alia:—

[p.229]

"In our view though it may be desirable for a trial Judge sitting alone to itemise the damages in certain personal injury cases it is not absolutely necessary and failure by the trial Judge to do so as in this case will not necessarily justify reversing the assessment of damages by the trial Judge.

In the case THE SIERRA LEONE SYNDICATE LTD vs. AMADU CONTEH referred to in the judgment of Ames P. in ARTHUR MASSALAY Vs. THERESA BECKLEY 1960-61 Sierra Leone Law Reports Vol. 1, the Court of Appeal for Sierra Leone and the Gambia said that in assessing general damages in cases of personal injury the Court should do so as if "Sierra Leone was the only country in the world" and then proceeded on "a matter of assessing damages in that case by a search for a comparable injury in England to see how much the English Court has awarded and then it was varied because the facts were not exactly like those in Conteh's ease and then it was considered how much, if at all, the judgment should be reduced owing to different circumstances prevailing in Sierra Leone."

In the case ARTHUR MASSALY vs. THERSA BECKLEY referred to above Ames P. in dealing with what he described as a "misunderstanding" as to what was meant in Conteh's case when the [p.230] existing Court of Appeal said that the matter should be considered as though Sierra Leone were the only country in the world said:—

"It seems to me to be common sense. It only referred to General Damages."

In that case Ames p. is reported to have said obiter:—

"The method adopted in that case adds to the admitted difficulty of assessing the amount to be awarded. If it is followed, it means looking for a "comparable ease" reported in England. Well oases usually are not exactly alike, so the English ease which has been found has to be adjusted, up or down, to guess what a Court or jury in England would have awarded had the case been exactly alike. Then it is necessary to consider if that figure should be varied, owing to the "special condition" existing here. One is then supposed to have arrived at the proper figure. Is it not much better to start and end in Sierra Leone? In England Courts do not find out what would have been awarded in comparable cases in the United States of America, Australia, India or anywhere else and then translates it into terms in England. They start and end in England.

In this country, there are very few eases of this kind, and it may be necessary to create a precedent in any particular case."

[p.231]

We hold the view that the method suggested by Ames P. in the case Arthur Massalay vs. Theresa Beckley mentioned supra, to wit "to start and end in Sierra Leone" is the proper method the Court below should adopt in assessing the amount to be awarded as General Damages for personal injuries. Our Courts should not in such matter take an excursion to England, United States of America, Australia, India any Commonwealth country or any where else to find out what would have been awarded in comparable cases.

In our view the Damages awarded could not in any way be regarded as excessive,"

Learned Counsel for the Appellant argued that the learned Trial Judge in making the lump sum awarded wrongly made an award for loss of future earnings. My learned brother, Awunor-Renner. JSC. has in a very lucid and succinct manner dealt with the submission which in my opinion is untenable, There is

nothing in the Judgment of the learned Trial Judge direct or from which it could be inferred that he made a guess as to what the loss of future earnings would be or what figure he would fix any loss of future earnings or that he made such an award. I would dismiss this Appeal with costs.

Hon, Mr. Justice Ken E.O. During

Justice of Appeal

CASES REFERRED TO

1. Mansaray v. Williams (1968-69) A.L.R. (S.L.) 326

2. John & Macauley v. Stafford & others S,L. Sup. Ct. Civ.App.

3. Bright v. Roberts (1964-66) A.L.R. (S.L.) 156

4. Davies v. Bickersteth (1964-66) A.L.R. (S.L.) 403

5. Cole v. Cummings (No.2) (1964-66) A.L.R.(S.L.)164

6. Ocean Estates Ltd. v. Pinder (1969) 2 A.C.19 at pp, 24-25

7. Performing Right Society Limited v. London Theater of Varieties Limited (1924) A.C.1 H.L. at p. 14

8. England v. Mope Palmer 14 W.A.C.A. 659.

9. Portland Managements Ltd. v. Harte (1976) 2 W.L.R. 174 C.A.

10. Bristow v. Carmican (1878) 3 App. Cas. 641 H.L

DR. C.J. SEYMOUR WILSON v. MUSA ABESS

[Civ. App. 5/79][p.62-87]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 17 JUNE 1981

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J., PRESIDING; MR. JUSTICE C.A. HARDING, J.S.C.; MR. JUSTICE O.B.R. TEJAN, J.S.C.; MR. JUSTICE A.V. AWUNOR-RENNER, J.S.C.; MR. JUSTICE S.M.F. KUTUBU, J.A

D.R. C. J. SEYMOUR WILSON - APPELLANT

vs

MUSA ABESS - RESPONDENT

JUDGMENT DELIVERED THE 17TH DAY OF JUNE, 1981

Dr. V.S. Marcus-Jones (Garvas Betts with him) for the Appellant

J.W. Davies (Luseni Massaquoi with him) for the Respondent

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JUDGMENT

LIVESEY LUKE C.J.

This appeal concerns the ownership of land at Wilberforce in the Western Area of Sierra Leone. By Writ of Summons dated 30th April, 1974 and issued and the High Court by the respondent herein (hereinafter called the Plaintiff) against the appellant herein (hereinafter called the Defendant) the Plaintiff claimed (i) declaration of title to land situated at Signal Hill, Wilberforce in the Western Area of Sierra Leone and bounded on the North by private property 210 feet on the South by a private property then or previously in the possession or occupation of J.B.S. King 210 feet, on the West by an access road to Aberdeen 66 feet and on the East by Signal Hill Road 80 feet; (ii) an injunction restraining the defendant his servant or agent from erecting a building on the land and (iii) Damages for Trespass. Pleadings were filed in due course. It is not necessary to set them out. A summary of the salient issues raised therein should suffice. In the Statement of Claim the plaintiff pleaded inter alia that the land was conveyed in fee simple to one Assad Joseph Yazbeck by one Gershon Theophilus Cole by Deed of Conveyance dated 28th June, 1951 and duly registered in the Books of Conveyances in the office of the Registrar General; that by Deed of Conveyance dated the 12th March, 1952 and duly registered in the office of the Registrar General the said Assad Joseph Yazbeck conveyed the land to him in fee simple; that since the 12th March, 1952 he had been in open and unchallenged possession of the land; that in March 1974 he discovered that the defendant was trespassing on the land by erecting a building thereon and that notwithstanding several requests and demands the defendant persisted in trespassing on the land. The defendant filed a Defence and Counterclaim.

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In his Defence the defendant inter alia denied that he had trespassed on any land belonging to the plaintiff; averred that he was the fee simple owner of the land in dispute by virtue of a Deed of Conveyance dated 23rd March, 1968 and expressed to be made between one Ellis Leslie England as vendor and himself as purchaser and duly registered in the office of the Registrar General; pleaded the Limitation Act, 1961 and alleged that the plaintiff had interfered with his possession of the land and had obstructed his building operations thereon. In his Counterclaim the defendant claimed special damages for loss a result of the plaintiff's obstruction of his building operation and general damages. The plaintiff filed a Reply and Defence to the Counterclaim. In the Reply the plaintiff denied the several allegations in the Defence and joined issue with the defendant. In the Defence to the Counterclaim the plaintiff inter

alia alleged that the defendant did not acquire any valid title from Ellis Leslie England and also pleaded the Limitation Act, 1961.

The trial was by Short J. (as he then was). The trial lasted several days and both parties were represented by learned Counsel. Each party gave evidence on oath, called witnesses including surveyors and tendered documents including maps and their respective documents of title. The learned judge delivered judgment on 8th March, 1977 dismissing the plaintiff's claim and awarding the defendant Le1000 as general damages. In dismissing the plaintiff's claim the learned judge after reviewing the evidence found "as a fact that the Plaintiff has failed to identify with any degree of certainty the land that he bought from Assad Joseph Yazbeck as being the land claimed by the defendant and also held that the plaintiff had "failed to prove that Gershon Theophilus Cole had a good title to pass to Assad Joseph Yazbeck" and that therefore Assad Joseph Yazbeck could not have passed a good title to the plaintiff.

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In deciding in favour of the defendant the learned judge said inter alia "It is manifestly clear that two completely different parcels of land are involved..... I find as a fact that the defendant is, and was at all times material to this action, the fee simple owner and in possession" of the land in dispute.

The plaintiff, being dissatisfied with the decision of Short J., appealed to the Court of Appeal. The appeal was heard by the Court of Appeal (consisting of S.B. Davies, During and C.S. Davies JJ.A) on 9th, 10th and 11th May 1978. Both parties were represented by learned counsel. The Court of Appeal delivered judgment on 25th May, 1979 allowing the appeal, setting aside the judgment of the High Court and remitting the case to the High Court for a retrial before another judge. In their judgment the Court of Appeal said inter alia—

"We have experienced considerable difficulty owing to the absence of any clear evidence as to whether the contention between the parties relate to one and the same land. That is the first point on which a Court has to satisfy itself before it can consider other matters. We would have thought that in a situation as the present one evidence from an independent source like the Director of Surveys and Lands was desirable. It was absent."

It is against that decision that the defendant has appealed to this Court. The plaintiff has also filed a notice of cross-appeal. The issues raised in this appeal and cross-appeal may be summarized as follows:—

(i) Do the plaintiff's title deeds relate to the land in dispute?

(ii) Did the plaintiff prove title to the land, and is he entitled to a declaration of title to the land?

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(iii) Who is entitled to damages for trespassers to the land - the plaintiff or the defendant?

(iv) Assuming that trespass to found in favour of the plaintiff, what amount should be awarded by way of General damages?

(v) Was the Court of Appeal right in ordering a retrial?

As indicated earlier, issue was made in the High Court as to whether the plaintiff's title deeds related to the land in dispute. The defendant contended and called evidence to establish that the land conveyed to the plaintiff in 1952 was not the land in distant was in fact situated some distance from the land in dispute. The learned trial Judge found that the land Conveyed to the plaintiff in 1952 and the land in dispute were completely different parcels of land. The Court of Appeal stated that they had experienced considerable difficulty in determining whether the land conveyed to the plaintiff in 1952 and the land in dispute were one and the same land. The Court of Appeal could have evaluated the evidence before them to determine the issue one way or the other. But this they declined to do and instead remitted the case to the High Court for a retrial. Learned counsel for the plaintiff strenuously argued before us that on the evidence the land in dispute is the same land as that conveyed to the plaintiff in 1952. Learned counsel for the defendant, on the other hand, argued with equal force that on the evidence the two lands were not the same. So while learned counsel for the plaintiff would have us reverse the finding of fact of the trial judge, learned counsel for the defendant urged that we should uphold the finding of fact of the trial Judge. There is no doubt that an appellate court has power to evaluate the evidence led in the court below,[p.67] reach its own conclusions and in a suitable case to reverse the finding of fact of a trial judge. But those powers are exercisable on well-settled principles, and an appellate court will not disturb the findings of fact of a trial judge unless those principles are applicable. The principles have been frequently stated both locally and in other commonwealth jurisdictions. They were authoritatively stated by the House of Lords in Watt or Thomas v. Thomas (1947) A.C. 484. It will be sufficient to, quote the headnote of that report, which succinctly states the principles. It reads:—

“When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him there for are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.”

See also Benmax v. Austin Motor Co. Ltd. (1955) 1 All E.R. 326 H.L. where Lord Reid said inter alia at p. 329:—

“But in cases where there is no question of the credibility or reliability of any witness, and in Cases where the point in dispute is the proper inference to be drawn from proved facts, [p.68] an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.”

See also EL Nasr Export and Import Co. Ltd. v. Mobie E1 Deen Mansour S.L. Sup. Ct. Civ. App. 3/72, Judgment delivered on 25/4/74 (unreported).

In view of what follows hereafter, I am of the opinion that in the instant appeal it is unnecessary to evaluate to evidence with a view to determining whether or not the trial judge's finding of fact that the plaintiff's title deeds did not relate to the land in dispute was right. I shall assume for the purpose of this or this judgment (unless otherwise stated) that the dispute is the same as the land conveyed to the plaintiff in (1952).

On the basis of that assumption, the first issue calling is whether the plaintiff proved title to the land dispute. This issue is relative to the plaintiff's claim for a declaration of a fee simple title. I think that it is trite law that in an action for a declaration of title the plaintiff must, be used on the strength of his title and not on the weakness of the defendant's title. See Kodilinye v. adu (1935) W .A. C .A. 336 where Webber C.J. (Sierra Leone) in delivering the judgment of the West African Court of Appeal said inter alia at pp. 337-338:—

"The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness or the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration."

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See also Mansaray v. Williams (1968-69) A.L.R. (S.L.) 326; and John & Macauley v. Stafford & others S,L. Sup. Ct. Civ.App. 1/75 judgment delivered 13/7/76 (unreported). Quite apart from the rule just stated, it is relevant to mention that the defendant pleaded in his Defence that he was in possession of the disputed land, That plea is in accordance with Order XVIII rule 20 of the High Court Rules. The effect of such a plea is a denial of the allegations of fact in the Statement of Claim. In interpreting Order XIX rule 15 of the Rules of Court, 1875 (with which our Order XVIII Rule 20 is identical) the House of Lords held in Dunford v. McAnulty (1883) 8 App, Case, 456 that in an action for recovery of land a statement of defence alleging that the defendant is in possession operates as a denial of the allegations in the plaintiff's Statement of Claim, and requires the plaintiff to prove them. So in this case, the plaintiff having averred that he is the fee simple owner of the land in dispute the onus is on him to prove that averment.

So the question that arises is whether the plaintiff discharged the burden cast on him to prove that he was the fee simple owner of the land in dispute. The plaintiff based his claim to a declaration of a fee simple title on the Conveyances of 1951 and 1952. The evidence relied on by the plaintiff was purely documentary. His case was that Gershon Theophilus Cole (hereinafter called Gershon Cole) was the fee simple owner of the and which he conveyed to Assad Joseph Yazbeck (hereinafter called Assad Yazbeck) in 1951 and that on the strength of that Conveyance Assad Yazbeck had a fee simple title in the land which he conveyed to him in 1952. In my opinion to succeed the plaintiff had to prove that Gershon Cole was the fee simple owner of' the land at the time (in 1951) when he conveyed it to Assad Yazbeck. A

Statutory Declaration was produced as a proof of Gershon Cole's title. The Statutory Declaration was sworn to by Gershon Cole, one Geoffrey Vidal Smart King and one Charles Bell in June, 1951.

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But none or the declarants was called at the trial nor was any attempt made to account for their absence. Section 3 or the Evidence (Documentary) Act Cap. 26 makes provision for the admission in evidence of any statement made by a person in a document tending to establish a fact if direct oral evidence of that fact would be admissible. But the Section stipulates certain conditions for the admissibility or such documentary evidence. Among the conditions are that the maker of the statement has personal knowledge of the matters dealt with by the statement and that he is called as a witness unless he is dead, or unfit to attend as a witness or he is out or the jurisdiction or if all reasonable efforts to rind him have been made without success or if the court having regard to all the circumstances and being satisfied that undue delay or expense would otherwise be caused orders that the statement shall be admissible in evidence. No attempt was made to fulfill any or the conditions laid down in the Section. In my opinion there could be no doubt that a statutory declaration is “a statement made by a person in a document” and is therefore governed by the provisions or the Act (Cap. 26). In my judgment the plaintiff having failed to fulfill any of the conditions stipulated in Section, 3 or the Act, the Statutory Declaration and consequently the statements made therein were inadmissible in evidence. See Bright v. Roberts (1964-66) A.L.R. (S.L.) 156. So the plaintiff was left with only his title deeds. No other evidence was led to prove Gershon Cole's title.

Before departing from this aspect of the appeal, it is necessary to deal with one or two matters raised by learned counsel during argument before us. Mr. Davies, learned counsel for the plaintiff, placed much reliance on Section 4 or the Registration of Instruments Act (Cap. 256). He argued that since the plaintiff's title deeds were respectively registered in [p.71] 1951 and 1952 and the Defendant's in 1968, the fact of prior registration ipso facto conferred a better title on the plaintiff than on the defendant. He submitted that that was the legal position by virtue of the provisions of Section 4 of Cap. 256. He claimed to derive support for this submission from Davies v. Bickersteth (1964-66) A.L.R. (S.L.) 403 a decision of the Court of Appeal. Mr. Garvas Betts, learned counsel for the defendant, submitted in reply that Section 4 of Cap. 256 does not deal with title. He added that Cap. 256 was a statute regulating the registration of instruments and not the registration of title, and that therefore the fact of the registration of a conveyance does not thereby confer an indefeasible title on the purchaser.

In view of the contending submissions of learned counsel, I think that it is necessary to set out Section 4 of Cat. 256. The section, so far as relevant, reads:—

“4(1) Every deed, contract, or conveyance, executed after the ninth day of February, eighteen hundred and fifty seven, so far as regards any land to be thereby affected, shall take effect, as against other deeds affecting the same land, from the date of its registration…… Provided that every such instrument shall take effect from the date of its execution, if registered within any of the periods limited for registration, as follows, that is to say:—

(a) if such instrument be executed in Freetown if registered within ten days from its date;

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(b) if such instrument be executed elsewhere in the Colony [now Western Area] or Protectorate [now Provinces], if registered within sixty days from its date

(c) if such instrument be executed elsewhere than in the Colony or Protectorate, if registered within one year from its date."

It will be convenient at this stage to refer to the case of Davies v. Bickerstgth (supra) relied on by counsel for the plaintiff. The relevant part of the judgment in that ease is at pp,405-406 of the report. It reads:—

"From this it seems quite clear that each party alleged ownership of the land in dispute and they both based their respective claims on deeds of conveyance. The simple issue therefore before the court was which of them had a better title…….. The position therefore was this, namely, that the appellant had traced his title back to a deed of conveyance which was registered on December 12th 1944, whereas the respondent had traced his own title back to a deed of conveyance which was registered on November, 27th 1945. Of the two therefore, it would appear that the appellant had a better title: See S. 4 of the Registration of Instruments Act (Cap.256), which reads [Section 4(1) was then set out] Judgment should therefore have been given in favour of the appellant."

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The question then arises: Was that a correct application of Section 4 of Cap. 256? The long title of Cap. 256 states clearly the intention of the legislature in enacting that Statute i.e. to amend and consolidate the law relating to the registration of instruments. Nowhere in the Act is any mention made of registration of title. There is a world of difference between registration of instrument and registration of title. The difference can be illustrated by reference to the position in England. In England the first attempt to introduce registration of title, as opposed to registration of deeds, was made by the Land Registry Act, 1862. Prior to the passing of that Act, a few counties had a system of registration of deeds. The registration of deeds and other instruments was designed to give publicity to dealings with land and to prevent frauds upon purchasers and mortgagees. The Middlesex Deed Registry was established in 1708 by The Middlesex Registry Act 1708. It was in 1891 transferred to the Land Registry, and it has since then formed part of that office. Under the 1708 Act all deeds and conveyances, whereby any lands or hereditaments in Middlesex could be affected at law or in equity were registrable. The omission to register an instrument under the Act did not invalidate it, but by reason of such omission, it will be adjudged "fraudulent and void" against a subsequent purchaser or mortgagee for valuable consideration. Instruments rank in order of date of registration and not of date of execution. But this was only a prima facie rule, and it was held to be subject to certain exceptions. Deed registries were established in Yorkshire by Statutes passed in the Eighteenth Century. The system of registration under those Statutes was substantially the same as that of the Middlesex Registry. The Yorkshire Registries Act, 1884 repealed and replaced the earlier Statutes

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Under the 1884 Act all assurances including conveyances, and Wills, by which any lands within the three Riddings of North, East and West Yorkshire are affected were made registrable.

All assurances entitled to be registered hare priority according to the date of registration and not according to the date of the assurance or of their execution. Thus a subsequent purchaser or mortgagee who registers first has priority over an earlier unregistered assurance, notwithstanding that he took with actual notice of it.

I shall now turn my attention to the registration of title. The object of registration of title to land is to simplify the means of transferring the ownership of land, by avoiding the necessity of investigation of title to it on every successive purchase, and by provision of simplified forms of assurance. The object of the land Registry Act 1862 (referred to above) is spelt out in the long title and the preamble thereof. The long title reads:—

"An Act to facilitate the proof of title to, and the conveyance of Real Property."

And the preamble recites:—

"Whereas it is expedient to give certainty to the title of real estate and to facilitate the proof thereof also to render the dealing with land more simple and economical."

The 1862 Act made elaborate provisions for the registration of title including the examination of title by the registrar and examiners of title, reference by the registrar of questions as to title to a Chancery judge, the establishment of the identity of the land, the holding of preliminary inquiries by the registrar, the public advertisement of notice of intention to register, the showing of cause against registration by any interested person before the registrar with a right of appeal [p.75] by either party, the completion of registration, and the effect of registration. What is registered under the Act is not the Conveyance or other instrument, but a memorial of it giving particulars and providing other data and material specified in the Act. The Act was on a voluntary basis, and provided that before registering (i) a marketable title must be shown; (ii) the boundaries must be officially determined and defined as against adjoining owners; and (iii) partial interests had to be disclosed and registered. With regard to the effect of registration of title, Section 20 of the Act is both relevant and instructive. The Section provides:—

"20. Subject to any exception, qualification, or condition mentioned in such record of title, and to any registered charges or incumbrances, and to such charges and interests (if any) as are therein declared not to be incumbrances, the person originally and from time to time namded and described in such record of title as aforesaid shall, for the purposes of any sale, mortgage, or contract of valuable consideration by such persons respectively, be and be deemed to be as from the date of registering such record by the registrar, or from such time as shall be fixed by him therein, absolutely and indefeasibly possessed of and entitled to such estates, rights, powers, and interests as shall be defined and expressed in such record, against all persons, and free from all rights, interests, claims and demands whatsoever, including any estate, claim or interest of Her Majesty……."

[p.76]

This Section quite clearly shows that it is the registration of an absolute title - after all the formalities of registration have been gone through - and not the registration of title deed that entitles the person concerned to an indefeasible title to the land affected.

Subsequent Acts dealing with registration of title were passed by the U.K. Parliament i.e. the Land Transfer Act, 1875, the Land Transfer Act, 1897, the Law of Property Act, 1922 and the Land Registration Act, 1925. But it is not necessary to refer to refer of them in detail. Suffice it to say that they all provided fir a system of registration of title as distinct from registration of instruments.

From the foregoing, it should be abundantly clear that there is a fundamental and important difference between registration of instrument, 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 its long title that it was passed to provide for the registration of instruments.

What interpretation then is to be put on Section 4 of Cap. 2567 In my opinion registration of an instrument under the Act confers priority over other instruments affecting the same land which are registered later. Registration of an instrument under the Act 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 my confer no title at all e.g. where the vendor had no title to pass. The effect of the Section may be illustrated thus:—

[p.77]

If A conveys Blackacre to B on 1st January, and then to C on 2nd January, (of the same year) both Conveyances being executed in Freetown and C registers his Conveyance on 14th January, and B registers his on 15th January, C's Conveyance will take effect as against B's Conveyance by virtue of prior registration. But if A conveys Blackacre to B on 1st January and the Conveyance is duly registered on 15th January, and if Y (who has no title to the land) conveys Blackacre (the same land) to Z on 1st January, and it was duly registered on 14th January," according to the Section, Z's Conveyance would take effect before B's Conveyance. But that does not mean that it would take effect to confer title on Z, for the simple reason that Y had no title to pass to Z or to anyone for that matter, the maxim being nemo dat quod non habet. B's title to Blackacre would remain intact unaffected and undisturbed by the conveyance to Z, notwithstanding the prior registration of Z's Conveyance. In such a situation Z would be left with a valueless document on his hands and his remedy would be against the fraudulent vendor Y, and not against B the true owner of the land. (This illustration is subject to the provisions of Section 4(2) of the Act enacted by Section 2 of the Registration of Instruments (Amendment) Act, 1964 providing that instruments not registered within the Prescribed time shall be void and also making provision for registration out of time.)

From the above illustration, it must be evident that the mere registration of an instrument does not confer title to the land affected 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. In other words, if two deeds Are registered in respect of the same land, one may take effect before the other under Section 4, [p.78] but that does not mean that the prior registered deed confers a better title. The prior registered deed may confer an imperfect title or no title at all. But its prior registration would not ipso facto perfect an imperfect or invalid title.

I think that 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 unregistered pre-1964 Conveyances. If the construction put upon, Section 4 by the Court of Appeal in Davies v. Bickersteth (supra) is upheld, it would mean that any person taking a Conveyance of 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 as against the true owner holding an unregistered pre-1964 conveyance. The legislature could not have intended such absurd consequences. Quite apart from this, it is a matter of common knowledge that most of the lands in the Western Area outside the City of Freetown are based on possessory title and most of them are not covered by title deeds. That situation is the result of the history of land holding established in the Western Area about two centuries ago. The system which has been in operation in the Western Area since the founding of the Colony (now the Western Area) is that land passes within the same family from one generation to another in many cases without the existence of any document of title. The question then arises; does the mere registration of a Deed conveying any such land confer title on the purchaser as against the true owner who may have an indefeasible possessory title but no document of title? In my pinion such a result could not have been intended by the legislature in enacting Cap.256 and in particular Section 4 thereof.

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Indeed the courts in Sierra Leone have on innumerable occasions decided in favour of owners of a possessory title without documents of title as against the holders of registered Conveyances. See for example Cole v. Cummings (No.2) (1964-66) A.L.R.(S.L.)164. For examples of cases where the rival titles were based on possessory non-documentary titles, See Mansaray v. Williams (supra) and John & Macauley v. Stafford & Ors. (supra).

In my judgment therefore the fact that the plaintiff's conveyance was executed and registered before the Defendant's conveyance does not ipso facto confer a better title on the plaintiff. In view or the foregoing, it follows that Davies v. Bickersteth (supra) was wrongly decided and should be over-ruled. And it is hereby over-ruled.

In view of the present trends and practices in dealings relating to land in the Western Area it-may be desirable to introduce a system of compulsory land registration in the Western Area. Such a measure may have the effect of putting an end to or of discouraging undesirable speculation and fraudulent dealings in land. It would protect innocent purchasers against fraudulent and unscrupulous dealers in land. It would also simplify conveying, and create certainty and security in the ownership of land. And it would relieve potential pur9hasers from the risk of buying law-suits.

To return to the facts of this case, the important question that arises is whether the plaintiff discharged the burden on him to prove that he had a fee simple estate in the land. To succeed he had to prove that he acquired a fee simple title from his predecessors in title, namely Assad Yazbeck and Gershon Cole. In other words did Assad Yazbeck acquire a good title from Gershon Cole in 1951 which he in turn passed to the plaintiff in 1952. No evidence was led to prove that Gershon Cole had any title to the land which he purported to convey to Assad Yazbeck in 1951.

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Any possessory title that may have been acquired by the plaintiff after he purchased the land from Assad Yazbeck must be ruled out, because that was not the case put up by him. His case for a declaration of title stands or falls on his documentary title. In my opinion in view of the fact that no evidence was led to prove that Gershon Cole was the fee simple owner of the land in 1951 when he conveyed it to Assad Yazbeck, the plaintiff's claim for a declaration of a fee simple title must fail.

In an endeavour to prove that the defendant had no title to the land the plaintiff tendered in evidence a certified copy of a registered Conveyance dated 27th November, 1963 and expressed to be made between Vivian Victor Thomas and Vidal George Solomon Tsukuma Bickersteth whereby Vivian Victor Thomas (hereinafter called Vivian Thomas) conveyed the land in dispute to Vidal George Solomon Tsukuma Bickersteth (hereinafter called Vidal Bickersteth) (Ex. K) According to the evidence led by the Defence, Vivian Thomas conveyed the same land to Ellis Leslie England by Conveyance dated 6th January, 1967. (Ex. N). Ellis Leslie England, (hereinafter called Ellis England) in turn conveyed the land to the Defendant by Conveyance dated 23rd March, 1968 (Ex.M). Learned counsel for the plaintiff contended that Exhibit K proved that when Vivian Thomas conveyed the land to Ellis England in January, 1967, he had no title to pass because he had already divested himself of the title to the land when he conveyed it to Vidal Bickersteth in November, 1963. Therefore, according to Mr. Davies' argument, the Vivian Thomas title now vests in Vidal Bickersteth or his successors in title. That argument conceded, it means that there is soma other person, not before the court, who has a rival claim to the title of the land and whose title may be superior to that of the plaintiff. In my opinion, that evidence (Ex.K) having been introduced by the plaintiff, it was incumbent upon him to take steps to join Vidal Bickersteth or his [p.81] successor in title, if he was to succeed in his claim for a declaration of fee simple title in himself. In the face of that evidence (Ex. K) and in the absence of Vidal Bickersteth or his successor in title, I am of the opinion that it would be futile to make a declaration of title in favour of the plaintiff. In the circumstances, the proper course is to dismiss the plaintiff’s claim for a declaration of title.

Although not cited by counsel, I am of course aware of the dicta of Lord Diplock in delivering the opinion of the Privy Council in Ocean Estates Ltd. v. Pinder (1969) 2 A.C.19 at pp, 24-25 to the following effect:

“At common law as applied in the Bahamas, which has not adopted the English Land Registration Act, 1925, there is no such Concept as an “absolute” title. Where questions of title to land arise in litigation the court is concerned only with the relative strength of the title proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or

occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act."

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It must be pointed out that that case was a case of trespass, and there was no claim for a declaration of title. So the above quoted dicta must be taken to be relative to a case of Trespass. Indeed it states the correct principles relative to a claim for trespass. In a case of trespass, what the plaintiff has to prove is a better right of possession than the defendant. One of the ways that he may do this is to prove that he has a better title to the land than the defendant. But "better" title in the context of an action for trespass is not necessarily a "valid" title. In a case of trespass the court is concerned only with the relative strengths of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession, succeeds, even though there may be another person, not a party, who has a better title than him. But in a case for a declaration of title, the plaintiff must succeed by the strength of his title. He must prove a valid title to the land. So if he claims a fee simple title he must prove it, to entitle him to a declaration of title. The mere production in evidence of a Conveyance in fee simple is not proof of a fee simple title. The document may be worthless. As a general rule the plaintiff must go further and prove that his predecessor in title had title to pass to him. And of course if there is evidence that the title to the same land vests in some person other than the vendor or the plaintiff, the plaintiff would have failed to discharge the burden upon him.

I have not lost sight of Order XII rule 11 of the High Court Rules Which provides that no action shall be defeated by reason of the misjoinder or - non-joinder of any party. But as pointed out by Viscount Cave L.C. in Performing Right Society Limited v. London Theater of Varieties Limited (1924) A.C.1 H.L. at p. 14, this does not mean that judgment can be obtained in the absence of a necessary party to the action.

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I shall now turn to the issue of trespass - that is, the third issue formulated above. For this part of my judgment, I shall not assume that the plaintiff's title deeds relate to the land in dispute. In an action for trespass the important consideration is possession. The important issue who has proved a better right to possession. A mere possession is sufficient to maintain trespass against anyone who cannot show a better title. See England v. Mope Palmer 14 W.A.C.A. 659. See also Portland Managements Ltd. v. Harte (1976) 2 W.L.R. 174 C.A. where Scarman L.J. said inter alia at p. 180:—

"Possession is, of course, a very important matter to be considered in an action of ejectment, or the action for trespass."

In Bristow v. Carmican (1878) 3 App. Cas. 641 H.L. Lord Hetherly said inter alia at p. 652:

"There can be no doubt whatever that mere possession is sufficient against a person invading that possession without himself having any title whatever, as a mere stranger; that is to say, it is sufficient as against a wrong doer. The slightest amount of possession would be sufficient to entitle the person who

is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

So the question for determination is whether the plaintiff or the defendant proved a better possession of the land in dispute. Taking first the evidence for the plaintiff, and assuming that his title deeds do not relate to the land, then there is evidence that at some stage he exercised acts of possession over the land.

[p.84]

Even if the evidence of his visit to the land in 1952 is ignored, there is evidence that in 1961 or 1965 he exercised rights of possession over the land by warning off a Mr. Lewalley whom he considered a trespasser, therefrom. In the case of the defendant he relies on his title deeds and other acts of possession. The Conveyance from Vivian Thomas to Ellis England was in 1967 and the Conveyance from Ellis England to the defendant was in 1968. But as stated earlier evidence was led that in 1963 Vivian Thomas had conveyed that same piece of land to Vidal Bickersteth. That evidence went uncontroverted and unrebutted. Learned counsel for the defendant suggested in argument before us that the land may have been re-conveyed to Vivian Thomas or he may have re-entered. But there is no evidence on which such a suggestion can be founded. In my opinion the only evidence of possession that the, defendant can rely on is his possession and the prior possession of Ellis England commencing in January 1967. So the relative position of the parties as to proof of possession is that the plaintiff has proved possession from about 1964 or 1965 and the defendant has proved possession from January 1967. In those circumstances, the plaintiff has, in my judgment, proves better possession which has been invaded by the defendant. In my judgment therefore the defendant is liable to the plaintiff in trespass.

I shall now consider what general damages are to be awarded to the plaintiff for the trespass found against the defendant. According to the evidence the plaintiff has not made any use of the land and he has certainly not developed it. In all the circumstances, I think that Le500 would be reasonable and adequate compensation to the plaintiff by way of general damages for the trespass by the defendant. This disposes of the fourth issue formulated above.

[p.85]

I now come to the last issue formulated above, and that is whether the Court of Appeal was right in ordering a re-trial. As state earlier the Court of Appeal said in their judgment that they had experienced considerable difficulty "owing to the absence of any clear evidence as to whether the contention between the parties related to one and the same land." With respect, if the Court found itself in such a difficulty it meant that the plaintiff had failed to discharge the onus upon him. In those circumstances they should have dismissed the appeal. As was pointed out by Webber C.J. in Kodilinye v. Odu (supra) if the plaintiff in an action for a declaration of title has failed to discharge the burden cast upon him the proper judgment should be for the defendant. In other words the plaintiff's claim for declaration of title should be dismissed. It is certainly not the proper course in such a situation to order a re-trial and thereby give the plaintiff a second opportunity to discharge the onus which he had failed to discharge in the first place.

The Court of Appeal went further and added that:

"We would have thought that in a situation as the present one evidence from an independent source like the Director of Surveys and Lands was desirable."

Assuming that evidence was desirable, who should have called it? Quite clearly the plaintiff, on whom the onus rested. And if he failed to c all that evidence, I would have thought that that was further proof that he had failed to discharge the onus on him. And if he failed to discharge that onus the proper course open to the Court in such circumstances the dismissal of his claim and not an order for a re-trial. It is of interest to note that a Surveyor and senior member of the staff of Surveys and Lands Department in the person of Mr. R.E. Boston-Mammah was called by the plaintiff as P.W.5. And yet no questions were put to him to assist in solving the problem of the identity of the land.

[p.86]

Indeed judging from his recorded evidence, it is surprising that he was called as a witness at all. One would have thought that Mr. Boston-Mammah was competent to give the "evidence from an independent source" which the Court of Appeal thought was desirable. If the plaintiff who called him failed to elicit that "desirable" evidence from him I would have thought that that was further reason why the appeal against the dismissal of the claim f or a declaration of title should have been dismissed.

As indicated above, the Court of Appeal having decided to order a re-trial proceeded to express an opinion as to what evidence it was desirable to call. That means that the Court of Appeal was advising the plaintiff what evidence to call at the re-trial. I think that it is necessary to state that it is not the business of the court, especially in a civil case, to give the parties gratuitous advice as to how they should conduct their cases or what witnesses to call. Otherwise the impression might be created that the court is taking sides in the dispute instead of holding the scales evenly which is its proper role.

In my opinion there was sufficient material before the Court of Appeal to determine the issues raised in the appeal one way or the other. In my judgment therefore the Court of Appeal was wrong in ordering a re-trial.

[p.87]

In view of the foregoing, I would allow the Appeal to the extent of setting aside the order for a re-trial and restoring the trial Judge's order dismissing the plaintiff's claim for a declaration of title. I would also allow the cross-appeal to the of setting aside the trial Judge's order of general damages for trespass against the plaintiff and substituting therefore an order of' Le 500 in favour of the plaintiff by way of general damages for trespass by the defendant.

(Sgd.) E. Livesey Luke

I agree

(Sgd.) C.A. Harding, J.S.C.

I agree

(Sgd.) O. B. R. Tejan, J.S.C.

I agree

(Sgd.) A. Awunor-Renner, J.S.C.

I agree

(Sgd.) S.M.F. Kutubu, J.A.

CASES REFERRED TO

1. Mansaray v. Williams (1968-69) A.L.R. (S.L.) 326

2. John & Macauley v. Stafford & others S,L. Sup. Ct. Civ.App.

3. Bright v. Roberts (1964-66) A.L.R. (S.L.) 156

4. Davies v. Bickersteth (1964-66) A.L.R. (S.L.) 403

5. Cole v. Cummings (No.2) (1964-66) A.L.R.(S.L.)164

6. Ocean Estates Ltd. v. Pinder (1969) 2 A.C.19 at pp, 24-25

7. Performing Right Society Limited v. London Theater of Varieties Limited (1924) A.C.1 H.L. at p. 14

8. England v. Mope Palmer 14 W.A.C.A. 659.

9. Portland Managements Ltd. v. Harte (1976) 2 W.L.R. 174 C.A.

10. Bristow v. Carmican (1878) 3 App. Cas. 641 H.L

GRACE JOHNSTON v. YVONNE NICOLS & YVETTE DAVIES

[Civ. App. No. 1/80][p.120-181]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 16TH DECEMBER, 1981

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J. PRESIDING; MR. JUSTICE O.B.R. TEJAN, J.S.C.; MR. JUSTICE K.E.O. DURING, J.S.; MR. JUSTICE S.C.E. WARNE, J.A.; MR. JUSTICE C.S. DAVIES, J.A.

GRACE JOHNSTON - Appellant

Vs

Yvonne Nicols

&

Yvette Davies as personal

Representatives and Administrixes of the Estate of Respondents

Rowland E.A. Harding "Deceased"

A.L.O. Metzer, Esq. for the Appellant

S. Hodson Harding, Esq, for the Respondents

JUDGMENT

LIVESEY LUKE C.J.

On 25th Ocotber, 1973 Rowland Eugene Alexander Harding (hereafter called the applicant) took out an Originating Summons in the High Court applying for the following orders:—

(i) An extension of time during which to register Deed of Conveyance dated the 30th day of March, 1967 and executed by Grace Omorlake Johnston (described as vendor) of the one part and Rowland Eugene Alexander Harding (therein described as the purchaser) of the other part in the Books of Conveyances kept in the office of the Administrator and Registrar-General for Sierra Leone and [p.121]

(ii) That the registration of the said Deed of Conveyance to take effect as from the date of execution thereof to wit 30th March, 1967.

The application was supported by an affidavit sworn by the applicant on 23rd October, 1973 to which he exhibited a copy of the Deed of Conveyance referred to in the Summons. The application was made under the proviso to Section 4(2)(a) of the Registration of Instruments Act, Cap. 256 (as amended). The Section so far as relevant reads—

"4(1) Every Deed, contract, or Conveyance, executed after the ninth day of February, eighteen hundred and fifty seven, so far as regards any land to be thereby affected, shall take effect, as against other Deeds affecting the same land from the date of its registration.

Provided that every such instrument shall take effect from the date of its execution, if registered within any of the periods limited for registration as follows, that is to say—

(a) if such instrument be executed in Freetown, if registered within ten days from its date ……

(b) ……

(c) …….

(2)(a) Every Deed, contract or Conveyance executed after the 1st day of June 1964, shall be void, so far as regards any land to be thereby effected, unless it is registered within the appropriate period limited for such registration under the proviso to sub-section (1).

[p.122]

Provided that any person prejudiced by the avoidance of any transaction under the provisions of this sub-section may apply by originating summons to a judge of the High Court for permission to register after the expiration of the period limited for registration, and if the Judge is satisfied that either

(i) The failure to register was not due to any fault of the applicant, or

(ii) the applicant, failure to secure registration in time was, in all the circumstances of the case excusable.

He may permit the applicant to register out of time and the transaction in question shall be deemed never to have been avoided and shall take effect as against other transaction affecting the same land from such date as shall be just."

Grace O. Johnson and the Administrator and Registrar-General were joined as Respondents to the application and both were duly served, Grace O. Johnston (hereafter called the Appellant) entered an appearance to the Summons and filed an affidavit in opposition Sworn on 5th November, 1973. She later filed another affidavit sworn by her on 21st November, 1973. The Administrator and Registrar-General did not enter an appearance and took no part the precedings.

The Summons was heard by Short J. (as he then was). During the course of the hearings the leaned Judge on the Application of learned counsel on 28th November, 1973 made the following orders—

[p.123]

(1) Both the applicant and the respondent may file and serve further evidence by affidavits within seven days from today and any affidavits in reply to be filed and served within another seven days;

(2) The deponents should be available for cross-examination by the opposite side.

Thereafter the following affidavits were filed in order of sequence:—

(i) Affidavit of Habert Bankole Bright sworn on the 5th day of December, 1973 and filed on behalf of the appellant.

(ii) Affidavit of Roderick Ewart Boston-Mammah sworn on the 5th day of December, 1973 and filed on behalf of the appellant.

(iii) Affidavit of Rowland Eugene Alexander Harding sworn on the 15th day of December, 1973 and filed on his own (i.e. applicant's behalf)

(iv) Affidavit of Grace Omolake Johnston sworn 18th day of December, 1973 and filed her own (i.e. appellant's) behalf.

By order made on 18th December, 1973 the learned judge designated the applicant as “plaintiff” and the appellant as “Defendant.”

The affidavits, to which I shall return presently contained allegations and counter-allegations of a very serious nature. Both parties were uncompromising in their attitude and were prepared for a bitter contest. It was in that charged atmosphere that the applicant entered the witness box on 18th December, 1973.

[p.124]

He was subjected to the most rigorous cross-examination by learned counsel for the appellant on that day and on three other days when the Summons came up for hearing. The printed records indicate that at the close or cross-examination, learned counsel considered it necessary to re-examine the applicant at length. At the end of the applicant's evidence, the appellant entered the witness box on 30th January, 1974. She too was subjected to a very rigorous cross-examination which lasted two days.

The affidavit were lengthy and the evidence copious. They have been set out in great detail in the judgments of the High Court and of the court of Appeal. I do not consider it necessary to set them out in any detail in this judgment. It will be sufficient for present purposes to give a brief summary of the affidavit and viva voce evidence. The applicant was a Barrister and Solicitor. The appellant is and was at all material times an Auctioneer and Estate Agent. They were intimate friends. The applicant acted as Solicitor for United Africa Company Limited (U.A.C. for short) in an action in the then Supreme Court (now High Court) against one B.L. Macfoy. Judgment was given in favour of U.A.C. In execution of that judgment a writ of fieri facias was issued by the applicant as Solicitor for U.A.C. to levy execution against the real property of B.L. Macfoy, the judgment debtor. Pursuant to the writ of fieri facias, the Sheriff or Sierra Leone sold, by public auction, the real property of B.L. Macfoy situated at Africanus Road Kissy Village in June 1966. Both the applicant and the appellant attended the auction. The applicant took part in the bidding as agent for the appellant. He deposed inter alia in his affidavit sworn on 15th December. 1973 as follows:—

[p.125]

“1. That sometime in 1966 I requested the first Respondent as a personal Friend and as an estate agent whether she would agree to have the property in question bought in her name to be held in trust at my discretion (or upon my instructions) and that she would be paid fees for so doing.

2. That having arranged for the purchase price of Le2,250 (Two Thousand Two Hundred and Fifty Leones) I attended the auction and made the final accepted bid on behalf of the first Respondent (as previously agreed upon)”

In reply to the above quoted paragraphs of the applicant's affidavit, the appellant deposed in her affidavit sworn on 18th December, 1973 as follows:—

"1. That there was never any agreement between the applicant and myself to have the property which is the subject of the action bought in my name to be held in trust for him at his discretion (or upon his instructions) nor did he pay me fees for doing so as alleged in paragraphs l and 9 of the second affidavit herein.

2. That the applicant attended the auction as Solicitor for U.A.C. who caused the property to be sold did not make the final bid on my behalf nor any bid at all.

3. That there was no arrangement for the purchase price of Le2,250 between us as alleged in paragraph 2 of his affidavit.

[p.126]

4. That the sale was by Public Auction to the highest bidder."

In his evidence under cross-examination the applicant said inter alia

"I was present when the property was being auctioned. I was there as Agent and Solicitor when the property was being auctioned. I did so as Agent and Solicitor of Grace Omorlake Johnston. At the time, I was also acting as Agent and Solicitor for Messrs. U.A.C. who had issued a Fi.Fa. in respect of the same properties. I I recall that at the auction the owner Mr. B.L. Macfoy threatened to kill any prospective purchaser of the properties. I thereupon took over the bidding for the properties from Grace Omorlake Johnston at her request. I signed the Auctioneer's certificate on behalf of Grace Omorlake Johnston……. I paid the purchase price on behalf of Grace Omorlake Johnston with monies that I got from Messrs. U.A.C ……I got the money from Messrs U.A.C. as their Solicitor because they were tenants and wanted the freehold. I invited Grace Omorlake Johnston to the Auction in her capacity as an Estate Agent so that she could buy the property and get it conveyed to me in my private capacity as Rowland Harding."

Under cross-examination the appellant agreed that that applicant had indeed made the final bid at the auction. She said inter alia:—

[p.127]

"The property was bought from the Sheriff of Sierra Leone …… I did not personally pay any money for this property. The plaintiff (i.e. the applicant) arranged this cash advance with Messrs. U.A.C. I had no dealing with U.A.C. about this. The plaintiff did all the arrangement ……When I went to the Sale and having made the highest bid through my agent the plaintiff, I asked Mr. Talabi Coker who was the representative at the Sale if he could arrange a cash advance from Messrs. U.A.C. to pay for the property. He then advised me to make that request through the Solicitor for Messrs. U.A.C. who was the plaintiff ……. After Talabi Coker gave me the reply to my request I then asked the plaintiff to negotiate the arrangement. At that time the plaintiff was the person who did the final bidding."

The Sheriff's Sale Certificate was signed by the applicant as "Agent for Grace Omorlake Johnston, Purchaser."

In pursuance of the Sale the property was conveyed to the appellant by the Sheriff by Deed dated 13th June, 1966 (Ex. C). The next stage in the story is the Sale or alleged Sale of the property by the appellant to the applicant. And this is where the controversy between the parties centred. According to the applicant, the appellant sold and conveyed the property to him. But according to the appellant she at no time sold or conveyed the property to the applicant. In paragraphs 2 & 3 of the affidavit in support of the Summons, which was sworn on 23rd October, 1973 the applicant deposed inter alia:—

[p.128]

"2. That on the 30th day of March, 1967 a Deed of Conveyance was executed by Grace Omorlake Johnston (therein described as the Vendor) and myself (therein described as the Purchaser) in respect of properties at Kissy Bye-Pass and Africanus Roads, Kissy Village aforesaid

3. That the witness to the execution of the said Deed of Conveyance was Mr. J.B. Jenkins-Johnston the brother of the said Grace Omorlske Johnston, now deceased"

In reply to the allegations made in the two paragraphs just quoted the appellant deposed inter alia in her affidavit sworn on 5th November, 1973:—

"2. That on the 30th day of March, 1967 the date of Conveyance copy of which is attached to Originating Summons I was out of Sierra Leone on board the M.V. Aureol sailing from Liverpool to Freetown having left Freetown since 20th August 1966 as evidenced by my passport.

3. That I did not execute the said Deed of Conveyance herein, nor did I knowingly execute any Deed of Conveyance to the said Applicant for my properties at Africanus Road and Bye Pass Road, Kissy Village, Sierra Leone.

4. That at no time did I intend to or agree to sell the said properties to the applicant here-in nor did he pay me the sum of two thousand two hundred and seventy five Leones or any sum at all for the said properties.

[p.129]

5. That the very first time I saw this Conveyance was on Thursday 25th October, 1973 when the Originating Summons was served on me.……

9. That on the 19th day of August 1966 the eve of my departure to the United Kingdom…… the applicant phoned to invite me to his Chambers to sign an agreement between U.A.C. and myself to confirm the cash advance given to me by U.A.C. through him, to pay for the said properties bought by me" …….

11. That on my arrival at his Chambers the applicant laid a document before me and told me that this was the agreement between U.A.C. and myself confirming that they will withhold the Lease rents for the petrol station on the said property until the cash advance made to me by them through the applicant as

my agent was fully paid and asked me to sign it which I did because he was my intimate friend and solicitor of the High Court.

12. That applicant at the time was a special friend of mine in whom I reposed a lot of confidence to act as my agent in this matter.

[p.130]

13. …….. I signed the document without reading it. ……..

15. That there was no witness to my signature when I signed that document on 19th August, 1966 and the applicant did not sign in my presence.

16. That on my return from the United Kingdom I asked the applicant to show me the document I had hurriedly signed on the eve of my departure but he said he had handed it to U.A.C. (S.L.) Ltd. who had sent it to their principals in London. I requested to see a copy of it which copy he could not produce and up to date has not produced to me.

17. That since 1966 the applicant has acted as my agent for the collection of rents for the said properties and was my so1icitor in court actions against the former owner of the property Hr. Macfoy and against the tenants occupying the freehold premises of the said properties."

In his reply to the allegations contained in the above quoted paragraphs of the appellant's affidavit, the applicant deposed inter alia in his affidavit sworn on 15th December, 1973:—

"3. that in August, 1966 I requested the First Respondent to convey the Property to me as previously agreed upon and she agreed to do so.

[p.131]

4. That on the 19th August, 1966 in the presence of the late Mr. J.B. Jenkins-Johnston, the first Respondent signed the said Deed of Conveyance to me at my Chambers, 9, Walpole Street, Freetown but I did not sign on that day."

Both parties maintained the positions taken in their respective affidavits with regard to the execution or non-execution of the Deed of Conveyance when they were cross-examinated

The fact is that the Deed of Conveyance which was the subject-matter of the application was not registered up to October, 1973. The applicant gave reasons for the failure to register. I shall return to this later. The next stage in the story is that the appellant terminated the agency of the applicant. She deposed inter alia in her affidavit sworn on 5th November, 1973:—

"23. That by letter dated 9th October, 1973 I demanded the said rents and my Conveyance for the property i.e. my title deeds from the applicant and by the same letter I gave him notice of my withdrawal of the agency from him."

According to the applicant, he applied during that same month to the Registrar-General to register the Deed of Conveyance, but the Registrar-General understandably and properly refused the application. Just over a fortnight after the termination of his agency, the applicant took out the Originating Summons.

The reason given by the applicant in his affidavit in support of the Originating Summons for his failure to register the Deed of Conveyance in time is contained in paragraph 4 thereof which reads:—

[p.132]

"4. That the said Deed of Conveyance has not been registered within the prescribed period of time owing to the fact that my clerk had mislaid the file containing the document and continuous but fruitless searches had been going on for the same until a few days ago when it was discovered amongst old Gazettes which had hitherto been packed and which I had been perusing recently."

But in his affidavit sworn on 15th December, 1973 the applicant deposed inter alia:

"5. That I failed to sign the said Deed of Conveyance within ten days after the departure from Sierra Leone of the first Respondent i.e. the 20th day of August, 1966 and decided to do so on her return to Sierra Leone.

6. That I then wrote to the first Respondent in England asking her estimated date of her return to Sierra

Leone and that she informed me that she could do so in the month of March, 1967 where upon caused my clerk to insert the month of March in the said Deed of Conveyance. My clerk erased the year 1966 and replaced it by the year 1967.

7. That I myself thereafter signed the said Deed of conveyance and handed it to my clerk for completion before registration.

[p.133]

8. That from that time onwards I mislaid the said Deed of Conveyance until I found it recently."

Under cross-examination the applicant said inter alia:

"The plan was in the Conveyance. I thereafter forgot all about it and when I asked for it about three days later my clerk told me that it was on my table, I told her it was not there."

This concludes the summary of the evidence.

I shall now turn my attention to the Ruling of the trial judge, The Ruling was delivered on 22nd March, 1974. After reviewing the evidence the learned judge formulated the issue for determination thus:—

"I have got to be satisfied that either:

(i) The failure to register was not due to any fault of the applicant, or

(ii) The applicants failure to register in time was, in all the circumstances of the case excusable."

He also itemized certain pieces of evidence which he considered important and relevant in assisting him in the exercise of his discretion. He then commented on the pieces of evidence high-lightedand in some cases made specific findings of fact,

The learned judge concluded his Ruling thus:—

"I have given careful consideration to the evidence in this case - both by the plaintiff/applicant and the defendant/respondent in so far as they are relevant to the issue before me. I shall be extremely remise in my duty if I found otherwise than that:—

[p.134]

1. The Plaintiff/Applicant's failure to register the Conveyance Ex. "A" was due wholly to his own fault, and

2. Such failure to ensure registration was inexcusable, and I so find after taking all the circumstance of the case into consideration. The permission sought is refused. The application is dismissed."

The applicant appealed to the Court of Appeal. The appeal was heard by a panel consisting of C.A. Harding, Awunor-Renner and Beccles Davies JJ.A. - (as they then were). Judgment was delivered on the 20th day of January, 1980 allowing the appeal (Mr. Justice C.A. Harding dissenting). The judgment of the majority was delivered by Beccles Davies J.A. He held that failure to register the Deed of Conveyance was due to the applicant's fault and then concluded thus:—

"Taking the entire circumstances of this Case including the then existing relationship between the applicant and the respondent I would give unequivocal answers in the affirmative to the questions: is it more probable than not that the applicant had mislaid the Conveyance by inadvertently putting it away among old Gazettes and what it had been eventually discovered by the applicant? And was this failure to register the Deed excusable in the circumstances of this particular case?"

He set aside the Ruling of Short J. and then proceeded to make the following findings of fact;

[p.135]

"1. That the Deed of Conveyance was mislaid by the applicant and subsequently discovered by him.

2. That the circumstances of this particular case are such as to render the applicant's failure to register the said Conveyance within the statutory period of ten days excusable.

3. That the Respondent on the 19th August, 1966 knowingly executed a Deed of Conveyance Ex. "A" conveying the property described therein to the applicant for an estate in fee simple according to the arrangement between them. I have not made this finding as a condition precedent to the granting of the application. I have made it because it has been raised as one of the issues in the matter.

4. That the said Conveyance had been witnessed by the respondent's brother the late Mr. J.B. Jenkins-Johnston.

5. That the true date of the execution of the Deed of Conveyance was 19th August, 1966."

He ended by making the following orders:—

'i. The appeal is allowed

ii. Leave is granted to the applicant to register Ex. "A" the Deed of Conveyance executed by the respondent as Vendor to the applicant as Purchaser, on the 19th August, 1966.

[p.136]

iii. The said Conveyance is to incorporate Plan L.S.514/66 as well as the new Plan in the Applicant's name and dated 15th October, 1973 signed by Mr. L.V. McEwen a licensed Surveyor and counter-signed by Hr. H.E. Boston-Mammah on behalf of the Director of' Surveys and Lands.

iv. the Conveyance is to take effect regarding the said land as from 19th August, 1966."

The appellant has appealed to this Court on the following grounds:—

"1. That the learned Appeal Court was wrong in Law and in fact in holding that failure on the respondent's part to register the document was excusable in the circumstances in accordance with S.2(a)(1) of the Registration of Instruments Act (Cap. 256) as amended.

2. That the learned Justices of Appeal exceeded the jurisdiction under S.2(1)(a) of the Registration of Instruments Act (Cap. 256) as amended by ordering date to be inserted in the Conveyance and a Plan dated 15th October, 1973 to be used for the purpose of such registration.

3. That the learned Appeal Court erred in Law in interfering with the exercise of discretion or the trial Judge in disallowing the Application of the respondent."

[p.137]

The applicant had died by the time judgment was delivered by the Court of Appeal. By order dated the 10th day of April, 1981 this Court ordered that the present respondents be substituted in place of the applicant (the original respondent in this appeal).

There is no dispute that on the evidence failure to register the Deed of Conveyance was due to the fault of the applicant. The learned trial Judge came to that conclusion, and all the Justices of the Court of Appeal came to the same conclusion. The dispute in this appeal is whether the learned trial judge was right in holding that failure to register the Deed of Conveyance in time was "in all the circumstances" inexcusable and whether he properly exercised his discretion in refusing the application, This is how the learned judge approached the matter in his Ruling: first he referred to the reliefs applied for in the Originating Summons; Secondly he referred to the relevant Statutory provision under which the application was made; thirdly he gave an exhaustive narrative of both the affidavit and viva voce

evidence; fourthly he formulated the issues for decision; fifthly he emphasized the fact that the application was for the exercise of his discretion and that the discretion must be exercised judicially; sixthly he high-lighted certain pieces of evidence which he considered important and of assistance in arriving at a decision; and finally he came to a conclusion and made the order refusing the application. No serious complaints were made against the said first five parts of the Ruling. The criticisms and complaints were directed at the sixth and final parts of the Ruling. It is therefore necessary to analyse and consider them in some detail. In the sixth part –

[p.138]

(1) He referred to the evidence contained in para. 4 of the first affidavit of the applicant to the effect that failure to register the Conveyance was due to the fact that his clerk had mislaid it and that it was discovered only a few days previously after continuous but fruitless search. He then commented that the clerk neither swore to an affidavit nor gave oral evidence. He also quoted the applicant's oral evidence to the effect that he told his clerk to substitute April for March in the Conveyance because he (the applicant) had signed it in April; that hereafter he forgot all about it until three days later when he asked his clerk about it and that his clerk told him that it was on the table and he replied that it was not there. The judge made no further comment. The evidence was certainly relevant. I fail to see what criticism can be levied against this part of the Ruling.

(2) He said inter alia "If the evidence of the plaintiff/ applicant is true the defendant/1st Respondent executed the Conveyance Ex. "A" which he backed as Solicitor on the 19th August, 1966. Then he had ten days thereafter within which to register it for the registration to be in compliance with Section 4 of the Registration of Instruments Act……He did not register it as a prudent solicitor should have done. He kept it, according to his evidence, until about eight months later……. He is therefore caught by the Act and his explanation for not registering the Conveyance Ex. "A" within 10 days after its execution because it was mislaid soon after he (the plaintiff/applicant signed it i.e. 30th of April, 1967) does not avail and is untenable. His explanation therefore fails." In my opinion no valid criticism can be made of this statement. If in fact the Conveyance was executed by [p.139] the Vendor on 19th August, 1966 then it should have been registered within 10 days thereafter. The explanation about the loss of the Conveyance relate to the execution by the applicant in March or April, 1967 and not to the execution by the Vendor. Therefore the learned judge was perfectly right in saying that that explanation did not avail and was untenable. There is also no doubt that the evidence was relevant.

(3) He referred to the testimonium clause of the Conveyance which states that it was executed and witnessed on the 30th of March, 1967. He continued: "I find as a fact that the Conveyance was neither executed nor witnessed on the 30th of March, 1967. Nor indeed was it signed by the plaintiff/applicant on that date. The evidence of the defendant/respondent which is supported by her passport shows that on the 30th of March, 1967, she was on the high seas on her home-ward voyage……. of course, he had to change his evidence on this issue in a subsequent affidavit after receiving the second affidavit by the defendant/respondent that she was out of Sierra Leone at the time." I think that it is conceded on all sides that the Conveyance was not executed by the appellant on 30th March, 1967. Indeed the Court of Appeal supported that finding. There is no doubt, in my view, that there was overwhelming evidence

before the judge (including the evidence the applicant himself) to support the conclusion that he did not sign the Conveyance on 30th March, 1967. There could also be no controversy that in his first affidavit the applicant had positively sworn in para. 2 thereof that the appellant had executed the Conveyance on 30th March, 1967; and that it was after the appellant had [p.140] filed and served her affidavit sworn on 5th November, 1973 stating in para. 2 thereof that she was on the high seas on 30th March, 1967, that the applicant changed his evidence by stating in his affidavit sworn on 15th December, 1973 that the appellant executed the Conveyance on 19th August, 1966. In my opinion therefore the comment of the judge was legitimate, justified and the evidence was relevant.

(4) He dealt with the evidence relating to the Plan attached to the Conveyance. He considered the contradictions in the evidence that the Plan was prepared for him by a Mr. Lemon Thomas, a Surveyor. He pointed out that Mr. Thomas signed the Plan on 15th May, 1966. He continued: “It follows therefore that, if the evidence is true, the Plan was prepared before the property was even bought [i.e. by the applicant]. This is an unfortunate piece of evidence.” It is of interest to quote the applicant's oral evidence on this issue. He said inter alia “Ex. “B” is the Plan I intended to use for the Registration of Ex. “A”…….. Ex. “B” was prepared by Mr. Lemon Thomas for me to register Ex. “A”. The date the Surveyor signed Ex. “B” was 15th May, 1966……” It If that evidence is to be believed, it means that the Plan was prepared for the applicant even before the appellant bought the property at the public auction. It was in that light that the judge made his comment about the evidence being unfortunate. In my opinion the comment was justified and the evidence relevant.

(5) He mentioned the fact that the first and only time a property Plan was prepared describing the property - as the property of the applicant - was only on 15th October, 1973, a few days before the Originating Summons was filed.

[p.141]

He continued: “Why this inordinate delay if all was well with the soul of the Conveyance by Grace Omorlake Johnston to Roland E.A. Harding.” The uncontroverted evidence was that the applicant took no steps to have a proper Plan prepared for the registration of the Conveyance from the time he is alleged to have bought the property up to a few days before filing the Originating Summons - a period of over seven years. The delay in taking steps to prepare a Plan was certainly inordinate. It could not be said that failure to prepare the Plan was related to the loss of the Conveyance. In the first place the Conveyance was not alleged to be lost until March or April 1967. Secondly I do not; think that it can be claimed that the Surveyor required to see the Conveyance for the purpose of preparing a Plan. The applicant offered no explanation for the delay in preparing the Plan. It was in those circumstances that the learned judge made his comment, clothed, as it was, in metaphor. In my opinion his comment may have been uncharitable, but it was certainly not improper or unjustified. He did not pass judgment on the validity of the Conveyance and the evidence was relevant.

(6) He referred to the oral evidence of the applicant that he did “not tell the appellant of the loss of the Conveyance nor did he prepare another Conveyance for the appellant to execute. He continued "One would have thought that the immediate re-action of any reasonable person in a straightforward and

untainted transaction involving someone who, during the period, was not only a friend but a special friend would have been to inform the defendant/respondent of the loss or misplacement of the Conveyance and to prepare another Conveyance for execution by her. After all the [p.142] plaintiff/applicant was acting also as Solicitor and Agent of the Defendant/Respondent. One who allegedly was a free voluntary vendor of the properties involved." The applicant did not offer any explanation for his failure to inform the applicant of the loss of the Conveyance or why he did not request her to execute another Conveyance for over seven years. His behavior was certainly curious and inexplicable. In my opinion the judge did not make a pronouncement on the validity of the Conveyance. His comment was, in the circumstances, legitimate and justified and the evidence relevant.

(7) He concluded thus: "I have given very careful consideration to the evidence in this case - both by the plaintiff/ applicant and the Defendant/Respondent in so far as they are relevant to the issue before me," and then made the findings and orders previously referred to.

I don't think that any exception was or can be taken to this passage. It show quite clearly that the judge was conscious of his duty, although he may have been wrong in his findings and/or orders.

The majority of the Court of Appeal held that the learned trial judge had exercised his discretion under mistakes of Law, misapprehension of facts as well as on irrelevant matters. The Court then proceeded to set aside the judge's order and then exercised its discretion in favour of the applicant. It is well-settled that an Appellate Court can in certain circumstances interfere with the exercise of discretion of a judge. The circumstances are: if the Appellate Court is satisfied that the judge was wrong, either in principle or by giving no weight (or no sufficient weight) to those considerations which ought to have weighed with him or by being influenced by other considerations which ought not to have weighed with him, or not weighed so much with him. The principle on which an Appellate Court acts [p.143] was stated with much clarity by Viscount Simon L.C. in Charles Osenton & Co. v. Johnston (1942) A.C. 130 H.L. He said inter alia at p. 138:—

"The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. "See also WARD v. JAMES (1965) 2 W.L.R. 455 C.A.

The question then arises: Did the Court of Appeal properly interfere with the exercise of the judge's discretion? The majority of that Court criticized the judge for saying in the early stages of the proceedings that he had to be satisfied as to the validity of the document sought to be registered. This was inspite of the fact that in his final Ruling the judge stated [p.144] quite clearly that the issue before him was one of registration, that validity of the Deed was not relevant to the issue and that he made no

findings on the validity of the Deed. Notwithstanding this criticism the majority of the Court of Appeal proceeded to commit the same offence of which they had accused the judge by making findings as to the validity of the Deed. In their findings of fact numbered 3 & 4, they said inter alia:

"3. That the Respondent on the 19th August, 1966 knowingly executed a Deed of Conveyance Ex. "A"……..."

4. That the said Conveyance had been witnessed by the respondent's brother the late Mr. J.B. Jenkins-Johnston."

With respect, by saying that the appellant had knowingly executed the Deed of Conveyance (which the appellant had persistently and strenuously denied) the Court was passing judgment on the validity of the Deed, which they themselves had said was irrelevant. Again by saying that the Deed was witness by Nr. J.B. Jenkins-Johnston (which had been denied by the appellant) they were pronouncing judgment on the validity of the Deed, The majority or the Court of Appeal also criticized the judge for not making a finding as to the exact date of execution. The judge found as a fact that the Deed "was neither executed nor witnessed on the 30th of March, 1967. Nor indeed was it signed by the plaintiff/applicant on that date." They said that that was not the and of the matter. They said that had the judge adverted his mind to the law on the point, he would not have concluded that, point as he did. They then stated what they considered to be the relevant law on the point and then concluded that "the execution of the Conveyance had taken place on 19th August, 1966 when the respondent signed it…… The conveyance should have been considered in that light".

[p.145]

There is no doubt that the Conveyance was not executed by the appellant on 30th March, 1967, as alleged by the applicant in his first affidavit. The applicant admitted in his second affidavit and under cross-examination that the appellant did not execute the Conveyance on that date. He also said under cross-examination that he did not execute the Conveyance on that date. So the judge was right in making the finding quoted above, albeit a negative finding. The majority of the Court of Appeal, having found that the date of execution by the appellant was 19th August, 1966, proceeded to hold that the reason for the failure to register the Conveyance in time was that "the applicant had mislaid the Conveyance by inadvertently putting it away among old Gazettes and that it had been eventually discovered by the applicant." With respect, the Evidence about the loss of the Conveyance was the reason advanced by the applicant in respect of the alleged execution on 30th March, 1967. That reason did not relate to the execution on 19th August, 1966. With respect, the court of Appeal (majority) having found that the execution was on 19th August, 1966 should have proceeded to consider whether any reasons were advanced by the applicant for failure to register after that date and then decide whether the reasons were excusable. In my judgment the Court of Appeal was clearly wrong to consider the reasons advanced in respect of the 30th March, 1967 alleged execution then considering whether to exercise their discretion in respect of the 19th August, 1966 execution. In my judgment therefore even assuming that the Court of Appeal could have interfered with the exercise of the discretion of the judge, they exercised the discretion wrongly.

The question therefore still remains: Did the judge exercise his discretion properly? I think that it is important to state that there is nothing in the proviso to Section 4(2)(a) [p.146] of the Registration of Instruments Act Cap. 256 to indicate that the granting permission to register an instrument out of time should be granted as of course. As was stated by the judge and the Justices of Appeal the application is normally made ex parte. In my judgment even where the application is made ex parte the burden is on the applicant to satisfy the judge with evidence that failure to register in time was not due to his fault or was in all the circumstances excusable, as the case may be. If there is no evidence, or no satisfactory evidence, before the judge explaining the circumstances of the failure to register in time and giving reasons fur the delay, which may be considered excusable, then there is no basis on which the judge can exercise his discretion. It is only when there is satisfactory evidence before the judge that he can apply his mind thereto and exercise his discretion one way or the other. In this connection I think that it is necessary to say that it is not the business of this court, or indeed of any other court, to lean over backwards to ferret for excuses for an applicant's failure to register in time, or to surmise the reasons for such failure, it also important to emphasise that in applications such as this, whether made exparte or inter parties, it is incumbent on the applicant to make a full and fair disclosure in presenting the evidence to the Court. The applicant must make sufficient and candid disclosure. In other words the utmost good faith must be observed. The applicant must observe uberrima fides. See Republic of Pery v. Dreyfus & Co. (1886) 55 L.T. 802 and Lazard Brothers & Co. v. Midland Bank Ltd. (1932) A.C. 289 H.L. at p.307. If the order is made ex parte, a failure to make such disclosure would justify the Court in discharging it, So if the evidence in support contains material mis-statements of fact, the application will not be granted or if already granted it will be discharged.

[p.147]

The dicta of Farwell L.J. in The Hagen (1908) p.189 are both relevant and applicable. He said inter alia at p.201:—

“[A]nd the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application.” [emphasis mine].

In my judgment the fact that an applicant chooses to make the application inter partes, instead of ex parte, does not absolve him of the obligation to observe utmost good faith.

What was the explanation offered by the applicant in this case, and was he full, fair and candid? It will be recalled that in para. 4 of his affidavit sworn on 15th December, 1973 the applicant deposed that the appellant executed the Conveyance on 19th August, 1966. He then proceeded in the next paragraph to depose as follows:—

“5. That I failed to sign the said Deed of Conveyance within ten days after the departure from Sierra Leone of the first Respondent i.e. the 20th day of August, 1966 and decided to do so on her return to Sierra Leone.”

Even if the applicant had to sign the Conveyance, it is difficult to understand why he had to wait until the return to Sierra Leone of the appellant before doing so. And he offered no explanation for this. He also did not explain why no attempt was made to register a Conveyance allegedly duly executed by the [p.148] Vendor and allegedly properly witnessed for over seven months before its alleged loss. In my opinion therefore there was no satisfactory evidence before the judge of the reasons for the failure to register the Conveyance after it was allegedly executed by the appellant on 19th August, 1966. There was therefore no basis, or insufficient basis, on which the judge could exercise his discretion. However much one wishes to be charitable to the applicant, it is difficult to run away from the conclusion that he was not full, fair and candid in presenting his evidence to the Court. His evidence is replete with mis-statements of material facts. This can be demonstrated by a reference to a few random pieces of evidence. On the question of the execution of the Conveyance by the appellant he deposed as follows:—

In his first affidavit (sworn on 23rd October, 1973):

"2. That on the 30th day of March, 1967 a Deed of Conveyance was executed by Grace Omorlake Johnston (therein described as the Vendor) and myself."

In his affidavit (sworn on 15th December,1973):

"4. That on the 19th August, 1966 in the presence of the late Mr. J.B. Jenkins Johnston, the first Respondent signed the said Deed of Conveyance to me at my Chambers 9, Walpole Street but that I did not sign on that day."

In his oral evidence on 23rd January, 1974:

"I still stand by paragraph 2 of my affidavit of the 23rd October, 1973, especially in connection with the date of execution by the defendant on the 30th March, 1967."

On the question of execution of the Conveyance by himself he deposed as follows:—

[p.149]

In his first affidavit: "2. that on the 30th day of March, 1967 a Deed of Conveyance was executed by ..... and myself."

In his oral evidence on 23rd January, 1974:

"It was on the 30th of April, 1967 that I signed Ex. "A" the Conveyance……. I did sign the Conveyance on the 30th of April, 1967"…… After I signed Ex. "A" I told my clerk to put the date in and to substitute April for March because it was signed in April.

In his oral evidence on 25th January, 1974:

“The Deed was lost only once; that after I had signed it on the 30th of March, 1967 (I did say that I signed it on the 30th April, 1967 but that was a mistake). If I signed it on the 30th of March, 1967, it could not have been in her presence because she was on the high seas returning home.”

On the question of the witnessing of the Conveyance, although Ex. “A” shows quite clearly that the document was witnessed only once, yet he deposed as follows:—

In his affidavit sworn on 15th December, 1973:

“4. That on the 19th August, 1966 in the presence of the late Mr. J.B. Jenkins Johnston, the first Respondent signed the said Deed of Conveyance at my Chambers 9, Walpole Street, Freetown but that I did not sign on that day.”

In his oral evidence on 23rd January, 1974:

“The witness J.B. Jenkins Johnston was called to my Chambers after the return of the defendant in connection with the execution of Ex. “A”. I sent for him to witness my signature. It was on the 30th of April, 1967 that I signed Ex. “A” the Conveyance.”

[p.150]

In his oral evidence on 25th January, 1974:

“I am not sure whether the defendant was present when Mr. J.B. Jenkins-Johnston signed as a witness to my signature in Ex. “A”.”

In my judgment the lack of candour to the Court on the part of the applicant deprived him of any assistance the Court is empowered to give him, including exercising a judicial discretion in his favour.

In view of the foregoing, the applicant's application could not possibly succeed. In my judgment therefore the learned judge was right in holding that the failure to register the Conveyance was not excusable in all the circumstances and in dismissing the application.

Since writing this judgment I have had the advantage of reading the draft of a separate judgment written by my learned brother Tejan J.S.C. In that judgment my learned brother found that the failure of the applicant to register the Conveyance within the prescribed time was due to a “misapprehension of the law.” Relying on a dictum of Lord Atkin in Evans v. Bartlam (1937) 2 All E.R. 646 at p. 649, he expressed the view that there is no presumption that everyone knows the law, and therefore held that the failure to register was excusable. With respect, my learned brother misapplied the dictum of Lord Atkin. The general rule is expressed in the time - honoured maxim: “Ignorantia facti excusat; ignorantia juris non excusat” meaning, “Ignorance” of fact excuses; ignorance of the law does not excuse.” Therefore a mistake of law is not per se excusable. It is only where there are equitable grounds for doing so, having regard to the particular facts of the case, that the Court will grant relief against a mistake of law: See Rogers v. Ingham 3 Ch.D.351 per Mellish L.J. at 357.

[p.151]

In the result, I would set aside the orders of the Court of Appeal and restore the orders of the High Court

…….

Hon. Mr. Justice E. Livesey Luke

Chief Justice

16/12/81.

TEJAN. J.S.C.

In this appeal, I shall refer to the appellant herein as the "Appellant" and to the Respondents herein as the "Applicants".

By an originating summons dated 25th day of October, 1973 the applicants sought permission to register a deed of conveyance dated 30th March, 1967 and executed by the appellant. The applicants also applied for an order that the registration of the deed of conveyance should take effect as from the date of execution to wit 30th March, 1967.

The summons was supported by an affidavit to which was exhibited the deed of conveyance Exhibit "A". The summons was served on the appellant and the Administrator-General. The Appellant entered an appearance and filed an affidavit in opposition. An affidavit in reply was filed by the applicants. The Summons came before Short J. as he then was, and who after having heard the submissions and arguments on both sides, gave a ruling on 28th November, 1973. In the ruling the learned Judge said:—

"…… Learned Counsel for the Respondent quite properly made certain applications, I hereby give the following directions as to the further conduct of these proceedings in Court.

1. Both the applicant and the respondent may file and serve further evidence by affidavits within seven days from today and any affidavit in reply to be filed and served within another seven days.

[p.152]

2. The deponents should be available for cross-examination by the opposite party.

3. Further hearing is fixed in Court for the 18th of December, 1973."

When on the 18th December, 1973, the Summons came before the learned Judge, Mr. Donald Macauley one of the Counsel representing the applicant made certain submissions which Miss Taylor, representing the appellant opposed. The learned Judge gave a ruling, and the relevant portion reads:—

"To enable me to properly exercise my discretion for an extension of time, the applicant must satisfy me, amongst other things, that the deed of Conveyance dated 30th March 1967, was in fact a valid document executed as such by Grace Omorlake Johnston, as alleged in the originating summons. I therefore rule that the applicant should discharge that onus and be designated as "defendant". The plaintiff should therefore submit himself to cross-examination by Counsel for the defendant."

Further affidavits were sworn by the appellant and applicants and filed. The applicant and the appellant were cross-examined on their affidavits. In the end, the Judge found that "(1) The Plaintiff/Applicant's failure to register the Conveyance Ex. "A" was due wholly to his own fault, and (2) such failure to secure registration was inexcusable, and I so find after taking all the circumstances of the case into consideration. The permission sought is refused. The application is dismissed with costs to the Defendant/Respondent Costs to be taxed".

It is against this decision that the applicant appealed to the Court of Appeal on the following grounds:—

[p.153]

(i) That the learned trial Judge was wrong in law in that in adjudicating upon the question raised by the appellant's originating summons which was solely whether the appellant should be permitted to register his Conveyance out of time, he conducted a full scale trial, without pleadings, and thereby not only misconceived the purpose of the said summons, but also confused himself as to the sole issue before him by admitting irrelevant evidence as to whether the respondent had any claims to the property described in the conveyance which the respondent herself had executed.

(ii) By admitting irrelevant evidence as aforesaid the learned trial Judge erronously refused permission to the appellant to register the conveyance out of time.

(iii) The appellant having led reasonable evidence that failure to register the conveyance wit in time was due to the fact that the said conveyance was misplaced, the learned trial Judge was wrong in law in holding that the appellant's failure to register was inexcusable.

(iv) That having regard to the mischief which section 2 of the Registration of Instruments (Amendment) Act No. 6 of 1964, seeks to avoid, the learned trial Judge was in the circumstances wrong in law in refusing permission to register a validly executed conveyance.

[p.154]

At the Court of Appeal, Mr. N. D. Tejan-Cole for the applicants elected to abandon grounds 2 and 3 and argued grounds 1 and 4. After having heard the arguments of both Counsel for the appellants and applicants, the Court consisting of Harding J.S.C. (dissenting) S.B. Davies and Awunor-Renner J.J.S.C. upheld the appeal and made the following orders:

(i) The appeal is allowed.

(ii) Leave granted to the applicant to register Exhibit "A" the Deed of Conveyance executed by the respondent as Vendor to the applicant as purchaser on the 19th August 1966.

(iii) The said Conveyance is to incorporate Plan L.S. 514/66 as well as the new plan in the applicant's name and dated 15th October, 1973 signed by Mr. L.V. McEwen a licensed surveyor and counter-signed by Mr. R.E. Boston-Mammah on behalf of the Director of Surveys and Lands.

(iv) The Conveyance is to take effect regarding the said land as from 19th August, 1966. The applicant is to have the cost this appeal and of hearing before the High Court.

Costs to be taxed.

The appellant have now appealed to this Court against the decision of the majority of the Court of Appeal. Three grounds of appeal have been set out and these are:—

(i) That the learned Appeal Court was wrong in law and in fact in holding that failure on the respondent's part to register the document was excusable in the circumstances in accordance S.F. (a) (1) of the Registration of Instruments Act (Cap. 256) as amended.

[p.155]

(ii) That the learned Institutes of Appeal exceeded their jurisdiction under S. 2(l)(a) of the Registration of Instruments Act Cap. 256) as amended by ordering date to be inserted in the Conveyance and plan dated 15th October, 1973 to be used for the purposes of such registration.

(iii) The learned Appeal Court erred in law in interfering with the exercise of the discretion of discretion of the trial judge in disallowing the application of the respondent.

Before dealing with the grounds of appeal presented to this Court, I think, it is necessary to cast my mind back to the proceedings at the High Court. The summons before the High Court was made under Section 4 of Cap. 256 which enacts that “Every deed, contract, or conveyance, executed after the 9th day of February, 1857, so far as regards any land to be thereby affected, shall take effect, as against other deeds affecting the same land, from the date of its registration, and every power of attorney, unless for the institution or defence of judicial proceedings only, and executed in the Colony or Protectorate, shall take effect from the date of execution.

Provided that every such instrument shall take effect from the date of its execution, if registered within any of the periods limited for registration, as follows, that is to say:—

(a) if such instrument be executed in Freetown, if registered in Freetown within ten days from its date,

(b) ……..

(c) ……

Section 4 of Cap. 256 was amended by Act No. 6 of 1964. Section 2 subsection 2 of Act No. 6 of 1964 reads thus:—

[p.156]

“Every deed, contract or conveyance executed after the 1st day of June 1964, shall be void, so far as regards any land to be hereby affected, unless it is registered within the appropriate period limited for such registration under the proviso to subsection (1).

Provided that any person prejudiced by the avoidance of any transaction under the provisions of this subsection may apply by originating summons to a judge of the Supreme Court for permission to register after the expiration of the period limited for registration, and if the judge is satisfied that either— (i) The failure to register was not due to any fault of the applicant, or (ii) the applicant's failure to secure registration in time was, in all the circumstances of the case, excusable, he may permit the applicant to register out of time and the transaction in question shall be deemed never to have been avoided and shall take effect as against other transaction affecting the same land and from such date as shall seem to the judge to be just".

The summons in this case was supported by an affidavit sworn by the applicant. A copy of the conveyance Exhibit "A" was annexed to the affidavit. The appellant, after having entered an appearance to the summons, filed an affidavit in opposition. A further affidavit was then sworn by the applicant. When the summons came to be heard, an application was made on behalf of the appellant that the parties were to be cross-examined on their affidavits. The application was opposed, but the judge gave his ruling in the following terms:—

[p.157]

"…….Learned Counsel for the Respondent quite properly made certain applications as to the further conduct of these proceedings in Court.

1. Both the applicant and the respondent may file and serve further evidence by affidavits within seven days from today and any affidavits in reply to be filed and served within another seven days.

2. The deponent should be available for cross-examination by the opposite party.

3. Further hearing is fixed in Court for 18th of December 1973……."

The effect of this ruling transferred the hearing in Chambers into Court and in my view, it was a proper ruling made by the Judge.

On the 18th December 1973, when the matter came before the Court, further submissions and arguments were presented by both sides, and the ruling given by the judge on these submissions and arguments was so remarkable to the matter in issue that I must confess that I am bound to record it.

In short, the ruling reads thus:—

"To enable me to properly exercise my discretion for an extension of time, the applicant must satisfy me, amongst other things, that the Deed of Conveyance dated 30th March, 1967, was in fact a valid document executed as such by Grace Omorlake Johnston, as alleged in the originating summons. I therefore rule that the applicant should discharge that onus and be designated "The Plaintiff" and that Grace Omorlake Johnston be designated as defendant".

[p.158]

The applicant was then cross-examined on his affidavits, and it emerged from the cross-examination and the affidavits sworn by the applicant that the appellant executed the deed of conveyance on 19th August 1966 and that the signature of the appellant was witnessed by J.B. Jenkins Johnston, the brother of the appellant. The appellant himself did not sign the deed on that day because when the deed of conveyance was being executed, he was attending to another client in another part of his chambers and that on his return, the appellant and her brother had left. The next day, the appellant left for the United Kingdom. The applicant then decided to wait on her return to Sierra Leone before signing the deed of conveyance. While the appellant was in England, the applicant and the appellant corresponded with each other and in one of the letters of the appellant written to the applicant, she mentioned that she was exacting to arrive in Sierra Leone on 1st April, 1967. The appellant, according to his affidavit, unfortunately thought the appellant was to arrive in March, 1967. The result of this inadverence on the part of the applicant, caused him to get his clerk to alter the date of the deed of conveyance to 30th March, 1967. Since that time, the convenience was mislaid, and was eventually discovered beneath some old gazettes a few days before the application to register out of time as made.

The effect of this piece of evidence is that the applicant gave two reasons for his failure to register the deed of conveyance within the statutory prescribed period. The first reason was that he was waiting for the appellant to return to Sierra Leone in March, 1967, and the second reason that since he (the appellant) signed the deed of conveyance, the deed was mislead.

The appellant was also cross-examined on her affidavits. The cross-examination revealed that she was not in Sierra Leone on the 30th March. 1967. She did not dispute her signature on the deed of Conveyance. She also preferred not to say whether the signature on the deed was that of her brother or not.

[p.159]

She however, admitted that she signed a document on the 19th August, 1966 in the chambers of the applicant but she thought that the document concerned certain transactions with U.A.C.

But in one of her letters (Exhibit “F”) to the applicant she said “Suppose I had refused to convey to you until U.A.C. pays me my fees.” There are other unsatisfactory features about the judgment of trial judge which I do not consider necessary to narrate.

However, the affidavit on both sides and their evidence contained innumerable irrelevant matters, and because of these irrelevant matters, and principally as a result of the prolonged cross-examination of the deponents to the affidavits filed, I am certain that the hearing of the application before the learned judge might in the normal case would have been expected to take a few minutes. Moreover, the record reveals that the atmosphere of the Court was not congenial.

In considering whether permission was to be granted to the applicant to register the deed of conveyance, the trial judge took into account any irrelevant matters. At one stage in the judgment, the judge said:—

“I have to consider not only the applicant's affidavit in support but also the several affidavits and Exhibits filed in opposition together with the evidence given at the hearing which was concluded on 31st day of January, 1974, with a view to ascertaining whether failure to register the conveyance already referred to was not due to any fault of the applicant, or whether his failure to secure registration in time was in all the circumstances of the case excusable bearing in mind that there has been a lapse of time of about seven years from the alleged date of execution of the conveyance to the date of this application.”

[p.160]

Another passage in the judgment which I think, is of some significance is:—

“But Counsel urged that the paragraphs in her affidavit already referred to should be ignored as irrelevant and that the issue was not one of validity. Be that as it may. In other words of the proviso, I have got to be satisfied that either:

(1) The failure to register was not due to any fault of the applicant, or

(2) The applicant's failure to secure registration in time was, in all the circumstances of the case excusable.

Further in the judgment the judge said he was guided in the exercise of his discretion by the diction of Lord Sterndale, M.R. in the case of Donald Campbell and Co. v. Pollak (1927) A.C. at page 809 and he then cited the following passage:

“The discretion must be judicially exercised, and therefore there must be some grounds for it's exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court (i.e. Court of Appeal) cannot interfere with his discretion.”

The learned trial judge then went on to recapitulate and chronicle what he termed the salient pieces of evidence which would assist him in the exercise of his discretion. He referred to paragraph 4 of the affidavit of the applicant dated 23rd day of March, 1973 in which the applicant deposed “That his failure to register the conveyance was because his clerk had mislaid it and that continuous but fruitless searches had been going on for some time until a few days ago when it was discovered amongst gazettes.

[p.161]

Learned Counsel for the Defendant/1st Respondent quite properly commented on the fact that the applicant's clerk neither swore to an affidavit nor did she give evidence to that effect. In his evidence, however, the Plaintiff/Applicant stated:—

“After I signed Exhibit “A” I told my clerk to put the date in and to substitute April for March because it was signed in April x x x x x” I therefore forgot all about it and when I asked about it three days later, my clerk told me that it was on my table. I told her it was not there.”

If the evidence of the plaintiff/applicant is true that the defendant/1st Respondent executed the conveyance Exhibit "A" which he backed as Solicitor on the 19th of August 1966. Then he had ten days thereafter within which to register it for the registration to be in compliance with Section 4 of the Registration of Instruments Act, Cap. 256 of the laws of Sierra Leone. He did not register it as any prudent Solicitor should have done. He kept if, according to his evidence about eight months later. His evidence is "I signed Exhibit "A" the conveyance on the 30th April, 1967." He is therefore caught by the Act and his explanation for not registering the conveyance Exhibit "A" within 10 days after its execution because it was mislaid soon after he (the plaintiff/applicant signed it (i.e. on the 30th of April, 1967) does not avail and is untenable. His explanation therefore fails. In the attestation clause of the conveyance Exhibit "A" it is stated that the conveyance was executed and witnessed on the 30th March, 1967. I find as a fact that the conveyance was neither executed nor witnessed on the 30th March, 1967. Nor indeed was it signed by the Plaintiff/Applicant on that date…… At all times material to the registration of the conveyance Exhibit "A" the Plaintiff/Applicant was practicing Solicitor ……. He is presumed to have known the requirements of the law and yet he did not have a plan of the property intended [p.162] to be conveyed by the conveyance Exhibit "A" prepared in his name for the purpose of registration under Section 12 of the Registration of Instruments Act Cap. 256 provides that:—

"Each instrument other than a will and each memorial before any certificate of Registry is placed thereon shall have on the margin or book, or annexed thereto, a plan of the land signed by the person who made it, and shall describe the land to which the same shall relate, and if possible, shall refer to the allotment of the land as numbered or described in the instrument of conveyance from the crown, if any."

Another passage in the judgment of the learned trial Judge is this:—

"Further, the first and only time that a property plan was prepared describing the property in issue as "property of Justice Rowland E.A. Harding" (Vide Ex. "F") was only on the 15th day of October, 1973 and countersigned by the Director of Surveys and Lands on the 19th day of October, 1973, that is to say, about five days before the originating summons herein filed. Why this inordinate delay if all was well with the soul of the conveyance by Grace Omorlake Johnston to Rowland E.A. Harding…… One would have thought that the immediate reaction of any reasonable person in a straight-forward and untained transaction ……."

[p.163]

I have endeavoured to the best of my capacity to refer in this my judgment to some of the passages which to my mind, greatly influenced the trial judge to exercise his discretion in the manner he did. I have refrained from mentioning the judgment of Harding J.S.C. since Counsel for the appellant, apart from briefly mentioning in his case filed that there was also a dissenting judgment read by Cornelius Harding J.S.C. upholding the decision of the High Court, perhaps for reasons known only to himself, concentrated his argument in the defence of the judgment of the High Court.

It is at this stage necessary to examine the well-established principles which entitle an appellate tribunal to interfere with the exercise of discretion of a trial judge.

Mr. Metzger submitted that a Court of Appeal had no power to interfere with the discretion of a judge but conceded that the court can do so if it is satisfied that the exercise of such a discretion was based on a mistake of law or misapprehension of facts. To this, I may also add that an appellate tribunal has the power to review a judge's exercise of his discretion and set it aside if it is satisfied that in the exercise of such a discretion, the judge took into account irrelevant matters or where such an exercise of discretion would lead to an injustice. An appeal is by way of re-hearing and a Court of Appeal has to consider the materials which were before the judge, and the additional materials, if any, before the court itself, and then makes up its own mind, carefully weighing and considering the judgment appealed against, and overruling it if, on full consideration, it comes to the conclusion that such judgment was wrong. Where the question is as to the inferences to be drawn from evidence admitted to be truthful, the Court of Appeal is in as good a position to decide as the court below. Lord Wright in Evans v. Batham (1937) 2 All E.R. stated the law clearly at page 654 when he said:

[p.164]

“It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant fact and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order”.

In the same case at page 650 Lord Atkin said:—

“Appellate jurisdiction is always statutory, there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds the decision will result in injustice being done, it has, both the power and duty to remedy it. The decision in Donald Campbell Co. v. Pollak (1927) A.C. 732 was based upon the fact that an appeal in the matter of costs was expressly excluded from the jurisdiction of the Court of Appeal by the Act and rules.”

At page 649 of the same case, Lord Atkin said:—

[p.165]

“For my part; I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never has been, a presumption that everyone knows the law. There is a rule that ignorance of the law does not excuse, a maximum of very different scoops and application.”

With regards to questions of fact, the rule is that where the trial judge's estimate of the witness as a man and his assessment of his credit enter substantially into the process of arriving at his finding of fact, the appellate court ought not as a rule to disturb such a finding. But once findings of fact pens beyond

simple facts testimony and becomes inferential in character, the Court of Appeal is at no particular disadvantage compared with the trial judge, and may reverse has conclusions, though it will give due weight to his views. In short, distinction must be drawn between the perception and evaluation of facts. See S.S. Hortestroon v. S.S. Sagaporack; S.S. Horhestroom v. S.S. Durham Castle (1927) A.C. 37 at 47; See Beemax v. Austin Motor Co Ltd. (1955) 1 A.E.R. 326.

In the case of Egerten v. Jones (1939) 3 All E.R. 889 at 891, Sir Wilfred Greene M.R. said:—

"It has been contended that this is a case where the judge has exercised his discretion and that this Court should not interfere with that exercise except according to well know principles. Which, it is said, do not operate on the present case. It is quite certain, on the other hand, that the discretion of the Court is not to fettered by rules. The discretion [p.166] is given by statutes, and must be exercised according to the circumstances of each particular case. On the other hand, it is equally true that, when a matter involving discretion comes before a judge, there must be in every case a number or considerations which he ought to have in mind for the purpose of enabling him to exercise his discretion. If it appears that he has taken into consideration something which he ought not to have taken into consideration, or has omitted to take into consideration something which he ought to have taken into consideration, or if on all the facts this Court is satisfied and convinced that the discretion has been wrongly exercised, it is the duty of this Court to interfere."

In the case of Maxwell v. Keun (1927) All E.R. Rep. at page 338, Arkin L.J. said:—

"The other point made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned Judge. I quite agree that the Court ought to be very slow, indeed, to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so; so on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has the power to review such an order, and it is, to my mind, its duty to do so."

[p.167]

Now, the application was made under Cap. 256 as amended by Act No. 6 of 1964. It was a simple application normally made ex parte. The applicant made the application inter partes bona fide with the sole intention that the application was not tainted or made males fides. He gave two reasons for his failure to register the conveyance within the prescribed statutory period. The first reason was no doubt that the applicant was under a misapprehension that he was to sign Exhibit "A" in the presence of the appellant. He was not able to do so because when he returned to his chambers on the 19th August, 1966. The appellant and the witness had already signed and gone away. At the time the applicant was engaged with another of his clients in another room in his chambers. The next day the appellant left for the United Kingdom, Still under the misapprehension that he was to sign Exhibit "A" in the presence of the appellant, he wrote to the appellant to find out when she was returning to Sierra Leone. The appellant wrote to say that she would arrive in Sierra Leone on the 1st day of April, 1967. The applicant changed the date of execution of Exhibit "A" to the 30th March, 1967. This was due obviously to the fact

that he misunderstood the appellant or that he had forgotten the date which the appellant said she would arrive in Sierra Leone. It therefore follows that the failure of the applicant to register Exhibit "A" within the prescribed time was due to a mistake of the law, since execution of Ex. "A" had been completed when the appellant signed. It had been suggested that the applicant ought to have known the law, being a solicitor. In Evans v. Bartham (Supra) Lord Arkin made it plain that there was no presumption in law, that anyone, even a judge knew all the rules and orders of the Supreme Court, and that the fact was, that there was not, and never had been a presumption that, everyone knows the law. Obviously this was what happened in this matter.

[p.168]

Since the facts in this case are mainly inferential, and nowhere in the judgment of the learned trial judge that a positive finding of fact was made, the applicant explained that after he had signed Exhibit "A" on the 30th March, 1967, the Conveyance was mislaid, and that it was fund beneath some old gazettes shortly before the application to register was made. Surely, one can only say that the applicant was inadvertent or careless. One can even go so far as to say that he was negligent. But is inadvertence, carelessness or negligence not excusable? My answer is that they are excusable. The case of In ReHeathstar Properties Ltd. (1966) 1 W.L.R. 933 encourages me to the right approach to the present case, even though, it does not in terms, perhaps, absolute cover this case but it is quite plain that the reason upon which it is based does. This case concerns the Company Act, 1948, and the provisions of the Act are almost similar to the provisions of Cap 256 (as amended by Act No. 6 of 1964).

Section 95 of the Companies Act, 1948 stipulates that:

"(1) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a Company registered in England and being a charge to which this section applies shall, so far as any security on the Company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the charge together with the instruments, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within 21 days after the date of its creation but without prejudice to any contract [p.169] or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately becomes payable……."

"Section 101 enacts that "The Court, on being satisfied the omission to register the charge within the time required by this Act or that the omission or mis-statement or any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on any other grounds it is just and equitable to grant relief, may, on the application of the Company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified."

In Re Heathstar Properties Ltd. (Supra) an application was made by summons for an order for extension of time to register. Several affidavits were sworn by the parties, and an application to cross-examine the deponents on their respective affidavits, was granted. The applicant say that the failure to register particulars of the charge within the prescribed 21 days of its creation was due to inadvertence. It was suggested that the Court could not properly perform its function under section 101 where the validity of the charge was in issue. Plowman J. said that he agreed that this was not the occasion for deciding the validity of the charge but did not accept the argument that he ought not to adjudicate upon the summons. He further said that the validity of the charge did not enter into the statutory pattern discernible in Part III of the Act of 1948. He said the protection of registration under section 95 of the Act of 1948 was conferred by delivering to the Registrar of Companies certain prescribed particulars of the charge together with the instrument, if any, by which it was created or evidenced.

[p.170]

With regard to section 101, Plowman J. said:—

"There is no reference there to the Court being satisfied as to the validity of the charge, and it would have been very simple to insert such a reference if it had been intended. What section 101 does is to give the Court power in certain circumstances to substitute its own time-limit for the time-limit in section 95, but apart from that it leaves section 95 to operate as is the application to register had been made in time."

Some support for the above proposition can be found in IN ReCunard Steamship Co. Ltd. (1908) W.N. 160.

In Heathstar Properties Ltd. case, it was submitted that the question there was not whether there was a charge, but whether there was a registrable charge, and Plowman J. said that it made no difference in law to the power of the Court to entertain an application for extension of time whether the issue was the existence of the charge or its registrability. He then said:—

"The question then arises whether the applicants have satisfied me that the omission to register it within 21 days was due to inadvertence. On the assumption, that it was a charge, the omission to register it appears to have been inadvertent so far as the respondents were concerned, because Mr. Greenman, their Solicitor, took the view that it did not require registration but I take the relevant inadvertence to be the inadvertence of Veitch and, possibly, also of Armstrong ……. The question then arises whether I should now exercise my discretion by extending the time for registration, or by refusing to do so. It seems to me that any risk of injustice to the respondents by allowing registration is far less than the risk of injustice to the applicants by refusing to do so, and propose, therefore, to extend the time for 10 days from the date of the order."

[p.171]

In the present case, the relevant period within which Exh. "A"should have been registered, is ten days from the date of execution which was on the 19th August, 1966. I say that the execution of the

Conveyance was on the 19th August, 1966 because there was evidence that a conveyance was produced and that the appellant signed a document which she thought was an agreement between herself and Messrs. U.A.C. Ltd. I am not in the least concerned about what she thought she signed. The trial Judge found as a fact that the conveyance was not executed on the 30th day of March, 1967, but he said nothing about the document which the appellant signed on the 19th August, 1966. The applicant's reason for not registering the conveyance within the prescribed time was merely a misapprehension of the law, in my view, was excusable, It was argued that because of the status of the applicant, he ought to have known the law, but Lord Atkin said in Evans v. Bartham (1937) (Supra) that there is no presumption in law that anyone, even a judge, knows all the rules and orders of the Supreme Court, and the fact is that there is not, and has never been a presumption that everyone knows the law.

This Court was taken in some detail through the evidence of the applicant and his affidavit, The Court's attention was drawn to various inconsistencies. I have carefully considered the discrepancies brought to the notice of this Court but have no reason to disagree with regard to the majority decision of the Court of Appeal with regard to the inconsistencies. Any inconsistency in the evidence of the applicant was due to mere forgetfulness and was not deliberate.

With regard to the evidence of the appellant and her affidavits, there are many unsatisfactory features about them. This Court is not a court of morals. Unfortunately, when domestic relations begin to deteriorate, there are basis conflicts which develop. The woman feels that the man is inconsiderate, crude and that his tact and finesse have entirely vanished, and that the day [p.172] of courtship have ruthlessly thrust on one side. The man feels that the woman is selfish, cold blooded, and interested primaril in financial matters. It is an unfortunate situation but this Court is not called upon to adjudicate upon this unfortunate situation.

Throughout the judgment of the learned trial Judge, it was apparent that he was solely concerned with the “soul” of the conveyance and the immediate re-action of any reasonable person in a straight-forward and untained transaction, a matter to which he had no business to be concerned with. In his dissenting Judgment, Harding, J.S.C. also fell into error. He said:—

“In my view the issues before the learned trial judge were (1) execution of the Deed of Conveyance sought to be registered and (2) the reason for the delay in registering it.”

He then referrers to the evidence and said:—

“It is clear from the foregoing that the respondent did not sign the purported Deed of Conveyance on 30th day of March, 1967. Whatever deed or document she signed must have been on 19th August, 1966. The appellant cannot say that it was on the 30th day of March, 1967 that the Deed of Conveyance was executed as he was not the party conveying; indeed it was not necessary for him to have signed the Deed of Conveyance at all. The trial Judge found “as a fact that the Conveyance was neither executed or witnessed on the 30th March 1967” and I am in agreement with him on this.”

There was the evidence that the appellant signed a document on the 30th day of March, 1967. There was also evidence that the appellant, through her Solicitor the appellant made an arrangement with

Messrs. U.A.C. for a loan. The appellant never met any of [p.173] the official of Messrs U.A.C. until when at the last stage of the transaction she spoke to Mr. Talabi Coker an official of Messrs. U.A.C. The question whether the applicant collected rent on behalf of the appellant or whether he gave evidence on behalf of the appellant before the Master and Registrar, to my mind has nothing to do with the application before the Court. According to the evidence, the appellant who was an estate agent was asked to bid at an auction on behalf of the applicant. Having found herself in a quandry, she deposed to a fantastic story that she, being a literate woman, that she did not read what she signed. My view is that she said this to surmount the difficulties with which she was entangled. The statute under which the application was made, does not stipulate property rights and the manner in which the learned trial judge approached the matter, is in my opinion, to frustrate the intention of the Legislature.

Lord Denning M.R. in Ward v. James (1965) 1 A.E.R. 563 said:

"This Court can, and will interfere if it is satisfied that the Judge was wrong. Thus it will interfere if it can see that the Judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him…….. It sometimes happen that the Judge has given reasons which enable this Court to know the considerations which have weigh with him; but even if he has given no reasons, the Court may inter from the way has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse the decision."

It is now necessary to examine what actually influenced the mind of the learned trial judge in this case. The judge said that he must be satisfied of the validity of the Conveyance; that the applicant being a Solicitor ought to know the law, that the [p.174] appellant could not have executed the conveyance of the 30th March, 1967 even though there was impeccable evidence that she signed a document on the 19th day of August, 1966. Moreover the learned judge failed to give a positive finding of fact. He also failed to come to a conclusion with regard to inferential facts.

The learned judge; as it is apparent from the record, had in mind the validity of the conveyance even though the application was …… missing permission to register a conveyance. Of course, the validity of a conveyance can be contested but the forum under which it can be contested is another matter, and surely not under Cap. 256. These are irrelevant matters which the learned Judge ought not to have taken into consideration. Even when Counsel for the applicant called the Judge's attention to the irrelevant matters the learned Judge dismissed him out of hand by the words "Be that as it may" which in my view, demonstrated the attitude of the learned Judge that he did not care one way or the other whether the evidence and affidavits sworn by the appellant were irrelevant or not. The dissenting judgment of Harding J.S.C. compromised the judgment of the trial Judge. After having considered all the irrelevant matters which ought not to have been considered, he said that "the respondent cannot be expected to sit idly by and allow the application to register an instrument which purports to convey property which she alleges belongs to her after having been made a respondent to such an application."

If the appellant alleged that the property in question belonged to her she had every right to challenge ownership but not under Cap. 256. There are many avenues open to her to contest the ownership of the

property, and I am certain, after having re……..missing carefully the statute under which the application was made, no contest of ownership can be made under it.

I now turn to the date of conveyance. It was alleged that the appellant could not have executed the conveyance on the 30th March, 1967. I entirely agree with this allegation. But there [p.175] was evidence that the execution of the conveyance was on the 19 August, 1966. Under a misapprehension of law which is excusable in the circumstances of the case, the applicant gave not only a reasonable explanation but also an excusable explanation having regard to the law pertaining to matters of this kind.

As far back as 1584 in Goddard's case (1584) 76 E.R. 396 it was well established that “a date is not of the substance of a deed; for though it want a date, or have a false or impossible date, yet the deed is good.

As was pointed out in the majority judgment of the Court of Appeal, it is stated in Halsbury's Laws of England 4th Edition Volume 12 at paragraph 1356 that:—

“A deed takes effect from the time of its delivery, and not from the day it is therein stated to have been made or executed, and a party to a deed is not estopped by any statement in the deed as to the day or time of its execution from proving that it was delivered at some other time……. A deed may be good although it has no date or bears false or an “impossible date.

At paragraph 1486 of the same Volume is to be found that:

"Extrinsic evidence is admissible to prove the date of delivering of a deed, or of the execution of any other written instrument. A deed takes effect from delivery, and any other instrument from the date of the execution, although the date expressed in the instrument is prima facie to be taken as the date of delivery or execution, this does not include extrinsic evidence of the actual date, and the actual date when proved prevails in case of variance, over the apparent date……"

[p.176]

The above profound enunciation of the law found support in Clayton's case (1585) 77 E.R. at 48 and in Browne v. Burton (1847) 5 Dow & L at page 289, and my researches on the matter have led me to believe that the law has never been changed.

In the present appeal, there was evidence before the learned trial Judge that the conveyance sought to be registered, was executed by the appellant on the 19th day of August, 1966. The appellant said that she did not execute any conveyance on that date but she signed a document which she thought was a transaction concerning Messrs. U.A.C. Ltd. Yet in one of her letters to the applicant she said “Suppose I had refused to convey to you until U.A.C. pays me my fees.” This letter which is Exhibit “F” was dated 28th October, 1966. The applicant gave a reasonable explanation for his failure to register within ten days and thereafter. He was under a misapprehension of the law. He even said that the appellant was due in Sierra Leone in March, 1967 when the appellant's letter clearly stated in her letter that it was in April, 1967 she was expected to arrive in Sierra Leone,

The applicant changed the date of the conveyance to 30th March, 1967 in the light of his misapprehension of law and facts. These to my mind, are excusable reason. Even Lord Atkin in Evans v. Bertham (Supra) said:

"That there is in any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is, there is not, and never has been a presumption that everyone knows the law……"

A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. It appears to me this was exactly what the learned trial judge failed to do in the present case.

[p.177]

I agree with the findings of fact of the majority decision of the Court of Appeal "that the circumstances of this particular case are such as to render the applicant's failure to register the said conveyance within the statutory period of ten days was excusable and "that the true date of the execution of the Deed of Conveyance was 19th August, 1966.

For reasons I have stated, the appeal should be dismissed and that the applicant be granted leave to register the Deed of Conveyance Exhibit "A" and that the Conveyance is to take effect as from the 19th day of August, 1966.

Costs to the applicant.

(Sgd.) Hon. Mr. Justice O.B.R. Tejan

Justice of the Supreme Court

16/12/81.

DURING. J.A.

I have had the opportunity of reading in Draft the Judgment of my learned brother The Chief Justice and also that of my teamed brother Tejan, J.S.C.

In this Appeal I shall refer to the Appellant herein as the "Appellant" and the Respondents herein as "the Applicant".

The Applicant applied in the High Court for leave to register out of time a Deed of Conveyance dated 30th day or March. 1967, which was admitted in evidence and marked "A".

My Lords have already referred to the section under which the Application was made and I need not write out in my Judgment the text.

The Applicant failed to register the Deed within 10 days from the execution of the same. My learned brothers have referred to the Affidavits filed by the Applicant and the Appellants.

[p.178]

The Applicant had to satisfy the Judge that either

(i) that the failure to register was not due to any fault of the applicant or

(ii) failure to secure registration in time was in all the circumstances of the case excusable.

The learned Judge in the High Court found that the failure to register was due to the fault of the applicant and that failure to secure registration in time was in all the circumstances of the case inexcusable.

The learned Judge made a finding that the Conveyance was not executed on the date in the Conveyance, that is 30th of March, 1967 but failed to make a finding as to the date the Deed was executed when there was evidence before him by both the Applicant and the Appellant that the Deed was executed on the 19th of August, 1966.

In my opinion the learned Trial Judge ought not to have considered the pieces of evidence in the Affidavits filed by the Appellant and her evidence viva voce in support of her contention that when she signed Exhibit "A" she did not know the nature o£ the document she was signing - the plea of non est factum. As my learned brother Tejan J.S.O. has stated in his Judgment such a plea should be raised in another form. It was not for the learned Judge in considering whether or not he should grant leave to register out of time for him to find out the circumstances under which the document was signed by the Appellant.

In my view the learned Judge was wrong in treating the matter before him as an Action. Indeed an Action could be brought by originating summons or a Writ of Summons. What was before the Judge was not an action but an application to register the document out of time. An action presuppose a claim. The Applicant did not bring a claim against the Appeal.

[p.179]

Although the learned trial Judge said that the question of validity of the document was not to be considered by him, the whole tenor of his Judgment shows that he thought the document was not genuine. Reading the Judgment of Harding J.A. as he then was it could also clearly be seen that why he would refuse leave to register the document was because he thought the purported execution was not genuine.

The Applicant gave his reason why he did not register within the prescribed period which was that he was of the opinion that he could not register it until he and the Vendor had executed the document.

The evidence before the Court disclose that the reason why the Applicant failed to register within time was because of misapprehension of the law and this in my view is excusable in all the circumstances of the case.

No one is presumed to know the law not even Judges. The maxim ignorance of the law is no excuse does not mean that everyone is presumed to know the law.

In my view the order of the Court of Appeal that the Conveyance is to incorporate plan L,S.514/66 as well as the plan in the Applicant's name now dated 15th October. 1975 signed by Mr. L.V. McEwen a licensed Surveyor and countersigned by Mr. R.E. Boston-Mammah on behalf of the Director of Surveys and Lands ought not to have been made.

I am in entire agreement with the well considered reasoning and conclusion of my learned brother Tejan J.S.C. I will dismiss the appeal and grant leave to the Applicant to register the Deed of Conveyance Exhibit “A”, the Deed of Conveyance to take effect as from 19th day of August, 1966 and award costs to the Applicant,

Hon. Mr. Justice K.E.O. During

Justice of Appeal

16/12/81.

[p.180]

WARNE J.A.

I have had the opportunity of reading the Judgments of the learned Chief Justice and my learned brother Tejan, J.S.C. I am satisfied that that of the learned Chief Justice is all embracing and there is nothing more I can add to it. I entirely agree with the Judgment and would also allow the appeal. I accordingly allow it and restore the orders of the High Court.

Hon Mr. Justice S.C.E. Warne

Justice of Appeal

16/12/81.

CONSTANT S. DAVIES J.A.

I have had the pleasure and privilege of reading the erudite judgments of the learned Chief Justice and my learned brother O.B.R. Tejan J.S.C. and would like briefly to state my views on this matter.

Both judgments have admirably traced the course of this case from the High Court to this Court and therefore I do not find it necessary to do so again.

As I see it the duty of the learned trial judge on the application before him was to establish (1) the date of execution of the Conveyance; (2) the reason for the failure to register within 10 days of that date and (3) to decide whether the failure to register was or was not due to the fault of the applicant or whether in all the circumstances the failure to register was excusable or not. This done he could then exercise his discretion Consequently I view the introduction of the proceedings designed to establish the validity of the deed as unfortunate in that in spite of the fact that the learned trial judge did say in his final ruling that the validity of the deed was not relevant to the issue and that he had made no specific finding on the validity of the deed he not only allowed himself to be influenced by irrelevant evidence introduced during those proceedings but also ignored such as would have assisted him in discharging his duty as already outlined.

[p.181]

Although the reason for the proceedings was irrelevant yet pertinent and useful evidence did emerge from them.

It was from those proceeding that the learned trial judge could have, instead of making a negative finding as he did, found the 19th August, 1966 as the Court of Appeal, the learned C.J. and O.B.R. Tejan J .S.C. found as the date of execution of the deed.

It was from the evidence in those proceedings that the reason for non-registration within 10 days of the 6th August, 1966 emerged.

I agree with the learned Chief Justice that the Court of Appeal, having established the date of execution. considered a reason for the failure to register that· was not in relation to that date.

The reason for failure to register within 10 days from 6th August, 1966 as disclosed by the evidence was that the applicant in the High Court felt that the deed was not yet ripe for registration as both parties had not by then signed the document. This misapprehension in my opinion must have been

induced by the testimunium clause in the deed. Considering all the circumstances and the dictum of Lord Aitkin at p.649 of the report in Evans & Bartham cited by my brother Tejan J.S.C I would say the reason was excusable.

I would therefore dismiss the appeal and grant leave to the Respondents to register the deed Ex. “A” to take effect as from 19th August, 1966.

Hon. Mr. Justice C.S. Davies

Justice of Appeal

CASES REFERRED TO

1. Charles Osenton & Co. v. Johnston (1942) A.C. 130 H.L

2. Ward v. James (1965) 2 W.L.R. 455 C.A.

3. Republic of Pery v. Dreyfus & Co. (1886) 55 L.T. 802

4. Lazard Brothers & Co. v. Midland Bank Ltd. (1932) A.C. 289 H.L.

5. Rogers v. Ingham 3 Ch.D.351 per Mellish L.J. at 357

6. Donald Campbell and Co. v. Pollak (1927) A.C. at page 809

7. Evans v. Batham (1937) 2 All E.R.

8. Donald Campbell Co. v. Pollak (1927) A.C. 732

9. Horhestroom v. S.S. Durham Castle (1927) A.C. 37 at 47; See

10. Beemax v. Austin Motor Co Ltd. (1955) 1 A.E.R. 326.

11. Egerten v. Jones (1939) 3 All E.R. 889 at 891

12. Maxwell v. Keun (1927) All E.R. Rep. at page 338,

13. Ward v. James (1965) 1 A.E.R. 563

14. Browne v. Burton (1847) 5 Dow & L at page 289,

STATUTES REFERRED TO

1. Cap. 256 as amended by Act No. 6 of 1964.

2. Section 95 of the Companies Act, 1948

3. Cap 256 (as amended by Act No. 6 of 1964)

SALLU MANSARAY AND THE STATE

[Cr. App. No. 1/80][p.1-49]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 31 MARCH 1981

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.; MR. JUSTICE C.A. HARDING, J.S.C.; MR. JUSTICE O.B.R. TEJAN, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER; MR. JUSTICE S. BECCLES DAVIES, J.S.C.

SALLU MANSARAY - APPELLANT

AND

THE STATE - RESPONDENT

C.F. Margai for the Appellant

A K Barber for the State

JUDGMENT DELIVERED THIS 31ST DAY OF MARCH, 1981

A. AWUNOR-RENNER, J.S.C.

The Appellant was convicted at the Bo High Court on the 8th December, 1979, before Williams J. and a jury for the murder of one Marie Karimu on the 30th day of June 1979 at Jahadama Village in the Bo District and sentenced to death. It is against his conviction that he has now appealed to this Court after first appealing to the Court of Appeal on the following grounds:—

(a) That the presiding judges of the Court of Appeal or Sierra Leone in the above ease Erred in law by holding that the charge of murder was proven as required by law and Hence up-held the conviction and sentence.

(b) The Presiding judges of the Court of" Appeal in the said case erred in law by holding that the learned trial judge in his summing-up to the jury adequately directed them as to the ingredients required by law to constitute the offence of murder thus justifying the conviction and sentence.

[p.2]

(c) The presiding judges of the Court of Appeal erred in law by holding that the learned trial judge adequately or at all put forward to the jury the case for the defense.

(d) That judgment is unreasonable.

The material facts of this case are as follows: On the day of the alleged incident the deceased with some other people including one Moilona Sandi were lying on hammocks in Moilena Sandi's verandah when the appellant appeared and the deceased complained to him that his ., sheep had on several occasions eaten vegetables which she had planted. As soon as the deceased said this the appellant hissed at her, took off her headtie and flung it on the ground accompanied by the following remarks “All this will finish today”. Soon thereafter one Foday Ansumana said in evidence that he saw the deceased walk past the house towards the back of the kitchen in the compound and that when he eventually went to investigate, he saw the deceased lying on the ground. The deceased then said "Mansaray you have killed me". "Mansaray you killed me". As words were being uttered by the deceased he saw the appellant running into the bush with a gun.

The Appellant made statements to the Police upon which he relied. I think it desirable at this stage to reproduce the statements in full. In his first statement to the Police the appellant had this to say—

“On Saturday 30th June 1979 at about 2.00 p.m. I was returning to the village from my mining acre. On arrival at the Coffee/Banana Farm by Jahadam. New Town I say a monkey sitting on the coffee tree towards the village. I shot the monkey with my gun. As I fired at the monkey, [p.3] I heard the deceased Mari Karimu shouting “Pa Mansaray you have killed me”. I rushed there and met the deceased lying down under a kola Nut tree just at the back of a toilet. I saw a bullet wound on the left side of the deceased with blood flowing out of there. I fell on her and tried to wipe the blood from her side. I beard the villagers say that they were killing me if they saw me. I became afraid and ran through the Coffee farm to the old town where I live. I went to the house of Pa Morlai Koroma. I hid the gun underneath his bed and Fled into the bush. Pa Morlai was not at the At that time only Fatu Samura was in the house. I have known Marie Karimu the deceased for over twenty-years. I have never had a misunderstanding with her. I know the husband of the deceased. I have not had any misunderstanding with him. I own the single barrel shot gun I used to shoot the deceased. The said gun is licensed for the current year. This is the gun it is a single barrel shot gun No. YB 10101 B.S.A. This is the license for the said gun. It is No. 6641 dated 2nd February, 1970. The monkey I shot fell dead. I saw the monkey not too far from Marie the deceased. This is the third time I am shooting at monkeys in that coffee farm. I used to sell the said monkeys at Le.3 in the village. This is all.”

[p.4]

The Second statement from the appellant reads as follows:—

“Today Tuesday 3rd July 1979, I led the C.I.D. men to the Scene at Jahadama Village. At Johadamn Village I led the Police to the place. I stood under a Kola nut tree behind a kitchen when I fired at the money I saw. I also led the police where I saw the monkey and fired at it. Observations were made on all the trees and the leaves around where I fired -at the monkey for bullet marks and scratches but none was seen. The area was brushed in search of monkeys but it was not see Search was also made for the empty cartridge shell but it was not found where I dropped It. Measurements of the various points were taken by the police from the Scene. I led the police to Jahadama Old town and showed the police where I hid the gun underneath the bed of Mr. Morlai Koroma. There was no blood at the spot I shot the monkey except human excrete. I have killed about three monkeys in the same coffee farm by the village One of these monkeys I gave to one Sahr Kono of Jahadama Old Town. The second monkey I killed was sold by one Alpha whose surname I do not know formerly of Jahadama Village but now of an unknown address in Bo. The third I gave to Alpha and Sahr Kono to brush my swamp. I had no intention to shoot the deceased because I had no dispute with her or any of per relatives. I lived on friendly terms with every body in the village. This is all.”

[p.5]

Finally the medical evidence established that the deceased died from gun shot wounds.

I must say at this stage that although several grounds of appeal were argued by Counsel for the appellant I only propose to deal with those contentions which in my view raise points of substance and the first of such points deals with the 1earned trial judge's direction on the question of “malice aforethought”. Counsel for the appellant referred this Court to several passages in the summing up and

also complained that the learned trial judge interpreted the supposed quarre1 to mean malice aforethought It. One of such passages complained of in the summing up is in these terms:—

“The killing must have been done with “malice aforethought”, Malice which can be expressed or implied is an intention to kill a human being which is express malice or to do grievous bodily harm to him or to do an act which the accused knows or must as reasonable person to taken to know that such and act is likely to kill or cause grievous bodily harm to a human being under the President’s peace. From such acts malice can be implied.”

The learned trial judge having explained “malice aforethought” to the jury in the above terms continued in various portions of his summing up to deal with the question of “malice” and “malice aforethought”.

Let me just quote a few of such references from his summing-up.

[p.6]

(1) I want to say to you that firstly, if on the evidence you are not convinced that there was any malice either expressed or implied then you cannot return a verdict of murder, it must be a verdict of not guilty of murder it is only if on the evidence you are satisfied that there is some form of malice either expressed or implied that you can possibly return a verdict of guilty of murder as I have said if you are not convinced that the to is any malice then the verdict of manslaughter is open to you depending on how you see the rest of the evidence.

(2) "One of them is P.W.1 who told you about the quarrel between the accused And the deceased. It is for you to say whether such a quarrel can amount to and can import malice on the part of the accused. The quarrel was that the woman told the accused that his sheep had eaten up the vegetables in her garden three times. By his reaction the accused hissed to her, snatched her head-tie from he head threw it away and said to her “All this will finish today”. Does malice, in your opinion members of the jury? If it does then that is evidence for murder. But if in your opinion that quarrel cannot amount to “malice aforethought” either expressed or implied then your verdict on the charge of murder must be not guilty.”

[p.7]

(3) “Therefore you must be perfectly satisfied that it was the accused who killed the unfortunate woman and at the time of the killing the accused had malice expressed or implied. If you so find on the evidence for the prosecution then have no hesitation in coming back with a verdict of guilty of murder.”

(4) “He could be guilty of murder if the quarrel between the accused and the deceased can amount to malice. If you are not satisfied that such a quarrel can amount to malice then he could be guilty of manslaughter.”

Let me now give the definition of malice as contained in ARCHIBOLD 35th Edition at page 916 at paragraphs 2484, and 2487.

“To amount to murder the killing must be committed with "malice aforethought". Aforethought does not necessarily mean premeditation, but it implies foresight that death would or might be caused. It "Express malice may be said to mean either of the following states of mind preceding or co-existing with the act or omission by which death is caused and it may exist where the act is unpremeditated:—

(a) An intention to cause the death of or grievous bodily harm to, any person whether such person is the person killed or not:

(b) Knowledge that the act which causes death, will probably cause the death of, or grievous bodily harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference [p.8] whether death or grievous bodily harm is caused or, not, or by a wish that it may or by a wish that it may be caused.”

“Implied Malice in many cases where no Malice is expressed or openly indicated the law will imply it from a deliberate cruel act committed by one person against another. It may be implied where death occurs as a result of a voluntary act of the prison which was (1) intentional and (2) unprovoked.”

This general principle as regards “Malice aforethought” either express or implied referred to supra are to be found in various decisions. I propose at this stage to refer to a few. In the Case of R. V. DOHERTY 16 Cox at page 306 and 307 Stephen J. had this to say - J. had this to say—

“Murder is unlawful homicide with malice aforethought”. Manslaughter is unlawful homicide without malice aforethought”' “first as to the term, “aforethought it’s” meaning has been laid down clearly by Holt C.J. who in REG. v MAWGRIDGE says “He that doth a cruel act voluntary doth it of malice “prepensed” which is the same as “aforethought”. “Therefore does not necessarily imply premeditation but it implies intention which must necessarily precede the act intended. What then is the intention necessary to constitute murder. Several intentions must necessarily have this effect; but I need mention only two in this ease, namely, an intention to kill and an intention to do grievous bodily harm.”

Also in the case of REGINA v VICKERS reported in (1957) 2 Q.B,D, at page 664 at para. 670 Lord Goddard O.J. had this to say—

[p.9]

“Murder is of course killing with “malice aforethought” but “malice aforethought” is a term of art. It has always been defined

in English Law as either an express intention to kill or implied where by a voluntary act the accused intended to cause grievous bodily harm to the victim and the victim died as a result.”

See also the case of YEBEMA v REGINA reported in 1957-1960 African Law Reports Sierra Leone Series at page 235.

In the case of WOOLMINGTON v D.P.P. reported in 25 Cr. App., R. at page 95 The Lord Chancellor had this to say

“When dealing with. a murder case the Crown must prove:—

(a) Death as a result of a voluntary act of accused and,

(b) Malice of the accused,

It may prove malice either expressly or by implication. For malice may be implied where death occurs as a result of a voluntary act of the accused which is either (1) intentional, and (2) unprovoked.”

In the case of SMITH v D.P.P. 1961 A.C. at page 290 it was held that —

“Grievous bodily harm should be given its ordinary and natural meaning of real serious bodily harm and that it was immaterial what the accused in fact contemplated as the probable result of his actions provided he was in law responsible for his actions; that the sole question was whether the unlawful and voluntary act was of such a kind that grievous [p.10] bodily harm was the natural and probable result; and that the only test of this was what the Ordinary reasonable man would, in all the circumstances have contemplated as the natural and probable result.”

Finally in the unreported case of SAHR M'BAMBAY & OTHERS v THE STATE Court of Appeal 31/74 Livesey Luke J.S.C. in dealing with the question of “malice aforethought” which was one of the grounds of appeal raised in that case and after reviewing a number of authorities had this to say—

“It is significant that the position in England since 1967 is that the test of an accused's intention is the subjective one introduced by the Criminal Justices Act 1967 Sec. 8. Of course this statute has no application in this country. In our experience and on the basis of decided cases available to us the Courts in Sierra Leone have always applied the objective test and that in our opinion is the test applicable in Sierra Leone.”

He further went on to say that—

“Applying the authorities cited above “malice aforethought involves the following states of mind:—

(1) Death caused in resisting lawful arrest by an officer of justice.

(2) Death caused by an act of violence in the course of or in furtherance of a felony involving violence.”

[p.11]

Looking at the learned trial judge's summing up on the question of “Malice aforethought” and the languages used by his direction to the Jury, I must say that he failed to explain it adequately to them. He further confused them with his definition of the words express and implied malice and made no attempt to explain the difference between them to the jury. Having done so, it seems to me, that he was under the impression, on several occasions that the alleged quarrel amounted to malice and emphasized this.

It only remains for me to say now that as far as this ground of appeal is concerned that I derive support from the above authorities referred to by me for the meaning of the doctrine of “malice aforethought”.

Another complaint of Counsel for the appellant was that the ease for the defense was not adequately put to the jury:

Counsel referred this Court to a passage in the summing up which reads as follows:—

“But if Voluntarily he offers a defense you are in duty bound to consider that defense alongside the prosecution's case. In this case the accused has offered a defense. His defense is contained in his statements and I dare say the defense is one of death by misadventure based on the monkey episode. I therefore invite you to consider the defence and ask yourself whether it can be satisfactorily accepted. If it is a defence which you can satisfactorily accept then you must find him not guilty of the offence. But if having considered the whole situation as disclosed to you by the evidence in this case you find yourselves unable to believe the story of this monkey episode then your verdict must be either guilty of murder or manslaughter.”

[p.12]

Another passage in the summing up also reads as follows—

“Go on to consider the defence of the accused which as I said hinges on the monkey story if you believe it and that by some accident pellets from the accused’s gun found their way into the woman's abdomen then this is death by misadventure in which case the verdict, should be not guilty. On the other hand if you do not believe the defence but rather believe the prosecution’s cease your verdict in this case should be guilty of manslaughter.”

The judge yet again had this to say –

“The only point which to my mind remains' for you to consider is the explanation about the monkey. Very carefully consider it to find out whether his story is consistent with events as they took place but if you as reasonable men and women think that such a story cannot be true and once you come to that conclusion that the story is untrue you are left with two alternatives so far as your verdict is concerned having regard to the evidence as a whole. It is either guilty of murder or guilty of manslaughter.”

Earlier on in this judgment I have quoted verbatim the two statements of the appellant upon which he relied during the trial and his defence in a nut-shell was that at that time he fired the fatal shot he thought that he was firing at a monkey which he had seen on a coffee tree. The learned trial judge told the jury that he appellant had offered a defence should he dared say was one of death by misadventure and that if they did not believe the appellant’s story of if they could not satisfactorily accept it then they must either find him guilty of murder or guilty of manslaughter. He also told them that if they did not believe the defence but rather believed the prosecution their verdict this case should be guilty of manslaughter. He failed to tell them of [p.13] the other alternative courses open to them as for instance that even if they disbelieved his story but that any reasonable doubt as to his guilt that he was entitled to an acquittal. The jury should be so directed. In the case of R. v. MURGTAGH & KENNEDY reported in volume 39 Criminal Appeal Report at page 72, convictions for murder and manslaughter were quashed

on the ground of a defect in the summing up, the jury not having been specifically directed to acquit if the explanation of the defendant left them in any doubt. The defence had been that of accident.

See also the case of SAHR M'BAMBAY & OTHERS v STATE Cr. App. 31/766 referred to supra. In the case of SEISAY & SIAFFA v R. reported in 1967-68 African Law Reports Sierra Leone Series at page 323 it was held that even if an accused person is lying, that does not necessarily mean that he is guilty or that he may be convicted without more-ado. The burden remains on the prosecution to prove his guilt and it is the judge's duty to make this clear to the judge" It also appears to me that in his summing up he was shifting the burden of proof on to the shoulders of the defence, the burden of proof is always on the prosecution to prove the accuser's guilty. See WOOLMINGTON v D.P.P. 25 Criminal Appeal Report at page 72, R. v. HEPWORTH 39 Criminal Appeal Report at page 152. KARGBO v R 1968-69 A.L.R. S.L. at page 542. I must also add that the learned trial judge in dealing with the defence of the appellant did not direct the jury on the principles of law involved which would reduce the killing from the offence of murder to one of manslaughter provided the prosecution failed to prove "malice Aforethought".

In view of the above misdirection, I have come to the conclusion that the defence of the appellant was not adequately put to the jury. The Court of Appeal came to the conclusion that [p.14] the Learned Judge misquoted the evidence but that the jury were not misled, they therefore held that there was no miscarriage of Justice and dismissed the appeal. The question now arises whether the Court of Appeal was right in applying the provisions of Sec. 58(2) of the Courts Act of 1965.

Sec. 58(2) reads as follows:—

"On an appeal against conviction the Court of Appeal may, not withstanding that they are of opinion that the point raised in the appeal may be decided in favour of the appellant dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

The above section I must say is almost in identical terms with See. 4(1) of the Criminal Appeal Act 1907. See ARCHIBOLD Thirty Fifth Edition paragraphs 939 at page 343 under the rubic "no substantial miscarriage of justice" for an explanation of' the said term. After the amendment to Sec. 58(2) of the Courts Act 1965, in 1976 the Court of: Appeal now has power to order a new trial as an alternative to dismissing the appeal if they feel that no substantial miscarriage of justice has occurred. In short the position now is that the Court of Appeal may either order a new trial or dismiss the appeal if they are satisfied that no substantial miscarriage of justice has occurred.

The meaning attributed to the words "no substantial miscarriage of justice" has actually occurred in relation to the Courts power to dismiss an appeal under the provisions of Sec.4(1) of the Criminal Appeal Act 1907 was dealt with by Channel J. in the ease of COHEN v BATEMAN 2 Cr. App. R. at 197 at page 208 were He said—

[p.15]

"If, however the Court in such a case comes to the conclusion that on the whole of the facts and on a correct direction the only reasonable and proper verdict would be one of guilty, there is no miscarriage

of justice, or at all events no substantial miscarriage of justice, within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge not being a wrong decision of a point of law."

See also R v HAROLD JONES reported in Volume 16 Cr. App. R, at page 128, Finally let me also refer to a case which though unreported deals explicitly and exhaustively on this point that is the case of THE STATE v BRIMA DABOH S.C. Cr. App, 1/79.

In the instant case I have no doubt in saying that had the jury been properly directed the only reasonable verdict they would have brought in would not be one of murder and as such I do not think that this a proper case in which to apply Sec. 58(2) of the Courts Act 1965. The jury properly directed may have found him guilty of manslaughter on the ground that he was negligent to the point of recklessness or that he conducted himself in such a careless manner and shoved such utter disregard for the life and safety of others as to be guilty of culpable negligence.

In the case of R v SALMON & OTHERS reported in 6 Q.B.D. at page 79 three people went into a field in proximity to certain roads and houses taking with them a rifle which would be deadly at a mile, for the purpose of practicing firing with it. One of them place a board, which was handed over to him by another one, on a tree as a target. All three fired shots directed at the [p.16] board so placed, from a distance o£ about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots fired by one of them, though it was not proved which one o£ them, killed a boy in a tree in a garden near the field at a distance of 393 yards from the firing point. They were all found guilty by a jury of manslaughter. In a case stated it was held that all three had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others and were rightly Convicted of manslaughter. Field, J. had this to say:—

"I am of the same opinion. I had some doubt a. to whether there was any duty owed by the prisoners to the particular boy, but it seems to me that there is a general duty to the public, of which the prisoners committed a breach. They had a duty not to use a weapon likely to cause death or injury in an improper place and without taking proper precautions to avoid injury. The evidence shows that was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right."

Stephen J. also had this to say.

"I am of the same opinion. Manslaughter is unlawful homicide not amounting to murder. It is unlawfu1 where caused by the culpable permission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or [p.17] things. It is the legal duty of everyone who does an act, which without ordinary precautions is or may be dangerous to human life to employ those precautions in doing it. Firing a rifle under circumstances such as in the present case, was a highly dangerous act, and all are responsible, and they unite to fire at thee spot in question, for they all omit to take any precautions whatever to prevent danger."

Even from the appellant's statements which have been reproduced above there is evidence to show that he was grossly negligent. He himself admitted that the shooting took place behind a kitchen. Is that a safe place to hunt for monkeys? I would say no. The area surrounding a kitchen is an area especially in Sierra Leone which would constantly be used by people. Having stated above that the learned trial judge had misdirected the jury, and come to the conclusion that the defence of the appellant was not adequately put the conviction for murder could not stand. It only remains for me to consider whether this is a proper case in which to apply the provisions of 8ec.59(2) of the Courts Act 1965 which provides as follows:—

"Where an appellant has been convicted of an offence and the Court which tried him or the jury (as the case may be) could have found him guilty of some other offence, and on the finding of such Court or the jury it appears to the Court of Appeal that such Court or the jury must have been satisfied of such facts which found him guilty of that other offence, the Court may instead of allowing or dismissing the appeal substitute for the verdict found by such Court or the verdict or guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted by law for that other offence not been a sentence of greater severity."

[p.18]

In considering whether the Court of Appeal should exercise the powers under this sub-section, the test to be applied is not whether the judge has in fact directed the jury on the alternative verdict but whether the jury must have been satisfied of facts which proved the defendant guilty of the other offence. See R. v LARGE 27 Cr. App. R. at page 213. There are several instances when a verdict or manslaughter could be substituted in place of a verdict of murder e.g. where the accused's line of defence which if successful would have absolved him completely from responsibility for the act which caused the death for example, self defence, accident etc. Also where the accused's defence which though it might not absolutely absolve him from responsibility but might be a mitigating factor, reduce the guilt to manslaughter e.g. provocation. See R. v. McPHERSON

41 Cr. App. R. at page 213, or that the killing was merely unlawful as being the result of the degree of recklessness sufficient for a verdict of manslaughter, but not with the necessary malice aforethought required for the offence of murder. Invoking the powers conferred by that section I think that this Court ought to substitute a verdict of manslaughter in place of the verdict of murder as there is evidence to warrant such a course.

Under the circumstances I would allow the appeal, set aside the conviction for murder and substitute a verdict of manslaughter and impose a sentence of 5 years imprisonment. Appeal allowed.

(Sgd.) Hon. Mrs. Justice A.V.A. Awunor-Renner

Justice Supreme Court

[p.19]

LIVESEY LUKE C.J.

I agree, in the main, with the judgment of my learned Sister, Awunor-Renner J.S.C., but in fairness to the learned trial judge and out of deference to the arguments addressed to us by learned Counsel, I would like to add a few words of my own. The material complaints in this appeal concern the learned trial Judge's direction on the subject of malice aforethought and on the defence of the appellant,

In my opinion the learned judge correctly directed the jury that malice aforethought means an intention to kill or to cause grievous bodily harm. That, generally speaking; that is the meaning of malice aforethought is established by a long line of cases both in our local jurisdiction and in other Commonwealth jurisdictions. See Reg. v. Doherty (1887) 16 Cox 306, Reg. v. Vickers (1957) 3 W.L.R. 326, Sahr M'bambay & Ors, v. The State Cr. App. 31/74 (S.L.C.A. unreported). In my view the use of the words “express” or implied” by the judge in relation to malice aforethought did not detract from or affect his direction on the meaning of malice aforethought. If the jury found express malice the requisite mental ingredient was satisfied. Also if they found implied malice the requisite mental ingredient was satisfied. In my opinion therefore the fact that the judge directed the jury as he did on express and implied malice could not be said to amount to a misdirection.

I think that where the learned judge went wrong on the subject of malice aforethought was when he came to direct the jury on the evidence. He quite properly, in my view, directed their attention to the evidence relating to the incident which took place on the veranda of the house of Moilana Sandi, at Jaingama Village shortly before the shooting. It was during that incident that the appellant is alleged to have said “All this will finish today.”

[p.20]

The learned judge referred to the incident as a quarrel. In my view it matters not whether he was right or wrong in referring to the incident as a quarrel. What is of importance and concern is that the judge told the jury that the quarrel could amount to “malice.” Such a statement was liable to give the jury the impression that the incident could amount to “malice aforethought,” and therefore if they believed the evidence relating to the incident, that was evidence of "malice “aforethought” In my opinion such a statement was a misdirection liable to confuse the jury on the all-important ingredient of mens rea. In my judgment the proper direction that the judge should have given is that the evidence of the incident (by whatever name called) was evidence, if believed, from which “malice aforethought” can be inferred.

The other complaint deserving consideration is that in directing the jury on the defence of the appellant the learned judge told them that it was only if they accepted or believed the explanation of the accused that they should return a verdict of Not Guilty. That was clearly a misdirection.

It is relevant to state that the accused relied on his statement to the Police. But, without going into the question of weight, the direction is the same, whether the accused gives evidence on oath or not. It is well established that the proper direction on this aspect of a summing up is as follows:—

(1) if the jury accept or believe the explanation of the accused they must acquit

(2) Even if they do not accept or believe the explanation but if it nevertheless leaves them in doubt, they must acquit and

[p.21]

(3) on a consideration of the whole of the evidence they must be satisfied of the guilt of the accused.

See Reg. v. Murtagh & Kennedy 39 Cr. App.: R. 72, Reg, v. Head & Warrener 45 Cr. App. R. 225 and Sahr M'Bambay & Ors. v. The State Cr. App. 31/74 (S.L.C.A. unreported).

Having held that the learned trial judge misdirected the jury on material issues, what then should be the result? Should the appeal be allowed and the conviction and sentence set aside? The Court of Appeal dismissed the appeal on the ground that there was no substantial miscarriage of justice. Although the Justices of Appeal d1d not say so, it is obvious that their intention to apply the provisions of Section 58(2) of the Courts Act, 1965 Which has been set out by my learned sister Awunor-Renner J.S.C Learned Counsel for the appellant submitted that the Court of Appeal erred by holding that no substantial miscarriage of justice was Occasioned by the dismissal of the appeal. The principles by which an appellate court is guided in deciding whether or not to apply provisions identical with or similar to Section 58(2) of the Courts Act, 1965 are well-settled. They are authoritatively stated in an impressive line of English Cases. See Cohen and Bateman [1909] 2 Cr. App. R. 197, Brown v. R [1971] 55 Cr. App. R. 478. In the recent case of The State v. Brima Daboh Cr. App. 1/79 (S.L.S.C. unreported) this court stated the principles thus:

“If the Court is satisfied that the evidence is overwhelming and that on a proper direction the only proper and reasonable verdict would be one of guilty, then no substantial miscarriage of justice has actually occurred.”

[p.22]

See also Solomon Gbewa & Others v. The State Cr. App. 33/74 (S.L.C.A. unreported).

The evidence in the instant case was certainly overwhelming. But was “Guilty of Murder” the only proper and reasonable verdict that the jury could have returned? In my opinion, based on the evidence, to which I shall return presently, a proper and reasonable alternative verdict which the jury could have returned if they had been properly directed is Manslaughter. In those circumstances it would be wrong to hold that the only proper and reasonable verdict the jury could have returned as one of' guilty of Murder.

I therefore agree with Awunor-Renner J.S.C. that the Court of Appeal was wrong to have applied Section 58(2) and dismissed the appeal.

I shall now proceed to give reasons for saying that Manslaughter was a proper and reasonable alternative verdict. On his own admission, the appellant fired a shot gun at a monkey which he saw sitting on a coffee tree. This took place behind the kitchen of Moilana Sandi's house. Immediately thereafter he heard the deceased shouting “Pa Mansaray you have killed me. It He rushed to where he

had heard the voice of the deceased and found her lying on the ground near a toilet. She had bullet wounds on her left side and was bleeding profusely. He said he saw the dead monkey near where the deceased was lying. He said that he had no intention to shoot at the deceased and that it was by accident that she was hit by the pellets. According to the evidence led by the prosecution, the place where the deceased was found lying after she had been shot at was at the back of the kitchen of Moilona Sandi's house and that the kitchen is about 15, feet away from the house. So it is quite clear from the evidence that the shooting did not take place in some remote and deserted place in [p.23] the bush. It took place in the village near a dwelling house where any reasonable man would expect persons to be. The appellant had a duty not to use a dangerous weapon, which a shot gun is, to endanger the life or limb of people in the village without taking proper precautions. This is a duty imposed by the common law applicable in this country. In my opinion that duty is based on and has the support of common sense. Indeed, I think that public policy and public safety also dictate such a rule in any organized society. The common law duty, which has as its object the preservation of human life, and which is a general duty owed to the public, is that persons who handle dangerous weapons and things likely to cause death or injury should not handle them or commit an act or omission in a place or in a manner likely to cause injury to life or limb without taking proper precautions.

It is well-established that if death result from a breach of such a duty, such death would amount to Manslaughter. The application of this rule is well illustrated by the case of The Queen v. Salmon Hancock & Salmon (1880) 6 Q.B,D. 79 which went to the Court of Crown Cases Reserved consisting of Lord Coleridge C.J. and four other Judges. The brief facts of that case are that the three appellant's went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practicing firing with it. A board was placed in a tree as a target and all three fired shots at the target 100 yards away. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one of them killed a boy in a tree in a garden near the field at a spot some 400 years away from the firing point. It was held that all three appellants had been guilt of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others and were rightly convicted of Manslaughter.

[p.24]

The judgments are instructive and I consider it useful to quote from two of them. Field J. said inter alia at pp. 82-83:—

"I had some doubt as to whether there was any duty owed by the prisoners to the particular boy, but it seems to me that there is a general duty to the public, of which the prisoners committed a breach. They had a duty not to use a weapon likely to cause death or injury in an improper place and without taking proper precautions to avoid injury. The evidence shows that that duty was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right."

And Stephen J. said inter alia at p. 83:—

“Manslaughter is unlawful homicide not amounting to murder. It is unlawful where caused by the culpable omission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of every one who does any act. Which without ordinary precaution is or may be dangerous to human life to employ those precautions in doing it.”

See also R. v. Burton (1759) 1 Str.481, R. v. John Jones 12 Cox c.c. 628. In the instant case the appellant clearly had a duty not to fire the shot gun in a place where persons were likely to be, without taking proper precautions to avoid injury to persons. The question is whether he breached that duty. The evidence is that he fired the gun near a dwelling house and it out-houses including a kitchen and toilet and that he knew that persons were in and around that vicinity. In my opinion firing a gun in such a location was a dangerous act and a reckless [p.25] disregard of the lives of persons in the vicinity. That was a breach of duty amounting to culpable negligence. Death resulting from such a breach of duty would amount to Manslaughter. In my judgment therefore a reasonable jury properly directed would have returned a verdict of Manslaughter at least. It means that, in my judgment, having regard to the facts of this case, there were only two reasonable and proper verdicts open to the Jury, namely, Murder or Manslaughter.

In view of the misdireetions on malice aforethought and on the defence of the appellant and of the inapplicability of Section 58(2) of the Courts Act, 1965. The conviction for Murder cannot stand. But in my opinion such misdirections do not affect the position as regards Manslaughter. In the first place malice aforethought is not a necessary ingredient of manslaughter. Therefore any misdirection on malice aforethought cannot affect a conviction or possible conviction for Manslaughter. Secondly, the misdirection on the defence of the appellant cannot affect the position. The reason is that the appellant's defence was that he deliberately fired the gun aimed at an object in a place where persons normally live and that by accident the deceased was hit by pellets, as a result of which she died, Of course it is because the victim was hit by accident that death in such circumstance would amount of Manslaughter. For if a person aims a loaded gun at another, knowing it to be loaded and pulls the trigger and the other person dies as a result, such a killing would be by design and therefore Murder of the victim. See Re. v. Campbell 11 Cox C.C. 323 the headnote of which reads:

[p.26]

“Where a person fires at another a fire-arm knowing it to be loaded, and therefore, intending either to kill or to do grievous bodily harm, if death ensues the c rime is Murder; and if in such a case the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is Manslaughter.”

On the facts of the instant case, the reasonable interpretation to be put on the defence put forward by the appellant is that he did not intentionally shoot at the deceased as claimed by the prosecution but that the shot fired by him accidentally killed her. So the issue raised by the defence of the appellant is not whether he deliberately fired at the deceased but whether the appellant firing a gun, as he admittedly did, was in breach of his common law duty. As I said earlier, on the appellant's own

admission and on the evidence as a whole, the appe1lant undoubtedly breached his common law duty and therefore committed culpable negligence amounting to Manslaughter. In those circumstances the only proper course open to this Court is to apply the provisions of Section 59(2) of the Court's Act, 1965 and substitute a verdict of Manslaughter for the verdict of Murder.

For the foregoing reasons, I agree with the orders proposed by Awunor-Renner J.S.C.

(Sgd.) E. Livesey Luke,

Chief Justice.

HARDING J.S.C.

I agree with the judgments of Awunor-Renner J.S.C. and Luke C.J. I too would allow the appeal, substitute a verdict of manslaughter for the verdict of Murder and impose a sentence of 5 years.

(Sgd.) C.A. HARDING

Justice of the Supreme Court

BECCLES DAVIES J.S.C.

I also agree with the judgments of Awunor-Renner J.S.C. and Luke C.J. and have nothing to add.

(Sgd.) S Beccles Davies

Justice of the Supreme Court

TEJAN J.S.C.

The appellant was charged at the High Court of Bo in the Southern Province of the Republic of Sierra Leone before William, J. with the offence of murder of a woman named Marie Karimu and sentenced him to death.

The facts of the case fall within a narrow compass, but for the authorities and the law involved, my judgment would have been correspondingly short.

On the 30th day of June, 1976, the appellant who was carrying a shot gun, passed in front of the veranda of Malona Sand. Sandi together with the deceased and two others were at the time lounging on hammocks in the veranda. The deceased told the appellant that after having complained on three occasions, the appellant’s sheep still ate the vegetables she had planted.

[p.28]

The Appellant hissed at the deceased, took her headtie and flung it on the ground. The appellant remarked that “all this will finish today” and then went away. It is necessary to state at this stage that Malona Sandi who was P.W.1 at the trial was the only witness who testified to the remark made by the appellant. Among the people who were in the veranda was P.W.2 Foday Ansumana alias Jainda

Ansumana. Shortly after, the appellant went away; the deceased left the veranda and went behind the kitchen in the compound. Foday Ansumana heard the sound of a gun shot. The sound came from the direction the deceased had gone. When Foday Ansumana and one Karimu who was with him heard the sound of the gun shot, they left the veranda and ran into the house. After having summoned sufficient courage, Foday Ansumana left the house and went to the direction where the sound of the gun shot came. Near a kola tree at the back of the kitchen, Ansumana saw the deceased lying on the ground. The deceased said "Mansaray you have killed "Mansaray you have killed me." While the deceased was uttering those words, Ansuma saw the appellant about fifteen feet away, run into the bush. Ansumana hurried back into the house and told Karimu what had happened. Eventually the matter was reported to the Section Chief who instructed some of the villagers to organise a search party to go in search of the appellant. One Sam king caught the appellant under a tree in the Bandajuma area. The Appellant was taken to the Section Chief who ordered that the appellant to be taken to the Police Station.

Detective Corporal 2144 Caulker investigated the case, and during the course of his investigation, he collected the gun which had been identified to him. He interviewed the appellant, and after the necessary caution had been administered, he obtained from the appellant a voluntary statement. Detective Corporal Caulker found the deceased underneath a coffee tree [p.29] where there were also kola nut trees. The coffee plantation was fairly mature and the trees were more than eight feet tall.

When the appellant was in the custody of the police who interviewed him, his explanation tallied with his statement which was part of his defence. In the statement, the appellant said that what he shot at was monkey, but after he had shot at the monkey, he heard the deceased say "Pa Mansaray you nave killed me." The appellant rushed to the place where the deceased was lying, and he saw bullet wound on the left side of the deceased, and that blood was oozing from the wound. The appellant tried to staunch the flow of blood, and while he was doing so, he heard the people in the village say that they would kill him if they saw him. Because of the threat to kill him, he ran away and hid his gun. The appellant had known the deceased for over twenty years and during this period there had been no misunderstanding between them. He had also known the deceased's husband.

Upon this evidence, and after the summing up by the trial judge, the jury retired. On their return they brought in a verdict of murder of ten against two. The trial judge not being satisfied with the verdict, summed up a second time to the jury who retired again, and when they return, they brought a unanimous verdict of guilty of murder.

The appellant appealed to the Court of Appeal against his conviction. The following are his ground of appeal:

(1) The learned trial judge did not define and/or explain the jury the law relating to the charge of "Murder" and therefore failed to assist them in considering their verdict so as to arrive at a fair and just verdict.

[p.30]

(2) The said judge did not define and/or explain for the benefit of the jury what “Manslaughter” is and the ingredients thereof, hence failed to assist the jury in their deliberations with a view to arriving at a fair and just verdict.

(3) The trial judge failed adequately or at all to put forward to the jury the case of the defence and by so doing denied the accused “Justice”.

(4) The learned trial judge misdirected the jury on the question of malice aforethought on the charge of murder.

(5) The verdict is unreasonable and cannot be supported having regard to the evidence.

The judgment of the Court was delivered by Warne, J.A. who said inter alia:—

“Mr. C.F. Margai who appears for the appellant has made very attractive submissions in support of these grounds, but in my opinion, they are not tenable in respect of grounds 1-4. These grounds have no merit. However ground 5 has some merit, in view of the defects in the summing-up, but has there been a substantial miscarriage of justice in order to warrant the appeal being allowed? This is what I will now proceed to consider.”

The learned Justice then gave a brief history of the ease and then said:

[p.31]

“In the summing-up the learned judge explained the law to the jury but when he came to deal with the facts he used very strong language and expressed strong views on the facts and introduced irrelevant elements, such as physics, and finally he misquoted the evidence. This is regrettable, however, I do not think the jury was misled in my view. The appeal being by way of rehearing, I have viewed the evidence and I find that the verdict therefore, is not unreasonable. In my view, the jury properly properly directed could have returned the same verdict. In spite of the shortcomings of the summing-up, there has not been a substantial miscarriage of justice to justify the verdict being set aside. The appeal is therefore dismissed.”

It is against this judgment of the Court of Appeal, the appellant has now appealed to this Court on the grounds that:

(a) The Presiding judges of the Court of Appeal for Sierra Leone in the above case erred in law by holding that the charge of murder was proven as required by law and hence upheld the conviction and sentence

(b) The Presiding judges of the Court of Appeal in the said case erred in law by holding that the learned Trial Judge in his summing up to the jury adequately directed. Them as the ingredients required by law to constitute the of murder. thus justify the conviction and sentence.

[p.32]

(c) The Presiding judges of the Court of Appeal erred in law by holding that the learned Trial Judge adequately or at all put forward to the jury the ease for the defence.

(d) The judgment is unreasonable.

In his argument in support of grounds (a) and (b) Mr. Margai Counsel for the appellant contended that the trial judge failed to explain the legal definition of murder to the jury. To strengthen his argument he referred to the following passage in the summing up:—

“Having said so, let me remind you that the charge of murder is the unlawful killing of a human being within Sierra Leone and under the President's peace. The killing must have been done by someone of sound memory and this he must have done within a year and a day. The killing must have be done with malice aforethought. Malice which can be expressed or implied is an intention to kill a human being which is expressed malice or to do grievous bodily harm to him or to do an act which the accused knows or must as a reasonable person be taken to know that such an act is likely to kill or course grievous bodily harm to human being under the President's peace from such acts malice can be implied.”

Mr. Margai justly criticised the above passage because it does not only fall very far short of the definition of murder, but also tends to confuse any reasonable jury. To give more life to his argument, it is necessary to start with the beginning of the summing-up itself which is far from encouraging:

[p.33]

“I am sure that your patience is now at an ebb. Therefore I will endeavour to sum-up to you as briefly as possible and as briefly as I think necessary in the case. You have heard lengthy addresses so that by now your minds I am sure, are confused. I will therefore attempt to put your minds in a proper perspective by narrowing the issues for you so that your duty and exercises when you are considering your verdict will be much lighter."

Now I agree that there is no formula. For a summing-up. Every judge has his method of summing-up in a case, but I am greatly worried when a summing-up begins with the method the trial judge adopted. The learned trial judge fully realised that their minds were in a confused state. I would have thought that in the circumstances, and for a fair justice in the trial. The trial judge ought to have adjourned the summing-up to a convenient date when he would have become certain that the minds of the jury were clear and active enough to understand the proceedings. The jury should be directed as to the law applicable to the particular ease and to discuss the evidence in relation to the law. After making it clear to the jury that the burden of proof lies on the prosecution and the standard of proof that is required, the jury be told that if the prosecution failed in this regard, they must as a fight acquit the accused. They jury must also be told that if there is any reasonable doubt in either the prosecution’s case or that of the defence, they are bound to acquit the accused.

In dealing with the burden and standard of proof, the trial judge said:—

[p.34]

“As you see him in the dock our laws presume the accused to be innocent until the prosecution prove to your entire satisfaction that he is guilty of the offence as charged, I have also reminded you that such duty is squarely fixed on the prosecution - to prove that the prisoner at the bar is guilty of the offence as charged, This the prosecution must do beyond the slightest doubt. So that if you find any doubt which exercises your minds, you should give the accused the benefit of the doubt doubt return a verdict of not guilty against him. If however you are perfectly satisfied with any shadow of doubt that the evidence for the prosecution points to one fact that the accused is guilty of the offence s charged, the have no hesitation to return a verdict of guilty against him, In this case your verdict can be either one of guilty of murder or one of guilty of manslaughter; thirdly it can be a verdict of not guilty,”

Throughout the summing-up, the trial judge made lavished use of the word “satisfied”. The jury ought to have been told that the prosecution have the burden of proving the case against the accused and that such proof should be beyond reasonable doubts so that they must feel sure that the accused is guilty of the offence. They must also be told that if there is any doubt in defence, they were bound to acquit. It is stated in Archbold (39th Ed. at page 598) that it is better for a summing-up should avoid the use of the term “reasonable doubt and direct the jury that before they convict, they must be satisfied by the evidence [p.35] so that they can feel sure that the prosecution have established the guilt of the prisoner. See R.v. SUMMERS (1953) 36 Cr. App. R. 14. Although there is no set formula for explanation to the jury that the burden of' proof lies on the prosecution, but merely to tell them that they must be satisfied with the guilt of the accused is insufficient. The case on this point is REG. v. HEPWORTH AND FEARNLEY (1955) 2 Q.B. 600; 39 Cr. App, R. 152. Lord Goddard, delivering the judgment of the Court in this case said at page 603:—

“Another thing that is said in this ease is that the Recorder only used the word “satisfied”. It may be, especially considering the number of cases recently in which this question has risen, that I misled the Court because I said in REG. v SUMMERS (Supra) - and I still adhere to it - that I thought that it was very unfortunate to talk to juries about “reasonable doubt” because the explanation given as to what is and what not a reasonable doubt are so very often extra-ordinarily difficult to follow that it is very difficult to tell. To tell a jury it must not be fanciful doubt is something that is without any real guidance. To tell them that a reasonable doubt such a doubt as to cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say that that would not cause him to hesitate at all. I therefore suggest that it would be better to use some other expression, by which I meant to convey to the [p.36] jury that they should only convict if they felt sure of the guilt of the accused. It may be that in some cases the word it satisfied is enough. Then it is said that the jury in a civil case has to be satisfied and, therefore, one is only laying down the same standard of proof as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards; therefore one would be on safe ground if one said in El. criminal case before a jury; "You' must be satisfied beyond reasonable doubt…….”

It is stated in ARCHBOLD (39th Ed.) para. 598 that notwithstanding the strictures in SUMNERS upon the “reasonable doubt” direction it nonetheless remains the fact that the House of Lords (in WOOLMINGTON v D.P P (1935) 57 Cr. App. R. 72) and more recently the House of Lords (in McGREEVY v. D.P.P. (1972) 57 Cr. App. R. 424) have consistently approved the form of direction and a substancial

body of opinion remains of the view that that form of direction is preferable to the other. The direction is based upon the following passage in WOOLMINGTON:

“Throughout the web of the English Criminal Law one of the golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject (to the qualification involving defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether (the offence was committed by him), the prosecution has [p.37] not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

In the case of WALTERS v. R. (1962) 2 A.C. 26, the Judicial Committee upheld a description of as “that quality and kind of doubt which when you are dealing with matters of importance in your affairs, you allow to influence you in one way or another.

In R. v. GRAY (1974) 58 Cr. App. R. 177, the Court held it erroneous to explain a “reasonable doubt” as the sort which might affect you in the conduct of your everyday affairs.” The Court expressed the view that there could be no proper criticism made if the direction had been the sort of doubt which may affect the mind of a person in the conduct of important affairs.”

Now, looking at the summing-up in this case, it cannot be said that the trial judge fully directed the jury, properly on the onus and standard of proof in the light of the authorities already cited.

I shall now deal with other misdirections or omissions to direct in the summing-up. In fact the learned trial judge not. only misquoted evidence, he even introduced evidence which was never given at the trial by any of the witnesses. Moreover in dealing with the defence, the trial judge failed to consider the evidence, that the shooting took place in a bush where cocoa plantation was eight feet in height. The trial judge did not appreciate that there were matters disclosed by the evidence, beside those considered by him, which could amount to accident [p.38] or misadventure; and since these matters were not brought to the notice of the jury, they might not necessarily bring in either a verdict of murder or manslaughter. See TEI S/O KABAYA v. R. (11961) E.A.L.R. 580.

In order to appreciate the matter, it will be well to set out certain passages in the summing-up:—

“The aspect is the height of the coffee trees. You will remember that the accused in his statement said that he saw a monkey on top of a coffee tree…….

The conclusion therefore that while the alleged monkey was eight feet up the tree the woman was 5’ 2” below. However when according to the accused, he shot at the monkey, pellets found their way into the woman's left side some 3 ft. or so below. Counsel for the accused highlighted the point that in this regard there is some doubt as to how the pellets left up there and came down to the woman’s left side. It is my duty to inform you that that cannot create a doubt in the prosecution's case; what it creates is

the truthfulness or otherwise of the accused's story. According& to the accused he saw the monkey eight feet above when he fired etc. etc ……..”

The above passage is classic example of misdirection, misquotation of evidence and a direct investigation to the jury to convict.

[p.39]

I now refer to the case of REGINA v. ABISA GRUNSHIE Vol.1 W.A.L.R. at page 36. It was held in that case that it is the duty of a judge in giving his directions to a jury (or in directing himself, as the case may be) particularly in cases where the account advanced by the prosecution differs from the defence's account by only a narrow issue of' fact, to make clear to the jury the effect of the three views which may be induced in them on weighing the evidence;

(a) If the explanation of the accused is accepted they must acquit;

(b) If the explanation of the accused falls short of acceptance but nevertheless creates doubt they must acquit.

(c) Quit apart from the explanation of the accused, they must on consideration of the whole evidence, be satisfied of the guilt of the accused before they may convict.

(ii) Where Police takes a voluntary statement from a prisoner it is desirable for them, particularly for a confession statement in a murder case, to require the presence of an independent civilian witness who understands what is being said and who is present throughout the time the statement is being taken. The civilian witness should sign the statement, as a witness, on its completion.

I may add that R. v MURTAGH AND KENNEDY, 39 Cr. App. R .. 72; (19.55) Crim. L.R. 506 was followed in this case.

[p.40]

The case of REX v KWABENA BIO (1945) 11 WACA at page 46 states that in a case of murder, and where there is a misdirection by no-direction, the Assessors should be correctly and fully instructed in the judge's summing-up, and referring to REX v. DINNICK, a judge is bound to put the defence however weak to the jury.

In the case of KEITH KEBBA BADJAN, Vol. 50 (1966) Cr. App. R, at page 141, it is clearly stated that where a cardinal line of e.g. self-defence) has been placed before the jury, but has not been referred to at all in the summing-up, it is in general impossible for the Court of Criminal Appeal to apply the proviso to Section 4(1) of the Criminal Appeal Act 1907 and refrain from quashing the conviction.

Convictions have been quashed for the omission by a trial judge to warn a jury to acquit if they are left in a reasonable doubt: See REV. v. AGNES SAWYER Vols. 3-5 Selected Judgments of WACA at page 155; See LAWRENCE v. THE KING (1933) A.C. page 69 where it is said at page 707:—

“But speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt, and it is essential that tribunal fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken not taken this fundamental principle into account is give in a case where the essential forms of justice have been disregarded. In such a case, unless it can be predicated that properly directed the jury muse have return the same verdict, a substantial miscarriage of justice appears to be established”

[p.41]

With regard to Manslaughter, the trial judge not even attempted to explain manslaughter to the jury. His only explanation in this regard is that the offence of manslaughter is committed if there is no evidence of malice. The judge went further to tell he jury that a mere altercation between the appellant and the deceased was a quarrel. The deceased told the appellant that his cattle had destroyed her vegetables. The appellant simply said “This will finish today”. It was wrong for the judge to have told the jury that if they believed the evidence of P.W.1who was the only witness to give that piece of evidence, (although there were other witnesses in the veranda) that they could infer malice, for what in my view, he wrongly interpreted as “quarrel”.

Manslaughter can be of two kinds, voluntary or involuntary manslaughter. Throughout the summing-up I not even the slightest attempt was made to mention the two kinds of manslaughter or the various modes by which the offence of manslaughter could be committed. Here the defence of the appellant is accident or misadventure. The jury were never given any assistance in this aspect of the defence. No effort was made to explain to the jury the degree of negligence that would amount to criminal negligence. The only evidence was that the shooting was done in the bush where there was thick undergrowth and cola trees to the height of eight feet. There was no evidence either from P.W.l or from any of the other prosecution witnesses that the area was frequently used by other persons. In fact there was evidence that monkeys had been previously shot at the area. To test whether an act amounts to criminal negligence so as to render is recklessness to amount to manslaughter, it is necessary to consider the background of the accused, the locality in which he lives, and the general conditions surrounding the village.

[p.42]

The fact of the appellant in this case did not take place in a headquarter town. There was no evidence as to local conditions Indeed, there was evidence that the appellant was illiterate. Therefore to apply strictly the general common law of negligence to the appellant who lives in a village, particularly, when the evidence against him is so weak, is in my view an erroneous approach.

I think it is necessary to quote a certain passage in 1962 Cambridge Law Journal at page 200 with regard to mensrea in oases of manslaughter. The passage reads thus:

“That there can be no exact measurement of degrees of negligence, and that the ascertainment of gross negligence depends on the response of ordinary people, are not good reasons for rejecting a concept so readily resorted to in everyday human judgments about conduct, and so firmly established in judicial precedent. What is required is that the consequence should have foreseen (adverted) as possible, and further that a reasonable man would not have taken the risk of the undesirable consequence ensuing by doing what the actor has done. The question whether reasonable man would have chosen to incur the risk of the undesirable consequence will depend upon the likelihood of such consequence ensuing, and upon the utility of the object which is sought to be achieved. Apart, therefore, from the element of foresight of consequence, the measure of reckless conduct is the sane as that for negligent conduct: it is the standard of the reasonable man. It may be [p.43] that in manslaughter mens rea expresses the element of moral blameworthiness which distinguishes the crime from accidental or justifiable homicide. ANDREWS v. D.P.P. (1937) A.C.S. 78 & 583 The imposition of the reck1ess actor of 1iabi1ity for an unforeseen consequence is justifiable only if the consequence was foreseeable. In this event, liability is based not upon recklessness mere1y, but upon recklessness and foreseability. Gross negligence, like that of simple negligence is a matter for the exercise of' the good judgment of ordinary people.”

Therefore, it is my opinion that it is absolutely necessary not to strictly apply the test of the common 1aw of negligence in every case. In some cases, the common law test of negligence may be applied depending upon the character of the accused. Many cases of this kind have happened in Sierra Leone. Some of them have been convicted, and others have been acquitted, each ease depending upon the factors surrounding the act of the aooused. My candid opinion is that if the trial judge had elicited the relevant evidence from the witnesses, and had he given the proper directions, the appellant would have been acquitted of' both murder and manslaughter.

In KOROMA v REG. (1964 to 1966) 542 at page 547, Bankole-Jones p. said:—

“In the prepared statement of his recollection of his summing-up, the learned tria1 judge appeared to have directed the jury to rule out self-defence, and rightly so in our view.

[p.44]

He then left to them the issue of determining whether on the facts there was provocation sufficient in law to reduce the crime to that of manslaughter. But nowhere do we find that the real defence of accident or misadventure was ever left to the jury. There is a long line that such an omission will be fatal. In R. v. MILLS (1935) 25 Cr. App. R.138, a conviction for murder was quashed in the ease of one of the two appellants jointly charged, on the ground. That his defence had not been adequately put to the jury in the summing-up. In the case of MURTAGH (1935) 39 Cr. App. R. 72 (1955) Crim. L.R. 506, convictions for murder and manslaughter were quashed in a case where the defence had been that of accident, on the ground of the defect in the summing-up, the jury not having been specifically directed to acquit if the explanation of the defendants left them in doubt.

In the case of YEBEMA v. REG. (1957) to (1960) (ALR) S.L, 237, Bairmian C.J. allowed an appeal because it could not be said with certainty that the appellant intended to cause the deceased grievous bodily harm.

When it comes to proper direction to be given by a trial judge, there is a long line of cases in this aspect, and some of these cases have been referred to in KARGBO v. REG.(1968 to 1969) A.L.R. (S.L.) at page 354 by Tambiah J.A. I need not take another reference to them. But in SEISAY AND SIAFFA v REG. (1967 to 1968) A.L.R. 323 (S.L.) Marcus-Jones J.A. said at page 327:—

[p.45]

“Looking at the summing-up, it does not appear that the learned trial judge was saying that when an unlawful act is committed in relation o human being, resulting in the death of that human being, the jury would be justified in convicting of manslaughter. If the act in which a person is engaged is unlawful and at the same time dangerous, and is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by his unlawful act, then he is guilty of manslaughter.”

After reviewing the evidence, the learned Justice went on: "The learned trial judge did not direct the jury as to whether these acts amounted to criminal negligence…….”

“It has been laid down in BROADHURST v R, (1964) A.C. 441, (1964) 1 All E.R. 111 that it is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying, for there is a natural tendency to think that if he is lying it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to the jury that this is not so. The burden remains on the prosecution to prove the guilt of the accused.”

“Looking at the summing-up, the learned trial judge failed to direct the jury on this aspect of the law, and this Court cannot say that the jury would reach the same conclusion had they been so directed.”

[p.46]

Reading the summing-up in this case, the ballistic expert gave evidence. This witness was in the Military Forces where he Handled small types of ammunition, including shot guns, rifles, machine guns and pistols grenades. His evidence was that he was conversant with the operations of these arms and that he could tell with ocular examination whether a particular ammunition had been fired and extinguished from a particular gun in dealing with the monkey episode, the learned judge said:—

“Do you believe that the story of the monkey is true? It is for you to say so. That is the crux of this case. If you believe that the story of the accused is a fabricated one then you must come to the conclusion that for some reason ns known to himself he shot at the woman, because it is impossible for one to aim an object eight feet high above with a gun an explosive instrument, yet instead of the shots going further up they came down with such force as to pierce through a woman's left side fatally. Pellets, if in truth are fired upwards, must travel upwards with force; and if when they descend they would do so without any lethal force. This is pure physics. If you send a stone into the air, depending on the velocity at which the stone travels, it does not move downwards but upwards much more pellets from a gun. The accused fired a gun pointing upwards according to him; how then did the pellets 'not travel upwards? Rather they hit a woman below, fatally.”

Apart from the grave and fatal misdirections in the above passage sufficient to quash any conviction based on the passage, I am really at a loss as to how the learned judge or from where he obtained the evidence. The ballistic expert never said anything about physics, and the learned trial judge repeated his direction to the jury on numerous occasions as to the height of the tree. Another passage in the summing-up for which no evidence was adduced, is the following:—

"The sequence of events was that the accused went out shooting; according to him he saw and shot a monkey but it turned out that it was a woman he had shot; she fell down he ran to the spot, met her and according to him, he noticed that it was she whom he had shot, and discovered that she had died. He wanted to remove the body. Ask yourselves, members of the jury, where did the accused want to take the body to? However, the accused did not tell us. As far as his behaviour is concerned immediately after the gun shot, the question as to whether he wanted to take the body to the village and show it to the villagers is one possibility or whether he wanted to take it away so as to dispose of it, is another possibility.

"I have read the statements of the appellant. I understand from his statement that when he discovered that it was a human being he had shot, he made attempt to staunch or to use his words "to wipe the blood that was oozing from the wound. I must confess that if I want to quote passages in the summing-up, Which are fatal misdirections, non-directions, misquotations, and evidence not offered by any of the witnesses, I will be faced with the arduous task of quoting, the entire summing-up.

[p.48]

When the summing-up ended, the jury retired and returned. They brought in a split verdict. The jury, without any request for further directives, the learned judge summed up to them a second time, and on the return, they brought in a unanimous verdict of guilty.

A conviction was quashed in the case of R. v. OWEN (1953) 36 Cr, App. R. 16 when after a summing-up, the jury retired and on their return, further evidence was introduced. The head note reads:—

"After the conclusion of the summing-up if the jury either before or after retirement, ask the judge a question on any matter on which evidence has been given, it is proper for the judge to remind the jury of such evidence and to instruct them accordingly, but it should be regarded as an established rule that, once the summing-up is concluded, no further evidence ought to be introduced to the jury."

Again in R. v. JOSEPH WILSON (151) Vol. 41 Cr. App. R. 226 a conviction was quashed even when the jury asked for further evidence after the summing-up had been concluded. The headnote in this case reads:—

"If the jury after retirement put a question to the Court with regard to the evidence, it is the duty of the judge to tell them if it is the fact, that no evidence on the point has been given and that they must take it that there is no evidence on the point, but if the question relates to a point on which evidence has been given, the judge should remind them of the evidence.

[p.49]

The principle that, once the summing-up is concluded, no further evidence ought to be given, must, be maintained in every case, and if further evidence is allowed at that stage even on a mater which appears to the Court of Criminal Appeal irrelevant, the conviction will be quashed."

With these irregularities which go to the root of criminal law, when the appeal went before the Court of Appeal, that Court said that ground 1 to 4 had no merits. The Court of Appeal however, conceded that ground 5 had merits and that the learned judge "used very strong language and expressed strong views on the facts and introduced irrelevant elements such as physics, and finally he misquoted the evidence. It is unfortunate the Court of Appeal did not carefully read the evidence, and it did not take into account the judg1gment of Channel J. in the case of COHEN AND BATEMEN (1909) 11 Cr. App. R. 197 at page 207. Had the Court of Appeal averted its mind to the many misdirections in this case, it would never have invoked the proviso under Section 58, I am also certain that that Court would never invoke Section 59 of the Courts Act, 1965. Of course the Courts (Amendment) R. 1976 would never be seriously taken into consideration. In conclusion, taken into account the summing-up as a whole the trial is very unsatisfactory with the result that I cannot seriously consider Sections 58 and 59 of the Courts Act 1965 or its amendment in 1976. I therefore would quash the conviction of the appellant and set aside the sentence imposed upon him.

(Sgd). Hon. Mr. Justice O.B.R. Tejan

Justice of the Supreme Court

CASES REFERRED TO

1. Regina v Vickers reported in (1957) 2 Q.B,D, at page 664 at para. 670

2. Yebema v Regina reported in 1957-1960

3. Woolmington v D.P.P. reported in 25 Cr. App., R.

4. Smith v D.P.P. 1961 A.C. at page 290

5. Sahr M'bambay & Others v State Cr. App. 31/766

6. Seisay & Siaffa v R. reported in 1967-68

7. Kargbo v R 1968-69 A.L.R. S.L. at page 542

8. Cohen v Bateman 2 Cr. App. R. at 197 at page 208

9. The State v Brima Daboh S.C. Cr. App, 1/79.

10. R v Harold Jones reported in Volume 16 Cr. App. R, at page 128

11. R v Salmon & Others reported in 6 Q.B.D. at page 79

12. R. v Large 27 Cr. App. R. at page 213.

13. R. v. Mcpherson 41 Cr. App. R. at page 213

14. Reg. v. Doherty (1887) 16 Cox 306,

15. Reg. v. Vickers (1957) 3 W.L.R. 326,

16. Sahr M'bambay & Ors, v. The State Cr. App. 31/74 (S.L.C.A. unreported).

17. Reg. v. Murtagh & Kennedy 39 Cr. App.: R. 72,

18. Reg, v. Head & Warrener 45 Cr. App. R. 225 and

19. Cohen and Bateman [1909] 2 Cr. App. R. 197,

20. Brown v. R [1971] 55 Cr. App. R. 478.

21. The State v. Brima Daboh Cr. App. 1/79 (S.L.S.C. unreported)

22. Solomon Gbewa & Others v. The State Cr. App. 33/74 (S.L.C.A. unreported)

23. The Queen v. Salmon Hancock & Salmon (1880) 6 Q.B,D. 79

24. R. v. Burton (1759) 1 Str.481

25. R. v. John Jones 12 Cox c.c. 628

26. Re. v. Campbell 11 Cox C.C. 323

27. R.v. Summers (1953) 36 Cr. App. R. 14

28. Reg. v. Hepworth And Fearnley (1955) 2 Q.B. 600; 39 Cr. App, R. 152

29. Woolmington v D.P P (1935) 57 Cr. App. R. 72

30. Mcgreevy v. D.P.P. (1972) 57 Cr. App. R. 424

31. Walters v. R. (1962) 2 A.C. 26

32. R. v. GRAY (1974) 58 Cr. App. R. 177

33. TEI S/O Kabaya v. R. (11961) E.A.L.R. 580

34. R. v Murtagh And Kennedy, 39 Cr. App. R .. 72; (19.55) Crim. L.R. 506

35. Rex v Kwabena Bio (1945) 11 WACA at page 46

36. Keith Kebba Badjan, Vol. 50 (1966) Cr. App. R, at page 141

37. Lawrence v. The King (1933) A.C. page 69

38. Andrews v. D.P.P. (1937) A.C.S. 78 & 583

39. Koroma v Reg. (1964 to 1966) 542 at page 547

40. R. v. Mills (1935) 25 Cr. App. R.138

41. Yebema v. Reg. (1957) to (1960) (ALR) S.L, 237

42. Kargbo v. Reg.(1968 to 1969) A.L.R. (S.L.) at page 354

43. seisay and siaffa v Reg. (1967 to 1968) A.L.R. 323 (S.L.)

44. Broadhurst v R, (1964) A.C. 441, (1964) 1 All E.R. 111

45. R. v. Owen (1953) 36 Cr, App. R. 16

46. R. v. Joseph Wilson (151) Vol. 41 Cr. App. R. 226

STATUTES REFERRED TO

1. Criminal Justices Act 1967 Sec. 8.

2. See. 4(1) of the Criminal Appeal Act 1907

3. Sec. 58(2) of the Courts Act 1965,

4. 1976 the Court of Appeal

5. Regina v. Abisa Grunshie Vol.1 W.A.L.R

WILLIAM COKER v. JOSEPH WALKER

[S.C. CIV. APP. NO. 8/79][p.50-61]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 27 APRIL 1981

CORM: MR. JUSTICE E. LIVESEY LUKE, C.J, PRESIDING; MR. JUSTICE C.A. HARDING, J.S.C; MR. JUSTICE O.B.R. TEJAN, J.S.C; MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.; MR. JUSTICE K.E.O. DURING, J.A

IN THE ESTATE OF WILLIAM THOMPSON (DECEASED)

BETWEEN:

WILLIAM COOKER - - APPELLANT

AND

JOSEPH WALKER - RESPONDENT

DR. W.S. MARCUS-JONES for appellant

No representation by or on behalf of the Respondent

JUDGMENT DELIVERED THIS 27TH DAY OF APRIL, 1981

HARDING, C.A. J.S.C

This appeal arose as a result of the dismissal by the Sierra Leone Court of Appeal of the Appeal by the Appellant against an Order of the High Court made on 29th June, 1976.

The proceedings were commenced in the High Court by means of Writ of Summons dated 3rd May, 1976, issued on behalf of the Appellant by Dr. Marcus-Jones, and the Statement of Claim indorsed thereon reads as follows:—

"The Plaintiff's Claim against the defendant is for

(a) The partition or sale of land and premises No. 9 Albion Street, Kissy.

[p.51]

(b) An account of the rents and profits therefore from the date of death of Sally J. Thompson, to date.

(c) Payment of one-half of such amount as found due to the Plaintiff by the Defendant.

PARTICULARS

1. By paragraph 4 of his Will dated 27th October 193. William Thompson, deceased, gave and devised his land premises No.5 (Now No.9) Albion Street, Kissy to his wife Sally J. Thompson for life and after her death to the Plaintiff and the defendant in equal shares as tenants in common.

2. "The said Sally J. Thompson died sometime Died sometime in the forties.

3. The Plaintiff was unaware of his interest in and entitlement to the said property until August 1975, when he paid a visit to his father, for the first time, in Liberia.

4. The Defendant has, since the death of Sally J. Thompson, been collecting rents from the said property and has paid nothing to the Plaintiff.

5. Since returning to Sierra Leone the Plaintiff has asked the Defendant for his share and interest in the said property and for an account profits thereof but the Defendant has ignored the Plaintiff's requests.

[p.52]

Wherefore the Plaintiff claims:—

(a) An account of all moneys collected by the Defendant as rents from the said property from the date of death of Sally J. Thompson to date.

(b) Payment over to the Plaintiff of one-half share thereof.

(c) An order for the partition or sale of the premises and payment to the Plaintiff of one-half of the net proceeds thereof."

The Writ was duly served on the Defendant (the Respondent herein) on 7th May, 1976, but no appearance was entered by or on his behalf. Subsequently, Dr. Marcus -Jones, counsel for the Appellant moved the Court under Order 23 Rule 11 of the Rules of the High Court for Judgment. The Notice of Motion requested:—

"An Order under 0.23 Rule 11 that Judgment may be entered for the Plaintiff as on the Writ of Summons and that the Plaintiff may be at liberty to sell the land and premises No.10 Albion Street, Kissy by Private Treaty or by Public Auction; that the Plaintiff do have conduct of the sale, that the Master and Registrar do hold an inquiry as to what sums are due and payable to the Plaintiff in respect of his one-half share and interest therein; that such share be paid over to the Plaintiff by the Defendant or deducted from the Defendant's share of the proceeds of the, said sale and that the costs of the action be paid by the Defendant to the Plaintiff and that the costs of and incidental to the sale of the property be deducted from the purchase price."

[p.53]

On the hearing of the Motion, counsel applied for leave to sign "final judgment" for the Plaintiff as on the Writ of Summons for the Plaintiff to be at liberty to sell land and premises at 10 Albion Street, Kissy etc., etc. The learned trial Judge received evidence from the Plaintiff; how this came about is not quit clear - whether on application by counsel or at request of the trial Judge. At the conclusion of the hearing the learned trial Judge found inter alia, that the gift had not been described with sufficient particularity, that there was no evidence that the state of the deceased had been completely administered by the rectors all of whom had died, that it was not known how the defendant came into possession of the property, that there was a discrepancy in the application - the endorsement on the Writ was partition or sale of land and premises No.9 Albion Street,

Kissy, while the particulars of claim on the Writ referred to 5 (now NO.10) Albion Street, Kissy and the Notice of Motion referred to No.10 Albion Street, Kissy. He accordingly ordered that the matter be referred to the Administrator and Registrar- General for further investigation and appropriate action in accordance with the Administration of Estate Act, Cap, 45 of the Laws of Sierra Leone, costs of the proceedings so far to be borne and paid out of the estate.

The appellant being aggrieved with the Order of the High Court appealed there from to the Sierra Leone Court of Appeal which Court on 12th July, 1979, dismissed the said appeal and also ordered that the learned trial Judge's Order referring the matter to the Administrator and Registrar-General and

awarding costs be amended by deleting it and an Order dismissing the application be substituted therefore That decision was based finally on the fact that it was wrong for the learned trial Judge have received oral evidence from the Plaintiff and on the

listing discrepancy in the Statement of Claim as to which property, [p.54] whether No.9 Albion Street, Kissy, or No.5 (Now No.) Albion Street, Kissy, an Order or sale was being sought.

It is against this decision that the Appellant has appealed to this Court on the following grounds, viz,—

"(l) That the Court of Appeal ought to have found that the High Court of Sierra Leone was wrong in law in dismissing the Ptaintiff1a claim.

(2) That the Court of Appeal was wrong in law in refusing to uphold the appeal and in failing to accept the uncontested evidence given before the High Court by the Appellant.

(3) That the decision is against the weight of the evidence adduced.

(4) That there was no or no justifiable reason in law for the Court of Appeal to dismiss the Appeal."

Dr. Marus-Jones, learned counsel for the Appellant Submitted that it would appear that the sole ground for the Court o Appeal dismissing the appeal was the apparent error or Inconsistency in the Statement of Claim relating to the premises the subject matter of the claim. He argued that the "Particulars" in the Statement of Claim cured the discrepancy in the Indorsements.

On the question of a "defective indorsement", learned counsel referred to the case of HILL vs LUTON CORPORATION (1951) 1 T.L.R. 853, (1951) 2 K.B. 387, where Devlin J. (as he then was) held that the delivery of the Statement of' Claim cured any defect in the writ; this decision was Followed by Ormerod, J. in GROUHDSELL vs CUTHELL AND ANOTHER (1952) 1 T.L.R. 1558; (1952) 2 Q.B. 673.

[p.55]

Counsel also contented that the Court of Appeal had the power to amend the indorsement and could have done so, rather than dismissing the application which has resulted in injustice being done to a part owner of property whose rights have not been questioned. He referred to Rule 31 of the Court of Appeal Rules 1973 which confers general powers to that Court to make any such order as may be necessary for determining the real question in controversy between the parties, and to have as full a jurisdiction over the whole proceedings as if they had been instituted and prosecuted in that Court as a Court of first instance. He furthermore referred to Order 28 Rule 12 of the English Rules of the Supreme Court (1959 White Book) which is the same as Order 24 Rule 11 or the High Court Rules whereby general power is conferred on the Court or a Judge at any time. On such terms as to costs or otherwise as may be just, to amend any defect or error in any proceedings necessary for the purpose of determining the real question or issue raised by or depending on the proceedings. However, when it was pointed out to him that it was the duty of counsel to apply for leave to amend and to state exactly the amendment he seeks, he thereupon applied to the Court for an amendment of the Statement of Claim to read "No. 10 Albion Street, Kissy", instead of "No. 9 Albion Street, Kissy". To buttress his application he cited the

cases of FRASER vs BALFOUR, (1918), 87 L.J. K.B. 1116. H.L., and HARNETT vs FISHER, (1927) A. C. 573, H.L., where the House of Lords gave leave to amend during the hearing of an appeal.

Finally he submitted that it was a very serious thing for the Court of Appeal to have dismissed the claim because of the error or inconsistency in the indorsement on the Statement of Claim and that on the totality of the Statement of Claim it was clear that the premises referred to were No.10 Albion Street Kissy.

[p.56]

He concluded by requesting the Court to make the amendment necessary and to grant the relief' which was asked for.

It is perhaps noteworthy to observe at the outset that the action instituted in the High Court was for a partition or sale of land and premises-commonly referred to as a "Partition Action". The relevant statutes governing such actions are the Partition Acts, 1868, (31 & 32 Vict. C. 40) and 1876 (39 & 40 Vict. C. 17) which are applicable in Sierra Leone by virtue of Section 74 of the Courts Act 196.5. Under these Acts the Court has wide powers to order a sale in lieu of partition where the nature of the property or the interest of' the parties makes that more convenient.

Before the passing of these Acts partition was a matter of right and the Court had no discretion to refuse partition or to order sale in lieu thereof. This often times resulted in many awkward and absurd situations and it was to remedy the position hence the Partition Acts were passed. By Section 4 of the Partition Act, 1868, in any action in which the Court has jurisdiction to order partition, if the party or parties individually or collectively interested to the extent of a moiety or upwards in the property to which the action relates request a sale, a sale and distribution of the proceeds must be ordered in lieu of partition, unless the Court sees good reason to the contrary. All actions for sale or partition were by Section 34(3) of the Judicature Act, 1873 assigned to the Chancery Division of the High Court, and the practice and procedure applicable generally to actions in that Court govern such actions.

The Plaintiff must allege his own title to the property in question with precision, and where there is default of appearance or of defence and he wishes to proceed to judgment he must follow [p.57] the procedure laid down by Order 10, rule 2 of the High Court Rules, i.e., file an affidavit of service, and then set down the action on motion for judgment under Order 23, rule 11 of the High Court Rules which states as follows:—

"In all other actions than those in the preceding rules of this Order mentioned, if the defendant make default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court shall consider the plaintiff to be entitled to."

The corresponding English rule is Order 27 Rule 11 and in interpreting the rule the better view has been that the Court cannot receive oral evidence but must give judgment according to the pleadings alone. I am therefore in agreement with the view expressed by the Court of Appeal that when the learned trial

Judge received oral evidence from the Plaintiff on two occasions, “that exercise was an absolute waste of time.”

The procedure to be followed is succinctly set out in Halsbury Law of England 1st Edition Vo1ume 21 dealing with the & subject of “Partition And Sale in lieu of Partition by Order of Court” at page 847 paragraph 1585 under the rubric General Practice. The paragraph reads:—

“In default of appearance or defence, the action in the Chancery Division may be set down on a motion for judgment as a short cause. If then the defendants are sui juris, the usual judgment is pronounced without further proof of title, the allegations in the statement of claim being taken as admitted.

[p.58]

If, however, the defendants or any of them are under disability, the plaintiff's title must be proved; such proof is given by means of an affidavit concisely verifying the statement of claim, and the guardian ad litem of an infant, or person of unsound mind, may consent to proof being given by affidavit. Where the material allegations in the statement of claim are admitted, the usual order will be made on motion for judgment without proof of title.”

The paragraph following - 1586 - then goes on to explain that “the usual judgment for partition, or sale in lieu of partition, directs the accounts and inquiries to be taken and made which are necessary to ascertain the rights of the parties interested. The accounts and inquiries usually directed are:— (1) Who are the persons interested in the property, and for what estates and interest and in what shares and proportions, and whether they are parties to the action; and also the following inquiries if and so far as any of them are applicable, that is to say: (2) an inquiry what encumbrances affect the entirety, or any and what parts thereof, and (if sale is ordered) whether such incumbrancers consent to a sale, and other inquiries as to title; (3) an account of the moneys (if any) expended by any and which to the parties interested in permanent improvements; (4) an inquiry to what extent the present value of the property has been increased by such expenditure; (5) an inquiry what would be a proper occupation rent in respect of any part of the property to be dealt with which is occupied by any of' the parties; and (6) an inquiry as to any waste committed, and the value of any timber felled or minerals gathered by any of the parties.”

[p.59]

In short there can be no unconditional order for partition or sale by the Court until the inquiry has been answered as to the persons interested and the nature of their interests, and whether they are parties to the action. It is only in exceptional cases that this inquiry can be dispensed with, e.g., where the title is simple, or the property is of small value, and all parties interested are before the Court; in such cases the Court may direct an immediate partition, or sale in lieu thereof, on proof of these acts by affidavit.

The Court of Appeal in its Judgment dated 12th July, 1979. Stated:—

“The statement of claim on the Writ was not amended. It claimed two properties - Nos. 9 and 10 Albion Street as one property. It remained as such until the motion for judgment was filed and continues to

remain so until now. How counsel could have expected the Judge to make an Order for the sale of real property on such a glaring discrepancy in the claim, passes my comprehension. The proper thing for the Judge to have done was to dismiss the application."

It would appear from the foregoing that the Court of Appeal took the view that when application was made under Order 23 rule 11 for Judgment to be entered for the Plaintiff "as on the Writ of Summons", the High Court was being requested to make an unconditional Order for sale of the property, i.e., to pronounce final Judgment. As has been pointed out certain statutory provisions govern these proceedings, viz; the Partition Acts of 1868 and 1876. The procedure governing the operation of these Acts has already been outlined above: What the High Court should have done was to have made a conditional order in the first instance directing the "usual inquiries"; these would have [p.60] ascertained the rights (if any) of the parties referred to in paragraph 4 of the Will dated 27th October, 1931 of William Thompson, deceased, and over what property, as is mentioned in paragraph 1 of the Particulars of the statement of claim indorsed on the Writ of Summons.

In POWELL vs POWELL (1874), 10 Ch. App. 130, it was held that where a sale had taken place before the registrar had issued his certificate as to the result of the inquiries, the purchaser was discharged from his purchase.

Learned counsel has urged on us that dismissing the Plaintiffs application for judgment to be entered on his behalf will operate as an injustice to him as he would thereby lose his rights over property to which he is entitled and which rights have not been questioned at all by the defendant. He also directed our attention to Rule 31 of the Sierra Leone Court of Appeal Rules which empowers that Court to make any order necessary for determining the real question in controversy in the appeal. Moreover, he has formally applied to us for an amendment of the indorsement in the Statement of Claim to read "No. 10 Albion Street, Kissy", instead of "No. 9 Albion Street, Kissy".

The Defendant will not in any way be prejudiced, and taking all the circumstances of this case into consideration justice demands that the application for the amendment be granted and I would hereby grant it. Accordingly, the appeal succeeds, and the Judgments of the Court of Appeal and the High Court are hereby set aside and I would direct that:—

(i) An Inquiry be held by the Master and Registrar o£ the High Court as to who are the persons interested in and entitled to the property known as NO.5 (now No.10) Albion Street, Kissy and in what shares.

[p.61]

(ii) An account be taken of all rents and profits collected and received by the Defendant from the said property from the date of death of Sally J. Thompson, deceased, to date, and of all moneys expended by the Defendant in respect thereof.

(iii) A Certificate of the findings thereof in respect of (i) and (ii) above be delivered to the High Court within three months hereof for further consideration.

(iv) Liberty to apply.

Costs in the cause.

(Sgd.) Hon. Mr. Justice C.A. Harding. J,S,C.

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, E.J.

I agree

(Sgd.) Hon. Mr. Justice O.B.R. Tejan, J.S.C.

I agree

(Sgd.) Hon. Mrs.Just1ce A.V.A.Awunor-Renner.J.S.C.

I agree

(Sgd.) Hon. Mr. Justice K.E.O. During, J.A.

CASES REFERRED TO

1. Hill vs Luton Corporation (1951) 1 T.L.R. 853, (1951) 2 K.B. 387

2. Grouhdsell vs Cuthell And Another (1952) 1 T.L.R. 1558; (1952) 2 Q.B. 673.

3. Fraser vs Balfour, (1918), 87 L.J. K.B. 1116. H.L.,

4. Harnett vs Fisher, (1927) A. C. 573, H.L

5. Powell vs Powell (1874), 10 Ch. App. 130

ZOUZOUKO DEGUI v. THE STATE

[p.88-108]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 23 JUNE 1981

CORAM: THE HON. MR. JUSTICE E. LIVESEY LUKE, CHIEF JUSTICE; MR. JUSTICE C.A. HARDING, J.S.C.; MR. JUSTICE O.B.R TEJAN, J.S.C; MRS. JUSTICE A. AWUNOR-RENNER J.S.C.; MR. JUSTICE S. BECCLES DAVIES J.S.C.

ZouZouko Degui Appellant (In the Court below)

And

The State Respondent (In the Court below)

Mr. Terry for Zouzouko Degui.

Mr. Tejan-Cole for The State

Judgment delivered on the 23rd day of June 1981

DAVIES, J.S.C.

Monsieur Zozouko Degui is the master of the Ivorian fishing vessel 'SAINT JEAN NO. 695'. He was found fishing within the territorial waters of Sierra Leone. He was arrested and charged for contravening Section 3(2)(b) of the Fisheries Act Cap. 195 as repealed and replaced by Section 1 of the Fisheries (Amendment) Act 1977. He was arraigned before the High Court. He pleaded guilty to the offence. The trial judge imposed a fine of Le 300.000.00 with an alternative of three years imprisonment.

He pleaded against his conviction and sentence. Ground 2 of the grounds of appeal argued before the Court of Appeal was couched in the following:

[p.89]

"2 The learned trial judge lacked jurisdiction to try the appellant on the indictment before him in that the offence charged in that indictment was instituted without the consent of and without the certificate of the Attorney General as required by law."

The Court of Appeal having heard the arguments by Counsel for the appellant and the Director of Public Prosecutions, who appeared for the respondent, ordered that further hearing of the appeal be stayed and that the points raised on the issue be referred to this Court for determination. The Court of Appeal had acted under Section 104 sub-sections (l)(a) and (2) of the Constitution of Sierra Leone 1978(to which I shall hereafter refer as the Constitution"). The provisions state—

104. (1) The Supreme Court shall save as otherwise provided in Sections 18 and 101 of this Constitution have original jurisdiction, to the exclusion of all other Courts

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution

(b).....

(2) Where any question relating to any matter or question as is referred to in the preceding sub-section arises in any proceedings in any Court, other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the supreme Court for determination;

[p.90]

and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Each party submitted questions on which the reference to this Court was based.

The questions submitted on behalf of M. Degui were

"1. Whether or not the powers to be exercised by the Attorney-General by virtue of Section 53(1) of the Criminal Procedure Act, Act No.32 of 1965 can in law and in fact be exercised by the holder of the office of Director of' Public Prosecutions having regard to the fact that the Law Officers Act, Act No.6 of 1965 and the Laws Adaptation Act, Act No.29 of 1972 remained unaltered either expressly OR impliedly by the Constitution Act No.12 of 19781

2. Whether or not there is under the Laws of Sierra Leone the office of Attorney General? If so are the powers vested in him by virtue of Section 53(1) of the Criminal Procedure Act 1965 Act No.32 of 1965 exercisable by him to the exclusion of the Director of Public Prosecutions to enable him to exercise the powers vested in the Attorney-General under Section 53(1) of the Criminal Procedure Act No.32 of 1965?

[p.91]

3 Whether or not Section 144(2) of the Criminal Procedure Act No.32 of 1965 requires an application and an order granting a trial by a Judge alone before commencement of a trial under this Section? If so, can such an application for trial by judge alone be properly and legally made by the Director of Public Prosecutions having regard to the wording of Section 144(2) and the director of Public Prosecution's powers under the 1978 Constitution Act No.12 of 1978?

4. Whether or not in the light of Section 7 of the 1978 Constitution and the appointment of a Director of Public Prosecutions, there is a necessary implication that the powers of the Attorney-General under the Criminal Procedure Act, Act No.32 of 1965 or any other enactment relating to the conduct of criminal cases are exercisable by the Director of Public Prosecutions without a special or general direction from the Attorney-General and Ministry of Justice? In other words whether or not in the enactments referred" to the word "Attorney-General" is interchangeable with the words "Director of Public Prosecutions"?

[p.92]

5. Whether or not the questions raised in 1, 2 and J supra go to jurisdiction? If so, what is the effect at law having regard to the powers of the Attorney- General and the Minister of Justice and the Director of Public Prosecutions under the 1978 Constitution Act No. 12 of 1978 .

The following questions were posed by the Director of Public Prosecutions—

"1. Having regard to the constitutional development of responsibility for public prosecutions in Sierra Leone resulting in the enactment of the Constitution of Sierra Leone Act No.12 of 1978 and particularly Section 97(4) therefore (sic) and in the absence of any general or special direction as required by Section 97(7) thereof,

(a) Must the Director of Public Prosecutions obtain the consent of the Attorney-General and Minister of Justice for the institution of criminal proceedings against a non-citizen for the offence committed within the territorial sea under the Criminal Procedure Act No.32 of 1965;

(b) Is the Director of Public prosecutions included in the proviso to sub-section 7 of Section 97 of the Constitution thus requiring him to obtain the consent of the Attorney-General and Minister of Justice under Section 53 of the Criminal Procedure Act 1965;

[p.93]

(c) Can consent under Section 53 of the Criminal Procedure Act 1965m be given now by the Attorney - General and Minister of Justice"

Mr. Terry argued questions 1, 2 and 4. He abandoned questions 3 and 5.

Mr. Tejan-Cole submitted during the course of his arguments that the questions posed before this Court could not be considered as raising constitutional issues. I do not agree. The questions raised relate to the interpretation of the Constitution is so far as it relates to the powers conferred on the Director of Public Prosecutions. A determination of the powers of the Director vis-avis the powers of the Attorney-General and Minister of Justice must necessarily involve or entail an interpretation of the Constitution. The office of Director of Public Prosecutions was created by the Constitution and his powers are spelt out therein. This Court can properly consider the questions referred to it by that Court of Appeal since they touch and concern the interpretation of the constitution.

Section 53(1) and (2) of the Criminal Procedure Act 1963 provide—

"53(1) Subject to sub-section (2), proceedings for the trial of any person, who is not a citizen of Sierra Leone for an offence committed within the territorial sea of Sierra Leone, shall not be instituted in any court except with the consent of the Attorney-General and upon his certificate that it is expedient that such proceedings should be instituted,

(2) (a)Proceedings before a Magistrate previous to the committal of an offender for trial or to the determination of the magistrate that the offender is to be put on trial, shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this section.

(b) It shall not be necessary to aver in any information or indictment that the certificate of the Attorney-General required by this section has been given; and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to

be signed by the Attorney-General and containing such consent and certificate shall be sufficient evidence of the consent and certificate required by this section

The Director of Public Prosecutions and not the Attorney-General issued the consent and certificate. It was in the following terms—

"IN THE HIGH COURT OF SIERRA LEONE

THE STATE

VS

ZOUZOUKO DEGUI

CERTIFICATE AND LEAVE UNDER SECTION

53 OF THE CRIMINAL PROCEDURE ACT

NO. 32 OF 1965

WHEREAS it has been made to me Nasiru-Deen Tejan-cole, Director of Public Prosecutions of Sierra Leone that ZOUZOUKO DEGUI who is not a citizen of the Republic of Sierra Leone has committed the offence of being the Master of "SAINT JEAN NO. 695" a foreign fishing vessel found fishing within the territorial waters of Sierra Leone without a liecence which is an offence within the jurisdiction.

AND WHEREAS I consider it expedient that proceedings for the trial of the said ZOUZOUKO DEGUI shall be instituted in the High Court holden at Freetown in the Republic of Sierra Leone.

Now these are to certify my opinion that such proceedings are expedient and to give my consent for the institution of the same.

GIVEN UNDER MY HAD AT FREETOWN in the Western Area of Sierra Leone this 17th day of October 1980.

N.D. TEJAN-COLE

DIRECTOR OF PUBLIC PROSECUTIONS,

LAW OFFICERS DEPARTMENT

LAMINA SANKOH STREET, FREETOWN

[p.96]

I now proceed to answer the question – does the office of the Attorney-General exist under the Laws of Sierra Leone? A convenient starting point for present purposes is the Constitution of Sierra Leone 1971 (Act No. 6.of 1971). It came into operation on 19th April 1971. (I shall refer to it as the 1971 Constitution)

Sections 51 and 54 of the 1971 Constitution provided —

“51. There shall be an Attorney General for Sierra Leone who shall be appointed by The President acting in accordance with The advice of the Prime Minister from among persons qualified to hold office As justice of Appeal and shall be Deemed to be a Minster under this Constitution.”

“54. The President acting in accordance with the evidence of the Prime Minster, may, By directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government of Sierra Leone, including the administration of any department of government; (Emphasis mine).

Provided that the responsibility for judicial affairs shall not be assigned to the Attorney-General.”

The combined effect of the above quoted sections was that there was the office of Attorney-General. He was deemed to be a Minister. He could be assigned ‘responsibility for any business of government including the administration of any department of government save that for judicial affairs. There could than have been fro example an Attorney-General and Minister for Social Welfare.

[p.97]

Section 51 of the 1971 Constitution was repealed and replaced by the Constitution (Amendment) (No.2) Act 1971 which came into existence on 19th April 1971. Section 51 as replaced was in these terms –

51(1) There shall be an Attorney-General for Sierra Leone who shall be appointed by the President from among persons qualified to hold office as a Justice of Appeal and who shall be a Minister under this Constitution.

(2) Where no such qualified person is a Member of Parliament the president may appoint as Attorney-General for Sierra Leone a Member of Parliament who is otherwise qualified to practice as a Barrister and Solicitor in the Superior Courts of judicature.”

Section 54 was consecutively repealed and replaced by The Constitution (Amendment) (No. 2) Act 1971 and Section 4 of The Constitution (Amendment) (No.2) Act, 1975. Section 54 as it stood after its repeal and replacement stated—

“54. The president may, by directions in writing, assign to the Vice president, the prime Minister or any other Minister government, including the administration of any department of Government:

Provided that the responsibility for judicial affairs shall not be assigned to the Attorney-General.”

[p.98]

The above proviso containing the restriction of the assignment of responsibility of judicial affairs, to the Attorney-General was removed on 13th April 1978. That was the date of the commencement of The Constitution (Amendment) Act, 1978 (Act No. 5 of 1978). Section 1 of that Act provided.—

“1. Section 54 of the Constitution is hereby amended by repealing the proviso thereto.”

The proviso to Section 54 of the 1971 Constitution was thereby removed. The president therefore had the right to assign responsibility for judicial affairs to the Attorney General, if be wished to do so.

On that same day – 13th April, 1978, the President assigned to the Honourabe F.M. Minah the portfolio of Attorney General and Minister of Justice. A notice from the Cabinets Secretariat to that effect was published in the Sierra Leone Gazette Vol. C.X of Thursday 11th May 1978 No. 27. The notice stated—

"Govt. Notice No. 445 M.P.CO/11

In exercise of the powers vested in the President by Section 54 of the Constitution of Sierra Leone, 1971, the President has assigned the portfolio of Attorney-General and Minster of Justice to the Honourable F.M. Minah, with effect from 13th April, 1973.

THE CABINET SECRETARIAT

TOWER HILL

8TH MAY 1978.

I have since discovered that the date of Mr. Mina's appointment was 13th April 1978 and not 13th April 1973. The discrepancy was due to a typographical error.

[p.99]

Parliament was aware of the existence of the office of Attorney-General arid Minister of Justice (under the 1971 Constitution) when it passed the Constitution. It provided for the holder for those portfolios immediately before the coming into effect of the Constitution, to continue in office as if he had been appointed under the Constitution. The provision is contained in Section 163(1). That section provides—

"163(1) Where any office has been established by or under the existing Constitution or any existing law, and this Constitution establishes or provides for the establishment of a similar or an equivalent office including the office of President, First Vice president, Second Vice president. Minister, Attorney-General and Minister of Justice. Member of the Cabinet, Deputy Minister or Parliamentary Special Assistant Any person who, immediately before the commencement of this Constitution, holds or is acting in the former office shall, so far as is consistent with the provisions of this Constitution, be deemed as from the commencement of this Constitution to have been appointed, elected or otherwise selected to or to act in the latter office in accordance with the provisions of this Constitution". (Emphasis mine). There is a proviso to the above section which is not relevant for present purposes.

[p.100]

The Ministerial portfolios of Attorney-General and Minister of Justice had been assigned to a single Minister. The combination of those two portfolios was given statutory recognition when the Constitution became effective on 14th June 1978. Quit unlike the 1971 Constitution which provided for the office of Attorney-General (who was deemed to be a Minister) (S.51) and the assignment of

additional Ministerial responsibility (S.54), Section 88(1) of the Constitution provided for the establishment of one office to be known as that of Attorney-General and minister of Justice'. Section 88(1) of the Constitution provides

"88(1). There shall be an Attorney-General And minister of justice who shall be a Minister of State and the principal legal adviser to the Government.

The Attorney-General and Minster of Justice is the principal legal adviser to the Government (S.88(1)). The prosecution of all criminal offences in the name of the Republic prosecution of all criminal offences in the name of the Republic shall flow from him (S.88(3)). He is exempted from the doctrine of the collective responsibility of Cabinet as regards advice given by him in criminal matters. (S87(2)(d)). He is not subject to the control of Parliament or the executive as to arriving at a decision, on whether or not to prosecute a particular case (S.97(8)). The ultimate authority over criminal prosecutions is his (S.97(7)). He is ex officio head of the Bar. The Solicitor-General is his principal assistant (S.96(4)). Those are some of the powers, rights and privileges which traditionally characterized the office of Attorney-General.

There is no longer in existence the office of Attorney-General, simpliciter, as it was known prior to 13th April, 1978. But there is now, an Attorney-General functioning under the new nomenclature of Attorney-General and Minister of Justice.

[p.101]

As I had said earlier, in this ruling, the single office of Attorney-General and Minister of Justice was established as such under the Constitution. The Constitution contains Certain transitional provisions. Among those provisions are Sections 161 and 162(1). They state—

"161. For the purposes of this Chapter, the expression 'existing law' means any Act, Law, Rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Constitution and having effect as part of the law of Sierra Leone or of any part thereof immediately before the commencement of this Constitution or any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council so having effect may be construed with such modifications adaptations qualifications and exceptions as may be necessary to bring it into conformity with this Constitution as if it had been made under this Constitution.

162(1) The existing law and enactments shall, notwithstanding the repeal of the Constitution of' Sierra Leone Act 1971, have effect after the entry into force of this Constitution as if they had been made in pursuance of this Constitution and shall be read and construed with such modifications, adaptations, qualification and exceptions as may be necessary to bring them into conformity with this Constitution."

[p.102]

This existing Constitution referred to above is the 1971 Constitution. The Criminal Procedure Act 1965 has beep preserved by the transitional provision of Section 95(1) of the 1971 Constitution and Section 162(1) of the Constitution respectively.

Section 53(1) of the Criminal Procedure Act (read and construed in the light of the Constitution with such adaptation as is necessary for present purposes,) should now be read by the deletion of the expression “Attorney-General” and the substitution of the words “Attorney-General and Minister of Justice” in its stead.

Can the Director of Public Prosecutions give the consent and certificate required by Section 53(1) of The Criminal Procedure Act?

The office of Director of Public Prosecutions was established by Section 97(1) of the Constitution. His powers are contained in Section 97(4), Sub-section (4) provides—

"(4). Subject to sub-section (3) of Section 88 the Director of' Public Prosecutions shall have power in any case in which he considers desirable so to do—

(a) to institute and undertake criminal proceedings against any offence against the law of Sierra Leone;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

[p.103]

(c) to discontinue at any stage before judgment is delivered any such criminal proceedingsinstituted or undertaken by himself or any other person or authority.”

In order to present a complete picture of the powers of the Director of Public Prosecutions and the restrictions imposed on the exercise of those powers, I will also set out the provisions of Section 88(3) and 97(6) respectively.

“88(3) All offences prosecuted in the name of the Republic of Sierra Leone shall be at the suit of the Attorney-General and Minister of Justice or some other person authorized by him n accordance with any law governing the same

91(6) The director of Public Prosecutions shall in all matters including his powers under this Constitution or any other law be subject to the general or special direction of the Attorney-General and Minister of Justice.”

The Director operates under the superintendence of the Attorney-General and Minister of Justice. Dr. Edwards in his book ‘The Law Officers of the Crown' puts the position thus at page 10—

“No one any longer doubts the exclusive subservience of the holder of the office of Director of Prosecutions to the State's Chief prosecutor the Attorney-General.”

The position is the same under the Constitution as in England.

[p.104]

The offices of Attorney-General and Minister of Justice and Director of Public Prosecutions respectively, are neither synonymous nor interchangeable. Admittedly, the Director has power to initiate, take over, or discontinue criminal proceedings. The right to initiate criminal proceeding' does not ipso facto confer a corresponding right to give consent for the institution of those proceedings otherwise than in accordance" with the statutory provision requiring such consent.

The offices of Attorney-General, Solicitor-General and Director of Public Prosecutions are derived from the English legal system. There is much to be derived from the English experience on the functioning of those offices. There is the following useful note from Halsbury's Laws of England 4th Edition Volume 11, paragraph 97 at page 68.

"97. Right to initiate criminal proceedings: In the absence of statutory provision to the contrary any person may of his own initiative, and without any preliminary consent, institute criminal proceedings with a view to an indictment; but there are some statutes which-require that certain criminal proceedings should be undertaken only by order of a judge or by the direction or with the consent of the Attorney-General, the Director of Public Prosecutions, or some other official person or body."

Dr. Edwards says at page 238 of his book—

"In all, some eighty offences exist at the present time in which no proceedings may be instituted without· the consent of the Attorney-General, either acting alone or, [p.105] alternatively with the consent of the Solicitor-General (under the Act creating the offence of the Law or the Law officers Act (1944)), the Director of Public Prosecutions, or some other person or persons."

Section 6 of the Law Officers Act 1965 confers on the Solicitor-General, the power to exercise all or some ooh h functions of the Attorney-General and Minister of justice.

Sub-sections (1) and (2) of Section 6 read pursuant to Section 162(1) of the Constitution should now be read as follows –

"6(1) The Solicitor-General may exercise and perform all or any of the powers, functions and Duties of the Attorney-General and Minister of Justice and shall, subject to the general or specific instructions of the Attorney-General and Minister of Justice, discharge such portion thereof as may from time to time assigned to him by the Attorney-General and Minister of Justice

(2) Whenever the expression "Attorney- and Minister of Justice" occurs in any existing or future enactment except Section 59 of the Constitution it shall unless the contrary is explicitly stated be deemed to include a reference o the Solicitor-General (or an acting Solicitor-General) acting under the provisions of this Section."

[p.106]

The Solicitor-General or an acting Solicitor-General, by virtue of the above provisions, could have given the consent and certificate required by Section 53(1) of the Criminal Procedure Act.

Mr. Tejan-Cole had submitted that any 'Law officer' could have given the consent and certificate having regard to the provision of Section 6(3) of the Law Officers Act 1972. This is a rather doubtful interpretation of Section 6(3). The definition of the expression 'Law officer' as set out in Section 2 of The Criminal procedure Act and Section 4 of The Interpretation Act 1971 respectively (read pursuant to Section 162(1) of the Constitution) is in these terms -

"Law officer" means the Attorney-General and Minister of Justice, the Solicitor-General, The First Parliamentary Counsel, and every State Counsel and parliamentary Counsel."

It would serve no useful purpose to make an pronouncement on that issue, in this ruling. Even if Mr. Tejan-Cole's submission was correct, the Director was not entitled to give the consent and certificate. The office of Director of Public Prosecutions does not come within the definition of 'Law Officer' which has been set out above.

Finally the Director sought to know whether he was included in the proviso to Section 97(7) thereby requiring him to obtain the consent of the Attorney-General and Minister of Justice before initiating proceedings under Section 53(1) of the Criminal Procedure Act. Section 97(7) reads—

"The powers conferred upon the Attorney-General and Minister of Justice by this Section shall be vested in him to the exclusion of any other person or authority:

[p.107]

Provided that where any other person or authority has instituted criminal proceedings, nothing in this Section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the Court."

I do not with respect see the relevance of this question to the problems, before this Court. Firstly, the proviso contemplates the withdrawal of proceedings by some person or authority the right to do so before the accused of defendant has been charged before the Court secondly, it does not contemplate a situation where the defendant has been charged., tried and convicted. Thirdly, the Director is not "any other person or authority" referred to in Section 97. Section 97(4) throws light on the matter. Section 97(4)(b) gives the Director the power to "take over and continue any such criminal proceedings that may have been instituted y any other person or authority". Sub section (c) then empowers the Director "to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority". The distinction is made between proceedings instituted by himself (The Director) and those initiated by some person or body or persons or a corporation.

M. Degui is not a citizen of the Republic of Sierra Leone. The offence for which he was charged, tried, and convicted, was alleged to have been committed within the territorial sea of [p.108] this Republic. The consent and certificate of the Attorney-General and Minister of Justice or the Solicitor-General should have been obtained before the commencement of the proceedings. In my judgment the Director

of Public Prosecutions was not competent to give the consent and certificate required by Section 53(1) of The Criminal Procedure Act.

I would answer questions 1 and 4 posed by Mr. Terry in the negative. I would answer his question 2 in the affirmative.

As regards those posed by Mr. Tejan-Cole, I would answer questions (a) and (c) in the affirmative. The answer to question (b) is that the Director is not included in the proviso to Section 97(7). He has to obtain the consent of the Attorney-General and Minister of Justice before initiating proceedings in the instant case.

SGD.

I agree

JUSTICE E. LIVESEY LUKE

SGD.

I agree

JUSTICE C.A. HARDING, J.S.C.

SGD.

I agree

JUSTICE O.B.R TEJAN, J.S.C

SGD.

I agree

JUSTICE A. AWUNOR-RENNER J.S.C.

STATUTES REFERRED TO

1. Section 53(1) of the Criminal Procedure Act, Act No.32 of 1965

2. Law Officers Act, Act No.6 of 1965

3. Laws Adaptation Act, Act No.29 of 1972

4. Constitution Act No.12 of 19781

5. Section 53(1) of the Criminal Procedure Act 1965 Act No.32 of 1965

6. Section 144(2) of the Criminal Procedure Act No.32 of 1965

7. 1978 Constitution Act No.12 of 1978

8. Criminal Procedure Act, Act No.32 of 1965

9. The Constitution (Amendment) (No. 2) Act 1971

10. Section 4 of The Constitution (Amendment) (No.2) Act, 1975

11. Section 1 of the Fisheries (Amendment) Act 1977

1982

JUSTICES OF THE SUPREME COURT

HON. MR. JUSTICE E. LIVESEY LUKE	-	CHIEF JUSTICE
HON. MR. JUSTICE C.A HARDING	-	JUSTICE OF THE SUPREME COURT
HON. MR. JUSTICE O.B.R. TEJAN	-	JUSTICE OF THE SUPREME COURT
HON. MRS. JUSTICE A.V.A. AWUNOR-RENNER	-	JUSTICE OF THE SUPREME COURT
HON. MR. JUSTICE S. BECCLES DAVIES	-	JUSTICE OF THE SUPREME COURT

REGISTRAR:—

E.C. NELSON-WILLIAMS, ESQ. ORIGINAL SIGNED

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DUMBUYA KOROMA V THE STATE

[C. R 1/82][p.63-77]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 14 JULY 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE.C.J. PRESIDING; MR. JUSTICE C.A. HARDING J.S.C; MR. JUSTICE O.B.R. TEJAN J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES, J.S.C

DUMBUYA KOROMA - APPELLANT

Vs.

THE STATE - RESPONDENT

SOLICITORS: E.A. Halloway, Esq. for Appellant

A.K.A. Barber, Esq. for Respondent

JUDGMENT

Awunor-Renner. J.S.C.

The appellant was convicted at the High Court Moyamba on the 7th day of November 1979 and was sentenced by Williams J. to death. He appealed to the Court of Appeal and judgment was delivered on the 21st day of January 1982 dismissing the appeal and affirming the conviction and sentence of the 'High Court. It is against that decision that the appellant has now appealed to this Court on the following grounds, viz:-

(1) That the Court of Appeal erred and/or misdirected itself in holding that “In any event upon a careful review of the evidence in this case, there is no evidence to support the issue of provocation being left to the jury".

(2) That the trial judge usurped the functions of the jury as judges of facts in assessing the weight of the evidence in this case substantially in the summing up.

[p.64]

(3) That having regard to the grounds or appeal above and their cumulative effect upon this case the trial judge caused or occasioned a substantial miscarriage of justice in the trial of the appellant.

(4) That the decision of the Court of Appeal is unreasonable or cannot be supported, having regard to the evidence.

Let me say here in passing that although there were other additional grounds of Appeal this Court refused Counsel leave for the appellant to argue them as they did not relate to matters raised before the Court of Appeal. He was also asked to give further and better particulars of grounds 2 and 3 above which he did. I propose to deal with the grounds of appeal later. I have no intention of going through all the evidence that was adduced but only to state the relevant facts as briefly as I can. The appellant Dumbuya Koroma was the husband of one Fatu Gbla, who had been having an affair with the deceased Joseph Minah. Fatu Gbla and the appellant had a son Tamu Koroma who was also a prosecution witness in this case. It appears that the appellant became suspicious of the relationship between the deceased and the appellant and so when Fatu became ill he refused to help her and instead carried out a swearing ceremony and threatened that unless she confessed the illness would grow worse. She then confessed and begged the appellant to forgive her. Whether he did so or not is another matter, but on the day or the alleged incident the appellant and his wife were sitting on the verandah when the deceased went past the house and walked down to the wharf where he met some children including Tamu who was the son of [p.65] the appellant and his wife. At that point the appellant left the house and said that he was going to a village called Bandabama to buy kerosene. He returned late in the night without having bought any kerosene and told Fatu that he had met up with her boyfriend the man she had been boasting about. His shorts were wet and he had his matchet with him. On the following day the corpse of the deceased was found floating at the wharf by Tamu and one Biareh Bangura another prosecution witness. The Town Headman who was the second accused in this case was informed about it. He came down to the wharf and after he was shown the corpse of the deceased he instructed one Pa Allie to tie a rope round 1t and throw it into the river again. Three months later when the police came to investigate Henry Gbemoh a Detective Police Sergeant claimed that he took the appellant to Mano Wharf and that the appellant showed, him a place along the river bank where he said that he had attacked and stabbed the deceased to death and that as they walked along the edge of the river some bones were discovered which looked like human bones.

One William Roberts a pathologist attached to the Bo Government Hospital also gave evidence before the trial judge and stated as follows. I quote

" I recall the 16th January 1979 I was on duty on that day I had cause to perform a postmortem examination on the skeleton remains of one Joseph Minah alleged, to have died on the 12th October 1978. The remains were identified to me by one Ansumana Kpaka uncle of the deceased of Moyamba Village. My examination was carried out at the Moyamba Police Station on examination the skeleton remains were:

[p.66]

The skull

Parts of lower and upper limbs

Few ribs

There were few soft tissues on the base of the skull. There were few soft tissues left in the pelvic area. There were few pieces of rags which were alleged to be the clothes which the deceased was wearing when he died.

Cause of death: Fracture base of skull, consistent with either the victim falling on a hard surface from a height or a blunt object administered with force on the skull."

At this stage I would not be amis if I were to mention that the appellant made two statements which were tendered in evidence the High Court. No objection as to the voluntariness of the statements were 'made in that Court. The only point raised, was that the statements offended against the Hearsay Rule as they had been taken through an interpreter who had not been called to give evidence of this. However both statements were eventually admitted in evidence. In the first statement which was tendered in evidence the appellant had this to say.

"It is true that I am the one who killed the deceased Joseph Minah on the road leading to Baoma Village on a certain day sometime in the month of October 1978.

The reason why I killed the deceased was that my wife Fatu Gbla had earlier confessed him to me. I had all the time been after the deceased for my woman palava but in vain. The deceased Joseph Minah did not make any settlement to me. This caused me to attack him and kill him on his way to Baoma Village, from my village Mano Wharf.

[p.67]

Town Chief Alusine Sesay is well aware of the woman palava between myself and the deceased Joseph Minah. This dispute had been between myself and the deceased for about a year now as he did not pay no heed to it this made me to have attacked and kill him on his way to Baoma Village where he was going to pass the night."

The statement continues as follows:

"It is true that I am the one who stabbed the deceased Joseph Minah to death with my cutlass by giving him four stabs on his neck and shoulder blades before he finally died. After he had died I then pushed or dragged the deceased's body to the river where I threw it before I returned to the village. It is true that I am the one who killed the deceased Joseph Minah sometime in the month of October, 1978 on his way to Baoma Village. It was jealously which tempted me to do so. I am only asking for mercy. That is all"

In the second statement appellant. said and I quote.

"It is true that I am. the one Who killed the deceased, Joseph Minah on the road between Mano Wharf and Baoma Village sometime in October 1978 about three months ago. I am only asking for mercy. That is all."

The appellant, during the course of his trial, when asked if he had anything to say or whether he wished to give evidence elected to make an unsworn statement from the dock which conflicted with the two previous statements, He stated as follows:

[p.68]

"My wife confessed the name of the deceased and in all six persons names. My wife afterwards fell ill and I refused to give her treatment because we wee many after her. She sent to the Town Chief to beg me to give her treatment. After the Town Chief had begged me I forgave her. This was after three years. Later on the deceased used to come to my house and play with my wife. When the deceased passed I was not there I went to Bandabama to buy kerosene. Bandabama and Bumpetoke are in opposite direction. As I came and passed people said they suspected me and I don't know anything. People suspected me of the murder of the deceased. If I had wanted to I would have issued a summons against the deceased. I was arrested by the Police and brought here that is all."

I must say at this stage that counsel for the appellant has put forward everything that he could to induce this court to say that the verdict was unreasonable. Several grounds of appeal were argued by him but I only propose to deal with the main issue involved which in my view raises the points of substance. The first point taken deals with the learned trail judge's direction on the question of provocation. Counsel contended that it was the duty of the trail judge where there is some evidence of provocation to put the issue of provocation to the jury. If there is none he said then he should not do so. He however stated that there was evidence to support the issue of provocation and referred to the evidence of Musu Gbla where she said:

[p.69]

"Towards dusk on that day Joseph Minah travelled from Shenge to our village. I was sitting in front of our house when I saw Joseph Minah walking past the house. He went down to the wharf where he met some children. First accused the appellant was sitting on the verandah of our house when Joseph Minah walked past. After Joseph Minah walked past 1st accused left to go and buy kerosene from a village called Bandabama travelling via the wharf."

He also referred to the portion of' Fatu Gbla's statement where she said that her relationship with the deceased continued until the time of' his death and also to the statement of the appellant from the dock when he said that the deceased used to come to his house and play with his wife. All these pieces of evidence he claimed were ignored by the Court of Appeal when Short J.A. said in his judgment and I quote.

"In any event upon a careful review of the evidence in this case, there is no evidence to support the issue of provocation being left to the jury."

Counsel for the appellant submitted further that Provocation could only be a defence in such situations if-the adulterers were caught red-handed and that we should not ignore our own environment but should remember that adultery with a wife and a third party can so infuriate the husband as to provoke

him to do harm. Now let me examine what the trial judge had to say about provocation in certain portions of his summing-up and I quote:

“Turning back to the 1st accused I am to remind you that after trying to impress on you that there would appear to be some doubts in the evidence as far as the 1st accused is concerned his counsel went one stage further by saying that [p.70] if you are convinced that the killing was done by 1st accused it was done by what in law is described as provocation and that if you are satisfied that he was sufficiently provoked to kill Joseph Minah then the verdict against 1st accused cannot be one of guilty of murder: it would be one of guilty of something else, namely manslaughter; but if you are convinced that there was not sufficient provocation before killing Joseph Minah then your verdict must be one of murder. Firstly provocation is no defence in a charge of murder. All that provocation does if satisfactorily proved is to reduce a charge of murder to that of mans1aughter. That is why counsel for 1st accused told you quite clearly that if you are convinced that it was the first accused who killed Joseph Minah then 1st accused might have done so because he was provoked and that if you are satisfied that he was sufficiently provoked then you should reduce the charge from murder to manslaughter which means that you should return a verdict of not guilty of murder but guilty of manslaughter --------

Provocation must be such that it is enough for a reasonable man to lose control of his temper.”

He continued further by saying

"If you are able to say on the evidence that it was the 1st accused who killed Joseph Minah, then ask yourself whether the love affair which lasted for three years was provocation enough to have excited a man like the 1st accused to [p.71] the extent of killing the paramount of his wife bearing in mind that the 1st accused had other remedies to which he could have had recourse if he wanted to get his own back from Joseph Minah. So members o£ the jury if you are convinced that it was the first accused who killed Joseph Minah then ask yourselves in the light of the evidence. Whether the provocation pleaded is of a kind which is sufficient to let 1st accused lose his temper and kill Joseph Minah the way the evidence has pointed out.

---------The question of provocation is one for you to consider. It is my duty as judge to point out to you aspects of provocation. It is your duty of consider whether such provocation is sufficient to let 1st accused lose the balance of his mind and of his mind and kill Joseph Minah.”

In my view the law on the question of provocation is quite clear. In Archibold thirty-sixth edition at paragraph 2499.

“Provocation is defined as an act or a series of acts done by the deceased to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self control rendering the accused so subject to passion as to make him for the moment not master of his mind. No provocation whatsoever can render homicide justifiable, or even excusable, but provocation may reduce the offence from murder to manslaughter.”

In the case of Mancini V.D.P.P. reported in 1942 A.C. at page 9 Viscount Simon had this to say:

“It is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the unlawful act which causes death.”

[p.72]

In the case of Helmes V D.P.P" reported in 31 Criminal Appeal Reports at page 123. It was held that a confession of adultery without move can never constitute a provocation sufficient to reduce murder to manslaughter. It is however different where a man actually discovers his wife in the act of adultery and there-upon kills her or him directly on the spot. It is well established that in a case where the evidence does not support the defence of provocation, it is the duty of the judge to direct the jury that the evidence does not support a verdict of manslaughter see Mancini V D.P.P. supra. Where however there is evidence to support this it is the duty of the judge to put the issue of provocation to the jury and for the jury to decide whether the accused killed the deceased as a result of provocation.

In the present case after having reviewed all the evidence including the statements of the appellant which I have narrated above and his statement from the dock, together with the evidence of Fatu Gbla and after considering all the authorities referred to supra I find myself in agreement with the Court of Appeal that there was no evidence to support the defence of provocation. Here was a man who knew that the deceased had been having an affair with his wife for three years and yet did nothing about it. In fact the wife admitted that she had been forced to confess to the appellant that she had been having an affair with the deceased. The appellant himself admitted that he could have issued a summons against the deceased but did not do so. I think that the trial judge went out of his way to direct the jury on provocation when there was no evidence to support that defence. I find no merit in this ground of appeal. The next point taken by counsel for the prosecution was that the trial judge substantially usurped the functions of the jury as judges of facts in assessing the weight of the evidence in this [p.73] case in his summing-up. He made particular reference to corroboration and referred this Court to certain portions in the summing up and I quote.

“Can you say that the boy was lying or that you are convinced that all he said was the truth, having regard to the fact that what he said was corroborated by PWJ another boy. PW3 from the witness box narrated to you almost exactly what he said, except the piece of evidence about the 1st accused remarks. It could be that the reason why PW3’s evidence did not corroborate that of PW2 on this piece of evidence is because PW2 resided with his father and mother. But apart from this but of PW2’s evidence PW2’s evidence was corroborated by the evidence of PW3 in every particular……..

If you believe him (PW2) then his evidence is sufficient corroboration about the utterances of the 1st accused and such utterances ought to assist you to make up your minds as to the guilt or otherwise of the 1st accused so far as the killing of Joseph Minah is concerned.”

In this case PW2 Tamu Korcma the son of the appellant and Fatu Gbla have given evidence on oath. PW3 Biareh Bangura had affirmed. There is nothing wrong with a witness affirming. Any person who objects to taking an oath because of his religious beliefs or because he has none is allowed to affirm, provided reasons are given for this. No evidence was given of the age of Tamu Koroma or Biareh Bangura and

neither was any objection raised to their giving evidence on oath or in affirming in the instant case. As a general rule the Courts may act on the testimony of a single witness though uncorroborated if satisfied with such evidence. Corroboration is required by law and in practice in certain cases. In law however corroboration is [p.74] required when a child of tender years gives unsworn evidence. The jury should be warned of the danger of accepting the uncorroborated evidence of a child of tender years; See the case of R V Pitts reported in 8 Criminal Appeal Reports at page 126. There is no evidence to show that both PW2 and PW3 were children of tender years" and as such that their evidence needed corroboration. Even in cases where corroboration is necessary this need not be by another witness it may even be by an admission of the accused and it is the duty of the judge to point out instances of corroborative evidence as I think the trial judge was doing in the passages referred to supra. On this same ground Counsel fertile appellant complained about the identification of the body of Joseph Minah and how the learned trial judge dealt with it in his summing up and I quote.

“There can be no doubt that he is dead, and indeed we have portions of his remains in this Court; they were identified positively as belonging to the body; there were no attempts to query the identification, they are the factual remains of Joseph Minah”.

I must however disagree with the learned trial judge's direction in the above passage. I have come to this conclusion because of the evidence of the following people one Stanley Kaillie who said as follows:

“I had first visited 1st accused's house where I found a black juju bag hanging on the wall of his room. From there I took him to Mano Wharf by the river. Reaching a certain point 1st accused told me that it was at that point, that he attacked and stabbed Joseph Minah to death. We walked along the river edge where I found bones which looked liked human bones. I collected the bones and brought them to the Moyamba Police Post.”

[p.75]

Dr. Roberts also give evidence for the prosecution and said and I quote:

“I had cause to perform a post mortem examination on the skeleton remains of one Joseph Minah. The remains were identified to me by one Ansumana Kpaka. On examination the skeleton remains were:

The skull

Parts of lower and upper limb

Few ribs.

Soft tissues at the base of the skull. There were soft tissues left in the pelvic area. There were few pieces of rags which were alleged to be the clothes which the deceased was wearing when he died."

I entirely agree with Counsel for the appellant's submission about the identification of the body of Joseph Minah in the passages referred to supra. In my opinion all that was seen were the skull and some

bones. I cannot understand how the identification was carried out and how they came to the conclusion that the bones and skull were those of Joseph Minah. There was however another passage in the summing-up in which the trial judge referred to the identification of the deceased. In this passage he said and I quote:

“Again after confirming the evidence of' PW2 the third witness for the prosecution said that when he and PW2 saw the floating corpse in the river they went and reported the matter to his father the second accused. The second accused went with them and some other people also. Second accused saw the corpse and [p.76] identified it to be that of Joseph Minah and instead of ordering the corpse to be brought ashore he gave instructions that the corpse should be pushed further up the river.”

I do not see how it can be said in this instance that the judge usurped the function of the jury. All the learned trial judge was doing in my view was to narrate and confirm the evidence of the prosecution witnesses. In any case there is ample evidence to show that the deceased Joseph Minah was dead. The statements of the appellant confirm this and so does the evidence of Tamu Koroma and Biareh Bangura both of whom actually testified to seeing the dead body of Minah floating on the river Even in cases where neither the body nor any trace of it has been found and the prisoner has not made any confession of any participation in the crime, the death is provable by strong circumstantial evidence which renders the commission of the crime certain and leaves no ground or reasonable doubt: See the case of R V Michel Onufrejizyk reported in volume 39 Cr. App. Report at page 1. In the present case the body was actually seen floating in the river by several persons who identified it and the appellant himself has confessed to the killing of Joseph Minah. As stated earlier the point that the statement was not made voluntarily was never raised. The statements as quoted above speak for themselves. In my view Counsel for the Respondent adequately and succinctly dealt with all the criticisms put forward by Counsel for the appellant.

Finally in my opinion I have come to the conclusion that the facts as proved at the trial were fairly and accurately put by the judge to the jury in his summing up. I therefore do not agree with Counsel for the appellant that the decision of the Court of Appeal was unreasonable or could not be supported having regard to the evidence. There was no misdirection and [p.77] I am therefore unable to allow the appeal.

Signed by Hon. Mrs. Justice A. Awunor-Renner, J.S.C

I agree

Signed by Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

Signed by Hon Mr. Justice C.A Harding, J.S.C

I agree

Signed by Hon. Mr. Justice O.B.R Tejan J.S.C

I agree

Hon. Mr. Justice S. Beccles Davies J.S.C

CASES REFERRED TO

1. Mancini V.D.P.P. reported in 1942 A.C. at page 9

2. R V Michel Onufrejizyk reported in volume 39 Cr. App. Report at page 1

FREETOWN COLD STORAGE CO. LTD. AND IGNATIUS GUILDFORD REFFELL

[Sc. Civ. App. No. 5/80][p.78-93]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 14 JULY 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE.C.J. PRESIDING; MR. JUSTICE C.A. HARDING J.S.C; MR. JUSTICE O.B.R. TEJAN J.S.C.; MRS. JUSTICE A.V. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES, J.S.C

FREETOWN COLD STORAGE CO. LTD, - APPELLANTS

AND

IGNATIUS GUILDFORD REFFELL - RESPONDENT

Smythe & Co. for the Appellants

J.E. Bankole-Jones, Esq for the Respondent

JUDGMENT DELIVERED THIS 14TH DAY OF JULY. 1982

LIVESEY LUKE C.J.

I have had the advantage of reading the judgment of my learned brother Beccles Davies, J.S.C. He has fully set out the facts. Therefore it is not necessary to recount them. I think that the two important issues in this appeal are:— firstly, whether the respondent resigned his appointment with the appellant company in February, 1976, and secondly, and in the alternative, whether the summary dismissal of the respondent by the appellant company was wrongful. I have said that the second issue is in the alternative, because if the first issue is decided in favour of the appellant company, then the second issue does not arise.

With regard to the first issue, the letter of resignation Ex. D and the resultant correspondence between the respondent and the appellant company have already been set out by my learned brother. Mr. Smythe, learned counsel for the appellant company, submitted that once the letter of resignation had been given, the contract of employment was at an end on the ground that resignation is a unilateral act, not requiring acceptance by the appellant company. He relied for this submission on [p79] Riordan v. The War Office (1959) 3 All E.R. 552.

In my opinion for a notice of termination of a contract to be effective it must be a valid notice. So if a contract is determinable by three months notice and a party to the contract gives only 1 week's notice, such a notice, admittedly a unilateral act, is not valid and therefore it is not effective to determine the contract. Similarly if according to the terms of a contract, written notice of termination should be given and one party gives oral notice, such notice is not valid and therefore it is not effective to determine the contract. Such action by the party giving the notice will clearly be a repudiation of the contract. So although the action of the party giving the notice is clearly a unilateral act, yet it is not valid and therefore not effective unless the innocent party accepts it. These general principles of the Law of contract were stated by Buckley L.J. in Decro-Wall International S.A. v. Practitioners in Marketing Ltd (1971) 1 W.L.R. 361 C.A. at P. 382 in these words:—

"Where a party to a contract gives notice to determine it pursuant to an expressed or implied term in that behalf, he is exercising a contractual right arising under that term of the contract. Where, on the other hand, the party who asserts that the contract has been determined has not in form given any notice determining the contract and has done nothing which can rationally be treated as an exercise of a contractual right to determine the contract unilaterally. I find it hard to see how he can properly be treated as having exercised his contractual right or termination
……..

Since, as we have held, there had been no [p.80] earlier repudiation of the agreement by the defendant company, the latter was ineffective as an acceptance of repudiation. It constituted in fact a repudiation on the part of the plaintiff company.A repudiation and a notice of determination are clearly different things. A repudiation may be withdrawn at any time before acceptance a notice of determination validly given cannot thereafter be withdrawn without agreement."

These general principles are applicable to all types of contracts including contracts of Employment; See Harris & Russell Ltd,v. Slingsby (1973) 3 All E.R. 31 at p. 32. In a contract of employment therefore, for a notice of termination, whether given by the or the employee, to be effective it must be a valid notice. So if a contract of employment is determinable by one month's notice and a week's notice is given, the notice is invalid and therefore ineffective, unless the other party accepts it. The action of the party giving the invalid notice would be a repudiation and not a termination of the contract of' employment. That would clearly be a unilateral act but that does not mean that it is effective to determine the contract of employment. So if an employee gives an invalid notice of termination, the employer can ignore it and treat the contract of service as being in force. And if the employee persists in his action and leaves the employment at the end of the invalid notice, the employer pan sue him for breach of contract. Similarly, if the employer gives the employee an invalid notice or termination, the employee

can ignore it. And if the employer persists in carrying into effect his invalid notice then the employee can sue him for damages for breach of contract i.e. wrongful dismissal.

[p.81]

Mr. Smythe relied on the following passage in the judgement of Diploock J. (as he then was) in Riordan V. The War Office (supra) at pp. 557-558—

"For the reasons, that I have indicated, I think that the regulations relating to the termination of employment must be regarded if not as the terms of a contract of employment at least as unalogous to the terms of such a contract and that the giving of a notice terminating the employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either immediately, or in the future. It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent."

It is important to note that the notice of resignation in that case was held to be a valid notice. So in my opinion, what the learned Judge had in mind when he referred to "a notice terminating the employment" was a valid notice. And when he said that "once given it cannot…….be withdrawn" he was referring to a valid notice. It seems to me that he did not say, and did not intend to be understood to be saying, that an invalid notice of termination of a contract of employment or of a tenancy or of any other contract cannot be withdrawn. In my view what the learned judge said is that a valid notice of termination of contract is a unilateral act that does not need to be accepted by the other party to render it effective.

So the important question arises: Was the notice of resignation given by the respondent valid and effective? I think that it is common ground that the length of the notice required [p.82] to terminate the respondent's employment was one month. I think that it is trite law that a party wishing to terminate a contract of employment may instead of giving notice for the requisite period pay in lieu thereof the salary for the exquisite period. See Fawcett v. Cash 5 B & Ad. 904. So in the case of a contract of Employment where one month's notice of termination is required, either party may pay one month's salary in lieu of notice. In the instant case, the respondent stated inter alia in his notice of termination dated 4th February, 1976 (Ex. D)

"Re Letter of Resignation

1. Due to circumstances beyond my control, I beg to tender my resignation from this company forthwith.

2. In this respect I would like to ask you to please deduct one month pay from my dues in lieu of notice."

So what the respondent proposed to do was to terminate his employment without giving the requisite notice and offering one month's salary in lieu thereof. The reaction of the appellant company is contained in a series of letters that followed the appellant's letter of resignation. The first of such letters was dated 10th February, 1976 and signed by the Personnel Manager (Ex. "E"). It stated inter alia:

“In the circumstances Management has therefore not accepted your resignation and would only be in a position to do so after those pendings have been carefully gone through and sorted out. Until then you still remain a member of the Managerial staff of F.C.S.C Ltd. In charge of Cold Storage Branch, Kenema.”

The second letter was signed by the Personnel Manager and dated 16th February, 1976 (Ex."F"). It inter alia informed the [p.83] respondent that;

“Management requests that you make yourself available at any time during his next visit to Kenema from the 18th-24th February, 1976, to assist in sorting out all outstanding matters in that Branch....."

The next letter was dated 26th February, 1976 and was signed by the General Manager (Ex. "G"). It inter alia stated:

“In view of the foregoing you are therefore suspended from duty as from today, 26th February, 1976 until all aspects pertaining to this deficiency have been clarified.”

The final letter was dated 5th March, 1976 and signed by the Personnel Manager (Ex. "H"). It inter alia stated:

“We note with regret that you have failed to carry out our instructions and as such, you are today summarily dismissed from this Company.”

It is not disputed by the appellant company that up to the date of the dismissal and even up to the date the trial ended, the appellant company did not deduct the one month's pay in lieu of notice as requested by the respondent in paragraph 2 of his letter dated 4th February, 1976 (Ex. “D"). So in the instant case, the resignation was not an entirely unilateral act. The other party to the contract i.e. the appellant company, had to do something to complete the act of the respondent. They had to deduct the one month's salary, as salary in lieu of notice. But they failed to do that. Instead they insisted that the respondent was still in their employment. In keeping with that insistance, they requested the respondent to report for duty at their Kenema Branch. The respondent complied with that request, and worked at the Kenema Branch for two days, although he was then on leave. A few days later, the letter of suspension was [p.84] sent suspending the respondent from 26th February 1976, About a week later, the letter of Summary Dismissal was issued informing the respondent that “you are today summarily dismissed from this company.”

Having regard to the facts and circumstances stated above, the position, in my view, is as follows The respondent did not pay a month's salary in lieu of notice, nor has it ever been deducted from his salary, as requested by him. And up to today, no salary in lieu of notice has been paid or deducted. Therefore the respondent's letter of resignation stood, and still stands, naked, without any salary in lieu of notice to cloth it with validity. In my judgment therefore the notice of termination of his employment contained in the respondents letter of resignation was invalid and the resignation was therefore ineffective. Both parties, by their conduct, treated the contract of employment as being in existence until it was terminated by the appellant company on 5th March, 1976. In my opinion, the appellant

company, having admitted their failure to deduct the month's salary in lieu of notice, cannot at the same time claim that the resignation was effective. They cannot take advantage of their own failure to render the resignation effective.

Before proceeding to consider the second issue, it is necessary to dispose of a preliminary issue relating to the pleadings. In their Defence the appellant company pleaded inter alia:—

"5. That on the 26th February 1976 the defendants by letter informed the plaintiff of all the discrepancies discovered and not having received a reply from the plaintiff suspended him from service and warned him that should he failed to present himself to Management to discuss and clear the [p.85] discrepancies further action will be taken. The plaintiff did not present himself as requested.

6. That the nature of the discrepancies was that the plaintiff phoned the Trading Firms of J.T . Chanrai and T. Choithram and ordered goods allegedly on behalf of the defendants. The goods were received into store and never accounted for in the books of the defendants as a result of which the defendants had to pay J.T. Chanrai Le1,182.00 and T. Choithram Ltd. Le1,684.05 thus incurring a total loss of Le 2,866.05.

7. That on the February, 1976 whilst the plaintiff was Manager of the defendants Store in Kenema a chit for Le50.00 for air Ticket was found signed by the plaintiff. There was no authority by Management for this and on the 16th February the plaintiff was queried by letter about this serious breach of the financial rules of the Company. He did not reply.

8. That as a result of all these enquiries the discrepancies were reported to the Police who after investigation arrested and charged both the plaintiff and his Storekeeper.

9. That after the preliminary Investigation the plaintiff and his storekeeper were committed to the High Court for trial where the plaintiff acquitted and the Storekeeper convicted for fraudulent conversion.

[p.86]

10. The plaintiff was dismissed by virtue of the provisions of section 9 of Chapter 212 of the laws of Sierra Leone the Employers and Employed Act."

Mr. Smythe submitted that paragraph 10 of the Defence entitled the appellant Company to rely on evidence of any matter not specifically pleaded to justify the dismissal of the respondent. It will be convenient to set out the section mentioned in para. 10 of the Defence. It reads:—

"10. Every contract of service wherein no agreement is expressed respecting its duration. not being a contract to perform some special work without reference to time, shall be determinable by either party —

(a) When the servant is engaged at a monthly wage, at the expiration of one month's notice which may be given at any time;

(b) When the servant is engaged at a weekly wage, at the expiration of one week's notice which my be given at any time; and

(c) When the servant is engaged at a daily wage, whether paid daily or not, at the close of any day without notice:

Provided that nothing in this section shall degorate from an employer's common law right to dismiss an employed for —

(i) willful disobedient of a lawful order;

(ii) gross moral misconduct, whether pecuniary or otherwise;

[p.87]

(iii) negligence in business, or conduct calculated seriously to injure the Employer's business;

(iv) incompetence, or permanent disability from illness:

Provided also that an employed shall not be entitled to determine a contract of service without notice to his employer whilst the employed is engaged in any journey or voyage."

Mr. Smythe's submission was that the appellant company could use the first proviso to the section as a basis to rely on evidence that was extracted from the respondent, under cross-examination, to the effect that post-dated cheques had been accepted at the Kenema Branch of the company, against instructions, while the respondent was the Manager of the Branch. Learned counsel further submitted that if the respondent wanted particulars of para. 10 of the Defence, he should have applied for them. What the submission amounts to is, that by that pleading, the appellant company had been presented with a carte blanche to go on a fishing expedition, during the trial in search of evidence in support of an unspecified allegation. I do not agree with learned counsel's submission. In the first place, my understanding of the Defence is that in paragraphs 5 to 9 thereof, the facts justifying the dismissal of the respondent were pleaded and that paragraph 10 merely stated the legal authority for the action taken by the appellant company on the basis of the facts previously pleaded. I do not understand para. 10 as pleading facts or circumstances justifying the dismissal. In those circumstances, no question of applying for or furnishing of particulars arose. The fact justifying the dismissal and particulars thereof had already been given in the previous paragraphs 5-9.

[p.88]

Secondly, it is important to emphasise that section 9 of the employers and employed Act (Cap. 212) makes provision for the determination of contracts of employment, where there is no express provision in the contract relating to its duration. Subsections (a) (b) & (c) provide for termination with notice, and the first proviso relates to termination without notice. By pleading as they did in their paragraph 10, the appellant company were in effect saying that they acted under the section, because there was in the contract of service between them and the respondent "no agreement is express respecting its duration"

In my opinion, the first proviso to the section does not confer any rights on any employer. It merely saves rights which employers already had at common law. The rights are conferred by the common law and not by the section or its provision. So by pleading the section the appellant company were not thereby pleading rights itemized in the provision thereto, because those rights were not conferred by the section or its provision, If an employer wants to plead his common law right of summary dismissal he should plead the common law, Similarly, if for example, a section of a statute provided as follows:

"Provided that nothing in this section shall derogate from a person's fundamental right of freedom of speech and freedom of movement under the Constitution of Sierra Leone."

It cannot be seriously contended that the fundamental rights of freedom of speech and freedom of movement were conferred by that section or by the proviso, Those rights are conferred by the Constitution, and if a person wants to plead those rights it is the Constitution that he should plead and not the above quoted proviso. So, strictly, speaking, what the appellant company pleaded is that they had dismissed the respondent under the provisions of sub-section (a) or,(b) or (c) of' the Section.

[p.89]

I think that it is well-settled that to entitle A defendant in an action for wrongful dismissal to rely on any ground as justification for the dismissal, the ground of dismissal must be specifically pleaded. In Tomlinson v. L.M.S. Railway Co. (1944) 1 All E.R. 537 Goddard L.J. (as he then was) said inter alia at p. 541:—

"Therefore to make it a good and proper pleading they ought to have alleged, by way of showing that they were not bound to have obeyed the provisions of the memorandum alleged in the Statement of Claim, that the plaintiff had been guilty of exceptionally grave misconduct in which summary action by the management was justifiable …….

I still think that the defence, in order properly to raise this, ought to have alleged exceptionally grave misconduct, and that summary action was justifiable."

In my judgment therefore the pleading in paragraph 10 of the Defence did not entitle the appellant company to rely on any allegation not specifically pleaded in the other paragraphs of the Defence.

There is an added reason why this court should not allow that piece of evidence referred to above to be used by the appellant company in justification of the dismissal. And that is that from the records, it would appear that both at the trial and in the Court of Appeal the appellant company did not rely on it to justify the dismissal. This is how that piece of evidence was elicited. In his evidence-in-chief, the respondent had referred to the various items listed in Ex.J (relating to dishonoured post dated cheques etc.) and had said that he did not accept the amounts stated therein as justifiable deductions from his entitlements due [p.90] from the company. That evidence was in support of his from the Company. That evidence was in support of his claim for special damages particularized in paragraph 4 of his statement of claim. Counsel for the appellant Company cross-examined him on the various items in the course of which the dishonoured cheques and other documents were tendered and admitted in evidence. In my

opinion that piece of evidence was relevant and relative to the issue of whether or not the appellant company were justified in making deductions from the respondent's entitlement in respect of the dishonoured cheques. According to the trial Judge's notes, in the address of Counsel for the appellant company, apart from conceding that no evidence was led in respect of one of the items listed in Ex. J. as having been deducted from the respondent's entitlement, no reference was made to Ex. J. or the piece of evidence elicited under cross-examination as stated above. Learned Counsel concentrated his attention on the submission that the respondent had resigned his employment and that therefore no question of wrongful dismissal arose. The notes end as follows:

"I ask Court to believe the evidence of D.W.2 and D.W.l. I would ask Court to dismiss the plaintiff's case for wrongful dismissal and allow one item of the claim." Presumably the one item he said should be allowed was the one in respect of which he had previously made a concession. So what he was saying in effect was that it had been shown that the other claims itemized in the particulars had been justifiably deducted from the respondent's entitlement and therefore the respondent's claim in respect of them should be dismissed. As regards his reference to the evidence of D. W. 1 and D.W.2 it is important to state that their evidence related entirely to the allegations made in paragraphs 6 and 7 of the Defence. Neither of them made any mention of any dishonoured cheques. According to the notes of the Presiding Justice in the Court of Appeal, learned counsel for the appellant company argued only two issues, namely whether the respondent had resigned his employment and whether the trial Judge had wrongly considered the evidence [p.91] that the respondent had been acquitted by Criminal Court. No mention was made of the evidence relating to dishonoured cheques. It is not surprising therefore that neither of the two judgments delivered by the Justices of the Court of Appeal made any mention of that evidence. It is therefore obvious that the whole basis on which the case was fought both in the High Court and in the Court of Appeal was whether the respondent had resigned his employment or whether his dismissal had been justified on the ground of the allegations stated in paragraphs 5 to 9 of the Defence, particularly paragraphs 6 and 7 thereof. In those circumstances I think that it is too late in the day for the appellant company to change front by presenting their case before this court on an entirely different basis.

I shall now turn my attention to the second issue. The two allegations relevant to this issue are (i) That in February, 1976 while the respondent was Manager of the appellant company's store at Kenema he took Le50 from the cashier of the Supermarket to pay for an air ticket and that he issued a chit for the amount (para.7 of Defence); and (ii) That he ordered and received goods into the store from T. Choithram Ltd. totaling Le1,684.05 and never accounted for them in the books of the company. The respondent admitted taking Le50 and issuing the chit. He said that he used the Le50 to pay for a return air ticket to Freetown on official business as had been happening before. He denied placing any orders with T. Choithram Ltd. for goods to be supplied or receiving any goods supplied by T. Choithram Ltd. The learned trial judge found that the allegations were not proved.

With regard to the Le50 taken from the cashier, the evidence is that the respondent was on, leave and wished to travel to Freetown. The respondent was recruited in Freetown in January, 1966. He was first appointed Assistant Sales Manager on probation on 13th January, 1966. His probationary period ended on 30th April, 1966. He was transferred to Kenema in October, 1966 by [p.92] letter dated 20th October,

1966 (Ex. “C”). In that letter he was instructed to fly to Kenema on that same day. He was promoted Manager in November, 1967. It is common practice in this country for employers in both the public and private sectors to pay the transport expenses of their employees to their towns and villages within the country while they are on leave. The respondent was a Manager, yet in this day and age the appellant company penalized him for taking a mere Le50 from the cashier to delay his transport expenses to his place of recruitment. In my opinion if the respondent's action was a breach of the company's regulations, it was such a minor infraction that it did not warrant the extreme sanction of summary dismissal.

With regard to the goods alleged to have been ordered from T. Choithram Ltd., the trial Judge said that he did not accept the evidence of the only witness on that allegation' (D.W.2). That witness (D.W.2) had said that the respondent had made the order by telephone, that he knew the respondent's voice, that subsequent to the supply of the goods he saw the respondent in his (D.W.2) office, that he asked the respondent about the goods supplied and that he replied that the appellant company would pay for them. According to the evidence the goods were received and signed for by the Storekeeper. The learned Judge accepted that evidence. It was the storekeeper's responsibility to enter the receipt of the goods in the Company's books, but he failed to do so. We are invited to reverse the findings of fact of the learned trial Judge on the ground that he overlooked the evidence of D.W.2 relating to the discussion held in D.W.2's office about the supply of the goods. In this connection it is relevant to state that when the respondent was being cross-examined by counsel for the appellant company no' questions relating to the alleged discussion were put to him. And when D.W.2 was being crossed-examined by counsel for the respondent, it was suggested to him that no such discussion ever took place. If we were to act on D.W.'s evidence about the [p.93] discussion, we shall be assuming that he was a credible witness and that his evidence was true. We shall be making a finding of fact on the assumption that the witness was a credible witness. In these circumstances, I do not think that we would be justified to reverse the findings of fact of the trial Judge, concurred in by the Justices of the Court of Appeal merely because the learned trial Judge did not take that piece of evidence into consideration.

In conclusion, I find myself in agreement with the trial Judge and with the three Justices of the Court of Appeal that the dismissal of the respondent by the appellant company was wrongful.

In the result I would dismiss the appeal with costs.

SGD.

[P.94]

BECCLES DAVIES. J.S.C.

The Respondent was employed by the Appellants at their branch in Kenema from 1966 to 1976 when, to use a neutral expression his services terminated.

The Respondent had sued the appellants claiming damages for wrongful dismissal. The Appellants resisted the claim.

The substance of the Respondent's claim is to be found in paragraph J and 4 of his Statement of Claim. They are in these terms—

"3. By letter dated February 1976, the Plaintiff was suspended from duty on that date and by letter dated the 5th of March 1976, the plaintiff was wrongfully and summarily dismissed from the service of the Defendant Company with effect from the date of the letter, that is to say, 5th March,1976.

[p.95]

4. By reason of the said dismissal plaintiff has incurred loss and suffered damage."

Quite apart from paragraph 11 of Appellants. Defence which contains a general denial of the allegations in the Respondent's claim, the defence rested on three assertions. Those assertions were—

(i) the respondent's resignation from the appellants service;

(ii) discovery of "very serious discrepancies" in his store and

(iii) the dismissal of the respondent by virtue of Section 9 of the Employers and Employed Act. These assertions are to be found on paragraphs 2, 3 and 10 of the defence. They state—

"2. The Descendants will contend that by 1etter dated 4th February 1976 the plaintiff resigned from his employment and never in fact worked after that date for the Defendants

3.. The Defendants will contend that it was after the discovery of very serious discrepancies in the store over which the plaintiff was Manager that the plaintiff sought to resign.

10. The plaintiff was dismissed by virtue of the provisions of Section 9 of chapter 212 of the Laws of Sierra Leone, the Employers and Employed Act.

A reply was filed by the Respondent. It was that the plaintiff joins issue with the defendants upon their defence."

[p.96]

No mention was made in the respondent's statement of claim that he had submitted a letter of resignation to the appellants by which he had sought to withdraw from the service of the latter. It came to light from the Appellant defences. Even though such resignation had been raised by the appellants the respondent did not plead of waiver by both parties of such resignation. Waiver of the letter of resignation was however raised in the respondent evidence at the trial. Such a plea requires a special reply and merely "joining issue" on the defence would be inadequate pleading.

As the learned authors of the Eleventh Edition of BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS explain at page 694—

“But frequently the plaintiff must do something more than merely traverse the Defence. For a joiner of issue merely contradicts the facts alleged by the defendant; and the plaintiff may often require to set up, some affirmative case of his own in answer to those facts."

The effect therefore of the respondent's reply as regards the letter of resignation was to contradict the appellants' assertion that he (the respondent) had tendered a letter of resignation. In the circumstances of this case, the respondent should have filed a special reply setting forth his claim to a waiver of the resignation (See precedent No. 801 at page 890 of BULLEN AND LEAKE'S PRECEDENTS referred to above).

The defence had pleaded the matters I have already referred to earlier in this judgment. The matters alleged were in the alternative - the respondent's resignation, his discharge of duties and the claim by virtue of the provisions of Section 9 of the Employers and Employed Act. Section 9 as regards the dismissal of an employee states—

[p.97]

“Provided that nothing in-this Section--shall derogate from an employers common law right to dismiss an employed for—

(i) Wilful disobedience of a lawful order;

(ii) gross moral misconduct, whether pecuniary or otherwise;

(iii) negligence in business, or conduct calculated seriously to injure the employer's business;

(iv) incompetence, or permanent disability from illness …….”

Sub-paragraph (i)-(iv) above contain those grounds on which an employer could dismiss his employee. The respondent should have applied for further and better particulars of the acts justifying dismissal under Section 9. He did not make such a request. The plea contained in paragraph 10 of the appellants' defence was couched in rather vague terms. The purpose of a request for further and better particulars is to tie down the opposite party and so prevent him from adducing evidence at the trial which might support his vague allegation. The case of WELLS V WEEKS 1965 1 W.L.R. 45 comes to mind. In a Statement of Claim in an action for negligence, the plaintiff had set out particulars of negligence alleged in a paragraph which concluded with the words “The plaintiff will also rely on Section 74 “of the Road Traffic Act, 1960 and on all the provisions of the Highway Code applicable to the drivers of motor vehicles in so far as the same are applicable in the circumstances”. The 'action went to trial without further and better particulars of the statement of claim being requested by the defendant. Lawton J. stated that pleading in such an imprecise manner was, virtually inviting a request for further and better particulars of the Statement of Claim, he was surprised that no such request had been made. He however refrained from further commenting on the matter.

[p.98]

The portion in this case is similar to that in WELLS V WEEKS above. The respondent in his own interest should have applied for further and better particulars.

I have highlighted the above matters to demonstrate that neither party seemed to have paid attention to a strict observance of the rules of pleading.

I now come to consider the case as a whole.

The respondent gave evidence at the trial. He called no witness. He narrated how he had been appointed by the appellants and transferred from Freetown to their Kenema Branch. He had been appointed as Assistant to the Manager of that branch. His duties included the checking of stock is receiving cash from the different departments of the branch posting of debtors accounts and watching the day to day running of the supermarket and pharmacy respectively He said he was appointed to the substantive post of Manager to the branch with consequential increase in his duties. He had in addition to his duties prior to his appointment, the responsibility for the accounts and correspondent. He was dissatisfied with the situation in which he had found himself after his promotion, because despite his promotion to the post of Manager, the appellants kept him on his old salary as Assistant to the Manager. He had expressed his dissatisfaction with the salary paid to him and had made verbal requests for an increase. The appellants had done nothing about it. He submitted a written petition which suffered the same fate as the verbal request preceding it. In disgust, he tendered his resignation from the appellants service on 4th February 1976. He claimed that the appellants had refused to accept the resignation. He was at the branch on 17th and 18th February to clear outstanding matters.

The appellants had alleged in a letter to him that he had ordered goods from Messrs. T. Choithram which were not accounted for in his books. He was summarily dismissed on 5th March 1976.

[p.99]

That was in broad outline the respondent is evidence in Chief at the trial in the High Court

The respondent was duly cross-examined. The cross-examination dealt with the respondent is resignation, acceptance of' post-dated cheques from customers, unpaid cheques, goods unaccounted for in the appellants' books which had been ordered from T. Choithram and Sons Limited. The respondent was re-examined by his Counsel. His case was then closed.

Two witnesses were called on behalf of the appellants Messrs Joseph Menjoh and Gordon Balwani (or Malirani).

Mr. Menjoh's evidence related to (a) the appellants prohibition against the acceptance of post dated cheques in payment for goods bought (b) the procedure to be adopted in accepting goods supplied into the appellants' stock (c) goods ordered from T. Choithram and Sons which were un-accounted for in the appellant books kept by the respondent (d) which transferred to Freetown for repairs and (e)the unauthorised withdrawal of Le50 from the appellants' funds by the respondent for the payment of his air passage to Freetown.

Mr. Balwani's evidence concerned the goods which had been ordered on behalf of the appellants from T. Choithram and Sons which were unpaid for.

I ought at this stage to consider the respondent's letter of resignation. It was in these terms—

“ Box 184

Kenema

4.2.76.

The General Manager

Messrs F.C.S.C. Ltd.

Freetown.

Dear Sir,

RE: LETTER OF RESIGNATION

1. Due to circumstances beyond my control, I beg to tender my resignation from this Company forthwith.

[p.100]

2. In this respect I would like to ask you to please deduct one month pay from my dues in lieu of notice.

3. Kindly use your good offices to arrange all my affairs in that I am just in Freetown for a couple of days before returning to Kenema where I intend to stay permanently.

4. Thanking you for interest over the years.

Yours truly,

Ignatius G. Reffell.”

The appellants reply to the above letter is Exhibit E. It states –

" Mr. I.G. Reffell

Box 184

Kenema

Date: 10.2.76

Dear Sir,

RE: LETTER OF RESIGNATION

We acknowledge receipt of your letter of 4th inst. resigning your post as Manager of our Kenema Cold Storage Branch.

On the 5th inst. you called on Management and had a brief discussion with him on the matter in the presence of the Personnel Manager and Mr. Quinter; as there are several matters that are still pending which are to be clarified by you as Manager in charge of that department, Management instructed you to spare the time and sort out these pendings which could have been done then as you had your documents with you. You then informed him that you would let him know the same afternoon if you would find the time to do so; but strangely enough you didn't.

In the circumstances Management has therefore not accepted your resignation and would only be in a position to do so after those pendings have been carefully gone through and sorted out. Until then you still remain a member of the Management staff of F.C.S.C. Ltd in charge of Cold Store Branch, Kenema.

[p.101]

You are however given another chance to communicate with Management and arrange with him a day and time convenient to both parties for you to meet and amicably sort out all outstanding matters.

We trust you will this time appreciate the advisability of co-operating with Management.

Yours faithfully

Freetown Cold Storage Company Limited

Personnel Manager."

The appellants claimed that they had no response to the above letter from the respondent. They addressed another letter to him dated 16th February 1976. They said —

Dear Mr. Reffell,

RE: OUTSTANDING HATTERS - KENEMA COLD STORE BRANCH

Further to our letter of 10 inst. regarding the above Management requests that you make yourself available at any time during his next visit to Kenema from the 18th - 24th February 1976, to assist in sorting out all outstanding matters in that Branch, give full explanation to all queries arising there from and settling same. Should you fail to do so, Management will feel free to do it alone and if any financial discrepancies are found during the investigations, the total amount involved will be debited to your account with us.

UNAUTHORISED WITHDRAWAL OF LE50.00

To the horror and dismay of Management, a cash chit dated 3rd February 1976 for Le50.00 was found signed by you for an air ticket. As Management has not authorised any air ticket we should like to know on whose authority this was done, and if it was meant to be an advance, who authorised it as staff

advances in this [p.102] Company can only be authorized by the Branch Manager of the area of management in Freetown.

Yours faithfully

Freetown Cold Storage Company Ltd.

Personnel Manager."

The General Manager of the appellants' Company visited Kenema to discuss matters connected with the Cold Store Branch at Kenema which had been under the respondent's Management. The visit was either on the 18th or 20th February 1976. On the return of their General Manager to Freetown, the appellants addressed a letter to the respondent dated 26th February 1976. They wrote—

"Dear Mr. Reffel,

References made to our letter of the 10th February 1976. Please be informed that our investigations have revealed that you appeared to have ordered by telephone from Messrs. T. Choithram and Sons Kenema, goods to the total value of Le1,684.05 as per invoices Nos. 3681, 3682, 3683, 3684 and 3695 on various dates during the month of January 1976. Our investigations showed further that these goods were received into stock but were never debited into the daily stock-movement sheet. They were therefore never officially accounted for in the Company's records. According to a statement from Storekeeper which we have in our possession, the instructions not to account for these goods were given by you.

In view of the foregoing you are therefore suspended from duty as from today 26th February 1976 until all aspects pertaining to this deficiency have been c1arified. You are also requested to present yourself to this office immediately and to furnish whatever explanations you may have pertaining to the above. Should you fail to do so until 3rd March 1976, Management will feel free to take whatever action is deemed necessary.

Yours faithfully

Freetown Cold Storage Company Ltd.

(Sgd.) General Manager."

[p.103]

The respondent did not reply to the above letter. He had told the trial judge that he had received it together with the subsequent letter summarily dismissing him from the appellants' service. The letter of dismissal is dated 5th March 1976.

It stated —

"Dear Sir,

SUMMARY DISMISSAL

We refer to our letter of suspension to you dated 26th February 1976 when you were also instructed to call and see us and furnish us with explanations pertaining to the discrepancies mentioned in that letter not later than the 3rd of March 1976.

We note with regret that you have failed to carry out our instructions and as such, you are today summarily dismissed from this Company.

Your entitlements will be paid to you as soon as we are able to complete our investigations on the discrepancies which occurred in our Kenema Cold Store Branch during the term of your office.

Yours faithfully

Freetown Cold Storage Company Ltd.

Personnel Manager."

The correspondence reveal the following:—

(a) The respondent's resignation from the service of the appellants with effect from 4th February 1976.

(b) The appellants postponement of the respondent is resignation until certain outstanding matters between them prior to the resignation had been disposed of.

(c) the appellants' dismissal of the respondent for non-compliance with the former's request to settle the outstanding matters between them.

[p.104]

The respondent was entitled to certain financial benefits from the appellants. Instead of submitting a month's salary in lieu of a month's prior notice to determine his employment he had requested the appellants to deduct a month's salary from his entitlements. In my opinion, that would be sufficient set off; if an action were brought by the appellants claiming the equivalent of a month's salary in lieu of notice the respondent would have had a valid defence under a plea of payment. The respondent need not go through the ceremony of handing in a month's salary when he could have received his benefits less a month's salary, which would have amounted to paying a month's salary in lieu of notice.

There is evidence that the appellants were claiming certain amounts of money from the respondent against the latter's entitlements. A month's salary could have been deducted by the appellants before paying him the balance and that would have been equally as good as if he had handed in a months notice; and the whole of his entitlements had been paid to him without, deduction.

"The allowance of cross demands on an account stated between the plaintiff and the defendant and payment of the balance by the latter, is a good payment of the entire claim". (See CALLANDER V HOWARD 1850 10 C.B. 290).

It does not appear from the Statement of Account - Exhibit J. that the appellants had deducted an amount equivalent to a month's salary, from the respondent's entitlements. The appellants had by their letter attempted to suspend the operation of the respondent's resignation. Indeed they paid him for the month of February (the month for which he had requested them to deduct a month's salary from his benefits) on the 5th March when they "terminated" his services. The appellants were undoubtedly in error to have thought that they could suspend-the" operation of the respondent's letter of resignation.

[p.105]

The month's salary which was paid by the appellants to the respondent was clearly paid to him under a mistake of law. It would be irrecoverable from the respondent by the appellants since it had been paid in consequence of such a mistake. The respondent could still keep the month's salary in lieu of notice which should have been in the appellants coffers.

The rule of law is that when once notice of determination of a contract of employment is given it cannot be withdrawn unilaterally. It can only be done with the mutual consent of the employer and the employed. In dealing with a notice of determination of his contract by an employee and the withdrawal of the notice before its expiration the court in HARRIS & RUSSEL LTD. V SLINGSBY 1973 3 All E.R. 31 at page 32 had said:—

"……. the court is satisfied that where one party to a contract gives a notice determining that contract he cannot thereafter unilaterally withdrawn the notice. It will of course be open to the party to agree to his withdrawing the notice, but in the absence of agreement the notice must stand and the contract will be terminated on the effluxion of the period of notice…… Once notice is given by either side it cannot be withdrawn, save by agreement." (See also RIODAN V WAR OFFICE 1959 3 All E.R. 552).

The respondent's resignation was without notice and should have taken effect immediately it was received by the appellants. Its operation could not have been suspended.

The respondent had sought to raise an issue of waiver of his resignation. He claimed that he had decided to continue working for the appellants after the latter had "refused" to accept his resignation. The appellants did not refuse to accept his resignation as he claimed. They merely purported to suspend the resignation until certain matters were disposed of and considered him to be in their service until such matters ere settled.

[p.106]

In the relevant potions of his evidence dealing with his resignation, the respondent had said—

"……From the date of my resignation I did not work for the defendants except the two days I have mentioned when I went to the office at Kenema to settle discrepancies. ……. I was asked to reconsider my resignation and I replied no. As far as I was concerned I was not working anymore for the defendants until I received their letter refusing to accept my resignation.

"……They told me that they could not accept my resignation until I cleared the discrepancies on the radio Section in Kenema. I told them I would let them know in the afternoon …… I said to them I had resigned and so I never returned to them."

There is no evidence whatsoever of any mutual agreement between the appellants and the respondent to waive the latter's letter of resignation, and that being so, the resignation was effective as from 4th February 1976.

The appellants did not deduct a month's salary from the respondent's entitlements because they were under the belief that they had a right to keep him in their service until the alleged discrepancies were examined before honouring his resignation. Having kept him in their service after his resignation they paid him until his purported dismissal. Suppose there were no discrepancies and the respondent had resigned making the same request to the appellants to deduct a month's salary from his entitlements in lieu of notice and the appellants did not choose to deduct it from his entitlements, would that have rendered the resignation invalid? I do not think so.

[p.107]

Assuming for a moment that the respondent was in the service of the appellants at the time of his purported dismissal by the appellants, were they justified in so dismissing him? The evidence adduced at the trial fell into the following categories—

(a) goods alleged to have been ordered from to Choithram and Sons by the respondent which were unaccounted for in the appellants books and for which they subsequently paid (b) the unauthorised use chit for Le50.00 for an air ticket and (c) the acceptance of post dated cheques which were dishonoured and kept by him until the time of his purported dismissal. The matters complained of could be categorized as alleged acts of misconduct and disobedience what then is misconduct within the context of the law of Master and Servant? I find the following statement of the law in the 21st Edition of CHITTY ON CONTRACTS at page 549—

"Misconduct. If a servant be guilty of misconduct, he may be discharged without no notice before the expiration of the period for which he was hired, and he is not entitled to any wages preceding his discharge if they had not then accrued due. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. The general rule is that if the servant does anything which is incompatible with the due and faithful discharge of his duty to his master the latter has a right to dismiss him, even though the incompatible thing be done outside the service……"

Lord James of therefore in delivering the judgment of the Privy Council in CLOUSTON CO. V CORRY 1904 - 1907 All E.R. Reprint said at page 687 -

"The sufficiency of the justification depended upon the extent .of the misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal.

[p.108]

Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the express or implied conditions of service will justify dismissal……"

At page 5.50

"Disobedience: A servant may be dismissed if he willfully disobey any lawful order of his master."

The ground of dismissal must be specifically pleaded. The ease cited for this proposition in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS is Tomlinson V. L.M.S. Railway 1944 1 All E.R. 537. Like in Tomlinson's case misconduct and disobedience were not specifically pleaded by the appellants. As I had indicated earlier on, misconduct and disobedience are grounds for summary dismissal of a servant by his master under the proviso to Section 9 of the

Employers and Employed Act. No request for further and better particulars of what was relied on in Section 9 by the appellants as justifying the respondent's alleged dismissed, was made on the latter's behalf. Goddard L.J. who dealt with the issue in Tomlinson's case had said at page 541 of the report—

"……..Unfortunately nowadays enough attention is not given to pleadings……. to make it a good and proper pleading they ought to have alleged …… that the plaintiff had been guilty of exceptionally grave misconduct in which summary action by the management was justifiable.

[p.109]

However for the reasons pointed out by Lord Greene M.R. that becomes immaterial, because it was made clear at the outset that the Company were relying on the conduct as being exceptionally grave misconduct. No objection was taken at the trial on that ……..I still think the defence in order properly to raise this, ought to have alleged exceptionally grave misconduct and that summary action was justifiable."

Where a matter is required by the rules of pleading to be specially pleaded would failure on the part of the party who is expected to plead it fatal to the action? The rule governing such special pleas is Order 19 rule 15 of the English Practice with a corresponding provision in Order XVI rule 11 of the Rules of' the High Court of' Sierra Leone. In dealing with the question I have posed above, Buckley L.J. in Re Robinson's Settlement GANT V HOBBS 1912 1 Ch 717 explained the position thus—

"……..Order XIX rule 15 provides that the defendant must by his pleading do various things but it names no consequence if he does not do those things …… it applies to all cases' of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising from the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the court shall adjudicate upon the matter as if a ground valid in law did not exist ……. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party [p.110] to tell his opponent what he is coming to the court to prove; If he does not do that the court will deal with it in one of two ways. It may say that it is, not open to him, that he has not raise it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect

the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the part in mercy and the court will deal with him as is just……."

No objection was taken in this case that misconduct had not been specially pleaded. The evidence which each party wished to adduce was presented to the court. It is in that light that the matter has to be considered.

The appellants adduced evidence that the respondent had ordered goods from Messrs. T. Choithrams and Sons by telephone. The goods were supplied to the appellants but never passed through their books. The respondent's defence was that he had not ordered the goods from the Manager of Choithram. Mr. Balwani the Manager gave evidence of how the respondent had ordered the goods by telephone. He (the respondent) had reminded Mr. Balwani on the following day about the order he had put in on the previous day. Mr. Balwani said he knew the respondent's voice over the telephone. When the goods were not paid for, Mr. Balwani on the respondent's visit to his (Balwani's) office took the opportunity of requesting payment for them. The respondent assured him that the appellants would pay for them. The trial judge in dealing with the evidence on this issue had thought that the telephone conversation could have been made by someone else and not the respondent.

[p.111]

He overlooked the evidence relating to the discussion between the respondent and Mr. Balwani in the letter's office.

The next issue related to the unauthorized use of Le50 by the respondent in meeting the cost of his air passage to Freetown to tender his resignation.

The appellants had given the respondent written instructions regarding sales. The instructions are contained in a letter dated 2nd June 1973. The relevant portions state—

"…….we therefore draw your attention to the fact that no goods should be issued out on credit or suspense basis, payment upon delivery.

We wish to remind you as well, that no post dated cheques should be accepted without prior reference to the management and any bounced cheque have to be reported on the same date to the Manager Kenema Mineral Water Factory."

Contrary to the above instructions, the respondent received post dated cheque which had been paid in by customers and handed to him. Some of which were not honoured by the bank.

There was the case of Mr. Hedjazi. He had issued a cheque of Le578.GO for goods bought from the appellant's store. It was issued on 23rd January 1975. It was not honoured by the bank. The respondent kept it for six months. Hedjazi presumably had no funds to meet it. A fresh cheque was then issued by HedJazi for the same amount on 1st July 1975 and remained unpaid until the respondent's dismissal. Despite the dishonour of those cheques, the respondent received more post dated cheques from

Hedjazi which he paid into the Bank on 15th October, 14th December and 16th December 1975 respectively. It appears that those cheques were honoured. Two of those cheques were for Le100 and the third was for Le300.

[p.112]

The appellants conduct regarding the goods ordered from Choithram was such that no employer would have confidence in such an employee. His conduct was incompatible with the due and faithful discharge of his duties to his employer. Lord James in CLOUSTON'S CASE had spoken of an employee's terms of his contract of service as entitling his employer to dismiss hi. One of the implied terms of an employee's contact is that he shall act towards his employer with the fidelity and good faith.

As regards the ultimate acceptance of post dated cheques and the holding back of dishonoured cheques, the respondent was clearly disobedient to lawful orders issued by his employer, which I have already set out.

The acceptance of post dated cheques, and the holding back of dishonoured cheques would naturally impair the appellants' business especially o when goods have been given out on them. That would be injurious to the appellants, business. An employee who conducts himself in such a way as to injure his employer's business is liable to summary dismissal. (See Diamond on Master and Servant 2nd Edition at page 192). On this issue the appellants were justified in dismissing the respondent both for misconduct and disobedience.

I would hold that the respondent had no case against the appellants and his action ought to have been dismissed. I would uphold the appeal and enter an order of dismissal of the respondent's case in the High Court. I would also set aside the decision of the Court of Appeal.

Costs to the appellants.

I agree

Signed by Hon. Mr. Justice S. Beccles Davies J.S.C

I agree

Signed by Hon Mr. Justice C.A Harding, J.S.C

I agree

Signed by Hon. Mr. Justice O.B.R Tejan J.S.C

I agree

Signed by Hon. Mrs. Justice A. Awunor-Renner, J.S.C

CASES REFERRED TO

1. Riordan v. The War Office (1959) 3 All E.R. 552.

2. Decro-Wall International S.A. v. Practitioners in Marketing Ltd (1971) 1 W.L.R. 361 C.A. at P. 382

3. Harris & Russell Ltd, v. Slingsby (1973) 3 All E.R. 31 at p. 32

4. Riordan V. The War Office (supra) at pp. 557-558

5. Fawcett v. Cash 5 B & Ad. 904

6. Tomlinson v. L.M.S. Railway Co. (1944) 1 All E.R. 537 Goddard L.J.

7. Harris & Russel Ltd. v. Slingsby 1973 3 All E.R. 31 at page 32

8. Riodan v. War Office 1959 3 All E.R. 552

9. Clouston Co. v. Corry 1904 - 1907 All E.R.

10. Tomlinson V. L.M.S. Railway 1944 1 All E.R. 537.

JAMES ALLIE AND OTHERS V. THE STATE

[Misc. App. No. 3/81][p.10-22]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 24 FEBRUARY 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE.C.J. PRESIDING; MR. JUSTICE C.A. HARDING J.S.C; MR. JUSTICE O.B.R. TEJAN J.S.C.; MRS. JUSTICE A.V. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES; J.S.C

James Allie and Others v. The State

(Constitutional Reference)

Berthan Macauley Jr. for the 2nd Appellant

Tejan-Cole. D.P.P. for the State

Delivered on 24th day of February, 1982.

JUDGMENT

LIVESEY LUKE C.J.

This is a reference by the Court of Appeal under the provisions of Section 104(2) of the Constitution of Sierra Leone 1978. The questions of law referred by that Court to the Supreme Court for determination are in the following terms:—

"1. Should Section 103(1)(b) be read together with Section 108(2) of the Constitution of' Sierra Leone. 1978? If so, what effect would that have on the right or appellants who must have leave from the Court of Appeal to prosecute their appeals against sentence and conviction on the grounds of mixed law and, fact?

[p.11]

2. Do the provisions of Section 57 of the Courts Act No. 31 of 1965, conflict with the provisions of Section 108(2) of the Constitution? If so, are criminal forms 1, 2 and 3 of Appendix C of the Rules of the Court of Appeal, P.N. 28 of 1973 obsolete?

3. What extent does section 108 (2) of the constitution affect sections 56 and 57 of the courts Act 1965 and the Court of Appeal Rules?

4. Are all appeals from the High Court to the court of Appeal as of right having regard to section 108 (2) of the Constitution and Sections 56 and 57 of the courts act 1965?"

The court of Appeal considered it necessary to refer these questions to the Supreme Court as a result of certain submissions made by learned counsel for one of the appellants during the hearing by the Court of Appeal of appeal titled Cr. App. 15/80 James Allie and others v. The State. Learned Counsels submission was to the effect that in view of the provisions of section 103 (1) (b) and Section 108 (2) of the Constitution of Sierra Leone 1978 which he submitted should be read together, and Section 162 of the same Constitution, leave to appeal was no longer necessary to appeal from the High Court to the Court of Appeal against conviction (whatever the grounds of appeal) or sentence. Learned counsel later informed the court that he had reconsidered his submission and conceded that he had misconstrued Section 108 (2) of the [p.12] constitution. But the Court o£ Appeal insisted that the questions raised should be referred to the Supreme Court for determination as they were o£ the opinion that important points of law on the interpretation of the Constitution had arisen.

It would appear therefore that notwithstanding the concession of learned Counsel, the members of the Court were of the view that questions relating to the interpretation of the Constitution had arisen. In those circumstances they felt obliged, having regard to the provisions of Section 104(2) of the Constitution, to refer the above quoted questions to the Supreme Court for determination.

The Section of the Constitution empowering lower Courts to refer matters or questions to the Supreme Court for determination reads as follows:—

"104(1) The Supreme Court shall, save as otherwise provided in Sections 18 and 101 of this Constitution, have original jurisdiction, to the exclusion of all other Courts—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution; and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law or under this Constitution.

[p.13]

(2) Where any question relating to any matter or question as is referred to in the preceding subsection arises in any proceedings in any Court, other than the Supreme Court, that Court, shall stay the proceedings and refer the question of law involved to the Supreme Court for determination, and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

It is not necessary for present purposes to discuss all the circumstances in which a Court is obliged to refer a matter or question to the Supreme Court. But on a proper reading of sub-section (2) of Section 104, one thing is certain. And that is, that a Court, of its own motion, may refer a question to the Supreme Court for determination if it comes to the conclusion that a matter or question as is referred to in Section 104(1)(a) or (b) has arisen. It follows that the

reference need not be made on the application, or with the concurrence of the parties or their Counsel. The Court may act of its own motion, notwithstanding the objection of the parties or their Counsel.

Having said this, I shall now proceed to consider the questions raised seriatim.

Question 1

Two sections of the Constitution are referred to in this question, and it is necessary to set them out. Section 103, so far as relevant, reads:

[p.14]

"103(1) An appeal shall lie from a judgment, decree or order of the Court of Appeal to the Supreme Court—

(a) .....

(b) as of right in any criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment, decree or order of the High Court of Justice in the exercise of its original jurisdiction; or

(c) with the leave of the Court of appeal, in any other cause or matter, civil or criminal, where the Court of Appeal is satisfied that the case involves a substantial question of law or is of pub1ic importance"

Section 108, so far as relevant, reads:—

"108(2) Save as otherwise provided in this Constitution or any other law, an appeal shall lie as of right from a judgment, decree or order of the High Court of Justice to the Court of Appeal in any cause or matter determined by the High Court of Justice"

Quite clearly, Section 103 confers rights of appeal from the Court of Appeal to the Supreme Court, whilst Section 108 confers rights of appeal from the High Court to the Court of [p.15] Appeal. But whereas the right of appeal conferred by Section 10)(l)(b) is very wide in its scope, that conferred by Section 108(2) is more limited in its scope. It is relevant to recall what this Court said in its Ruling in The State v. Brima Daboh Misc. App. 1/79 delivered on 27th February, 1979 (as yet unreported). In the course of that ruling, I said inter alia—

"There is no doubt that Section 103(1)(b) of the Constitution of Sierra Leone, 1978 introduced far-reaching and indeed radical changes in the law relating to appeals from the Court of Appeal to the Supreme Court in criminal matters. Prior to the coming into operation of the 1978 Constitution, on the 14th June, 1978, there was no right of appeal as of right from the Court of Appeal to the Supreme Court in criminal matters tried in the High Court in its original jurisdiction except where the decision complained of involved questions as to the interpretation of the Constitution (see Section 70(1)(d) of the Courts Act, 1965) ……..

Without doubt, on the coming into operation of the 1978 Constitution, by virtue of Section 103(1)(b) thereof, there was an automatic right of appeal from the Court of Appeal to the Supreme Court in all criminal matters tried in the High Court in its original jurisdiction and no leave of the [p.16] court of Appeal or special leave of the Supreme Court is necessary. In all criminal cases decided in the High Court in the exercise or its original jurisdiction appeal lies as of right irrespective of whether the ease involves the interpretation of the Constitution or whether any question of general or public importance is involved. An appeal based solely on questions of act is now permissible as of right".

The Court of Appeal may have referred to Section 103 in formulating this question, because they considered it curious that the right of appeal to the intermediate appellate court should be more restricted than the right of appeal to the final appellate court. Parliament in its wisdom has countered a more restricted right of appeal in respect of appeals to the Court of Appeal than in respect of appeals to the Supreme Court. Ours is not to question why. Our duty is to interpret the Constitution and to apply it to any relevant situation that come before us as a Court. It may be said that the unrestricted right of appeal conferred by Section 103(1)(b) will leave the flood gates wide open to frivolous appeals to the Supreme Court. But the Justices constituting the Supreme Court should have sufficient sense and experience to know how to dispose of such appeals.

The fact that Section 103 confers a wider right of appeal should not be a factor to be taken into consideration in interpreting Section 108. The two sections (i.e. Sections 103 and 108) are separate and independent sections. There is no reason why they should be read together. The answer to the first question is therefore "No", and consequently the second part of the question does not arise.

[p.17]

Question 2

This question raises the issue of the effect of rights of appeal conferred by Section 108(2) of the Constitution on the rights of appeal conferred by Section 57 of the Courts Act, 1965. Section 57 of the Court. Act, 1965 (as amended) provides:

"57(1) A person convicted by or in the High Court may appeal to the Court of Appeal—

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Appeal against the sentence passed on his conviction; unless the sentence is one fixed by law; and

(d) against a finding of insanity where the Court has made a special finding under Section 73 of the Criminal Procedure Act, 1965.

[p.18]

(2) Any person aggrieved by the acquittal or discharge of an accused or defendant before the High Court may appeal to the Court of' Appeal against such acquittal or discharge:

Provided that no such appeal shall lie except on a question of law."

The question is whether the above-quoted provisions conflict 11th the provisions of Section 108(2) of the Constitution. That sub-section of the Constitution has been set out above. Admittedly, it states inter alia that "an appeal shall lie as of right from a judgment, decree or order of the High Court of Justice to the Court of Appeal in any cause or matter determined by the High Court of Justice." But that apparently unrestricted right of appeal is subject to a very important qualification which is embodied in the opening words of the sub-section, to wit "save as otherwise provided in this Constitution or any other law." It is not necessary to discuss the provision of the Constitution contemplated by the words "otherwise provided in this Constitution." I shall confine myself to the words "otherwise provided in ..... any other law." "Any other law in that context means any laws of Sierra Leone other than the Constitution of Sierra Leone 1978. The Constitution itself helpfully spells out what comprises the laws of Sierra Leone. Section 125of the Constitution provides inter alia:

"125(1) The laws of Sierra Leone shall comprise

(a) this Constitution

(b) enactments made by or under the authority of the Parliament established by this Constitution;

[p.19]

(c) any orders, Rules and Regulations made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;

(d) the existing law; and

(e) the common law

(2) The common law of Sierra Leone shall comprise the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the rules of customary law including those determined by the Superior Court of Judicature

(3) For the purpose of this Section, the expression "customary law" means the rules of law which by custom are applicable to particular communities in Sierra Leone.

(4) The existing law shall, save as otherwise provided in subsection (1) of this section, comprise the written and unwritten laws of Sierra Leone as they existed immediately before the date of the coming into force of this Constitution and any statutory instrument issued or made before that date which is to come into force on or after that date."

The Court. Act, 1965, having come into force on 6th October, 1965, was a written law of Sierra Leone existing immediately before the coming into force of the Constitution on 14th June, 1978.

[p.20]

Therefore section 57 of that Act is an existing law, and is consequently expressly saved by section 125(1)(d) of the Constitution, And since section 57 otherwise provides as regards rights of appeal from the High Court to the Court of Appeal, Section 108(2) of the Constitution must be read subject to section 57 of the Courts Act, 1965. In other words the right of appeal as of right apparently conferred by Section 108(2) of the Constitution is subject to the rights conferred by Section 57 of the Courts Act, 1965. So the present position is that a convicted person has a right of appeal to the Court of Appeal as of right only in cases where (1) the appeal i8 against conviction on any ground of appeal which involves a question of law alone (see S,7(1)(a) of the Courts Act, 1965) (ii) against a finding of insanity where the Court has made a special finding under Section 73 of the Criminal Procedure Act, 1965 (see S.57(1)(d) of the Courts Act, 1965). In the case of an appeal against conviction on any ground of appeal which involves a question or fact alone or a question of mixed law and fact or any other grounds which appears to the Court to be a sufficient ground of appeal, the convicted person can appeal only with the leave of the Court of Appeal or upon the certificate of the trial judge (see S.57(1)(b) of the Courts Act, 1965). And in the ease of appeals against sentence, the convicted person must obtain the leave of the Court of Appeal (see S.57(1)(c) of the Courts Act, 1965).

To sum up the position: The provisions of Section 57 of the Courts Act, 1965 do not conflict with the provisions of Section 108(2) of the Constitution. Section 125 of the Constitution expressly saved all existing laws including the Court. Act, 1965 and Section 57 thereof. The opening clause [p.21] of Section 108(2) of the Constitution expressly makes the provisions of that Section subject to the provisions of any

other law. Therefore Section 108(2) of the Constitution must be read subject to Section 7 of the Courts Act, 1965 which 15 an existing law.

Having regard to the foregoing, the answer to the second question is an unequivocal “No”.

Having answered the question in the negative, the second part of the question does not really arise. But for the avoidance of doubt, I shall answer it briefly. The Rules referred to are the Sierra Leone Court of Appeal Rules, 1973 which came into force on 3rd May, 1973. Those Rules were made by the Rules of Court Committee by virtue of powers conferred on that Committee by Section 40 of the Courts Act, 1965. Annexed to those Rules three appendices i.e. A, B & C. Appendix A sets the forms to be used in Civil matters. Appendix B sets out the fees to be paid in Civil matters. Appendix C sets out the forms to be used in Criminal matters. There is no doubt that the appendices form part of the Rules. Quite clearly those Rules were “Rules made by an authority pursuant to a power conferred in that behalf ..... by any other law.” Therefore Section 125(1) (c) of the Constitution recognizes them as comprising part o£ the laws of Sierra Leone. It follows that the Rules were saved by the 1978 Constitution and Section 108(2) of the Constitution should be read subject to them. In the circumstances the Rules including their appendices are very much alive and in force. They are not obsolete.

[p.22]

Question 3

Section 56 of the Court. Act, 1965 mentioned in this question relates to appeals to the Court of Appeal in Civil matter. This Reference arose in a Criminal matter. It seems to me therefore that the reference to Section 56 of the Courts Act, 1965 is irrelevant. Having disposed of the reference to Section 56, it is sufficient to say that the question, so far as it relates to Section 108 (2) of the Constitution and Section 57 of the Court Act, 1965 has already been answered in dealing with Question 2 above.

Question 4

Again the reference to Section 56 of the Courts Act, 1965 is irrelevant. For the reasons given above in answering Question 2, the answer to this question is “No”.

Decision accordingly.

Signed by Hon. Me. Justice E. Livesey Luke)

Chief Justice

I agree

Signed by (Hon Mr. Justice C.A. Harding J.S.C)

I agree

Signed by (Hon. Mr. Justice O.B.R. Tejan, J.S.C.)

I agree

Signed by Hon.Mrs.Justice A. Awunor-Renner.J.S.C

I agree

Signed by (Hon.Mr. Justice S. Beccles, Davies J.S.C)

CASES REFERRED TO

1. The State v. Brima Daboh Misc. App. 1/79

STATUTES REFERRED TO

1. Section 108 (2) of the constitution affect sections 56 and 57 of the courts Act 1965 and the Court of Appeal Rules.

2. section 103 (1) (b) and Section 108 (2) of the Constitution of Sierra Leone 1978

3. Section 73 of the Criminal Procedure Act, 1965.

4. Section 40 of the Courts Act, 1965

SAMUEL LOMBA AND THE STATE

[CRIMINAL APPEAL NO. 1/81][p.1-9]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 24 FEBRUARY 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE.C.J. PRESIDING; MR. JUSTICE C.A. HARDING J.S.C; MR. JUSTICE O.B.R. TEJAN J.S.C.; MRS. JUSTICE A.V. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES - J.S.C

BETWEEN:

SAMUEL LOMBA - APPELLANT

AND

THE STATE - RESPONDENT

CHARLES MARGAI, ESQ., for Appellant

N.D. TEJAN-COLE, ESQ., D.P.P. for Respondent

Delivered on 24th day of February, 1982.

JUDGMENT

BECCLES DAVIES, J,S.C.

The Appellant was first arraigned before the High Court in Bo on 5th February, 1979. He had been arraigned for the offence of murder. A jury had been empanelled and sworn to try him on 21st February, 1979. He was given in charge of the jury. Prosecuting Counsel called six witnesses, after which he applied to the trial judge on 2nd March, 1979 for an adjournment to the following sessions as he had encountered some difficulty in locating a vital witness for the prosecution. The trial judge granted the application with considerable reluctance.

The case was not tried at the immediately succeeding sessions. It was on 29th May, 1979, again adjourned to the succeeding sessions which were to commence on 18th September, 1979.

[p.2]

On 2nd October, 1979, during the currency of the September 1979 sessions, the appellant was again arraigned.

A fresh jury were empanelled, and he was given in their charge. Eight witnesses testified for the prosecution. Prosecuting Counsel then applied for an adjournment of the trial to the following sessions as his last witness was still in available. The trial judge granted the adjournment with the same reluctance he had expressed on the first occasion.

Then came the November sessions. The end of the road was in sight. The appellant was arraigned for the third time. The third jury were empanelled on 26th November 1979. The trial of' the appellant was gone through without any Impediment. The jury found the appellant not guilty of murder. He was however found guilty of manslaughter and sentenced to imprisonment for life.

The appellant presented appeals against his conviction and sentence respectively, to the Court of Appeal. Five grounds of appeal were before the Court of Appeal. The fifth ground emerged as a result of the Director of Public Prosecutions' intimation to the Court of his view that the third arraignment, trial and conviction of the appellant were a nullity. Counsel for the appellant in consequence of the Director of' Public Prosecutions' intimation to the Court formulated a ground of appeal in these terms—

“That the trial in the Court below was a nullity as the Court had no jurisdiction to entertain trial."

That was the only ground of appeal argued before that Court. Counsel for the appellant abandoned the other grounds and accepted before us that he had done so. The Court of Appeal [p.3] (Warne, Davies and Short JJ.A.) delivered a written judgment on the issue. Warne, J.A. in delivering the judgment of the Court had said—

"The jury sworn on the 21st February, 1979 was never discharged and as such the trial which commenced on that date was still pending.

In my view the Court had no jurisdiction to start a new trial with a fresh jury on the 18th September, 1979. This trial in law is a nullity.

The appeal therefore must needs succeed and the appeal is allowed.

However, the provision of 8.59(5) of Act No.31 of 1965 in my opinion is applicable. 5.59(5) states 'Where the Court of Appeal is of opinion that the proceedings in the trial court were a nullity, either through want of Jurisdiction or otherwise, the Court may order the appellant to be tried by a Court of competent jurisdiction.'

The Court will not order the appellant to be tried by a Court of competent jurisdiction because the trial which started on 21st February, 1979 is incomplete.

The appellant is remanded in 'custody." The appellant was dissatisfied with the last two paragraphs quoted above by which the Court of Appeal had ordered him to be remanded in custody, while declining to order his trial before a court of competent jurisdiction, because in their view, the trial of 21st February was still pending.

[p.4]

At the two trials preceding that at which the appellant was convicted, prosecuting counsel had experienced difficulty in securing the attendance of a vital witness for the prosecution. The presiding judge at those trials upon granting the application to an adjournment had ordered that the trial was "adjourned to next sessions". There was no order discharging the jury. It is an established rule that when an accused is put in charge of the jury, they must return a verdict unless they are discharged from giving a verdict by the trial. judge. (See R. v HEYES 1950 2 All E.R. 587).

The Court of Appeal had placed reliance on Section 181 of The Criminal Procedure Act 1965 in support of its view that the trial which commenced with a jury on 5th February, 1979 and was adjourned was still pending. Section 181 Provides—

"If a trial is adjourned, the jurors shall be required to attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial.

Reading that section in isolation would give the impression that when once a jury are empanelled and the accused is put in their charge, the trial can be adjourned from session to session for further hearing with the same jury until their delivery of a verdict. That however, is not correct, the statute has to be read as a whole in order to get the true intention of Parliament. There is a restriction imposed by the provisions of Section 162 and 165 of the same Act. They provide—

"162. Whenever it shall be necessary to form a panel of Jurors to serve at any session, the Sheriff in conjunction with an officer nominated by the Judge, shall cause the names [p.5] of the jurors in the list, resident at and near the district, to be written on separate cards or pieces of paper of equal size and placed in ballot boxes to be kept for that purpose, and shall draw from the said boxes such number of' names, as the Court may direct, of special jurors and common jurors to form a panel, and the cards or

slips so drawn shall thereupon be locked up in separate boxes until the whole of the names of' the jurors, except those who may have served at the last preceding session, shall be returned to the ballot boxes, and, when required the names shall be re-drawn in manner aforesaid." (Emphasis mine).

"165. The Sheriff before the sitting of any Court whereat a jury shall be necessary, shall on receiving from the Court a precept issue summonses requiring the attendance thereat of the persons so drawn as aforesaid from the ballot box, and every such summons shall be personally served upon, or left at the usual or last known place of residence of the person so summoned, two clear days, or such other time as the Court may direct, before the day appointed for the sitting of the Court." (Emphasis mine).

[p.6]

A Juror therefore cannot serve at any session immediately succeeding that at which he had previously served. His name would not appear at the formation of the panel for such subsequent sessions (S.162). No summons would consequently be issued to him under S. 165 summoning him to attend such sessions. Where it is desired to adjourn a trial in which they are summoned for service. By fiction of law the duration of a session (like an Assize) is one legal day divided into several natural days (See DOE V HERSEY 3 Wills. 274). The adjournments permissible under section 181 are intended to occur within a single session and not from session to session. If the trial cannot be concluded within a session, then, the jury should be discharged by the trial judge or any other judge sitting in his stead.

I have used the expression 'or any other judge sitting in his stead because of a reference which was made by counsel during the course of argument to a decision of the Court of Appeal. The decision was DAUDA KAMARA V THE STATE Cr. App. 5/76 (unreported) delivered on 22nd October, 1976. The point raised in that case was the same as in this appeal. The court had held that the jury had to be discharged by the judge before whom they had been empanelled before adjourning the hearing to the subsequent sessions and not the judge who presided over the subsequent sessions. The court had said—

"When Kutubu J. adjourned the case against the appellant to the next sessions of the court and ordered the appellant to be kept in custody he should there and then have discharged the jury as they had not given a verdict.

[p.7]

It was Kutubu J. who put the accused in charge of the jury and who should have in the circumstances discharged the jury and not the Judge before whom the Appellant was subsequently arraigned. This was an unfortunate mistake and in our view the trial was void ab initio. The Appellant ought not to have been arraigned a second time before Okoro-Idogu J. in the absence of a discharge of the Jury by Kutubu J. In our view there was no trial of the Appellant. There was certainly a mistrial. The proceedings before Okoro-Idogu were void ab initio."

It is not the judge who formally puts an accused in the charge of' the jury. It is the Registrar of the Court. The Registrar addresses them thus—

“Ladies and Gentleman of' the Jury, the accused is charged with the following offence(s) (here Indictment is read) Upon this Indictment, the Prisoner has been arraigned; And upon his arraignment, he has pleaded not guilty to the charge. Your duty therefore, is to listen carefully to the evidence that shall be adduced and enquire whether he be guilty or not guilty and give your true verdict thereon.”

The right to discharge the jury is not personal to a trial judge. Any judge of the High Court sitting in his stead could do it. To hold otherwise would cause untold inconvenience in the administration of' justice. Suppose a trial judge before whom an accused had been given in charge took ill. [p.8] Suddenly or died during the trial? If such a restricted view is taken on the subject, the only course open to the prosecution would be to enter a nolle prosequi against the accused, before a recommencement of the trial could be achieved .

Okoro-Idogu J. was right in discharging the jury at the sessions immediately following those at which they had served. The provisions of S. 162 had operated to relieve them of further service immediately the sessions at which they had served had ended. What the judge did in effect was to place on record that they had been discharged by reason of the operation of the provisions of S.162. In view of the foregoing, in my judgment, DAUDA KAMARA v THE STATE supra was wrongly decided and ought not to be followed. I would therefore overrule it.

Returning to the present appeal, I would hold that the trial judge should have discharged the jury on 2nd March, 1979 before adjourning the indictment to the following sessions. Trial judges would be well advised when they find that they cannot against the end of a session, complete cases (in which juries had been empanel led and accused persons put in their charge) to discharge the jury before adjourning to the following sessions. A note of such discharge being entered on the record. Now comes the crucial question. Does the failure or the judge to formally discharge the jury in those circumstances render the trial a nullity? I do not think so. I have referred to the provisions of Sections 162 and 165 of The Criminal Procedure Act 1965. The jury in consequence of those provisions were relieved of continuing with the trial at the immediately following sessions even if the vital witness had been traced. The point taken in this appeal is therefore untenable, because Section 162 by necessary implication had [p.9] operated to discharge the jury. Those persons who had formed the panel of that jury could not have been selected and summoned for service at the immediately succeeding sessions.

A fresh jury would have had to be empanelled as was eventually done in this case. The appellant's eventual trial and subsequent conviction on 3rd December, 1979 were not a nullity.

I would set aside the judgment of the Court of Appeal and substitute therefore an order dismissing the appeal in the Court of Appeal and in this Court.

(Hon. Mr. Justice S. Beccles Davies, JSC)

I agree

(Hon. Mr. Justice E. Livesey Luke)

Chief Justice

I agree

(Hon. Mr. Justice C. A. Harding, JSC)

I agree

(Hon. Mr. Justice O. B. R. Tejan, JSC)

I agree

(Hon. Mrs. Justice A. V. Awunor-Renner, JSC)

CASES REFERED TO

1. R. v Heyes 1950 2 All E.R. 587

2. Dauda Kamara v. The State Cr. App. 5/76 (unreported)

THE STATE V. AHMED S. D. TURAY & ORS.

[Sc. Cr. App. No.2/81][p.31-62]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 13 JULY 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J. PRESIDING;

MR. JUSTICE C.A. HARDING, J.S.C;

MRS. JUSTICE A.V. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

MR. JUSTICE K. E. O. During, J.A.

THE STATE - APPELLANT

Vs.

AHMED S. D. TURAY & ORS. - RESPONDENTS

Tejan Cole Esq., D.P.P. for the State

T.S. Johnson, Esq., for Respondents

JUDGMENT DELIVERED THIS 13TH DAY OF JULY, 1982

Livesey Luke, C. J.

On 29th March, 1978 the three respondents and two others were convicted by Mr. Justice C.S. Davies sitting as a Judge alone at the Freetown High Court on an Indictment containing eleven counts. It is not necessary to set out the counts in full. It will be sufficient to state their substance.

In Count 1, the 1st respondent (Ahmend Sankey Dian Turay), the 2nd respondent (Joseph Ngebeh Squire) and one Amadu Mohamed Conteh were charged with Larceny by a servant contrary to Section 17(2)a of the Larceny Act, 1916; and the particulars of offence alleged that on a day unknown between 21st August, 1975 and 20th September, 1975 at Newton Agricultural Station in the Ministry of Agriculture and Natural Resources they stole Le2159.19 belonging to the Republic of Sierra Leone.

In Count 2, the same person named in Count 1 were charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st September, 1975 and 20th October, 1975 and that the amount stolen was Le4214.43.

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In Count 3, the same person named in count 1 were charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st October, 1975 and 20th November, 1975 and that the amount stolen was Le3966,93.

In Count 4, the same persons named in Count 1 were charged with the same offence as in Count l, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st November, 1975 and 20th December, 1975 and that the amount stolen was Le4117.41.

In Count 5, the 1st respondent and one Evans Rashid Jobo Sama were charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st May, 1975 and 20th June, 1975 and that the amount stolen was Le4563.90.

In Count 6, the same persons named in Count 5 were again charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st June, 1975 and 20th July, 1975 and that the amount stolen was Le853.38.

In Count 7, the 1st respondent, the 2nd respondent and the 3rd respondent (Josephus Justice Davies) and Amadu Mohamed Conteh were charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st May, 1976 and 20th June 1976 and that the amount stolen was Le5463.81.

In Count 8, the same persons named in Count 7 were again charged with the same offence as in Count 1, the only difference being that in the Particulars of Offence it was alleged that the offence was committed between 21st Ju1y, 1976 and 20th August, 1976 and that the amount stolen was Le5116.31.

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In Count 9, the 1st respondent, the 2nd respondent, the 3rd respondent and Amadu Mohamed Conteh were charged with Falsification of Accounts contrary to Section 1 of the Falsification of Accounts Act, 1875; and the particulars alleged that on 8th June, 1976 at the Newton Agricultural Station they made or concurred in making a false Pay Sheet No.WR443/6/76 purporting to show that the sum of Le399.96 was due and payable as wages for the period 21st May, 1976 to 20th June, 1976 to certain named persons as employees of the Ministry of Agriculture and Natural Resources.

In Count 10, the 1st respondent and Evans Rashid Jobo Sarna were charged with the same offence as in Count 9, the only difference being that in the particulars of offence it was alleged that the offence was committed on or about 18th March, 1975, that the pay sheet alleged to have been falsified was given as No.WR425/J/75, that the amount involved was stated as Le665.28, that the period for which the wages were due and payable was stated as 21st February, 1975 to 20th March, 1975 and that the persons named as employees of the Ministry were different from those named in Count 9.

In Count 11, the 1st respondent and Evan Rashid Jobo Sama were charged with Conspiracy to Defraud and in the Particulars of Offence it was alleged that on divers days between 1st July, 1974 and 31st January, 1975 at Newton Agricultural Station they together with others unknown conspired with intent to defraud the Republic by the preparation of monthly Pay Sheets for fictitious employees.

The learned trial Judge found the 1st respondent Not Guilty as charged but Guilty of Obtaining Money by False Pretences in respect of Counts 1, 2, 3, 4, 5, 6, 7 and 8; and Guilty as charged in respect of Counts 9, 10 and 11. He found the 2nd respondent Not Guilty as charged but Guilty of Obtaining Money [p.34] by False Pretences in respect of Counts 1, 2,3,4,7 , and 8 and Guilty as charged in respect of Count 9. He found the 3rd respondent Not Guilty as Charge but Guilty of Obtaining Money by False Pretences in respect of Counts 7 and 8; and Guilty as charged in respect of Count 9. In respect of each conviction the learned judge imposed a punishment of a fine or imprisonment in default thereof. The three respondents appealed to the Court of Appeal against conviction In addition the 1st and the 3rd respondents appealed against sentence. The appeals were heard by the Court of Appeal (Tejan J.S.C., Warne and Short JJ.A.) in September, 1980. Judgment was delivered on 27th January, 1981. Three separate judgment were delivered. The main judgment was delivered by Tejan .J.S.C. and Warne J. A. concurred with him adding a few observations of his own. All three Justices were in agreement in allowing the appeal of the 1st respondent against conviction. Tejan J.S.C. and Warne J.A. allowed the appeals of the 2nd and the 3rd respondents against conviction, whilst Short J.A. dismissed their appeals. In the result the appeals of all the three respondents were allowed and their convictions were quashed. It is against that decision that the State has appealed to this Court. Seven grounds of appeal were filed by the Director of Public Prosecutions on behalf of the State. The main issue raised in this appeal may be summarized thus:

(i) Whether there is any obligation on a trial judge sitting without a jury to warn himself that the oral or written statement of one accused person is not evidence against a co-accused.

[p.35]

(ii) In what circumstances are a challenged oral or written confession by an accused person admissible in evidence at a trial?

(iii)What is the standard of proof to be applied in deciding on the admissibility of a confession statement?

(iv) If the confession of the 1st respondent was not properly admitted in evidence at the trial, what is the effect?

(v) Was there any circumstance that rendered the trial unfair or unsatisfactory?

The question whether the proper verdicts on Counts 1 to 8 should have been Larceny as charged was not raised before us. So it is not necessary to deal with it.

With regard to the first issue formulated above, Tejan J.S.C. stated in several parts of his judgment that there was an obligation on the trial judge to warn himself that the statement of an accused person not on oath was not evidence against a co-accused. He went further to state that where a judge had failed to give himself such a warning, a conviction will be quashed. Mr. Tejan-Cole submitted that there is no rule of law or practice that imposed such an obligation on a trial judge sitting alone. I am myself at a complete loss to find any authority to support the propositions of the learned Justice. He relied on four cases, namely R v. Gunewardene(1951) 35 Cr. App. R.80, R v Rhodes(1959) 44 Cr. App. R.23, R v. Bowen (1972) Crim. L.R. 312 and R v. Rogers and Tarran (1971) Crim. L.R. 413.

There is no doubt that it is a fundamental rule of evidence that statements made by one accused person either to the police or to others (other than statements, whether in the presence or absence of a co-accused, made in the course and [p.36] pursuance of a joint criminal enterprise to which the co-accused was a party) are not evidence against a co-accused unless the co-accused either expressly or by implication adopts the statements and thereby makes them his own: See R v. Rudd (1948) 32 Cr App. 138. And it has repeatedly been said by the Courts not only in England but also in this and other Commonwealth jurisdictions that it is the duty of the judge to impress on the jury that the statement of one accused person not made on oath in the course of the trial (and not falling within any other recognised exception) is not evidence against a co-accused and must be entirely disregarded: See R v. Gunewardene (1951) 35 Cr. App. R.80, a decision of the English Court of Criminal Appea1, where Lord Goddard L.C.J. said inter alia at P.91. "If no separate trial is ordered, it is the duty of the Judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded."

I shall now refer briefly to the other cases relied on by the Learned Justice. In R v. Rhodes (1959) 44 Cr. App. R. 23 the appellant was indicted and tried together with a man named named Mills of Burglary and Larceny. It was not disputed that they were together during the whole of the material time. A substantial part of the case against Mills consisted of a statement implicating the appellant which Mills was alleged to have made and which Mills denied having made. The Chairman, after warning the jury that the statement could not be evidence against the appellant invited the jury first to consider the case against Mills in the light of his alleged admission and then, if they convicted Mills to consider the case

against the appellant on the footing that the two men were together at the material time. It was held by the English Court of Criminal [p.37] Appeal that by the way in which he invited the jury to consider the case against the appellant, the Chairman Was, for all practical purposes, negativing and nullifying his previous warning that Mill's alleged admission was not evidence against the appellant.

R v. Bowen (1972) Crim. L.R. 312 was a case where one of the accused persons changed his plea to Guilty at the end of the prosecution's case. The judge did not ask the jury to return a verdict on him at that stage. The accused who changed his plea had made a number o£ statements admitting his guilt and implicating his co-defendants and copies had gone to the jury during the prosecution case. In his summing up the judge used the Statements of the accused who had changed his plea extensively to fill in the background of the case, and also to fix the date of the offence which according to the statement's had taken place on a Saturday, though he repeatedly warned the jury that they were not evidence against the other accused persons. The main point of the appellant's defence was that there was no admissible evidence as to the time of the offence. It was held by the English Court of Appeal (Criminal Division) that it was not open to use the statements as he did. So although the Judge gave the jury the requisite warning he was at the same time directing them to use the statement o£ one accused person against another, thereby nullifying his previous warning.

R v. Rogers and Tarran (1971) Crim. L.R. 413 was a case on which Crichton J. sitting at the Mold Assizes ruled against the admissibility o£ a confession statement of one accused person in a joint trial on the ground that its prejudicial effect against the co-accused outweighed its probative value against its maker. In the course of his ruling the learned Judge acknowledged that the statement was not evidence against [p.38] the other accused person. But otherwise the case is irrelevant to the issue under consideration.

Admittedly, all the cases relied on by the learned justice acknowledged the fundamental rule stated above to the effect that the statement of one accused person is not evidence against a co-accused. The first three cases also acknowledge the duty of a trial judge to explain and impress that rule upon the jury. But with respect to the learned justice, none of the cases lays down any rule that a judge sitting alone should impress that rule upon himself. It is perhaps relevant to note that all the cases relied on by the learned justice were cases of trial by jury. There are many good reasons why it is necessary to impress the rule upon juries. Apart from being laymen, jurors do not give reasons for their verdicts. So it is not possible to know whether the jury has taken into consideration the statement of one accused person to convict a co-accused. But in the case of a judge sitting alone, the position is different. He gives reasons for his decision. And it could be ascertained by a perusal of his judgment whether he relied on the stamen of one accused person in convicting a co-accused. And if it is ascertained that a judge sitting alone so relied on a statement of an accused person, that irregularity can be remedied by an appellate court. But in the case of a jury, if inspite of a proper direction against relying on the statement of the accused against a co-accused, they still relied on such a statement in convicting a co-accused, an appellate court would be in the dark. In my judgment, the learned justice’s proposition of law on this issue is not supported by any authority and in any case is wrong in principle.

[p.39]

It is relevant to state that the learned Justice mentioned briefly in his lengthy judgment that the learned Judge “in effect made use of the unsworn statement of each appellant against the others." Unfortunately the learned Justice did not substantiate that accusation. I have carefully read the judgment of' the trial Judge and I have not been able to find any material to support that accusation. In my judgment therefore, the judgment of the learned trial Judge cannot be faulted on the ground that he relied on the statement of one of the accused persons tried by him in convicting any of the co-accused, including any of the respondents.

I shall now proceed to consider the issues relating to the admissibility of a confession statement. It has long been an established rule of English Law that to render a confession by an accused person admissible at his trial the confession must be proved by the prosecution to be voluntary in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The rule was stated by Cave J. in Reg. v. Thompson (1893) 2 Q.B. 12 at p.15 in these terms:—

"By that law [i.e the Law of England], to be admissible, a confession must be free and Voluntary……. If it flows from hope or fear, excited by a person in authority, it is inadmissible.”

That rule has been stated and restated over the years by the English Courts and has been transported from English soil and transplanted in many Commonwealth countries allover the globe, where, in most cases, it has taken firm root. In this connection, it is not surprising that the most classic statement of the rule was made by the Privy Council in an appeal from a British Colony. That appeal, Ibrahim v. R(1914) A.C.599, was from the judgment of the Supreme Court of the Colony of Hong Kong.

[p.40]

In the celebrated judgment of the Board, delivered by Lord. Sumner he said inter alia at pp. 609-610:—

“It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.”

That statement of the Law has been approved and applied by the House of Lords and other English Courts in innumerable cases since 1914: some commissoner of Customs and Excise v. Harz & anor (1967) 1 A.C. 760 C.C.A & H.L D.P.P v. Ping Lin (1975)3 W. L. R. 410 C.A H.L and Reg. v. Rennie (1982) 1. W.L.R. 64. C.A. The Privy Council also has repeated and applied that statement in many appeals from all over the Commonwealth: see Sparks v. The Queen (1964) A.C. 964 P.C an appeal from Berumuda; Chan Wei Keung v. The Queen (1967) 2. W. L.R. 552 P.C. an appeal from Hong kong; Ragho Prasad v. The Queen (1981) W.L.R. 469 P.C, an appeal from Fiji; and Ajodha v. The State (1981) 3 W.L.R. 1 P.C., an appeal from Trinidad and Tobago. I think that the judgment of the Board in the last case cited is very instructive and I commend it to trial judges in this jurisdiction.

Where the admissibility of a statement is challenged on the ground that it was not made voluntarily, it is the duty of the judge to determine that issue. The proper course is for the judge to hold a trial within a trial (or voir dire) to try the issue. The burden is on the prosecution to prove that the [p.41] statement was voluntary. The prosecution should normally call all the material witnesses relevant to the making of the statement. The accused may give evidence if he so desire and call witnesses. The trial within a trial is normally held in the absence of the jury. After the conclusion of the evidence, the judge should rule on the admissibility of the statement in the absence of the jury, if they had been previously excluded. It should be emphasised that it is the duty of the judge to decide on the admissibility of an impugned statement.

He cannot abdicate that duty to the jury: See R v. Francis Murphy (1959) 43 Cr. App. R. 174, Sharp v. The Queen (supra) and N'Doinje v. Reg (1967-68) A.L.R. (S.L.) 202. Once the statement has been admitted in evidence then the question of its probative value is for the jury: See Chan wei Keung v. The Queen (1967) 2 W.L.R. 552. Therefore after the statement has been admitted, the defence is entitled to cross-examine who had already given evidence on the voir dire as to the circumstances in which the statement was made: R v. Murray (1951) 1 K.B 391.

I shall now turn to the question of the standard of proof required to prove a confession statement at the voir dire. In R v. Thoropson (supra) Cave J. said inter alia:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford the Magistrate a simple test by which the admissibility of a confession may be decided. They have to ask: Is it proved affirmatively that the confession was free and voluntary……..……..? …… it was incumbent on the prosecution to prove whether any …… before the Magistrate could properly be satisfied that the confession was free and voluntary."

[p.42]

In recent years the English Courts have held that standard of proof on the prosecution is beyond reasonable doubt: See R v. Satori (1961) Crim. L.R. 397, R v. McLintock (1962) Crim. L.R. 549 C.C.A. And more recently certain dicta of some of their Lordships in the House of Lords have lent support to that view. In D.P.P. v Ping Lin (supra) Lord Hailsham said inter alia at p. 436:—

"The question raised was as to the admissibility of a significant part of it, and this in turn depends upon the application of the well known rule, peculiar to English Law and its derivative systems, that to be admissible, confessions, however convincing must be voluntary in the sense that the prosecution must prove, and prove beyond reasonable doubt, in the classical words of Lord Sumner in Ibrahim v. The King." [Emphasis mine]

And Lord Kilbradon said inter alia at p. 442:—

“On the second part, if what was said may have been regarded (and acted upon) by the accused as an inducement to confess, the Crown have failed to discharge the burden of showing beyond reasonable doubt that the confession was not induced by what was said.” [Emphasis mine].

But the Australian Courts have rejected that view. They have advanced very attractive arguments to the effect that the proper standard of proof required to prove a confession statement is proof on the balance of probabilities: See Wendo v. R (1964) 109 C.L.R. 559, a decision of the High Court of Australia.

[p.43]

This Court is of course not bound by the decision of the English or Australian Courts. They are only of persuasive authority. We shall have to make up our minds as to what standard of proof is required in our own jurisdiction. The Court of Appeal said that the standard was proof beyond reasonable doubt. Counsel on both sides before us argued the assumption that that was the right standard. Not having had the benefit of argument of Counsel on the issue, I do not consider it advisable for us to express any concluded views on such an important matter. I think that for the purposes of is appeal, we should assume that the proper test is proof beyond reasonable doubt. So the question is whether the learned trial Judge applied the standard of proof beyond reasonable doubt in deciding to admit the confession statement of the 1st respondent (Ex. R). It was held by the Court of Appeal that the trial judge did not apply that standard of proof. Admittedly the learned judge did not use the words “beyond reasonable doubt” throughout his ruling. After reviewing the evidence, he concluded his Ruling thus:—

“For many reasons which I don’t find necessary to spell out I could not believe the evidence of the accused. As stated earlier I believe the prosecution witness and find that they have proved to my satisfaction their allegation that the statement was voluntarily made. The objection is over-ruled and the statement will be admitted in evidence.”

In my opinion merely because the learned Judge failed to use the words “beyond reasonable doubt” does not mean that he did not apply that standard. There is no magic in those words. [p.44] The important thing is that on a consideration of the Ruling as a whole an appellate court must come to the conclusion that the judge applied the right standard. In R v. Summer (1953) 36 Cr. App. R. 14 Lord Goddard L.C.J. said inter alia at p.15

“It is far better, instead of using the words "reasonable doubt", and then trying to explain what is a reasonable doubt, to direct a jury: “You must not convict unless you are satisfied by the evidence that the offence has been committed. “…… I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner.”

See also R v. Hepworth and Fearnley (1955) 39 Cr. App. R. 152. In Sparks v. Tl1e Queen (supra) Lord Morris said inter alia at p.982:—

“Unless it was shown to the satisfaction of the judge that the statements were voluntary (in the sense referred to by Lord Summer) he could not admit them.” [Emphasis mine].

As I said earlier the English Courts have accepted the beyond reasonable doubt standard on this issue. It will be useful to quote from some of the speeches in D.P.P. v. Ping Lin (supra), a decision of the house of Lords. Lord Morris said inter alia at p. 433:—

"In the circumstances posed a judge must decide whether the prosecution have shown that a statement was voluntary. His decision will generally be one of fact."

And Lord Salmon :said inter alia at p. 444:[p.45]

"It follows that a judge may allow evidence of an alleged confession or statement by an accused to go before the jury only if he is satisfied that the confession or statement has not been obtained in contravention of the principle laid down in the authorities to which I have referred
.....

……

He has to weigh up the evidence and decide whether he is satisfied that no person in authority has obtained the confession or Statement …….. If the judge is so satisfied, he may admit evidence of the confession or statement. If he is not so satisfied he must exclude it."

[Emphasis mine]

In my opinion therefore the fact that the judge said that the voluntariness of the statement had been proved to his satisfaction, does not mean that the proof was not "beyond reasonable doubt or that he was not sure. The Ruling has to be looked at as a whole. The objection of the 1st respondent to the admissibility of the statement was that hope was held out to him by a C.I.D. Officer that he would be used as a witness for the prosecution in a case against one Roach, the 1st respondent's Head of Department then under investigation. In his evidence during the trial within a trial the 1st respondent deposed in effect that he was threatened that if he did not make a statement, he would not be allowed to go home. In his Ruling, after narrating the evidence led by the prosecution and the 1st respondent, the learned Judge said inter alia:—

[p.46]

"It is from all the evidence that I have to decide whether the prosecution have demonstrated that their allegation that the statement was voluntarily made is true ……..

……..

I feel I am bound to look at the entire evidence and if I see any evidence which if believed would render the statement involuntary I am so bound to declare. The point really is, has the prosecution demonstrated by their evidence that their allegation is true?"

He then commented adversely on the demeanour of the 1st respondent as a witness and added that his evidence was demonstrably untrue. Finally he came to the conclusion previously quoted, that he did not

believe the evidence of the accused, that he believed the evidence of the prosecution witnesses and that he was satisfied that the statement was voluntary. In my opinion the learned Judge left no room for doubt about his belief that the 1st respondent was lying when he said that hope was held out to him and that he was threatened, or about his belief that the statement was voluntary. On the simple and straightforward issue before him he was saying in effect that he was sure that the prosecution witnesses spoke the truth about the voluntariness of the statement, that the 1st respondent lied when he said that hope was held out to him and that he was threatened and that the statement was not voluntary. It follows that in my opinion, and 6peaking for myself, that the learned Judge properly and rightly ruled that the confession statement of the 1st respondent (Ex "R") was admissible in evidence. In conclusion I respectfully quote the words of Lord Lane O.J. in Regina v. Rennie (supra) at P. 70:—

[p.47]

“The person best able to get the flavour and effect of the circumstances in which the confession was made is the trial judge, and his findings of fact and reasoning are entitled to as much respect as those of any judge of first instance.”

But let us assume that the confession statement of the 1st respondent was wrongly admitted in evidence and therefore is not evidence against him. The question then arises: Was there other admissible evidence against the 1st respondent to warrant his conviction? The Court of Appeal said there was none except in the words of Tejan J.S.C. "simply a repetition of his statement [to the police Ex. “R”] by P.W.l and P.W.2 [The police witnesses].” But is that so? Nr. Tejan-Cole has submitted that there was overwhelming evidence against the 1st respondent even if his confession statement Ex. R is ignored. I shall now examine the evidence to determine whether Mr. Tejan-Cole's submission has any substance.

The case for the prosecution was that at the material time the respondents were all civil servants attached to the Newton Agricultural Station of the Ministry of Agriculture and Natural Resources. The 1st respondent was Principal Agricultural Officer and Assistant Chief Agriculturist, the 2nd respondent was Chief, Clerk and the 3rd respondent was an Acting Agricultural Officer. A large number of daily waged workers was employed by the Ministry of Agriculture and Natural, Resources and attached to various sections (five in all) under the Newton Agricultural Station. The workers were paid monthly. The names of the workers were entered in a Roll Call book in respect of each section (Exs. J1-5). Time Sheets were kept for each section to record the attendance of the workers for the relevant period of each working month. The name of each [p.48] worker, his designation, his attendance, the total number of days worked, his rate of pay and date of engagement were entered on the Time Sheet. At the bottom of each Time Sheet there was the following certificate “I certify that each of the employees listed above has been employed in the capacity stated for the dates shown against his name” and signed by the Time Keeper and the Officer in Charge of the Station. It would appear that the working month at each section for payment of wages purposes commenced on 21st of each calendar month and ended on the 20th of the next calendar month.

On the basis of the entries on the Time Sheet a Pay Sheet (or Payment Voucher) was prepared in respect of each section under the Station, The following particulars were entered on the Pay Sheets: The name

of the worker: his designation, his daily rate of pay, number of days worked~ normal wages, gross wages (including overtime), net wages payable and the total of the wages payable to all the workers listed. At the bottom of each Pay Sheet there were two certificates headed "A" and "B". Certificate “A” reads as follows:—

“I certify that the above-named employees (with the exception of those shown as unclaimed) were this day paid by me and that all deductions and unclaimed wages have been brought to account under Receipt Voucher.”

This certificate should be dated, signed by the Paying Officer and witnessed after the wages have been paid. Certificate "B" reads as follows:—

“The gross expenditure of Le ..... was incurred against the authority of D.W. No ..... and will not cause any excess expenditure.”

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This certificate should be dated and signed by officer in Charge of the station.

After the preparation of the Pay Sheet and after the Officer in Charge had signed it, it was forwarded together with the relevant Time Sheet and other relevant documents to the Headquarters of the Ministry in Freetown and presented to the Accounts Section for processing. The officers at the Accounts Section checked the various entry on the documents presented to them and if satisfied passed the Pay Sheet for payment. A cheque was then prepared for the total of the various amounts on all the Pay Sheets presented for the month. The cheque was made payable to the Principal Agricultural Officer, drawn on the Bank or Sierra Leone and signed by the Accountant and other responsible officer in the Ministry. The cheque was then taken to the Bank of Sierra Leone and cashed after it had been endorsed for payment. The cash was then taken to the Station where the workers employed in the various sections were paid. Each worker on receiving his wages signed or affixed his thumb print at the back of the Pay Sheet to acknowledge receipt of his wages. After completion of payment. the Paying Officer completed and signed Certificate "A" on the Pay Sheet.

Between July 1974 and August 1976 fake Time Sheets were prepared in respect of fictitious workers who were not employed in any of the Sections under the Station and whose names did not appear on the Roll Call Book for any Section. The entries on the fake Time Sheets were then entered on fake Pay Sheets claiming payment in respect of the fictitious workers. The requisite Certificates "B" were duly signed by the Officer in Charge of the Station. The fake Pay Sheets and the fake Time Sheets were then presented to the Ministry in Freetown together with genuine Pay Sheets and Time Sheets. A cheque [p.50] for the total amount stated in all the Pay Sheets (genuine and fake) was prepared signed and made payable to Principal Agricultural Officer. The cheque was cashed at the Bank of Sierra Leone. Part of the cash received from the Bank of Sierra Leone was used to pay the genuine workers and the surpluses (consisting of the amounts claimed in respect of the fictitious workers) were not paid back to the Ministry but were misappropriated.

This in brief, according to the admissible evidence led by the prosecution, was the racket that operated at the Newton Station during the period relevant to the Indictment.

What then was the evidence (if any) against the 1st respondent? I shall answer this question in respect of each Count in turn.

Count 1 - The Pay Sheets for the working month 21st August 1975 to 20th September 1975 called for Le11,084.55. Among them were three Pay Sheets namely Ex. A1 for Le708.84, Ex. A2 for Le701.91 and A5 for Le748.44 totaling Le2159.19. Certificate "B" on each of those three Pay Sheets was signed by the 1st respondent, in his capacity as Officer in Charge of the Station. The relevant supporting Time Sheets were certified by the 1st respondent and the Time Keeper in the following terms:—

"I certify that each of the employees listed above has been employed in the capacity stated for the dates shown against his name."

But in fact the names of the workers entered on the three Pay Sheets and their supporting Time Sheets did not appear on any of the relevant Roll Call Books. Mr. Harleston (P.W.6), a Principal Auditor, said in evidence that the 1st respondent was the Vote Controller of the Station, and as such he was in charge of the Vote Service Ledger (Exs. K1 & K2). He said that [p.51] the amounts on the Pay Sheets should be entered on the. Vote Service Ledger. He said that the amounts in respect or the three Pay Sheets were not entered on the Vote Service Ledger. All the Pay Sheets for that month (including the three referred to above i.e. Exs. A1, A2 & A5) together with the supporting Time Sheets and other relevant documents were presented to the Accounts Section of the Ministry in Freetown. In due course a cheque was prepared and signed by the responsible officers.

The cheque was dated 23rd September, 1975, drawn on the Bank of Sierra Leone for Le11.084.55 and made payable to the "Principal Agricultural Officer Newton." The cheque was endorsed for payment by Mrs. Webber, (P.W.5) the Sub-Accountant at the Ministry on behalf of the Principal Agricultural officer, Newton. She said that she made that and other endorsements at the request of the 1st respondent and the learned trial Judge accepted her evidence. The cheque was cashed at the Bank of Sierra Leone Payment or the workers was effected on 24th September? 1975. According to Certificate "A" on the three Pay Sheets (Exs A1, A2 & A5) the workers listed therein were alleged to have been paid a total of Le2159.19 on 24th September, 1975. As stated earlier the workers listed in the three Pay Sheets were fictitious. The clear inference therefore is that the monies claimed and received in respect of those fictitious workers were misappropriated. The irresistible conclusion therefore is that the 1st respondent signed a certificate falsely certifying that the workers listed on the three Time Sheets were employed during the relevant period, falsely signed Certificate "B" on the three Pay Sheets and concurred in presenting those documents to the Ministry falsely representing that the workers listed in the three Pay Sheets and the supporting Time Sheets were employed in one of the Sections under the Station.

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Acting on that false representation, the responsible officers issued a cheque for a total of Le11,084.55 which included the sum of Le2159.19 claimed in respect of the three Pay Sheets. Thereby the sum of

Le11,084.55 was paid by the Bank of Sierra Leone for and on behalf of the Ministry, and the sum of Le2159.19 misappropriated. Clearly on the evidence the 1st respondent actively participated in making the false representation and concurred in fraudulently appropriating the sum of Le2159.19c.

The evidence in support of Counts 2 to 8 was to the same effect. So it is not necessary to discuss it in any detail. It will be sufficient to highlight certain pieces of evidence in respect of each Count.

Count 2 - The fake Time Sheets were certified by the 1st respondent. The fake Pay Sheets (Exs. B1, B2, B3 & B4) were also certified by him. The total amount claimed on those four Pay Sheets was Le4214.43. The cheque dated 23rd October, 1975 was made payable to the Assistant Chief Agriculturist III and was for Le11,056.35 (Ex. AA2). The cheque was endorsed by the 1st respondent and cashed at the Bank of Sierra Leone. Payment of workers was certified on the four Pay Sheets as having been effected on 24th October, 1975.

Count 3 - The fake Time Sheets were certified by the 1st respondont. The fake Pay Sheets (Exs. C1, C2, C3, C4) were also certified by him. The total amount claimed on those four Pay Sheets was Le3966.93. The cheque dated 26th November, 1975 was made payable to the Principal Agricultural Officer, Newton and was for Le12,206.05 (Ex. AA3). The cheque was endorsed by Mrs. Webber “for the Principal Agricultural Officer Newton.” It was cashed at the Bank of Sierra Leone. Payment of workers was certified on the four Pay Sheets to have been effected on 26th November, 1975.

[p.53]

Count 4 – The fake Time Sheets were certified by the 1st respondent. The fake Pay Sheets (Exs. Dl, D2, DJ & D4) were also certified by him. The total amount claimed on those four Pay Sheets was Le4117.41. The cheque was dated 24th December, 1975, made payable to the "P.A.O. Newton" and was for Le14,150.86 (Ex. AA4). The cheque was endorsed by the 1st respondent and it was cashed at the Bank of Sierra Leone. Payment of workers was certified on the four Pay Sheets as having been effected on 24th December, 1975.

Count 5 - The fake Time Sheets were certified by the 1st respondent. The fake Pay Sheets (Exs. El, E2, E3 & E4) were also certified by him. The total amount claimed on the four Pay Sheets was L4563.90. The cheque was dated 24th June, 1975, made payable to the Principal Officer Newton" and was for Le14,742.18 (Ex& AA5). The cheque was endorsed by the 1st respondent and it was cashed at the Bank of Sierra Leone. Payment of the workers was certified on the four Pay Sheets by the 1st respondent himself as having been effected, but no date is stated.

Count 6 - Only one fake Time Sheet and one fake Pay Sheet are involved. The Time Sheet is Certified by the 1st respondent. The amount claimed in the Pay Sheet (Ex. F1) is Le853.38. The cheque was dated 25th July, 1975, made payable to the “Principal Agricultural Officer Newton” and was for Le13,164.14. It was endorsed by Mrs. Webber on 25th July, 1975 for principal Agriculture Officer Newton.” The date payment of workers was effected is not stated on the Pay Sheet. The paying officer did not sign the certificate, but a witness to the payment signed.

Count 7 - The fake Time Sheets were not certified by the 1st respondent. But the fake Pay Sheets (Exs. G1, G2, G3, G4 & G5) were certified by him. The total amount claimed on those five [p.54] Pay Sheets was Le5463.81. The cheque was dated 22nd June, 1976 made payable to the Principal Agriculture Officer Newton" and was for Le15,390.83 (Ex. AA7). The cheque was endorsed by the 1st respondent and it was cashed at the Bank of Sierra Leone. Payment of the workers was certified on the five Pay Sheets as having been effected. But the date of payment is stated on only two Pay Sheets (i.e. Exs. G4 & G5) as 24th June, 1976.

Count 8 The fake Time Sheets were not certified by the 1st respondent. But the fake Pay Sheets (Exs. H1, H2, H) & H4) were certified by him. The total amount claimed on those four Pay Sheets was Le5116.37. The cheque was dated 23rd August, 1976, made payable to the "Principal Agriculture Officer Newton" and was for Le·13,809.69 (Ex. AA9). The cheque was endorsed by the 1st respondent and it was cashed at the Bank of Sierra Leone. Payment of the workers was certified on the four Pay Sheets as having been effected on 27th August, 1976.

Count 9 - This count relates to Pay Sheet WR.44/6/76 (Ex.G1). According to the evidence already referred to, the entries thereon, including the amounts entered as wages due workers who were alleged to have worked at the Newton Poultry Station, were clearly false. The Pay Sheet was certified by the 1st respondent. On this evidence the reasonable inference could be drawn that he made or concurred in making the false entries on the Pay Sheet with intent to defraud the Republic of the sum of Le399.96 (i.e. the total amount entered on the Pay Sheet).

Count 10 - This count relates to Pay Sheet No. WR.425/3/75 (Ex. F2). The total amount claimed therein in respect of fictitious workers listed therein is Le665.28. It was certified by the 1st respondent on 18th March, 1975. A cheque dated 21st March, 1975 for Le12,823.87 was made payable to “P.A.O. Newton.” The cheque was endorsed by the 1st respondent and it was cashed at the Bank of Sierra Leone. From this [p.55] evidence it could reasonably be inferred that the 1st respondent made or concurred in making the false entries and with intent to defraud the Republic of the sum of Le665.28.

Count 11 - According to the judgment of the trial Judge the evidence relied on by the prosecution to prove this count is the confession statements of the two accused persons i.e. Ex. R in the case of the 1st respondent and Ex. S in the case of the other accused. And that was the evidence relied on by the trial Judge in convicting the 1st respondent. But since I am assuming in this part of my judgment that Ex. R was wrongfully admitted in evidence, it means that there is no other evidence to warrant the conviction on this count. In the circumstances I would dismiss the appeal on this count.

It is of interest to note that the 1st respondent made a cautioned statement on the 12th January, 1977 after he had been charged. The statement was tendered and admitted in evidence without any objection by or on behalf' of the 1st respondent (Ex.T). And no suggestion was made at the trial or since then that that statement was not a voluntary statement. The statement reads:—

“I rely on my previous statement made to the police on Monday 10th January, 1977 at 1606 hours.”

The previous statement mentioned in Ex. T was EX. “R” the impugned statement.

I propose to base my conclusion on the evidence against the 1st respondent as analysed above, excluding the contents of the two statements (Ex. R & Ex. T) from my consideration.

On that basis, the evidence against the 1st respondent on each of Counts 1 to 10 was, in my judgment, clear and overwhelming and that the only reasonable verdict that a jury properly directed, or a judge properly directing himself would have arrived at one of' Guilty on each of those counts.

[p.56]

I shall now turn to the appeals against the 2nd and the 3rd respondents. In their Notices of Appeal to the Court of Appeal the 2nd respondent filed three grounds of appeal against conviction, and the 3rd respondent filed two grounds of appeal against conviction. At the hearing of the appeal before the Court or Appeal, the 3rd respondent was given leave to file an additional ground of appeal. After dealing exhaustively with the appeal of the 1st respondent, the Court of Appeal (majority)proceeded to summarily dispose of the appeals of the 2nd and 3rd respondents by allowing their appeals. They failed to consider the merits or otherwise of their appeals. With respect, it would appear that the majority of the Court of Appeal were so obsessed with the appeal of the 1st respondent especially on the issue of admissibility of his statement to the police, that they allowed their views to be clouded in dealing with the appeals of the 2nd and the 3rd respondents. I shall now deal with the appeals against the 2nd and 3rd respondents seriatim.

The 2nd Respondent

The 2nd respondent was charged and convicted on Counts 1, 2, 3, 4, 7. 8 & 9. The Grounds of Appeal of the 2nd respondent to the Court of Appeal were as follows:—

(1) That the verdict is unreasonable or cannot be supported having regard to the evidence.

(2) That the learned Judge did not sufficiently consider the case for the appellant.

(3) That the learned trial Judge erred in the law relating to Larceny and Falsification of Accounts.

[p.57]

None of these grounds of appeal was dealt with by either Tejan J.S.C. or Warne J.A. in their respective judgment. The 2nd respondent made three statements to the Police. The first was a cautioned statement made on 7th January, 1977. It was objected to but the trial Judge after holding a trial within a trial held that it was made voluntarily and admitted it in evidence (Ex. H). The second was a cautioned statement made on 11th January 1977. Counsel for the 2nd respondent objected to it, but he immediately thereafter withdrew his objection. Whereupon the learned trial judge admitted it in evidence (Ex. "N"). The third was a cautioned statement made on 12th January, 1977 after he had been charged, and was admitted in evidence without any objection (Ex. V). In the first statement (Ex. M) the 2nd appellant gave a detailed catalogue of his involvement in preparing fake Time Sheets and fake Pay Sheets from August, 1975 to November, 1976. He admitted preparing fake Time Sheets and fake Pay Sheets and then benefiting from the distribution of the loot thereof in respect of (1) period 21st Augu'st-

20th September, 1975 (Count 1); (2) period 21st September, 1975 to 20th October, 1975 (Count 2); (3) period 21st October, 1975 to 20th November, 1975 (Count 3); and (4) period 21st November, 1975 to 20th December, 1975 (Count 4). In the second statement (Ex. N) the 2nd respondent again gave a detailed catalogue of his involvement and participation in various corrupt transactions relating to reparation of Time Sheets and Pay Sheets from January, 1976 to November, 1976. He admitted preparing fake Time Sheets and fake Pay Sheets and then benefiting from the loot thereof in respect of (5) period 21st May, 1976 to 20th June, 1976 (Count 7) and (6) period 21st July, 1976 to 20th August, 1976 (Count 8). In the third statement (Ex. V) the 2nd respondent stated that he relied on his two previous statements i.e. Ex. M & Ex. N.

[p.58]

There was no appeal to the Court of Appeal against the admission in evidence of the first statement (Ex.M) or against the admissibility of' the second (Ex.N) or the third (Ex.V) statement. In addition to these three uncontested confession statements before the Court of Appeal, there was also overwhelming and uncontroverted oral and other documentary evidence against the 2nd respondent. There was evidence that he signed the requisite certificates on the relevant Time Sheets and Pay Sheets in respect of the (7) period 21st August 1975 to 20th September, 1975 (Exs. Al, A2 & A5 Count 1); (8) period 21st September, 1975 to 20th October 1975 (Exs.Bl-4 and Count 2); (9) period 21st October, 1975 to 20th November, 1975 (Exs. C1-4 and Count 3), (10) period 21st November, 1975 to 20th December, 1975 (Exs. D1-4 and Count 4); (11) period 21st May, 1976 to 20th June 1976 (Exs. G1-5 and Count 7); (12) period 21st July to 20th August, 1976 (Exs. H1-4 and Count 8); (13) Pay Sheet WR.443/6/76 (Ex. G1 and Count 9).

Evidence was also led that the 2nd respondent's thumb print was a fixed to the back of the Pay Sheets relevant to the charges against him, thereby creating the impression that those thumb prints were the thumb prints of genuine workers who had received their wages.

Having regard to the Grounds of Appeal filed by the 2nd respondent and the overwhelming evidence against him, there was clearly no merit in his appeal to the Court of Appeal. Therefore the Court of Appeal should have dismissed his appeal as being unmeritorious. It follows that in my judgment the Court of Appeal (majority) erred in allowing the appeal of 2nd respondent against his conviction in respect of each of the the Counts on which the learned Judge convicted him.

[p.59]

The 3rd Respondent

The 3rd respondent was charged and convicted on Counts 7, 8 & 9. His Grounds of Appeal to the Court of Appeal were as follows:—

(1) That the learned trial Judge erred in the law relating to obtaining by False Pretences and Falsification of Accounts.

(2) That the verdict is unreasonable and cannot be supported having regard to the evidence.

His additional Ground of Appeal was in the following terms:—

"The 3rd appellant having been found not guilty of Count 7 and 8 of stealing monies alleged to belong to the Republic the learned trial judge erred in law in convicting him of obtaining the said monies which were never proved by the prosecution to have belonged to the Republic of Sierra Leone, by false pretences and with intent to defraud."

The Court of Appeal (majority) failed to deal with any of these grounds of appeal. The 3rd respondent made three statements to the police. The first was made on 8th January, 1977 (Ex. "O")and the second on 11th January, 1977 (Ex."P"). The third was made on 11th January, 1977 when the 3rd respondent was charged (Ex. "W"). All three statements were tendered and admitted in evidence without any objection. In the first statement he admitted that he started signing fake Time Sheets and fake Pay Sheets in February or March, 1976 and continued doing so until December, 1976 "When there was no funds again to cover payments for the fake workers." He also admitted [p.60] sharing in the loot. It is relevant to not that the period covered in the Counts against him is May 1976 to August, 1976. In the second statement he repeated his previous admission additional evidence that he signed the certificates on the supporting Time Sheets of Exs. G1-5 as Officer in Charge and also countersigned the Pay Sheets (Count 7). He also certified the supporting Time Sheets of Exs. H1-4 as Officer in Charge and countersigned the Pay Sheets (Count 8). He certified also the supporting Time Sheet of Ex. G1 as Officer in Charge and countersigned the Pay Sheet (Count 9). It is abundantly clear therefore that there was overwhelming evidence against the 3rd respondent on all the three Counts in respect of which he was charged. The points of law raised in his Grounds of Appeal were imprecise and lacked any substance. In the circumstances the Court of Appeal should have dismissed his appeal against conviction as being without any merit.

I shall now deal with the final issue. Tejan J.S.C. concluded his judgment by saying that he was "unable to say that the appellants had a fair trial. My view is that the entire trial was unsatisfactory." Mr. Tejan-Cole has submitted that that statement was totally unjustified. The learned Justice did not specify in what respect the trial was unfair or unsatisfactory. I entirely agree with Mr. Tajan-Cole's submission. Rather than the trial being unfair or unsatisfactory, the printed records show that the learned trial Judge bent over backwards on too many occasions during the trial in an apparent effort to be fair to the accused resulting in the trial being unnecessarily protracted.

[p.61]

In the result I would allow the appeal against the 1st respondent in respect of count 1 to 10. I would set aside the orders or the Court of Appeal with respect to these Counts and restore his conviction on those counts (Counts 1 to 10). I would dismiss the appeal against him in respect of Count 11 and confirm the order of the Court of Appeal acquitting him on that Count. I would allow the appeal against the 2nd respondent in respect of Counts 1, 2, 3, 4, 7, 8 & 9. I would set aside the orders of the Court of Appeal and restore his conviction on those Counts. I would allow the appeal against the 3rd respondent in respect of Counts 7, 8 & 9. I would set aside the orders of the Court of appeal and restore his conviction on those Counts.

Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

Signed byHon Mr. Justice C.A Harding, J.S.C

I agree

Signed by Hon. Mrs. Justice A. Awunor-Renner, J.S.C

I agree

Signed by Hon. Mr. Justice S. Beccles Davies, J.S.C

I agree

Hon. Mr. Justice Ken. E.O. During, J.A.

[p.62]

The 1st respondent appealed against sentence to the Court of Appeal. This court, exercising the powers of the Court of Appeal under Section 58(4) of the Courts Act 1965, may pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence passed by the trial judge. In my opinion the sentence imposed on a convicted person must meet the crime and the case. The prevalence of this type of offences and the magnitude of the fraud perpetrated by the 1st respondent are some of the factors that the learned trial judge should have taken into consideration in passing sentence

In my opinion the circumstances of this case warranted a custodial sentence. To impose a fine in such circumstances would give the impression that criminals may profit from their crime. Speaking for myself, I would have substituted a custodial sentence for the sentence imposed by the trial judge.

But in all the circumstances this court has decided not to interfere with the sentence imposed.

(sgd.) Livesey Luke

Chief Justice

13th July, 1982.

CASES REFERRED TO

1. R v. Gunewardene(1951) 35 Cr. App. R.80,

2. R v Rhodes(1959) 44 Cr. App. R.23,

3. R v. Bowen (1972) Crim. L.R. 312

4. R v. Rogers and Tarran (1971) Crim. L.R. 413

5. R v. Rudd (1948) 32 Cr App. 138

6. Reg. v. Thompson (1893) 2 Q.B. 12 at p.15

7. Ibrahim v. R(1914) A.C.599

8. commissoner of Customs and Excise v. Harz & anor (1967) 1 A.C. 760 C.C.A & H.L

9. D.P.P v. Ping Lin (1975)3 W. L. R. 410 C.A H.L

10. Reg. v. Rennie (1982) 1. W.L.R. 64. C.A.

11. Sparks v. The Queen (1964) A.C. 964 P.C

12. Chan Wei Keung v. The Queen (1967) 2. W. L.R. 552 P.C.

13. Ragho Prasad v. The Queen (1981) W.L.R. 469 P.C

14. Ajodha v. The State (1981) 3 W.L.R. 1 P.C.

15. R v. Francis Murphy (1959) 43 Cr. App. R. 174

16. N'Doinje v. Reg (1967-68) A.L.R. (S.L.) 202.

17. Chan wei Keung v. The Queen (1967) 2 W.L.R. 552

18. R v. Murray (1951) 1 K.B 391

19. R v. Satori (1961) Crim. L.R. 397,

20. R v. McLintock (1962) Crim. L.R. 549 C.C.A.

21. Wendo v. R (1964) 109 C.L.R. 559

22. R v. Summer (1953) 36 Cr. App. R. 14

23. R v. Hepworth and Fearnley (1955) 39 Cr. App. R. 152.

WELLINGTON DISTILLERIES AND ELECTRODIA P. CLARKSON

[MISC. APP. NO. 4/81][p.23-30]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 8 APRIL 1982

CORAM: MR. JUSTICE E. LIVESEY LUKE.CHIEF JUSTICE; MR. JUSTICE C.A. HARDING J.S.C; MR. JUSTICE O.B.R. TEJAN J.S.C.; MRS. JUSTICE A.V. AWUNOR-RENNER J.S.C; MR. JUSTICE S. B. DAVIES J.S.C

BETWEEN:

WELLINGTON DISTILLERIES - APPELLANTS

AND

ELECTRODIA P. CLARKSON - RESPONDENT

(CONSTITUTIONAL REFERENCE)

C. DOE-SMITH ESQ., for Appellant

DESMOND LUKE, ESQ., with him G. OKEKE, ESQ., for respondent

DELIVERED ON THE 8TH DAY OF APRIL 1982

JUDGMENT

TEJAN J.S.C.

A writ of summons was issued on behalf of the appellants by the Hon. Attorney-General and Minister of Justice on the 25th day of January, 1978 claiming the sum of Le.1884.16 being cost of goods and products sold by the appellants to the respondent. The Statement of Claim states that the appellants is and was at all material times a limited liability company registered under Cap. 249 of the Laws of Sierra Leone, and that the respondent was at all material times agent and or distributor of the appellants' goods and products. The Statement of Claim then shows the circumstances under which the debt was incurred by the respondent. An appearance was entered and a statement of defence filed and delivered. In the statement of defence, the respondent counter-claimed against the appellant. A reply and defence to the counter-claim were also filed and issues were joined.

[p.24]

On 1st day of February, 1979 the respondent moved the High Court challenging the status of a Law Officer in issuing of the writ and asked that the writ be set aside on a number of grounds. There was an affidavit sworn on the 29th day of February, 1978 in support of the notice of motion.

The application was heard by Thompson-Davis J. on the 1st and 5th February, 1978 when Ruling was reserved

In giving his ruling on the 5th day of November, 1979, the learned Judge said!

"The real question relevant to this notice of motion is whether the writ of Summons in this action can be properly brought by a State Counsel that is a member of the Law Officers Department."

He then proceeded to refer to the relevant portions of the pleadings, and then said:

“Now the office of the Attorney-General and the organisation of the Law Officers' Department are regulated by the Principal Act the Law Officers Act, 1965.

Section 2 of this Act reads—

“2(1) The Attorney-General shall in addition to the function conferred upon him by sections 73 and 74 of the Constitution.

(a) be the principal legal adviser of the government and

(b) represent the government, ministries, Parliamentary Secretaries, and Public Officers in all civil proceedings arising in the course of the discharge of their duties

[p.25]

2(2) The Attorney General shall be the Principal Legal Adviser to the Minister referred to in any legislation establishing a statutory corporation as being responsible for the discharge of the functions conferred on a Minister by the said legislation.”

In his carefully considered judgment, and having taken into account the relevant Acts and Legislations pertaining to the issues before him, the learned Judge allowed the application and set aside the writ of summons together with all subsequent proceedings.

It is against that decision that the Attorney-General and Minister of Justice appealed to the Court of Appeal on the following grounds

(1) The learned trial Judge failed in law to advert his mind to section 3 of the law officers Act No. 6 of 1965 before reaching his decision.

(2) The learned trial Judge misdirected himself in holding that the real question relevant to this notice of Motion is whether the Writ of Summons in this action can be properly brought by a State Counsel that is a member of the Law Officer's Department.

(3) The learned trial Judge failed to consider Section 38{4) of the Constitution which give6 right of audience to the Attorney-General in all courts except Local Courts.

(4) the learned trial judge wrongfully reached his decision as if the Attorney-General was the plaintiff in the action.”

[p.26]

On the 29th September 1901, who hearing of the appeal came before During, Cole and Navo (JJ,A.). The proceeding before the Court of Appeal was brief and unsatisfactory. What was recorded in the record of the Court of Appeal can be shortly stated. It reads:—

“Court indicates to Mr. Doe-Smith that the question to be decided on appeal might be of Constitutional importance which should be gone into by the Supreme Court to wit whether or not the Attorney General or anyone acting on his behalf, e.g. State Counsel could institute the proceedings in this matter. Doe-Smith Agrees that the judgment raises point which touches on Constitutional question but in his view, having regard to Section 3 of the Law Officer's Act No.6 of 1965, the Attorney-General acting on the request of the President can himself and by someone acting on his behalf represent any other person in any proceedings before any Court, civil or otherwise.”

DECISION

“We hold that this is a matter which we should refer to the Supreme Court to determine whether or not the Attorney-General or any person or a State Counsel acting on his behalf is competent to institute a Civil Action on behalf of a Corporation which is not a Statutory Corporation for example a Private Company in which the Sierra Leone Government has shares or controlling shares on a claim as that endorsed in the Writ of Summons in this matter.

[p.27]

We order stay of proceedings and refer this matter for consideration of the question referred to above by the Supreme Court of Sierra Leone.”

Section 104(1) of the Constitution enacts that the Supreme Court shall, save as otherwise provided in sections 18 and 101 of this Constitution, have original jurisdiction, to the exclusion of all other Courts

(a) in all matters relating to the enforcement or interpretation of any of the provision of this Constitution, and

(b) where any Question arises whether an .enactment was made in excess of the power conferred upon Parliament or any other authority or person by law or under this Constitution.

In my opinion the question posed by the Court of Appeal is vague and imprecise. The lower Courts in referring matters to the Supreme Court should endeavour to formulate questions in precise terms. They must refer to the specific section of the constitution which requires interpretation.

The question as posed is a Constitutional question. But it should be noted that not all Constitutional questions may necessarily involve or entail the interpretation of' the Constitution. The question that should be referred to the Supreme Court must relate to the interpretation of any of the provision of the Constitution.

The question posed, in my view, does not relate to the interpretation of the Constitution. Therefore it should not have been referred to this Court. In the circumstances, we are not empowered to deal with it as a reference under section 104 of the Constitution.

[p.28]

Mr. Doe Smith relied on the right of audience conferred on the Attorney-General and Minister of Justice by section 88(4) of the Constitution, Indeed that section is referred to in ground (3) of the grounds of appeal to the Court of Appeal. He used this right as the basis for his submission that the Attorney-General and Minister of Justice had an unrestricted right to represent any person in any proceedings before any Court ... (except Local Courts). This argument is so novel, and if accepted, will have such far reaching effect, that for the avoidance of a multiplicity of references, it is considered expedient to deal with it.

What then does the right of audience conferred on the Attorney General and Minister of Justice Section 88(4) of the Constitution mean and-what is its scope? In my opinion the section is simple. What it confers, is a right to be heard. It says that the Attorney-General and Minister of Justice has the right to be heard in all Courts. This is one of the rights conferred on all duly enrolled Barristers and Solicitors in Sierra Leone. This is one of' the rights enjoyed by all Barristers in England for centuries. The position in England was stated in Collier V. Hicks (1831) 2 B & A.D. 663, Lord Tenterden C.J. said at page 668:—

“The Superior Courts do not allow every person to interfere in their proceedings as an advocate, but confine their privilege to gentlemen admitted to the bar by the members of one of the Inns of Courts. They do not allow attorneys to act as advocates, and in one of them (the Court of Common Pleas), even all gentlemen of the bar are not allowed to exercise all the duties of advocates, but the full privilege of so doing is confined to those who are of the degree of the coif. So doctors of the civil law are not [p.29] Entitled to act as advocates in the courts at Westminster, although they may do so by special permission by those Courts. So at the quarter sessions, the justices usually require that gentlemen of the bar only should appear as advocates; but, in remote places where they do not attend, members of the other branch of the profession are permitted to act as advocates. Persons not in the legal profession are not allowed to practice as advocates in any of these courts.”

Parke J. in the same case said at page 672:—

“No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the Superior Courts, by ancient usage, persons of a particular class are allowed to practice as advocates, and they could not lawfully be prevented.”

In Rondel v. Worsley (1966) J W.L.R. 950, Lord Denning M.R. dealing with the right of audience of a Barrister in England said at page 962:—

“As an advocate he is a Minister of Justice equally with the judge. He has a monopoly of audience in the higher Courts. No one have he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility.”

[p.30]

In view of what I have said above, I do not think that we should answer the question posed. The Court of Appeal should proceed with the hearing of the appeal and ultimately answer the question posed if they consider it necessary.

Hon. Mr. Justice O. B. T. Tejan, J.S.C.

I agree

Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

Hon. Mr. Justice C.A. Harding, J.S.C.

I agree

Hon. Mrs. Justice A. Awunor-Renner, J.S.C.

I agree

Hon. Mr. Justice S. Beccles Davies, J.S.C.

CASES REFERERD TO

1. Collier V. Hicks (1831) 2 B & A.D. 663, Lord Tenterden C.J.

2. Rondel v. Worsley (1966) J W.L.R. 950

1983

JUSTICES OF THE SUPREME COURT

Hon, Mr. Justice E. Livesey Luke — Chief Justice

Hon. Mr. Justice C.A. Harding — Justice of the Supreme Courts

Hon. Mr. Justice O.B.R. Tejan — Justice of the Supreme Court

Hon. Mrs. Justice A.V.A Awunor-Renner — Justice of the Supreme Court

REGISTRAR:—

E.G. NELSON-WILLIAMS, ESQ., ORGINAL SIGNED.

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THE BANK OF CREDIT & COMMERCE INTERNATIOANAL v. THE CHARGE D' AFFAIRES OF THE REPUBLIC OF IVORY COAST EMBASSY IN SIERRA LEONE ACTING FOR AND ON BEHALF OF THE REPUBLIC OF IVORY COAST, FREETOWN

THE BANK OF CREDIT & COMMERCE INTERNATIONAL J.S.C. v. THE CHARGE D' AFFAIRES OF THE REPUBLIC OF IVORY COAST EMBASSY IN SIERRA LEONE ACTING FOR AND ON BEHALF OF THE REPUBLIC OF IVORY COAST, FREETOWN

ALPHABETICAL LISTING

ALPHONSO CAMPBELL, BALLAH BANGURA, ALIMAMY KAMARA AND THE STATE

[SC. Cr. App. No. 4/82] [p.40-44]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 4 JULY 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE M. S. TURAY J.A.

Alphonso Cambel }

Ballah Bangura }

Alimamy Kamara (Alias Thaimu) } - Appellants

AND

The State - Respondent

C.V.M. Campbell, Esq., - for the Appellants

A.K.A. Barber, Esq., - for the State

RULING DELIVERED ON MONDAY 4TH JULY, 1983

Livesey Luke . C.J.

The 2nd Appellant was convicted before the High Court sitting in Freetown on 8th May, 1981 of the offence of Robbery contrary to section 23(2) of the Larceny Act 1916 and sentenced to 7 years imprisonment. He appealed to the Court of Appeal against his conviction and sentence. On 9th June, 1982 the Court of Appeal delivered judgment inter alia substituting a verdict of Guilty of Receiving agains the 2nd Appellant in place of the verdict of Guilty of Robery and dismissed the appeal against sentence. Subsequently, Mr. C.V.M Campbell, Solicitor acting for the 2nd Appellant gave a notice of Appeal to the Supreme Court dated 31st july, 1982 against the judgment of the Court of Appeal.

When the appeal came up for hearing on 7th June, 1983, this Court called upon Mr. C.V. M. Campbell, Counse for the 2nd Appallant, to satisfy us that the appeal of the 2nd Appellant was within the prescribed time.

[p.41]

The Supreme Court Rules, 1982 prescribe that time for giving notice of Criminal appeal to the Supreme Court. Rule 74(1) provides as follows:—

"74 (1) Where the State or any person desires to appeal to the Supreme Court in a Criminal cause or matter he shall give notice of an application for special leave to appeal within one month of the decision of the Court of Appeal or within ten days of the refusal of leave by the Court of Appeal as the case may be."

(Emphasis Mine).

Mr. Campbell accepted in the course of his argument that "month" in rule 74 (1) means "calendar month." Indeed rule 1 of the Rules defines month as "calendar month." but Mr. Campbell submitted that one month in the context of rule 74(1) means one of the twelve unequal parts (months) into which a calendar year is divided, for example the months of January, February, April and so on. In other words, according to Mr. Campbell, a month means from the first tot he last day of the month. So according to him, if a decision is given on the 2nd of a month, time for appealing would not start to run until the first day of the following month. Mr. Barber on the other hand submitted that for the purpose of computing a "calandar month" the period expires on the date of the succeeding month immediately proceding the date on which the decision was given.

What Mr. Cambell's arguments amounts to is this: Whether a decision was given onthe first or the last day of a particular month, time for giving a Notice of Appeal would not start to run util the first day of the following month. So an aggrived party would have more or less time to give his Notice of Appeal

[p.42] depending on whether the decision was given early or late in the month. Such a result would give an agrived party whose decision was given early in the month an unwarranted advantage. In my opinion, the construction contended for by Mr. Campbell would result in inequality of treatment of appellants, would make the period for giving Notices of Appeal indefinate and would result in absurdity.

I think that the words of the sub-rules are quite plain and unambigeous. The rules says that the notice shall be given "within one month of the decision of the Court of Appeal." i interprete one month"of the decision" as meaning one month from the date of the decision. In other words it means one calendar month from the decision. There is nothing in the sub-rules to indicate or even suggest that "within one month of the decision" means within one calendar month form the first day of the succeeding month.

I think that it is well settled that when the period prescribed for doing an act or taking a precedural step is a calendar month running from any artibitrary date, the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the peirod starts. An arbitrary date in this context would mean the date on which a decision is given by a Court. So if a decision is given on the 2nd of the month, the one month within which to give Notice of Appeal would expire on the 1st of the succeeding mongth. Similarly, if a decision is given on the 15th of the month, the one month within which to give Notice of Appeal would expire on the 14th of the succeeding month; and so on and so forth. But the position is different if the period starts at the end of the calendar month which contains more days than the succeeding mongh. In that case the peirod would expire at the end of the succeeding month. So if for example the decision is given on the 31st of March, the period of one month [p.43] would expire on the 30 of April. Similarly, if the decision is given on the 31st of January, the period of one month would expire on 28th February,or in the case of a leap year on 29th February. See Halsbury's laws 3rd Ed. Vol. 37 para. 143 pp. 83-84

As a general rule, the computation of time is the same whether the matter is Civil or Criminal. See Redeliffe v. Bartholomew (1892) 1 Q.B. 161. Sos if a prisoner is sentenced to one month's imprisonment on the 17th of the month, his term would expire on the 16th of the succeeding month. Thus it was held in Migutti v. Colvill (1879) 4 C.P.D. 233 that a person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in succeeding month immediately preceding the day corresponding to that from which his sentence takes effect. Brett L.J. stated the position succinctly at p. 238 thus:

"I am of the opinion that the term a calendar month is legal and technical term, and what we are bound to interpretits legal and technical meaning. The meaning of the phrase is that, in computing time by calendar month, the time must be reckoned by loking at the calendar and not by counting days: and that one calendar month's imprisonment to the day numerically corresponding to that day in the following month less one."

And Cotton L.J. added inter alia at pp. 238-239:—

..... it is not a question of measurement of time, but of the technical meaning of the word "calendar month." Prisoners cannot always be imprisoned during one particular [p.44] calendar month, in the sense of a month the name of which is to the found in the calendar. What than is the meaning of the

term when the sentence begins otherwise than on the first day of the calendar month
.....

The imprionsment ends at 12 o'clock on the day immediately preceding the day in the following month corresponding to the day on which the imprisonment begins."

In the course of his reply Mr. Campbell reminded us, rightly, that this Court is not bound by decisions of the English Courts and urged us not to follow English decisions like Migotti v Colvill (supra). In my opinion the interpretation put by the English Courts over the years on the words "calendar month" in cases like Migotti v. Colvill and Radcliffe v Bartholomew is the only reasonable and common sense interpretation, and one not calculated to result in absurdity or uncertainty. I have no hesitation in adopting and applying these decisions.

In my judgment therefore "within one mongh of the decision of the Cort of Appeal" in the instant case means one calendar month from 9th June 1982. On the basis of the computation stated above, the one month expired on 8th July 1982. In the circumstance the Notice of Appeal was patently given out of time.

I would therefore strike out the appeal of the 2nd Appellant.

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

(Sgd.) Hon. Mr. Justice c.a. Harding, J.S.C.

I agree

(Sgd.) Hon. Mrs. Justice A. Awunor-Renner, J.S.C

I agree

(Sgd.) Hon. Mr. Justice S. Beccles Davies J.S.

I agree

(Sgd.) Hon. Mr. Justice M.S. Turay J.A.

CASES REFERRED TO

1. Redeliffe v. Bartholomew (1892) 1 Q.B. 161

2. Migutti v. Colvill (1879) 4 C.P.D. 233

STATUTES REFERRED TO

1. Larceny Act 1916

2. The Supreme Court Rules, 1982

3. Halsbury's laws 3rd Ed. Vol. 37 para. 143 pp. 83-84

AMADU WURIE AND EDWARD WILSON SHOMEFUN & ANOR

[CIV. APP. NO. 8/81] [p.103-117]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 29 DECEMBER 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE O. B. R. TEJAN, J J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE F.A. SHORT J.A.

BETWEEN:—

AMADU WURIE - Appellants

AND

EDWARD WILSON SHOMEFUN - 1ST RESPONDENT

FODAY BANGURA - 2ND RESPONDENT

Mr. Garvas Betts and with him Mr. Taylor-Kamara , Esq., for the Appellants

Mr. J.H. Smythe Q.C. and with him Miss Patrice Wellesley-Cole, Esq., for the State

JUDGMENT DELIVERED THIS 29TH DAY OF DECEMBER, 1983

TEJAN J.S.C:

The events leading to this appeal can be stated briefly:—

The story according to the appellant started on the 7th day of February, 1976 when the appellant, a motor apprentice, boarded a Mazda Van WR. 8976 driven by the 2nd respondent and owned by the 1st respondent to convey him to Waterloo village. The appellant was to pay the sum of twenty cents as a fare for the journey. The second respondent, arrive at Tombo village stopped the Van and took some passengers. They second respondent then continued his journey, but because of the number of passengers when he arrived at Mama Beach, he asked the appellant to assist in loading the goods of the passengers on the carrier of the van. The appellant obligingly did so, and the second respondent told him to sit on the right side of the vehicle, the steering wheel being on the other side. The second

respondent continued the journey and when he drove towards a lop in Jumu Town, the vehicle developed speed and got into a gallop. The result was that the appellant fell off the vehicle and was unable to get up. The attention of [p.104] the second defendant was called, and on reversing the vehicle, road over the leg of the appellant who fainted and gain consciousness at the Connaught Hospital where he was treated by the Senior Specialist Surgeon Mr. Ulric Jones and later by Senior Specialist Surgeon Mr. Abu Kargbo. When the appellant was discharged from the hospital he went to Waterloo police station to make a statement in respect of the accident, but to his dismay he was told that he had already made a statement and the matter had been disposed of in the Magistrate Court.

Being dissatisfied with the manner in which the matter was handled, the appellant on the 31st day of January 1977, instituted proceedings against the 1st and 2nd respondents, claimed damages for negligence and also special damages.

The respondents denied negligence on the part of the 2nd respondent, denied that the 2nd respondent reversed, and contended that if there was negligence on the part of the 2nd respondent (which was categorically denied) the appellant contributed to the negligence.

The case was heard by Williams J. and first witness for the appellant was Mr. Ulric Jones. This witness testified that on the 7th February 1976, he examined the appllant and he found the following injuries:—

1. He had sustained a crush injury to the right lower limb

2. Swelling on his left ankle

3. Multiple bruises and abrasions of the left leg.

4. Severe strain of his back

5. Shock

The appellant was admitted in hospital on the same day, and after the witness had removed a lot of dead tissues and cleaned the wound, he had grave doubt whether the limb would e saved and on the 14th day of February, 1976, he had to perform an electric amputation. Following this the appellant had general treatment and was later transferred to Murray Town Hospital on the 9th day of March, 1976 for measurement and assessment for an artificial limb.

[p.105]

Between the 7th day of February, 1976 and 14th day of February 1976, the appellant was ill, and witness had great doubts as to whether the appellant had full powers of memory, consciousness and awareness. The appellant had impaired consciousness up to the 24th day of February, 1976, indicating that, he had had a toxic illness. This necessitated the administration of pre-medication drugs on the 12th day of February, 1976. The witness was confidence that between the 12th day of February 1976 and 14th February 1967, and in particular on the 13th day of February 1967, the appellant was not in any condition to undergo any high task of memory. The witness put in evidence exhibit “A” for which he had

received the sum of Le 20.00 and that he recommended the use of artificial limbs the cost of which ranged at the time from Le 800.00 to Le 2,00.00 for each limb. According to the witness, the amputation of the appellant's limb would affect his activities and he would continue to suffer pain on the knee from to time, and that even with an artificial limb, the appellant would not be able to drive a vehicle unless it is a specially adjusted vehicle.

Dr. Abu Kakarra Kargbo Senior Surgeon Specialist attached to the Connaught Hospital examined the appellant on the 7th day of September 1976 and found that the appellant had permanently lost his right leg due to amputation following a crushed injury. The appellant complained of intermittent pain in his lumbo-sacral spine and also restricted movement on that part of his spinal column. The appellant was tender on the medical aspect of his left ankle, and he complained of pain in his joint. His evidence corroborated to a large extent the evidence of Mr. Ulric Jones. He admitted that he was paid the sum of Le 100.00 and he than put the residual assessment f the appellant disabilities at 70%.

The appellant having told the Court how the accident happened, was cross-examined on behalf of the respondents. He denied that he was an apprentice working for the second respondent on the day in question. He said that he paid Mr. Kargbo the sum of Le 100.00 [p106] and Mr. Jones the sum of Le 40.00 but Mr. Jones said that the amount paid to him was the sum of Le 20.00 for which he produced a receipt. While he was in the hospital, he bought food to the total amount of Le 100.00, and that he spent more than Le 50.00 while he was attending hospital. He said that he did not know one Eku and one Mr. Jalloh.

He denied that while the van was in motion he climbed to its roof in order to steal fish.

The 1st respondent neither gave evidence nor called any witness, buth second respondent gave evidence and called witnesses. His evidence was tat on the 7th February, 1976 he drove van WR 8967 and that it was one James Bernie who hired him to drive the van. When the van was handed to him, one Eku and the appellant were the apprentices. He recalled that 7th February 1976 when the van was involved in an accident at Jumu Town while he was proceeding from Mama Beach. There were hills and pot holes on the road. He closed the an after his apprentices had entered it as this was his usual custom while he was driving Eku stopped him by shouting "one bell". He stopped after travelling a short distance and alighted. He then say the appellant lying on the road with one of the baskets. He did not know what had happened when he heard the call for "one bell" and he did not reverse the van. In answer to Mr. Betts, learned Counsel who appeared for appellant at the trial, he said that he made a statement to the police a day after the accident. He denied that he told the police that he loaded seven large baskets f fish on the carrier. He said that Eku wan not called Abu and he denied that he told the police that it was his apprentice named Abu who signaled to him that the appellant had fallen off the van. He denied that he was charged with the offence of carrying passengers at the entrance and also for carrying passengers without proper sitting accommodation.

Ekundayo Taylor gave evidence on behalf of the respondents. This witness deposed that he knew the 2nd respondent and the appellant. About two years previously, a Mazda van driven by the 2nd respondent was involved in an accident at Jumu Town. [p.107] That at the material time, he and the

appellant were apprentices attached to the 2nd respondent an that both of them were on the van at the time of the accident. He said that he 2nd respondent was driving the van from Tombo village. At Tombo village, the 2nd respondent loaded the van, closed the door, went to the driver's seat and drove off. The witness and the appellant were on board the van when the 2nd respondent closed the door. When the van got at Jumu Town, the appellant claimed up to the carrier.

At Jumu Town, the appellant fell down with a basket. The witness shouted "one bell" indicating to the driver to stop. The 2nd respondent stopped the van d did not drive backwards after he had stopped. The witness and 2nd respondent put the appellant into the van but the passenger refused to board the van the witness and 2nd respondent took the appellant to the hospital at Waterloo and later brought him to the Connaught Hospital in Freetown. The 2nd respondent left the witness at the Connaught Hospital, saying that he was going to report the accident at he police station.

The next witness for respondent was Jaiah Kaikai, a police constable attached to the Traffic section at Masiaka police station. This witness recalled the 7th day of February, 1976 when a report of a road accident was made by the driver of Mazda ban WR 8967 Foday Bangura of Tombo Village. The scene of the accident had been visited by other police officers, but on eh 8th February, 1976 he took over the investigation of the accident. He visited the scene together with the 2nd respondent on the same day he took over the investigation. He obtained voluntary statements from both the 2nd respondent and appellant. He opened a police file containing all statements and other documents pertaining to the accident. He put the file in evidence and it is exhibit "D" folio 2 of exhibit "D" was the statement of the appellant and it was obtained on the 13th day of February, 1976 at the Connaught Hospital.

[p.108]

In answer to Mr. Betts, Counsel for the appellant, the witness said that he conducted the investigation and charged Foday Bangura with the offence of carrying one adult passenger at the near entrance door of the van while in motion and carrying passengers without proper sitting accommodation. The witness was shown Folio 1 page 2 of exhibit "D". He said that the name of Abu was there an apprentice and he did not have the name of Ekunday Taylor as an pprentice. According to the witness, the name of Ekundayo Taylor was not mentioned as one of the passengers on board the van and eh did not have the name of Ekindayo taylor as an apprentice.

In dealing with the evidence, the learned Judge referred to the Statement of Defense filed and delivered y the respondents admitting that the appellant was a passenger on board the van, and disbelieved the evidence of the 2nd respondent and Ekundayo Taylor that the appellant was an apprentice on board the van at the time of the accident. The Learned Judge refereed to Exhibit "D" the statement of the 2nd respondent made a day after the accident, and in that statement the 2nd respondent said that the name of Ekundayo Taylor was never mentioned to him. It is significant that Ekundayo Taylor said in his evidence that he continued as an apprentice to the 2nd respondent never mentioned the name of Ekundayo Taylor when he made the statement to the police. It is quite clear that the Learned Judge did not believe the defense. The Learned Judge's view on the matter is expressed thus: —

“On the whole I do not for one moment believe that he plaintiff climbed to the carrier of the vehicle whilst it was in motion and it was from there that he cut out and fell down. I believe that owing to the inadequacy of sitting accommodation in the van at the material time the plaintiff cut out from where he was sitting in the van and fell over. I believe also that after the alarm was given that the plaintiff had fallen off, the driver second defendants stopped the van and reversed it to where the plaintiff was lying down and rode over the latter’s right leg.

[p.109]

The description of the injury to the plaintiff’s right leg cannot by any stretch of imagination be consistent with mere falling down to the road from off the van. Since his right leg was crushed to the extend of having it amputated as being useless and unserviceable, some heavy force must have been applied on that right leg whilst it was lying on the road. Such crushing injury can only be consistent with the story that the vehicle reversed and rode over the plaintiff’s right leg."

The Learned Judge dealt with the evidence of Ekundayo Taylor in the following terms:—

"As regards to evidence of the said Ekindayo Taylor apart from his demeanour in the witness box which made his evidence very suspect, his narrative of the accident and the alleged behavior of the plaintiff to say the least, was so hazy that such a cam can only be described as inveterate liar.”

In the end the Learned Judge gave Judgment in favour of the appellant and awarded him the sum of Le 35,000.00 as General Damages and the sum of Le 250,000 as Special Damages

It is against that judgment that the respondent appealed to the Court of Appeal on four grounds:—

(1) That the Trial Judge erred in law in failing to give consideration the entire evidence of the Plaintiff/Respondent in that he accepted those portion of his statement which are favourable to him whilst completely ignoring in his judgment the portion of evidence which supported the case for the defense.

(2) That the Learned Trial Judge was biased in law in failing to consider the entire evidence of the Plaintiff/Respondent thus disenabling him from making a fair and accurate evaluation of the whole evidence before him.

[p.110]

(3 That the judgment is against the weight of evidence.

(4) That in all the circumstances the sum of Le 35,250.00 awarded as damages was excessive.

The appeal was heard on the 22nd day of January 1981 before During, Cole and Turay JJ.A. The Court of Appeal, after having heard arguments on both sides, delivered judgment on the 15th day of April 1981. Cole J.A. who delivered judgment on the 15th day after giving a summary of the contentions and submissions of both sides, concluded that he immediate issue which arose out of the subtle and enlightened arguments by both Counsel, was to determine whether Learned Trial judge in reviewing the

evidence, drew proper inferences and evaluated the evidence correctly. The Learned Justice stated this aspect of the law as he understood it, and after making references to several authorities, which I do not consider necessary to deal with, set aside the judgment of the trial judge.

The appellant, being dissatisfied with the judgment of the Court of Appeal has now appealed to this Court. His grounds of appeal are:—

(1) That the Court of Appeal drew the wrong inference from the judge's primary finding of fact that since sitting accommodation had been provided for P.W.1 (the Appellant herein) with the Defendant's vehicle that the accommodation so provided was safe, adequate and satisfactory, and constituted a complete discharge of the defendant's duty of care to the plaintiff.

(2) That in determining the question of the 2nd defendant's manner of driving, the Court of Appeal failed to consider that the duty of care of a driver to his passenger was not fixed or absolute but was referable to all the circumstances of the case.

[p.111]

(3) That the Court of Appeal erred in law in impliedly excluding from its consideration the statement allegedly made by the 2nd defendant, on the basis that the statement had been withdrawn by Counsel for the second defendant, when the said statement was tendered by Counsel for the second Defendant in Exhibit "D"

(4) That in excluding from its purview the said statement of the second defendant, it disabled itself from evaluating accurately, the evidence of P.W.3 (Ekundayo Taylor) and appreciating and or agreeing with the Learned Judge's conclusions on the weight to be attached to his evidence.

(5) That the Court of Appeal's conclusion that the "Respondent was the author of his own misfortune, was based on a totally wrong evaluation on the evidence before it and the wrong premises.

(a) That since P.W. 1 was seated within the vehicle if in the course of the journey, he fell out of it, it could only have been through his own fault.

(b) Secondly, that the learned trial Judge ought not to have regarded the evidence of D.W.2 Ekundayo Taylor.

(6) That in failing to state positively, whether P.W. 1 fell off from the canopy of WR 9867, which was the contention of the Defendants in the Court below, the court of Appeal declined to indicated whether it believed the story of the plaintiff or the Defendants and thereby precluded itself in law from coming to the correct inferences from the learned trial judge's finding of fact

[p.112]

(7) That in observing that nowhere in the evidence, the 2nd defendant admitted that he pleaded guilty in the Magistrate's Court, the Court of Appeal erred in law, when it failed to have regard to the fact that there was evidence before the learned presiding Judge with could properly have led him to the

conclusion that the 2nd Defendant had been charged and convicted of carrying passengers on the tail piece and failing to provide adequate sitting accommodation for his passengers.

Mr. Betts, Counsel for the appellant submitted that the Court of Appeal had acted as if it were a Court of first instance rather than an Appeal Court. There is some justification for the submission. The Court of Appeal, after stating that the finding of fact by a trial Judge should not be lightly interfered with, then referred to Section 9(1) OF THE Court of Appeal Rules which stipulates that all appeals shall be y way of rehearing and then cited Bennmax V Austin Motors Co. Ltd (1955) 1 All E.R. 366 where it was observed that "an Appellate Court, on an appeal from a case tried by a judge alone, should not lightly differ from a finding of a trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and evaluation of facts"

The learned Judge, after a careful and meticulous review of the evidence believed the appellant. He disbelieved the respondent and his witness Ekundayo Taylor n their credibility.

It should be noted that in rule 9(1) f the Court of Appeal Rules, the expression "by way of rehearing" is used. The expression does not mean that the parties and their witnesses are to appear before the court of Appeal and give their evidence. The words "by way of rehearing" expresses the practice of the old chancery appeal (which was not strictly and appeal so much as a rehearing before a higher court. See Quilter v Walpleson (1882) 9 Q.B.D. at page 676; See order 58 Rule 3 of the English Rules (1959) Edition. It is simply a rehearing on the printed records.

[p.113]

In this connection, it think it is necessary to refer to the case of Warren v Coombeg (1979-1980) 142 G.L.R. at page 531. In the course of the joint judgment of Gibba Ag. C.J. Jacobs and Murphy JJ. The question was posed as to what is the duty of an Appellate court when questions of credibility have been decided and the matter which remains for decision is what inferences should be drawn from the facts which have been found and are no longer in contest? Their Lordships then proceeded thus at p.537; "We are concerned of course with an Appellate tribunal to which there is an appeal by way of rehearing.. ……and which has the powers and duties of the Court from which the appeal is brought including those of drawing inferences and making findings fact……. The appeal, although by way of rehearing is conducted on the transcript of the evidence taken at the trial, and the witnesses are not called to give evidence afresh, but the appeal is a general appeal and is not limited, for example, to questions of law……." In the case of S.S. Hontestroom v S.S. Sagaporack (1927) A.C. 37 at page 47 Lord Sumner discussed what Lord Wright in Powell v Streathanm Manor Nursing Home (1935) A.C. 243 at page 264 called "the antimony which arises when the Court which is judge offacts has neither seen or heard the witnesses. In such a case, there is conflict between two principles, each of which has to be given effect. The first is that the appeal is a rehearing, and, and, as Lord Summer said, it is not " a mere matter of discretion to remember and take account of this fact: it is a matter of justice and of judicial obligations". Not to have seen the witnesses put the appellate judges in a permanent position of disadvantage against the trial judge, unless it can be shown that he has failed to use or has palpably misused his advantage. The higher court ought not to take the responsibility of reversing conclusions so

arrived at, merely on the result of their own comparison and criticisms of the witnesses and of their own view of the probabilities of the case". The House of Lords [p.114] has held in Powell's case (supra) that "but the appeal, although a rehearing, is a rehearing on documents and not, as a rule, on oral evidence, and where the judge at the trial has come to a conclusion upon the question which the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal generally defer to the conclusion which the trial judge has formed." Again in Powell's case (supra) at vol. 152 L.T.R Lord Wright stated the principles succinctly in precise terms. He said the "two principles are, I think, clear that in an appeal of this character, that is from the decision of the trial judge based on his opinion of the trustworthiness of the witnesses whom he has seen, the Court of Appeal in order to reverse must not merely entertain doubts whether the decision below is right, but he convinced that it is wrong."

In the appeal before this court, the learned trial judge definitely and categorically rejected the evidence of the respondents and that of Ekundayo Taylor who was aptly described as an inveterate liar. The 2nd respondent visited the scene on the 8th day of February, 1976. A plan was drawn which showed skid marks and distances. There was evidence that ht e accident took place when the van entered slop, developed speed and galloped. Moreover, there were pot holes on the road, perusing the evidence carefully I am of a considered opinion that the trial judge in his capacity as judge and jury came to a reasonable conclusion that the 2nd respondent was negligent. Yet with such abundant and overwhelming evidence, I am at a loss how the Court of Appeal could have arrived at such a blatantly erroneous conclusion that the evidence of th4 appellant was romantic and that the appellant was the author of his own misfortune.

I think it is necessary to refer to the case of Elnasr Export and Import Co. Ltd, vs Mohi Eldeen Mansour S.C.Civ. App. No. 3/73 when this Court dealing with the function of an appellate Courtwith regard to finding of facts said:— "……. It is [p.115] true that Rule 21 of the Court of Appeal Rules (public Notice No. 28 of 1973) gives very wide and sweeping powers to the Court of Appeal even to the extent of rehearing the whole case. At the same time it is settled law and good sense that it should be in the rarest occasions and in circumstances where the Appellate Court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

The Court then considered Watt (or Thomas) v. Thomas (1947) A.C. at page 487 and Bermax v Austin Motor Co. Limited (1955) 1 All E.R. 236. In Watt (or Thomas v Thomas (supra), the following propositions were laid down:—

"1. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a deferent conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

2. The Appellate Court may take the view that, without having seen of heard the witnesses it is not in a position to come any satisfactory conclusion on the printed evidence.

3. The Appellate Court, either because the reasons given by the trial judge are not satisfactory, because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the Appellate Court."

The above propositions make it abundantly clear that before an Appellate Court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely of their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption of its correctness which must be displaced.

[p.116]

A careful survey and analysis of the reasoning of the Court of Appeal in this case clearly show that this appeal does not come within any of the permissible exceptions, and it would not be said that this is "one of the rarest cases or circumstance in which the Appellate court have been convinced by the plainest consideration". See E1 Nasrs, case

Throughout the judgment of the Court of Appeal, there have been grave and serious errors. I only need to quote a few of the passages in the judgment:—

"From the respondents own account of how he became connected with the vehicle on the day in question, and what subsequently followed and leading to his unfortunate fate, a proper evaluation of the evidence should have disclosed that the respondent was not a passenger but one of the apprentices to the 2nd appellant on board the said vehicle."

The learned Judge dealt with the credibility of the respondents, and he did not believe their evidence. When then did the question of evaluation of evidence enter into the matter?

Another passage in the judgment which is startling is this:—

"I venture to ask what further ordinary duty of care did the 2nd appellant owe to the Respondent? Wheat also could the 2nd Defendant have done to discharge his ordinary duty of care owed to the respondent? To may mind, there is nothing more the 2nd defendant could have done to discharge that duty."

Surely, there could be not doubt that the duty of care owed by the 2nd respondent did not end by closing the door of the van.

Another offending passage in the judgment is this:—

"As a matter of fact, the plan of the scene of the accident which is a folio in Exhibit "D" and forms part of these proceedings and which binds the respondent reveals that he 2nd appellant was in no way driving unreasonably and without care in those circumstances."

[p.117]

I have seen the plan; no evidence was called to explain it. Skid marks and distances were indicated on it. In my view if at all it has any evidential value, it seems to me that it supports the case of the appellant rather than that of the respondent, and this was the plan which greatly influenced the judgment of the Court of Appeal.

I need not refer to the case of Simpson v Perr (1952) 1 All E.R. 447 at page 448 cited by the Court of Appeal because it is patently obvious that the Court of Appeal misconceived the judgment of Lord Goddardin that case.

No doubt the Court of Appeal considering itself free by virtue of Rule 9 (1) of the Appeal considering itself free by virtue of Rule 9 (1) of the Court of Appeal Rules, felt itself at liberty to go beyond the learned judge's findings of fact and in particular when the finding relates to credibility, but such an approach should absolutely be discouraged.

I have carefully read and re-read the judgment of the Court of Appeal with every legitimate and lawful desire to support its finding and conclusion in this appeal, if it can be reasonably supported, but I find myself quite unable to do so .in the circumstance, I would set aside the judgment of Court of Appeal and restore the judgment of the High Court as regards liability and award the special damages. On the question of damages, I am of the view, that having regard to all the circumstance, the award of the sum of Le 35.00.00 as General Damages was excessive I consider an award of the sum of Le 15,000.00 as General Damages reasonable in the circumstance. I would therefore award the sum of Le 15,000.00 as General Damages. I would award costs to the appellant in this Court and in the Courts below.

(Sgd.) Hon. Mr. Justice O.B.R Tejan, J.S.C.

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, J.C.J.

I agree

(Sgd.) Hon. Mrs. Justice A.V. Awunor-Renner C.J.

I agree

(Sgd.) Hon. Mr. Justice S. Beccles Davies, J.S.C

I agree

(Sgd.) Hon. Mr. Justice F.A.Short, J.A

CASES REFERRED TO

1. Bennmax V Austin Motors Co. Ltd (1955) 1 All E.R. 366

2. Quilter v Walpleson (1882) 9 Q.B.D. at page 676

3. Warren v Coombeg (1979-1980) 142 G.L.R. at page 531

4. S.S. Hontestroom v S.S. Sagaporack (1927) A.C. 37 at page 47

5. Powell v Streathanm Manor Nursing Home (1935) A.C. 243 at page 264

6. Elnasr Export and Import Co. Ltd, vs Mohi Eldeen Mansour S.C.Civ. App. No. 3/73, Unreported

7. Watt (or Thomas) v. Thomas (1947) A.C. at page 487

STATUTES REFERRED TO

1. The Court of Appeal Rules

2. Court of Appeal Rules (Public Notice No. 28 of 197)

FALKENBERG & BRAUN LTD. & E. SCHMIDLI V. FLORENCE McGAURAN

[SC. CIV. APP. No. 4/81] [p.45-66]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 7 JULY 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MR. JUSTICE O.B.R. TEJAN J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE C.S. DAVIES J.A.

Falkenberg & Braun Ltd. - 1st Appellant

and E. Schmidli - 2nd Appellants

Vs.

Florence McGauran - Respondent

J.H. Smythe, Esq., Q.C. with him Manly-Spain Esq. for the Appellants

Miss Adelaide Dworzak for the Respondent

JUDGMENT DELIVERED ON THURSDAY 7TH JULY, 1983

Beccles Davies . J.S.C

Miss Florence Dworzak now Mrs. McGauran (hereinafter callsthe respondent) entered the employment of Messrs. Falkenberg and Braun (hereinafter calld the first appellants) on 2nd January, 1969 and

continued in theservice of the first appellants until her resignation from that service on 5th December, 1978.

The respondent's letter of appointment reads—

"26th November, 1968

Miss Florence Dworzak

P.O. Box 1324

Freetown

dear Madam,

EMPLOYMENT

We refer to our various conversations and in particular to our meeting to 22nd November, 1968: we are, in fact, very glad to learn tht you did accept our offer, and we, therfore, wish to confirm the following:

[p.46]

Your position will be that of an assistant to the undersign and, as such, you will hold a highly confidential position. Therefore, no information whatsoever relating to any of our business activities are to be divulged to any person or organization etc. Further you shall abide and carry out the instruction and regulations of this company for the time being in force.

It has been agreed that you will commence work on 2nd Jauary. 1969 and your hours of working will be as follows:—

Monday to Friday: 0830 - 1230 and 1400 - 1630

Saturday: 0830 - 1230

Further you will be entitled toone afternoon off per week the day to be determined as per mutual agreement.

We shall grant you one calendar month leave for each calendar year with full pay, the time of such leave to be mutually agreed.

May we confirm that it is our intention to grant you the right to sign letters for and on behalf of this company within a year's time as and when directed by the unmdersigned.

Your salary will at the rate of Le 350.00 (three hundred and fifty leones only) payable in Sierra Leone monthly in arrear an in accordance with existing legislation, we shall have to deduct income tax from such salary which is at present Le 30.03 (thirty leone and three cents per month.

Please note that as from 1st January 1970 your salary will be at the rate of le 400.00 (four hundred leones only) payable Sierra Leone Monthly in arrear. Such salary is taxable and we shall have to make the necessary deductions per month as stipulated int he monthly income tax deduction table then being in force.

It has been agreed that we shall pay to you the sum of Le 30.00 in cash monthly in arrear being car expenses and you are herewith requested to prepare and sign a cach voucher in the usual manneras and when such amount (thirty leones only) becomes due for payment.

For good order's sake we wish to put on record that this agreement may be terminated by either party by giving one month notice in writing to be forwarded by registered mail at any time.

Finally we which to point out that any alterations in the terms of this agreement will have to be made in writing and it goes without saying that this agreement shall be construed in accordance with the laws of Sierra Leone.

[p.47]

We should be grateful if you would kindly sign the attached carbon copy of this letter signifying your agreement to the terms and conditions mentioned therein, and we would further ask you return such copy to us as soon as possible.

Your early reply will be appreciated and we remain,

Yours faithfully

per pro FALKENBERG & BRAUN

E.V. Eglin

Secretary."

The respondent worked for the first appellants under the above conditins until some of those conditions were altered because of her family commitments. The altered conditions were contained in a letter dated 25th April. 1972. That letter states—

"25th April 1972

PROPOSED NEW WORKING HOURS FOR MRS F. McGAURAN STARTING ON 1ST MAY 1972

Monday - Friday	8.00-130	=	5 Hours per day
		=	25 hours
Saturday	8.00 - 12.30	=	4½ hours
			29½ hours

_____

These new hours are to be paid at a new rate of Le 3.00 per hour.

Overtime to be tax free at Le 3.00 per hour.

Car allowance to be at the reduced rate of Le 15.00 per month.

medical expenses to be increased to le 6.00 per month

Mrs. McGauran will work full time whenever Mr. Huebscher is away at the same hourly rates as given above.

FOR FALKENBERG & BRAUN

B. Huebscher.

In 1978 the respondent said she was dissatisfied with the service of the first appellants. She tendered her resgination from their service by letter dated 5th December 1978. The respondent's letter of resignation reads—

[p.48]

5TH December 1978

The Managing Director

Falkenberg and Braun Ltd

P. Box 65

Freetown

Dear Sir,

It is with regret that i am tenderign my resignation to Falkenberg and Braun at the close of my 10th year in your service. However, the unpleasant incident this morning was proverbial final strawand, according to the terms of my contract, I hereby give the required one month's notice as from today's date.

It must be pointed out, however, that since Mr. Flakenberg himself together with Mr. Huebscher drew up my "new" conditions of service on 25th April 1972 those conditions have not been improved, with the exception of my car allowance being raised form Le 13.00 - Le 65.00 and medical expenses from Le 6.00 - Le 26.00 and this in 6½ years of rampant inflation: Requested increments or betterment of conditions were denied. In fact I am the Only person in the entire Falkenberg and Braun establishment to hold this record: Over four years ago, at your request, I used my top level contacts in Liberia to get Falkenberg and Braun established there with their first contract. It was very difficult and took two long arduous years of travelling to liberia regularly etc. You promised me 1% of the contract value if it succeeded and you deducted Le 10.000 off the cash of the works carried out at my house to date,

however you have not closed this le 10.000 'debt' to my account even though you have promised to do so on many occasions. To safeguard myself I have taken the precaution of having a certain signed document held in a lawyer's safe covering this matter. I trust you will not amicably settle this and I hope pay me a long-service gratuity although I am fully aware that this is at your discretion.

I must again mention my deep regret that I have to depart on such a sour note but I hope that it will not finally and unpleasantly for I should hate to look back on my 10 years with Falkenberg and Braun with bitterness.

Thank you.

Yours faithfully

Florence J McGauran."

[p.49]

The first appellants, on the following day acknowledged receipt of the respondent's letter of resignation and promised to settle the matters raised in it vby the respondent, within a few weeks. The first appellante letter states.

6th December 1978

Dear Madam,

Re: YOUR RESIGNATION

We hereby acknowledge receipt of your letter dated 5th December 1978 and accept herewith your resignation of the service of our company as per January 4th 1978.

The outstanding matters in your letter shall be settled within the next few weeks.

We take this opportunity to thank you very much, for the sevices renderedto our Company and remain, dear madam,

Yours faithfully

For: FALKENBERS & BRAUN LTD

E. Schmidli

Managing Director."

The respondent was not paid a gratuity. On 4th April 1979 she issued a writ claiming "damages for breach of agreement partly in writing and partly oral amde between the plaintiff (that is the respondent) and the Defendants, (the appellants) in November 1968". I shall set out the relevant paragraphs of the particulars of the claim. They are—

"3. On or about the 26th November 1968, after various conversations the plaintiff entered into an agreement with the Defendants.

4. A letter dated 26th November 1968, and signed by the servant or agent of the Defendants contained some of the terms of the agreement of employment of the plaintiff.

[p.50]

8. All employes leaving the company are paid a gratuity by the Defendants this also being a policy of the Defendants.

9. That relying on the previous system or usage of the Defendants in their contracts of employment the plaintiff is entitled her contract to a gratuity.

11. By reson of the matters aforesaid the plaintiff has suffered loss and damage."

The respondent gave evidence at the trial of the ..... She told the Court that she had entered into her contract of employment with the appellants after various conversations and that the contract was partly oral and partly ..... the respondent claimed that during the conversations she ..... Mr. Eglin who was the appellants' secretary, the ..... expressed the hope that she would work for the ..... for at least five years, and that if she did she would receive a handsome graguity. On the basis of what Mr. Eglin had said, she proceeded to serve the appellants for ten years. Mr. Eglin had died before the trial of the action.

The trial judges reasons for finding in favour of the respondent that she was entitled to a gratuity.

The trial judge's reasons for finding in favour of the respondent are to be found in these words—

"Looking closely at the opening remarks of the letter of the 26th November 1968, i am bound to construe the words "Our various conversations and in particular our meeting of 22nd November 1968" are bound to suggest some 'collateral' arrangement..... Is this collateral arrangement warranty or condition?

[p.51]

This is certainly a warranty. It cannot be otherwish. Even if there was not a collateral agrement to that effect there certainly was an implied term of the Contract that the plaintiff would perform her duties dilligently and that when she left the Company she would be paid a handsome gratuity....There was clearly a warranty in my cnsidered view and it could not be understood otherwise..... Even if this were not so, where a man makes a promise that another will be paid a handsome gratuity if that other works for him for five years and that other acting on this promise not only works for that period but egged on and so induced, works for ten years could the promiser at the end of the day be heard to say 'I did not mean what I said? It is my considered view that handsome means what it says ....."

The appellants than appealed to the Court of Appeal. That Court upheld the decision of the trial judge. In disposing of the point whether the agreemnt was partly oraly and partly written, the Court of Appeal said—

"We have carefully read Ex. A. There is nothing therein which reles out that there was never an oral agreement for payment of ratuity prio to the initialling of the document by the respondent. Ex. a states and refers to "various conversations" [p.52] before the letter was written and refers pariticularly to a meeting betweent he parties on 22nd November 1968."

The appeliants have appealed to this Court of Appeal. The raised gy the appeal were (1) Was there an oral collaterl agreement to the written contrat entered into by the and the first appellants? (2) Was the trial judge right in refusing to award the appellants the cost of the action?

In considering the full issue formulated above, it is necessary to examine the statement of claim. The indorsement claims damages for breach of contract which was partly oral as partly written. Paragraphs 8 and 9 of the particulars ..... that it was a policy of the appellants to pay gratuities to employees leaving their (the first appellants') service: that the respondent relying on the 'previous custom or ..... in contracts of employment entered into by the first appellant their employees, was entitled to a gratuity.

In the respondent's attempt to prove usage or custom had said—

"All senior employees were paid gratuity - even juniors - labourers were paid gratuity. These gratuities are not on the same scale. Junior workmen received union rates i.e. 27 days salary or wages for year. Senior Members: The last Administrative Manager got Le 4,00 after 3 years as gratuity."

It is on the basis of this piece of evidence that the trial judge awarded the respondent Le 12.00 as gratuity.

Quite apart form the assertion of the respondent that gratuities were paid to all workers leaving the appellant service, there was no proof of the appelants having paidgratuities to their workers. In the first place workers [p.53] who are entitled only are paid gratuities under the Joint Industrial Council agreements and secondly in the case of the Administrative Manager referred to in her evidence, the respondent did not show that the alleged payment of gratuity to him, was not a written term of his Contract. However, Counsel for the respondent during the course of her argument before us stated that she was not relying on custom or usage but on the partly oral and partly written nature of the agreement between the parties. That bing the case, I shall proceed to examine the Contract and its implications.

The trial judge in his resoning had considered three situations, any one ofwhich entitled the respondent to succeed on her claim - namely (i) that the alleged oral part of the contract was warranty, (ii) that it was an implied term of the written Contract and (iii) promissory estoppel. The Court of Appeal however held that there was nothing in the written agreement which ruled out "that there was never an oral agreement for payment of gratuity." They failed to state whether or not there was in fact an oral agreement concerning the payment of gratuity to the respondent.

In order to be able to determine whether there was such an oral agreement or not, one has to consider this evidence before the trial judge in its entirety. The respondent's letter of employment (Exh. A) referred to various prelikinary discussions (or "conversations" as the appellants prefer to describe them) and confirmed the matters stated in it. on the respondent's resignation from the service of the appellants she had said inter alia e. Exh. B —

"To date, however, you have not closed this Le 10.000 'debt' to my account even though you have promised to do so on many occassions. To safeguard myself I have taken the precuation of having a signed document held in the Lawyer's safe covering [p.54] this matter. I trust you will now amicably settle this and I hope pay me a long service gratuity although I am fully aware tht this is at your discretion..... (Emphais mine)

The respondent's answers under cross-examination on the agreement between herself and the first appellants are of some assistance in determining this issue. The respondent had replied

"There was no provision for gratuity in my letter of appointment `Exh. 'A', Exh. B made no provision for gratuity..... it is not true thatI was clear in my mind that there was no provision for payment of gratuity..... I agree I said 'I hope pay me a long service gratuity although I am fully aware that this is , at your discretion..... I have continued to regard Exh. 'A' as containing the terms of employment with the defendant Company..... " (Emphasis supplied).

Putting the respondent's letter of imployment - Exh. 'A' side by side with her letter of resignation Ex. 'B' (with particular reference to that portion of Exh. B in which she expressed the hope of being paid a long service gratuity the knowledge that such a payment was within thefirst appellant's discretion) it is apparent that the language imployed by the respondent was that of a suppliant rather than that of someone who knew knew she had a legal entitlement the implementation of which was being demanded. The respondent's answers under cross-examination which I have highlighted demonstrate that she knew she was not entitled to a gratuity under any agrement, be it oral or in writing, and that all the terms of her employment [p.55] was contained in Exh. 'A' From the foregoing, I hold that there was no oral agreement between the parties to pay the respondent a gratuity int he event of her leaving the first appelants' service.

Assuming for a moment that Mr. Eglin, the first appellants agent had told the respondent during negotiations that she would receive a handsome gratuity is she worked satisfactorily for five years in the first appellants' service, and that promise was not luded in Exh. A - the letter of employment - does that make the promise a term of the agreement? The parties to a contract may make all kinds of statements whether in writing ororally leading up to the contract. Even in a case where it is established that certain statements were mad by the parties it does not necessarily follow that all those statement are terms of the contract. it is the duty of the judge trying the matter to decide which statements are contractual and which are non-contractual, merely including the formation fo the contract but not forming part of it. In other words the judge must determine which statements are mere representations and which are really terms of the contract. The law on the point is stated in the 4th Edition of Halsbury's Laws of England volume 9 at paragraph 346 thus —

"During the course of the formation of a contract, one of the persons who are to become parties to the contractmayh make representations to another such person. A representation is a statement made by one party (the representee) which relates by way of affirmation, denial, description or otherwise, to a matter of fact or present. intention.

[p.56]

A representation of fact may or may not be intende to have contractual force if it is so intende it will amount to a contractual term; if it is not so intended. it is termed a mere representation.

Except where a representation amounts to a representation of fact, it can normally have no effect on a contract between the reporesentor and representee unless it amounts to a contractual promise. Exceptionally, however, a representation of intention may have an effect on the contract, notwithstanding that it does not amount a contractual promise, by reason of the doctrines of waiver and equitable estoppel

In determining whether a statement is a contractual term or a mere representation the primary consideration is the ..... of the parties. The test of intention is objetive. The Court have have had regard to certain factors as aids so arriving at the intention of the parties. Thes aids are out in Halsbury's Law of England Vol. 9 at paragraph 347:

"those factors should be regarded as valuable though not decisive tasts:

The factors taken into account by the Courts are as follows:-

(1) If only a brief period of time elapses between the making of the statement and the formation of the contract, the Court may be disposed to hold that the statement is a term of the contract.

[p.57]

(2) Where the party to whom the statement is made makes it clear tht he regards the matter as so important that he would not contract without the assurance being given, that is evidence of an intention of the parties that the statement is to be a term of the contract.

(3) Where the party making the statement is stating a fact which is or should be within his own knowledge and of which the other party is ignorant, that is evidence that the statement is intended to be a term of the contract.

(4) Where, subsequent to negotiations, the parties enter into a written contract and that contract does not contain the statement in question, that may point towards the statement bding a mere representation. Though there have been cases where it has been found that such a preliminary statement constitute a collateral contract.

(5) Where the party making the statement suggests an indpendent survey or opinion that may show that on warranty was intended.

[p.58]

(6) It has ben said that maker of a statement can rebut an inference of warranty if he can show that he was innocent of fault in making it, and that it would not be resonable in the circumstance to hold him bound by it."

The above factors were crystalised into three questions by the learned authors of the Seventh Edition of Cheshire and Fifoot's law of Contract at pp. 107 and 108. They are:

(i) At What stage in the course of the transction was the crucial statement made?

If it was made only in the preliminary negotiation, it should not be regarded as contractual. See Routledge v Mckay 1954 1 ALL E.R. 855 (1954) 1 W.L.R. 615. If the time between the negotiations and the contract is well marked and sustaintial, the answer would be that the partiesdid not intend the statement to form part of the contract. On the other hand if only brief period of time elapses between the making of the statement and the formation of the contract the court may be disposed to hold that statement was a term of the contract.

[p.59]

There is no evidence as to when the alleged statement was made by Mr. Eglin. There appear to have been 'various conversations' preceding the final 'conversation' on 22nd November 1968 Test (i) therefore is not of assistance having regard to the lack of evidence as to when the alleged statement was made

(ii) 'Was the oral statement followed by a reduction of the terms into writing?

If the oral statement was followed by a reduction of the terms into writing, and the writing does not contain the statement in question. That may point to the statement being a mere representation; though there have been cases in which such preliminary statements have been held to constitute a collateral contract.

In the instant case, there were "various conversations" ending 'in paticular' with that on 22nd November, when all the terms of the contract were undoubtedly settled. The argument was reduced into writing and dated 26th November 1968, when all the terms of the contract were undoubtedly settled. The argument was reduced into writing and dated 26th November 1968. It stipulated the financial aspects of the responden's employment But significantly made no mention of her entitlement to a gratitiy. On 25th April 1972, the respondent's respondent's hours of work and salary were altered respectively to meeet her domestic commiments, yet again no montion was made of her entitlement to a gratuity. If M. Eglin had made the alleged statement, it would have been so vital to the repondent that it is resonable to expect that she would have drawn attention to its absence and insisted on an alteration of the terms of the contrat at the earliest possible opportunity or at the latest in April 1972 with financial provisions of her contract were altered in writing.

[p.60]

I hold that even if Mr. Eglin had made the alleged statement it would have been nothing more than a mere representation. It was not a term of the contract.

and (iii) Had the person who made the statement special knowledge or skill as compared with the other party?.

This test is inapplicable to the peculiar circumstance of this case.

Taking all the dircumstance of this case into consideration no reasonable man would expect that it was the intention of the parties that there should have been a term in the contract, whether oral or in writing, that the respondent would be entitle to a gratuity on the termination of her contract of service with the first appelants.

Counsel for the appellants submitted during his argument that negotiations prior to a matter agreement are not part of the contract. He referred us to Prenn v Simmonds 1971 3 All E.R. 237. 1971 1 W.L.R. 1381. The summary of tthat decision as it appears at page 238 of the reporrt states—

"Althogh in construing a written agreement the Court is entitled to take account of the surrounding circumstance with reference to which the words of the agreement were used and the object, appearign from those circumstance with reference to which the words of the agreement were used and the object, appearing from those circumstance, which which the person using them had in view, the Court ought not to look at the prior negotiatins of the parties as an aid to the construction fo the written contract resulting from those negtiations. Evidence should be restricted to evidence of the factual vackground known to the prties at or before the date of the contract, including evidence of the 'genesis' and objectively, the 'aim' of the transction."

[p.61]

The legal issues involved in Prenn v Simonds and those in this case are similar. In Prenn's case the issues turned on the interpretation of the terms of a written contract, and alternatively rectification. The issue in the instant case was whether or not there was an oral collateral contract to that in writing. if there was such an oral contract to that in wirting then evidence will be entertained to put the entire contract in its proper perspectiv. The position is thus stated in Cheshire and Fifoot an Contracts 6th Edirtion at page 104—

".....the exclusion of oral evidence is clearly imappropriate where the document is designed to contain only part of the terms - where, in other words, the parties have made their contract partly in writing and partly by ord of mouth. The situation is so comparatively frequent as in effect to deprive the ban on oral evidence of the strict character of a 'rule of law' which has been attriguted to it . It will be presumed in the words of learned author 'that a document which looks like a contract is to be treated as the whole contract. But this presumption though strong is not irrebutable. In each case the Court must decide whether the parties have or have not reduced their agreement to the precise terms of an all embracing written formula. If they have, oral evidence will not be admitted to vary or contradict it; if

they have not, the writing is but part of the contract and must be set side with the complimentary oral terms..."

[p.62]

In my judgment counsel for the appellants contention is misconceived. The effect of the decision in Prnn,s case is that negotiations prior to the formation of a written contract are not admissible in evidence as an aid to the interpretation of a written agreement resulting from those negotiations. There is no authority to support the proposition that tems agreed upon durign prior negotiations can in no circustances form pa..... of a subsequent written contract. Indeed the law as postulate above is that the oral terms agreed upon during negotiations of form party of a written agreement. It is quite permisible to import oral terms into a subsequent written agreement.

Therefore it was quite proper for the trial judge and ind... the court of Apeal to consider evidence regarding the alleged oral term of the contract concerning the paymrnt of gratuity to the respondent

I now turn to consider the second issue raised in this appeal, namely, the failure of the trial judge to award costs of the action to the Second Appellant Mr. E. Schmidli who was Secretary to the Frist Appellants. The trial judge in disposing of the case against the second appellant said.—

" I find myself unable to find Mr. E.V. Schmidli liable as the second defendant to pay such damages and cost because he did not presonally appoint Mrs. McGauran. If he did sign any letters he did so for and on behalf of Messrs Falkengerg and Braun be it a firm or Company."

The second appellant was was ismissed from the suit by the trial judge after having found in his favour in the statement quoted above.

In dealing with the complaint of counsel for the second appellant, on the trial judge's failure to award costs to his client, the Court of Appeal resolved the matter in these terms.

[p.63]

"Mr. Syythe has contended that the learned trial judge did not award costs to to be paid by the respondent to the 2nd Appellant when the learned trial judge dismissed him from the suit. It appears that learned Counsel lost ocmplete focus of the fact that the 2nd Appellant was the ostensible agent of the 1st Appellant and that the action was not improperly brought. learned Counsel has also argued that he learned trial judge did not show good cause for not awarding the 2nd Appellant costs. In our view it was for learned Counsel to show on the evidence and the judgment that there was no good cause for him not to have awarded costs tothe Appellant. It must not be forgotten that costs are at the discretion of the Court and what there could only be complaint if in execising such discretion the Court did not do so judiciously. We find no substance on the gorund relating to costs."

The trial judge made no order as to costs. The Court of Appeal hawever, refused 2nd Appellant the costs of his defence saying that counsel for the Second Appellant had lost sight of the fact that the Second Appellant was the ostensible agent of the 1st Appellant and that the action had not been improperly

brought. The Court of Appeal said further that it was for Counsel to demonstrate to that Court that there was an absence of good cause in refusing costs to the 2nd Appellant.

Order XLVI rule 1 of the High Copurt Rules provides —

[p.64]

"Subject to the provisions of any Act and these rules, the costs of and incident toall proceedings in the High Court.... shall be in the discretion of the Court..... provided also that the costs shall follow the event unless the Court shall for good cause, otherwise order."

The above rule undoubtedly gives tht rrial judge a discretion as to awarding costs. A discretion when confirmed mplies that it "must be exercised according to the rulesof reason and justice and not to private openion, according to law and not the humour. The ecercise of the discretion must not be arbitary, vague and fanciful, but legal and regular."See Sharpe v Wakefield & others 1886-1890 All E.R. Report: pep. (1891) AC 173.

The Respondent had presumably relied on the provisions of Order XII rule 4 of the high Court Rules in joining the 2nd Appelantas a party to the proceedings. Rule 4 provides—

"All persons may be joined as defendants against whom the right to relief is alleged to exist, whether jointly, severally or in the alternative.....

The suposed right to relief against the Second Appellant is to be found in paragraph 7 of the respondent's particulars of claim

Paragraph 7 states—

"7. that in spite of repeated request increments by the plaintiff these were denied by the second defendant presonally as the servant/agent of the first defendant."

The respondents evidence connecting the Second Appellant with this case isto be found in the notes of evidence. she stated—

[p.65]

"..... 2nd Defendant is the Managing Director..... The Second Defendant refused to give any increase of salary. I approached him form time to tieme to increase my salary because of the soaring cost of living and he refused .....In December 1978 when I went to the 2nd Defendant for monies and could not pay me for the days I was away when my child was ill. The second defendant became Managing Director in 1973. It was in 1973 that increments was received by me. Prior to Mr. Schmidli joining Company in 1973 I did received inorements. I am claiming damages of breach of contractwitht he Company. I am also claiming damages against 2nd defendant as Managing Director of this company."

under cross-examination she shaid —

"The 2nd Defendant was not a party in any agreement with Falkenberg and Braun Ltd. and myself....."

The particulars of the respondents claim ahd declared that the 2nd Appellant was the servant/agent of the 1st Appellants. In her evidence, she said that she was claiming damages against the 2nd Appllant because, as the servant or agent of the 1st Appellants, he had refused her increments of salary. I fail to see how the claim against the 2nd Appellant was either 'join several or in the alternative' to that against the 1st Appelllants. I hold the vew that the Respondent's claim against the 2nd Appellant was frivolous.

[p.66]

The trial judge did not state any cause for refusing to award costs to the 2nd Appellant. The general rule is that costs follow the event. Taking the respondent's pleadings and evidence into consideration the respondent's claim against the 2nd Appellant was frivolous. in these circumstance the judge should have awarded coststo the 2nd Appellant. The judge did not exercise his discretion properly. I would allow the appeal of the 2nd Appellant on the issue of costs.

I would also allow the appeal of the 1st Appellants set aside the judgments of the Courts below, and enter judgment in their favour.

(Sgd.) Hon. Mr. Justice S. Beccles Davics J.S.C

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

(Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C

I agree

(Sgd.) Hon. Mr. Justice O.B.R. Tejan, J.S.C

I agree

(Sgd.) Hon. Mr. Justice Constant Davies. J.A

CASES REFERRED TO

1. Routledge v Mckay 1954 1 ALL E.R. 855 (1954) 1 W.L.R. 615

2. Prenn v Simmonds 1971 3 All E.R. 237. 1971 1 W.L.R. 1381

3. Sharpe v Wakefield & others 1886-1890 All E.R. Report: pep. (1891) AC 173.

STATUTES REFERRED TO

1. Order XII rule 4 of the High Court Rules

FRANKLYN KENNY v. THE STATE

[SC. CR. APP. NO. 282] [p.1-13]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 28 APRIL 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE F.A. SHORT J.A.

FRANKLYN KENNY - APPELLANT

VS.

THE STATE - RESPONDENT

T.G. JOHNSON, ESQ., for the Appellant

N.D. TEJAN-COLE, ESQ., for the Respondent

AWUNOR-RENNER, J.S.C.

On the 8th DAY of May, 1981 at the Freetown High Court the appellant was convicted of the offence of Fraudulent Conversion contrary to Sec. 20(1) (iv) (a) of the Larcency Act 1916 and sentenced to 2 years imprisonment by Justice D.E.M. Williams sitting as Judge alone.

The particulars of the offence are:—

"That Franklyn Kenny on the 24th day of April, 1978 at Freetown in the Western Area of Sierra Leone Fraudulently converted to his own use and benefit, that is to say the sum of three hundred and fifty Leones entrusted to him by Christie Wallace Kargbo in order that he the said Franklyn Kenny might pay the same into the Judicial Sub-Treasury Freetown."

[p.2]

The Appellant however, appealed to the Court of Appeal on the 20th day of May, 1981 against his conviction and sentence. On the 26th January, 1982 the Court of Appeal dismissed the appeal against conviction and sentence. On the 26th January, 1982 the Court of Appeal dismissed the appeal against conviction and allowed that against sentence. it is against that decision that the Appellant has now appealed to this Court on the following grounds:-

(a) The Court of Appeal having found that the trial Judge did not advert his mind to the third point that the persecution had to prove that is to say, that the misuse of the money was "fraudulent and dishonest" and having found that, it is not enough to say that the accused has converted the said amount to his own use and benefit, such use and benefit must be "fraudulent and dishonest" and having held that "in that regard the appeal can succeed" erred in law in not allowing the appellant's appeal against conviction

(b) Leave of the Court of Appeal having been sought and granted to delete and substitute for the original grounds one and three; the following new grounds one and three.

"One: The appellant having challenged P.W.4 and P.W.5 respectively at the trial on their testimony as being totally [p.3] different on material points form that giving erred in law in ignoring their conflicting and contradictory evidence and in convicting him on the Court of Fraudulent Conversion."

"Three: The learned trial judge misdirected himself on the evidence by holding that the sum of Le350 was not paid into the Judicial Sub-Treasury having regard to the unsatisfactory and unreliable evidence of prosecution witnesses when compared with their testimony before the committal magistrate. The court of Appeal erred in law in not allowing Counsel for the appellant to argue the said new grounds (one and three) on the grounds that it could not and would not look at the depositions taken before the Committal Magistrate as they did not form part of the records before the Court.

[p.4]

The learned presiding Justice adding that the only reason Counsel for the appellant wanted the depositions looked at, was because he was concerned with the preliminary investigations."

The facts of the cawse as far as i need to refer to them are as follows: According tot he prosecution at the material time the appellant was working at the Registry of the Court of Appeal. One Mrs. christie Wallace Kargbo on the 24th day of April, 1978 handed the sum of Le. 350 to him in order that he should pay the amount into the Judicial Sub-Treasury on behalf of one Mr. Ajai Cole. Mrs. Kargbo was than issued with a temporay recipt by the appellant. On the following day she was also issued with a paying-in-slip which he the (appellant) claimed was the official receipt. This amount was never paid into the Judicial Sub-Treasury. The appellant however admitted receiving the sum of Le. 350 from Mrs. Wallace Kargbo ont he day in question and then issuing a temporary receipt to her. He claimed that Mrs. Kargbo had asked him to keep this amount for her as he had told her that it was insufficient for the purpose for which it was intended. he also stated that when Mrs. Kargbo called at his office on the following day he handed over the Le. 350 to her and he prepared and handed to her a payin-in-slip in triplicate for the sum of Le. 410 and asked her to pay this amount into the SubTreasury. she later returned with two copies of the paying-in-slip with the Sub-Treasury stamp on them. He then retained one copy as [p.5] usual which he kept in his file and then gave her the other copy. In arguing his fround (a) he submitted that there was nothing in the evidence from which the learned trial judge could have inferred a fraudulent intent on the part of the appeliant. he submitted further that in a case of Fraudulent Conversion the prosecution must prove certain ingredients. He also submitted that where a trial judge sat as a judge and jury the Court of Appeal should not have applied the provisions of Section 58 sub-

section 2 of the Courts Act No. 31 of 1965 as fraudulent intent could not be inferred from the evidence. Mr. N.D. Tejan-Cole Counsel for the respondent in reply to Counsel for the appellant submitted inter alia that the learned trial judge did advert his mind to the fact that the issue of the money was dishonest and fradulent and that he was not obliged to say so in as many words since on totality of the evidence there was ample material to infer that the appllant dishonestly and fraudulently converted the sum of Le. 350 entrusted to him. The ingredients of an offence under the section are conveniently summarised in the cas of R v BRYCE reported in Cr. App. Report Volume 40 at page 62, where Hallet J. said and I quote—

"Where a charge is for Fraudulent Conversion it is essential that three things should be proved to the satisfaction of the jury; Firstly that the money was entrusted to the accused person for a particular purpose, secondly that he used it for some other purpose and thirdly that such misuse of the money was fraudulent and dishonest".

[p.6]

See also Archbald Thrity Sixth Edition page 694 at paragraph 1909. Also in Archbold Thrity Sixth Edition page 695 at paragraph 1912 it is stated as follows:-

"In order that a prisoner charged with Fraudulent Conversion may be convicted he might be found to have had a fraudulent intent."

The intention of an accused person at the time he commits a crime is often a necessary ingredent of the crime and must be proved by the prosecution as any other fact or circumstance in the case. See the case of R. v STEANE C.C.A. (1947) K.B. at page 997 where Lord Goddard C.J. had this to say

"Now the first thing which this Court would observe is that where the essence of an offence or a necessary constituent of an offence is a particular intent that intent must be proved by the Croun just as much as any other fact necessary to constitute the offence."

Further down in the same judment he continued by saying —

"The important thing to note in this respect is that where an intent is charged in the indictment the burden of proving that throughout remains on the prosecution. No doubt if the prosecution proves an act the natural consequences of which would be a certain result and no evidence or explantion is given, then a jury may on a proper direction find that the [p.7] prisoner is guilty of doing the act with the intent alleged but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction and if on a review of the whole evidence they either think that the intent did not either think that the intent did not exist or they are left in doubt as to the intent the porisoner is entitled to be acquitted."

In the case of R v CRUBB reported in 11 Cr. App. Report at page 153 the appellant was convicted before the Recorder at the Central Criminal Court of fraudulent conversion of money and shares and was sentensed to nine months imprisoment Lord Reading C.J. said inter alia at page 157 —

"There cannot be a fraudulent conversion without an intent to defraud."

Sometimes an intention is incapable of direct proof and this can only be inferred from overt acts done by the prisoner and proved at the trial.

The defination of an "intent to defraud" has been stated in several cases. See the cases of R v WINES (1953) 2 A.E.R. 1497 C.C.A. and In Re LONDON AND GLOBE FINANCE CORPORATION (1903) 1 Ch, 728 at page 738.

Generally a man is taken to intend the natural and probable consequence of his own acts. Direct evidence of a man's state of mind is not always available.

[p.8]

However a man's act may afford abudants evidence of his intention to produce a particular result although evidence to the contrary is always admissible to rebut this. see the cases of R v STEANE Supra. R v RILEY (1967) Criminal Law Review 656. R v LYON Central Criminal Court Sept. 28, 1958.

Having briefly stated the facts supra and the law applicable, I must now proceed to examine the evidence to see how the principles enuciated above can be aopplied to the present case.

Mrs. Christie Kargbo on the 24th Day of April, 1978 handed the sum of Le. 350 to the appellant to be paid into the Judicial Sub-Treasury. This amount was to satisfy the conditions of Appeal in the case of ADJAI COLE v ALONGO COOKER. The appellant accepted this amount although he knew that is was not his duty to do so. He than issued a temporary receipt ot her in his own hand in the following words. :Temporary Receipt received form Mrs. C. Kargbo of Wilberforce Barracks the sum of Le 350 for Adjai Cole". When asked why he had issued a temporary recipt, he replied that there was no one in the office to issue an official receipt. On the following day when Mrs. Kargvo again called on him he issued her with another recipt. The contents of that receipt also read as follows:

"Payment into Judicial Sub-Treasury Cr. App. 25/77 Adjai Cole v Alongo Coker. Deposit Le. 350.00 25th April 1978 by whom paid Adjai Cole."

At this stage I think it will be necessary for me to refer to a few quotations from the statement of the appellant and from his evidence. In his statement he said and I quote -

[p.9]

"On the 24th day of April I received the sum of Le. 350. from Mrs. Christie Wallace Kargbo and then issued the temporary recipt now in question to her. The following day Mrs. C.W. Kargvo coame back to me. I then handed over the sum of Le 350.00 back to her to be filled up to Le. 410.00. Issued triplicate paying-in-slip for Le. 410.00 to her to enable her to pay the said amount to the cashier at the Judicial Sub-Treasury."

In his evidence the appellant also said and I quote —

"After returning the Le. 350.00 no other monies passed between us."

I have referred to the contents of the two receipts above because on the evidence, it is quite clear that it was the appellant who wrote out both of them. His own witness Horton admitted that it was the appellant who wrote out the latter receipt and that he was familiar with his handwriting. A witness for the prosecution John Alimamy Sandi also claimed that the appellant admitted preparing it. This is important because although he denied preparing it there is abudant evidence that he did and if this is the case he was surely lying when he said that he returned the Le. 350.00 to Mres. Kargbo on the 25th April, 1978. Apart from the quotations I have mentioned above there is a lot of discrepancies in the evidence of the appellant. Furthermore his answers as regards most of the exhibits tendered in Court were most evasive.

Finally there is evidence that the amount of Le. 350.00 was never paid into the Judicial Sub-Treasury and as [p.10] a result the appeal involving Adjai Cole was struck out for non-fulfilment of the conditions of appeal. Taking all the above facts into consideration, one cannot help but ask what was the appellant's ntention at the time he received the money? Right from the beginning one could discern from the acts done by him how his mind as working and that he intended fraudulently to convert the sum of Le. 350.00 to his own use and benefit, which he in fact did. I have lready stated above what is meant by an intent to defraud and how the intention may be proved.

In the present case i think that he evidence clearly shows that he appellant at the time he received the money when he knew he had no right to do so intended by decit to induce Mrs. Wallace Kargbo to act to her detriment and thus intended to defraud. A person is taken to intend the natural and probable consequences of his own act.

I now propose at this stage to refer to the passages complained of in the judgment of Warne J.A. by counsel for the appellant and I quote—

"It seems to me that the learned trial judge did not advert his mind to the thrid point that the prosecution had to prove that is to say that misuse of the money was fraundulent and dishonest.

In the judgement the learned trial judge had this to say—

"He has failed to pay the money into the Judicial Sub-Treasury; he has failed even to return the amount to Mrs. Christie Kargbo.

[p.11]

He has failed to account for the money, otherwise, therefore it is clear on the evidence that the accused has converted the said amount to his own use and benefit. With respect to the learned trial judge it is not enough to say that the accused "has converted the said amount to his own use and benefit, such use and benefit must be fraudulent and dishonest.

In this regard the appeal can succeed, however on the totality of the evidence it is in my opinion, conclusive in support of the indicitment. I do not think the verdict should be disturbed because if the

judge had properly adverted his mind to the thrid essential point, the verdict would have been the same. In short the judge's failure to advert his mind to the third point is not tantamount to a substantial miscarriage of justice".

In my opinion in these circumstances, although it would have been preferable if the judge had made a specific finding of fraudulent intent, his failure to do so was not fatal. In view of the totality of the evidence the only resonable inference to have been drawn by the trial judge was that the appellant [p.12] fraudulently converted the sum of Le. 350 to his own use and benefit. In my judgment therefore the Court of Appeal was right in applying the provisions of Section 58 sub-section 2 of the Courts Act 1965. This in my view disposes of ground (a).

As regards ground (b), I think that all the contentions should be dealt with together. The facts relating to this particular ground of appeal are as follows: At the hearing of the Appeal in the Court of Appeal counsel for the appellant had applied for leave to amend the original grounds of appeal which application had been granted by that Court. He had claimed that although the appellant having challenged PW4 and PW5 respectively at the trial on their testimony as being totally different on material points from that given before the Committing Magistrate, yet the Court of Appeal had erred in law in not permitting him to argue this particular point as they claimed that they would not look at the depositions as they did not form part of the record.

The question one should now ask is this; was the Court of Appeal right in refusing to look at the depositions for the reason given and there-by depriving him of the right to argue this particular ground of appeal? Quite clearly the depositions did not form part of the record and therefore the Court of Appeal was quite right in refusing to allow Counsel for the appellant permission to refer to the depositions.

Indeed, learned Counsel applied to us to refer to the depositions. He conceded that they were not tendered in the High Court or Court of Appeal. We refused the application. In my opinion this ground of appeal also has no merit.

[p.13]

The appeal is dismissed.

(Sgd.) Hon. Mrs Justice A. Awunor-Renner, I.S.C

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

(Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C

I agree

(Sgd.) Hon. Mr. Justice S. Beccles Davice J.S.C

I agree

(Sgd.) Hon. Mr. Justice F.A. Short. J.A.

CASES REFERRED TO

1. R V Bryce Reported Cr. App.

2. R. V Steane C.C.A. (1947) K.B. At Page 997

3. R V Crubb Reported , CR. App. Report at Page 153

4. R V Wines (1953) 2 A.E.R. 1497 C.C.A.

5. Re London and Globe Finance Corporation (1903) 1 CH, 728 at Page 738.

6. R V Riley (1967) Criminal Law Review 656.

7. R V Lyon Central Criminal Court Sept. 28, 1958.

8. Adjai Cole v Alongo Coker, Cr. App. 25/77 (Unreported)

STATUTES REFERRED TO

1.Section 58 sub-section 2 of the Courts Act 1965

J. S. BANGURA v. S. L. ELECTRICITY CORPORATION

[S. C. CIV. APP. NO. 10/81] [p.22-39]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 5 MAY, 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE S. M. F. KUTUBU J.A.

BETWEEN:

J.S. BANGURA - APPELLANTS

Vs.

S.L. ELECTRICITY CORPORATION . - RESPONDENTS

M.J. Clinton, Esq., for Appellant

Miss P.S. Wellesley-Colefor Respondent

JUDGMENT DELIVERED THIS 5th DAY OF MAY, 1983

HARDING. J.S.C.

The appellant was employed as payments Cashier by the Sierra Leone Electricity Corporation (hereinafter referred to as " the respondents") and was earning a salary of Le 1,250.00 per annum when he was summarily dismissed from his employment on 1st October, 1973 by letter dated 28th September, 1973 alleging that the Corporation's Board of Directors had concluded that he was "culpable for serious misconduct in respect of his handing and management of the Corporation's funds". The appellant was aggrieved with his dismissal and so he consulted a solicitor who, after exchange of correspondence with the respondents, instituated proceedings agains them on behalf of the appellant for the recovery of arrears of salary and damages for wrongful dismissal by writ of summons dated 8th July, 1976. The respondents after entering appearance to the writ delivered and filed a [p.23] defense and counter-claim to which the appellant delivered and filed a defense and reply. The action went to trial and on 20th October, 1978, Williams, j. dismissed the respondent's counterclaim and gave judgment for the appellant in the sum of Le. 2,067.50 which award included an amount of Le. 1,365.00 assessed general damages.

The respondents appealed to the Court of Appeal against the judgment of Williams, J. on five grounds of appeal.

In their Judgment dated 14th July, 1981 the Court of Appeal (Ken E.O. During, Marcus E. A. Cole and M.S. Turay JJ.A.) allowed the appeal on three of the grounds and held that the other two were withou merit. The three grounds on which the appeal succeeded were:—

"2. That the learned trial judge misdirected himself on the case for the appellants on the evidence.

4. That the learned trial judge erred in law in finding that the plaintiff/Respondent had been wrongfully dismissed and in awarding damages to him.

5. That the decision is against the weight of evidence."

Marcus Cole, J.A. in delivering the unaimous judgment of the Court stated as follows:—

"The issue whether the appellants were justified in theinstant case in summarily determining the respondent's services was one of fact. There is no fixed fule fo law defining the degree of miscounduct which will justify dismissal.

[p.24]

Each case would depend on its facts and circumstances. The appllants in the instant case have stated in Exhibit "D" letter of dismissal:—

..... the Board of Directors has given careful attention to the facts pertaining to the pay roll fraunds in the Western Area and has reviewed the part you played for which you were suspended. The Board has concluded that you are culpable for serious miscounduct in respect of your handling and management of the corporation's funds.....

Cogent and credible evidence has been adduced by the appellants to justify that the respondent had been found culpable for serious miscounduct in respect of his handling of the appellant's funds. This decision was reached as a result of careful investigation by the appellants.

A proper evaluation of the evidence and correct inference thereforom indicate irresistibly that the appellants were justified in summarily dismissing the respondent from their employment and I so hold."

The appeal now before this Court is against that judgment. Twelve grounds of appeal were filed but in my view grounds 10, 17 and 12 emb odied the main complaint of the appellant, viz,

[p.25]

10. The Court of Appeal erred in law in failing to uphold the High Court decision which was based upon the question of truthfulness of the witnesses and not necessarily upon inferences to be drawn

11. The Court of Appeal erred in holding that the judg's finding in the present case is based on incosistencies in the evidence of the appellants' witnesses particularly that of D.W.2

12. The decision was against the weight of evidence."

Counsel for the appellant conceded the respondents' rights both at common law and under the "Rules, Regulations and Conditions of Employment" of the Respondent Coprporation to summarilly dismiss the appelant, if he was guilty of serious misconduct, but countended that miscounduct must be proved on the balance of probabilities and that the burden of proof throughout as to such misconduct was on the reaspendents; and that it was a question fo fact for the Court to decide whether or not there was such a misconduct. He submitted that on the basis of the evidence adduced no such misconduct had been proved and that the learned trial judge was righ in finding that the appellant had been wrongfully dismissed from his employment.

Counsel for the respondents on the other hand contended that he learned trial judge misdirected himself on the case for tghe respondents on the evidence tht he erred in law in finding that the appellant had been wrongfully dismissed and urged that there was abundant evidence to show that the appellant's conduct in his office disclosed miscounduct, disobedience of lawful orders, dishonesty and negligence.

[p.26]

The respondents case is stated in their Defence and Counterclaim as follows:—

"6. As direct result of the failure and neglligency of the plaintiff to conduct his business strictly in accordance with the directives of the defendant, his employers, the defendant sustained a loss ofLe. 1,952.60 which the plaintiff has neithe accounted for nor paid.

In breach of the express terms and conditions of his employment, the plaintiff:—

(a) Made out payments which were not supported by valid and authorised pay cards.

(b) kept each, form wages, in his custody for more than three days in flagrant viclation of the mandatory regulations which required him to rebank such monies within 48 hours after pay day

(c) On the 2nd January, 1973 repaid to the defendant's banking account Le. 1,045.47 from his own monie in part satisfaction of a general total deficit of Le. 4,164.31. When queried about this plantiff described the payment as "excess cash" accumulated in his safe from October to December 1972. This payment to the bank was made after [p.27] the defendant had pointed out to him that his reconciliation statements were erroneous

(d) Failed to provide a reconcilliation for january 1973/"

As stated earlier the trial judge found for the appellant, i.e., held that he was wrongfully dismissed, but this decision was reversed by the Court of Appeal on the fround that" a proper evaluation of the evidence and correct inference therefrom indicate irresistibly that the appellants (the respondents herein) were justified in summarily dismissing the respondent (the appellant herein) from their employ."

Thus the issue before this court is, whether on a review of the evidence as presented in this case, there is any, and if so sufficient material to warrant the Court of Appeal in holding that the appellant had been dismissed justifiably. However, before embarking on a review of the evidence it is necessary to state that whilst it is the duty oa an appelate court to form itrs own opinion upon the evidence adduced a distinction must be drawn between findings based on conflicting testimony and deduction to be made from the evidence as a whole. In the former case a finding on a question of fact should not lightly be disturbed, but in the latter an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opion giving weight if possible to the opinion of the trial judge. Indeed the Court of 'Appeal in its judgment referred to various authorities on the subject, viz.

(i) DOMINION TRUST CO. vs NEW YOURK LIFE INSURANCE COMPANY (1919) A.C. 254, P.C.

[p.28]

(ii) MNGOMERIE & co, LTD, vs JAMES 96. L.T. Rep. (1904) a.c. 73

(iii) BENMAX vs AUSTIN MOTORS & CO.L LTD (1955) 1 A. E. r. 326

(iv) TEXACO (S.L.) LTD. vs E.B. SMITH Civ. Cpp. 15/77 (unreported).

In WATT or THOMAS vs THOMAS (1947) 484, H.L. Lord Thankerton stated (at pp. 487 & 488) the principles enuniciated in all the above mentioned cases thus:-

"1. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appeliate court which is disposed to dome to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reaosn of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

"2. The appellat court may take the view that, without having sen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

"3. The appellate court, either because the reasons given by the trial judge are satisfactory, or because it unmistakably so appears from the evidence, may be statsfied that he [p.29] has not taken proper advantage of his having seen and heard he witnesses, and the matter will than become at large for the appellate court."

See also EL NASR EXPORT & IMPORT CO. LTD vs MOHIE EL DEEN MASOUR S.C. CIV. App. 3/72 Judgment delivered on 25th April, 1974, and Ayo Wilson vs. James Samura & Anor. S.C. CIV. App. 3/72 Judment delivered on 3rd June, 1973 (both cases as yet unreported).

According to the evidence adduced before the trial judge, the appellant was the payments cashier in the Finance Section of the respondent's business and his duties as stated in a memorandum dated 24th September, 1972 - Exhibit E - were:—

"1. Writing of cheques for all payables received form stores and finances section respectively.

2. Cashing of cheques for salaries and wages, leave payments of all staff.

3. Posting of payments and petty cash books.

4. Preparing of payment vouchers."

Other employees in the Finance Section were the Payroll Clerks. Accounts Clerks, Assistant Finance Officer, who at the material time was a Mr. P.E. Temple, and who was the first of two witnesses to testify on behalf of the respondents.

According to Exhibit E the duties of the Finance Officer includes:—

1. Supervising the staff in the Finance Section.

[p.30]

2. Reconcilliation with Tab. 32 of sixteen balance sheets accounts.

3. Reconciliation of Bank of Sierra Leone accounts and National Development Bank accounts.

4. Submitting payments vouchers and Petty Cash Journals with other Journals to Management Accounts Section for processing at Central Statisticas Office.

5. Checking the Payment and Petty Cashier at intervals and during re-imbursements.

6. Initialing cheques drawn by the Payments Cahier and forwarding to Chief Accountants.

7. General duties of Office Management."

The appllant's main duty was to pay wages monthly based on timed job cards prepared by the Time Keepers of the various section showing the name of the employee, his designation, rate per day, deductions, etc. The names on the Job Cards are taken from a Register which is kept by the Section Head and it is he who supplies the names to the Time Keeper. After the Time Keeper has prepared the Job Cards they are passed on to the Section Head for signature after which they are journalised to arrive at a total amount required for the payment of wages in respect of all the sections. A cheque for a little over the exact amount to make up for errors is then prepared by the appellant; the Finance Officer initials the cheque after which it is cashed at the bank by the appellant. On his return he packets the wages of each worker according to the Job Cards [p.31] in the presence of the Finance Officer and on pay day he could go to the various sites and make payment to the workers each of whom would be identified by the Time Keeper and Section Head. After payments of wages it was the appllant's duty to prepare a Reconciliation Statement each month showing the amount redceived from the bank, the amount paid out and the total amount of unclaimed wages.

It was also the appellant's duty to re-bank all unclaimed wages within two days after making payment of wages. It was also stated in evidence that it was the duty of the Finance Officer to check the Recociliation Statements and if found to be correct to sign them. it was whilst the Reconciliation Statements for the year 1972 were being checked that the Finance Officer discovered certain discrepancies, i.e., that there were differences between what the appellant paid out and what were recorded in the Job Cards and Journal Vouchers; this was on 29th December, 1972. The discrepancies were pointed out to the appellant by the Finance Officer who also instructed him to go with the Payroll Supervisor to the various stations where the differences arose. They left about 3.p.m. for Blackhall Road power Station but returned about an hour later only to report that the Time Keeper could not lay hands ont he Register as it was locked up in the Districtiion officer's room. On 2nd January, 1973, the Finance Officer ordered appellant and the payroll Supervisor to go again to Blackhall Road power Station but the appellant refused to go with the Supervisor and insisted on going alone.

Appellant, according to the Finance Officer, thereupon secured his safe and cashier's cage and went out alone. Later he returned with a Barclays Bank Paying-In-Slip for the sum of Le. 1,045.47 and at the same time he informed him that a Mr. Kamara the Time Keeper was unable to pay his own [p.32] protion of the differences and that he (Kamara) would prefer to repay by instalments. The Finance Officer thereupon told appellant tht the matter was a serious one which he could have to report. on the next day the matter was reported to the Acting Chief Accountant, mr. Salaam who subsequently ordered an investigation. The investigation was conducted by one Muektarr Raham of the Internal Audit Section (D.W.2) In evidence he stated thus:—

"I discovered that certain monies alleged paid out by the plaintiff were in fact paid out on forged cards and the sum of Le. 1,045.47 had not been properly accounted for.....

I made some findings about surplus cash and the plaintiff. Some bank paying-in-slips were showing a rebanking of the Le. 1,045.47. I discovered that the rebanking were not done at the correct time as they should have been rebanked within 48 hours were not so re-banked within 48 hours were not so re-banked for three months. The re-banking took place before my investigaitons started. I spoke with the plaintiff the question of his records relating to re-banking of unclaimed wages. The Le. 1,045.47 I have referred to was described by the plaintiff as excess cash in his safe. I discovered that there was no reason why he should have excess cash. I discovered that [p.33] the sum of Le 1,045.47 was made up of three seperate sums of money. He said that the first sum was in October, the second in Novemger and the third in December, 1972. I asked him why he had not re-banked them as he discovered them. He replied that he did not know how the excess came about and he had referred the matter mr. Temple (D.W.1) and that Mr. Temple had told him to investigate and find out. Mr. Temple denied any knowledge of this."

I should here state that in hs evidence before the Court the Finance Officer deniend giving the appellant any counter instruction to keep surplus cash.

The Witness than went on to state that all his findings were embodied in Exhibit M. which was a query dated 6th Julyu, 1973 addressed to the appellant by the respondents. he stated further that during his investigation he referred to Job Cards principally and the Journals and the Reconcilation Statements.

The appellant on His part stated that during the months of October, November and December 1972, he discovered excess cash, that he reported the matter to the Finance Officer who instructed him to keep same until the Journal Vouchers had been checked. In support of this allegation he produced two documents which were admitted in evidence without any objection, by counsel for the respondents and marked Exhibits P and Q respectively.

Exhibit Q dated 30th October 1972 was written bythe Finance Officer to the appellant and it reads as follows:—

[p.34]

"Finance Officer

Elec. House

30/10/72

"J.S.Bangura,

Please keep any excess cash you have discovered after your normal re-banking. I shall check the Job Cards and the Journals for October 1972. I shall inform you of the date you will rebank it. The payroll clerks are busy on other work

(Sgd) ? ? ?

Finance Officer."

Exhibit p was writen by the appellant to the Finance Officer and it rads thus:—

"Electricity House

30th November, 1972

"P.E. Temple

Finance Officer

S.L. Elec. Corporation.

I am reminding you that i have experienced another excess chash on Le.646.19 in Novembger, 1972 after my normal rebanking which I recalled your attention sometime in October 1972. What shall i do although you told me to wait as the payroll clerks are busy on other work. I consider this instruction very dangerous asI don't like to keep cash in may safe for long time.

(Sgd.) J.S. Bangura

payment Cahier"

[p.35]

As previously mentioned the respondent's case embodied in paragraph 6 of the Statement of Defence and Counterclaim and counsel has urged on us to hold that contrary to the learned trial judge's finding the appelleant has been guilty of such a serious dereliction of duty athat the respondents were justified indismissing him as regards the first allegation that the appellant mad payments which were not supported by valid and authorised job cards the learned trial judge had theis to say:—

"The evidence produced points to the fact thatthe plaintiff did not prepare job cards. The evidence goes further to say that on pay day the job cards were handed over to the time keepers who were always present and it was they who used to call out the names on the job cards and then identify the worker to the plaintiff before he paid him. On the evidence therefore there is nothing to show that the plaintiff was connected in any woay with the allegedly forged job cards.

On this same allegation the defendants did not produce any of the allegedly forged job cards before this Court. There was also the allegation that there was some difference between the number of job cards handed over to the plaintiff for payment purposes and the number returned after pament. Again no record was produced by the defendants in support of this allegation."

[p.36]

As regards the second and third allegations that the appellant kept cash form wages in this custody for more than three days and that he refunded the sum of Le.1.045.47 from his own monies in part satisfaction of a general deficit of Le 4,164.31 on 2nd january 1973 after it had been pointied out to him that his reconciliation statements were erroneous, the trial judge found that the appellant was justified i not re-banking the excess cash he had discovered because of instructions he had received from the

Finance Office to hold on to such cash until such time as he the Finance Officer should communicate with him. The appellant stated in evidence that it was the Finance Officer who asked him on 2nd january 1973 to go and pay the amount and that he thereupon took out the money form his safe and went and paid it. The Finance Officer was appellant's immediate boss and according to Exhibit E appellant was under his supervision. Indeed the appallant in his Defence to counterclaim and Reply" had pleaded that if at all there were any mandatory regulations which required him to re-bank any monies kept by him within 48 hours such regulations had been waived by he issuing of Exhibit Q to him by the Finance Officer. The Finance Officer did not deny receipt of Exhibit P or the issuing of Exhibit Q. The inference is that the appellant acted on the Finance Officer's instructions. It would be unreasonable to say that he was disobeying lawful instructions when in fact he was acting under the instructions of his immediate boss who up to the time of trial and still is the respondent's employer. If indeed it was in breach of regulations it was not so serious as to warrant summary dismissal especially as the Finance Officer was still in service. Assume that this was an unlawful order as stated by the Court of Appeal which the appllant was not justified in obeying, I do not think that this default constituted such an act of grave misconduct or a flagrant violation of laid down regulations as to warrant the summary dismissal of appellant.

[p.37]

As regards the fourth allegation that the appellant failed to provide a reconciliation statement of January 1973 the appellant stated in evidence that he could not have prepared such a statement as by then he had been relieved of his duties. This was never controverted by the respondents.

The Court of Appeal in its judgement referred to the case COULSTON & CO. LTD vs CORRY (1904-7) All. ER. Rep. 685 where it is stated in the Head Note that:—

"In an action for worngful dismissal, if the defendant pleads that the misconduct of the servant justified the determination of the contrat of service, the question whether the misconduct proved established the right to dismiss the servant is a question of fact for the jury."

Lord James in his Judgment, at p. 687 observed:—

"The sufficiency of the justification depended upon the extent of the misconduct. there is no fixed rule of law defining the degree of misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct incosistent with the fulfilment of the express or implied conditions of service will justify dismissal."

In LAWS vs LONDON CHRONICLE (INDICATOR NEWSPAPERS) LTD (1959) 2 all. e.r. 285 where an employee had been dismissed summarily for one act of misconduct, Lord Evershed M.R. observed:—

[p.38]

"I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think that one act of disobedience or misconduct can justify dismissal

only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions: and for that reason, therefore, I think..... that the disobedience must at least have the quality that it is "wilful": it does(in other words) connote a deliberate flouting of the essential contractual conditions."

Sellers, L.J. in SINCLAIR vs NEIGHBOUR (1966) 3 All. ER 988 expressed his own views on the question as to what kind of conduct by an employee would justify instant dismissal by the employer thus (at p. 989):—

"The whole question is whether that conduct was of such a type that it was inconsistent in a grave way - incompatible with the employment in which he had been engaged as a manger."

In the instant case the respondents had sough to justify the summary dismisal of the appellant. The grounds on which they had relied were found by the learned trial judge, after an exhustive review of the entire evidence, to be untenable. it was within his province to decide on the credibility of the witnesses and it has not been shown that his evaluation of the evidence orthe inferences he drew from fact were wrong.

[p.39]

As regards the award made by the High Court, I would allow the amount of Le 365.30 claimed as arrears of half salary from 14th March, 1973 to 30th Septemhber, 1973. On the claim for salary in lieu of notice, the appellant, according to the terms and conditins of service as laid in Section A of the Respondents' Rules Regulations and Conditions of Employment - Exhibit U - is entitled to only one month's notice or pay on termination of employment: I would also allow the amount awarded under this head viz, Le. 112.40.

As regards the claim for Le. 224 arising out of redundancy as a result of his wrongful dismissal i see no basis for the learned trial judge making such an award. There is no justification also for awarding Le. 1,356.00 general damages since the award of one month's salary in lieu of notice constitutes general damages. This award as well as the award of Le. 224.80 redundancy pay are set aside.

I would allow the appeal and set aside the judgment of the Court of Appeal and restore the judgment of the High Court to the extent stated above.

Costs in this Court and in the lower Courts to the appellant.

(Sgd.) Hon. Mr. Justice C.A Harding, J.S.C

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke C.J.

I agree

(Sgd.) Hon. Mrs. Justice A. Awunor-Renner, J.S.C

I agree

(Sgd.) Hon. Mr. Justice S. Beccles Davice J.S.C

I agree

(Sgd.) Hon. Mr. Justice S.M.F. Kutubu, J.A.

CASES REFERRED TO

1. Dominion Trust Co. Vs New York Life Insurance Company (1919) A.C. 254, P.C.

2. Mngomerie & Co, Ltd, Vs James 96. L.T. Rep. (1904) A.C. 73

3. Benmax Vs Austin Motors & Co.L Ltd (1955) 1 A. E. r. 326

4. Texaco (S.L.) Ltd. Vs E.B. Smith Civ. Cpp. 15/77 (unreported)

5. Watt or Thomas Vs ThomaS (1947) 484, H.L. Lord Thankerton)

6. El Nasr Export & Import Co. Ltd Vs Mohie El Deen Masour S.C. CIV. App. 3/72

7. Ayo Wilson vs. James Samura & Anor. S.C. CIV. App. 3/72

8. Coulston & Co. Ltd Vs Corry (1904-7) All. ER. Rep. 685

9. In Laws Vs London Chronicle (Indicator Newspapers) Ltd (1959) 2 ALL. E.R. 285

10. Sinclair Vs Neighbour (1966) 3 All. ER 988

MADAM BALLU YILLAH V. MOHAMED HEDJAZI

[SC. CIV. APP. No. 3/8] [p.67-78]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 12TH JULY 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE Constant S. DAVIES J.A.

Madam Ballu Yillah - Appellant

AND

Mohamed Hedjazi - Respondent

George Gelaga-King, Esq., - for the Appellants

Berthan Macauley, (Jr.), Esq., for the State

Beccles Davies . J.S.C

This appeal concerasn land at Sognal Hill Road Wilberforce in the Western Arean. The respondent was the plaintiff in the High Court claiming "possession of all that piece or parcelof land situate and being off Signal Hill Road, Wilberforce and for an injuction restraining the defendant or her servant or agents from trespassing on the said land." The land is described as being bounded ont he North-East byh property of Isaac John Bright 235 feet; on the South-East by preporty of Isaac John Bright 245 feet; on the Sout-East by property of Mrs. Renner Sharaff 225 feet; on the North-North-West by property of M.S. Mustapha 96.3 feet and 227.5 feet respectively.

The defence filed on behalf of the appellant had averred inter alia that the land described by the respondent in his statement of claim was "not the piece and parcel of land "Owned" and in her possession; and further that the land owned by her had been in her full free and undisturbed possession since 1963 on the death of her father one Saidu Yilla. The defence discribed the [p.68] land as bing at Pipe Line Road, Wilberforce and bounded on the North by private property 110.58 feet respectively on the South 242.5 feet, 96.5 feet and 83.3 reet respectively; on the East 184.15 feet and 115.02 feet respectively; and on the West 36.49 feet. That was the state of the pleadings when the matter went to trial.

The respondent gave evidence at the trial. He told the Court that he had bought the land at the public auctionin 1955. The land had been sold in consequence of an order of the then Supreme Court (now High Court) empowering the official Administrator (now Administrator and Registrar-general) to do so. He had been the highest didder and it was knooked down to him at the price of five hundred pounds. Adeed of conveyance of the land had been executed in his favour, by the official Administrator. The deed of conveyance was put in evidence by him. It revealed that the land had formed part of the estate of Willam J. powells. He explained how he had inspected the land in 1970 and had found some shacks on it which he had learn on enquiry, had been erected by the appellants.

The appllant also gave evidence. She stated that she was living at 7, Pipe Line, Wilberforce. She was the daughter of Saidu Yillah who died in 1963. She had been born at 7, Pipe Line and had lived there throughout her childhood. 7, Pipe Line stood in a compound which had belonged to her late father and presently to her. There were over ten houses in the compound, seven of which were built by her father, her late brother and herself; and the rest of her children. In 1968 she had engaged the services of a surveyor to survey the land. A plan was prepared which wasincorporated in the Statutory Declaration. The Statutory Declaration was registered.

At the conclusion of the appellant's evidence, her counsel applied for an amendment to her defence. The amendment was for the inclusion of an additinal paragraph to the defence.

[p.69]

The application was granted. The new paragraph reads—

"4. Alternatively, the Defendant says that the plintiff's claim is barred and his title, if any which is denied was extingushed prior to this action by virtue of the provisions of the Limitation Act 1961".

The appellant then called a witness Yayah Fofana who said he had been living at 7. Pipe Line, Lower Signal Hill since 1947. He was present when the land was handed over to the appellant by the tribal Headman after the death of the appellant's father - Saidu Yillah.

At close of the evidence at the trial, the appellant's defence was that (i) the land alleged by the respondent to be his was not the same land as that described by the appellant in her defence; and (ii) alternatively, the respondent's claim was statute barred.

The appellant did not adduce evidence at the trial in support of her contention tht the land referred to by the respondent in his statemnt of claim and that referred to by her in her defence were two different lands.

The matter however seemed at the end of the day to have rested on the Limitation Act 1961.

I shall now refer tot he provisions of the Limitation Act 1961 which are germane to the instant case. They are sections 5(3), 6(1), 11(1) and 16. Section 5(3) is in these terms:—

"5(3) No action shall be brought by any person to recover any land after the expiration of twelve years form the date on which the right of action acdrud to him, or if it first accrued to some person through whom he claims to that person....."

Section 6(1) then provides —

[p.70]

"where the person bringing an action to recover land, or some person throgh whom he claims, has been in possession thereof, and has whil entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accured on the date of the dispossession or discontinuance."

Section 11(1) states—

"No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favourthe period of likitation canrun (hereinafter in this section referree to as "adverse possession") and where under the provisions of this act anyright of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possessionis taken of the land ."

Finally Section 16 enacts—

"Subject to the provisions of section 8 of this Act at the expiration of the period prescribged by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinquished."

Section 8 referred to above relates to settled land and land held on trust.

The appellant has therefore asserted that the respondent had been dispossessed of the land and that she and her father had been in adverse possession for a period of at least 12 years before [p.71] action was brought by the respondent and that his title to the land had been consequently extinquished.

I shall now state the law on the point. The following statement of the law appears in Halsbury's Laws of England 4th Edition at paragraph 769 —

"An owner of land may cease to be in possession of it by reason of dispossession or discontinunance of possession. Dispossession occurs where a person comes in and puts another out of possession; discontinuance of possession occurs where the person in possession goes out and another person takes possession, and that possession must be continuous and exclusive.

The true test whether a rightful owner has been dispossessed or not is whether an action for possession of the land will lie at his suit against some other person. The rightful owner is not dispossessed so long as he has all the enjoyment of the property that is possible, or leaves it unoccupied pending materialisation of some future use which he had in mind. Where land is not capable of and enjoyment, there can be no dispossession by mere absence of use and enjoyment, but where the owner has no future use for the land in mind and merely leaves it derelict, possession taken by a trespasser may be adverse even though the owner suffers no incovenience. To constitute dispossession, acts must have been done which were inconstistent with the enjoyment of the soil [p.72] by the person entitled for the purposes for which he had a right touse it, and with the intention of establishing dominion and not merely with the intention of using the land until prevented form doing so....."

The claimant to possession under the Statue of Limitations must prove (i) dispossession of the true owner or (ii) discontinuance of possession by the true owner.

the appellant tendered in evidence rate demand notes and receipts for the period 1942-72. They were in respect of 12 pipe Line, Wilberforce; 8 pipe Lie, Wilberforce; 7 pipe Line Smart Farm; 8 Pump Line, Murray /Town; and 8apump Line, Wilberforce respectively. In the instant case there was no evidence linking those demand notes and receipts with house on this disputed land. The mere production of a receipt or demand note is not enough. Evidence should be led to connect those demand notes and receipt with the property to which they relate. Such evidence was crucial to the success of the appellant's case since the respondent had said when he bough the land in 1955 there were no buildings on it. There was consequently no evidence as to when the appellant's father went on the land in dispute if at all he did so.

I now turn to ascertain whether the respondent was dispossessed by the appellant or went out of posession of the land. in the High Court, the appellant had told the trial judge—

"I know one Saidu Yilla. He is now dead. He died about 13 years ago. he was my Father..... When my father die and i remained the only surviving child I took possession of the property and claimed it to be mine.....

[p.73]

In 1968 after my father's death I got a survayor to survey the land and prepare plan. He called Baxter. After he had prepared the plan a Statutory Declaration was prepared in respect of the land....."

The appellant's only witness yayah Fofana had told the judge—

"I know one Saidu Yillah. He is now dead..... He died in 1963..... After his death the tribal headman in the area handed over his property to Ballu Yillah....."

When cross-examined he had replied.—

"I was present when the property was handed over to defendant in 1963. What I am saying is the truth."

Yayah Fofana was a declarant to the Statutory Declaration reffered to tby the respondent. He and one Brima fofana had declared in paragraph 9 thereof —

"That some years prior to hes death, the late Saidu yillah in our presence and in the presence of several othr inhabitants of the village gave the said piece or parcel of land by way of gift to the First Declarant (Ballu yillah) herein in consequence of valuable services rendered to him during his lifetime."

It is evident from the above quoted pieces of evidence that while the appellant deposed in one breath that she had been put in possession of the land by her father before his death in 1963, in the next breath she was saying that it was after her father's death that she took possession of the land and claimed itas hers, being the only surviving child. Her witness said that it was after her (the appellant's) father's death, that the tribal [p.74] headman in the area put her in possession of the land. previous to his evidence this same witness had declared on the Statutory Declaration - Exh. 'E' that the appellant's father had put her in possessin 'some years oprior to this death." On the other hand the appellant had declared in Exh. 'E' that it was "in or about the year 1963" that she was putin possession of the land. In my opinion therefore, the evidence of the appellant and her witness was flearly unreliable as to when she took possession of the land.

In order to succeed under the Statute of Limitations a claimant must prove either that he or someone through whom he claims has dispossed the tru owner or that the true owner has discontinued possession of the same for a continuous period of at least 12 years. The real test whether a rightful owner has been dispossed or not is whether he could institute an action for possessin against some other operson. There is no dispossion of the rightful owner as long as he has all the enjoyment of the land that he could possibly have or does not occupy it pending the fruition of some project for which he intends toutilise it. If land is not capable of use and enjoyment, mere absence of use and enjoyment of it by the rightful owner would not amount to dispossession. Where however an owner has no future use for his land and merely abandons it, if a trespasser takes possession of it such possessin may be adverse to the owner. In order that there might be dispossession therefore, the acts of the trespasser on the land must be inconsistent with the use of enjoyment of it that was available to or intended by the right of possessionove it.

The judgments in Leigh v Jack 49 L.J.Q.B. 220 indicate guidelines in determining the issue of dispossession —

Cockburn C.J. at page 222 of the report—

[p.75]

"I am of opinion tht a person does not necessarily discontinue possession ot land because he does not actually use it by himself or by his agent. The question is one of fact to be settled by the circumstances of each case"

Bramwell L.J. in dealing with the issue in his judgment said inter alia—

"This is, however a question of fact, and a fact which is difficult to establish against an owner of land..... I do not think he is wrong, for it is necessary that the defendant should show dispossessin or discontinuance of possession; acts of trespass by the defendant are not enough, he must go further....."

Cotton L.J. in agreeing with Cockburn C.J. and Bramwell L.J. said—

"As to the question of the Statue of Limitations. I am unable to discover any fact which can be said to amount to dispossessionof the plaintiff by the acts of the defendant: I do not think that the plaintiff can be said to have discontinued possession. It is not necessary that an owner should actually be in possession in person, for though absent he may still in the eye of the law be in possession. he does not discontinue possession because he does not actually use or personally enjoyed property, the nature of which [p.76] prevent there being such use or enjoyment in the absence of the owner. It is in every case necessary to look at the nature of the property..... the acts of the defendant did not oust the plaintiff, soalso the plintiff has not himself discontinued possession....."

More recently Lord Denning M.R. he stated the position in these words.. in Wallis Cayton Bay Holiday Camp Ltd. v Shell-Max and B.P. 1974 3 All E.R. 575 at 580; 1974 3W.L.R. 387 at 392 —

"Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been disposssed and another musthave taken it adversely to him. There maust be something in the nature of an ouster or the true owner by the wrongful possession.....

When the true owner of land intends to use it for a particular purpose int he future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title toit simply because some other person enters on it and uses it for some temporary purpose, like stacking materials or for some seasonal purpose, like growing vegetable, not even if this temporary or seasonal purpose continues year after year for 12 years or more: see Leigh v Jack, Williams Brothers Direct Supply Stores Ltd. v Raftery. Techbild Ltd. v Chamberlain. The reason is not because the user does not amount [p.77] to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decision is because it does not lie in the trespasser's mouth to assert that he used the land of his own wrong as a trespasser, Rather his user is to be ..... to the licence or permission of the true owner. By

using the land knowing that it not belong to him; he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission."

On thebasis of the principles set out above, let us assum for the purposes of this appeal that the appellant was in adver possession; the question then arises 'for what period was she adverse possession'?

There is no evidence that the appllant's father had dispossessed the respondent or that he was in advers possession of the land prior to 1963, if he went on the land at all since the evidence as to when the appellant's father went on the land is unreliable, and also since it is uncertain when the appellant actually went on the land, this Court cannot add the period of the father's alleged prior possession to here. According to the evidence, the earliest possible time when the appellant went on the land was "1963 and "in or about the year 1963." The plan showing the buildings on the land is dated 1967

[p.78]

The writ of summon commencingthe proceedings in this matte, was issued on 4th July 1974. Taking the earliest possible date in 1963 - 1st January 1963, then the appellant was in adverse possesion of the land for the prescribed statutory period o 12 years, whether seh went there in 1963 or 1967. I agree with the trial judge that the appelant was not in adverse possession of the land for 12 years to enable her to avail heself the limitatin Act. The appeal therefore fails.

(Sgd.) Hon. Mr. Justice S. Beccles Davics J.S.C

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

(Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C

I agree

(Sgd.) Hon. Mrs. justice A.V.A. Awunor-Renner J.S.C

I agree

(Sgd.) Hon. Mr. Justice Constant S. Davies. J.A

CASES REFERRED TO

1. Leigh v Jack 49 L.J.Q.B. 220

2. Wallis Cayton Bay Holiday Camp Ltd. v Shell-Max and B.P. 1974 3 All E.R. 575 at 580; 1974 3W.L.R. 387 at 392

3. Leigh v Jack,

4. Williams Brothers Direct Supply Stores Ltd. v Raftery.

5. Techbild Ltd. v Chamberlain

STATUTE REFERRED TO

1. Limitation Act 1961

OSMAN THOMAS SONS AND BROS. LTD. & BASTONE & FIRMINGER (EXPORT) LTD.

[SC. CIV. APP. NO. 7/81] [p.14-21]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 28 APRIL 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE C. A. HARDING, J.S.C.; MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C; MR. JUSTICE F.A. SHORT J.A.

OSMAN THOMAS SONS AND BROS. LTD. - APPELLANTS

AND

BASTONE & FIRMINGER (EXPORT) LTD. - RESPONDENTS

J.B. JENKINS-JOHNSTON ESQ., FOR THE APPELLANTS

F.R. ANTHONY ESQ., FOR THE RESPONDENTS

JUDGMENT DELIVERED ON 28th DAY OF APRIL. 1983

LIVESY LUKE. C.J.

The respondents to this appeal (hereinafter called Baston) issued a specially indorsed writ of summons against the appellants to this appeal (hereinafter called Osman Thomas) on 7th September, 1977 claiming the sum of Le 78,77.66 as amount due and owing for goods sold and delivered. It will be useful to give a narrative in some detail of the various procedural steps taken up to the delivery of judgment in the High Court. Apperance was entered on behalf of Osman Thomas. On 6th October, 1977 pursuant to an application for summary judgment under order XI (1) of the High Court Rules, Williams J. after hearing counsel for Baston, granted leave to Bastone to enter final judgment for the sum of Le 78,493.58 with interest at 7 percent per annum from the data of the issue of the writ of summons plus cost to be taxed. Osman Thomas were not represented at the hearing of the application for summary judgment although their solicitor had been duly served with the summons and affidavit in support.

[p.15]

On 13th December, 1977 solicitor for Osman Thomas filed a Notice of Motion applying inter alia that the Order dated 6th October, 1977 granting Baston leave to enter final judgment be sed aside and that Osman Thomas be at liberty to defend the action. In the affidavit in support of the Notice of Motion, it was deposed inter alia that Osman Thomas had a good Defence

to the action and a proposed Defence was exhibited to the affidavit. The motion was heard by Williams J. in the presence of counsel for both parties.The hearing took three days during which the deponent of the affidavit in support of the application was cross-examined and counsel made submissions. At the end of counsel's submissions on 17th February, 1978, the learned judge ordered inter alia that the judgment ordered on 6th October, 1977 be set aside, that leave be granted to Osman Thomas to defend the aftion as a short cause, that the action be set down for speedy hearing by him,.and that the date for trial be than fixed by consent of counsel having regard to the convenience of his court; that the costs thrown away be paid by Osman Thomas, and that the costs of the application, agreed at Le 200, be paid by Osman Thomas. The judge than added "Adjourned to 4.4.78." Presumably that was the date fixed by counsel having regard to the convenience of the court in accordance with the order previously mentioned.

The case was called before Williams J. on 4th April, 1978. Counsel for both parties were present. By consent an adjournment was taken to 17th April, 1978. The next time the case was called was not 17th April, 1978 but on 6th June, 1978 before Williams J. On that occassion counsel for Bastone was present but there was no apperance by or on behalf of Osman Thomas. "The learned judge adjourned to 19th June, 1978 and ordered that Notice be served on the [p.16] solicitor for Osman Thomas. When the case was called before Williams J. on 20th June, 1978 counsel for both parties were present. Counsel for Bastone than proceeded to open his case in the course of which he asked leave to abandon part of the claim and ended by saying that he revised claim amounted to Le 23,530.02. Counnsel for Osman Thomas then made certain submissions in the course of which he applied for an adjournment to the following day. The judge granted the application and adjourned to 21st June, 1978.

On 21st June, 1978 when the case was called before Williams J. counsel for Bastone proceeded to call two witnesses. The first witness was Terrence john Calcutt a Director of Bastone. In the course of his evidence in chief he deposed about the various transactions between his company and Osman Thomas and produced a number of invoices and other documents. The witness was crossed examined by counsel for Osman Thomas . The second witness was formal witness one Randu Deen a clerk of the Administrator & Registrar General's Department. At the end of the evidence-in-chief of that witness, counsel for Bastone closed the plaintiff's case. The case was then adjourned.

On 4th July, 1978 counsel for Osman Thomas called Abdul Lasite Thomas, the General Manager of Osman Thomas. He gave evidence on the transctions between the parties. He gave evidence on the transactions between the parties. he was cross-examined by counsel for Bastone, at the end of which counsel for Osman Thomas closed the case for the Defence. The judge then adjourned the case to 5th July. 1978. Counsel for both parties addressed the court in their turn on 5th july, 1978 at the end of

which the learned judge reserved his judgment on 12th October, 1978 dismissing the plaintiffs' claim with cost. Bastone appealed to the Court of Appeal against that judment.

[p.17]

The appeal was heard by the Court of Appeal in March, 1981. Judgment was delivered on 16th April,1981 allowing the appeal and setting aside the judgment of Williams J. The court ordered inter alia that the Master & Registrar or his Deputy hold an inquiry into the transcation between the parties and into the accounts made by the plaintiff to determine what amount if any had been paid by the defendants to the oplaintiffs with liberty to both parties to surcharge or falsify.

Osman Thomas have appealed to this court against the decision of the Court of Appeal of the following grounds:-

1. That the learned justices of the Court of Appeal failed to considered adequately or at all the burden of proof which lay on the Respondent herein in the High Court especially having regard to the principle of law contained in the maxim "Ei incumbit probatio, qui dicit, non qui negat."

2. That the learned Justices of the Court of Appeal failed to consider adequately or at all the Defence of the Appellants herein in the High Court.

3. That the learned justice of the Court of Appeal were wrong in law to have ordered an inquiry between the parties having regard to the totality of the evidence led in the High Court.

4. That the learned Justices of the Court of Appeal were wrong in law to have set aside the Judgment of Williams J. in the High Court in the light of all the evidence which was before the Learned Trial Judge.

[p.18]

cases were filled by counsel for both parties, counsel for Osman Thomas contending inter alia that the judgment of Williams J. should be restored and counsel for B astone contending inter alia that the judgment of the Court of Appeal be upheld.

Mr. jenkins-Johnston, learned counsel for Osman Thomas argued the appellants' case with much eloquence, and Mr. Anthony learned counsel for Bastone was equally eloquent in arguing the Respondent' case. it was during Mr. Anthon's argument that the Court had cause to call for the original high Court records. Irt was then discovered that no Defence had been filled or delivered by or on behalf of Osman Thomas and tha the ation had not been entered for trial. Counsel on both sides agreed that was the state of affairs. The court thereupon called upon Counsel to address us on the legal effect of such lapeses ont he part of both parties.

Mr. Jenkins-Johnston while conceding that no Defence to the action had been filled or delivered, submitted that since a trial had taken place this court should overlook the non-compliance with the rules and uphold the judgment of the High Court. Mr. Anthony submitted that the defendants having failed to file a Defence, the trial was a nullity in view of the fact that the judge purported to act on a

non-existent Defence. But learned counsel was not prepared to take his submission to its logical conclusion. He urged the court to rescure the self-same proceedings with he had submitted were a nullity.

It will be recalled that a proposed Defence was exhibited to the affidavit in support of the Notice of Motion dated 13th December, 1977. It was on the basis of that affidavit, including the proposed Defence, that the learned judge set aside the judment on 6th October, 1977 [p.19] and granted Oasman Thomas leave to defend the action. The proposed Defence was never delivered and filled. I am aware that under Order XIVB of the English Rules of the Supreme Court, 1960, as applied in our jurisdiction, in a case where a specially indorsed writ has been issued, a judge may in certain circumstances order trial without further pleadings. But the provisions of that order are not applicable to the instant case. No application was mad for trial without further pleadings and on order was made dispensing with further pleadings. In those circumstances Osman Thomas were obliged to deliver and file their Defence within the time limited for that purpose. This they failed to do, and that omission on their part still continues.

Our High court Rules (hereinafter referred to as the 'Rules") are quite clear as to the course of action to be taken in a case where a party fails to file and deliver and file a pleading. Order XXIII of theRules spells out the action to be taken where one party to an action has made default in delivering and filing within the time allowed for that purpose a pleading which he is obliged to deliver and file. There is no doubt that the claim in the instant case is for a debt or liquidated demand. In those circumstances the rule apoplicable is Order XXXIII r. 2 which reads as follows:—

"2. if the plaintiffs' claim be only fro a debt or liquidated demand and the defendant does not, within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed costs."

[p.20]

So what should have happened in this case was that at the expiration of the time limited for delivering and filling a Defence after the order dated 17th February, 1978 (granting leave to defend), Bastone should have entered final judgment for the amount claimed with costs, Osman Thomas having defaulted in delivering and filling a Defence.

If final judgment had been entered, than when the case came up on 4th April, 1978 the judge should have been so informed and he would have then realised that there was nothing for him to try. The necessity of adjourning the case to a later date and of embarking on a full scale trial on 20th June, 1978 would then not have arisen.

The learned judge seems to have overlooked the fact that no Defence had been delivered and filed. If no Defence had been delivered and filed it meant that there was no issue to be tried. So even though final judgment in default indefault had not been entered, the plaintiffs' claim had not been put in issue in a Defence duly delivered and filed. It follows that there was no issue before the court to be tried and the learned judge should not have embarked on a trial. And even assuming that a Defence had been

delivered and filed, it would have been necessary to enter the action for trial in accordance with Order XXV r. 9 of the Rules or on the Special List in accordance with Order XI r. 7 of the Rules, And it is only after such an action has been entered on the Cause List or the Special List, as the case may be, that is can come on for trial. So even if a Defence had been delivered and filed in this case, it was not ripe for hearing because the action was never entered for trial.

[p.21]

In those circumstances the judge should not have embarked on a trial of the action.

In my judgment therefore the trial was unnecessary and the whole proceedings commencing from 20th June, 1978 to 12th October, 1978 when judgment was delivered were invalid. In my opinion the determination of the issue raised by this court effectively disposes of this appeal. In the circumstances, I do not consider it necessay to deal with any of the grounds of appeal lodged by Osman Thomas.

It is regretable that a lot of time, effort and expense were wasted o an unnecessary and abortive trial before the High Court, and in the proceedings before the Court of Appeal. But unfortunately there is nothing that can be done to rectify the situation. In may opinion the purported trial was a nullity: See Macfoy v U.A.C. Ltd. (1961) 3 W.L.R. 1405. In the circumstances there is no alternative but to set aside the proceedings before Williams J. commencing on 20th June, 1978 including his judgment and orders. I would also set aside the judgement and orders of the Court of Appeal. In view of all the circumstances, I think that it is but fair anf just, that each party should bear their costs in this court and the courts below.

In conclusion I can only express the hope that the parties or their solicitor will now take the proper steps as provided int he Rules to ensure the speedy disposal of this long outstanding matter.

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree

(Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C.

I agree

(Sgd.) Hon. Mrs. Justice A. AwunorRenner, J.S.C

I agree

(Sgd.) Hon. Mr. Justice S. Beccles Davics J.S.C

CASE REFERRED TO

1. Macfoy v U.A.C. Ltd. (1961) 3 W.L.R. 1405.

THE BANK OF CREDIT & COMMERCE INTERNATIONAL AND THE CHARGE D'AFFAIRES OF THE REPUBLIC OF THE IVORY COAST EMBASSY

[MISC. APP. No. 3/82] [p.79-102]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 21ST SEPTEMBER 1983

CORAM: MR. JUSTICE C. A. HARDING, PRESIDING; MR. JUSTICE O.B.R. TEJAN J.S.C; MR. JUSTICE S. BECCLES DAVIES J.S.C.

BETWEEN:

The Bank of Credit & Commerce - Appellant

AND

The Charge D'Affaires of the Rebublic of the

Ivory Coast Embassy in Sierra Leone Acting for

and on behalf of the Republic of Ivory Coast, Freetown - Respondent

Garvas J. Betts, Esq., (with him Miss Patrice Wellesley-Cole) for the Applicants

T.M.Terry, Esq., for the Respondent

C.A. HARDING . J.S.C.

The Applicants herein were the Respondents in Civil Appeal 60/81 before the Court of Appeal and the Respondent herein was the Appellant. The application before us is for special leave to appeal to this Honourable Court against the judgment and Order of the Court of Appeal dated 15th April, 1982 made therein and for a stay of execution and or proceedings on the judgment and Order aforsaid on terms pending the hearing of the proposed appeal.

The events leading up to this application may be catalogued as follows:—

The 29th June, 1981, the Respondent took out a specially indorsed writ claiming, inter alia, repayment of at the sum of [p.80] Le 18,000/00 plus interest from the Applicants. service of the Writs was effected on that same day on the Applicants who entered appreance thereto on 6th July, 1981.

On 5th October, 1981, the Respondent obtainedjudgment in default of Defence and caused a Writ of Fi-Fa to be issued agains the Applicants. On the following day in response to the Writ of Fi-Fa the Applicants issued a cheque made payable to the Master and Registrar for the sum of Le 21,606.10.

On 7th October, 1981 before clearance for payment of the said cheque was effected, on an Ex-parte application mad by the Applicatns inter ali (1) to set aside the Writ of Fi-Fa (2) alternatively for an interim stay of the Writ of Fi-fa pending an application to set aside the judgment in Default and all

subsequent proceedings (3) that the Judgment in Default of Defence be set aside and (4) that leave be granted to file a defence to the Writ of Summons, Thompson-Davis, J. ordered (a) that the Default Judgment and all subsequent proceedings including the Writ of Fi-fa be stayed for the period of five days and (b) that the application by Motion be served on the other side i.e. on the Respondent, and the matter adjourned to 13th October, 1981.

On 9th October 1981, before ever the motion was heard counsels for the Respondent sought leave of the learned judge to appeal to the Court of Appeal against the interim order made of 7th october 1981; leave was granted on 21st October, 1981.

On 15th April, 1982, the Court of Appeal alowed the appeal, set aside the Orders of Thompson-Davis, J. and substituted therefor an interim order for a stay of proceedings, on the Applicants, on or before the 16th of [p.81] April, 1981, paying to the Respondent the sum of Le. 21,606.10, the Respondent to give a written undertaking to repay the said amount to the Applicants or any amount that may be ordered to be paid by any competent Court in Sierra Leone to the Applicants after the final determination of the action. it furthers ordered that on payment of the said amount the Master and Registar of the High Court was to place the original Motion brought by the Applicants to set aside the default judgment before Thompson-Davis J. or another Judge of the High Court for hearing inter parties.

On 16th April, 1982, the Applicants sought leave of the Court of Appeal to appeal against the Orde of 15th April, 1982, to this Court, but the applicaiton was refused and counsel has now applied to this Court for special leave to appeal against the aforsaid Order.

As stated above, before even the Applicants original Motion was heard by the High Court the Respondent on 9th october, 1981, appealed against the interim order made on 7th October, 1981 to the Court of Appeal. The grounds of appeal may be summarised as follows:—

(1) Bias on the part of the learned trial Judge, he being the lessor of the Respondent.

(2) That the learned trial Judge ought not on an Ex-parate application to have made an interim order staying the Default judgment and all subsequent proceedings including the writ of Fi-fa for a period of five days.

(3) That there was no longer in existence a Writ of Fi-fa as the said Writ had already been executed on 6th October, 1981 and in consequence the Order of 7th October, 1981 and in consequence the Order of 7th October, 1981 setting aside the Writ of fi-fa was one made in vain.

The Court of Appeal mcad no adjudication as regards (3) but as regards (1) and (2) held respectively that there was nothing to warrant their coming to the conclusion that therewas a likelihood of bais if the learned trial Judge sat as [p.82] he did at the hearing of the Ex-parate Motion and that the learned trial judge had power to grant interim stayh on terms. Nevertheless the Court proceeded to set aside the Orders fo the learned trial judge and to Order payment of the amount claimed to the Respondet by the Applicants' on the Respondent giving a written undertaking to repay if so ordered by any competent court in Sierra Leone as a condition for listing the original Motion before the High Court for hearing.

Both in the affidavit in support of the original Motion and in that in support of the present one, the solicitor for the Applicants had deposed that because of the Respondent's diplomatic status and money once paid may not be recoverable by legal process. Also, in the affidavit in support of the present application before us it was stated that the Applicants were prepared to pay into Court the amount claimed pending the hearing and determination of this application as well as the proposed appeal.

Counsel for the Applicants has urged that the matter is one of sufficient public importance to warrant this Court granting special leave to appeal against the judgement of the Court of Appeal dated 15th April, 1982. He referred to Sec. 3 of the Diplomatic Immunities and privileges act. No.35 of 1961 and to Halsbury's Laws of England 3rd Edition, volum 16 paragraph 19 and volume 7 paragraphs 7, 571 and 576 and also to the case of DUFF DEVELOPMENT CO. vs KELANTAN GOVERNMENT (1924) A.C. 797. He submitted that the issuing of Writ and a submission to the jurisdiction made by a foreign envoy does not amoutn to a waiver of execution. He submitted further that on analysis of the judgment and the Court of Appeal order they did not consider that the Motion before the high Court was ripe for hearing because by such an Order the High Court was precluded from making [p.83] any ordir which maigh havefelt disposed to make and thereby the Court of Appeal was usurping the functions of the High Court because by so doing they were determining the Motion which was before the High Court.

Counsel for the Respondent submitted that before leave to appeal is granted to the Applicants it must be shown by them that there is an arguable appeal or that there is a prima facie case or that the Court from whose decision leave to appeal is sought must have committed an error on a point of law or has failed to exercise its discretion lawfully or on wrong grounds. He contended that the proposed grounds of appeal prima faci do not disclose good grounds nor can it be said that the Court of Appeal committed an error of law or failed to exercise its discretion judicially or the the decision was based on wrong principles. he submitted that if leave to appeal granted this should not operate as a stay of execution, that the Applicants have not made out a case for depriving the "Respondent of the fruits of his judgment and that a stay will not accord with the justice the case.

I have presued the proposed grounds of Appeal (six in all) and i am satisfied that they raise important issues which should warrant this Court to exercise the power conferred on it by Rule 6(2) of the Rules of this Court. I will accordingly grant the Applicants special leave to appeal to the Supreme Court and I so order. I also make the following Orders:—

(a) That the grounds of appeal be as follows:—

"1. That the Court of Appeal was wrong in law ot have set aside the Order or orders of the High Court dated 7th October, 1981 in the judment dated 15th April, 1982 when the Appellant's first fround of Appeal had been rejected by the Court of [p.84] Appeal and there had been no finding by the Court, that the learned trial Judge in the High Court had exercised his discretion wrongly or non judicially, in granting the Defandants in that Court a stay of proceedings pending service of the ex-parte motion on the Plaintiff.

2. That by its decision in setting aside the order of Thompson-Davis, J. dated 15th April, 1981, the Court of Appeal impliedly held, and wrongly in law that the High Court may not properly grant an ex-parte order, or must necessarily do so only on the Appellant's undertaking.

3. That the order of the Court of Appeal that "the master of Registrar of the High Court do place the motion to set aside the judgment brought by the Respondent" only after payment of the said amount of Le. 21.606.10 cents was wrong in law in so far as the said order could notin law have properly been made by the said Court.

4. That in all the cicumstances of the case, the court of Appeal was wrong in law to grant a stay on condition which compelled the Appellants, the Respondents before the Court of Appeal to pay entire amount of the judgment award to the Respondents herein on the Respondents undertaking to refund the same, on the eventual determination of the action, when to the knowledge of that court, there was a motion ripe for hearing before the High Court, seeking to set aside the Respondents Writ of Fi-fa in the action on the grounds irregularity.

5. That the Court of Appeal was wrong in law to have made any order compelling payment of the judgment award to the Respondent, when the High Court had not adjudicated on the motion before it ot aside the Writ of Fi-fa in case as irregular as well as the judgment in default of defence.

6. That the Court of Appeal was wrong in law to order payment of the judgment monies to the Respondent because of the comity of nations when the Court of Appeal knew that there is in law no process to compel a foreign envoy to restore monies once paid and especially in view of the fact that the judgment relied on what a default judgment."

[p.85]

(b) That the Applicants lodge the Notice of Appeal within 10 days from date hereof.

(c) That the Applicants deposit the sum of Le. 5.000/00 or enter into recognisance for the payment of the said amount in one surety as security for cost

(d) That the Applicants deposit the sum of Le. 1,000/00 for the costs of the Record

(e) That the amount of Le. 21,606.10 already lodged by the Applicants do remainin court pending the determination of the proposed appeal.

(f) That a stay of execution and/or proceedings on the judgment and order of the Corut of Appeal made and dated the 15th day of April. 1981 is hereby granted pending the hearing and determination of the proposed appeal.

(g) Costs of this Application to the Respondent assessed at Le. 350.

(Sgd) C. Augustine Harding

(Hon. Mr. Justice C.A. Harding, J.S.C., Presiding)

[p.86]

TEJAN. J.S.C.

In order to appreciate the application before this Court, I think it is necessary to deal briefly with history of the events which necessiated the application, and these can be stated thus: On the 29th of une 1981 the respondent issued a Writ of Summons against the applicants claiming:

(a) Damages against he applicants for loss and damage caused by the applicants by reaosn of the fact that the applicants negligently and/or in breach of contract paid a cheque of Eighteen Thousand Leones (Le. 18,000.000) purporting to be drawn by the respondent payable to bearer and negligently debited the said amoutn of the respondent with the sum of le. 18.000.00

(b) A declaration that the applicants are not entitled to debit the respondent's account with the amount of Le. 18.000.00

(c) A declaration that the respondent is entitled to the repayment to him of the sum of Le.18,000/00 plus interest at the rate of 16%

(d) Such further or other relief as may be just.

(e) Costs

On the 6th day of July 1981, the applicants entered an unconditional appearance. The applicants, having failed to file a defence, the respondent obtained a judgment in default of defence on the 5th day of October, 1981. On the 6th day fo Ocotber 1981, the respondent levied execution by a writ officers facias against the applicants. The applicants issued a cheque for the sum of Le. 21,606.10 in the name of the Master and Registrar on the same day. The respondent presented the cheque for special clearance but the cheque was cancelled by the applicants on the ground of exparte motion was filled gy the applicants in the Higg Court praying as the folowing orders:—

[p.87]

"(1) That the writ of fieri facias be set aside ton the grounds of (a) non-compliance with the Form of Writ of fiere as prescribed in the schedule A of chapter 22 of the Laws of Sierra Leone, or alternatively form No. 1 in Appendix H of the Rules of the Supreme Court; (b) In so far as the writ is directed to the wrong legal person, that isto say, Bank of Credit and Commerce International rather than the Bank of Credit and Commerce (Overseas) International Limited, the proper Defendants in this action.

(2) In the alternative, an interim stay of the writ of Fieri Facias herein pending an application in this motion contained to set aside the judgment in default and subsequent proceedings, and that the defendants be allowed to defend this action.

(3) That the defendants be at liberty to move this court exparte, on such terms as to acts as the Court may think just

(4) That the judgment in default of defene herein be set aside.

(5) That the defendants be at liberty to file a defence to the writ of summons in this action

(6) Such further or other orders as to the Court may seem just."

To this motion, an affidavit was atached in support. This affidavit was sworn to by Mess Wellesley-Cole. The motion ..... before Thompson-Davis, J. who made the following orders:—

"(1) That the default judgment and all subsequent proceedings including the writ of fi-fa atayed for a period of five days.

(2) It is further ordered that this application by motion is ordered to be served on the other side and matter is adjourned to 13 october 1981.

It is to be noted that he esx-perte application was heard on the same day the notice of motion was filed. The respondent, being agrrieved by the orders made, appealed against the orders without delay to the court of Appeal. The appeal was heard by During, navo and Turay 33. of Appeal and on the 15th day of April 1982, the Court of Appeal [p.88] delivered judgment

In a passage of the judgment, the Court of Appeal said:—

"In the Court below, apparent in the affidavit of Miss Wellesly-Cole in suppport of the Ex-parte application and before us was argued it is clear to my mind that the Respondent only wants stay because they are of the opinion that they might not be able to recover any amount paid over the applicant should in case an order for repayment is made by our Courts. I must state that it seems to me to bevery odd that a reputable bank would makd out a cheque due for payment on demand and not in future and then attempt ot stop execution of a writ of fi-fa on the ground that it migh not recover any money paid to the judgment creditor on a regular judgment if Diplomatic previlege or immunity is claimed by the judgment Credi to who has submitted tothe Jurisdiction of our Courts. it appears to me that the Respondent when they made out the cheque to the Sheriff had no intention to honour the same on demand for payment. I think I am absolutely right in saying that our Courts must take judicial notice of the fact that the Ivory Coast is a friendly country. As far as Sierra Loene is concerned it is not a hostile country or an enemy of State in so far as the relationship between our country and the Ivory Coast is concerned and diplomatic relationship still exists between the two States. I see no reason why we should start with the presumption that the appellant would not behave in accordance with a simple matter like this before us. I am of the apinion that the Respondent the aplicant in the Court below should have been put in terms.

During J. 4 further said:

"I would set aside the orders of the learned judge and make an orde granting interim stay of proceedings on the Respondents on or before Friday the 16th of April 1982 paying to the Appellant to give an undertaking in writing to repay the said amount of Le. 12.606.10 to the Rrspondent or any amout that may be ordered to be paid by any compatent Court in Sierra Leone to the respondent after

the final determination of the said action. On the payment of the said sum of Le. 21.606.10 on terms as stated above I would direct the Master and Registrar of the High Court ot put the motion to set aside the Default judgment brought by the Respondent before the same judg or another judge of the High Court."

[p.89]

It is against that decision of the Court of Appeal that the applicant having been refused leave to appeal to the Supreme Court that they now have applied of Special Leave to appeal to this court. In addition to the application for Special leave to appeal, the applicants prayed for anorder grating an interim stay of execution and on the proceedings on the consequential orders of the Court of Appeal pending the hearing of the application. The Applicants also prayed for an order granting "a stay of execution on the proceedings on the judgment and order of the Court of Appeal as aforesaid on terms that the applicants pay into court the entire amount of Le.21.606.10 as ordered by the Court of Appeal to be paid by said Applicants to the Respondent, or on such other terms and to the Court may seem just pending the hearing and determination of the proposed appeal".

I propose to deal firstly witht he applicaiton for a stay of execution. The general rule with regard to stay of proceedings is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court of Appeal, may order, and no intermediate act or proceding shall be invalidated, except so far as the Court of Appealed from or the Court of Appeal may direct. But a Court will not make it a practice at the instance of a successfull litigant of depriving a successful one of the fruits of his litigation until a further appeal is determined except in special circumstance. See MONK v BARTRAM (1891) 1 Q.B. 346: and BARKEY v LAVERY (1885) 1 Q.B.D 769. But when it is the exercise of a Judg's discretion, the appellate tribunal will only in extrem case interfere with the discretion of the judge. See HANSORD v LETHBRIDGE (1891) 8 T.L.R. 179.

[p.90]

As a general rule an order staying proceedings is granted upon payment gy the appellant of the maoney in question, the plaintiff giving security for repayment, and on the undertaking of the solicitor to abide by any order which the Court may makd as to refundign if the appel proves sucdessful; and the cost of the aplication have to be paid by the applicant: See MORGAN v ELFORD (1876) 4 Ch. D. 388; COOPER v COOPER (1876) 2 Ch. D 429

In MONK v BARTRAM (supra) it was held that where a stay of execcution has been refused by the judge at the trial, an applicaiton made to the Corut of Appeal for a stay pending an appeal must be supported by special circumstance, and the allegaitons that there has been misdirection, that the verdict was against the weight of evidence or that there was no evidence ot support the verdict or judgment are not special circumstances on which the Court will grant the application.

The question of stay of execution arose in the cases of MORGAN v ELFORD (1876) 4 ch. D. 388 and in COOPER v COOPER (1875) - 1876) Ch.D. 492. it was held that as a general rule an order staying procedings is granted upon payment bg the appellant of the money in question, the plaintiff giving

security for repayment, and on the undertaking of the Solicitor to abide by any order which the court may make as to refunding if the appeal proves successful if directed and cost of the applicaion have to be paid by the appellant.

In the case of BARDER v LAVERY (1885) 14 Q.B.D. 769, it was held that execution for cost pending appeal from the Court of Appeal to the House of Lords will not be stayed, unless evidence be adduced to show that the respondent to the appeal will be unable to repay the amount levied by execution, [p.91] if the appellant be successful before the House of Lords.

There arenumerous cases with stay of execution; but there is a different apporach when the matter relates to foreign nations. ambassadors and those who have diplomatic immunity. But in TENDERX CORPORATION v CENTRAL BANK (1977) 1 A.E.R. 889 Lord Denning M.R. said that—

"I now believe that he doctrin of incorporation is correct. Otherwishe I do not see that our Courts could ever recognise a change in the rules of International Law. It is certain that international law does change and the Courts have applied the changes without the aid of Act of Parliament. The bounds of sovereign immunity have changd greatly in the last 30 years. The changes have bgeen recognised in many countries, and the courts in or country and theirs - having given effect to them without any legislation for the purpose, notably int he decision of the privy council in Philipine Admiral (owners) v Wallen Shipping (Hong Kong) Ltd. (1976) 1 All E.R. at page 78; (1976) 2 W.L.R. 214. Seeing that the rules of international law have changed - and do change - and the Courts have given effect to the changes without any Act of parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English Law. It follows too that a decision of this Court, as to what was the rulling of International Law 50 or 60 years ago is not binding on this court today. International law knows no rule of stare decisis. If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change, and apply the change in our English Law, without waiting for the house of Lords to do it.

A century ago, no sovereight state engaged in commercial activities. It kept to the traditional functions of a sovereign; to maintain law and order, to conduct foreign affairs, and to see to the defence of the country. It was in those days that England, with most othe countries adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law of the time. In re Parliament Belge (1880) 5 P.D. 197 at 205, (1874-80) A.E.R. Rep. 104 at 109, Brett C.J said:

[p.92]

"the exemption of the person of evey sovereign from adverse suit is admitted to be a part of the law of nations (so also his property), The universal agreement which has made these propostions part of the law of nations has been an implied agreement."

This rule was stated by Dicy in his work on conflict of laws (5th Ed.) 1932 at page 194 and 9th Edition (1973) at page 138 and repeated religiously by the Judges thereafter. The classic restatement of it was made by Lord Atkin in COMPANIA NIVIERA VASCONGADA v CHRISTIANA (1938) 1 All E.R. 719 at 720, 721 (1938) A.C. 485 at 490 in these terms:—

"The courts of a country will notimplead a foreing sovereign, that is, they will not by their process make him against his will a party to legal procedings, whether the proceedings involve process against his peson or seek to recover from him specific property or damages."

Viscount Simons repeated this doctrin in the case of RAHIMTOOLA v NAZIM OF HYDERABAD (1957) 3 All E.R 441 at 446; (1938) A.C. 370 at page 394.

Mr Betts' contention was that if the proposed appeal is successful, it would not be possible to ge a refund rom the respondent. Mr. Terry on the other hand, argued that since the respondent had submitted to the jurisdiction by institution an action coupled with the affidavit sworn to by the Charge D' Affaires of the Ivory Cost Embassy, on a successful appeal, the respondent would refund the money.

It is to be noted that the transaction between the applicant and respondent, in my view, is a commercial transaction, and int he case of PHILIPPINE ADMIRAL (owners) v WLLAN SHIPPING (HONG KONG) LTD. (1976) 1 All E.R. at 95. 96 (1976) 2 W.L.R. 214 at 233 the Privy Council said:

"..... the trend of opinionin the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transaction [p.93] ..... their Lordships themselfes think that it iswrong that it should be so applied. ..... Thinking as they do not the restrictive theory ismore consonant with justice, they do not think that they should be deterred form applying it....."

Lord Denning M.R. in the TENDREX TRAIDING CORP (supra) said at page 981:

"Such reason is of general applicaiton. It covers action in personam. In those actions, too, the restrictive theory is more consonant withjustice. so it should be applied to them. It should not be retained as an indefensible anolaly."

In his speech at pag 821 in the case of DUFF CO v GOVERNMENT OF KELANTAN (1924) A.C. 797 Lord Dunedin said that—

"the present action does not embrace the Chancery cost. It seeks to enforce the award as a judgment. The sultandoes not in this action waive the privilege of soverignty. He can therefore only be subjected to the jurisdiction if either he has done so by appearing as palintiff in the chancery suit or by his subscription of the contract. .... An arbitrator is not a court, and therefore by appearing before the arbitrator he did not submit himself to the jurisdiction of the Court."

Lord Sumner in his speech said at page 822:

"The principle is well settled that a foreign soverign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether involving it as a plaintiff or by appearing as a defendant without objection."

The rule is, there is nothing to prevent a foreign soverign form appearing as plaintiff in the English Courts; and if he does so appear, he is treated just like another litigant in such matters as discover of documts and security for costs; see Dicey and Morris on Conflict of Laws (9th Ed.) at page 144

[p.94]

Referring to the DUFF DEVELOPMENT case (supra) Lord Carson said at page 832:

The main contention, however of the appllant in the present case is that where ever a Soverign State has submitted to the jurisidction of our courts, it waives his privileges, and must for the purpose of doing justice be treated in exactly the same way. The general proposition upon this subject is I think, acurately sated in Westlake's private International Law, 6th Ed. 259 S. 192. But a foreign state or person entitled to the privilege of exterritoriality. Bringing an action in England, will be bound as a private corporation or person would bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subject to all cross-actions, counter-claims, defences and steps of procedure with as between private parties would be ocmpetant to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim.

The Learned Lord further said:

"It is to be observed that the main principle underlying the cases referring to the exercise of jursdiction by our Municipal Courts is that it was necessary that a soverign power should be ocnsidered to have waived its privileges and be treated as otherlitigants for the purpose of enabing complet justic to be done between the parties: see Kinf of Spain v Hullet 1 Dow & Clerk 333, 335, and alsoin the judgment of James L.T. in Strousberg v Republic of Costa Rica 44 L.T. 199.....

It is in applying this principles of equal treatment that the soverign submitting to the jurisdiction has been ordered to give security for costs and also security for damages; See The Newbattle 10 P. D.33."

It was recongised at common law that a diplomatic agent or other member of the diplomatic staff might waive immunity form civil and criminal jursdiction of the local courts, either by expressly consenting through his solicitor to the proceedigns, or by entering an apperance to the writ or by commencing proceedings as plaintiff. Since, however, the privilege is the privilege of the sending State, not of the individual diplomat, it was essential that consent to tis waiver should have been given by the sending State in the [p.95] case of proceedings agains the head of the mission, and by the head of the misison where the proceedings were against a subordinate member of the staff.

But these rules have been interpreted in this way. In the first place, the authority of the sending State ot waive the privilege is retained, and it is enacted that a waiver by the mission shall be demed to be a vaiver by that State. The words of this last provison are wide enough to embrace the case where the head of the mission waives his own privileges, not merely that of a subordinate member of the staff. it is enacted that a waiver must always be express: See Chershire's private International Law (9th Ed. at page 114).

It is now settled that —

"the initiaiton of proceedings by person enjoying immunity from jursdiction..... shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim."

I think it is necessary to mention the case of the Newbattle (1885) P.D. 33 at page 34 when Butt J, in a brief judgment said—

"on the assumption which I have already mentioned the Louise Marie cannot be arrested, so that the case falls within S.34 of the Admiralty Act, 1861. Mr. Aspirall contended that though this case wa within the words of that though this case was within the words of that section it was not within the intention of it, but I think it is within both the wording and the intention. It has however, been contended that even so, a foreign government being plaintiff, and the matter being in the discretion of the Court, it could not order security to be given. But ther is authority from the other Divisions of the High Court ot show that the pradctice has been to oblige foreign government to give security for costs. By parity of reasoning I see no reson why a foreign government should not be ordered to give security for damages. The motion must therefor be dismissed with costs.

The plaintiff appealed against the decision of Butt J. In the appeal, Brett M.R.

"The present case is clearly within the words of the 34th Section of the Admiralty Court Act, 1961. It was argued by counsel for the plaintiffs that this order should not be mad upon a sovereign prince. There are some cases indeed in which orders ought not to be made against a sovereign prince. In the parliament Belge (5 P.D. 197), where the king of the Belgians appeared under protest, and where the question was whether the ship could be arrested, it was decided that being a ship of a foreign presence it could not.

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It has always, however, been held that if a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him. The court has never hesitated to exercise its powers against a foreign government to this extent."

Cotton L.J. agreed with Brett M.R. and said at page 35 —

"..... "But when a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders which may properly be made. Regard must be had to the fact that in this case the king of the Belgians is a sovereign prince, but the order is nevertheless a proper one."

In the same case at page 36, Lindley L.J, said:

“I agree that the order appealed against is right; a counter-claim seems to me to be equivalent to the cross action mentioned in the Admiralty Act, 1861, and this case falls within both the letter and the spirit of that Act:”

IN BULLET v KING OS SPAIN 1 Dow & Clark, Lord Lynhurst (Chancellor) said at page 490:

"Suppose the king of Spain had sent jewels here to be set, and the jeweler refused to restore them, would the king of Spain have no remedy at law to recover them or their value?

Why should he not have his remedy here as well as any other foreigner? When he sues here as a plaintiff the Court has complete control over him, and may hold him to all proper terms."

Most of the earlier cases have been based on the Diplomatic privileges Act 1708, which has always been interpreted as a declaratory Act. In HAMELEERS-SHENLEY v THE AMAZONE, RE THE AMAZONE (140) 1 All E.R. at page 269, it was held that the immunity was affected by the Diplomatic Privileges Act, 17 o8, which is confirmatory of, and does not supersede, the common law. The Editorial note in this case reads:

"The question here discussed is of importance, since if the attached obtained here privilege only under the Act of 1708, it might be that he could prove his claim to it only after the fact that the goods were his had been established. The difficult, however, does not arise, since it is held that Act does not exhaustively define the nature of diplomatic common law."

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Slesser, L.J. in his judgment in that case said at page 271:

"The question of substance has already been considered, and, I think, decided in Parkinson V Potter (1885) 16 Q.B.D. 152: 11 Digest 538, 409, 53 L.T. 818 in which it is assumed and earlier cases have said the same thing –that the diplomatic privileges Act. 1708, is by no means exhaustive of the common law dealing with diplomatic immunity……."

I shall now turn to the Laws of Sierra Leone relating to diplomatic immunity. The Diplomatic Immunity and Privileges Act, No. 35 of 1961 came into force on the 27th day of April, 1961. With regard to immunities to Foreign Envoys and Consular officers, Section 3 of the Act enacts that

"Subject to the provisions of this Act every foreign envoy and every foreign consular officer, the members of the families of those persons, the members of their official or domestic staff, and the members of the families and of their domestic staff or the members of their official staff shall be accorded immunity from suit and legal process and inviolability of residence, official premises, and the official archives to the extent to which they were respectively so entitled I force in Sierra Leone immediately before the passing of this Act."

Subsection 2 provides that:

"Any writ in process sued forth or prosecuted before or after the coming into operation of this Act, whereby any foreign envoy authorized and received as such foreign envoy is la able to arrest or imprisonment, or his or her goods or chattels are liable to distress, seizure or attachment, shall be void."

The provisions of this section of Act No. 35 of 1961 are similar to Section 3 of the Diplomatic privileges Act, 1708. Section 3 of Act No. 25 of 1969 does not stipulate any regulation with regard to a foreign

envoy who voluntarily submits to the jurisdiction of our Courts. However, Section 74 of the Courts Act No. 31 of 1965 enacts that –

[p.98]

"Subject to the provisions of the Constitution and any other enactment, the common law, the doctrine of equity, and the statues of general application in England on the 1st day of January 1880, shall be in force in Sierra Leone.

It seems to me from the authorities already referred to that a foreign envoy can be ordered to give security for cost, security for damages, and when he sues in this county as a plaintiff, the court has complete control over him, and may hold him to all proper terms. A government who comes in as a suitor, submits to the jurisdiction of the Court and to all orders which may properly be made

In the application before us, the respondent sued in the name of The Charge D' Affairs of the Republic of the Ivory Cost Embassy in Sierra Leone acting for and on behalf of the Republic of Ivory Coast. The respondent, by suing as a plaintiff, has submitted to the jurisdiction of our municipal Courts. A number of affidavits has been sworn to and filed by both parties in this matter. One of the affidavits was sworn to on the 11th day of May 1982 at 11 a.m. by Mamadou Torue, the Charge D. Affairs of the Republic of Ivory Coast.

In paragraphs 2 and 3 of the affidavit, he said:

"That I have submitted myself to the jurisdiction of the Court of Sierra Leone by instituting proceedings in the matter C.C.481/81 (1981 C. No. 6 and that in the light of paragraph two (2) supra of my affidavit and the undertaking signed by me on the 16th April 1982 pursuant to the Court of Appeal Judgment dated 15th April 1982, I consider myself bound by any decision of any competent Court in Sierra Leone in respect of the above mentioned matter.

The said undertaking is exhibited by me and marked MT2".

In Exhibit MT2 the respondent undertook by himself, his heirs and executors administrators and assigns to repay the amount of Le. 21.606.10 in the event of the applicants being successful in an action intituled Civ. Appeal 60/81.

[p.99]

Mr. Betts argued forcefully that if the amount is paid directly to the appellant, and that if the applicants are granted the orders sought in the motion before the High Court, and that the applicants subsequently become successful, it would be impossible to get a refund of money by the process of execution.

On the other hand Mr. Terry contended that he respondent having given an undertaking to refund the amount coupled with his submission to the jurisdiction of our Courts, no difficulty would be encountered in recovering the money.

The application before us is a matter of discretion, and in the area of judicial discretion, there are no binding precedents properly so-called, as each case must be dealt with its own merits. The money in this matter, as I understand, has been deposited into the account of the Master and Registrar. And Mr. Betts has told this Court that the applicants would be willing to pay any interest in the respondent is successful upon the determination of the case. Any order for a stay of execution was granted by the High Court after execution had been levied. This is a question with which I am deeply concerned, because there was no writ of Fi-fa in existence the execution of which can be stayed. There is also an application before this court seeking an order for special leave to appeal to this Court, leave to appeal having been refused by the Court of Appeal.

A survey of the matters referred to in the affidavits coupled with the arguments on both sides forces me to the conclusion that he reasons given by applicants for an order to stay of execution are untenable.

It must be noted that there is no pending process of execution.

[p.100]

Execution has been levied and the money had been deposited in the account of the Master and Registrra. The main point is, is there any pending of process of execution to be stayed? To my mind since there has been execution of the fiery facias, there is nothing before this Court to make an order in vain, In the circumstances, the application for Stay of execution is belated.

The case with regard to the application for special leave to appeal, in my opinion, presents the necessary future which would make it fit for the granting of special leave to appeal.

I agree with During, J.A. when he said –

“I think I am absolutely right in saying that our Courts must take judicial notice of the fact that the Ivory Cost is a friendly country. As far as Sierra Leone is concerned, it is not a hostile country of an enemy state in so far as the relationship between our country and the Ivory Cost is concerned and diplomatic relationship still exist between the two States. I see no reason why we should start with a presumption that the appellant would not behave in accordance with the comity as exists between the two States in a simple matter like this before us.”

The argument of the applicants is mainly, that the respondent would refuse to make a refund if the money is paid to him, and that they could not levy execution on his person or property. The question is why must we start with the assumption that the respondent, having submitted to the jurisdiction of our Courts and having given an undertaking to abide by any order or decision of the court? In my opinion, the argument of the applicants has failed to satisfy me that the reasons given [p.101] for the application for stay of execution of the fiery facias (which has already been executed) are not tenable grounds for granting the application. In the circumstance, the application for stay of execution is refused. In refusing the application for stay, I have also taken into consideration Section 102 subsection 3 of the Constitution Act No.12 of 1978.

Costs of the application to be paid the Respondents.

(Sgd) O.B.R. Tejan

(Hon. Mr. Justice O.B.R. Tejan, J.S

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BECCLES DAVIES J.S.C.

I have had the opportunity of reading in draft the rulings of my learned brethren Harding and Tejan JJ.S.C. I agree with the ruling of Harding J.S.C. and the orders proposed by him. I have nothing more to add.

(Sgd).

(Hon. Mr. Justice S. Beccles Davies, J.S.C)

CASES REFERRED TO

1. Duff Development Co. Vs Kelantan Government (1924) A.C. 797.

2. Monk V Bartram (1891) 1 Q.B. 346:

3. Barkey V Lavery (1885) 1 Q.B.D 769.

4. Hansord V Lethbridge (1891) 8 T.L.R. 179.

5. Morgan V Elford (1876) 4 Ch. D. 388;

6. Cooper V Cooper (1876) 2 Ch. D 429

7. Barder V Lavery (1885) 14 Q.B.D. 769,

8. Tenderx Corporation V Central Bank (1977) 1 A.E.R. 889

9. Philipine Admiral (Owners) V Wallen Shipping (Hong Kong) Ltd. (1976) 1 All E.R. At Page 78; (1976) 2 W.L.R. 214.

10. Compania Niviera Vascongada V Christiana (1938) 1 All E.R. 719 At 720, 721 (1938) A.C. 485 At 490

11. Rahimtoola V Nazim Of Hyderabad (1957) 3 All E.R 441 At 446; (1938) A.C. 370 At Page 394.

12. Philippine Admiral (Owners) V Wllan Shipping (Hong Kong) Ltd. (1976) 1 All E.R. At 95. 96 (1976) 2 W.L.R. 214

13. Duff Co V Government Of Kelantan (1924) A.C. 797

14. Bullet V King Os Spain 1 Dow & Clark

15. Hameleers-Shenley V The Amazone, Re The Amazone (140) 1 All E.R. At Page 269

16. Parkinson V Potter (1885) 16 Q.B.D. 152: 11 Digest 538, 409, 53 L.T. 818

STATUTES REFERRED TO

1. Diplomatic Immunity and Privileges Act, No. 35 of 1961

2. Section 3 of the Diplomatic privileges Act, 1708

3.. Section 74 of the Courts Act No. 31 of 1965

THE BANK OF CREDIT & COMMERCE INTERNATIONAL AND THE CHARGE D'AFFAIRS OF THE IVORY COAST EMBASSY

[S.C. MISC. APP. NO. 4/82] [p.118-121]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 29 DECEMBER 1983

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.(PRESIDING); MR. JUSTICE O. B. R. TEJAN, J.S.C.; MR. JUSTICE S. BECCLES DAVIES J.S.C;

BETWEEN:

THE BANK OF CREDIT & COMMERCE INTERNATIONAL - APPELLANTS

AND

THE CHARGE D' AFFAIRS OF THE IVORY COST EMBASSY - RESPONDENT/APPLICANT

Berthan Macauley, Jr. Esq, for the Respondent/Applicant

Gravas J. Betts Esq., with him Miss P.S. Wellesley-Cole, for the Appllant

RULING DELIVERED ON THE 29TH DAY OF DECEMBER, 1983

BECCLES DAVIES, J.S.C.

In this application, the applicant seek to set aside certain orders made by Harding, J.S.C. (sitting as a single Justice of the Supreme court) on 22nd April, 1982.

The orders sought from this Court are—

"That an order be made by the Supreme Court of Sierra Leone constituted by three justices thereof pursuant to Rule 2(2) (b) and (3) of the Supreme court Rules Public Notice No. 1 of 1982 discharging OR

reversing the Order dated 22nd April, 1982 of the Honourable Me. Justice C.A. Harding, J.S.C. presiding Justice sitting as a single Justice of the Supreme Court on the ground of non-compliance with Rule 2 (6) of the said Supreme Court Rules Public Notice No. 1 of 1982 discharging OR reversing the order dated 22nd April, 1982 of the Honourable Mr. Justice C.A. Harding, J.S.C. Presiding Justice sitting as a single Justice of the Supreme Court on the ground of non-compliance with Rule 2(6) of the said Supreme Court Rules public Notice No. 1 of 1982.

and

"That an Ode be made by the Supreme Court of Sierra Leone constituted by three Justices thereof pursuant to Rule 2 (b) and 2(3) of the [p.119] Supreme Court Rules 1982 aforementioned discharging or reversing the Order dated the 22nd April, 1982 of the Honourable Mr. Justice Cornelius Harding, J.S.C Presiding justice sitting as a single Justice of the Supreme Court on the ground that he said application of the Applicant/Appellants herein could NOT in law be mad ex parte without motion papers and accompanied documents in support of the application on the Respondent and /OR his solicitor herein."

A single Justice of the Supreme court is empowered to here matters "not involving the decision of a cause or matter before the Supreme Court." Such power however may be subject to review by a court of three Justices of the Supreme Court. The pertinent rule on the subject is Rule 2(2) (b). It provides—

2(2) "As single Justice of the Supreme Court may exercise any power vested in the Supreme Court not involving the decision of a cause or matter before the Supreme Court, save that—

(a) ……

(b) in civil matters, any order, direction or decision made or given in pursuance of the powers of the powers conferred by this section may be varied, discharged or reversed by the Supreme Court constituted by there Justices thereof.

The ground on which application to reverse or discharge the orders of Harding J.S.C is non-compliance by the Respondents herein, with Rule 2(6) of the Rules of the Supreme Court public Notice No. 1 of 1982.

The orders made by Harding J.S.C on 22 April 1982 were—

[p.120]

"That the applicants (now respondents) herein are granted an interim stay of all execution and/or proceedings or further proceedings on the orders of the Court of Appeal (1) dated 13th April, 1982 and (ii) made the 21st day of April, 1982, respectively pending the hearing and determination of the motion dated 22 April, 1982 filed in the Supreme Court seeking special leave to appeal against the said orders of the Court and stay of execution which said motion is to be heard on the 27th day of April, 1982.

(2) That pending the hearing of the said motion on the 27th day of April, 1982, the applicants deposit with the Registrar of the Supreme Court a Bankers' cheque (Draft) in the sum of Le 21,606.10 by noon on Friday 23rd April, 1982, to abide the decision of the Supreme court.

(3) This order to be served on the Respondents by 4 p.m today 22nd April, 1982."

Rule 2(6) relied upon by the Applicants in support of their contention provides—

"The Registrar of the Supreme Court shall give or cause to be given to the parties or their solicitors reasonable notice of the hearing of…… any application under these rules."

How valid than is the contention that there should have been service of the "the necessary motion papers and accompanied documents in support of the application" in accordance with Rule 2(6) quoted above? I do not read Rule 2(6) as requiring the Registrar to serve the motion papers and accompanying documents in respect of the application on the applicants. It requires that notice of the hearing of the application should be given to he parties or their Solicitors. We are all familiar with the form of Notice given by [p.121] Registrar of the hearing of appeals and applications. There is no validity in the applicant's contention. It is based on a misapprehension of Rule 2(6).

Assuming for a moment that there was validity in the applicant's contention, the orders made by Harding J.S.C. were interim orders which have now been superseded by permanent orders made by a Court of three Justices of the Supreme Court, that being so the contention had become academic

The application fails.

(Sgd.) Hon. Mr. Justice S. Beccles Davies, J.S.C.

I agree

(Sgd.) Hon. Mr. Justice E. Livesey Luke, J.C.J.

I agree

(Sgd.) Hon. Mr. Justice O.B.R Tejan, J.S.C.

STATUTE REFERRED TO

Rule 2(6) of the Rules of the Supreme Court public Notice No. 1 of 1982

1984

JUSTICES OF THE SUPREME COURT

HON. MR. JUSTICE E. LIVESEY LUKE — CHIEF JUSTICE

HON. MR. JUSTICE C.A. HARDING — JUSTICE OF THE SUPREME COURT

HON. MR. JUSTICE D.B.R. TEJAN — JUSTICE OF THE SUPREME COURT

HON. MRS. JUSTICE A.V.A. AWUNOR-RENNER — JUSTICE OF THE SUPREME COURT

HON. MR. JUSTICE S. BECCLES DAVIES — JUSTICE OF THE SUPREME COURT

REGISTRAR:—

E.G. NELSON-WILLIAMS, EAQ.

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ABDULAI SESAY (ALIAS IBRAHIM KAMARA) v. ABDULAI KAMARA (ALIAS BLACKIE) & ANOR.

[S.C. CR. APP. NO. 7/82] [p.95-115]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 12 DECEMBER 1984

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J.

MR JUSTICE C.A. HARDING, J.S.C.

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MRS. JUSTICE A.V.A. AWUNOR-RENNER

MR. JUSTICE S. BECCLES DAVIES

ABDULAI SESAY (ALIAS IBRAHIM KAMARA) — APPELLANTS

AND

ABDULAI KAMARA (ALIAS BLACKIE)

AND

THE STATE — RESPONDENT

Ade Renner-Thomas, Esq., for the Appellants

M. T. Ngobeh, Esq., for the State (Respondent)

LIVESEY LUKE, C.J.:

The appellants were in November, 1980 tried in the High Court sitting in Freetown in respect of offences alleged to have been committed at Koidu Town in the Kono District in October, 1979.

The trial was by Williams J. with a jury. The Indictment on which the appellants were tried contained six counts. In the first count both appellants were charged with Robbery with Aggravation contrary to section 23(1)(a) of The Larceny Act 1916 as repealed and replaced by Act No. 16 of 1971 In the second, third and fourth counts, they were charged with Wounding with intent to Murder contrary to section 11 of The Offences against the Person Act, 1861. In the fifth count they were charged with Shooting with intent to Murder contrary to section 14 of The Offences against the Person Act 1861. And in the sixth count they were charged with Wounding with Intent contrary to section 18 of The Offences against the Person Act, 1861.

[p.96]

The trial concluded on 12th November, 1980 when the jury returned unanimous verdicts of Guilty against the 1st appellant in respect of the six counts and unanimous verdicts of Guilty against the 2nd appellant in respect of all six counts except the fifth count on which they returned a unanimous verdict of Not Guilty against him.

The 1st appellant was accordingly convicted in respect of all the six counts and the 2nd appellant was convicted in respect of all the six counts except count 5. The trial Judge passed sentence on the 1st appellant as follows:— Count 1-50 years imprisonment, Count 2-25 years imprisonment, Court 3-25 years, Count 4–25 years, 5-40 years and Count 6 - 25 years; and ordered that the sentences in Counts 1 and 5 were to run consecutively and those counts were to run concurrently with the sentences in Count 1 and 5. He passed sentence on the 2nd appellant as follows:— 25 years imprisonment on each of the five counts on which he was convicted, and ordered that the sentences in counts 1 and 2 were to run consecutively and those in counts 3, 4 and 6 were to run concurrently with the sentences in counts 1

and 2. The result therefore was that the first appellant was sentenced to serve a total of 90 years in jail whilst the 2nd appellant was sentenced to serve a total of 50 years in jail.

Both appellants appealed to the Court of Appeal against their respective convictions and sentences. The appeals were heard by the Court of Appeal (During, Warne and Navo JJ.A) in September, 1982. Judgment was delivered on 15th November, 1982, dismissing the appeals against convictions, and setting aside the sentences of imprisonment imposed in respect of the convictions on count 1 and substituting therefore a sentence of death against both appellants.

It is against that decision that the appellants have appealed to this Court.

The facts of this case make gruesome reading and it is necessary to set them out briefly. Hassan Hussein Srour (Hassan for short), a Business man and diamond dealer, lived with his wife and two daughters [p.97] at No. 31 Yengema Road Koidu Town in the Kono District. On the night of 25th October, 1979 Hassan and his family retired to bed at about 11 p.m. Early on the following morning, they were all aroused from sleep by a loud noise. Hassan got out of bed to find out what was happening. He discovered that the front door of his house was being hit from outside and that the door had already been cracked. He tried to hold on to the door while raising an alarm. His children were also shouting "thief". He then heard a gun shot from outside. The shot penetrated one of the windows near where the children were standing.

The front door was then broken open and five men forced their way into the house. All the five men were masked and armed within a shot gun, a pistol, a wooden pestle and a crow bar. They rushed at Hassan and demanded the key to his safe. He told them that he did not have the key with him. Whereupon the intruder armed with the matchet hit him on the, head" as a result of which he sustained a wound on the head and he fell to the ground with blood oozing from the wound. He became dizzy, but the intruders continued to demand the key. The intruder armed with the matchet and the one armed with the pestle rushed at the wife who was about 4 months pregnant at the time. The intruder holding the matchet attempted to hit the wife with it, but one of daughters (Rima) went to the mother's rescue. The intruder then turned on Rima and hit her on the head with the matchet. As a result she fell to the floor and became unconscious. The wife begged the intruders not to hit her husband, but she also suffered the same fate. They demanded the key to the safe from her and then proceeded to beat her all over her body with the pestle and to strike her on the head with the matchet, as a result of which she collapsed, and fell to the floor. The intruders then turned their attention to Hassan. One of the intruders held a pistol to his (Hassan's) back, whilst the others pushed him around the house hitting him all over the body with the pestle and the crow bar. In the process the intruders broke open the doors of three rooms in search of the safe.

[p.98]

They then broke open the door of a fourth room. That room was the office and the safe was located therein. The intruder armed with the crow bar then hit Hassan on his right side which caused him to fall to the ground. In his semi-conscious state he heard one of the intruder saying to the others that they should "shoot and finish" the occupants of the house. He soon became unconscious. Hassan's brother,

one Khalil, who lived next door, heard the cries for help of his brother's family. He attempted to go to their rescue. He heard shooting and noise outside. He heard his brother's children shouting that they were being killed. He went outside and almost immediately he was shot at, as a result of which he sustained injuries in both legs. Fortunately, two police constables who were on patrol duty that night heard the sound of gun shots coming from the direction of Yengema Road. They informed another constable on patrol duty. They then boarded a vehicle and went to Yengema Road. They heard the sound of gun shot coming from 31, Yengema Road. They ordered the driver to stop the vehicle. The driver stopped the vehicle but left the headlights on. The constables then saw armed masked men dressed in black coming from 31 Yengema Road. They gave chase and succeeded in apprehending one of them, the 1st appellant. He was holding a gun while running but he dropped it before he was caught. He was still masked when he was apprehended. The constables took off the mask. The constables took the 1st appellant to 31, Yengema Road. A doctor was summoned to the scene. He arrived there within a short time. On entering the house he found that several of the inmates were wounded and also saw blood all over the house. He examined Hassan, his wife, his daughter (Rima) and Khalil. He found that all four of them were bleeding profusely from wounds recently inflicted. In his opinion the wounds sustained by each of the victims were very serious. All the four victims were taken to a private hospital in Kono where they received emergency treatment.

[p.99]

Later that day the doctor took the victims to Freetown by plane, and had them admitted at the Military Hospital at Wilberforce. All the four victims later went abroad for further medical treatment.

The main issues raised in this appeal may be summarized thus:—

(1) Whether the trial Judge had misdirected the jury in his summing up.

(2) Whether the Statement to the Police of the 2nd appellant (i.e. Ex. "O") was properly admitted in evidence at the trial.

(3) Whether the verdicts of the Jury against the 1st and the 2nd appellants were unreasonable and could not be supported having regard to the evidence.

(4) Whether the Court of Appeal was right in law in holding that the sentence prescribed by section 23(1)(a) of the Larceny Act, 1916 as amended by section 2 of Act No.16 of 1971 was a mandatory death sentence.

With regard to the first issue stated above, I think that it is sufficient to say that I find no merit in any of the misdirection’s alleged.

With regard to the second issue, the statement complained of was tendered in evidence by Police Detective Sergeant Sonny Albert Macfoy (P.W.12). He testified that he obtained a voluntary statement from the 2nd appellant on 12th April 1980. When he attempted to produce the statement, the trial Judge made the following record of what transpired:—

"At this stage the 2nd accused states that he did not make any statement. The 2nd accused is shown the statement and he identifies his signature thereon. He states further that he was forced to sign the document but he did not say anything to the witness.

[p.100]

Court: The statement is admitted in evidence and marked Exhibit "O". Statement read."

Mr. Renner-Thomas submitted that in view of what was stated by the 2nd appellant, the Learned Judge should have held a trial-within-a trial to determine whether the statement was admissible in evidence or not; and that the Judge not having adopted that course, the statement was wrongly admitted in evidence. It is true that there no formal objection by the 2nd appellant to the admissibility of the statement. This is understandable since he was not represented by counsel. But the failure of an accused person or his counsel to take a formal objection to the admissibility of a statement does not absolve a trial judge of his duty of determining the issue of voluntariness of a statement if it is raised. In the instant case the 2nd appellant did not only state that he did not make the statement but he also added that he was forced to sign the statement. In my opinion, those assertions by the 2nd appellant clearly raised the issue of voluntariness of the statement and consequently challenged its admissibility.

It is pertinent to refer to the State vs. Ahmed S.D. Turay & ors. Sc. Cr. App. No. 2/81 (judgment delivered on 13th July, 1982 — as yet unreported) where I said inter alia:—

"It has long been an established rule of English law that to render a confession by an accused person admissible at his trial the confession must be proved by the prosecution to be voluntary in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority …….. That rule has been stated and restated over the years by the English Courts and has been transported from English soil and transplanted in many Commonwealth countries all over the globe, where in most cases, it has taken firm root ……. Where the admissibility of a state merit is challenged on the ground that it was not made voluntarily, it is the duty of the Judge to determine that issue. The proper course is for the judge to hold a trial within a trial (or voir dire) to try the issue."

[p.101]

It is also relevant to refer to Searaj Ajodha v. The State (1981) 3 W.L.R. 1, where the question for determination was almost identical to the issue now under consideration. The question was stated by Lord Bride of who delivered the opinion of the Board, follows at p. 5:—

"The primary question for their Lordship's decision in these appeals can be stated in its simplest form as follows: When the prosecution proposes to tender in evidence a written statement of confession signed by the accused and the accused denies that he is the author of the statement but admits that the signature or signatures on the document are his and claims that they were obtained from him by threat or inducement, does this raise a question of Law for decision by the judge as to the admissibility of the statement?"

His Lordships answered the question posed at pp. l0-12 of the Report. After citing the famous dictum of Lord Sumner in Ibrahim v. The ----- (1914) A.C. 599 at 609, and referring to Director of Public Prosecutions v. Ping Lin he said at pp. 10-11:—

"Given this deeply entrenched principle it seems to their Lordships clear beyond argument that, if the prosecution tender in evidence a statement in writing signed in one or more places by the accused, they are relying on the signature as the acknowledgment and authenticator by the accused of the statement as his own, and that from this it must follow that, if the voluntary character of the signature is challenged, this inevitably puts in issue the voluntary character of the statement itself.
…….

In all cases where the accused denies authorship of the contents of a written statement but complains that the signature or signatures on the document which he admits to be his own were improperly obtained from him by threat or inducement, he is challenging the prosecution's evidence on both grounds and there is nothing in the least illogical or inconsistent in his doing so."

And His Lordship continued at p.12:—

"It may be helpful if their Lordships indicate their understanding of the principles applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice …….

(2) The accused, as in each of the instant appeals, denies authorship of the written statement but claims that he signed it involuntarily. Again, for the reasons explained, the judge must rule on admissibility, and, if he admits the statement, leave all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate."

In the instant case, according to the Judges record of proceedings (quoted above) the 2nd appellant first denied the authorship of the contents of the statement and secondly alleged that his signatory appearing on the statement was improperly obtained from him by forces.

In my opinion the 2nd appellant was in those circumstances challenging the prosecution's evidence on both grounds, namely, the authorship of the statement and the voluntariness of his signature. In those circumstances, the trial Judge was under a duty to hold a trial—within — a trial to determine the issue of voluntariness of the statement and to rule thereon. It is beyond argument that the trial Judge [p.103] failed to follow that course which as indicated earlier, is based on well established principles of fundamental importance. In my judgment therefore the Learned Judge wrongly admitted the statement complained of.

I shall now deal with the third issue which can be disposed of very briefly. The evidence led by the prosecution has been summarized above. The 1st appellant gave evidence on oath at the trial denying participation in the crime. The jury returned a unanimous verdict of Guilty against him in respect of all the counts of the Indictment. In the course of their judgment, the Court of Appeal said inter alia that the evidence against the 1st appellant was overwhelming. I wholeheartedly agree. The evidence against the

1st appellant was indeed overwhelming. I therefore find no justification for this court to interfere with the verdict of the jury on any of the counts and the resultant convictions thereon. With regard to the 2nd appellant, apart from the statement complained of (i.e Ex. '0') the prosecution led no other evidence against him. He gave evidence on oath denying participation in the crime. I have already ruled that the statement (Ex. 'O') was wrongly admitted in evidence. Therefore its contents should not have been left to the jury at all. If the statement had not been left to the jury, then, as indicated earlier, there would have been no other evidence against the 2nd appellant on which to found a conviction on any of the counts laid against him in the Indictment. In the circumstances, the irresistible conclusion which I come to is that the verdicts against the 2nd appellant in respect of all the counts against him were unreasonable and could not be supported having regard to the evidence. It follows that the convictions against the 2nd appellant must be quashed, and the sentences set aside.

I shall now turn my attention to the fourth and final issue. Under Count I of the Indictment both appellants were convicted of Robbery with Aggravation contrary to section 23(1)(a) of the Larceny Act, 1916, as repealed and replaced by Act. No. 16 of 1971. Section 23 [p.104] of the Larceny Act, 1916, as repealed and replaced by Section 2 of the Imperial Statutes (Criminal Law) Adoption (Amendment) Act, 1971 (Act No. 16 of 1971) reads as follows:—

"23(1) Every person who—

(a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob any person;

(b) robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person:

shall be guilty of felony and on conviction thereof liable to suffer death.

(2) Every person who robs any person shall be guilty o£ felony and on conviction thereof liable to imprisonment for life.

(3) Every person who assaults any person with intent to rob shall be guilty of felony and on conviction thereof liable to imprisonment £or a term not exceeding ten years..

As stated earlier the trial judge sentenced the appellants to terms bf imprisonment in respect of the convictions under Count 1 of the Indictment. But the Court of Appeal, as stated earlier, set aside the sentences of imprisonment imposed by the trial judge and passed sentences of' death on both appellants. The reason the Court of appeal gave for taking such an extreme course was that in the view, the sentence prescribed for offences against the amended section 23(1)(a) of' the Larceny Act, 1916 was a mandatory death sentence, and that there was no discretion to pass a sentence imprisonment.

[p.105]

It seems to me that the course adopted by the Court of Appeal raises questions of Constitutional law and of Interpretation of Statutes. The Constitutional question may be stated thus: Is the Court of Appeal

bound by its own previous decisions. The answer to the question is provided by section 107(3) of the Constitution of Sierra Leone, 1978. The sub-section is in the following terms:—

"Subject to the provisions of sub-sections (1) and (2) of section 101 of this Constitution, the Court of Appeal shall be bound by its own previous decisions and all courts inferior to the Court of Appeal shall be bound to follow the decision of the Court of Appeal on questions of law."

The provisions of subsections (1) and (2) of section 101 of the Constitution are not relevant for the purposes of this appeal.

Mr. Renner Thomas referred us to a previous decision of the Court of Appeal on the issue, namely Mohamed Sorie Fornah & 14 others vs. The State C.A. Cr. App. 31/74 judgment delivered on 30th April, 1975 (as yet unreported). He submitted that that decision was binding on the Court of Appeal. In that case the Court of Appeal construed section 3(1) of the Treason and State Offences Act, 1963.

The subsection, so far as relevant, reads:—

"3(1) A person is guilty of treason and shall on conviction be liable to suffer death who either within Sierra Leone or elsewhere ……"

The Court of Appeal in that case by a majority, held that the words "shall be liable" in the subsection import a discretion; and the sentence of death under section 3 of the Treason and State Offences Act, 1963 is discretionary and not mandatory; and that a judges as a discretion as to whether to pass the death sentence or not. The words construed by the Court of Appeal in Fornah's case were "shall on conviction be liable to suffer death." The words which the Court of Appeal had to construe in the instant case were "shall …….. on conviction thereof liable to suffer death." It is quite clear to me [p.106] that the words used in both statutes are identical and indistinguishable. In those circumstances, the previous decision of the Court of Appeal was binding on it in the instant appeal. And the fact that the previous decision was a majority decision does not in the least detract from its binding force. It is not clear whether the decision in the Fornah's case was brought to the attention of the Court of Appeal during the hearing of the appeal in the instant case. Be that as it may the decision in Fornah's case was still binding on it. It may be argued that in England from where we derive our system of jurisprudence, the Court of Appeal although normally bound by its previous decision, may in certain exceptional circumstances depart from it. The position has been authoritatively stated in Young v. Bristol Aeroplane Co. Ltd. (1944) K.B. 718 where the exceptions are spelt out and in Miliangos v. Geo Frank (Textiles) Ltd. (1975) 1 Q.B. 487 C.A. It is also well settled in England that in criminal appeals, the Court of Appeal is not limited to the exceptions specified in Young v. Bristol Aeroplane Co. Ltd. in departing from a previous decision. It is now accepted that if the Court of Appeal is of the opinion that the law has been either misapplied or misunderstood in a decision and that on the strength of the decision an accused person has been sentenced and imprisoned, it is that duty of the Court to reconsider its previous decision. Thus in Rex. v. Taylor (1950) 2 K.B. 368 C.A. Lord Goddard CJ, delivering the judgment of the Court of Criminal Appeal consisting of seven judges, said inter alia at p.371:—

"I desire to say a word bout the reconsideration of a case by this court. The Court of Appeal in civil matters usually considers itself bound by its own, previous decisions or by decisions of a court of co-ordinate jurisdiction …… The court however has to deal with questions involving the liberty of the subject, [p.107] and if it finds, on reconsideration, that in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to see whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present, ……."

This principle was restated in R v. Gould (1968) 1 All E.R. 849 C.A. where Diplock L.J. (as he then was) said inter alia at p.851:—

"In its criminal jurisdiction, which has been inherited from the Court Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction. If on due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this Court or its predecessor the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in Young v. Bristol Aeroplane Co. Ltd. as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case."

Even if the exceptions to the general principle just stated are applicable in this jurisdiction, the Court of Appeal can only Over-rule a previous decision if satisfied that the case comes within one [p.108] of the recognised exceptions. In the instant case the Court did not even consider or even refer to the previous decision, nor did they give any consideration to the question whether the case came within one of the recognised exceptions. In my opinion the circumstances do not show that any of the recognised exceptions were present in this case to justify the Court departing from its previous decision.

But it is doubtful whether the exceptions are now applicable to our Court of Appeal.

In my opinion sub-section (3) of section 107 of the Constitution is quite clear and unambiguous in its terms. It says in simple language that the Court of Appeal shall be bound by its own previous decisions. It seems that that provision admits of no exception. And according to its terms it is applicable to all previous decisions, civil as well as criminal. I think that this view is further re-inforced when the subsection is contrasted with subsection (2) of section 102 of the Constitution. That subsection provides as follows:—

“(2) The Supreme Court may, while treating its own previous decision as normally binding, depart from a previous decision when it appears right so to do; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

It seems clear therefore that while the Supreme Court may in certain circumstances depart from its own previous decision, the Court of Appeal may not. In view of the position occupied by the Court of Appeal in our hierarchy of courts, it is of the utmost importance that its decisions on the same question of law

be consistent. The Justices sit in panels and the panels change from time to time, and sometimes from case to case. If each panel is allowed to reach its own decision on the same point of law, in total disregard of a previous decision of the Court, then the result would be chaos. Conflicting decisions on the same point of law would be given by the same court resulting in uncertainty in the law. Such a state of [p.109] affairs would not be good for the development of the law or for the public that come before the courts for redress in both civil and criminal matters. I think that it is at the utmost importance, that the Judges of the Court of Appeal should loyally follow not only previous decisions of the Supreme Court but also previous decision, of the Court of Appeal; even if they disagree with the previous decisions, unless they can distinguish them from the case before them. In this connection it is pertinent to recall the words of Lord Simon of Glaisdale in Farrell v. Alexander (1977) A.C. 59 at P. 92:—

"The Court of Appeal occupies a crucial position in our judicial system. Most appeals stop there. It handles an immense volume of business. It sits in a number of divisions. Unless it follows its own decisions, as the law directs, litigation will be a gamble on which division of the court is to handle the appeal and what Law will be declared there. Most actions which are threatened or begun are settled by agreement — to the great advantage of the public generally and the litigants in particular. They are settled on the basis of a prognostication of the applicable law. If the law becomes unpredictable, changing from court to court and from case to case, it will be failing the public."

In my judgment therefore the Court of Appeal erred in failing to fallow the decision in Fornah's case which was binding on it. The court was therefore wrong in holding that the sentence prescribed by section 23(1)(a) of the Larceny Act, 1916 as amended by section 2 of Act No. 16 of 1971 was mandatory and in setting aside the sentences of imprisonment passed by the trial Judge and in imposing sentences of death.

The Supreme Court is of course not bound by the decision in Fornah’s case. And the 1st Appellant has appealed against sentence.

[p.110]

Therefore it is necessary to consider the question of interpretation of Statute raised by the course adopted by the Court of Appeal. The question may be formulated thus: Is the sentence prescribed by section 23(1)(a) of the Larceny Act, 1916 as amended by section 2 of Act No.16 of 1971 a mandatory death sentence or does a trial judge have a discretion in imposing the death sentence or not? In order to determine this question, it is necessary to construe the subsection. The subsection has been set out above. In my opinion, the important words as far as the penalty is concerned, are "shall be 'liable. It seems to me that the word "liable must have some meaning and significance in the context in which it appears. It could not have been used by the draftsman in vain. It must be read with the other words in the context.

In my opinion the plain and ordinary meaning of the word "liable" is "exposed to possibility or risk," "exposed or open to." Therefore when it is provided that a convicted person shall be liable to a specified punishment, it means that he runs the risk of that sentence being passed on him, or he exposes himself to or leaves himself open to that sentence. It does not mean that the sentence will be passed on him. He

merely exposes himself to that sentence, and runs the risk of or opens himself to that sentence being passed on him. It will be useful to refer to two English Cases in which phrases the where word "liable" appeared were construed. In Jones v. Young (1884) 27 Ch. D.652, North J. said inter alia at p. 55:—

" …… but when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."

In Re Loftus-Otway (1895) 2 Ch. 235, Stirling J. said inter alia at p. 240:—

[p.111]

"The words are not merely 'be deprived' but 'be deprived or be liable to be deprived' and there is a contrast between being deprived and being liable to be deprived. The words "be liable to be deprived' are meant to add something to that which goes before …….. It seems to me that the latter words must be read as including acts which, so far as the person who committed them is concerned would put it out of his power to have any voice in the matter, and would leave it with a Court of Justice to say whether or not he is to be deprived"

In my opinion therefore the use of the word “liable" imports the element of discretion. It will be helpful to refer to a few statutory provisions in which he word "liable" is used. Section 24 of the Larceny Act, 1916 provides that a person convicted of the offence created by that section (i.e. Sacriledge) "shall be…..... liable to penal servitude for life" (emphasis supplied). Also section 25 of the same Act provides that a person convicted of the offence created by that section (i.e. Burglary) "shall be……. liable to penal servitude for life" (emphasis supplied). It should be noted that "panel servitude" has been abolished and in its place should be substituted "life imprisonment". I do not think that there as any dispute that the courts in England as well as in Sierra Leone have never considered the life imprisonment prescribed in those two section as mandatory. Trial Judges have always had a discretion as to whether a person convicted of those offences should be sentenced to life imprisonment or to a lesser term of imprisonment. Similarly of a statute provides that a person convicted "shall be liable" to ten years imprisonment, it is not mandatory that the person convicted should be sentenced to the ten years imprisonment prescribed by the statute. The trial judge will have a discretion as to [p.112] whether he imposes the maximum sentence or a lesser sentence. In my opinion therefore, when a statute provides that a convicted person be liable to suffer death", what it means is that the convicted runs the risk of the death sentence being passed on him. It does not mean that he must be sentenced to death. In my opinion the "liable" in that context confers a discretion on the trial Judge as to whether the death sentence should be imposed or not. This is in accordance with the policy of our system of law which has always allowed trial Judges a wide discretion in imposing sentence except in those cases where the sentence is fixed by law. In Halsbury's Laws of England 3rd Ed. Vol. 10 para. 888 pp.486-487, it is stated:—

"In all crimes except those for which the sentence of death must be pronounced a very wide discretion in the matter of fixing the degree of punishment is allowed to the judge who tries the case.

The policy of the law is, as regards most crimes, to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit.

The exercise of this discretion is a matter of prudence and not of law ……"

On the other hand where the Legislature intends to fix a mandatory punishment, it uses words which put it beyond doubt that that is the intention. For instance if it is provided that a convicted person "shall be sentenced to ten years imprisonment" or "shall be sentenced to death", there could be no doubt that a mandatory sentence of ten years imprisonment was intended in former case, and a mandatory sentence of death was intended in the latter case. A reference to a few statutes should illustrate this point.

[p.113]

Section 2 of the Offences against the Person Act, 1861 provides as follows—

"Upon every conviction for murder the court shall pronounce the sentence of death ……."

Section 2 of the Piracy Act, 1837 provides inter alia that a convicted person:

"shall suffer death as a felon"

And section 1 of the Dockyards etc. Protection Act, 1772 provides inter alia that a convicted person:

"shall suffer death, as in case of felony……."

In my considered opinion each of these three statutory provisions makes it abundantly clear that the punishment for the respective offences is death. In the one case, the court "shall pronounce the sentence of death", in the other two cases, the convicted person pass the death sentence in each of those cases. The punishment is mandatory and the judge does not have any discretion in the matter.

In my opinion therefore the words "shall suffer death" or "shall pronounce the sentence of death" provide for a mandatory death sentence, whilst the words "shall be liable to suffer death" provide for a discretionary death sentence. In the former case the trail Judge must pass the death sentence. But in the latter case, the Judge has a discretion whether to impose the death penalty or not. Two East African cases which support this view were cited in the majority judgment in the Fornah's case. I need refer to only one of them, namely Oboya v. Uganda (1967) E.A. 752 where the East African Court of Appeal held inter alia that the words "shall be liable on conviction to suffer death" provide a maximum sentence only and that the courts have a discretion to impose a sentence of death or of imprisonment. Sir Clement De Lestang V.P. who delivered the judgment of the Court said inter alia at p.754:—

[p.114]

"We consider such to be the correct approach to the construction of the words 'shall be liable on conviction to suffer death' especially when contrasted with the words of s.184 which are "shall be

sentenced to death." Consequently construing s.273(2) in the ordinary meaning of the word used therein free from authority we would have no hesitation in holding that the sentence of death which it prescribes, is discretionary and not mandatory. To hold otherwise would be to give an unnatural meaning to the words of the section and we see no compelling reason to do so".

In my judgment therefore the proper construction to be put on section 23(1)(a) of the Larceny Act, 1916 as amended by section 2 of Act No.16 of 1971 is that it provides for a discretionary death sentence. It gives the judge a discretion as to whether to pass the death sentence or not. Of course, in exercising his discretion, the Judge would have to take into consideration all the relevant circumstances of the case. If the Judge decides not to impose the death penalty he will have to decide, in the exercise of his discretion, what other punishment, warranted in law, to pass and the extent of such punishment. So if he decides to impose a custodial sentence, he will have to decide the length of such sentence.

In the instant case, the trial Judge imposed a custodial sentence. It has not been suggested that he exercised his discretion wrongly in imposing a custodial sentence. Indeed, Mr. N'gobeh, learned counsel who appeared for the State, conceded that section 23(1)(a) of the Larceny Act 1916 as amended confers a discretion on a trial Judge as to whether to pass the death sentence or not. And he did not argue or even suggest that the trial\ Judge did not exercise his discretion properly in deciding not to pass the death, sentence. However, Mr. Renner-Thomas submitted that the custodial sentences imposed on the 1st Appellant were excessive. As stated earlier the trial Judge sentenced the 1st Appellant to serve a total of 90 years in jail.

[p.115]

I think that it is well-settled that an appellate court will generally not interfere with the sentence passed at the trial unless the sentence is one not warranted in law or unless it is manifestly excessive or wrong in principle. There is no suggestion that the sentence passed in this case was not warranted in law or was wrong sentence in principle. The complaint of the 1st Appellant is that the sentence passed by the trial Judge is manifestly excessive. The age of the 1st Appellant is not known, but there is no dispute that he is an adult. Taking into consideration the normal life expectancy and even allowing for remission of sentence, the 1st Appellant would in all probability die in jail before he completes the sentence passed on him. The sentence imposed would in these circumstances amount to more than life imprisonment. Taking all the circumstance into consideration, there could be no doubt that the sentence imposed is manifestly excessive. I therefore think that this is a proper case in which this court should interfere with the sentence.

In the result I would dismiss the appeal o£ the 1st Appellant against conviction, I would allow his appeal against sentence and would in all the circumstances reduce the sentence passed on Count to 30 years imprisonment, and on each of the other Counts to 21 years imprisonment, all the sentences to run concurrently from the date of conviction.

I would allow the appeal of the 2nd Appellant against conviction on all the Counts in respect of which he was convicted, quash the convictions, and set aside the sentences imposed on him.

SGD

MR. JUSTICE E. LIVESEY LUKE, C.J.

SGD

MR. JUSTICE C.A. HARDING J.S.C

I agree

SGD

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C

I agree

SGD

MR. JUSTICE O.B.R. TEJAN, J.S.C.

I agree

SGD

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

CASES REFERRED TO

1. State vs. Ahmed S.D. Turay & ors. Sc. Cr. App. No. 2/81 (judgment delivered on 13th July, 1982 - as yet unreported)

2. Searaj Ajodha v. The State (1981) 3 W.L.R. 1

3. Section 2 of the Imperial Statutes (Criminal Law) Adoption (Amendment) Act, 1971 (Act No. 16 of 1971)

4. Mohamed Sorie Fornah & 14 others vs. The State C.A. Cr. App. 31/74 judgment delivered on 30th April, 1975 (as yet unreported)

5. Young v. Bristol Aeroplane Co. Ltd. (1944) K.B. 718

6. Miliangos v. Geo Frank (Textiles) Ltd. (1975) 1 Q.B. 487 C.A.

7. Young v. Bristol Aeroplane Co. Ltd.

8. Rex. v. Taylor (1950) 2 K.B. 368 C.A.

9. R v. Gould (1968) 1 All E.R. 849 C.A.

10. Young v. Bristol Aeroplane Co. Ltd.

11. Farrell v. Alexander (1977) A.C. 59 at P. 92

12. Jones v. Young (1884) 27 Ch. D.652

13. In Re Loftus-Otway (1895) 2 Ch. 235

14. In Halsbury's Laws of England 3rd Ed. Vol. 10 para. 888 pp.486-487

15. Oboya v. Uganda (1967) E.A. 752

ALHAJI A.B. MANSARAY v. ABDUL M. ISCANDRI & ORS

[S.C. MISC. APP. NO. 6/84] [p.72]

DIVISION: SUPREME COURT, SIERRA LEONE

CORAM: MR JUSTICE EO LIVESEY LUKE, C.J., Presiding

MR JUSTICE C A HARDING, J.S.C.

MR JUSTICE S BECCLES DAVIES, J.S.C.

ALHAJI A.B. MANSARAY — APPLICANT

Vs

ABDUL M. ISCANDRI & ORS — RESPONDENTS

T.M TERRY Esq with him Berthan Macauley, Jr Esg for Applicant

George Gelaga-King Esq for Respondents

RULING

BECCLES DAVIES, J.S.C.:

This is an application seeking special leave to appeal to this Court, a stay of execution

of the ruling of the Court of Appeal dated 14th February 1984 and/or a stay of all proceedings in this matter in the High Court, and any further or other reliefs as may be deemed expedient by this Court.

The respondents Mr Abdul M. Iscandri had filed an election petition on 17th May 1982 in the High Court against the election of the applicant. Counsel for the applicant took steps to set aside the petition on several grounds.

His application was heard and dismissed by Mr. Justice Bankole Thompson. The applicant then obtained leave to appeal against the Order of the High Court. The appeal was heard by the Court of Appeal which dismissed it on 14th February 1984. An application for leave to appeal to this Court was made to the Court of Appeal and was refused on 2nd April 1984.

The applicant now applies for special leave to appeal. We have gone through the papers in this matter. We are grateful to Counsel for their able arguments. We are not satisfied that this is a proper case in which our discretion to grant special leave can be exercised. The application is refused.

(SGD.)

JUSTICE S BECCLES DAVIES, J.S.C.

I agree

(SGD)

MR JUSTICE E LIVESEY LUKE, C.J.

I agree

(SGD)

MR. JUSTICE C A HARDING, J.S.C.

DONALD MACAULAY v. EMMANUEL SHALLOP

[S.C. MISC. APP. NO. 3/84] [p.88-94]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 17 MAY 1984

CORAM: MR. JUSTICE C.A. HARDING, J.S.C., PRESIDING

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES

BETWEEN:

DONALD MACAULAY — APPLICANT

VS.

EMMANUEL SHALLOP

AND

MIRIB SHALLOP — RESPONDENTS

T.S. JOHNSON, ESQ., FOR THE APPLICANT

A.J.B. GOODING, ESQ., FOR THE RESPONDENTS

RULING

HARDING. J.S.C.:

The respondents in proceedings instituted in the High Court obtained judgment, with costs to be taxed, on 3rd February, 1984 against the applicant for "the sum of U.S. Dollars 129,566.15 or Le323,915.38 plus interest thereon at the rate of 18% from the 8th day of September, 1980 until the date of judgment". On 10th February, 1984, the applicant through his solicitor, filed a Notice of Appeal against the said judgment in the Court of Appeal, and on the following day i.e., 11th February, he applied to the Court of Appeal for a stay of execution of the judgment of the High Court pending the hearing and determination of the appeal. On 27th February, 1984; the Court of Appeal refused the application for a stay; likewise it turned down a subsequent application for leave to appeal to the Supreme Court against the order of refusal of stay.

The applicant has now applied to this Court for the following Orders:

[p.89]

"(i) An Order granting the applicant special leave to appeal against the order of the Court of Appeal contained in its Ruling of 27th February, 1984;

(ii) An Order granting a stay of execution and all further proceedings of the judgment and order of the High Court dated February 3, 1984 already appealed against by Notice of Appeal filed in the Registry of the Court of Appeal on 10th February, 1984, pending the hearing and determination of the said appeal;

(iii) An Order that the costs of and occasioned by this application may be costs in the intended appeal."

I have listened carefully to the arguments of counsel on both sides and read the various affidavits and exhibits thereto filed herein. As regards the first order applied for, I do not think that this is a proper case calling for the exercise of my discretion to grant special leave; accordingly, I would refuse special leave to appeal to this Court. Special leave to appeal to this Court having been refused it necessarily follows that no order for a stay of execution of the judgment can be ordered by this Court.

I would dismiss the application with costs to the respondents,

SGD.

MR. JUSTICE C.A. HARDING, J.S.C.

SGD.

MR JUSTICE S. BECCLES DAVIES, J.S.C.

I agree.

[p.90]

AWUNOR-RENNER. J.S.C.:

I have arrived at a different conclusion from that reached by my learned brothers on the question of granting special leave to appeal to this Court in this matter.

The applicant applied to this Court on the 24th day of March, 1984 for the following Orders on a Notice of Motion dated the 24th March, 1984.

(1) An Order granting the applicant special leave to appeal against the Order of the Court of Appeal contained in its ruling of the 27th February, 1984.

(2) An Order granting a stay of execution and all further proceedings of the judgment an order of the High Court dated February 3, 1984 already appealed against by Notice of Appeal on 10th February, 1984, pending the hearing and determination of the said appeal.

(3) An order that the costs of and occasioned by this application may be costs in the intended appeal.

The said Notice of Motion contains the grounds upon which special leave to appeal is sought.

A short history of this matter discloses that on the 3rd day of February, 1984, the High Court gave judgment and ordered the applicant herein to pay the sum of Le.323.915.38 plus interest thereupon at the rate of 18% from the 8th day of September, 1980 until the date of the said judgment to the Respondent herein.

On the 11th February, 1984 the applicant applied to the Court of Appeal for a stay of execution of the said judgment of the High Court dated 3rd February, 1984. In a ruling delivered on February 27th 1984 the Court of Appeal refused the application for a stay.

I think that it would be convenient for me at this stage to set out the ruling in question. I quote.

[p.91]

SHORT, J.A.

This is an application by T.S. Johnson Esq., of Counsel for the Appellant/Applicant herein for an order granting a stay of execution of the judgment and order of the High Court contained in the decision of Mr. Justice William A.O. Johnson Judge, dated the 3rd day of February, 1984. The judgment referred to amounts to the payment of the sum of U.S. dollars 129,566.15 or Le.323,915.38. Rule 28 of the Appeal

Court Rules is bare. Order 42 rule 19(1) of the White Book states inter alia "where a judgment is given or an order made for the payment of money by any person and the Court or judge is satisfied an application made at the time of the judgment or order or at any time thereafter by the judgment debtor or other party liable to execution that there are special circumstances which renders it inexpedient to enforce the judgment or order or that the judgment debtor is unable from any cause to pay the money, then the Court or judge may order stay of execution of the judgment or order by Writ of Fieri Facias etc."

It would appear that the only grounds on which under the above rule the Court can stay execution on a judgment debt or order for payment of money are either that there are special circumstances which render it inexpedient to enforce the judgment or order or that the judgment debtor is unable from any cause to repay the money. Neither the affidavit of Thomas Sigismund Johnson sworn to on the 11th day of February nor the affidavit of Donald Marius Alison Macaulay sworn to on the 21st day of February, 1984 discloses any special circumstances which might render it inexpedient to enforce the judgment or order or that the judgment debtor is unable from any cause to pay the money.

[p.92]

In our view there are no supporting grounds and the application for a stay of execution is refused with costs assessed at Le.l00 to be paid by the appellant/applicant to the Respondent On the 5th March, 1984 a notice of Motion was filed in the Court of Appeal for leave to appeal against the order contained in the ruling of the 27th February, 1984.

The application for leave to appeal was refused on the 19th March, 1984. It was against that refusal for leave to appeal that the applicant has now applied inter alia, to this Court for special leave to appeal.

The rules applicable to an application for special leave to appeal and which ought to be considered are contained in Rules 6(2) of the Supreme Court Rules 1982. Rules 7 and 8 also of the Supreme Court Rules 1982 and Sections 103 Sub-section (1)c and 103 sub-sec (2) of the Constitution of Sierra Leone Act No.12 of 1978.

Counsel for the applicant in his argument for special leave to appeal urged this Court to consider the question of granting special leave. He claimed that his reasons are contained in his notice of motion and further stated that apart from that the decisions of the Court of Appeal are binding on itself and that was one reason why he was asking that the ruling of the Court of Appeal of 27th February, 1984 should not be allowed to stand.

Mr. Gooding on the other hand contended that before special leave is granted there must be a substantial question of law which must be a serious question of law and cited several cases to support his preposition. He also referred us to the Supreme Court Rules and the Constitution as regards the powers of the Supreme Court to grant special leave to appeal.

Sec. 6(1)c of the Supreme Court Rules states as follows —

[p.93]

"An appeal shall lie from the judgment decree or order of the Court of Appeal to the Supreme Court with leave of the Court of Appeal in any other cause or matter, civil or criminal where the Court of Appeal is satisfied that the case involves a substantial question of law or is of public importance."

Section 6(2) of the Supreme Court Rules states as follows—

"Notwithstanding the provisions of the preceding sub rules (as contained in Rule 6 sub rule 1, a, b, c, d, e and g) the Supreme Court shall have power to entertain any application for special leave to appeal in any cause or matter civil or criminal to the Supreme Court and to grant such leave accordingly."

Apart from the fact that Rule 6(1)c states under what conditions leave can be granted to appeal to the Supreme Court. In no part of Rule 6(2) can I find what conditions should be satisfied before special leave to appeal can be granted by the Supreme Court. To me it appears as if the powers conferred by this section to the Supreme Court to grant special leave is quite an extensive one.

In my view I think that as regards the question or special leave to appeal to this Court the trouble arose from the ruling or the Court of Appeal on the 27th day of March 1984 when it refused to grant the stay of execution applied for, Counsel for the applicant is contending that it was made under the wrong rule, Order 42 rule 19 of the English Rules when it should have been made under Order 58 rule 12. He further stated that Order 42 rule 19 does not apply in this instance.

In my opinion it is a short point but one or importance and I think that in such bases it is extremely desirable for this Court to make some sort or pronouncement on the issue or granting special leave or the guidance of applicants, so as to inform them as to what the proper yardstick is.

[p.94]

The ruling of Short J. A. on the 27th March 1984, contains the refusal to grant a stay of execution and there is no doubt that he was influenced by the provisions of Order 42 rule 19 of the English Rules this in my opinion is a prima facie case that an error has been made on a question of law which is likely to affect other members of the public until it is either set aside or reversed. I would therefore hold that this is a proper case for which special leave to appeal ought to be granted.

In my opinion if I am wrong in the view I have expressed as regards the question of special leave to appeal then it is the way I see it and nothing more.

As regards the application for a Stay of Execution I express no opinion as to whether this order ought to be granted or otherwise.

I would allow the application for special leave to appeal and make no order as to costs.

SGD.

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

STATUTES REFERRED TO

1. Rule 28 of the Appeal Court Rules

2. Order 42 rule 19 of the English Rules

3. Rules 6(2) of the Supreme Court Rules 1982

4. Order 58 rule 12. He further stated that Order 42 rule 19

5. Supreme Court Rules 1982 and Sections 103 Sub-section (1)c and 103 sub-sec (2) of the Constitution of Sierra Leone Act No.12 of 1978

KAPINDI JAMIRU v. THE STATE

[SC. CR. APP. NO. 6/82] [p.80-87]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 24 APRIL 1984

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J., PRESIDING

MR. JUSTICE C.A. HARDING, J.S.C.

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

KAPINDI JAMIRU — APPELLANT

AND

THE STATE — RESPONDENT

A.L.O. Metzger, Esq. for the Appellant

S.B. Berewa, Esq. with him E. Taylor-Kamara, Esq. for the State

JUDGMENT

HARDING, J.S.C:

The appellant was convicted by the High Court at Freetown on 25th February, 1979 by C.S. Davies, J.A. (sitting as Judge alone) on an Indictment which, inter alia, charged him and two others with the offence of Causing by False Pretences a Valuable Security to be delivered to Another Contrary to Section 32(1) of the Larceny Act, 1916. At the material time he was the Provincial Secretary, Northern Province and was

stationed at Makeni. It was his responsibility to see that certain Government Quarters and Buildings, in respect of which notice to re-wire had been issued by the Senior District Manager Sierra Leone Electricity Corporation, be electrically wired and for this purpose he secured the services of one Sulaiman Jalloh who was called as a witness for the prosecution (hereinafter referred to as "P.W.28"). Jalloh, although he had demonstrated that he was a competent electrician was however not licensed, and in order to be able to undertake the exercise he was required to do, had to come down to Freetown and negotiate with one Francis Wonnie, a Licensed Electrical Contractor, to be appointed his representative in Makeni. Wonnie gave him letter-heads, electricity forms, letter of authorisation and a stamp all of which he showed to the appellant who then expressed [p.81] approval and informed him that when he was ready he would send for him. All this happened towards the end of 1975. Subsequently, the appellant sent for Jalloh and asked him if he could make estimates and Jalloh replied that he could not read or write. Appellant then informed him that he had received re-wiring notice for two Government Quarters at Teko and wanted to know how much he would charge for doing the job. Jalloh could not say until after he had seen what was to be done. He was duly shown the quarters and he enquired from the appellant if he was to provide the materials and when he was told no he then made his charges.

Eventually a bargain was struck for the sum of Le.200 for each quarter. On the following morning he collected the necessary materials from the appellant's quarters and proceeded to do the job, on the completion of which he reported to the appellant. Appellant then asked him for the electricity form (i.e. the completion form) and he handed him not only the forms but letter heads as well, whereupon appellant told him he was going to have the work inspected. Appellant later told him that he had received the inspection report and that the work had been done satisfactorily, Jalloh said that he "prepared a bill". Appellant later asked him to check from the chief clerk if the bill was ready and when he was told that it was not, he went and reported to the appellant and he was requested by him to come again. Subsequently the appellant's landrover driven by one Tejan Jalloh (since deceased) went for him and he was taken to the appellant's office whereupon appellant informed him that his bill was ready; he then produced the bill and he (Jalloh) signed and stamped it. A few days later appellant sent for him and informed him that the voucher had been prepared and that he should go to the Sub-Treasury and collect the cheque. The accountant, one J.A. Harding, after ascertaining his identity, asked him to sign the voucher and to stamp it with his stamp. The cheque was then handed over to him to take to the bank for encashment. After the cashing of the cheque Jalloh returned with the money to the appellant who after checking it asked him how much he had to pay him. He replied that it was Le.400 and appellant [p.82] counted out this amount and gave it to him plus Le.20 more in appreciation for the excellent performance of the job, He stated that the amount he collected from the bank on that occasion was over a thousand leones. It is worth mentioning that on each occasion that appellant sent for Jalloh it was his driver Tejan Jalloh that he would send and it was this same driver who went with him to the Sub-Treasury and the bank and returned with him to the appellant with the money.

Other re-wiring jobs were done by Jalloh on the instruction of the appellant not only in Makeni, but in Magburaka, Kabala, Port Loko and Kambia and in each case the same procedure was followed — that is, the bills would be prepared in the appellant1s office on the instructions of the appellant, he (Jalloh)

would Sign and stamp them and leave them with the appellant who would later notify him when the vouchers were ready and he would be accompanied by a member of appellant's staff to the Sub-Treasury to collect the cheques and to take them to the bank and to return to the appellant with the money which was always in excess of what was due him. However, as far as he (Jalloh) was concerned appellant always paid him what was due him. Materials for the various jobs were provided by the appellant. Jalloh received final payment for all the jobs he undertook at the instance of the appellant at about the end of 1976 when appellant was due to go on leave.

The Particulars of the Offence for which the appellant was convicted alleged that he (and two others named)

"on or about the 9th day of April, 1976 at Makeni in the Northern Province of Sierra Leone, with intent to defraud, caused a valuable security, that is to say a Barclays Bank (Sierra Leone) Ltd. cheque No.011776 dated 9th day of April, 1976 for the sum of Le.5,332.45 to be delivered to Sulaiman Jalloh by John Abesodun Harding, Sub-Accountant attached to the Sub-Treasury Makeni aforesaid by falsely representing that the said sum was due and payable by the Republic to the said [p.83] Sulaiman Jalloh in respect of expenses incurred and services rendered to the said Republic."

Among the many witnesses called by the prosecution was one I.B.S. Kamara, Staff Superintendent D.O.'s Office, Makeni (hereinafter referred to as "P.W.32") who testified that from 1st July, 1975 to 1st July, 1976, he was Clerk/Confidential typist in the Provincial Secretary's Office, Makeni, and that he worked under the appellant. He stated that as confidential typist he was in charge of typing documents pertaining to confidential and secret matters and that he also typed other documents which were not confidential or secret that were handed to him by the Provincial Secretary. He stated that he prepared bills from manuscripts supplied to him by the appellant in appellant's own handwriting after which appellant would return the typed bills duly signed and stamped by P.W.28 as well as by appellant himself. Vouchers in respect of these bills were made out in the name of P.W.28 by the Finance Clerk. He further went on to say that on the instructions of the appellant he would destroy the manuscripts when the typed bills were received by him duly signed by the appellant.

It is the prosecution's case that the appellant acted fraudulently, thereby causing Government to incur our extra expenses by preparing false documents, to wit inflated bills, which he knew to be false and thereby inducing the accountant in the Sub-Treasury in Makeni to part with Government monies which were in his custody.

The appellant on his part denied that he ever prepared the bills in manuscript and got P.W.32 to type them before calling on P.W.28 to sign and stamp them. He suggested that P.W.32 assisted P.W. 28 by typing the bills during official working hours, that both of them were very friendly and that they were both lying.

As hereinbefore stated the appellant was convicted of the offence. He appealed to the Court of Appeal and, as far as this conviction is concerned, the relevant ground is as follows:—

[p.84]

"That the learned Trial Judge erred in law and in fact in that he failed to direct himself on the law relating to accomplices with particular reference to the evidence of P.W.28 and P.W.32."

The Court of Appeal in upholding the appellant's conviction held that P.W.28 was neither an accomplice nor a witness who had to serve or an interest of protect, and hence the trial

was not obliged to warn himself about the danger of conviction the uncorroborated evidence of that witness; however, as regards p.w.32 it held that he was a witness who had a purpose of his own serve", but applied the provisions of Sec. 58(2) of the Courts Act, No. 31 of 1965 — on the ground that "the totality of the evidence is such that no substantial miscarriage of justice was done to the appellant by convictions.

The appellant has now appealed to this Court on the following grounds:—

"1(a) The learned trial Judges erred in law and in fact in holding that P.W.28 was not an accomplice and that consequent upon this, his evidence needed no corroboration.

(b) The learned trial Judges also erred in law and in fact in holding that P.W.28 had no purpose to serve or interest to protect.

(c) The learned trial Judges erred in law and in fact in holding that in spite of their finding that P.W.32 was a witness who had a purpose of his own to serve and that the Judges should have warned themselves, there was no substantial miscarriage of justice done to the 1st appellant by his conviction.

Counsel for the appellant in arguing the appeal referred to various portions of the evidence and submitted that from those bits of evidence P.W. 28 was in fact and in law an accomplice or in the [p.85] alternative a person who had a purpose of his own to serve or an interest to protect and contended that as such the Court of Appeal should have held that the trial judge should have warned himself of the danger of convicting on the uncorroborated evidence of such a witness and that since he failed to do so the conviction should be quashed. He contended also that the Court of Appeal having found that P.W.32 was a witness who had a purpose of his own to serve, there being no warning of the danger of convicting on the uncorroborated evidence of this witness, it erred in law and in fact in applying the provisions of Sec. 58(2) of the Courts Act No. 31 of 1965 since the burden of establishing that on the totality of evidence there was no miscarriage of justice had not been discharged by the prosecution.

The offence for which the appellant was convicted is made a misdemeanor by the statute i.e., Larceny Act, 1916, Sec. 32(1), and it is trite law that in cases of misdemeanor an accomplice includes all persons committing, procuring or aiding and abetting the commission of such offences.

In DAVIES vs D.P.P. (1954) A.C. 378, the rule was laid down that a conviction would be quashed where no warning has been given as to the danger of acting on the uncorroborated evidence of an accomplice.

In R. vs PRATER (1960) 44 Cr. App. R. 83 (1960) 2 Q.B.464 it was held that this was a rule or practice and it was there stated that "it is desirable ……. in cases where a person may be regarded as having some purpose of his own to serve the warning against uncorroborated evidence should be given."

In R. v STANNARD (1964) 48 Cr. App. R. 81, it was held that whether or not to give a warning depends on the facts of the case and that it was a matter within the Judges discretion.

See also R. v. ROBERTS & WITNEY (1967) Cr. Law Review 477 (C.A.); R. v RUSSELL (1968) 52 Cr. App. R. 147 and R. v PURNELL (1968) Cr. Law Review 449.

[p.86]

In the instant case the trial Judge reviewed the entire evidence against the appellant and arrived at the conclusion that P.W.28 and P.W.32 were speaking the truth when they said that the bills were prepared by the appellant and typed by P.W.32 and were subsequently signed and stamped by P.W.28. This is a finding of fact which the Court of Appeal accepted and which this Court sees no reason to disturb.

The trial Judge having so found, failed to state whether they were accomplices or whether they had some purpose to serve.

The question whether or not a witness is an accomplice is one of mixed fact and law depending on the circumstances of the particular case. Throughout his Judgment the trial Judge did not advert his mind as to whether P.W.28 could be regarded as an accomplice or a witness who had a purpose to serve.

In dealing with this issue the Court of Appeal said, inter alia, that "nowhere did the Judge make any findings that P.W.28 was an accomplice and "since he did not make such finding, it was not necessary for him to advert his mind to any evidence or corroboration". This is quite an erroneous proposition; the fact that the Judge did not make any finding that P.W.28 was an accomplice did not absolve him from considering whether he (P.W.28) should be regarded as such.

As stated earlier the Court of Appeal held that p.W.28 was neither an accomplice nor a witness who had a purpose to serve. We are in agreement with this. In these circumstances the trial Judge was under no obligation to warn himself of the danger of convicting on the uncorroborated evidence of that witness.

With regard to P.W.32, again the trial Judge did not make any finding as to whether he was an accomplice or a witness who had a purpose of his own to serve and he did not warn himself of the danger of convicting on his uncorroborated evidence. The Court of Appeal held that he was not an accomplice. We entirely agree.

[p.87]

However, the Court held that he was a witness who had a purpose to serve. It is not quite clear what purpose of his own this witness could have had to serve, but assuming — without deciding — that the witness had a purpose of his own to serve, the trial Judge merely had a discretion to warn himself of the danger of convicting on his uncorroborated evidence. The Judge was under no obligation to warn himself of this danger.

In those circumstances it cannot be said that he erred in law in failing to warn himself.

It was therefore not necessary to apply the provisions of Sec. 58(2) of the Courts Act, No. 31 of 1965.

In our view the evidence against the appellant was clear and overwhelming, and we find no justification to interfere with the conviction. Accordingly this Court upholds the conviction and the appeal is therefore dismissed and the conviction and sentence are confirmed.

SGD.

MR. JUSTICE C.A. HARDING, J.S.C.

I agree

SGD

MR. JUSTICE E. LIVESEY LUKE. C.J., PRESIDING

I agree

SGD.

MR. JUSTICE O.B.R. TEJAN, J.S.C.

I agree.

SGD

HON. MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

CASES REFERRED TO

1. In Davies vs D.P.P. (1954) A.C. 378

2. In R. vs Prater (1960) 44 Cr. App. R. 83 (1960) 2 Q.B.464

3. In R. v Stannard (1964) 48 Cr. App. R. 81

4. R. v. Roberts & Witney (1967) Cr. Law Review 477 (C.A.)

5. R. v Russell (1968) 52 Cr. App. R. 147

6. R. v Purnell (1968) Cr. Law Review 449

STATUTES REFERRED TO

Section 32(1) of the Larceny Act, 1916.

Sec. 58(2) of the Courts Act, No. 31 of 1965

MOMOH SESAY v. AMADU KARGBO & 2 ORS.

[S.C. CIV. APP. NO.1/82] [p.116-130]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 31 DECEMBER 1984

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.A (PRESIDING)

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MRS. JUSTICE A.V.A AWUNOR RENNER J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

MR JUSTICE S. M.F. KUTUBU, J.A.

BETWEEN:

MOMOH SESAY — APPELLANT

vs

AMADU KARGBO

FATU KARGBO — RESPONOENTS

BEAREH CONTEH

J.B. Jenkins-Johnston, Esq., for the Appellant

Leonard Williams, Esq., for the Respondents

AWUNOR RENNER J.S.C.:

This is an appeal from a judgment of the Court of Appeal dated the 4th day of March 1982 reversing a judgment of Thompson-Davis J. dated 27th November, 1980, dismissing the respondents' claims for damages for trespass to land, an injunction restraining the appellant from trespassing on the respondents' land and for means profits.

The relevant facts of this case are as follows:— The action was commenced by the respondents as plaintiffs by a writ of summons dated the 16th day of July, 1976. They claimed that at all material times before and during this action that they were the fee simple owners of the land in dispute situated at Boderich Village in the Western Area of Sierra Leone. They further alleged that they became the fee simple owners of the said land by virtue of a Deed of Gift dated 9th April, 1970 [p.117] and registered as number 31 at page 11 in Volume 48 in the Book of Voluntary Conveyances kept .in the Registrar General's Office in Freetown. The said Deed of Gift was duly produced at the trial in the High Court. I

shall however deal with that later. It is also alleged by the respondents that when the appellant (defendant in the High Court) started to build on the said land they warned him that the land belonged to them and they even complained to the Police but despite all warnings he continued to build and eventually they had to instruct their solicitor to write to him telling him that they were the fee simple owners of the land in question and when he still persisted this action was then instituted against him.

The appellant did not give evidence but in his statement of defence he pleaded that he had acquired a fee simple title of the portion of the said land in 1974. He further stated that title to the piece of land had always belonged to the Fofanah family of which one Alieu Fofanah was head and that he will therefore strongly challenge the Deed of Gift dated 9th April 1970.

At the hearing of the action in the High Court only the first respondent gave evidence before the learned trial judge Thompson-Davis J. He as stated supra dismissed the respondents' claims. The respondents then appealed to the Court of Appeal and that Court on the 4th day of March 1982 set aside the judgment of the Court below, allowed the appeal, awarded the respondents the sum of Le.1,000 as damages for trespass, costs and an injunction restraining the appellant by himself or his servant or agent from trespassing on the said land.

The appellant has now appealed to this Court on several grounds asking for the following reliefs—

[p.118]

(1) That the judgment of the Court of Appeal dated 4th March 1982 be set aside.

(2) That the judgment of the High Court (Thompson-Davis J.) dated 27th November, 1980 be restored.

(3) Any further or other order as the Court may seem necessary and equitable.

Various arguments have been adduced in this Court on behalf of both the appellant and the respondents. Briefly on the one hand Mr. Jenkins-Johnston counsel for the appellant argued that the respondents had never claimed that they had been in possession of the land in question. In fact he said that this was the view held by the learned trial judge. He further submitted that in fact it was the appellant who had been in actual possession at the time of the alleged trespass. A further argument raised on the appellant's side is to the effect that the respondents had pleaded that they were the fee simple owners of the land in question by virtue of Ex. "A", the Deed of Gift. He contended that the evidence was not enough to support the alleged title to the land. The burden of proof he further submitted was on the person asserting title to prove such title in accordance with the pleadings and that the appellants having based their rights to possession on the document in question their case ought to stand or fall on the strength of the Deed of Gift. He further submitted inter alia that in a case of trespass possession alone is sufficient to maintain an action as against a wrong doer but that such possession must be clear and exclusive. Appellant's counsel' then endeavoured to show that the Court of Appeal was clearly wrong when they said that the respondents had made out a case and that there was no evidence on which that Court could have found that they were in clear and exclusive [p.119] possession

of the land in question and that they were therefore wrong to have reversed the decision of the trial judge.

He also cited several authorities in support of his contentions to show the circumstances when an appellate court could reverse the findings of a lower court.

The main arguments put forward by Mr. L. Williams, counsel on behalf of the respondents were as follows—

Firstly what must the respondents prove to succeed in an action for trespass? Secondly he submitted the respondents had in fact proved their case since, he claimed that actual entry as such by the respondents was not necessary in law to maintain an action for trespass but as against a wrong doer the slightest acts of possession by the respondent is sufficient for them to maintain an action for trespass.

He further contended that even if the respondents' title is defective though he was not conceding this that the court should interpret the conducts of the respondents as to whether those acts amount to the assertion of a possessory title to the land in dispute. The main question he further submitted was who had a better right to possession, the appellant or the respondents.

He finally referred to circumstances when the Court of Appeal could interfere with the findings of fact of a trial judge and referred the Court to the case of WATT or THOMAS v THOMAS reported in 1947 A.C. page 484 and BENMAX v AUSTIN MOTOR, CO. LTD. reported in 19551 A.E.R. at page 326 at page 329.

Having narrated the arguments put forward by both counsels for the appellant and the respondents it now becomes necessary for me to consider the evidence adduced in this cage, together [p.102] with the law on the points raised and the authorities relied on by both counsels.

The first point which I now have to consider is the question of whether either party proved that they had a better title to the land in question. I do not intend to lose sight of the fact that this was an action for trespass. However the respondents in their statement of claim had pleaded that at all material times before and during the action they had been the fee simple owners of the land in dispute by virtue of a Deed of Gift Ex. "A" dated the 9th day of April 1970 and registered as number 31 at page 11 in volume 48 in the Book of Conveyance kept in the office of the Registrar-General in Freetown. The Deed of Gift was also relied on at the trial and tendered in evidence. In fact at the trial and under cross-examination 1st respondent had this to say:

"I did not buy the said land. It was my uncle who gave it to me. He is Pa Aliau Fofanah. He himself gave me the land. Pa Alieu Fofanah is now dead. Died long ago. Remember when. I am not literate in English. Fofanah gave me the land by means of Ex. "A". I cannot remember when Pa Fofanah died. My uncle did not die in 1970 he died after 1970. Before my uncle died he made a small document which was a Deed of Gift. He died and we found a surveyor. He surveyed the whole compound. He then prepared a plan and gave us a copy. We then prepared the documents for registration. The document was then registered. It was after the death of Pa Alieu that we made Ex. "A". It contains Fatu Kargbo, Beareh Conteh and my name."

He continued further in his evidence by stating as follows:—

"I know Salifu Koroma. I would know him. Ex. "A" does not say that Salifu Koroma [p.121] gave us the land. I would agree with you that Salifu Koroma did not give any land at Goderich."

The trial judge in his judgment had this to say about these pieces of evidence given by the 1st respondent herein—

"The case for the plaintiff is a most curious one and to say the least a calamity. They have not attempted to prove this case against the defendant indeed they have proved and achieved nothing. Ex. "A" is to my mind a spurious document and an affront to the integrity of this court. The plaintiffs have dismally failed to prove their case and their claim against the defendant fails."

The appellant on the other hand did not give any evidence, neither did he tender in evidence any document in support of the allegation in his statement of Defence that he had acquired a fee simple title of a portion of the said land. In fact no reason was given for the non production of any document to support his allegations.

I take it therefore to be clear that since the respondents in this case were Claiming that they were the fee simple owners of the land in question that they had to prove that they had title in themselves or through some person from whom they were claiming and the question was whether they had in fact done so That would of course depend on the evidence actually adduced.

It is now necessary to examine the Deed of Gift Ex. "A" on which the respondents are relying and which purports to convey the land in question to them. The 1st respondent who testified before the High Court and produced it claimed inter alia —

[p.122]

"I know Salifu Koroma. He sold the land in question to my uncle Pa Alieu Fofanah. Land is at Goderich. My uncle made a will leaving the said land to us in the event of his death."

In continuing his evidence he said —

"Did speak of a will. See this document it is a Deed of Gift, wish to produce. Marked "A".

On these pieces of evidence quoted above I cannot see how any-one could attach much credence to Ex. "A". What is contained in it is in direct variance with the oral evidence of 1st respondent. The deed of gift was supposed to have been executed by one Salifu Koroma on the 9th day of April 1970 when in fact in his evidence the 1st respondent had testified that the land in question had been sold to his uncle Pa Alieu Fofanah by Salifu Koroma and that his uncle had made a will leaving the property in question to them. Later on he had alleged that his uncle had died after 1970 but that before he died he had given them the property by means of a small document which was a deed of gift. After his uncle died they engaged a surveyor to survey the land and prepare a plan. A deed of gift was then prepared to which the plan was attached. That deed of gift was tendered in evidence by the 1st respondent and marked Ex.

"A". On this sort of evidence I fail to see how the respondents could claim the land as fee simple owners. In my view the document is a useless one and cannot be relied upon to prove ownership of the said land.

Let me at this stage point out that it is not necessary to prove ownership of land which is the subject matter of dispute in an action for trespass as in this case.

[p.123]

This is an action for damages for trespass to land.

Trespass, to land is an entry upon or any direct and immediate act of interference with the possession of land.

Trespass to land is defined in Halsbury's Laws of England 3rd Edition volume 38 at page 739 paragraph 1205 as follows—

"Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies although no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, or rides or drives over it or takes possession of it or expels the person in possession or place or fixes anything on it."

Also in the same volume of Halsbury's Laws of England supra at page 744 paragraph 1214 it is also stated as follows—

"Trespass is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who was or who is deemed to have been in possession either actual or constructive of the said land at the time of the trespass. The type of conduct necessary to evidence possession varies with the type of land; and to maintain an action against a person who never had any title to the land, the slightest amount of possession is sufficient."

In the case of WUTA OFFEI v DANQUAH reported in (1961) 2 W.L.R. at page 1238, the matter concerned land at Christian Borg, Accra, which the respondent in that case alleged was native custom and was included in land which pursuant to granted to her by the Stool of Osu in 1939 in accordance with Sec. 2(1) of the Accra Town (Lands) Ordinance, 1940, vested in the Chief Secretary in trust for his Majesty. In 1956 a divesting order was made releasing the suit land. Notwithstanding the ordinance of 1940 the respondent had had her [p.124] original gift confirmed in 1945 by an indenture which was duly registered. In 1948 the appellant (who pleaded a grant of the land to him by the Osu Stool prior to that of the respondent) having erected a building on the land, the respondent claimed against him inter alia, damages for trespass. Until 1948 the said land was vacant and unenclosed but the respondent deputised her mother to look after this plot and keep watch on it to see that no one intruded. The appellant contended that there was no evidence to establish that the respondent was in possession at the date of his entry on the land in 1948 and that assuming that she was in possession before the date of the Ordinance in 1940 her possession was determined thereunder and she had taken no active steps thereafter to reassert her possession.

It was held (1) that while section 2(1) of the Ordinance determined her possession it did not affect the factual aspect of possession if she was in actual possession at the date of the Ordinance, the section did not change that state of facts.

(2) That to establish possession it is not necessary for a claimant to take some active step in relation to the land such as enclosing or cultivating it. In the case of vacant unenclosed land which is not being cultivated little can be done on the land to indicate possession. The type of conduct which indicates possession must vary with the type of land. Here the type of possession which the respondent sought to maintain was against the appellant who never had any title to the land and the slightest amount of possession would be sufficient to entertain a claim for trespass. In BRISTOW v CORMICAN (1878) 3 A.C. page 641 at page 657. H.L. Lord

Hatherly said —

"There can be no doubt whatsoever that mere possession is sufficient, against a person invading that possession without [p.125] himself having any title whatsoever, as against a mere stranger; that is to say that is sufficient as against a wrong doer. The slightest amount of possession would be sufficient to entitle the person who is in possession or claims under those who have been or are in such possession to recover as against a mere trespasser."

The principles in both these two cases BRISTOW v CORMICAN and WUTA OFFEI v DANQUAH supra were also illustrated in the decision and reasoning in the House of Lords in the case of OCEAN ESTATES v NORMAN PINDER reported in (1969) 2 W.L.R. H.L. at page 1359 at page 1364.

Actual possession is a question of fact which consists an intention to possess the land in question and exercise of control over the land. The type of control which should be exercised over the land would vary with the nature of the land and the use made of the land in question. See the case of OCEAN ESTATE v PINDER supra. As indicated earlier counsel for the appellant had maintained that there was not sufficient evidence to establish that the respondents were ever in possession of the land at the critical period and that they had never pleaded that they were ever in possession of the disputed land. No authority was cited by counsel for the appellant in support of the contention that the respondents must plead that they were actually in possession of the land in question. In fact I myself have been unable to find any.

This to my mind I would therefore say is unnecessary in view of the principles contained in the case of DR. C.J. SEYMOUR-WILSON v MUSA ABESS Civ. App. 5/79 (Supreme Court) unreported and in the cases mentioned supra as to who was in fact in possession of the said land and bearing in mind the principle that the slightest amount of possession is enough to maintain an action for trespass.

[p.126]

At this stage it now becomes necessary for me to consider on the evidence before the court which of the two, the appellant or the respondents, had a better right to possession of the land in question. As I have already stated above that the appellant did not give any evidence and neither was any evidence

adduced on his behalf. The only witness who gave evidence was the 1st respondent. He testified that the land was given to him and the other two respondents by his uncle one Salifu Koroma who died after 1970 but that after the death of his uncle they had procured the services of a surveyor to survey the whole compound and prepared the plan of the land. He then gave us a copy. The plan which was attached to Ex. "A". The surveyor signed and dated the plan on the 20th March 1969. From this it can be inferred that the respondents exercised acts of possession over the land in March 1969 through their agent and the surveyor. That sometime in 1972 he found the appellant building on the land and that he told him that they owned the land in question.

Let me at this stage quote the relevant portion of his evidence.

"I recall 28.4.74 also remember what happened in 1972. Sometime that year I found Momoh Sesay in Goderich. He built a house on the land. He built the house in 1972. I told him that he had no right to be on the land and that we owned it. He said that he bought it from one Pa Abdulai Fofanah. I told him that Pa Abdulai Fofanah does not own the land. I went to the C.I.D. and reported him as he refused to quit the land. One Pa Momoh Bangura my brother went with us. The defendant was called to the C.I.D. and questioned. He said that he had bought the land from Pa Abdulai Fofanah."

[p.127]

Apart from this there is evidence also that although the appellant was warned to get off the land he nevertheless continued to build on the land until the building was completed and that thereafter the 1st respondent instructed his solicitor to write to the appellant about the matter. When he still continued to occupy the land action was then instituted against him.

In my view having considered the whole of the evidence adduced in this case and especially those referred to above together with the authorities cited by me I am satisfied that the respondents had entered into possession of the land before the appellant did. They did not have to take active steps to show that they were in possession WUTA OFFEI v M. DANQUAH supra. The principle that mere possession is sufficient to maintain an action for trespass has been approved in BRISTOW v CORMICAN supra and in several other cases. The actions taken by the respondents in surveying the land and in warning the appellant off the land in question is I think adequate to show that they were in possession before the appellant entered upon the land in dispute and that they were merely trying to assert their claim to possession of the said land. For these reasons I hold that the respondents had a better right to possession and were therefore entitled to succeed in an action against the appellant for trespass.

By way of summing I would pose the following questions which are as follows:

Have the respondents proved their claim as contained in the Writ of Summons? I would certainly not hesitate to say that on the evidence adduced at the trial that they have failed dismally to prove that they were the owners in fee simple of the land in question. As regards the question of whether they were in fact in possession of the said land at [p.128] the time of the alleged trespass? I have carefully considered the principles of law involved, the arguments adduced by both counsel together with the evidence and

have come to the conclusion that the respondents were in fact in possession of the land at the material time.

The second question which I have to answer is whether the trial judge was right in dismissing the action? It follows from what I have already stated above that the trial judge was right as far as ownership of the land based on the Deed of Gift is concerned but that he was wrong as far as the question of possession of the land is concerned.

Having come to this conclusion my last and final question is — was the Court of Appeal right in reversing the decision of the learned trial judge? As regards the question of trespass I would say yes. As regards the question of whether the Court of Appeal was right in reversing the decision of the trial judge I would also say yes.

It was stated in the head note of the case of WATT or THOMAS v THOMAS reported in (1947) A.C. at page 484 that —

"When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantages of having seen and [p.129] heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

As I have already stated there is no doubt that a case of trespass has been made out by the respondents against the appellants. In my opinion the respondents have proved that they were in possession of the land in question at the material time. The Court of Appeal also came to his same conclusion. In fact this is what During J. A. had to say in his judgment.

"In our view" the learned trial judge was wrong in holding that the appellant had failed to make a case of trespass. The appellants in fact proved their case."

The Court of Appeal having come to the conclusion that the learned trial judge was wrong in his findings as regards the question of trespass were clearly entitled to reverse the learned trial judge's findings of fact on the question of what has been proved or not proved.

As regards the question of granting an injunction I do not think that it is appropriate for me to grant it because of the respondents' conduct in this matter. The court must look at the particular circumstances in each case. The evidence reveals that although the respondents had seen the appellant constructing a building on the land and even warned him off in 1972, their solicitor did not write to him until the 16th day of July, 1976 before a writ was against issued him. In those circumstances it will be inequitable to order an injunction. I must under the circumstances disagree with the Court of Appeal in this regard and refuse to grant the injunction claimed.

[p.130]

For the reasons which I have already given above, I have come to the conclusion that this appeal should be dismissed subject to an order setting aside the injunction granted.

Costs to the respondents.

SGD

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

SGD.

MR. JUSTICE E. LIVESEY LUKE, C.J.

I agree

SGD

MR. JUSTICE O.B.R. TEJAN, J.S.C.

I agree

SGD

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

I agree

SGD

MR JUSTICE S. M.F. KUTUBU, J.A.

CASES REFERRED TO

1. Watt or Thomas v Thomas Reported In 1947 A.C. page 484
2. Benmax v Austin Motor, CO. LTD. Reported In 19551 A.E.R. at page 326 at Page 329
3. Wuta Offei v Danquah reported in (1961) 2 W.L.R. at page 1238
4. In Bristow v Cormican (1878) 3 A.C. page 641 at page 657
5. Bristow v Cormican and Wuta Offei v Danquah
6. Ocean Estates v Norman Pinder reported in (1969) 2 W.L.R. H.L. at page 1359 at page 1364
7. Ocean Estate v Pinder
8. Dr. C.J. Seymour-Wilson v Musa Abess Civ. App. 5/79

9. Wuta Offei v M. Danquah supra

10. Bristow V Cormican

11. Watt or Thomas v Thomas reported in (1947) A.C. at page 484

STATUTES REFERRED TO

1. Sec. 2(1) of the Accra Town (Lands) Ordinance, 1940

2. section 2(1) of the Ordinance

SOLOMON H. DEMBY v. MANNAH KPAKA

[S.C. MISC.APP.NO. 7/83] [p.73-79]

DIVISION: COURT OF APPEAL, SIERRA LEONE

DATE: 18 APRIL 1984

CORAM: MR. JUSTICE C.A. HARDING, J.S.C. PRESIDING

MR. JUSTICE O.B.R. TEJAN, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

BETWEEN:

SOLOMON H. DEMBY — APPLICANT

Vs.

MANNAH KPAKA — RESPONDENT

Tejan M. Savage, Esq. for Applicant

A.B. Yilla, Esq. for Respondent

BECCLES DAVIES, J.S.C.:

Introduction

This is an application for (1) "an enlargement of time of appeal (SIC) to this Honourable Court for special leave to appeal against the judgment and order of the Court of Appeal dated the 13th day of July, 1983. (2) special leave to appeal against the said order and (3) an interim stay of execution of the said judgment; (4) any further or other relief equitable in the opinion of this Honourable Court.

Facts

On 13th September, 1983 the Court of Appeal dismissed the applicant's interlocutory appeal. The applicant thereafter applied for leave to appeal to this Court. That application was refused by the Court of Appeal- An application dated 13th July, 1983 for special leave to appeal was heard by this Court and struck out on 2nd November, 1983. The present application was filed on 12th November, 1983 seeking the orders I have quoted above.

[p.74]

The right to appeal to the Supreme Court

The right of appeal to the Supreme Court from any judgment, order or decree of the Court of Appeal is to be found in section 103 of The Constitution of Sierra Leone 1978. (Hereinafter referred to as "the Constitution") Section 103 provides —

"103.(1) An appeal shall lie from a judgment, decree or order of the Court of Appeal to the Supreme Court—

(a) as of right, in any civil cause or matter where the amount or value of the subject matter of the dispute is not less than such an amount as may be determined by Parliament; or

(b) as of right, in any criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment, decree or order of the High Court of Justice in the exercise of its original jurisdiction; or

(c) with leave of the Court of Appeal, in any cause or matter, civil or criminal, where the Court of Appeal is satisfied that the case involves a substantial question of law or is of public importance.

(2) Notwithstanding the provisions of the preceding sub-section, the Supreme Court shall have power to entertain any application for special leave in any cause or matter, civil or criminal, to the Supreme Court, and to grant such leave accordingly."

I find the provisions of Section 103(1) and (2) repeated in Rule 6(1)(a), (b) and (c), and Rule 6(2) of The Supreme Court Rule, 1982 (P.N.1 of 1982) to which I shall hereafter refer as "the Rules".

[p.75]

Rule (6)(1)(a) of the Rules deals with 'appeals as of right' in civil cases; Rule 6(1)(b) refers to appeals as of right in criminal matters and Rule 6(1)(c) provides for appeals with leave of the Court of Appeal in civil or criminal matters. Rule 6(2) enables an intending appellant to apply to this Court for 'special leave' to appeal.

Rule 7 of The Rules

In order to give due regard to the hierarchy of Courts set up by sections 101, 107 and 110 of The Constitution, Rule 7 of 'the Rules' provides that an application for leave to appeal must be made in the

first instance to the Court of Appeal and if that Court refuses to grant the leave sought, and then application could be made to this Court for 'special leave' to appeal.

Time for applying for 'special leave'

The period stipulated within which an application for special leave is to be made is set out in Rule 10 of the Rules. It state

"10. An application for special leave shall be filed within one month of the date of the judgment from which leave to appeal is sought or of the date on which leave to appeal to the Supreme Court is refused by the Court of Appeal

The rather complicated phraseology of this rule seems to have been simplified by Rule 26 sub-rule 3 which simply requires the application to be filed within one month from the date of the decision of the Court of Appeal.

'Rule 26'

Rule 26 of the Rules deals with time for appealing and time within which application for extension of time is to be made.

I will set out Rule 26. It stipulates—

"26(1) Where an appeal lies as of right the appellant shall lodge his notice of appeal within three months from the date of the judgment appealed against unless the Supreme Court shall enlarge the time.

[p.76]

(2) Where there is no appeal as of right the appellant shall lodge his notice of appeal within three months from the date on which leave to appeal or special leave is granted.

(3) An application for special leave shall be filed within one month from the date of the decision of the Court of Appeal.

(4) No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought ……." (Emphasis mine).

Generally speaking, Rule 26 deals with the times within which civil appeals as of right, appeals with leave, and appeals with special leave are to be lodged. Finally it deals with applications for enlargement of time within which to appeal.

Sub-rule (1) requires that an appeal as of right shall be lodged within three months of the judgment appealed from, unless the time for lodging such an appeal has been extended under sub-rule (4). It provides for time in respect of those matters referred to in Sec. 103(1)(a) of The Constitution, and Rule 6(1)(a) of The Rules.

Sub-rule (2) stipulates that appeal with leave as well as those with special leave shall be filed within three months from the date on which leave or special leave was granted. Consideration is thereby given to matters in Sec.103(1)(c) and 103(2) of The Constitution, and Rule 6(1)(c) and 6(2) of The Rules.

By sub-rule (3) an application for special leave to appeal should be made within one month from the decision of the Court of Appeal. The sub-rule simplifies the provision of Rule 10. Applications for special leave under Sec. 103(2) of The Constitution and 6(2) of The Rules have a time limit prescribed for them.

[p.77]

Sub-rule (4) allows an intending appellant one month within which to apply for enlargement of time in which to appeal after the time within which an appeal may be brought. I have highlighted the phrases "enlargement of time within which to appeal"

and “after the time within which an appeal may be brought" to indicate that there is no mention in this sub-rule or for that matter anywhere in Rule 26 in which provision is made for enlargement of time within which 'special leave' may be made and granted. The sub-rule speaks of enlargement of time within which an appeal may be applied for after the time within which an appeal may be brought. Counsel for the applicant during his argument relied on this sub-rule. The sub-rule is not useful to his present application.

Sub-rule (4) as I apprehend it, refers to appeals as of right where the period is three months, and appeals in which leave or special leave has been granted and this Court is satisfied that there were 'good and substantial reasons for the intended appellant's failure to lodge his appeal within the prescribed period of three months. It does not avail someone who has had his application for special leave struck out. Such an application for special leave cannot be renewed after the expiration of one month of the refusal of the Court of Appeal to grant leave to appeal to this Court.

'Rule-74'

By way of contrast I will draw attention to the provisions of Rules 74(1) and (2) of the Rules.

Let me at once state that they relate to criminal appeals. They are however germane to the issue I am demonstrating Rule 74 sub-rule (1) provides—

"Where the State or any person desires to appeal to the Supreme Court in a criminal cause or matter he shall give.....

…….. notice of an application for special leave to appeal within one month of the decision of the Court of Appeal or within ten days of refusal of leave by the Court of Appeal as the case may be ……

[p.78]

(2) The period within which …….. notice of an application for special leave may be given may be extended by the …… Supreme Court on an application by notice of motion."

This sub-rule provides for the enlargement of time within which an application for special leave may be made in criminal matters.

Can this Court extend time for special leave?

I have contrasted the position in civil matters with that regarding criminal matters. There is no power under the present Rules of this Court to grant such an extension of time within which to apply for special leave to appeal in civil matters. The answer to the question I have posed above is No.

GATTI v SHOOSMITH

The decision in GATTI v SHOOSMITH (1939) 3 All E.R. 916 was cited to us by Counsel for the applicant while urging us to grant him an extension of time within which to apply for special leave. That was a case in which the English Court of Appeal granted an extension of time within which to appeal. The omission to appeal in due time in that case was due to a mistake on the part of the applicant's legal adviser. It is alleged in the instant case that as a result of lithe error or mistake of Counsel" in making his application to this Court on 2nd November 1983 the application was struck out; and that "in the interest of justice and all the circumstances of this case the applicant ought not to suffer because of the error or mistake or negligence of his Counsel or his Solicitor".

I will now consider the appropriateness of Gatti's case to the instant application. It is based on the combined effect of two rules of the English Annual Practice — Order 58 Rule 13 sub-rule and Order 64 rule 7. Order 58 Rule 13 sub-rule 2 provides —

"Any application to the Court of Appeal for leave to appeal (other than an application made after the expiration of the time for appealing) shall be made ex parte in the first instance ……"

Order 64 Rule 7 then provides

"A Court or a Judge shall have power to enlarge …….. the time appointed by these Rules or fixed by an Order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after expiration of the time appointed or allowed ……."

The effect to these two rules is to give the Court an unfettered discretion to extend the time stipulated by the Rules contained in the Annual Practice. To be able to exercise a discretion, the Court must be empowered by some rule of law or practice which then becomes the basis on which the discretion could be exercised one way or the other. There is no similar provision in the Rules of this Court giving it a blank cheque as it were to exercise its discretion to extend the time within which special leave could be applied for.

Conclusion

No power having been conferred on this Court to extend time within which an application for special leave could be made in civil cases this Court cannot grant the application. It is accordingly dismissed.

SGD.

MR. JUSTICE S. BECCLES DAVIES, J.S.C

SGD.

MR. JUSTICE C.A. HARDING, J.S.C.

I agree.

SGD.

MR. JUSTICE O.B.H. TEJAN, J.S.C

CASE REFERRED TO

Gatti v Shoosmith (1939) 3 All E.R. 916

STATUTES REFERRED TO

1. Order 58 Rule 13 sub-rule and Order 64 rule 7

2. Rules 74(1) and (2) of the Rules.

3. Sec. 103(1)(a) of The Constitution, and Rule 6(1)(a)

4. Sec. 103(2) of The Constitution and 6(2) of The Rules

5. section 103 of The Constitution of Sierra Leone 1978

THOMAS O VINCENT v. B.P. (SIERRA LEONE) LTD.

[S.C. CIV. APP. NO.2/81] [p.1-71]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3 APRIL 1984

CORAM: MR. JUSTICE E. LIVESEY LUKE, C.J., PRESIDING

MR. JUSTICE C.A. HARDING, J.S.C.

MR. JUSTICE O.B.R. TEJAN, J.S.C

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

BETWEEN:

THOMAS O VINCIENT — APPLELANT

AND

B.P. (SIERRA LEONE) LTD. — RESPONDENTS

T.S. Johnson Esq. for Appellant

J.H Smyth, Esq. With him Miss P. Wellesley-Cole for Respondent

JUDGMENT

LIVESEY LUKE, C.J.

Thomas O. Vincent (hereafter called the appellant) qualified in England as an Engineer in the early 1960's. In 1964 while he was in the employment of British Railways as a graduate Engineer, he applied to B.P. (West Africa) Ltd. for an appointment. In November, 1964 he attended an interview in London following that interview the Group Manager (Administration) of B.P. (West Africa) Ltd. based in Lagos Nigeria, a Mr. N. Campbell wrote to him a letter dated 7th December, 1964 (Ex. 'B') forwarding a formal letter of offer of appointment (Ex. 'A'). The formal letter of appointment was also dated 7th December, 1964 and was signed by Mr. N. Campbell. The formal letter of appointment offered him an engagement as an engineer with B.P. (West Africa) ltd. in Sierra Leone to commence before 1st March, 1965. He was requested to signify his acceptance of the offer by signing below the formal letter of appointment and returning it. He duly signified his acceptance by a signing and returning the letter. In due course he travelled to Freetown, Sierra Leone and took up appointment with B.P. (West African) Limited on 2nd February, 1965.

[p.2]

He was then aged 35 years. After serving a six months probationary period, as provided for under the terms of his engagement, he was confirmed in the employment. At the end of his first year he was granted a salary increase and was designated Operations Sales Engineer. Thereafter he was granted salary increases annually. During his first year with B.P. (West Africa) Ltd., he was sent to Nigeria where he was attached to its branch there. In October, 1973 on the recommendation and sponsorship of his employers he attended the Group Development Stage I Course in the United Kingdom which was designed for senior executives of the B.P. Group. Later that same year he was appointed Operations Manager.

In 1976 a new company named B.P. (Sierra Leone) Limited was incorporated in Sierra Leone to take over the total business operations of B.P. (West Africa) Limited. The services of the employees of B.P. (West Africa) Limited including those of the appellant were transferred to B.P. (Sierra Leone) Limited with effect: from 1st January, 1976. By letter dated 31st March, 1976, the General Manager of B.P. (West

Africa) Ltd. Sierra Leone Branch informed the appellant of the new development and stated inter alia that "your full service benefit and existing terms and conditions of employment will be transferred to B.P. (Sierra Leone) Limited with effect from 1st January, 1976", and intimated that his employment with B.P. (West Africa) Ltd., Sierra Leone Branch would be transferred to B.P. (Sierra Leone) Limited. He was asked to signify his acceptance of the transfer to B.P. (Sierra Leone) Limited on his "full service benefits and existing terms of conditions of employment," by signing and returning a duplicate of the letter. The appellant duly accepted the transfer by signing and returning the duplicate letter on or about 14th April, 1976.

The appellant continued performing his normal duties as Operations Manager under the new company. However, in December, 1976 there was a new and far-reaching development. It arose thus:—

[p.3]

On 29th December, 1976 Mr. Callander, the General Manager of B.P. (Sierra Leone) Ltd. invited the appellant into his office and told him that he was restructuring the company and that he (the appellant) would not fit into the new structure. The appellant asked Mr. Callander what he meant and the latter replied that the appellant would either be made redundant or he could resign, as there was no other alternative. He then asked the appellant to go away and think about what he had told him and communicate his decision to him later. Later that day, the appellant wrote a letter to the General Manager, as a result of which the General-Manager invited the appellant to his office. They held a discussion in the course of which Mr. Callander said that because of his high qualification and seniority the appellant would not fit into the new structure. Mr. Callander also told him of the amounts he would be paid as benefits if he was made redundant or retired by the company or if he was to resign. The appellant suggested that he should be allowed to proceed on vacation leave but Mr. Callander refused, insisting that he required to know the appellant's decision by the following day. On 31st December, 1976, the appellant did not report for duty. He sent a sick report to the company's office reporting his illness. Mr. Callander telephoned him at home sympathising with him on his illness and enquired about the letter he was expecting from him. The appellant then went to the company's office and handed a letter dated 30th December, 1976 (Ex. 'D') to Mr. Callander. In that letter the appellant referred to the interview of 29th December, recapitulating the gist of the conversation including the benefits that were said to be payable to him on redundancy or resignation. He requested the General Manager to confirm that the benefits payable to him were as stated in the letter so as to "enable me to come to a decision" He posted a copy of that letter on the same day to the Managing Director of B.P. (West Africa) Ltd. based in Ghana.

Later that day the appellant received a letter from the General Manager dated 31st December, 1976 (Ex. 'E'). The letter was in the following terms:—

[p.3]

31st December, 1976

Dear Mr. Vincent,

We would refer to our various conversations (Vincent/Callander) on the 29th and 30th December, 1976. We would formally advise you of the company's decision to exercise its discretion to retire you effective 31st December, 1976 in accordance with paragraph 2.13 of the Executive Staff Handbook. The following entitlements are due to you and we would be obliged if you could call on the undersigned as soon as possible to finalise the matter:

(1) One month's salary in lieu of notice	976.73
(2) Outstanding leave balance/leave allowance	1,327.00
(3) Provident Fund	14,023.06
(4) End of Service Benefit	3,136.00
(5) Ex Gratia Retiral Gratuity	3,000.00
	22,462.79

Note: Income tax to be 'deducted at source where applicable.

Finally we would like to thank you for your service over the years and wish you every success in the future.

Yours sincerely,

M. Callander

General Manager."

There then followed a series of correspondence between solicitors acting for the appellant and solicitors on behalf of B.P. (Sierra Leone) Limited. Eventually" on 21st February, 1977 the appellant issued a writ of summons in the High Court against B.P. (Sierra Leone) Limited claiming:

"1. Breach of the Plaintiff's contract of employment.

2. Damages for wrongful dismissal of the Plaintiff from the Defendant's employment.

3. Damages for wrongly inducing the Plaintiff by false representation any by the unconscientious use of power and authority, to yield to Defendant's [p.4] discriminatory and unlawful design to deny the plaintiff his right of participation in the Defendant's Executive Staff non-contributory Pension Scheme preparatory to the Defendant's secret plan to dismiss him unlawfully from its employment".

The Writ was accompanied by a Statement of Claim. It is not necessary to set out the Statement of claim in full. Most of the allegations contained therein have been narrated above. It will be sufficient to set out a few material paragraphs, namely:

"1. The Plaintiff is a highly qualified Engineer, and at all times relevant to this action, a top executive of the Defendant's Company in Sierra Leone, and holding very successfully the office of Operations

Engineer in Sierra Leone, and having the distinction of being the only Sierra Leonean executive to have completed with flying colours the Defendant's Management Stage 1 Course in 1973, designed for General Managers and run by the Defendant.

3. By letter dated 7th December, 1964, addressed to the Plaintiff at his address in England where he carried on his profession as an Engineer, the defendant offered the Plaintiff employment as executive engineer at a commencing salary of Le.3,200 (three thousand two hundred leones) per annum basic, for a probationary period of six months and subject to termination at any time by one calendar month's prior notice in writing on either side.

4. It was an essential condition of the offer of employment referred to above, that the Defendant's Executive Staff Pension Scheme — hitherto reserved for expatriates — which is non-contributory, shall apply to the Plaintiff on confirmation, and that on [p.5] reaching the age of 55 years with a minimum of 15 years company service, his annual pension would be calculated at one eightieth of his earning over his last year of employment multiplied by his years of service.

6. The plaintiff accepted the said offer of employment in accordance, inter alia, with the conditions as stated in paragraphs 3 and 4 above. He was then 35 years old, and commenced work on 2nd February, 1965.

8. In November 1975, the Defendant's new General Manager in Sierra Leone informed the Plaintiff that a Sierra Leonean executive of the company was opting out of the Defendant's Executive Staff non-contributory Pension Scheme and that he was required to do likewise.

9. Falsely representing to the Plaintiff that the Defendant could not and would not operate the said Scheme for a lone African Executive, by the unconscientious use of his power and authority to make or mar the Plaintiff's excellent record, by the application of daily pressure which he brought to bear on the Plaintiff, the said General Manager unlawfully induced the Plaintiff to yield to his request that the Defendant terminates the Plaintiff's participation in the Executive Staff non-contributory Pension Scheme.

10. By 1st July, 1976, the Plaintiff's basic salary was Le10,192.00 (Ten thousand one hundred and ninety-two leones) per annum, and but for his wrongful dismissal, would have amounted to Le10,840 per annum by 1st July,1977.

11. On the 29th day of December, 1976, the Defendant's General Manager - the Plaintiff's immediate superior, called the Plaintiff into his office and quietly informed him that the Defendant was restructuring itself. And that because of his high qualifications and high position attained with the defendant, he could not fit him in the new structure.

[p.7]

12. On 30th December, 1976, the following day the said General Manager begged the Plaintiff to resign his then appointment, promising that if he did the defendant would top any monies due him by

Lel0,000.00 (Ten thousand leones). This amount was Le2,000.00 (Two thousand leones) more than he had offered earlier in the day.

13. By letter dated the said 30th day of December, 1976, from the plaintiff to the General Manager, copied to the defendant's Managing Director resident in Ghana, delivered on the 31st December, 1976, the plaintiff, inter alia, requested of the General Manager confirmation of the inducements being held out to him.

14. Thereafter, on the said 31st December, 1976, the defendant forthwith and without notice retired the plaintiff from the defendant's employ with immediate effect, and did so in circumstances amounting to a wrongful dismissal and before he had attained the pensionable age of 55 years, The defendant has since refused to allow the plaintiff to remain in its service.

15. The said arbitrary and unilateral retirement of the plaintiff was:

(i) unlawful in that it constitutes a flagrant breach of the plaintiff's contract of employment

(ii) scandalous in that it was designed to get rid of the plaintiff and to rob him of his just reward after 12 years of employment with the defendant and,

(iii) a denial of the plaintiff's right to complete 15 years at least of pensionable service as per his contract of employment.

16. By reason of the above, the plaintiff has been greatly injured.

[p.8]

Particulars of damage:

Loss of Eight years salary to retirement at the pensionable age of 55 years (calculated to take into account reasonable expectation of appointment to the office of General Manager) Le.114,980.00

Lump sum compensation in lieu of pensionable

emoluments (Twenty years @ Le.3,000 per annum) Le. 60,000.00

Total Le.174,980,00

Plus 15% of Le.114,980 i.e. rent allowance 17,247.00

Le.192,227.00

Wherefore the plaintiff claims as damages the sum of Le.192,227.00

B.P. (Sierra Leone) Limited (hereafter called the Company) duly filed a Defence which was in the following terms:—

“1. The defendant admits that the plaintiff was his employee up to and including the 31st day of December 1976.

2. Said that the plaintiff attended a basic Information Course for members of the BP Group in the middle management cadre the defendant does not admit the allegations contained in paragraph 1 of the Statement of Claim.

3. The defendant says that the plaintiff voluntarily opted out of its non-contributory Pension Scheme and denies that any pressure was put on him to do so or that the plaintiff was the only African Executive in the Scheme.

4. The defendant states that as a result of a reconstruction within the Company, the plaintiff's position became redundant. Instead of terminating the plaintiff's services as the Company could have done, the defendant opted to retire the plaintiff with his full entitlements including an ex-gratia gratuity, made as follows:

[p.9]

One month's salary in lieu of notice (less income tax)	—	591 .46
Outstanding leave balance/leave allowance (less income tax)	—	1110.83
Provident Fund	—	14023.06
End of Service benefit*	—	3136.00
Ex Gratia Retiral Gratuity*	—	3000.00
21861.35		

*These items are paid without deduction of Income Tax, the responsibility for which will now rest with the plaintiff.

5. The plaintiff owes the defendant Company the sum of Le49.90 in respect of petroleum products supplied to him in December, 1976. The defendant therefore sets this sum off the total of Le166.81 being expenses due to and claimed by the plaintiff and authorised by the General Manager.

6. By letter dated 12th January, 1977, the plaintiff, through his Solicitor, accepted the above payments save and except the End-of-Service benefit, The Defendant says that the End-of-Service benefit was calculated in accordance with the terms of its End-of-Service Benefit Scheme and now brings into Court the sum of Twenty one thousand eight hundred and sixty one leones thirty five cents (Le21,861.35) plus the balance of one hundred and sixteen leones ninety one cents (Le116.91) due and payable to the plaintiff, totaling twenty one thousand nine hundred and seventy eight leones twenty six cents (Le21,978.26).

7. Save as is herein expressly admitted the defendant denies each and every allegation of fact contained in the Statement of Claim as if the same had been herein set out and traversed seriatim."

[p.10]

A reply was filed joining issue on the Defence and making a number of averments which are not necessary to be set out.

In due course the action went to trial. The trial commenced on 25th November, 1977 before Williams J. Both parties were represented by Counsel, The appellant was the only witness called in proof of his claim. Two witnesses were called on behalf of the

Company, namely Norman Callander the Managing Director of the Company and Donald Charles Oguntola Smythe-Macauley, the Marketing Manager of the Company, Counsel for both parties addressed the trial Judge on 24th November, 1978 at the end of which the learned Judge reserved judgment. Judgment was delivered on 25th September, 1979. The judgment was in favour of the appellant. The learned Judge awarded the appellant damages assessed at eight years salary "less an amount for contingencies of life". He calculated the salary at Le.976.73 per month totaling Le.93,766.08 less a reduction at the rate of 3 per cent "for contingencies of life" amounting to Le.2,812.98. He therefore awarded the net figure of Le.90,955.10 and costs to be taxed.

The Company appealed to the Court of Appeal on the following grounds of appeal:—

(a) That the learned Trial Judge was wrong in law

(i) In holding that the Managing Director of the Appellant Company acted without the authority of the Board of Directors.

(ii) In finding that evidence of a decision of the Board with respect to the retirement of the Plaintiff, was essential for proving the fact of his retirement.

(b) That the learned Trial Judge was wrong in law in awarding damages to the plaintiff and in the event acted on wrong principles of law.

(c) That the decision is against the weight of the evidence."

[p.11]

A Notice of Cross-Appeal was filed on behalf of the appellant. The grounds of cross-appeal urged in the Notice were as follows:—

"(1) There being no evidence of any mutuality between the parties and the defendant with regard to Exhibit 'F' — the Defendant's Executive Handbook — the learned Trial Judge erred in law in holding that the defendant without the consent of the plaintiff, had a discretion to retire the plaintiff prematurely in accordance with the said Exhibit 'F' and in breach of his contract of employment.

(2) The learned Trial Judge erred in law in disallowing the plaintiff's claim of Le.60,000.00, being lump sum compensation claimed in lieu of pensionable emoluments lost arising out of the defendant's proven breach of the plaintiff's contract of employment."

The hearing of the appeal commenced before During. Cole and Turay JJ.A on 4th March, 1981 and ended on 12th March, 1981 when judgment was reserved. Judgment was delivered on 16th April, 1981 allowing the appeal, disallowing the cross-appeal and ordering that the Judgment and orders of the High Court be set aside with costs to the Company to be taxed.

It is against that judgment that the appellant has appealed to this Court. Several grounds of appeal were filed on behalf of the appellant and argued before us by his counsel. It is not necessary to set them out. Suffice it to say that the material issues raised in this appeal may be formulated thus:—

(1) What were the terms of the appellant's Contract of Service?

(2) Was the Company's Executive Handbook (Ex. 'F') applicable to the appellant?

[p.12]

(3) Are "Termination" and "Retirement one and the same thing under the appellant's Contract of Employment?

(4) If "Termination" and "Retirement" are not one and the same thing, was the appellant properly retired in accordance with his Contract of Employment?

(5) Assuming that the Company acted wrongly in retiring the appellant, is the appellant entitled to any damages and if so what amount of damages?

(6) Was the appellant entitled to be employed by the Company until he attained the age of 55 years?

(7) Was the appellant entitled to be paid any amount by way of pension?

I shall now proceed to consider these several issues.

It will be convenient to consider the first and second issues together. In this connection, it will be recalled that when the appellant was first appointed in 1964, he received two letters from B.P. (West Africa) Limited (Ex. 'A' & Ex. 'B'). In the formal letter of Appointment (Ex. 'A') it was stipulated that the appellants engagement was subject to the following conditions inter alia:—

"1. That the company will, so long as you are able to perform and actually do perform the duties required under engagement, pay your salary at the rate of Le.3,200 (three thousand two hundred leones) per annum, payable monthly in arrears.

2. That variation in salary which may latter at any time be made shall not constitute a new agreement but that the terms and conditions of your employment as set out here, except as to such variation, shall continue in force.

[p.13]

3. That your engagement is subject to termination.

3. That your engagement is subject to termination at any time by one calendar month's prior notice in writing on either side, and that the Company's liability for salary will cease on the date your engagement terminates.

4. That you are regarded as undertaking a probationary period of six months.

5. .....

6. That you will not be eligible for membership of a Pension Scheme or Provident Fund Scheme until you have satisfactorily completed the probationary period stipulated."

The forwarding letter (Ex. 'B') so far as relevant stated inter alia —

"……

"As our engagement letter states, you are required to serve a period of probation of 6 months usually before being confirmed. You may then apply to join the Provident and Pension Funds.
……

The company Staff Provident Fund into which the employee, if he wishes to join the Scheme, contributes a sum equal to 5%; is open to executive staff. The monies in the Fund accumulate at interest and cannot be withdraw until such time as the employee leaves the Company. The Pension Fund is non-contributory and applies to executive staff only. If a member reaches pensionable age (55) and has completed 15 years company service his annual pension will be calculated at 1/80th of his earnings over his last year of employment multiplied by his years of service." The appellant accepted the offer of appointment on the basis of the terms and conditions spelt out in the two letters. There could be no doubt therefore that the appellant as well as the company were bound by those terms and conditions.

[p.14]

In January, 1972, management of B.P. (West Africa) Limited branch in Sierra Leone issued a Hand Book entitled "the Executive Staff Handbook". It contained inter alia an Introduction followed by ten clauses each dealing with a specific subject matter and two appendices. Each clause (except two) was sub-divided into sub-clauses. The Introduction was in the following terms:—

"This Handbook has been compiled for the information and guidance of Executive staff, particularly newly joined staff, of BP (West Africa) Limited in Sierra Leone. It describes the conditions of service for staff, giving a brief outline of what the company expects from you and what you can expect from the company.

The company's policy, as reflected in this Handbook, is subject to revision from time to time and you will be advised of such changes by means of amendments to and/or re-issue of the Handbook.

Suggestions which you feel would improve the usefulness of this Handbook will be welcomed and would be sent to the Manager."

Turning to the main body of the Handbook, Clause 1 dealt with Departmental Management. Clause 2 dealt with Terms of Employment including hours of work, leave, career development, transfers, annual assessment, company transport, Retirement/Termination, Provident Fund, and Long Service Recognition. Clause 3 dealt with Training including Educational assistance. Clause 4 dealt with Job Grading/Title. Clause 5 dealt with salary including salary reviews. Clause 6 dealt with Loans and Advances including car loan scheme and Housing Loan scheme. Clause 7 dealt without of Pocket Expenses including expenditure on entertainment. Clause 8 dealt with Medical including medical facilities. Clause 9 dealt with Welfare including discount to staff purchasing BP, products.

[p.15]

Clause 10 dealt with General including communications to Press/Radio — TV and speeches and BP New Bulletin. The first Appendix, numbered 11 dealt with Rent subsidy, Duty Mileage allowance, Touring Allowances, Transfer allowances, leave allowance and Company Accommodation Rental. The second Appendix contained four tables showing the Organograms of the General Management, Account Department, Sales Department and Operations Department.

Copies of the Executive Staff Handbook were handed to all senior staff members of B.P. (West Africa) Limited, Sierra Leone Branch in January, 1972. The appellant was handed a copy. He raised no objections to the terms contained therein. On the contrary, on his own admission he received the allowances as provided far therein and enjoyed all the admittedly better condition contained therein. It will be recalled that in March, 1976 the services of the employees of B.P. (West Africa) Limited were transferred to a new company, B.P. (Sierra Leone) Limited.

On 14th April. 1976 the appellant accepted the offer of transfer and signed the following acceptance:—

"I accept your offer to transfer to BP (Sierra Leone) Limited my full service benefit and existing terms and conditions of employment".

When he signed that acceptance he had been in possession of a copy of the Executive Staff Handbook far over four Years and had been enjoying the benefits provided for therein for the same period.

So when he accepted to transfer his existing terms and condition of employment he was well aware of the terms and conditions laid down in the Handbook and was infact enjoying the benefits conferred. In those circumstances, the appellant could not seriously or honestly say that the terms and conditions laid down in the Handbook were not applicable to him. It is therefore not surprising that both the trial Judge and the Court of appeal rejected the contention that the terms and conditions contained in the Handbook were not applicable to the appellant. In my judgment therefore the terms of the appellant's contract of employment were [p.16] contained in the formal letter of Appointment (Ex. 'A'), the forwarding letter (Ex. 'B') as well as the Executive Staff Handbook (Ex. 'F').

The next important issue is whether "Termination" and "Resignation" are one and the same thing under the appellant's contract of employment. In its letter dated 31st December, 1976 (Ex. 'E'), the company informed the appellant that the company had decided "to exercise its discretion to retire you effective 31st December, 1976 in accordance with paragraph 2.13 of the Executive Staff Handbook." And in the course of his evidence Mr. Callander confirmed that the appellant had been "retired". It is necessary to set out para. 2.13 of the Executive Staff Handbook It reads:—

"2.13 Retirement/Termination

The normal retirement age is fifty-five years of age; by mutual consent, or at the discretion of the company, this may be extended or fore-shortened.

The length of notice required to be given by either side, in the event of termination or resignation, is clearly laid down in your letter of engagement."

In my opinion this clause makes a clear distinction between "retirement" and "termination". The heading itself makes that distinction. Also whilst the first part of the clause clearly deals with "retirement" at the normal age, or at an extended age or a foreshortened age by mutual consent or at the discretion of the company, the second part of the clause clearly deals with length of notice for "termination" or "resignation" which is laid down in the letter of engagement. In this connection it will be recalled that the appellant's letter of engagement (Ex. 'A') provided in para. 3 there of:—

"3. That your engagement is subject to termination at any time by one calendar month's prior notice in writing on either side……."

[p.17]

In my opinion therefore the clause provides firstly for retirement at the normal age of fifty-five years or at an earlier or later age by mutual consent or at the discretion of the company, and secondly for termination or resignation at any time before retirement by either party giving one month's prior notice. In my (s.i.c) judgment therefore "retirement and termination" do not mean one.

and the same thing under Clause 2.13 of the Executive Staff Handbook I shall now proceed to consider the next issue, which is whether the appellant was properly retired in accordance with his contract of employment. As stated earlier the company exercised its discretion under Clause 2.13 of the Executive Staff Handbook to retire the appellant before attaining the normal retiring age of 55 years. So the question that arises is whether the company properly exercised its undoubted discretion conferred on it by Clause 2.13. I think that it is necessary to point out at the outset that no period of notice of retirement is expressly provided for in the Clause. The second part of the Clause refers to the length of notice required for termination or resignation which according to the appellant's letter of engagement (Ex. 'A') is one calendar month's notice. That length of notice (i.e. one month's is applicable to termination or resignation. There is no indication in the Clause or in any other part of the Contract of Employment that it is applicable to retirement. What then is the position? Is the company entitled to exercise its discretion to foreshorten the normal retiring age of an employee to whom Clause 2.13 is

applicable by giving no notice at all, or by giving a day's or a week's or a month's notice? The answer to these questions is provided by the common law. It is well established at common law that where a contract makes no provision as to the time at which an act under the contract has to be performed, the court will in the absence of custom, imply a reasonable time with the object of giving business efficacy to the contract. The position was stated with much clarity by McNair J. in Martin-Baker Aircraft Co. Ltd & Anor. v. Canadian Flight Equipment LD. (1955) 2 Q.B. 556, and I cannot do better than recall his words. He said inter alia at pp. 577-578:

[p.18]

"The common law, in applying the law merchant to commercial transactions, has always proceeded more on the basis of reasonableness in filling up the gap in a contract which the parties have made on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which has subsequently found their place in the great codifying statutes of the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, and the Bills of Exchange Act, 1882, where this view of the law merchant has been adopted and provision has been inserted to the effect that where the contract makes no provision for either fixing price or premium or time at which an act has to be performed, then the law is that a reasonable price and reasonable premium or reasonable time will be imported. It is, of course true that this kind of consideration can in many cases be excluded by express provision, but where the contract leave the matter open, I think that the common Law approach would be to provide a solution which is reasonable. At the same time, of course, I hope I bear in mind that it is not the function of the court to make a reasonable contract between the parties; and in so far as the matter is one of implying terms one can only imply terms which are necessary to give business efficacy to the contract."

And he continued at p.582:—

"But if an agreement of this nature has to be looked at as a whole, and the whole of its contents considered …….

It seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where admittedly the agreement is terminable not summarily — except in the event of misconduct but by reasonable notice."

[p.19]

Similar principles of reasonableness apply to various types of contracts where no express provision is made in the contract and where no custom is applicable. Examples of such contracts are Sale of Goods, Landlord and Tenant, Licensor and Licensee and Master and Servant. Thus in the absence of express stipulation or custom, a tenancy from year to year is determinable by reasonable notice, which has been established by a long line of authorities to be half a year's notice. Also a contract between a Licensor and Licensee is, in the absence of express stipulation determinable by reasonable notice. See Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd. (1948) A.C. 173 H.L. Similarly in a contract of Employment where there is no express stipulation as to determination, and no custom is applicable and

where no question of summary dismissal arises, the contract can only be determined by reasonable notice. The principle, as it applies to Contracts of Employment, is stated thus in "The Modern Law of Employment" by Fridman at pp.468-469:—

"where no express term has been agreed upon for the duration of the contract, and where no implication can be made of a yearly hiring, either by inference from the circumstances or by applying the presumption as to yearly hiring; the contract will be one for an indefinite hiring. In the absence of any express terms as to termination, and apart from misconduct, the general principle applicable to such contracts of employment is that the engagement can only be terminated after reasonable notice. It is in fact an implied term of such a contract that reasonable notice will be given; and to exclude this term, clear, express Language must be used by the parties. Thus a statement that the contract is terminable "at the option" of the employer will not exclude the implied term as to reasonable notice."

[p.20]

In my opinion the same principle is applicable whether the determination of the employment is by termination, resignation, dismissal or retirement. In all such cases, the determination must, in the absence of express stipulation. Custom or misconduct be by giving reasonable notice.

The next question is whether the fact that clause 2.13 conferred a discretion on the company makes any difference. The clause must be construed in order to determine the limits of the company's discretion. According to the wording of the clause, retirement may take effect either firstly by attaining the normal retiring age of 55 years, or secondly the normal retiring age may be extended or foreshortened or thirdly at the discretion of the company the normal retiring age may be extended or foreshortened. So the parties may by mutual consent agree to foreshorten the retiring age at any time before the employee attains the age of 55 years. Similarly in the Case of retirement at the discretion of the company, the company may decide to foreshorten the retiring age at any time before the employee attains the age of 55 years. In my opinion therefore the discretion conferred on the company by the clause relates to and is limited to the timing of the exercise of the discretion to retire; it has nothing to do, with the company's obligation to give notice of retirement or with the length of notice to be given. Therefore at whatever time the company decides to exercise its discretion before the employee attains the normal retiring age, the company is obliged to give reasonable notice to the employee. I derive support for this view[sic] from the opinion of the English Court of King Bench Division consisting of Lord Alverstone C.J., Bucknill and Bray JJ. given in a special case stated by arbitrators in African Association (Limited) v. Allen (1910) 1 K.B. 396; 26 T.L.R. 234. The facts of that case were that by an agreement between a trading firm and Allen the latter was to serve the former on the West Coast of Africa as a clerk and trade assistant. Clause 2 of the agreement [p.21] provided as follows:— "The said [assistant] shall, as and from the date of leaving Liverpool for Africa become and, subject as hereinafter provided, continue for two years, or until the date of his leaving Africa, in the service and employment of the said employers as clerk and trade assistant for them …… provide always, however, that the employers may at their absolute discretion, terminate this engagement at any earlier date than specified if they may desire to do so" [Emphasis mine]. Clause was as follows:— "Should the assistant fail to give satisfaction to the employers, or to their agent or other representative …… and of such failure the said agent or other

representative of the employers shall be the sole judge; or should the assistant absent himself from any duties, or barter or trade in any manner whatever except on the employer's account, and in any such case, the said agent or other representative may summarily dismiss" the employee. It was held that in the absence of misconduct on the part of A1 the employers were not entitled under the proviso to Clause 2 of the agreement to terminate his engagement without giving him reasonable notice.

The report of the case in the Times Law Reports is brief, a[sic] it will be useful to quote from the opinions reported to have been expressed by the Lord Chief Justice and Mr. Justice Bray. The Learned Chief Justice is reported to have said inter alia at 26 T.L.R. p. 235:—

"The only general principle applicable was that, in the absence of misconduct or grounds mentioned in the agreement, dismissal must be subject to notice. As to the particular case, it appeared that Allen, a few months after going to Africa, for some cause not explained, received instructions to go home and that when he came home he was summarily dismissed. Had the employers that right under the agreement? ……. but the question was whether the words at the end of Clause 2, "The employers may at any time hereafter, at their absolute discretion, [p.22] terminate this engagement at any earlier date than specified if they may desire to do so," gave the employers the right to dismiss Allen summarily. Under that Clause, his lordship considered that the employers had an absolute discretion to fix an earlier date fore the termination of the agreement than the two years; but the Clause did not say, nor in his opinion did it imply, that the employers had an absolute discretion to dismiss Allen at any time without giving him reasonable notice. The proviso to Clause 2 was not inconsistent with Allen's having reasonable notice before the termination of his employment."

The brief report of Mr. Justice Bray's opinion is at pp.235-236.

It reads inter alia:—

"In the absence of misconduct, prima facie there was no right to terminate the employment except by giving of reasonable notice, unless there were words in the agreement showing a contrary intention. The proviso to Clause 2, as it seemed to him gave the employers a right to terminate the agreement, before the expiration of two years, in the ordinary way, viz. by giving reasonable notice. In the view there was nothing in the agreement to negative the usual implied rule that the service could not be terminated in the absence of misconduct, except by notice."

What then is reasonable notice? In determining that question, regard must be had to the circumstances of the case. What then are the circumstances of this case? The appellant was at the time of his retirement aged 47 years. He was a highly qualified engineer being a member of the Institute of Mechanical Engineers, member of the Institute of Marine Engineers, follow of the Institute of Petroleum, graduate member of the Institute of Civil Engineers and graduate member of the Institute of Production Engineers, all the Institutes being professional bodies or Great Britain. At the material time he was the Operations Manager earning a basic salary of Le10,192 per annum. According to the company's hierarahy the posts of Accountant, Marketing Manager and [p.23] Operations Manager were on the same level and ranked immediately below the General Manager. The General Manager himself admitted in evidence that it was because of the appellant's seniority that he could not fit into the new

structure. In my opinion, having regard to all the circumstances, a period of six months would constitute reasonable notice. In my judgment therefore the appellant was entitled to six months notice and the Company was in breach of contract in failing to give him reasonable notice of retirement. It follows that in my judgment the Court of Appeal was wrong in holding that there was no difference between termination and retirement under the Contract and that one month's notice of retirement was sufficient.

Learned counsel for the appellant submitted before us that the breach of the contract of employment by the Company entitled the appellant to be paid, by way of damages, salary up to the normal retiring age of 55 years. That argument found favour with the learned trial judge and as indicated earlier he awarded damages on that basis. The question then arises: was the appellant entitled under his Contract of Employment to be employed by the Company until he attained the age of 55 years? It is necessary to revert to the terms of the contract. According to the terms of the Contract, the contract was determinable at any time before the appellant attained the age of 55, by one calendar month's notice of termination or resignation, or by mutual consent to retire or by the Company exercising its discretion to retire the appellant by giving him reasonable notice. It is quite clear therefore that the appellant was not entitled to be employed by the Company until he attained the normal retiring age of 55. The Company was entitled to determine the contract at any time by notice of termination, or by foreshortening the normal retiring age by mutual consent or by the exercise of its discretion under the contract. And the fact that the employment was referred to as pensionable and that he was a confirmed officer does not affect the position. This view is supported by Ward v. Barclay Perkins Co, Ltd. (1939) 1 All E.R. 287. In that case the plaintiff was [p.24] employed by the defendant company, who had established a staff endowment and pension scheme, to which the plaintiff had contributed for several years on the footing that he was a staff employee. The rules of the scheme indicated a distinction between employees in temporary or other employment and employees on the staff. "Staff employee" was defined as meaning every male employee on the permanent staff.” The defendants gave the plaintiff 3 months notice to leave, as it appeared that there was no scope for advancement for him. No reflection of any sort was made upon his character — like in the instant case. The plaintiff contended that there was an implied contract that, if he came into the pension scheme, he became a member of the permanent staff, and that he thereby became, subject to such considerations as health, good conduct and the continuance of the company's business, entitled to permanent employment and could not be given ordinary notice until he attained the age of 65, and obtained the full benefit of his contributions. It was held that such a stipulation could not be implied in a contract unless, on the evidence, it was shown to have been mutually intended, and necessary to give business efficacy to the document and the plaintiff's action accordingly failed. In this connection, it is also pertinent to recall the words of Lord Goddard in McClelland v. Northern Ireland General Health Services Board (1957) 1 V.L.R. 594 H.L. He said inter alia at p.601:—

"That an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is, that a person employed would be on the general staff with an expectation that apart from misconduct or inability to perform the general duties of his office the employment would

continue for an indefinite period. But apart from a special condition, in my opinion, a general employment is always liable to be determined by reasonable notice. [p.25] Nor do I think that because a person is offered pensionable employment the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension."

Learned counsel for the appellant also argued that the appellant was also entitled to be paid his pensionable emoluments under the Pension Scheme. But Learned counsel himself conceded before us that according to the evidence the appellant had agreed to opt out of the Pension Scheme in December, 1975 and that he had been paid all his entitlements under that scheme between December, 1975 and April, 1976. There is therefore no merit in the claim for pensionable emoluments. With regard to the third relief indorsed on the Writ, claiming damages for wrongly inducing the plaintiff by false representation etc. etc., quite apart from the objectionable and scandalous language in which that claim is couched; it lacks any merit in law or substance.

In my judgment all that the appellant is entitled to is damages for breach of contract in that the Company failed to give him reasonable notice of retirement. It is well established that the measure of general damages in cases of this nature is the wages or salary for the period of the notice. I have already held that the length of reasonable notice in the circumstances of this case is six months. Therefore I would award the appellant six months salary as general damages. According to the evidence the appellant's basic annual salary in December, 1976 was Le10,192. I would therefore award him Le5,096 as general damages.

The appellant also claimed 15 per cent of his basic salary as rent allowance. He would have been entitled to be paid his rent allowance during the period of the notice of retirement. Therefore he is entitled to rent allowance for six months as special damages. That is, 15 per cent of 6 months salary (i.e: Le5,096) which amounts to Le764.40.

[p.26]

In the result I would allow the appeal, set aside the judgment and orders of the High Court and those of the Court of Appeal and award the appellant Le5,096 as General Damages and Le764.40 as Special Damages for breach of contract. I would award the costs in this Court as well as the costs in the Courts below to the appellant.

(Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J, Presiding

I agree……. (Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C.

I agree……. (Sgd.) Hon. Mr. Justice S. Beccles Davies, J.S.C

TEJAN, J.S.C.:

The Appellant is a Chartered Engineer. He has a first degree in Engineering (B.Sc.) London; he is a member of the Institute of Mechanical Engineers and also a member of the Institute of Marine Engineers. He is a Fellow of the Institute of Petroleum, graduate member of the Institute of Production

Engineers from Universities and Professional Bodies of Great Britain. While he was in Britain, he worked for the British Rails as a graduate engineer when he accepted an appointment in London to work for British Petroleum.

His letter of appointment dated the 7th day of December, 1964 and which is Exhibit "A" contains his conditions of service which conditions the appellant accepted. Paragraph:3 of Exhibit “A” states "that your engagement is subject to termination at any time by one calendar month's notice in writing on either side, and that the Company's liability for salary will cease on the date your engagement terminates", Exhibit "B" a letter also dated 7th December, 1964 spells out, among other things, the benefits to which the appellant would be entitled. Paragraph 3 of Ex. "B" states that "The Pension Fund is non-contributory and applies to Executive staff only. If a member reaches pensionable age (55) and has completed 15 years Company. Service his annual [p.27] pension will be calculated out at 1/80th of his earnings over his

last year of employment multiplied by his years of service."

After various conversations and correspondents between the appellant and the General Manager the appellant was retired from service with effect from the 31st day of December, 1976 by letter which is exhibit "E" and reads as followings:—

"Dear Mr. Vincent,

We would refer to our various conversation (Vincent/Callander) on the 29th and 30th December, 1976. We would now formally advise you of the company's decision to exercise its discretion to retire you effective 31st December, 1976 in accordance with paragraph 2.13 of the Executive Staff Handbook. The following entitlements are due to you and we would be obliged if you could call on the undersigned as soon as possible to finalise the matter:—

(1) One month’s salary in lieu of notice Le 976.73

(2) Outstanding leave balance/ 1,327.00

(3) Provident Fund 14,023.06

(4) End of Service Benefit 3,136.00

(5) Ex Gratia Retiral Gratuity 3,000.00

Le.22,462.00

Note:— Income Tax to be deducted at source where applicable.

Finally we would like to thank you for your service on the years and wish you every success in the future.

Yours sincerely,

N. Callander

General Manager."

The appellant then consulted a solicitor Mr. Hodson Harding. Various letters were written by Mr. Hodson Harding and Dr. W.S. Marcus-Jones who was the solicitor for the Respondents.

[p.28]

Both solicitors kept in constant touch with their respective clients, and on the 17th February, 1977, Mr. Hodson Harding wrote a letter which is Exhibit "L" to the appellant requesting him, among other things to collect all his documents and to consult another solicitor.

A writ of summons dated 21st day of February, 1977 was issued by Mr. T.S. Johnson, Solicitor and Counsel for the appellant claiming damages for the following:—

(1) Breach of the Plaintiff's contract of employment.

(2) Damages for wrongful dismissal of the Plaintiff from the defendants employment.

(3) Damages for wrongly inducing the Plaintiff by false representation and by the unconscientious use of power and authority, to yield to the Defendant's discriminatory and unlawful design to, deny the Plaintiff his right of participation in the Defendant's Executive Staff non-contributory Pension scheme preparatory to the Defendant's secret plan to dismiss him unlawfully from its employment."

From the lengthy statement of claim accompanying the writ of summons, para. 16 states:—

"By reason of the above, the Plaintiff has been greatly injured. Particulars of damage:—

Loss of eight years salary to retirement at the pensionable age of 55 years (calculated to take into account reasonable expectation of appointment to the office of General Manager) Le.114,980.00 — lump sum compensation in lieu of pensionable emoluments (Twenty years at Le.3,000.00 per annum) 60,000.00

Total Le.174,980.00

Plus 15% of Le114, 980 i.e.

rent allowance Le. 17.247.00

wherefore the Plaintiff claims as

[p.29]

The appellant who was 35 year of age when he joined the respondents Company testified as to his periodic rise in salaries up to the time he was designated operations Sales Engineer and also as to the other benefits he was receiving. Sometime in November, 1975, the appellant had been approached by the Accountant who was at the time acting as General Manager about the appellant's employment with the Respondent, and in respect of the non-contributory staff pension scheme. The Accountant told the

appellant to go and think about it. There were two Sierra Leoneans in the scheme, when the Company was been B.P. (West Africa) Ltd. During the same month in November, 1975, the substantive, general Manager returned. He also spoke to the appellant about the scheme and asked whether he had thought about it. The Manager said that he would not operate the scheme for the appellant alone. Various conversations took place between the appellant and the General Manager about the scheme. The appellant felt that he was pressurized to such an extent that he might run into difficulty. He then asked the General Manager what was meant by the scheme. The General Manager explained that the scheme was worth Le.18,000.0. This discussion took place in December, l975. The appellant agreed to opt out and to accept payment by instalments. In December, 1975, the General Manager paid the appellant the first installment of the sum of Le.5,000.00.

On 31st March, 1976 the appellant was informed that a local Company known as B.P. (Sierra Leone) Ltd. had been incorporated in Sierra Leone. He tendered a letter which is Exhibit "C" to this effect. The letter informed the appellant about the change of name of the Company.

The appellant received another sum of Le.5,000.00 during the early part of April 1976 in connection with the non-contributory staff pension scheme, and he was then requested to sign a document. The appellant enquired about the balance of Le.8,000.00 and he was told that the amount would go towards income tax on the transaction. The appellant made enquiry at the Income Tax [p.30] Department when he was no longer in the employ of the respondents and he was told that no amount had been paid. This was in January, 1976.

On the 29th December, 1976 the appellant was called into the office of the General Manager he told him that the Company was being restructured and as a result he would not fit into the new structure. When the appellant asked the General Manager what he meant, he was told that he could either be made redundant or he could resign, there being no alternative. He was told to go and think about it and to let the General Manager know what he had decided. According to his testimony, the appellant said that the General Manager later told him that because of the appellant's high qualification and seniority, he would not fit into the new structure. The appellant then wrote a letter to the General Manager on the 29th December, 1976. He did not receive a reply to the letter but he and the General Manager discussed the contents of the letter. It was during the discussion, the General Manager told him that the fact that he would not fit into the new structure had nothing to do with his efficiency but it was because of his high qualification and seniority. The General Manager told him that if he was made redundant or retired by the Company he would receive Le.15,000.00 as benefits but if he resigned, he would receive the sum of Le.8,000.00 in addition to the sum of Le.17,000.00. At this stage, the appellant suggested going on leave so as to give him time to consider the matter but the General Manager refused to grant him leave, and gave the appellant up to the next day to have his decision as the matter was urgent. On 30th day of December, 1976 the appellant wrote another letter the General Manager for a confirmation of the monetary discussion they had had the previous day. This Letter was handed to the General Manager on the 31st day of December, 1976. On the morning of the same day, the General Manager telephoned the appellant and assured him that he was a man of his word but the amount was increased to Le.10,000.00. The letter the appellant wrote to the General Manager is Exhibit "D" and reads thus:—

[p.31]

"Dear Mr. Callander.

1. I refer to my interview with you yesterday Wednesday the 29th instant.

2. You will recall you told me that in view of the proposed re-organisation of the Company, I might not easily fit in the new setup, because of my high qualification. You advised me that there are two choices open to me. One is for the Company to make me redundant, in which case my benefits will be about Le.17,000.00. The other cause is for me to resign, in which case you told me that in addition to the Le.17,000.00, I will further be paid the sum of Le.8,000.00.

3. I should be grateful if you kindly confirm that the benefits to be paid me in the case of redundancy or resignation as stated by you at our interview. This will enable me to come to a decision.

4. I look forward to hearing from you soon.

Yours faithfully,

(Sgd.) T.O. Vincent.

c.c. J.C. Eastwood, Esq.,

Managing Director,

B.P. Ghana Limited,

P.O. Box 553

Accra, Ghana."

Three hours later, the appellant received a letter dated 31st 1976, which was a retirement letter. This letter is Exhibit "E" and is in the following terms:—

"Dear Mr. Vincent,

We would refer to our various conversation (Vincent/Callander) on 29th and 30th December, 1976. We would now formally advise you of the Company's decision to exercise its discretion to retire you effective 31st December, 1976 in accordance with Paragraph 2.13 of the executive Staff Handbook. The following entitlements are due to you and we would be obliged if you could call on the undersigned as soon as possible to finalise the matter:

[p.32]

(1) One month's salary in lieu of notice	Le. 976.73
(2) Outstanding leave balance/leave allowance	1327.00

(3) Provident Fund	14023.06
(4) End of Service Benefit	3136.00
(5) Ex Gratia Retiral Gratuity	3000.00
22,462.79	

Note:— Income Tax to be deducted at source where applicable.

Finally we would like to thank you for your service over the years and wish you every success in the future.

Yours sincerely,

N. Callander

General Manager.

The appellant testified that since he left the respondents Company he had not been able to obtain alternative employment although he had been making efforts to get one.

The appellant was familiar with Exhibit "F" and he agreed that the respondents' Company had all rights to retire employees before they attained the age of 55 years as embodied in clause 2 sub clause 13 of Exhibit "F", but he did not regard Exhibit "F" to include him as he joined the Company in February, 1965 and that Exhibit "F" pertained to people who joined the service after January, 1972, although he received allowances as stated in Exhibit "F" because they were better conditions. He said — "it is correct the Company has tendered to me one month's salary in lieu of notice in accordance with my conditions of service but I have not collected it."

There were several meetings between Hr. Callander, the General Manager and the appellant over the pension scheme, and according to Mr. Callander the appellant agreed for the purchase of his pension without any duress or pressure when he signified his signature on Exhibit "M" after a letter dated 25th November, 1975 had been addressed to him. Mr. Callander told the appellant, [p.33] that Mr. Eastwood and himself had decided that the Company's organisation must be changed as it was not proving completely effective or cost conscious enough, and much that he regretted that there was no position for a person like the appellant because of his seniority in the new organization, the Company was faced with the choice of either declaring him redundant requesting his resignation or his retirement. Mr. Callander even explained to the appellant the financial implications that would be evolved. The appellant expressed surprise and regret and asked for some time over the matter. He was then asked to give his decision on the 30th December, 1976 which he failed to do.

At lunch time on the 29th December, 1976 the appellant went to see Mr. Callander and expressed his surprise that he should be retired after eleven years service when he had not faulted on his job performance. Further explanations were given to the appellant and he undertook to give his decision on the 30th day of December, 1976. The next day, the appellant did return to work although the General

Manager had recovered a medical certificate giving him four days excuse duty. On the afternoon of the 30th December 1976, the General Manager telephoned the appellant who asked the General Manager to write to him on the financial details being offered. The General Manager offered to give him the details over the telephone which he did. Matters of Tax position were also discussed over the telephone. The appellant then promised to let the General Manager have his answer by 4.30 p.m. on 30th December, 1976. When no answer was received, a letter of retirement was issued to him on 31st day of December, 1976.

Counsel then addressed the Court and made submission in support of their respective clients, backed by authorities.

On the 25th day of September, 1979, Williams J. delivered judgment in the case. The learned Judge considered carefully the arguments presented by both counsel and went over the evidence of the appellants and respondents.

[p.34]

The learned Judge said that—

"…… it behoved the Defendant/Company then to show to this Court that it acted lawfully in the exercise of its discretion as contained in paragraph 2.13 of the Handbook.

The only way to do so was to adduce evidence that a decision to exercise the discretion was taken by the Board of Directors at a Board Meeting duly convened for that purpose. It must be emphasized that the Defendant/Company is a corporate body, which by law must be controlled by a Board of Directors. Without doubt such a major decision must, of necessity come from the Board. There is no evidence that such was taken and approved of by the Board of Directors of the Defendant/Company, to exercise its discretion under regulation 2.13 of the Handbook to retire prematurely a very high rated Executive like the Plaintiff.

…… in justifying their action, the Defendant/Company must show firstly, that a decision was taken according to law. Secondly, the Defendant/Company must show that acting on their behalf, there was proper delegation of power to Callander to implement such decision. As a Company law, they can only do so by producing evidence that such a decision was taken at a Board meeting. There is no such evidence and I dare say that the swiftness with which the whole matter was mentioned, left no room to bring any Board decision ……. Rather, Mr. Callander acting on behalf of the Defendant/Company frantically telephoned the plaintiff on the 30th December, 1976 even though the plaintiff was to his knowledge, ill and in bed. He was there and then pressing for the resignation of the plaintiff. When that was not forth-coming, Mr. Callander acting on behalf of the Defendant/Company issued a letter of premature retirement to the plaintiff ……. why did Mr. Callander act with such indecent haste? …….. There is no evidence that the Defendant/Company ever rectified the apparently unilateral action of their Managing Director or General Manager ……"

[p.35]

The learned trial Judge then highlighted the various unique and remarkable qualifications of the appellant and said—

"With the employment situation in Sierra Leone it is not surprising that the plaintiff has found it difficult to obtain employment according to his qualifications and status."

The learned Judge made references to several authorities to justify his conclusion of the case.

At the end the learned Judge gave judgment for the appellant in the sum of Le.90,955.10 and costs to be taxed. In the course of delivering the judgment, the learned Judge said:—

"The Plaintiff has remained unemployed since 31st December, 1976 the date on which he was wrongfully retired prematurely. In spite of his efforts he has been unable to secure alternative employment.

Having regard to the scope of employment for the plaintiff which is very narrow in Sierra Leone, the imbalanced probability that he would be able to obtain alternative employment within the next five years or so and up to the time when he would have been due for normal retirement cannot be emphasized. I think therefore that having regard to all the circumstances of this case and the scarce possibility of the plaintiff obtaining employment in Sierra Leone in the near future, I will award him damages assessed at eight years salary less an amount for contingencies of life. Calculated on the basis of Le.976.73 per month, the amount of damages would total Le93,766.08. I allow reduction by Le.2,812.98 leaving a net balance of Le.90,955.10. The other claims of the plaintiff are disallowed.

The Plaintiff will have judgment in this case in the sum of Le.90,955.10 and the cost of those proceedings, such costs to be taxed."

It is against that judgment, the respondents appealed to the Court of Appeal on the following grounds:—

[p.36]

(a) That the learned trial Judge was wrong in law

(i) In holding that the Managing Director of the Appellant/Company acted without authority of the Board of Directors.

(ii) In finding that evidence of a decision of the Board with respect to the retirement of the Plaintiff, was essential for proving the fact of his retirement.

(b) That the learned trial Judge was wrong in law in awarding damages to the Plaintiff and in the event acted on wrong principles of law.

(c) That the decision is against the weight of the evidence. There is also a cross-appeal by the appellant. His grounds of appeal are:—

(1) There being no evidence of any mutuality between the plaintiff and the defendant with regard to Exhibit "F" the defendant's executive Handbook — the learned trial Judge erred in law in holding that the defendant without the consent of the plaintiff, had a discretion to retire the plaintiff prematurely in accordance with the said Exhibit "F" and in breach of his contract of employment.

(2) The learned trial Judge reed in law in disallowing the plaintiff's claim of Le.60,000.00 being lump sum compensation claimed in lieu of pensionable emoluments lost arising out of the defendant's proven breach of the plaintiff's contract of employment.

The appeal and cross-appeal were heard before During, Cole and Turay JJA. on the 5th day of March 1981 and subsequent days.

In the Court of Appeal, During J A. who delivered the judgment of the Court agreed, with the learned trial Judge that paragraph 3 of the statement of claim failed having regard to the evidence"

[p.37]

The learned Justice then said:—

"What this Court has to consider is was there a breach of Contract of Employment which would amount in law to wrongful dismissal? The Court must bear in mind that a claim for wrongful dismissal is a claim for breach of contract and not a claim in tort and that it ought not to apply on the question of damages the same principles it would apply in a claim in tort in a claim for breach of contract.

After fully reviewing the evidence and discussing arguments presented by both Counsel, both Counsel agreed with the learned trial Judge that the respondents by virtue of Exhibit "F" had the right to retire the appellant at their discretion, and that Exhibit "F" was binding on the appellant. The learned Justice went on to deal with the facts of the case and the laws pertaining to those facts, and, in the end said:—

"We set aside the judgment in the Court below and order that all amounts paid by the appellants to the respondent be repaid under the judgment. We order that the respondent pay the costs of the appellants in the Court below such costs to be taxed. We allow the appeal of the appellants with costs such costs to be taxed and disallow the cross appeal of the respondents with costs to the appellants to be taxed."

Being aggrieved with the judgment of the Court of Appeal, the appellant has now appealed to this Court His grounds of appeal are:—

“(1) The appellant herein having cross-appealed to the Court of Appeal on the following ground, to wit — There being no evidence of mutuality between the plaintiff and the defendant with regard to Exhibit “F” — the defendants Executive Handbook — the learned Judge erred in law in holding that the defendant, without the consent of the plaintiff, had a discretion to retire the plaintiff prematurely in accordance with [p.38] the said Exhibit "F", the Court of Appeal erred in law in holding that the said Exhibit "F" was binding on the parties on the ground of mutuality, formed part of the contract of employment, and in dismissing the cross appeal despite the defendant's evidence to the contrary.

(2) The Court of Appeal erred in law in failing to distinguish between and in equating, Termination under the plaintiff's contract of employment — Exhibits A and B with premature retirement under Exhibit "F", and in doing so wrongly ignored the evidence of the Defendant — the author of the said Exhibits A and B and F — admitting such a clear distinction between the said terms.

(3) The Court of Appeal erred in law in holding that the appellant's employment was terminated under the contract of employment and erred in law in discountenancing both the Respondent's is pleading on the point and its evidence in support thereof.

(4) The Respondent not having appealed to the Court of Appeal against the damages awarded by the High Court, or against its quantum, and the question of damages not having been canvassed during the hearing of the said appeal, the Court of Appeal erred in law in adjudicating on the question of damages and in holding that one month's salary was the proper measure of damages under the contract of employment."

It has been argued before this court that the Appellant was not retired in accordance with his terms of contract which is Exhibit A and B but was retired by virtue of Exhibit "F" which the appellant said was not applicable to him because when he was employed Exhibit "F" was not in existence.

I am unable to follow such argument. The appellant was employed in 1965, and while he was still in the employment of the respondent's company, Exhibit "F" came into existence and he even derived benefit under Exhibit "F" a Handbook dealing with the [p.39] general conditions and instructions of the respondent. Exhibit "F" specifically states that an employee could be prematurely retired

It does not stop at this but it also states that an employee who

wanted any provision to be fully explained, was at liberty to apply for such explanations. It is important to note that Exhibit "F" came in existence in 1972, and since that time, the appellant had no quarrel with any of its provisions until when, one of the provisions was invoked to his detriment. However, there has been a concurrent finding that Exhibit "F" binds the appellant, and reading carefully the case of SRIMATI BIBHABATI DEVI v KUMA RAMANDRANARAYAN ROY (1946) A.C. 508 relating to concurrent findings of fact many prepositions were laid down, and in the present case, there are no special circumstances to warrant a departure from them. In the case of AGIP (SIERRA LEONE) LTD. V ABASS ALI EDMASK (By His Attorney Adnan Nayef Abess Allie and the Paramount Chief of Kakua Chiefdom Council of the Kakua Chiefdom Bo District) S.C. Civ. App. No.2/71, Cole, C.J. dealt

adequately and exhaustively with the propositions laid down in Devi's case (supra) when he listed the eight propositions which described as containing good sense. He then said:—

"In the present appeal I find no special circumstances, namely, any miscarriage of justice or any violation of some principle of law or procedure nor do I consider it a Case of an unusual nature on this particular question to justify a departure from this well established practice."

The principles laid down in Devi's case were adopted in the case,"

of YACHUK AND ANOTHER v OLIVER BLAIS CO. LTD. (1949) A.C.386 and in the STOOL OF ABINABINA v CHIEF KOJO ENYIMADU (1953) A.C. 207

I have carefully read the evidence with regard to Exhibit “F” and my opinion it would be hopeless to contend that there are not sufficient evidence to support and fully substantiate the conclusion of both the learned trail judge and court of Appeal to arrive at the findings.

[p.4]

Having concluded that the appellant was bound by Exhibit “F” what was his position with regard to the Handbook which states that the normal retirement age is thirty-five years of age; by mutual consent or at the discretion of the Company this may be extended or fore-shortened. Since it appears from the discussions between the appellant and the Manager of the respondent's Company that it seemed impossible to obtain mutuality owing to the appellant's frequent delay in his replies and his sudden illness, the respondents invoked the alternative solution of retiring the appellant at their discretion.

It has been suggested that compensation should be paid to the appellant or at least reasonable notice should have' been given to him. It is a pity that this regard the appellant must have obtained legal Advice, which at best, was nebulous.

The parties in this case have contracted that either by mutual consent or at the discretion of the respondent, the appellant could be premature1y retired.

In the absence of mutual consent, the appellant was retired in accordance with the terms of the contract, at the discretion of the respondent.

The matter is well illustrated in Batt, Law of Master and Servant (5th Edition) Chapter v at page 117. It states that

"…….. the parties to a contract of service have complete liberty to make what ever terms they choose; they may make elaborate provisions about every person the contract, or example, as to wages, then and where payable, what duties are to be performed by the parties, and when and where such duties are to be performed what length of notice is to be required to terminate the contract, what are to be the rights of the parties on the illness of the employee, what are to be the rights of their representatives on the death of either of them, and so on.

The only general limitation on this freedom of contract is the general rule that the Courts will not enforce or recognise any agreement the purpose of which is deemed by law to be illegal."

[p.41]

In other words, the courts cannot imply terms in contract between parties so as to make a new contract for them. To emphasize this most important function of contractual parties:

cite REIGATE v UNION MANUFACTURING CO. (1918) q K.B.D. 592 at 60

Sorutton L.J. said:—

"The firs thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, “what will happen in such a case", they would both have replied, "of course so and so will happen, we did not trouble to say that, it is too clear". Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

Makinson, L.J. said in the case of SHIRLAW v SOUTHERN FOUNDERI

(1939) 2 All E.R. 113 at page 124:—

"I recognise that the right or duty of a Court to find the existence of an implied term or implied terms in a written Contract as a matter to be exercised with care, and a Court is too often invited to do so upon vague and uncertain grounds. Too often, also, such an invitation is backed by the citation of a sentence or two from the judgment of Bowen, L.J. in The Moorcock (1889) 14 P.D. 64.

They are sentences from an extempore judgment as sound and sensible as are all the utterances of that great judge but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favorite citation of a supposed principle of law, and I even think he might sympathise with the occasional impatience of his successors when The Moorcock (1889) (Supra) is so often flashed before them [p.42] in that guise. For my part, I think there is a test that may be at least as useful as such generalities. If I may quote from an essay, which I wrote some years ago, I then said:

"Prima facie that which is any contract is left to be implied and need not be expressed is something so obvious that it goes without saying.'"

It is stated in Chitty on contract (22nd Ed.) paragraph 599 that

" ……. in the construction of all instruments it is the duty of the Court not to confine itself to the force of the particular expressions, but to collect the intention of the parties from the whale instrument taken together, but where by the use of general words such intention is clearly and unequivocally expressed, every court is bound by it, however capricious it may be, unless it is plainly controlled by other. parts of the instrument.”

In WARDS v BARCLAY PERKINS, & CO. LTD. (1939) 1 All E.R. at page 287, the plaintiff was employed by the defendant/Company, who has established a state of endowment and pension scheme, to which the plaintiff has contributed far several years on the footing that he was a staff employee. The rules of the scheme indicated a distinction between employees in temporary or other employment and employees on the staff …… The defendants gave the plaintiff 3 months notice to leave, as it appears there was no scope for advancement for him. No reflection of any sort was made upon his character. The plaintiff

contended that there was an implied contract that, if he came into the pension Scheme, he became a member of the permanent staff, and that he thereby became, subject to such consideration as health, good conduct and the continuance of the company's business, entitled to permanent employment, and could not be given ordinary notice until he attained the age of 65, and obtain the full benefit of his contribution. It was held that "such stipulation could not be implied in a contract unless, on the evidence, it was shown to have been mutually intended, and [p.43] necessary to give business efficacy to the document" — This could not be said the present case, and the plaintiff, therefore, failed in his action. Oliver J. at page 289 said:—

"In my judgment, one has to read a great many of these rules in order to see whether or not the stipulation is to be implied — in other words, whether or not it is consistent with other passage in the rules. It must be borne in mind, indeed, it is conceded that no stipulation ought to be implied in a contract unless upon the evidence it must be taken to have been mutually intended, and necessary to give business efficacy to the document, which I think, is the expression as quoted in the Moorcock (1889) 14 P.D. 64, and is the one usually adopted …… "

McNair J. in the case of MARTIN BAKER CO. LTD. v CANADIAN FLIGHT EQUIPMENT LTD: SAME v MURBISON (1955) 2 Q.B. 577 at page 733 said:—

"The common law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties have made, on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently found their way in the great codyfying statutes of the Sales of Goods Act, 1873, The Marine Insurance Act; 1906, and the Bills of Exchange Act, 1882, where this view of the law merchant has been adopted and a provision has been inserted to the effect that where the contract makes no provision for fixing either the price, premium or time, at which an act has to be performed, then the law is that a reasonable price or reasonable premium, or reasonable time, will be implied …….. but, where the contract leaves the matter open, I think that the common law approach could be to provide a solution [p.44] which is reasonable. At the same time I bear in mind that it is not the function of the Court to make a reasonable contract between the parties, and, in so far as the matter is one of implying terms, one can only imply terms which are reasonable to give business efficacy to the contract …….. "

In the case of LLANELLY RY & DOCK CO. v LONDON & NORTH WEST [sic] RY CO. (1873) 8 Ch. App. at page 949, James L.J. said:—

"I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon the person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but to be in some way or other subject to determination. No doubt there are great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed

in various modes all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended determinable……."

This passage in the judgment of James L.J. was echoed by Lord Selborne in his speech when the case went before the House of Lords at page 550, L.R. 7 H.L. (1875).

In the case of READ v ASTORIA GARAGE (STREATHAM) LTD. (1932) 2 All E.R. at page 292, a private company incorporated in 1932,adopted as its articles Table "A" of the Companies Act, 1929, art. 68 of which provides:

"The directors shall from time to time appoint one or more of their body to the office of Managing Director …… for such term and for such remuneration ……. as they may think fit, and a director so appointed shall not, while holding that office be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if cease from any cause to be a director; or if the Company in general meeting resolve that his tenure of office of managing director ……. be determined."

In January, 1932, at the first meeting of directors of the company it was resolved that the plaintiff "be and he is hereby appointed managing director of the Company at a salary of £7 pen week as from Monday February 1, 1932." At a later date the salary was increased. At a meeting of the directors on May 11, 1949, it was resolved that the plaintiff's "employment be terminated", and the secretary was instructed to send him a month's notice, but the Company paid his salary until, on September 28, 1949, an extraordinary meeting of the Company was held at which a resolution approving the action of the directors in removing him from his office was passed. In an action by the plaintiff claiming, inter alia, damages for wrongful dismissal and breach of contract on the ground that, he had not been given reasonable notice. It was held that:—

"……since the resolution of the directors appointing the plaintiff as managing director contained no special terms beyond the fixing of his remuneration and neither amplified nor was inconsistent with the provisions of art. 68, the plaintiff was appointed managing director on the terms of art 68, with such tenure of office as was provided for by that article; in the absence of any contract between the parties independent of art. 68 and the resolution there was no ground for implying a term as to reasonable notice; and therefore, the plaintiff had no special right to receive any particular notice of termination of his employment when the Company decided to determine it and did so by resolution in general meeting."

[p.46]

The above authorities cited, have the same common features and these are—

(1) that no stipulation or term Can be implied in a contract, unless, upon the evidence, it must be taken to have been mutually intended, and necessary to give business efficacy to the contract;

(2) that it is not the function of the Court to make a reasonable contract between parties, and in so far as the matter is one of implying terms, one can only imply terms which are reasonable to give business efficacy to the contract;

(3) that the party who says that the contract is revocable must show either some expression in the contract itself or something in the nature of contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but to be in some way or other subject to determination and

(4) where the contract contains no special terms beyond what the parties have agreed upon, and neither amplified nor was inconsistent with the provisions in the contract, there could be no ground for implying a term as to reasonable notice, the plaintiff would have no special right to receive any particular notice of termination of his employment.

In the present case before this Court, the parties have express in Exhibits A, B and F exactly what they wanted. They have agreed to give a month's notice by either side in case of termination or resignation. In Exhibit F which came into operation in 1972, the parties also agreed that the normal retiring age should be fifty five years of age but "by mutual consent or at the discretion of the Company this may be extended or foreshortened." The parties also agreed that any clarification in Exhibit “F” if necessary, [p.47] could be suggested or discussed with the General Manager. There was no evidence that any request for clarification was ever made by the appellant.

It is clear what "the parties have expressed in the contract, and in such a case, the court cannot imply a term because the court thinks it would have been reasonable to have inserted it in the contract. The appellant insisted that exhibit "F” which had been in existence since 1972 and from which he benefited — benefit which he did not refuse, that he was not bound by it. I do not agree with him. There is provision in Exhibit "A" for termination by one Calender month's notice on either side, but in the absence of notice, a month's salary in lieu will suffice. A month's salary was offered to the Appellant who refused to accept the off because he believed that he was wrongfully dismissed. All the entitlements were paid into Court including end of service benefit to which he was not legally entitled.

Mr. Johnson, Counsel for the appellant strenuously argued that Exhibit "F" was not binding on the appellant, but the contrary arguments derived its chief strength from the fact that the appellant knew of the existence of Exhibit "F", since 1972. The appellant received benefits under Exhibit "F". He knew of the rules and conditions contained in Exhibit "F". He knew that if a clarification of Exhibit "F" was necessary, he could have discussed the matter with the General Manager. Many discussions or conversations took place between the appellant and the General Manager in December, 1976, and these discussions apparently took place with[sic] the object of obtaining mutuality.

Failure to obtain mutuality, the General Manager invoked the alternative term of retirement at his discretion — discretion conferred upon him by the contractual terms to retire the appellant. Most of the authorities deal with termination of appointment but the long list of authorities which I have carefully scrutinized, some of them either by statute, bye-laws or licensing laws bears no place in the case before this court. It may be argued that the common law rules may be applied to this case by analogy, [p.48]

but even the common law has its imitations when the matter relates to ordinary contracts devoid of any regulations.

There remains, as the one live issue in this case, the question of how a discretion van be exercised.

Stroud's Judicial Dictionary (4th Ed. at page 792) states that 'Discretion', is the herb of grace that l could wish every Commissioner of sewers well stored withal. But note that “(in 23 Hen. 8 C. 5)" the word 'wisdom' is coupled with it, and the word 'good' is annexed to them both, as best showing of what pure metal they should be made of — after good, wisdom and discretion. There are several degrees of discretion: Discretion generalis, Discretio legalis, Discretio specialis.

(a) Discretio generalis is required of everyone in everything that he is to do or attempt;

(b) Legalis discretio is that which Sir E. Coke meaneath and setteth forth in Rooks and Keighley's case, and this is merely to administer justice according to the prescribed rules of the law;

(c) The third discretion is where the laws have given no certain rule …….. and herein discretion is the absolute judge of the cause, and gives the rule. (Callis 112, 113).

I may add Francis Bacon Essays “of Judicature’ Judge ought of remember that their office is jusdicare and not jus dare — to interpret the law and not to law or give law. Bacon’s words have been widely accepted in England as a classic, description of the judicial function. Judges, even when they are in truth creating law, almost invariably profess to be declaring, interpreting and applying pre-existing norms in new situations.

I have made reference to Bacon's Essays because if this Court attempts to imply terms to an unambiguous contract before us, after reading carefully the entire evidence and perusing deligently [p.49] the exhibits in this case, the court would be acting contrary to the rules of law and creating injustice. There is no doubt that the case before the Court falls within discretion generalis.

It is trite law that there is no mode of forcing a person which has discretionary power to exercise his discretion in a particular manner, and the role of the courts is limited to ensuring that discretion has been exercised according to law, see: THE KING v BISHOP (1831-1832) Vol. 2 Barnwole & Adolphus Reports page 158 at page 163. In that case, Lord Tenterden C.J. gave a very short judgment. The learned C.J. said:—

"The authority given to the registrars by this patent is to exercise the office by themselves or one of them, or by a sufficient deputy or deputies to be appointed by them, and to be approved of and allowed by the bishop'. In this case he disapproves of the appointment, and he distinctly states that he has good and sufficient reasons for so doing. It is true, he says he has made no charge, reflection, or insinuation against any person's character: but he may have reasons sufficient to determine his judgment, without feeling called upon to throw out imputations. He has, by law, the power of approving or disapproving, and we cannot call upon him to exercise it in one particular way or another."

Applying this principle in the present case it is apparent that this Court (apart from laws and regulations) cannot inquire into the exercise of the discretion of the respondents not even by any far-fetched analogy.

In the construction of all instruments it is the duty of the Court not to confine itself to the force of the particular expressions, but to collect the intentions of the parties from the whole instrument taken together, but where by the use of general words such intention is clearly and unequivocally expressed, every Court is bound by it, however capricious it may be, unless it is plainly controlled by other parts of instrument: See Chitty on Contract (22nd Ed.) paragraph 599.

The relevant principles which emerge from the use of discretion (apart from statutory, by laws or other regulations) may be broadly summarised as follows:— The authority in which a discretion is vested can be compelled to exercise that discretion but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to be matter before it.

In the appeal before this Court, there is evidence that discussions took place in December, 1976 between the appellant ------ the General Manager of the Respondents/Company with view of arriving at mutuality. The appellant, whether by design or otherwise always requested further time. Eventually, when the last of his decision was expected, he forwarded a sick report excusive him four days off work. The respondents therefore invoked the alternative and retired him on the 31st December, 1966. The respondents was not obliged in law to give any notice. The retirement could take any form either summarily or otherwise.

At the same time I must admit that terms have been inserted in contracts governed by law statute, bye-law and other regulation and even in these cases have been implied to give business efficacy to the transaction. But the contract in this appeal has left no gap — nothing left open to entitle the interference of the Court. There is no gap to fulfill, and no inserted term can give business efficacy to the contract. This filling of the gap has been severely criticised by Lord Simonds when he said "it appeal to me to be a naked usurpation of the legislative function under the disguise of interpretation. And it is less justifiable when it is guesswork with what material the legislative would, if it had discovered the gap, have filled it in. If a gap is disclose the remedy lies in an Amending act."

As I have said earlier that there is no gap in an unambiguous contract between the appellant and the respondents with regard the contract, if there has been a gap or equivocal terms in the contract, the parties could have filled" up the gap or remedied equivocal terms since 1972.

[p.51]

Upon my understanding of the evidence and the arguments presented to this Court, I would act on the footing that the appeal and cross-appeal be dismissed I set aside the judgment of the High Court and accept the judgment of the Court of Appeal. I allow costs in this Court and the Court below to the Respondents.

(Sgd.) Hon. Mr. Justice O.B.R. Tejan, JSC

AWUNOR-RENNER. J.S.C.:

This is an appeal against the decision of the Court of Appeal dated the 16th day of April, 1981. On that date the Court of Appeal allowed the appeal of B.P. (Sierra Leone Ltd. (hereinafter referred to as the respondent) and dismissed the cross-appeal of Thomas O. Vincent (hereinafter referred to as the appellant).

I need not restate the grounds of appeal nor most of the facts. It is sufficient to say that this has already been done but however for the sake of clarity in my judgment let me just narrate a few of the facts which I think are relevant.

On the 7th December, 1964 a letter Ex. A couched in the following terms was addressed to the appellant by the Group Manager Administration B.P. (West Africa) Ltd.

"Dear Sir,

With reference to your recent interview we now write of offer you an engagement as an Engineer subject to the following conditions:—

(1) That the Company will, so long as you are able to perform the duties required under your engagement pay you salary at the rate of Le.3,200 (three thousand two hundred leones) per annum monthly in arrears.

(2) The variation in salary which may 1ater at any time be made shall not constitute a new agreement but that the terms and conditions of your employment as set out here, except as to such variation shall continue in force.

[p.52]

(3) that your engagement is subject to termination at any time by one calendar months prior notice in writing on either side, and that the Company's liability for salary will cease on the date your engagement terminates.

(4) that you are regarded as undertaking a probationary period for six months

(5) that you will be eligible for four weeks leave for each completed year of service with the Company and will be required at all times to carry out to the best of your ability all proper instructions and undertakings given to you by the Company.

(6) that you will not be eligible for membership of a pension scheme or Provident Fund Scheme until you have satisfactorily completed the probationary period stipulated.

(7) that you successfully pass medical and X-Ray examinations and that reference, taken up by us are satisfactory.

The date of your engagement is to be fixed by mutual agreement if you will let us know at what date you will be able to commence. If, however you are not able to commence employment with our Company before 1st March, 1965, this offer of employment will be considered as being withdrawn. If this offer is acceptable to you will you will please sign hereunder and return this letter. A signed copy is enclosed herewith for your retention.

Yours faithfully,

B.P. (West Africa) Ltd.

N. CAMPBELL

Group Manager Administration.

"To:

The Group Administration Manager.

B.P. (West Africa) Ltd.,

P.O. Box 512

I have read the foregoing offer of employment and now confirm my acceptance of the conditions set out herein.

Date……. Signed……"

[p.53]

A further and final letter, Ex. B, offering the appellant employment in the Company was also addressed to him on the 7th December, 1964. The contents of that letter reads as follows:

"Dear Mr. Vincent,

We have been in correspondence with our Head Office in London concerning your application for employment and we are now pleased to be able to send you our Formal Letter of offer of employment. As you see, we have left the starting date open but, as in our practice in these cases have stipulated a date by which you would have to start or have our offer withdrawn.

If you accept our offer would you please complete and return to me the enclosed application for employment form. This will keep our records straight. We shall of course, wish to write to previous employers etc., so I would be grateful if you would ensure that the addresses and dates on the forms are reasonably accurate. I am afraid that we do not offer assistance in passages to West Africa and hope that you are able to make arrangements to come to Freetown yourself. As our engagement letter states, you are required to serve a period of probation of six months usually before being confirmed. You may then apply to join the Provident Fund and Pension Funds.

The Company grants a loan to buy a car after an executive completes a minimum of 3 months satisfactory employment. The loan is interest free, repayable over 36 months. When an employee uses his car for business purposes, a car mileage allowance is paid. The Company Staff Provident Fund into which the employee, if he wishes to join the scheme, contributes 10% of his salary, the Company on its part contributing a sum equal to 5%, is open to executive staff. The monies in the fund accumulate at interest and cannot be withdrawn until such time as the employee leaves the Company.

[p.54]

The Pension Fund is noncontributory and applies to executive staff only. If a member reaches pensionable age (55) and has completed 15 years Company Service his annual pension will be calculated at 1/80th of his earnings over his last year of employment multiplied by his years of service.

The Company will not provide you with a house either in Sierra Leone or in Nigeria, where you will probably do a period of temporary duty after a preliminary period in Sierra Leone. However; while you are on temporary duty outside the country of normal domicile the Company will assist you to find suitable accommodation and will pay you a special allowance.

I hope that you will now have enough information to allow you to decide and I will look forward to hearing from you, and if you accept our offer an indication of when you will be able to report for duty in Freetown.

Yours sincerely,

B.P. (West Africa) Ltd.

N. CAMPBELL

Group Manager Administration"

As can be seen from the evidence adduced in this case, the appellant accepted the offer of employment on the terms and conditions stipulated in the two letters I have referred to above and took u [sic] appointment with the Company on the 2nd February, 1965 at the age of 35 years. Sometime in the early part of 1973 the appellant said in his evidence that he was given an Executive Staff Handbook in connection with his employment by the respondents. He himself tendered this book in evidence as Ex. F. The introduction in Ex. F(s.i.c)states that this handbook has been compiled for the information and guidance of Executive Staff particularly newly joined staff of B.P. (West Africa) Ltd. in Sierra Leone. It also describes the conditions of service for staff giving a brief outline of what the Company expects from his employees and what they should expect from the Company. It further states that the Company's Policy is [p.55] reflected in the handbook and is subject to revision from time to time and that the employees would be advised of such changes. Amongst the provisions contained in Ex. F is a paragraph numbered 2.13 which reads as follows:

Retirement or Termination.

The normal retirement age is 55 years of age, by mutual consent or at the discretion of the Company this may be extended or foreshortened.

The length of notice required to be given by either side in the event of termination or resignation is clearly laid down in your letters of appointment."

On the 31st March, 1976 a letter Ex. C was written to the appellant asking him whether he was willing to transfer his service to B.P. (Sierra Leone) Ltd. with his full service benefits and existing terms and conditions of employment. He was to signify his acceptance of his employment with B.P (Sierra Leone) Ltd. in the following terms —

"I accept your offer to transfer to B.P. (Sierra Leone) Ltd. my full service benefits and existing terms and conditions of service."

This he did.

On the 29th December, 1976 the appellant was called in to the office of the General Manager of the respondent/company and was told that they were restructuring the Company and that as such he would no longer fit into the new structure and after some discussions and correspondence the appellant claimed he received a letter on the 31st December, 1976 which he said was a retirement letter.

He did not go to work again.

I think that it is convenient at this stage to set out the letter of retirement. This letter has been tendered as Ex. E and the contents reads as follows —

[p.56]

"Dear Mr. Vincent,

We would refer to our various conversations (Vincent/Callander) on the 29th and 30th December, 1976. We would now formally advise you of the Company's decision to exercise its discretion to, retire you effective 31st December, 1976 in accordance, with the paragraph, 2.13 of the Executive Staff Handbook.

The following entitlements are due to you and we would be obliged if you could call on the undersigned as soon as possible to finalise the matter.

(1) One month's salary in lieu of notice Le967.73

(2) Outstanding leave balance/leave allowance Le1,327.00

(3) Provident Fund Le14,023.06

(4) End of Service Benefit Le3,136.00

(5) Ex Gratia Retiral Gratuity Le3,000.00

Le22,462.79

Note: Income Tax to be deducted at source where applicable. Finally we would like to thank you for your service over the years and wish you every success in the future.

Yours sincerely

N. CALLANDER

General Manager.”

On the 21st day of February 1977 the appellant issued a write against the respondents claiming

(1) Breach of the plaintiff's contract of employment.

(2) Damages for wrongful dismissal of the plaintiff from the defendant's employment.

[p.57]

(3) Damages for wrongly inducing the plaintiff by false representation and by the unconscientious use of power and authority to yield to the defendant's discriminatory or unlawful design to deny the plaintiff his right of participation in the defendant's Executive non-contributory Pension Scheme preparatory to the defendant's secret plan to dismiss him unlawfully from its employment."

In his Statement of Claim the plaintiff alleged the following—

"Particulars of Damage

Loss of eight years salary to retirement at the pensionable age of 55 years (calculated to take into account reasonable expectation of appointment to office of General Manager) — Le.114,980.00

Lump sum compensation in lieu of

pensionable emoluments (Twenty

years at Le.3,000 per annum) — Le.60,000.00

Total — Le.174,980.00

Plus 15% of Le.114,980 i.e.

rent allowance 17,247.00

Le.192,227.00

In the concluding paragraphs of his judgment which was in favour of the appellant the learned trial judge said and I quote—

"The plaintiff has remained unemployed since 31st December 1976 the date on which he was wrongfully retired prematurely.

In spite of his efforts he has been unable to secure alternative employment.

Having regard to the scope of employment for plaintiff which is very narrow in Sierra Leone the imbalanced probability that he would be able to obtain alternative employment within the next five years or so and up to the time when he would have been due for normal retirement cannot be over emphasised. I think therefore that having regard to all the circumstances of this case and the scarce possibility of the [p.58] plaintiff obtaining employment in Sierra Leone in the near future. I will award him damages assessed at eight years salary less an amount for contingencies of life.

Calculated on the basis of Le.976.73 per month the amount of damages would total Le.93,766.08. I allow reduction of this amount at the rate of 3% as I said for contingencies of life. That means the amount allowed is reduced by Le.2,812.98 leaving a net balance of Le.90,955.10. The other claims of the plaintiff are disallowed.

The plaintiff will have judgment in this case in the sum of Le.90,955.10 and the costs of these proceedings, such costs to be taxed."

Subsequently the respondents herein appealed to the Court of Appeal against the decision of the learned trial judge. The Court of Appeal allowed the appeal, set aside the judgment of the Court below and ordered that all amounts paid by the respondents to the appellants be repaid under the judgment. It is against that decision that the appellant has now appealed to this Court.

Various arguments have been canvassed in this Court by both Counsel for the appellant and the respondent. In the main it was contended by Counsel for the appellant Mr. T.S. Johnson that the terms of employment of the appellant were contained in Exs. A & B supra and that as such he could only have been terminated under the provisions contained in the two exhibits. He argued that Ex. F was not binding on the appellant as the provisions contained therein applied only to employees who had entered the employment of the respondents after that document came into operation. He further said that even if Ex. F was binding on the appellant the respondent were bound to negotiate the question of compensation with the appellant and to see what he would accept for his enforced retirement. He was entitled to reasonable compensation he said. He stressed however that though the appellant was retired under Ex. F this point was not a ground of appeal and was not canvassed.

[p.59]

Mr. J. Smythe for respondents countered Counsel for the appellant arguments in short by saying that the appellant had been lawfully retired under Ex. F. He argued further that Ex. F was is binding on the appellant and that all the respondents did was to retire the appellant under paragraph 2.13 of Ex. F, as they, were entitled to do without giving him any notice whatsoever. They had rightfully exercised their discretion and as such it could not be said that the appellant had been wrongfully dismissed.

The problem must as it appears to me to be confined in the present case to the question whether the appellant was in fact bound by Ex. F the handbook and in particular by paragraph 2.13 I have already stated supra the provisions contained in that paragraph. It must therefore follow that the proper

matters for consideration is the meaning and effect of the language used in 2.13 and also the purpose for which Ex. F was intended. I would deal with the latter first. Ex. F was compiled for the information and guidance of Executive staff particularly newly joined staff of B.P. (West Africa) Ltd. It also describes the conditions of service of staff and the Company's policy. I have already dealt with this fully above. The appellant was a member of the Executive staff. Quite clearly Exhibit F affected existing staff and in particular newly joined staff. There is also evidence to show that the appellant accepted certain benefits contained in it before he was retired. I therefore have no hesitation in coming to the conclusion that the appellant was bound by Ex. F. It was so held by the trial judge and the Court of Appeal.

The letters of appointment Exs. A and B indicate certain

conditions of employment, the breach of which is alleged to be the foundation of the action for wrongful dismissal by Counsel for the appellant in the present case but since I have already held that the appellant was bound by Ex. F. in my view it is to the handbook to which one must turn to ascertain the rest of the conditions of employment particularly paragraph 2.13. What then is the meaning and effect of that paragraph. In short were the [p.60] respondents entitled to retire the appellant at their discretion at an earlier date, if so, was he entitled to reasonable notice as well although this was not provided for? Could this Court there-fore infer the words (reasonable notice) under the circumstances in the present case.

In Batt on the Law of Master and Servant 5th Edition at pages 27, 61 and 117, it is stated as follows:

"Subject to statutory exceptions hereinafter mentioned the parties may now agree to any form of contract of service containing any stipulations the parties desire so long as the agreement does not involve an illegal purpose or is not otherwise contrary to public policy."

"The basis of our contract law is the common law, not statute and the essentials of the law of Master and Servant are thus founded on the common law, for in spite of many statutes regulating the relations of Master and Servant, the creation and termination of that relationship depends upon the free agreement of the parties and the enforceability of agreements is in the main a matter of common law and not of statutory regulations."

"The length of a contract of service depends entirely upon the agreement of the parties; it may be any period from an hour or a day to years, or even the lives of the contracting parties; since there seem no doubt that an agreement to serve for life is perfectly valid in the absence of vitiating elements such as fraud, undue influence or undue restraint of trade."

"The parties to a contract of service have complete liberty to make whatever terms they choose; they may make elaborate provision about every aspect of the contract, for example as to wages when and where payable what duties are to be performed, what length of notice is to be required to terminate the contract and so on."

[p.61]

To start with it must first be discovered what terms the parties have expressly included in their contract since every contract must be read as a whole and effect must be given to the intention of the parties collected from their expressions of it as a whole "Particular terms are to be construed in that sense which is most consistent with the general intention." See FORD v BEACH 1848 11 Q.B. page 852.

Apart from terms in a contract, which the parties have expressly adopted, there may be others imported into the contract either by custom or by statutes or they may be implied by the Courts in order to reinforce the language of the parties and realize their intention. However a term may be excluded in accordance with the general principles of the common law either by clear and unambiguous language or if its implication would be inconsistent with an express term of the contract. In the case of LYNCH v THORNE reported in (1956) 1 A.E.R. at page 744. The defendant contracted to sell to the plaintiff a plot of land on which was a partially erected house and to complete its construction. The contract provided that the walls were to be [sic] nine-inch brick. The defendant built the house in accordance with this specification but it was in fact unfit for human habitation because the walls could not keep out the rain. The Court of Appeal in giving judgment for the defendant could not imply a …… [sic] in the contract which could create an inconsistency with the express language of the bargain. As a matter of fact the Courts have in a host of cases refused to imply terms in contracts and similarly have been willing to do so in other cases when this becomes necessary depending on the circumstances of each case.

To mention a few in the case of the Moorcock reported in All E.R Reprint 1886-1890 at page 530. The Headnote reads as follows;

"Contract — Implied term — term needed to give efficacy to transaction — Prevention of failure of consideration — presumed intention of parties — Agreement by Ship owners to discharge and load cargo at wharf — Damage through grounding of ship at ebb tide uneven bed of river. Implied warranty by wharfingers as to safety of the river bed."

[p.62]

In that case the defendants also had agreed in consideration of charge for landing and storing the cargo to allow the plaintiff a ship owner to discharge his vessel at their jetty. The jetty extended into the Thames and as both parties realized the vessel must ground at low water. Whilst she was unloading, the tide ebbed and she settled on a ridge of hard ground beneath the mud. The plaintiff sued for the resultant damage.

It was held that both parties must have known when entering into the agreement that unless the ground was safe the ship could be placed in a position of danger and that all the consideration for the payment by the plaintiff to the defendant for the use of the wharf might fail and therefore, a term was to be implied in the agreement that the defendants warranted that they had taken reasonable care to see that the berth was safe and that if it were not safe they would warn the plaintiffs of that fact, and the plaintiffs were entitled to succeed. Bowen L.J. at page 534 had this to say —

"I believe that if one were to take all the instances which are many of implied warranties and convenants in law which occur in the earlier cases, which deal with real property passing through the

instances which relate to the warranties of title and of quality, and the case of executory contracts of sale and other classes of implied warranties like the implied authority of an agent to make contracts, it will be seen that in all these cases the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended it should have.

If that is so the reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transaction, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from [p.63] all the burdens, but to, make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for."

In the case of WARD V BARCLAY PERKINS & CO. LTD. reported in (1939) 1 All E.R. at page 287 where the plaintiff in that case had been given three months notice to leave the employment of the defendant company the plaintiff had contended that there was an implied contract that if he that if he came into the pension scheme he became a member of the permanent staff, and that he thereby became subject to such considerations as health, good conduct and the continuance of the Company's business, entitled to permanent employment and cou1d not be given ordinary notice until he attained the age of 65 and he obtained the full benefit of his contribution, It was he1d that such a stipulation could not be implied in a contract unless on the evidence, it was shown to have been mutually intended and necessary to give business efficacy to the document. This could not be said in the present case, and the plaintiff, therefore, failed in his action.

See also the case of LISTER v ROMFORD ICE AND COLD STORAGE

CO. LTD. reported in (1957) A.C. at. page 555. The House of Lords by a majority gave judgment for the respondents by implying in the masters favour that the servant would "serve him with good faith and fidelity and that he would, use, reasonable care and skill in the performance of his duties." They however refused to imply a term in favour of the appellant that the respondents should indemnify him "against all claims or proceedings brought against him in the course of his employment".

The next point I have to deal with is whether the respondents were entitled to retire the appellant at an earlier date under paragraph 2.13 of Ex. F without giving him reasonable notice. 2. 13 is headed as follows:

"Retirement or termination," And continues "The normal retirement age is 55 years of age. This may be extended or foreshortened by mutual consent or at the discretion of the Company."

[p.64]

"The length of notice required to be given by either side in the event of termination or resignation is clearly laid down in your letter of engagement."

Paragraph 3 of Ex. A the letter of appointment states as follows;

"That your engagement is subject to termination at any time by one calendar month's prior notice in writing on either side and that the company's liability for salary will cease on the date your engagement terminates."

Quite clearly the letter of appointment Ex. A makes proviso for termination by giving one calendar month's notice in writing on either side. Similarly in the event of resignation or termination under paragraph 213 of Ex. F either side could give one calendar month's notice in writing. However when it comes to the question of retirement, this could be either by mutual consent or at the discretion of the Company. I have already stated above certain principles i.e.

(1) The parties are at liberty to make any form of contract of service containing any stipulations they desire provided that it is not contrary to public policy or for an illegal purpose

(2) That one must look at the express terms of the contract and

(3) That terms could only be implied into a contract by the Courts under certain circumstances.

The general principle is that where the contract of service is silent as to notice the Court will infer reasonable notice. See Batt on the Law of Master and Servant Fifth Edition at page 75.

I quote

"Except where the hiring is for a definite period, the contract must be terminated by notice, and where the parties are silent at the time of making the contract as to notice, the Court will be anxious to find that a reasonable notice must be given, on either side"

[p.65]

See also Chitty on Specific Contracts Twenty First Edition at page 545 which also states as follows:—

"Where the contract of service does not contain any stipulation as to notice it can only be determined by reasonable notice."

The general principle therefore is that in the absence of any express term as to termination (emphasis mine) and apart from misconduct, the engagement can only be terminated after reasonable notice. There are many reported decisions on this point.

In the case of RE AFRICAN ASSOCIATION v ALLEN reported in (1910) 1 K.B. at page 696 in spite of a clause in the contract providing "that the employers may at any time at their absolute discretion, terminate this engagement at an earlier date than specified if they may desire to do so" it was held on the reading of the contract as a whole, that the employers could not in the absence of an agreement terminate the engagement without reasonable notice (Batt on Master and Servant Fifth Edition at page 76).

In that case the Lord Chief Justice Alverstone in giving judgment said—

"The only general principle applicable was that in the absence of misconduct or grounds mentioned in the agreement dismissal must be subject to notice."

Mr. Justice Bray was of the same opinion and he thought that must be taken that under an agreement of employment such as they were dealing with in the absence of misconduct, prima facie there was no right to terminate the employment except by giving reasonable notice, unless there were words in the agreement showing a contrary intention. In his view there was nothing in the agreement to negative the usual implied rule that the service could not be terminated in the absence of misconduct except by notice.

Let me now try to see whether this case could be distinguish from the present case. In the case of Re AFRICAN ASSOCIATION LTD v. ALLEN, the Association claimed that they had an absolute discretion to terminate the employment of Allen as this was contained in an agreement made between the parties. Also in the [p.66] same agreement there was provision for Allen's Services to be terminated in the event of misconduct or on other grounds mentioned in it. The whole contract however was silent as to notice at the time of making it. No provision had been made for it in any event, therefore in that case the only alternative appeal to the Court was for it to imply reasonable notice in the absence of misconduct unless there were words in the agreement showing a contrary intention. In short in order to exclude the implied to as to reasonable notice for termination clear express language must be used by the parties.

In the present case there was express provision for termination by giving one month's notice on either side. There was express provision also for resignation; one calendar month's notice and finally there was an express provision in the contract for retirement at the discretion of the Company without notice by mutual consent.

In the case of MARTIN BAKER, LTD. v CANADIAN FLIGHT EQUIPMENT LTD. (1955) 2 All E.R. at page 722. R.M. was appointed sole selling agent of the North American Continent of all products of M.B. He agreed to use his best endeavours to promote sales in that territory: to act as general marketing consultant for M.B. and not to become interested in the sale of competitive products His remuneration was to be a commission at the rate of 17½ percent on orders obtained by him. M.B. desired to terminate the relationship summarily which he did. Any unilateral termination of the relationship by either party to a contract will be, wrongful unless it is done in accordance with the contract, if there was an express term dealing with the matter. If no such express term exists it will depend upon the construction of the contract. The common intention of the parties with regard to the power of termination must be ascertained in the light of all the available evidence.

In the above mentioned case J. McNair had this to say at page 733:—

[p.67]

"The Common Law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties have made on the basis of what is reasonable. So far as that does not conflict with the express term of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently

found their place in the great codyfing statutes of the Sale of Goods Act 1893, the Marine Insurance Act 1906 and the Bills of Exchange Act, where this view of the law merchant has been adopted and a provision has been inserted to the effect that, where the contract makes no provision for fixing either price or premium, or time at which an act has to be performed, then the law is that a reasonable premium or reasonable time will be implied.

It is of course true that this kind of consideration can in many cases be excluded by express provision, but where the contract leaves the matter open, I __ think that the common law approach would be to provide a situation which is reasonable. At the same time, I bear in mind that it is not the function of the Court to make a reasonable contract between the parties and in so far as the matter is one of implying terms which are reasonable to give business efficacy to the contract."

It was also held in this case that the agreement of March, 9 1954 regarded as a whole was more analogous to an agreement between Master and Servant than to an agreement merely of agency as R.M was to expend much time and money and was restricted from selling other person's product. Accordingly the agreement on its true construction was also determinable by reasonable notice, apart from the provision of Clause 4(iv) which rendered it determinable summarily in certain specified events.

So we see that even in this case express provisions had been made for the summary determination of the contract only under certain circumstances and since no provision was made for notice the only possible thing to do was to infer reasonable notice.

[p.68]

See also the case of McCLELLAND v NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD reported in 1957 2 All E.R. at page 129. By an advertisement in a newspaper in June 1978, the board invited applications for posts which I subject to a probationary period will be permanent and pensionable". The appellant applied for a post and in July 1948 was selected for appointment. Conditions of service known as the "September Conditions" were approved in September 1948. The appellant accepted the conditions, and her[sic] employment which under them was probationary until confirmed, was confirmed in February, 1949.

Under Clause 9 of the conditions, every employee was required to take the oath of allegiance and failure to do so involved immediate dismissal. By Clause 12 the Board could dismiss any officer for gross misconduct or who was proved to be inefficient and unfit to merit continued employment, and except in the case of gross misconduct, the Board had to give at least one month's notice of their intention to exercise their powers of dismissal, all permanent officers who wished to terminate their employment with the Board had to give one month's notice in writing. In 1953 the Board sought to terminate the employment of the appellant on the ground of redundancy of staff and she was finally given 6 months notice expiring in August 1954. The appellant contended that her employment was not subject to termination or reasonable notice by the Board.

Held —

"The Appellant's employment had not been validly terminated by the Board because it was terminable only as provided in the September conditions which was exhaustive in that respect, and, accordingly a power to terminate hand, accordingly a power to terminate her employment by reasonable notice could not be implied."

Lord Oaksey had this to say in his judgment at page 132—

[p.69]

"The clauses I have set out all contain express powers of termination and in my opinion there is no ground for suggesting that it is necessary to imply a further power to terminate the contract in order to give the contract the efficacy which the parties must have intended it to have."

In the case of READ v ASTONA GARAGE LTD. (1952) Ch. at page 637.

It was held that where a managing director was appointed under an article which provided that his appointment was subject to determination ipso facto if the Company by a resolution in a general meeting resolved that his tenure of office be determined, it was held that the appointment could be determined without notice.

As I have already stated above the only point in this case on its true construction, and on a fair reading of it as a whole is whether the respondents could retire the appellant at their discretion. My answer is Yes. The reasons which have lead me to this conclusion are reasons arrived at by processes of comparison and analysis of the various principles and cases mentioned supra and also, on the facts of the present case which is simply that the appellant was appointed in accordance with Exs. A & B and held such tenure of office as was provided for under these two exhibits and paragraph 2.13 of Ex. F. and in my opinion had no special right to receive any particular notice in the event of the respondents deciding to retire him under paragraph 2.13 of Ex. F. Express provisions have been made in this contract and I see no reason to depart from them.

There is however, I think one or two more matters which ought to be taken into consideration. On the other hand, let me for one moment assume that the appellant was entitled to reasonable notice, See Batt Fifth Edition at page 64 which states as follows—

[p.70]

"It is a question of fact for the Court to determine what length of notice the parties contemplated at the time of the creation of the engagement in order to terminate it and their intention, if the terms of the agreement written or oral are silent must be gathered from the circumstances of the case, the nature of the employment, the period at which wages of salaries are paid and the length of notice if any customary to such engagement in the locality or trade in which the agreement is made."

Also in Batt supra at page 78. It is also stated that—

"Decided cases do not conclude the matter, each case must depend upon its own particular facts and a previous case of similar facts is merely a guide as to the future and not binding either on the judge or the jury as governing the case then to be decided."

In the instant case the 1enght of notice required for termination and resignation was one calendar month's notice. The appellant's salary was to be paid monthly. Each case must depend upon its own particular facts and looking at this contract as a whole one could discern that the parties did not intend the perch of notice in any event to exceed one calendar month. I however cannot therefore see how reasonable notice in the present case could exceed one calendar month's notice even if the appellant will retired at the discretion of the respondents. The next question is, was he entitled to any damages.

In Chitty on Specific Contracts Twenty First Edition at page 599 it is stated as follows—

"If the contract expressly provides that it is terminable upon e.g. one month's notice, the damages will ordinarily be a month's wages."

I think that this is all the appellant was entitled to and this has already been offered to him by the respondents. Even if the appellant had been wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the [p.71] manner of his dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it difficult for him to obtain fresh employment. See the case of ADDIS v GRAMOPHONE COMPANY LTD. Law Reports (1910) A.C. at page 488.

Notwithstanding the majority judgment of this Court, I am unable to adopt their conclusions. I still think that the judgment of the Court of Appeal ought not to be disturbed. For the reasons which I have already given above, I would dismiss the appeal.

Appeal dismissed.

Costs to the Respondents in this Court and the Courts below.

SGD.

MRS. JUSTICE A.V.A. AWUNOR-RENER, J.S.C.

CASES REFERRED TO

1. GATTI v SHOOSMITH (1939) 3 All E.R. 916

2. McNair J. in Martin-Baker Aircraft Co. Ltd & Anor. v. Canadian Flight Equipment LD. (1955) 2 Q.B. 556,

3. Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd. (1948) A.C. 173 H.L.

4. African Association (Limited) v. Allen (1910) 1 K.B. 396; 26 T.L.R. 234.

5. Ward v. Barclay Perkins Co, Ltd. (1939) 1 All E.R. 287

6. McClelland v. Northern Ireland General Health Services Board (1957) 1 V.L.R. 594 H.L.

7. Srimati Bibhabati Devi v Kuma Ramandranarayan Roy (1946) A.C. 508

8. Agip (Sierra Leone) Ltd. v Abass Ali Edmask (By His Attorney Adnan Nayef Abess Allie and the Paramount Chief of Kakua Chiefdom Council of the Kakua Chiefdom Bo District) S.C. Civ. App. No.2/71, Cole, C.J. dealt

10. Yachuk And Another v Oliver Blais Co. Ltd. (1949) A.C.386

11. Stool Of Abinabina v Chief Kojo Enyimadu (1953) A.C. 207

12. Reigate v Union Manufacturing Co. (1918) q K.B.D. 592 at 60

13. Shirlaw v Southern Founderi (1939) 2 All E.R. 113 at page 124

14. In Wards v Barclay Perkins, & Co. Ltd. (1939) 1 All E.R. at page 287

15. Martin Baker Co. Ltd. v Canadian Flight Equipment Ltd: Same v Murbison (1955) 2 Q.B. 577 at page 733

16. Llanelly Ry & Dock Co. v London & North West [sic] RY CO. (1873) 8 Ch. App. at page 949

17. Read v Astoria Garage (Streatham) Ltd. (1932) 2 All E.R. at page 292

18. Ford v Beach 1848 11 Q.B. page 852.

19. Lynch v Thorne reported in (1956) 1 A.E.R. at page 744

20. All E.R Reprint 1886-1890 at page 530

21. Ward v Barclay Perkins & Co. Ltd. reported in (1939) 1 All E.R. at page 287

22. Lister v Romford Ice and Cold Storage Co. Ltd. reported in (1957) A.C. at. page 555.

23. Re African Association v Allen reported in (1910) 1 K.B. at page 696

24. African Association Ltd v. Allen

25. Martin Baker, Ltd. v Canadian Flight Equipment Ltd. (1955) 2 All E.R. at page 722.

26. Mcclelland v Northern Ireland General Health Services Board reported in 1957 2 All E.R. at page 129

27. Read v Astona Garage Ltd. (1952) Ch. at page 637

28. Addis v Gramophone Company Ltd. Law Reports (1910) A.C. at page 488

29. The King v Bishop (1831-1832) Vol. 2 Barnwole & Adolphus Reports page 158 at page 163

STATUTES REFERRED TO

1. Section 103(1) and (2) repeated in Rule 6(1)(a), (b) and (c)

2. Rule 6(2) of The Supreme Court Rule, 1982 (P.N.1 of 1982)

3. Rule (6)(1)(a) of the Rules

4. sections 101, 107 and 110 of The Constitution, Rule 7

5. Rule 26 sub-rule 3

6. Sec. 103(1)(a) of The Constitution, and Rule 6(1)(a) of The Rules

7. Sec.103(1)(c) and 103(2) of The Constitution, and Rule 6(1)(c) and 6(2) of The Rules

8. Sec. 103(2) of The Constitution and 6(2)

9. Rules 74(1) and (2) of the Rules

10. Order 58 Rule 13 sub-rule and Order 64 rule 7

11. Companies Act, 1929, art. 68

1985-1995

JUSTICES OF THE SUPREME COURT

The Hon. Mr. Justice E. Livesey Luke, Chief Justice	-	Presiding Justice of the Supreme Court
The Hon. Mr. Justice C..A. Harding	-	Justice of the Supreme Court
The Hon. Mr. Justice O.B.R. Tejan	-	Justice of the Supreme Court
The Hon. Mrs. Justice A.V.A. Awunor-Renner	-	Justice of the Supreme Court
The Hon. Mr. Justice M.S. Turay	-	Justice of Appeal

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EMMANUEL B. SMITH v. TEXACO AFRICA (S.L.) LTD.

[S.C. C.I.V. APP. NO. 5/81] [p.1-11]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 4 JULY 1985

CORAM: MR. JUSTICE E. LIVESEY LUKE, C. J. – PRESIDING;

MR. JUSTICE C.A. HARDING, J.S.C.;

MR. JUSTICE O.B.R. TEJAN, J.S.C.;

MRS. JSUTICE A.V.A. AWUNOR-RENNER, J.S.C.;

MR. JUSTICE M.S. TURAY, J.A

BETWEEN

EMMANUEL B. SMITH - APPELLANT

Vs.

TEXACO AFRICA (S.L.) LTD. - RESPONDENTS

Dr. W.S. Marcus-Jones for Appellant

J..H. Smythe, Q.C. and with him Mr. Manley-Spain for the Respondents

JUDGMENT DELIVERED THIS 4TH DAY OF JULY. 1985

TEJAN. J.S.C.

The Appellant was an employee of the Respondents in January, 1961, in Liberia, and in June 1965, he was transferred to the branch of the Respondents' Company in Sierra Leone when he had become a Senior Mechanic. In 1970, he was promoted to the post of Superintendent of Maintenance. On 11th November, 1974 the Respondents' workshop was burgled, officers of the Criminal Investigation Department were called, and afterthe appellant had checked the items in the store, he was taken to the

C.I.D. where he was detained for a whole day and night. In January, 1975 the appellant had cause to query one Mr. Scott a fitter in the employment of the Respondents. The query which is exhibit “A” is in the following terms:—

"To: E.M. Scott (Workshop Fitter)

From: E.B. Smith

Date: January, 8, 1975.

[p.2]

Please explain and give reasons why you failed to repair the following faults on the Company's vehicle WR 1251 assigned to you since 6th of January 1975.

(1) The Radiator (2) The Exhaust Pipe. Further you opened the racker cover and dismantle the Caburator switch which I think was uncalled for.

Please explain.

(Sgd.) E.B. Smith

CO. IN

Operations Supervisor.”

A copy of exhibit “A” was sent to the Operations Supervisor. Mr. Scott replied to exhibit “A” on the same day. The reply is exhibit “B” and reads as follows:

“To: E.B. Smith, Maintenance Foreman

From: E.M. Scott

Date: January 8, 1985.

I received your Memorandum dated 7th January, 1975 with regards your observation on my Job. (1) on your return from leave there was nothing between us as things were normal. After a week a case arise about a coil rope missing from the Jetty, and when it was alleged that you told the marine crew that I sold the rope when very well you know that you took it. I was being asked about it and my answer was no, failing to answer that which I have not done, I was being in mind of you and you avoided not even given me jobs: I only took jobs for myself.

In the case of the Bedford Lorry, the driver reported the defects to me, straight away I started working on the vehicle and told the driver to tell Mr. Smith about the vehicle and [p.3] that I am working on it. After my discovery of all the faults I reported them to you; your reply was I don’t care to know. I went as far as to tell you about the lamps ordered were not the correct ones you told me to fit them as it is, your attention was being drawn by me about the bulbs that were not available and you said nothing.

Also Cylencer and Radiator which wore not done by the welders, you said nothing again, instead you keep on shouting and I was molested. We have garage hands but by then they were not available a day the rest of the two hours are spent as house boys.

On Sundays they work as houseboys and paid by Texaco. First and foremost there was nobody to carry the Cylencer to the Welders.

With these few explanations of mine I think things would come to normal and co-operation.

(Sgd.) E.M. Scott

c.c. D.M.

Operations Supervisor"

The appellant wrote to the District Manager. The letter is exhibit "C" dated 9th January, 1975. The letter explained the circumstances of how a particular houseboy was employed and how the houseboy used to press his suits on few Sundays. For clarity, it is necessary to quote Exhibit "C" which is in the following terms:-

"To: The District Manager

From: E.B. Smith

Date: January, 9, 1975.

Fitter E.M. Scott was queried by me with two letters dated 7th and 8th of January, 1975.

[p.4]

Instead of answering the query he brought up allegation that (i) Workshop boys work six hours a day and (ii) One Sunday they went and work as my house boys and they are paid by Texaco.

These allegations are wrong and to explain further I have workshop boy who used to work as houseboy to me. Before he started with me he was working with a European who had long retired from S.A. Coore. My wife engaged him. He later complained that the payment was small because he had wife and children. Because he was very good my wife asked me to help him get a casual job. So he started with Pa Pratt. Because he can iron properly few days Sundays I would ask him to press my suits when they used doing and after a dash that is all but sending men from the Terminal to work at my house is totally incorrect. Because my wife has two to three boys on hire who does all her business

(Sgd.) E.B. Smith."

c.c. Operations Supervisor"

Another query which is exhibit "D" dated January, 1975 was sent to Mr. Scott. It reads: —

"I have observed that you have been very reckless with all jobs assigned to you and also you idle your time chatting in the main stores down the marine etc.

(ii) On the 6th January in the morning WR1461 was assigned to you for repairs. The radiator was dismantled and left unrepaired.

You got the welder and plater idle while you leiter the compound.

If your attitude does not improve in future you will face disciplinary actions.

(Sgd.) E.B. Smith

C.C. Operations Supervisor

0 – 2"

[p.5]

In consequence of exhibits "B", "C" and "D" one Mr. Manley was asked to carry out an investigation. After Mr. Manley has presented the report of his investigation, the appellant was summarily dismissed by letter dated 17th January, 1975. The letter which is exhibit "E" is in the following terms:

"Personnel

E.B. Smith

Dear Sir,

Due to gross misconduct and negligence in the execution of your duty, brought to light in a recent investigation at our terminal, we have to advice you that as from 11.45 hours on January, 18th (Eighteenth) 1975 you are summarily dismissed from Texaco Africa Limited, Freetown.

Will you please present yourself to the Accounts office on Tuesday, January 21st, to collect any monies due you.

Yours very truly,

Texaco Africa Limited

(Sgd.) G. Cooper

District Manager."

Following his dismissal, the appellant on the 19th March, 1975 commenced proceedings against the Respondents by the issue of a writ of summons claiming damages for breach of contract, wrongful dismissal and wrongful detention of goods. In their statement of defence, the Respondents pleaded that they would contend that the appellant was well aware of the charges of gross misconduct and negligence in the execution of his duty made against him and was given the opportunity to defend

himself, and would also contend that this dismissal was justifiable on the grounds of gross misconduct and negligence in the execution of his duties.

The case was heard by M.E.A. Cole, J (as he then was) on 20th November, 1975 and subsequent dates. The learned Judge, after carefully listening and examining the evidence of both [p.6] the appellant and respondents, on 17th March, 1977 dismissed the appellant's claim for detinue but gave judgment for the appellant for wrongful dismissal, and made the following awards:

Leave allowance	Le.	75.00
Rent allowance		33.00
Transport allowance		5.00
Night allowance work days		90.00
Night-do-Sundays		180.00
Salary-do-		28.00
General damages	Le.	2025.00
TOTAL	Le	2436.75

It is against that judgment that on the 21st day of April, 1977, the Respondents appealed to the Court of Appeal on the following grounds:—

"(1) That the trial Judge erred in law in failing to consider whether there was sufficient evidence which the Appellant had believe in good faith they would have been justified in dismissing the Plaintiff from their services.

(2) That the trial Judge wrongfully assessed the evidence.

(3) That the decision could not be supported having regard to the evidence.

(4) That the trial Judge applied wrong principles of law in considering the meaning of "Unlawful Dismissal".

The appeal was heard by S.B. Davies; J.A. (as he then was) Warne and Navo JJA. On the 31st day of March, 1981, S.B. Davies J.A. (as he then was) delivered the judgment of the Court. The Court agreed with the findings and conclusions of the trial Judge in every issue with the exception of the issue regarding 2(12 volt batteries). The appeal was allowed and the judgment of the court below was set aside with costs in that Court as well as in the Court below.

[p.7]

The appellant (Smith) being dissatisfied with the Judgment of the Court of Appeal, on the 15th day of June, 1981 appealed to this Court on a number of grounds. These grounds are:

(1) That the summary dismissal of the Appellant was bad and unfair by reason of the fact that the decision to dismiss was based on the findings of a secret investigation which was not brought to the appellant's notice, and in which he was not given an opportunity of testifying or defending himself.

(2) That at the time of the appellant's dismissal the withdrawal of three batteries from store on charge slip No. 2395 was not the reason constituting “gross misconduct and negligence” as justifying the dismissal. The Court of Appeal therefore erred in law in finding that the withdrawal of the batteries was sufficient misconduct to entitle the Respondents to dismiss the Appellant summarily.

(3) That the Court of Appeal were wrong in law in equating authority to withdraw, with actual withdrawal and in holding that the Plaintiff's signature on the charge slip No. 2395 was irregular.

(4) That the Court of Appeal were wrong in finding that the Respondent had satisfied the burden of proof cast upon it by law to justify the dismissal of the Appellant.

(5) That the Court of Appeal were wrong in law in disturbing the specific findings of fact by the learned trial Judge and describing them as “inferences” to be drawn from facts.”

[p.8]

Dr. Marcus-Jones for the appellant contended that the procedure adopted by the Respondents in the conduct of the investigation carried out by Mr. Manley breached the rules of natural justice. To deal with this contention, it is necessary to consider the circumstances which culminated in the dismissal of the appellant. I have already quoted exhibits "A", “B", "C" and "D”.

As a result of exhibits "B", "C" and "D" the respondents decided to engage the services of the Searchlight Agency (of which one Mr. Manley was the head) to investigate. A room in the respondents' place of business was allocated to Mr. Manley for this purpose. Mr. Manley then proceeded with his investigation in this manner: Several employees of the respondent Company were called separately into the room in the absence of the appellant who was unaware that his conduct was being investigated. Each employee was interrogated and a written statement obtained from him. The appellant was not called into the room to enable him to admit or deny the statement of the other employees.

On the 13th January, 1975, Mr. Manley interrogated the appellant who made a statement which is exhibit "S". Exhibit "S" is very illuminating, and it explained lucidly and in detail all the allegations which might or might not have been made against him. In his statement the appellant said inter alia:—

"I fully remember one day when I was leaving for town, Mr. Isaac Williams called me and asked me to collect three (3) 12 volt batteries from Lucas House. He did not give me the local purchase order. The L.P.O. had already been taken to Lucas House. The batteries had already been filled and charged before I got there. I collected the batteries and handed them over at the stores. The batteries were in the store for sometime and Mr. Williams asked me to draw the batteries from the store for Aspet 4. I told Mr. Williams that those were not the batteries for Aspet 4. I told him that the batteries add [p.9] up to 36 volts and the batteries used by Aspet 4 are five by 6 volts heavy duty. Mr. Williams told me that it will be alright, and that it costs less to run Aspect k as the batteries are only for the lights. I withdraw

the batteries from the stores and place them in the workshop. Sometime after, Mr. Williams came to me in the workshop for one of the batteries in order to start his car. Mr. Williams further said that someone had used his battery on the barges and had spoilt it and that he was therefore going to claim the one he was borrowing. I told him that he would have to inform the Manager. Mr. Williams replied that he was not afraid of that so long he could prove that they had used his own battery. Mr. Williams took the battery away. I never asked him for the battery again as I expected he would have seen the Manager. I did not want to involve myself with Mr. Williams as Mr. Floode had told me that Mr. Williams was his assistant and every order he gives I have to carry them out.

....."

It is apparent from the evidence that the appellant was unaware that his conduct was being investigated, that the charges alleged against him were not brought to his notice, and that he was not afforded the opportunity to either admit or deny what was said by the other employees who also made statements. Since the statements were not put in evidence, it is impossible for any, of the courts to say that the statements were either favourable or unfavourable to the appellant. In any event, the manner in which Mr. Manley carried out the investigation was improper and violated all the important rules of natural justice.

[p.10]

In this connection, it is relevant to quote the dicta of Pearce L.J. in RIDGE v BALDWIN (1962) 2 W.L.R. 716 at page 727 He said inter alia:

"Assuming, however, that the defendants did have a duty to inquire judicially of quasi-Judicially did they fail in this duty? The requirements of natural justice do not form a code. They may vary according to the exigencies of the situation. But always three things are needed: good faith (which is not herein in question) a knowledge of the man charged of the substance of that which is being put against him, and an opportunity of answering it."

Lord Jenkins summarised the authorities on the rules of natural justice in UNIVERSITY OF CEYLON v FERNANDO (1960) 1 W.L.R. 223. He quoted with approval the words of Tucker L.J. in RUSSEL vs DUKE OF NORFOLK (1949) 1 All E.R. 109 and said inter alia at page 231.

"There are, in my view, no words which are of Universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Taking the entire evidence into consideration, it is quite clear firstly, that the appellant was not informed that his conduct was under investigation; secondly, that he was not informed of the substance of any charge, or charges against him; thirdly, he was not given an opportunity of challenging any allegations made against him by the other employees interrogated.

[p.11]

In the circumstances, I am of the opinion that the respondents were in breach of the rules of natural justice in conducting the investigation which led to the dismissal of the appellant. I therefore hold that in those circumstances the dismissal of the appellant was wrongful.

Having arrived at this conclusion, it is not necessary to consider the other grounds of appeal. However I shall deal briefly with the ground on which the Court of Appeal allowed the appeal. The Court of Appeal in setting aside the judgment of the Court below laid great emphasis on the issue of batteries which were alleged to have been irregularly issued by certain employees of the Respondent's Company. With respect, the Court of Appeal did not seem to advert their minds to the evidence of Mr. Floode, the Operation Supervisor of the Respondents' Company. The evidence of Mr. Floode clearly indicated that the issue of batteries was not one of the grounds of complaints against the appellant. In my opinion therefore, the Court of Appeal erred in basing their decision on the issue of batteries.

1 would therefore allow the appeal, set aside the judgment of the Court of Appeal, and restore the judgment of the High Court with costs in the three Courts.

(Hon. Mr. Justice O.B.R. Tejan, J.S.C.)

I agree

(Hon. Mr. Justice E. Livesey Luke, Chief Justice)

I agree

(Hon. Mr. Justice C.A. Harding. J.S.C.)

I agree

(Hon. Mrs. Justice A. V.A. Awunor-Renner, J.S.C.)

I agree

(Hon. Mr. Justice M. S. Turay, J.A.)

CASES REFERRED TO

1. Ridge V Baldwin (1962) 2 W.L.R. 716 at Page 727

2. University of Ceylon V Fernando (1960) 1 W.L.R. 223.

3. Russel Vs Duke of Norfolk (1949) 1 All E.R. 109

GABRIEL MOHAMED TENNYSON KAI-KAI & 13 ORS v. THE STATE

[CR. APP. 1/88] [p.40-136]

DIVISION: THE SUPREME COUR OF SIERRA LEONE

DATE: 29 SEPTEMBER 1989

CORAM: MR. JUSTICE S.M.F. KUTUBU, C.J.-PRESIDING;

MR. JUSTICE S.B. DAVIES, J.S.C;

MR. JUSTICE S.C.E. WARNE, J.S.C;

MR. JUSTICE M.O. TAJU-DEEN, J.A.;

MR. JUSTICE A.B. TIMBO, J.A.

BETWEEN:

Gabriel Mohamed Tennyson Kai-Kai)

Prince Deen Kai-Kai)

Joseph John Harding)

Daniel Sulaiman Kai-Kai)

Francis Mischeck Minah)

David Abu Sanu)

Francis Massaquoi)

Amara Allieu Tarawallie) - APPELLANTS

Joseph Abiodun Williams)

Hassan Morlai Conteh)

Conrad Innis)

Haruna Vandy-Jimmy)

Benjamin Orissa Dumacca Taylor)

Sheku Deen Kamara)

AND

THE STATE - RESPONDENT

C.F. Margai, Esq. for 1st, 8th, 9th, 10th & 14th Appellants

J.A. Wilson, Esq. for 2nd, 3rd, 4th & 11th Appellants

C.J. Betts, Esq. and S.E. Berewa, Esq. for 5th Appellant

Miss Isha Dyfan for 6th & 7th Appellants

Berthan Macauley (Jnr.) Esq. for 12th Appellant

C.A. Osho-Williams, Esq. and A.B.C. Johnson, Esq. for 13th Appellant

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JUDGMENT

KUTUBU, C.J.

This is an appeal from the judgment of the Court of Appeal for Sierra Leone, comprising Turay J.A. , Thompson-Davis J.A., and Johnson J., dated 22nd September, 1988. The brief history of this case can be succinctly stated.

Eighteen accused persons were in the month of June, 1987 arraigned before the High Court in Freetown on a four count indictment of Treason, Misprision of Treason and Murder. Count 1 charged the first 16 accused with the offence of Treason contrary to S. 3(1)(a) of the Treason and State Offences Act, No. 10 of 1963. Four of the 16 accused were charged with the offence of Misprision of Treason, contrary to law.

The trial proceeded before Williams, J.A. and a jury, from 1st June, 1987 and was concluded on 17th October, 1987. Suffice it to say that this trial was beset by many difficulties of unparalleled proportions in the history of criminal trials in this country, one such being the empanelling of jurors which took four weeks to accomplish.

At the close of the case for both the prosecution and the defence, and after a long summing-up by the learned trial Judge which lasted several days, the jury returned a unanimous verdict of guilty as charged in respect of the accused. The death sentence was passed on the first 16 accused, while the 17th and 18th accused were sentenced to terms of imprisonment of 4 and 7 years respectively.

It was against this background that all 18 convicted prisoners appealed to the Court of Appeal against their conviction on various grounds. The 18th Appellant also appealed against sentence. As it was the position in the High Court, all the Appellants in the Court of Appeal were represented by counsel.

On the 16 Appellants convicted of Treason, the Court of Appeal upheld the appeals of the following four Appellants, namely:

[p.42]

(i) Francis Augustine Ensah

(ii) Patrick Benedict Kai-Kai

(iii) Kazim Allie and

(iv) Raymond Brima Dorwie, who were accordingly acquitted and discharged

The appeals of the following twelve Appellants were dismissed by Court of Appeal, namely:

(1) Gabriel Mohamed Tennyson Kai-Kai

(2) Prince Deen Kai-Kai

(3) Joseph John Harding

(4) Daniel Sulaiman Kai-Kai

(5) Francis Mischeck Minah

(6) David Abu Samu

(7) Francis Massaquoi

(8) Amara Allieu Tarawallie

(9) Joseph Abiodun Wiliams

(10) Hassan Morlai Conteh

(11) Conrad Innnis and

(12) Haruna Vandy-Jimmy

The Murder appeals in respect of —

(i) Prince Deen Kai-Kai

(ii) Joseph John Harding

(iii) Daniel Sulaiman Kai-Kai and

(iv) Conrad Innis were dismissed.

So also were the appeals for Misprision of Treason in respect of Benjamin Orissa Dunacca Taylor and Sheku Deen Kamara.

Appellants have appealed to this court against the judgment of the Court of Appeal on various grounds. For the purpose of this judgment, Appellants who number fourteen in all, are now re-numbered 1-14, starting with the 1st Appellant Gabriel Mohamed Tennyson Kai-Kai, and ending up with Sheku Deen Kamara, the 14th Appellant.

[p.43]

The indictment upon which the Appellants were convicted contained four counts which I shall proceed to set out as laid. The count for Treason contains 26 overt acts in all.

COUNT 1

STATEMENT OF OFFENCE: TREASON CONTRARY TO SECTION 3(1)(a) OF THE TREASON AND STATE OFFENCE ACT, 1963 AS AMENDED,

PARTICULARS OF OFFENCE: GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE And HARUNA VANDY JIMMY on divers days between that day and the 23rd day Of March, 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means.

OVERT ACTS OF THE SAID TREASON

1. On the 1st day of June, 1986 and on divers days between that day and the 23rd day of March 1987 in Sierra Leone the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY ALLIE conspired together and with other persons unknown to overthrow the Government of Sierra Leone in that they agree—

[p.44]

(a) To lay ambush, attack and kill the President of Sierra Leone Major General DR. JOSEPH SADIU MOMOH.

(b) To make a broadcast over the Sierra Leone Broadcasting Service announcing the dissolution of Parliament, the suspension of the Constitution of Sierra Leone, the disbanding of the Recognized party and the formation of a National Reformation Council.

(c) To impose a dusk to dawn curfew in Sierra Leone.

(d) To overthrow and take over the Government of Sierra Leone by unlawful means.

2. Francis Mischeck Minah on a date unknown between the 1st July, 1986 and 23rd March, 1987 in Freetown incited Jamil Sahid Mohamed and Gabriel Mohamed Tennyson Kai-Kai and others unknown to overthrow the Government of Sierra Leone by unlawful means.

3. On a date unknown between the 1st July, 1986 and 23rd march, 1987 Francis Mischeck Minah incited Haruna Vandy-Jimmy to solicit and collect contributions in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

4. On a date unknown between the 1st February, 1987 and 21st March, 1987 Haruna Vandy-Jimmy collected from inhabitants of Wonde Chiefdom, Bo District in the Southern province of Sierra Leone and other persons unknown – the sum of Le 80,000 (eight Thousand Leones) on behalf of Francis Mischeck Minah in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

5. On Wednesday 11th March, 1987 at 42 Waterloo Street, Freetown Gabriel Mohamed Tennyson Kai-Kai incited Daniel Sulaiman Kai-Kai and Joseph John Harding to overthrow the Government of Sierra Leone by unlawful means by giving the sum of Le500.00 (Five Hundred Leones) to use as transport to recruit other persons to [p.45] join in the plot to overthrow the Government of Sierra Leone.

6. On Wednesday 11th March, 1987 in Freetown, Daniel Sulaiman Kai-Kai procured Conrad Innis and Samuel Taylor to join the said plot.

7. On Thursday 12th March, 1987 at 42 Waterloo Street, Freetown, Daniel Sulaiman Kai-Kai and Gabriel Mohamed Tennyson Kai-Kai procured and incited David Abu Samu to join the plot to overthrow the Government of Sierra Leone by unlawful means.

8. On the same day Thursday 12th March, 1987 at 42 Waterloo Street, Freetown in furtherance of the plot to overthrow, the Government of Sierra Leone by unlawful means Joseph John Harding procured and incited Francis Massaquoi and Amara Allieu Tarawallie by giving them the sum of Le500.00 (Five Hundred Leones).

9. On Thursday the 12th March, 1987 at 42 Waterloo Street, Freetown, Gabriel Mohamed Tennyson Kai-Kai incited Joseph John Harding, Daniel Sulaiman Kai-Kai, Francis Massaquoi, Amara Allieu Tarawallie Conrad Innis and Samuel Taylor by giving them the sum of Le500.00 (five Hundred Leones) to join in a plot to overthrow the Government of Sierra Leone by unlawful means. He the said Gabriel Mohamed Tennyson Kai-Kai further procured Prince Deen Kai-Kai to join the aforesaid plot.

10. On Friday the 13th of March 1987, Daniel Sulaiman Kai-Kai and Joseph John Harding in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means reconnoitred Hill Cot Road, Freetown in the Western Area of Sierra Leone and selected points thereon for attacking and killing the President of Sierra Leone.

11. On Friday the 13th March, 1987 Joseph John Harding, Amara Allieu Tarawallie, Conrad Innis and others unknown attending a meeting at 42B Waterloo Street, Freetown and Gabriel Mohamed Tennyson Kai-Kai disclosed to them details of the plan to overthrow the Government by unlawful means.

[p.46]

12. On Saturday 14th March, 1987, in Freetown in furtherance of their plan to overthrow the Government of Sierra Leone by unlawful means Joseph John Harding, Daniel Sulaiman Kai-Kai, David Abu Samu, Amara Allieu Tarawallie, Francis Massaquoi and Conrad Innis met at Aberdeen Bridge Freetown whence they proceeded to W.26 Spur Road where Gabriel Mohamed Tennyson Kai-Kai incited them to join in a plot to overthrow the Government by unlawful means by showing to them assorted weapons to be used in furtherance to the said plot.

13. On Saturday the 14th March 1987 at Freetown David Abu Samu incited Joseph Abiodun Williams to join in a plot to overthrow the Government by unlawful means by giving him the sum of Le30.00 (Thirty Leones).

14. On Saturday the 14th March 1987 at W.26 Spur Road, Freetown Gabriel Mohamed Tennyson Kai-Kai incited Josephus Abiodun Williams to join in a plot to overthrow the Government by unlawful means by giving him the sum of Le 100.00 (One Hundred Leones).

15. On Sunday 15th March, 1987 Daniel Sulaiman Kai-Kai, David Abu Samu, Josephus Abiodun Williams, Joseph John Harding, Amara Allieu Tarawallie, Francis Massaquoi, Sheku Deen Kamara, Conrad Innis, Gabriel Mohamed Tennyson Kai-Kai and other persons unknown in furtherance of the plot to overthrow the Government of Sierra Leone agreed that Friday 20th March, 1987 as the day to attack and kill the president along Hill Cot Road, Freetown and Gabriel Mohamed Tennyson Kai-Kai requested the aforementioned persons to bring their uniforms and military kit and they did bring the said uniforms and military kit as part of a plan on Thursday the 19th March, 1987 to overthrow the Government of Sierra Leone by unlawful means.

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16. On the same day Sunday the 15th March, 1987 at No. 42B Waterloo Street, Freetown Gabriel Mohamed Tennyson Kai-Kai further incited Daniel Sulaiman Kai-Kai and Joseph John Harding to go and reconnoitre Hill Cot Road Freetown preparatory to a plan to ambush, attack and kill the President.

17. On Sunday the 15th of March, 1987 at Freetown Gabriel Mohamed Tennyson Kai-Kai in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means contacted a Mr. Jaward of No. 25 Bathurst Street, Freetown to procure arms and ammunition.

18. On or about the 15th March, 1987 Gabriel Mohamed Tennyson Kai-Kai in furtherance of the preparations to overthrow the Government of Sierra Leone by unlawful means procured arms and ammunition which he showed to Joseph John Harding, Daniel Sulaiman Kai-Kai, Josephus Abiodun Williams, Amara Allieu Tarawallie, Conrad Innis and other persons unknown.

19. On Sunday the 15th day of Maroh, 1987 in Freetown in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means Prince Deen Kai-Kai procured Francis Augustine Ensah as a driver and Gabriel Mohamed Tennyson Kai-Kai gave the sum of between Le60 (Sixty Leones) and Le80 (Eighty Leones) to the said Francis Augustine Ensah in furtherance of the said plot.

20. On Monday the 16th March, 1987 Daniel Sulaiman Kai-Kai and Joseph John Harding reconnoitred Hill Cot Road Freetown in the Western Area of Sierra Leone to mark and did mark positions for the attack on the Presidential motor-cade in furtherance of their plan to overthrow the Government of Sierra Leone by unlawful means.

21. On Tuesday the 17th March 1987 in Freetown Daniel Sulaiman Kai-Kai gave the sum of Le1,000.00 (One Thousand Leones) to Josephus Abiodun Williams, Joseph John Harding, Francis Massaquoi, [p.48] Amara Allieu Tarawallie and Conrad Innis to bring their uniforms and military kit the following day Wednesday 18th March, 1987 in furtherance of the plot to overthrow the Government of Sierra Leone by unlawful means. And they the said Josephus Abiodun Williams, Joseph John Harding, Francis Massaquoi, Amara Allieu Tarawallie and Conrad Innis did bring the said uniforms and military kit.

22. On or about the 18th March, 1987 in Freetown Gabriel Mohamed Tennyson Kai-Kai procured quantity of arms and ammunition in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means and transferred part of the said arms and ammunition to No. 42B Waterloo Street Freetown in a motor car registration SN. 16000.

23. On or about the 19th March 1987 in Freetown Gabriel Mohamed Tennyson Kai-Kai solicited Hassan Morlai Conteh and Prince Williams to procure a vehicle in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

24. On or about the 19th March, 1987 in Freetown Gabriel Mohamed Tennyson Kai-Kai wrote a speech in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means which speech contained measures pertaining to the taking over of the Government of Sierra Leone and was recorded on a cassette.

25. On or about the 20th March, 1987 at No. 25 Bathurst Street, Freetown in furtherance of a plot to overthrow the Government of Sierra Leone Kazim Allie gave to Gabriel Mohamed Tennyson Kai-Kai the sum of Le100,000.00 (One Hundred Thousand Leones).

26. On or about the 21st of March, 1987 Gabriel Mohamed Tennyson Kai-Kai received arms and ammunition at No. W26 Spur Road Freetown and caused the said arms and ammunition to be conveyed by Hassan Morlai Conteh and Patrick Benedict Kai-Kai to No. 42B Waterloo Street Freetown for delivery to Prince Deen Kai-Kai in furtherance of a plot to overthrow the Government of

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Sierra Leone. And he the said Gabriel Mohamed Tennyson Kai-Kai solicited Raymond Brima Dorwie at New England Police Station to join the said plot.

COUNT II

STATEMENT OF OFFENCE: MISPRISION OF TREASON CONTRARY TO LAW.

PARTICULARS OF OFFENCE: SHEKU DEEN KAMARA on the 15th March 1987 in Freetown in the Western Area of Sierra Leone well knowing that TREASON had been committed by GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH , DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, P.A.TRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY in that the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU. FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI AMARA ALLIEU TARAWALLIE. JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN CONTEH CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY had prepared to overthrow the Government of Sierra Leone by unlawful means, unlawfully concealed the commission of the said Treason.

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COUNT III

STATEMENT OF OFFENCE: MISPRISION OF TREASON CONTRARY TO LAW.

PARTICULARS OF OFFENCE: BENJAMIN ORISSA DUMACCA TAYLOR on the 21st March, 1987 in Freetown in the Western Area of Sierra Leone well knowing that TREASON had been committed by GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAR, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTER, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY in that the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI JOSEPH JOHN HARDING DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAR, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE JOSEPHUS ABIODUN WILLIAMS PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTER, CONRAD INNIS KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY had prepared to overthrow the Government of Sierra Leone by unlawful means, unlawfully concealed the commission of the said Treason.

COUNT IV

STATEMENT OF OFFENCE MURDER CONTRARY TO LAW.

PARTICULARS OF OFFENCE: PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI and CONRAD INNIS on the 23rd March 1987 at Freetown in the Western Area of Sierra Leone murdered MOHAMED ADAMA ROGERS.

[p.51]

The case for the prosecution is that between June 1st 1986 and on divers days between that day and the 23rd day of March, 1987 Gabriel Mohamed Tennyson Kai-Kai, 1st Appellant herein and 17 others committed the offence of Treason, in that they prepared to overthrow the Government of Sierra Leone

by unlawful means. Four of the Appellants were charged with the Murder of Mohamed Adama Rogers an S.S.D. Officer, and two others were each charged with the offence of Misprision of Treason.

Several acts of preparation were laid in the twenty six overt acts under Count I of the indictment, which included the allegation of conspiracy with other persons unknown to overthrow the said Government in that they agreed among others, to ambush, attack and kill the President of the Republic of Sierra Leone, disband the recognised Party declare a dusk to dawn curfew, form a National Reformation Council and take over the Government by unlawful means.

The prosecution further alleged that in the said act of preparation overthrow the Government several persons were solicited and incited join the plot, monies were collected from individuals and paid to others in pursuit of the plot to overthrow the Government by unlawful means and that arms and ammunition were collected from persons and stored in places, while others were issued to some of the Appellants in furtherance of the said plot.

At the trial in the High Court in Freetown, the prosecution called many witnesses thirty-six in all, in support of their case twenty-two witnesses including the Appellants, some of whom gave evidence on their own behalf, while others made statements from the dock. On the charge of murder, the prosecution relied substantially on circumstantial evidence. On the whole, there was a total of forty-four exhibits.

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Many grounds of appeal were filed on behalf of each Appellant in this appeal, but on the whole, they are substantially identical and having common ground with those filed on behalf of the other Appellants. I now proceed to consider these grounds.

THE INDICTMENT

Counsel contended on behalf of Appellants that the laying of overt acts is not permissible under S. 3 (1)(a) of the Treason and State Offences Act, 1963, there being no reference to overt acts in any of the provisions under the said Act. It was also contended that the laying of the several overt acts under the same count rendered the count duplicitous and therefore void. That since the repeal of the Treason Act of 1351 by virtue of S. 19 (2) of the Treason and State Offences Act, 1963 the inclusion of overt acts in a charge of Treason ceased to have any place in our criminal laws, referring in particular to 8.74 of the Courts Act. No. 31 of 1965 and also the Criminal Procedure Act. 1965 S.3 Part 1, captioned, "General Provisions Procedure".

This contention was common ground to almost all the Appellants both in the Court of Appeal and in this Court. To buttress their arguments, counsel among others relied on the judgment of the Court Appeal in the Treason Appeal of Mohamed Sorie Fornah and others v. The State, Cr. App. 31/74 judgment delivered on 30th April, 1975 (unreported). Like in the present appeal, there was before the Court of Appeal in Fornah's case the issue as to whether there was in our laws any legal basis, for the inclusion of

overt acts in charges under the Treason and State Offences Act, 1963. This was a ground of appeal before their Lordships.

Luke J.S.C. (as he then was) inter alia, had this to say —

“The necessity for overt acts in information or Indictment of Treason was first introduced by the Treason Act, of 1351. According to the [p.53] statute that requirement related only to the species of Treason of "Being adherent to the King's enemies in his realm", and not to any other species of treason. That species of treason was required to be proved by “open deed”, which in more modern times has been defined as, “any act manifesting the criminal object” (See R v. Thistlewood (1820) 33 St. Tr. 681). In the 17th & 18th centuries the Courts by Judicial interpretation extended the requirement of an overt act to all species of Treason. But the Treason Act, of 1351 is no longer applicable in Sierra Leone. It was repealed by S. 19 (2) of the Treason and State Offences Act, 1963. The question then is: are overt acts necessary in Indictments for the species of Treason created by the Treason and State Offences Act, 1963? That is an arguable question, but it is not necessary to decide it in this appeal because the State chose to lay overt acts in the indictment in the instant case".

Suffice it to say that this issue was never decided by their Lordships’ Court. The question was left open, only to resurface in the Court of Appeal and in this Court for our consideration and determination.

I now consider the term "overt act". What is an overt act? Oxford Universal Dictionary Illustrated 3rd Edition Vol. II 1970 Reprint defines the word overt as follows: open, not closed; uncovered. Open to view or knowledge; evident, plain, unconcealed, not secret.

[p.54]

Learned Attorney-General for State Respondent referred us to Wharton's Law Lexicon 4th Ed. p. 723 and Jowits Dictionary of English Law 2nd Vol. p. 13000, 1977 Ed. Jowit defines "overt act", inter alia as, “an open act, or one consisting of something stronger than mere words, and evidencing a deliberate intention in the mind of the person doing it. The phrase is chiefly used in the law of treason it being a rule that a treasonable intention is not punishable unless it is evidenced by some overt act .....

Wharton's defines "overt act" inter alia as follows:

"The expression overt act means an act which shows the intention of the party doing it is used principally in connection with treason and conspiracy. A treasonable intention is not punishable unless it is manifested by an overt act. In the same way conspirators may make their criminal purpose clear by some overt act, such as an agreement to further their common design .....”

Following the respective legal definitions given to the term "overt act", I take it to mean that an overt act is an act that is open to the world in the sense that it can be perceived by anyone placed to do so.

In Shamwana v. The People (1985) L.R.C. (Criminal) p. 120 to which frequent references were made by counsel on both sides in the prosecution of this appeal, Section 52 of the Republic of Zambia penal Code

Chapter 146 of the Laws of Zambia in relation to Treason and allied offences makes specific reference to “overt act” and defines it in these terms:

[p.55]

Section 52—

"In the case of any of the offences defined in this chapter, when the manifestation by any overt act of an intention to effect any purpose is an element of the offence, every act of conspiring with any person to effect that purpose, and every act done in furtherance of the purpose, by any of the persons conspiring, is deemed to be an overt act manifesting the intention".

We in Sierra Leone, unlike Zambia, do not have a codified system of laws. We therefore look for our laws from the relevant provisions of the Constitution, in particular, S. 125 of the Constitution of Sierra Leone Act. No. 12 of 1978 (as amended). I have looked in vain for an answer whether it is permissible to lay overt acts under our Treason and State Offences Act, 1963. However, the matter does not rest there.

Criminal proceedings in this country are regulated by the provisions of the Criminal Procedure Act, No. 32 of 1965 (as amended). It is an Act to consolidate and amend the Law Relating to Criminal Procedure. The relevant sections and Rules for our purpose are in these terms.

Section 51 (1) of the Criminal Procedure Act, No. 32 of 1965 states:

"Every information or indictment shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge".

[p.56]

Rules 3(4) (5) of the Criminal Procedure Rules state as follows:

Rule 3 (4)—

“After the statement of offence particulars of such offence shall be set out in ordinary language in which the use of technical terms shall not be necessary.

Provided that (a) where any rule of law or any Act or statute limits the particulars of an offence which are required to be given in an information or indictment, nothing in this rule shall require any more particulars to be given than those so required. (b) It shall be sufficient if only the words of the section of the enactment creating the offence are set out in the particulars of the offence.

Rule 3 (5) states:

“The forms set out in the Appendix to these rules, or forms conforming thereto as nearly as may be, shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case.”

Also in Mattaka & others vs. The people, E.A.L.R. (1963) p, 627 the Appellants were charged with the offence of Treason under S. 39 of the Penal Code of Tanzania. the Criminal procedure Code made no provisions as to the method of laying a charge for Treason contrary to S. 39 (2) and the prosecution followed the English practice of [p.57] sitting out the various overt acts in each count after having first set out the statement of offence. It complied, however, with the Criminal procedure Code as it set out a statement of the specific offence charged and then gave such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 135 of the Tanzanian Criminal Code, which is in the same terms as our section 51 (1) of the Criminal procedure Act, No. 32 of 1965 states:

section 135 –

"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

This procedure was not questioned and was in the view of the East African Court of Appeal correct. I am also of the opinion that it was both proper and correct procedure, since it complied with the provisions of S. 52 (1) of our Criminal procedure Act, No. 32 of 1965.

The overt acts laid in the present count are no more than further particulars of the particulars of offence charged. They are in themselves not specific or distinct charges, but merely further particulars.

In my judgment and for the reasons stated supra, the Indictment as laid under S. 3 (1) (a) of the Treason and State Offences Act, 1963 together with the overt acts is correct, proper and in conformity with the provisions of S. 51 of the Criminal Procedure Act No. 32 of 1965 and Rules 3(4) (5) thereof. Under our criminal procedure the proof required for any criminal offence is proof beyond reasonable doubt. In the instant case what the prosecution was required to prove against the accused/appellants herein was he substantive offence of preparation to overthrow the Government of Sierra Leone by unlawful means, which is treason.

[p.58]

It was further contended by Appellants that the court under which they were charged with treason was duplicitous and therefore void. In short, they complained that they were charged with several separate and distinct offences in the same count.

In law, where two or more offences are charged in the same count of an indictment, the indictment is to that extent bad for duplicity. The law relating to duplicity is to ensure the protection of an accused person, by not subjecting him to an unfair trial so that he may know exactly what case he has to answer. It is also to give him an opportunity at some future date to plead autre fois convict or autre fois acquit as the case may be.

It has been said time and again that duplicity in a count is a matter of form not of evidence called in support of the count. To ascertain whether a count is bad for duplicity, one must examine the count

itself, that is, the count's statement of offence, as read with its particulars of offence. If an examination shows that two or more offences have been charged therein, then the count is bad for duplicity.

There is a long line of cases where it has been held that where there is duplicity in a count, the conviction should be quashed as it goes to the root of jurisdiction. Thus Lord parker remarking in the case of Mallon v. Allon (1964) 1 Q.B.385; (1963) 3 All E.R. 843 said:

"That duplicity although is a highly technical point is one which goes to the jurisdiction of the Court and if a good point, it is good whenever taken and the conviction should be quashed. An accused should know of what offence he is charged and convicted".

In David Lasana & 11 others v. Regina (1970-71) A.L.R. (S.L.) 186 – the Appellants were charged with preparing or endeavouring to overthrow the Government of Sierra Leone by unlawful means. They were

convicted of treason and sentenced accordingly. On appeal, the Court of Appeal set aside the conviction on the grounds that the counts were bad for duplicity.

[p.59]

I must now determine whether the count including the several overt acts is void for duplicity; and also whether in a count for treason two or more conspiracy overt acts may be laid without making the count duplicitous. This brings me to a consideration of the provisions of s. 51 (1) of the Criminal Procedure Act No. 32 of 1965, which I have already set out in appropriate places (supra).

Now the statement of offence in the instant case is Treason, contrary to s. 3 (1)(a) of the Treason and State Offences Act, 1963 (as amended). The particulars of offence inter alia are, "Gabriel Mohamed Tennyson Kai-Kai …….. and Haruna Vandy-Jimmy on the 1st day of June, 1986 and on divers days between that day and the 23rd day of March, 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means" (emphasis mine).

An examination of Count 1 of the indictment clearly shows that the only offence charged in the statement of offence is treason, not treason and conspiracy or conspiracies. The particulars of offence alleged, that the Appellants together prepared to overthrow the Government - not prepared or/and endeavoured to overthrow the Government. Had the Statement of offence in Count 1 charged Appellants with two separate offences and the particulars of offence alleged that Appellants had "Prepared or endeavoured" to overthrow the Government as was the case in David Lansana and 11 others v. Regina (supra) the count would have been duplicitous and bad in law as the terms "prepared" and "endeavoured" would have related to distinct specific offences of treason. This is not the position in the instant case.

The contention of Appellants that the various overt acts laid in indictment make Count 1 bad for duplicity is in my view insupportable in law and Wholly untenable. Suffice it to say that the various overt acts were not laid as substantive offences but as further particulars of the particulars of offence of the one and only count of treason in the indictment. In law, it is permissible to lay any number of overt acts in the same count of an indictment without making the count duplicitous.

[p.60]

Where there are several overt acts laid in a count of an indictment and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient are sufficiently laid. In law proof of one overt act will sustain the count provided that the overt act so proved is a sufficient overt act of the species of the treason count in the indictment. Consequently, the charge of the learned trial Judge to the jury, that proof of one overt act is sufficient to sustain the count is correct and proper in law.

I have looked at overt act 4 as laid in the indictment in respect of 5th Appellant and also learned trial Judge's charge to the jury thereof. I am satisfied that there is nothing in the said overt act 4 touching and concerning the 5th Appellant in relation to the treason charge. The direction of the learned trial Judge is clearly wrong in this regard. But as already stated, where there are several overt acts charged in a count of an indictment and a judgment is given on a general verdict of guilty on that count as was the case here, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains al1egations of overt acts that are sufficient and are sufficiently laid.

This in my view is the crux of the matter.

Was the conspiracy overt act in the count properly laid? A specific conspiracy charge is a common law offence (misdemeanour) and an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. It was defined by Willes J. in Mulcahy v. The Queen (1868) L.R. 3H. L. 306 at 317 as follows:

[p.61]

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means".

In R v. Brisac, Grose J. said: (1803) 4 East p. 164 at p. 171—

“Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them".

In the Queen v. Aspinall (1876) 2 Q.B.D. 48 Brett J .A. said at p. 58—

"The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time certain things. It is not necessary in order to complete the offence, that any one thing should be done beyond the, agreement. The conspirators

may repent and stop, or may have no opportunity, or may fail. Nevertheless the crime is completed when they agreed".

[p.62]

If several persons do an act preparatory to the overthrow of the Government by unlawful means, that would amount to treason under s.3(1) (a)of the Treason and State Offences Act, 1963. Consequently, the respective acts of the parties can be laid as overt acts of the treason of preparing. In the instant case, the forbidden act under the treason and State Offences Act, 1963 with which Appellants were charged, was preparation to overthrow the Government of Sierra Leone by unlawful means. Conspiracy is a preparatory act, preparatory to the commission of an unlawful act.

Therefore when persons agree to overthrow Government by unlawful means, that agreement is a preparatory act, which amounts to a preparation to overthrow the Government by unlawful means contrary to S.3(1)(a) of the Treason and State Offences Act, 1963. Consequently, the said agreement to overthrow Government by unlawful means is a sufficient overt act of the species of treason created by S.3 (1) (a) of the Act of 1963.

In law conspiracy to commit treason is a sufficient overt act of treason, and can be properly laid in a count for treason. That this is so is supported by a long line of authorities - See: Mulcahy v. The Queen (supra); Lansana & 11 others v. Regina (supra).

In R v. Greenfield (1973) 3 All E.R. 1050 it was held that the fact that the evidence disclosed other conspiracies did not make the count duplicitous. In McCafferty (supra) two conspiracy overt acts 'were validly laid in the same count. It is also permissible in law to lay two or more conspiracy overt acts in a count for treason.

MISPRISION OF TREASON

This case raises the question whether there is today such an offence as misprision of treason in Sierra Leone. Counsel for 13th and 14th Appellants say that such an offence is not known to our laws; or if it was an offence, it has ceased to be so, since the repeal of [p.63] the English Treason Act of 1351 by virtue of S. 19 (2) of the Treason and State Offences Act, No. 10 of 1963, which in their view swept overboard the common law misdemeanour of misprision of treason. Until its repeal, the Treason Act of 1351 was law in Sierra Leone.

Counsel for State Respondent says that there always has been such an offence, as is exemplified by the prosecution of the instant case. Misprision of Treason is a common law misdemeanour and is committed when any person who knows, or has reasonable cause to believe that another has committed treason, omits to disclose this information or any material Part of it to the proper authority (Smith & Hogan Criminal Law 5th Edn. 1983). It is also defined in Halsbury's Laws of England 4th Edn. Vol. 11 p. 483 as, "an offence at' common law, punishable by fine and imprisonment at the discretion of the court, for a person who knows that treason is being planned or committed not to report it as soon as he can to a Justice of the Peace or other authority".

Over the years eminent legal exponents of the common law have extended its scope to include bare knowledge and concealment. As soon as a person becomes aware of a treasonable design, that is a knowledge that treason is merely being planned or committed, it is his duty to reveal it to a Judge or Justice of the Peace or other authority at the earliest opportunity. Failure to do so is misprision of treason for which he can be prosecuted (See Stephen's Commentaries on the Laws of England 21st Ed. p. 405 at 4O6). I shall come to this aspect later in his judgment.

What appears in my view to have conduced learned counsel to subscribe to this erroneous assumption that misprision of treason is no longer an offence in Sierra Leone, is the DICTUM of his Lordship Tambiah J.A. . in the leading judgment delivered by his Lordship in the Treason Appeal of David Lansana and 11 others v. Regina (1970-71) ALR (S.L.) 186, where his Lordship observed that misprision of treason was no longer an offence in Sierra Leone.

[p.64]

With respect, his Lordship took the view albeit mistaken, that the repeal of the English Treason Act, of 1351, by S. 19 (2) of the Treason and State Offences Act, 1963 ipso facto abolished the common law offence of misprision of treason, particularly so, when the repealing Act did not contain any provision relating to misprision of treason as known to English Law. Regrettably, as the position is, that was never the case. With respect it was a misconception on the part of the learned Justice.

Suffice it to say that neither the repeal of the Treason Act of 1351 nor the absence of any mention of this offence in the Treason and State Offences Act, 1963 makes any difference to the status of misprision of treason as a criminal offence in this country. It is quite another matter, however, if for purposes of convenience, simplicity and clarity our Parliament in its wisdom considers it desirable to spell out the offence of misprision of treason in our laws by appropriate legislation as in some of our sister common law jurisdictions.

Be that as it may, our position will be brought into proper focus if I trace the sources of our laws. The laws of Sierra Leone are to be found in S. 125 of the Constitution of Sierra Leone, Act No. 12 of1978 and S. 74 of the Courts Act, No. 31 of 1965. Section 125 inter alia states:

“Subject to the provisions of the Constitution and any other enactment, the common law, the doctrines of equity, and the statutes of general application in force in England on the 1st day of January, 1880 shall be in force in Sierra Leone”.

From the foregoing, it is quite clear that the English law applicable to Sierra Leone is the common law of England, the doctrines of equity and statutes of general application which were in force in England on 1st January, 1880 (S. 74 of the courts Act, 1965 and S. 125 [p.65] of Act No. 12 of 1978). In regard to the contentions of learned counsel for Appellants, I will dismiss such contentions as there are, by reference to the memorable pronouncement of Lord Denning in Sykes case which I consider not only correct but appropriate in the circumstances.

Lord Denning in Sykes case (1961) 3 All E.R. p. 33, held that misprision of treason and misprision of felony still exist in England. I must add here, that I know of no authority to the contrary. By the reasons stated above, misprision of treason has always been and still is a common law offence in Sierra Leone.

In relation to misprision of felony, in the same case, his Lordship had this to say - ([1962] A.C. at 564; [1961] 3 All E.R. at 42):

"My Lords it is said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are 'contact' men for thieves who assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony".

By parity of reason, this principle, which in my view, is sound in law and grounded in common sense, is applicable to the offence of misprision of treason so that the arm of the law in Lord Denning's words would not be too short to reach not only those who hide treason but also those who conceal knowledge that treason is merely being planned or committed – [See Stephen supra]. It is, I feel good law, because it accords with our society's sense of justice, devoid of subtleties and technicalities in the particular circumstances.

[p.66]

Having held that the offence of misprision of treason is known to our laws, and that the 13th and 14th Appellants were properly tried, I now come to consider the evidence adduced by the prosecution in respect of Appellants.

The 13th Appellant Benjamin Orrisa Dumacca Taylor, was up to the time of the abortive coup plot on the 23rd March, 1987 and his subsequent arrest, a senior member of the Republic of Sierra Leone Police force with a record of twenty-three years service to his credit. During this period, he served in various capacities, including that of personal bodyguard, to 5th Appellant, Francis Mischeck Minah, whom he served for a period of nine years, 1973-1982. He rose to the rank of Deputy Superintendent of Police, and at the time of his arrest, was Officer Commanding Central Police Station Freetown.

Briefly, the case for the prosecution was that on Saturday evening, the 21st March, 1987, 13th Appellant Benjamin Taylor visited Jay's Pub at Texaco, Aberdeen Road to have a drink. He found Mustapha Sheriff, 18th prosecution witness already there. Mustapha Sheriff received him warmly and served him a pint of Beer and a second. According to Appellant, he refused the second pint as he was hungry, and was proceeding home to have his meal.

There and then Mustapha Sheriff called Appellant aside and told him that he, Mustapha Sheriff, had been approached by people in connection with a coup plot, but that he had not yet seen weapons and arms. Mustapha Sheriff, however, did not give Appellant the names of the coup planners, but promised to furnish him further details in this regard when he received full information, in any case, not later than following day. Appellant said O.K. and he left Jay's Pub for Aberdeen Village.

In keeping with his promise to call on Appellant, on the following day, Sunday 22nd March, 1987 Mustapha Sheriff, accompanied by his friend Prince Williams P.W.33 boarded a van and set out for Aberdeen Village to see 13th Appellant. Unfortunately for him, due to a road [p.67] block, he was unable to reach the 13th Appellant. They returned and instead, decided to drive to Wilberforce Village and divulge the planned coup plot to the Military Intelligence Branch, which, they did.

This piece of information set the machinery of the Security Forces in motion, culminating in the foiling of the coup plot in the early hours of Monday 23rd March, 1987 and the apprehension of Appellants and others.

"As soon as a person becomes aware of a treasonable design, that is, a knowledge that treason is merely being planned or committed, it is his duty to reveal it to a Judge or Justice of the Peace or other authority at the earliest opportunity. Failure to do so is misprision of treason for which he may be prosecuted" [see Stephen's Commentaries on the Laws of England supra].

Suffice it to say that these words are plain and unambiguous.

The evidence in this case was that Mustapha Sheriff informed 13th Appellant Benjamin Orissa Dumacca Taylor at Jay's Pub, about the planned coup plot, short of giving him the names of the plotters. In the circumstances of this case, was the tip-off given to the 13th Appellant by Mustapha Sheriff not of such a nature and importance as to warrant its expeditious disclosure by 13th Appellant to the proper authorities in the style and manner of a Senior Police Officer, so that a stitch in time would save nine? In all the circumstances of this case, was the information from Mustapha Sheriff not of sufficient momentum and gravity as to put a Police Officer of Appellant's calibre and standing on the qui vive, making it incumbent on him to initiate immediate investigations without more? Finally, was the 13th Appellant interested in any information from Mustapha Sheriff? I fail to see any evidence of it. His general attitude in my view, was one of apathy and resignation.

[p.68]

Suffice it to say that it is the duty of every citizen to assist in the detection and suppression of crime, and that prevention is better than cure. A fortiori, by the nature of his duty which carries with it a high degree of responsibility, much was expected of Appellant at a time when it would appear to any reasonable person that the country was on the brink of a precipice. Regrettably, Appellant was in my view woefully wanting in fore-sight and the expected standards of a highly placed and disciplined Police Officer.

In the circumstances and for the reasons given, I am of the view that the Court of Appeal rightly and correctly dismissed Appellant's appeal. I have looked at the evidence and having regard to the special circumstances of this case, I find myself unable to uphold this appeal. The appeal is accordingly dismissed.

The 14th Appellant, Sheku Deen Kamara was up to the time of his arrest, a private soldier in the Republic of Sierra Leone Military Forces, having served for eleven years.

The case for the prosecution is that the 14th Appellant attended a secret meeting at 42B Waterloo Street, Freetown on the 15th March, 1987 together with Appellants herein, in order to prepare and overthrow the Government of Sierra Leone by unlawful means. There was no denying that Appellant attended this meeting albeit once and did not show his face there again. At this meeting, the logistics of the coup plot were discussed at length. Among those who attended were, Gabriel Mohamed Tennyson Kai-Kai, 1st Appellant, David Samu, 6th Appellant, Francis Masaaquoi, 7th Appellant, Allieu Tarawallie, 8th Appellant Josephus Williams , 9th Appellant and Conrad Innis, 11th Appellant. In his voluntary cautioned statement, Exh. "FF", Appellant said:

"I never thought of revealing this information to any authority because the whole plan seemed to have been impossible for a single Police Officer to stand and fight to overthrow the [p.69] Government of Sierra Leone. O.C. Kai-Kai never gave me any amount to keep the information secret".

Again in his charged statement Exh. "N" he said:

"The reason why I failed to report was because I was not convinced that a Police Officer can succeed in making a coup in this country as there is a standing Military Force".

Appellants gave evidence on oath from the witness box. The jury saw the witnesses, heard them and on a consideration of the evidence adduced, returned a verdict of guilty as charged. The Court of Appeal considered this ground and dismissed it for want of substance.

In my view, no reasonable jury properly directed would have returned a verdict otherwise than guilty of the offence as charged. I agree with the findings of the Court of Appeal and hold that misprision of treason which is a common law misdemeanour, constitutes an offence in this country, punishable under our laws. In my opinion the sentence is neither severe nor inordinate. I would therefore loath interfere with it.

I would dismiss this appeal.

MURDER CHARGE

The 2nd, 3rd, 4th and 11th Appellants herein, were convicted of murder of Mohamed Adama Rogers and sentenced to death by the High Court in Freetown, on the 17th October, 1987. They appealed against conviction to the Court of Appeal for Sierra Leone on various grounds.

It was contended on their behalf that the learned trial Judge had in many respects misdirected the Jury and also failed to put the case of Appellants adequately to them. Particular prominence was given to a contention that the learned trial Judge had failed to direct the [p.70] jury as to how they should view and approach circumstantial evidence, being the pith and substance of the case for the prosecution. That since the prosecution case was based substantially on circumstantial evidence, before Appellants could be convicted on such evidence, it must be so mathematically accurate that it leads to one and only irresistible conclusion that the Appellants murdered the deceased. It was therefore contended that the learned trial Judge's direction to the jury, that they must not convict unless they were satisfied beyond reasonable doubt of the guilt of the accused, was not sufficient in law. Apart from this contention, the

other points raised by counsel are wholly inconsequential and do not deserve serious consideration. It is sufficient therefore if I deal with the main issues.

The Court of Appeal dealt with these contentions and dismissed Appellants' appeals for want of substance. It held that there was evidence on which the jury properly directed were fully justified in returning a verdict of guilty against Appellants. On a consideration of the whole of the evidence, the Court of Appeal held the view that the learned trial Judge's charge to the jury was proper, fair and accurate.

In a criminal trial, it is the duty of the Judge to make clear to the Jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution case is based on circumstantial evidence the Judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

[p.71]

According to the evidence, the deceased, Mohamed Adama Rogers died from bullet wounds at 42B Waterloo Street Freetown, involving Appellants who were acting in furtherance of a conspiracy to overthrow the Government of Sierra Leone by unlawful means. Appellants and their confederates had assembled at 42B Waterloo Street Freetown, their rendezvous, waiting for the signal, to plunge into action. It came out in evidence that 42B Waterloo Street belonged to 1st Appellant Gabriel Mohamed Tennyson Kai-Kai, who put it at the disposal of his brothers 2nd, 3rd, 4th Appellants and others for residential purposes. That was the position at 42B Waterloo Street on the night of Sunday 22nd - Monday 23rd March, 1987.

The Security Forces had before Sunday evening 22nd March, 1987 got wind of the coup plot, and the movements of Appellants, and were taking counter measures to close in on them as they assembled at 42B Waterloo Street. At the same time, Appellants had discovered to their dismay that they had been betrayed and that their plans and secrets were now in the hands of the Security Forces. In anticipation of an imminent attack on them, Appellants prepared themselves for the worse, as in their estimation retreat was no longer an option open to them in those circumstances.

According to the evidence, 2nd Appellant, Prince Deen Kai-Kai who, as it were, master-minded the affairs of Appellants at 42B Waterloo Street that night, gave each of them one sub-machine gun with magazines full of ammunition. The 3rd, 4th and 11th Appellants went and took their positions by the veranda. The 2nd Appellant who stayed down stairs loaded several weapons and waited there at the ready.

When the Police vehicle arrived at 42B Waterloo Street with its complement of security personnel, including the deceased Mohamed Adama Rogers, all four Appellants opened fire on the Police vehicle [p.72] Mohamed Adama Rogers who had just alighted from the vehicle was fired upon and he dropped dead on the spot. The bullet wound was 6 mm in diameter. It entered through his forehead and escaped

through the occiput. After several bursts of fire from Appellants, they ran away, dropping their rifles and ammunition as they made good their escape. After many days of intensive search for Appellants, the 2nd, 3rd and 4th Appellants were apprehended near the Liberian Border, while the 11th Appellant was arrested in Freetown area.

On the basis of the evidence adduced in this case, it cannot be said that there was no clear and convincing evidence of the presence of Appellants at 42B Waterloo Street Freetown on that fateful night, and also of their participation in the unlawful criminal act - the shooting incident culminating in the death of Mohamed Adama Rogers. In addition, there was overwhelming evidence connecting Appellants with the plot, and that they had the opportunity of committing those offences the prosecution alleged against them.

From the evidence adduced that the Appellants conspired with others to overthrow the Government of Sierra Leone by unlawful means, the fact that they were well armed, the discovery of dangerous arms and ammunition of every description at 42B Waterloo Street, the residence of Appellants, the body of Mohamed Adama Rogers found at the scene of the crime, the statements of Appellants giving details of the parts each of them played in this criminal undertaking, the absence of co-existing circumstances which might weaken or destroy the evidence adduced, though circumstantial, that the deceased was murdered by the Appellants, confirmed the view of the Appellate Court that the Appellants committed the offence, charged. Indeed, these were all matters for the jury to consider in arriving at their verdict.

From the range of evidence, it was apparent that there were matters sufficient for the consideration of the jury, and further, that it was open to them to draw conclusions from the mass of evidence which would warrant them in deciding that the guilt of Appellants had been established or not.

[p.73]

Counsel for Appellants in this Court renewed with vigour and tenacity, the same arguments and submissions he had earlier made in the Court of Appeal, as to alleged misdirections. As in the Court below, counsel put much reliance on the authority of Ogwanweka Ona v. The State - Nigeria W.L.R. 1985 p. 164; also Teper v. R [1952] A.C. 480 and Taylor on Circumstantial Evidence for his submissions.

In my view, the locus classicus on the law of circumstantial evidence is to be found in the judgment of the House of Lords in McGREEVY v. D.P.P. [1972] Cr. App. R. 424 in which Lord Morris of Borth-Y-Gest reviewed a wide range of authorities on the subject.

This was an appeal to the House of Lords where Appellant's conviction for murder at his trial in Northern Ireland turned entirely on circumstantial evidence. Their Lordships were invited to consider the point of law, whether at a criminal trial with a jury in which the case against the accused depended wholly or substantially on circumstantial evidence, a special duty devolves on the trial Judge to give a special direction to the jury on the question of proof of guilt, other than the general requirement that proof must be established beyond reasonable doubt.

Suffice it to say that in our criminal procedure the standard of proof is, and has always been, "proof beyond reasonable doubt". It is stated in ARCHBOLD 39th Ed. 598 that notwithstanding the strictures in SUMMERS upon the "reasonable doubt" direction, it nonetheless remains the fact that the House of Lords (in WOOLMINGTON v. D.P.P. (1935) 57. Cr App. R 72) and the House of Lords (in McGREEVT v. D.P.P. (1972) and a substantial body of opinion remains of the view that that form of direction is preferable to the other. The direction is based upon the following passage in WOOLMINGTON:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject [p.74] (to the qualification involving the defence of insanity and to any statutory exception): If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

At page 95 of WOOLMINGTON v. D.P.P. the Lord Chancellor, Lord Sankey had this to say:

"When dealing with a murder case the Crown must prove:—

(a) Death as a result of a voluntary act of the accused and,

(b) malice of the accused.

It may prove malice either expressly or by implication. For malice may be implied where death occurs as a result of a voluntary act of the accused which is either (1) intentional and (2) unprovoked".

In Taylor on Circumstantial Evidence 11th Ed. Vol. 1 p.74, it is stated that after the facts sworn to are proved, a further and a higher difficult duty remains for the jury to perform.

"They must decide not whether consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused.

[p.75]

The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing".

Taylor, however, expresses the view that the form of any particular direction stems from the general requirement that proof must be established beyond reasonable doubt.

In Tepper v. R. referred to supra at p. 498, Lord Hormand inter alia said:—

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded

the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest', and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

So also were the words used by Lord Goddard C.J. in ONUFREJCZIK (1955) 39 Cr. App. R. 1; [1955] 1 Q.B. 388 (in dealing with the situation where in a murder case no corpse had been found) when at pp. 3 and 394 of the respective reports he said:

[p.76]

"Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion only".

In Ona v. The State, on which counsel for Appellant has put great reliance on the effect of circumstantial evidence, where the prosecution case was mainly circumstantial, the facts briefly, were as follows:

Appellant was convicted of murder and sentenced to death by the Anambr State High Court in Nigeria. She was alleged to have killed the deceased, a relation of her husband, by inflicting matchet cuts on her, The evidence against the accused was mainly circumstantial, The corpse of the deceased was found close to her compound. Blood stains were found on her wrapper. A blood stained matchet was also found in her room which she shared with her husband. Matchet cuts were found on the deceased. However, there was no positive evidence linking the accused with the actual killing of the deceased.

The prosecution during trial failed to call as a witness one Eke Agbo, who seemed to know more than anybody else, the circumstances surrounding the killing and whose evidence could have helped a great deal in deciding the case one way of the other. Nevertheless, the learned trial Judge convicted the accused as charged and this was confirmed by the Court of Appeal. The Appellant appealed to the Court of Nigeria. It was held inter alia:

[p.77]

"That before a person can be convicted upon circumstantial evidence, such evidence must be mathematically accurate that it points to the one and only irrestible conclusion that that person was the one responsible for the offence for which he has been charged".

Perhaps it will be pertinent to point out that in the ONA case the Appellant was charged under the Criminal Code of Eastern Nigeria. unlike the instant case where Appellants were charged with murder contrary to law. Murder is a common law offence, in Sierra Leone, where the guilt of the accused must be established by proof beyond reasonable doubt. Even in ONA's case it is significant to note from the Judgment of KAZEEM J.S.C. one of the Justices of the Supreme Court of Nigeria on the panel, of the need for the general requirement, that proof must be established beyond reasonable doubt. The learned Justice inter alia said:

"It may well be that the Appellant in this case in fact killed the deceased; however, the circumstantial evidence relied upon by the prosecution did not lead to the only conclusion that she was the one responsible for the murder of the deceased. The law also requires that the Appellant's involvement with the offence must be proved beyond reasonable doubt……."

With respect, on the facts of ONA's case, no reasonable jury properly directed would have returned a verdict of guilty of murder against her.

[p.78]

In Kenny's Outlines of Criminal Law, 15th Ed. [1936], it is said:

"No distrust of circumstantial evidence has been sewn by English law. It does not even require that direct evidence shall receiveany preference over circumstantial evidence".

Also in R v Taylor [1928] 21 Cr. App. R. at p. 20 Lord Hewart said:

"It is no derogation to say that the evidence is circumstantial".

Many instances are cited of important capital convictions of unquestionable standing based solely on indirect or circumstantial evidence. Admittedly, it has become the practice and also a settled rule in some commonwealth jurisdictions that a special direction as to the way circumstantial evidence is to be viewed, should be given. Until lately, the attitude of our criminal courts in this jurisdiction where the case for the prosecution was based upon circumstantial evidence, was that to convict, such evidence should be cogent, compelling and water-tight, and should point exclusively to the accused. Proof beyond reasonable doubt now suffices for all purposes without more.

The principles underlying the judgment of the House of Lords in McGreevy v. D.P.P. can be summarised in the following terms:

(i) There is no special obligation on a trial judge for the purposes of summing-up to seek to classify evidence into direct or circumstantial with the result that, if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence the Judge becomes under obligation to comply with special requirement.

(ii) That although in certain types of cases there are rules of law and practice which require a Judge to give certain warnings [p.79] to a Jury, there should be no set formula to be used by a learned Judge.

(iii) That in all cases, it is the duty of the Judge to make clear to a Jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied , beyond reasonable doubt.

As I said earlier, in this Judgment, our standard of proof in criminal cases is proof beyond reasonable doubt. The Judgment in McGreevy v. D.P.P. in my view, is based on sound principles of law; a fortiori, it has the -support of a substantial body of opinion, making it the locus classicus on the law relating to circumstantial evidence.

For the purpose of this appeal, I hold that the proper direction to be given in all criminal trials in this country irrespective of whether the evidence adduced at such trials is direct or circumstantial is proof beyond reasonable doubt.

I would also like to add that the prosecution case against Appellants was based on common design. It was alleged by the prosecution that Appellants conspired with others to overthrow the Government of Sierra Leone by unlawful means. They led evidence to establish both the conspiracy and the common design to effect their unlawful purpose.In furtherance of the common unlawful purpose, the Appellants on Monday 3rd March 1987 at 42B Waterloo Street, killed Mohamed Adama Rogers, although it was not known by whom the fatal shot was fired. The evidence is already legion and need not be repeated here.

In law, if several persons act together in one common unlawful undertaking and death results, but it is not known by whom, all are responsible. Consequently, the 2nd, 3rd, 4th and 11th Appellants are all responsible for the death of Mohamed Adama Rogers.

[p.80]

There is overwhelming evidence in support of the verdict of guilty of murder which the jury on proper direction rightly returned. The Court of Appeal confirmed the conviction and sentence of the High Court.

On the totality of the evidence, no jury properly directed would have returned a verdict otherwise than that of guilty of murder. The Court of Appeal cannot be faulted in dismissing Appellants' appeals and confirming the conviction and sentence. I would dismiss this appeal.

MISDIRECTIONS/WRONGFUL ADMISSION OP EVIDENCE

HEARSAY EVIDENCE

It was contended by learned Counsel for 5th and 12th Appellants herein that the Court of Appeal erred in law in dismissing the appeal of Appellants inspite of the wrongful admission of evidence against them of the hearsay evidence of D.W.20 relating to intelligence report received by him about meetings allegedly held at Yannihun Village, Wonde Chiefdom, having regard to the nature of the said evidence and the nature of the learned trial Judge's direction on it, and the wrongful basis on which the learned trial Judge admitted that evidence It was also contended by Appellants that the Court of Appeal was in error in refusing to hold that the learned trial Judge misdirected himself by admitting the hearsay evidence of D.W.20. The objection was that that piece of evidence was ever allowed to be given and admitted by the learned trial Judge, considering its prejudicial effect on the minds of the jury.

It is a fundamental rule of evidence that hearsay evidence, whether oral or written (common law and statutory exceptions apart), is inadmissible in criminal proceedings. In the celebrated case of Subramanian v Public Prosecutor [1956] 1 W.L.R. 965 decided by the Privy Council, the following formulation of the Privy Council has gained wide acceptance. It is in these terms:

[p.81]

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

The essence of hearsay evidence is that the statement complained of was made in the absence of the accused person. It is not the best evidence and it is not delivered on oath. The truthfulness and accura of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost. The rule however, admits of certain carefully safeguarded and limited exceptions, one of which is that Words may be proved when they form part of the res gestae, that is, the facts surrounding or accompanying a transaction which is the subject of the legal proceedings.

In the prosecution of the treason count against 5th and 12th Appellants among others in the High Court in Freetown, it was alleged by the prosecution that on Sunday 22nd March, 1987, the 5th and 12th Appellants herein convened a meeting at Nyannihun, Wonde Chiefdom, Bo District where monies were collected in furtherance of a conspiracy to overthrow the Government of Sierra Leone by unlawful means. Their defence was an alibi, both denying presence, participation and knowledge of the said meeting. Witnesses both for the prosecution and the defence gave evidence in court.

[p.82]

D.W. 20 M.M. Bangura, Senior District Officer Bo District justified on behalf of 12th Appellant Haruna Vandi-Jimmy. Under cross-examination, D.W.20 said inter-alia, that from intelligence reports received from the area, it was reported that a meeting was at Yannihun by 12th Appellant, 5th Appellant and others and that monies were collected on behalf of Appellants. This piece of evidence was admitted by the learned trial Judge. In his charge to the jury the learned trial Judge had this to say:

"Well, the Senior District Officer is a disinterested witness who holds no bias for either the 16th or 5th accused or for Paramount Chief Dabo, therefore this piece of evidence ought to be taken very seriously. The 5th and 16th accused have denied holding any meeting at Yannihun. The witnesses called by the Prosecution had testified here that that meeting was held. The witness for the 5th accused have testified here that such a meeting was never held. The Senior District Officer who was a defence witness confirmed that from intelligence report reaching him a meeting was indeed held and monies were collected as alleged by the Prosecution. Therefore gentlemen of the jury this is evidence which you should take into consideration in considering your verdict in so far as the 16th and 5th accused persons are concerned and if you are satisfied that the evidence given by the Senior District Officer is one which is worthy of credit, then it should assist you to come to your conclusion on the verdict you will give against the 5th and 16th accused".

[p.83]

Having regard to D.W.20's evidence and the nature of the learned trial Judge's direction on it to the jury, the contention of Appellants is valid to, the extent that the hearsay evidence of D.W.20 based on the, intelligence reports received, was wrongly admitted by the learned trial Judge in that it went beyond the principles laid down in Subramanian, in that the object of the evidence was to establish the truth of the statement in the intelligence reports not the fact- that It was made. The learned trial Judge misdirected himself by admitting D.W.20's hearsay evidence. The Court of Appeal also erred in law in holding that that piece of evidence was rightly admitted by the learned trial Judge.

Be that as it may, the fact that evidence is wrongly admitted does not make the verdict unsafe unless it can be shown that the evidence has actually influenced the verdict of the jury. Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at.

The question is, barring the evidence of D.W.20, was there other evidence before the jury for consideration in assessing the guilt or otherwise of Appellants in relation to the Nyannihun affair? Suffice it to say that the prosecution called witnesses to support their allegation that Appellants held meetings in Nyannihun on Sunday 22nd March 1987 and collected monies in furtherance of a plot to overthrow the Government of Sierra Leone. These witnesses were emphatic in their assertions particularly their identification of Appellants. Appellants also called witnesses to prove that no meetings were held by them in Nyannihum on Sunday 22nd March, 1987 and that they were neither at Nyannihun that day nor took part in any transactions there. In both cases the prosecution and the defence relied on the evidence adduced in support of their case.

[p.84]

In his summing-up to the jury, the learned trial Judge carefully and repeatedly explained to them the burden and standard of proof in criminal proceedings. On the basis of his direction to the jury, heard the witnesses and watched their demeanour returned their on a matter of credibility which as judges of fact was within their province. By their verdict, it was clearly demonstrated that the jury believed and accepted the evidence of prosecution witnesses and .disbelieved the evidence of defence witnesses.

The question as I see it, is whether looking at the proceedings as a whole and taking into account what has properly been proved, the conclusion arrived at has been a just one. In my view, disregarding the piece of hearsay evidence of D.W.20 relating to the transactions in Nyannihun, there was other evidence to be left to the jury for consideration on a right direction, in determining the guilt or otherwise of the Appellants. The jury were properly directed on that evidence

In my view the jury would or must inevitably have arrived at the same verdict if the evidence complained of had not been admitted.

THE ALIBI

It was argued by counsel for 5th and 12th Appellants that the Court of Appeal in its consideration of the alibi of Haruna Vandy-Jimmy and the evidence of the prosecution witnesses in so far as the alleged meeting in Nyannihun of the 22nd March, 1987 was concerned and the presence of the 5th Appellants herein.

The ease for the prosecution on overt act 3 depended on the presence of the 5th and 12th Appellants, together at Nyannihun on Sunday 22nd March, 1987. Appellants contended that on the basis of the evidence both for the prosecution and the defence, it was highly improbable, if not impossible for the 5th and 12th Appellants to have been together in Nyannihun Village at the time alleged. Their defence [p.85] was an alibi - that Appellants were not at Nyannihun and could not have taken part in any criminal acts there calculated to overthrow the Government of Sierra Leone by unlawful means as alleged.

The prosecution called several witnesses not only to prove that meetings were held in Nyannihun on the date in question, but also to show that Appellants participated in those meetings and that monies were collected in furtherance of a conspiracy to overthrow the Government of Sierra Leone by unlawful means. Appellants also called witnesses who adduced evidence refuting the evidence of prosecution witnesses. Was 12th Appellant's alleged presence at Nyannihun one of mistaken identity as contended on his behalf? On the basis of the evidence adduced, in particular, that of P.W.22 Musu Bawo and the verdict of the Jury, this contention appears to be far-fetched and devoid of truth.

At a criminal trial with a jury, where an accused raises an alibi as a defence, it is the duty of the trial Judge to explain that defence to the jury. He must explain to the Jury what in law amounts to an alibi. It must be explained further to the jury that even where an accused raises an alibi, the burden of proving his guilt lies on the prosecution throughout the proceedings. In law, no duty is imposed on an accused to prove his alibi although nothing stops him from calling witnesses to buttress such alibi if he chooses.

The Jury must be told this in clear terms and that if an alibi fails the matter does not end there. The overall burden of proving the guilt of the accused lies on the prosecution. The standard of proof required of the prosecution is proof beyond reasonable doubt.

In short the trial Judge should give the jury the following directions:

(i) A specific direction on the burden of proof in relation to the defence of alibi.

[p.86]

(ii) That even if the alibi is rejected they must nevertheless go on to consider the case for the prosecution in its bid to establish the guilt of the accused beyond reasonable doubt,

(iii) The defence however weak must be put to the jury.

(iv) That even if the accused's alibi fails, the prosecution did not necessarily succeed.

(v) That even where the alibi is rejected they can only convict on the evidence led by the prosecution if they feel sure of the guilt of the accused.

What were the respective alibi defences of the 12th and 5th Appellants in relation to the Nyannihun Meetings?

In his evidence at his trial, the 12th Appellant Haruna Vandy-Jimmy recalled the morning of Saturday 21st March, 1987 in Bo. He left Bo that day and travelled to Freetown, arriving there at 4 p.m. He proceeded to 44 Wellington Road, Kissy Mess Mess, where he met P.W. 36 Anthony Kallon. He did not go out until the morning hours of the 22nd March and travelled to Freetown to attend Parliament on Monday 23rd March, 1987. In short he was not at Nyannihun on Sunday 22nd March and could not have done what the prosecution alleged he did.' The Appellant in his evidence stated that at 12.30 p.m. on Friday 20th March, 1987 he and his party left Freetown for Bo, arriving thereby 4 p.m. They had lunch in Bo at one Lansana Kallon's residence, and took off at 4.45 p.m. for Pujehun arriving there at 7 p.m.

On Saturday 21st March, 1987 he held a meeting at Yoni from 11 a.m.-1.40 p.m. On Sunday 22nd March, 1987 after seeing into accommodation, he left Pejehun for Bo at 12.30 p.m. arriving there at 3 p.m. They had lunch at Lansana Kallon's residence and the party left for Freetown at about 4 p.m. arriving in Freetown at 7.15 p.m. [p.87] Although Appellants were not in law bound to do so, yet they called witnesses in support of their alibi defences which they had every right to do. The learned trial Judge considered the whole evidence adduced by both the prosecution and the defence including the alibi defence and dealt with the several burdens and standards of proof. Even though there was no specific direction on the burden of proof in relation to an alibi defence as was the proper thing to do nevertheless, there was no evidence of any misdirection on the part of the learned trial Judge in his summing-up to the jury, which could amount to a shifting of the burden of proof from the prosecution to the Appellants in respect of their respective alibi defences.

The learned trial Judge in his summing-up directed the jury over and over on the burden of proof being on the prosecution to establish the guilt of the Appellants and that he did this after reviewing the whole evidence and explaining the nature of their defences to the jury in non-technical language. The jury understood the learned trial Judge's direction and were not confused by it in arriving at their verdict.

By their verdict the jury rejected the evidence adduced on behalf of the Appellants and felt sure that their guilt had been proved by the prosecution beyond reasonable doubt. They accepted the evidence of the prosecution. In my view this ground is not tenable and there has been no miscarriage of justice.

ACCOMPLICES

This was a common ground of appeal both in the Court of Appeal and before this court. It was contended by Appellants that the learned trial Judge misdirected the jury into believing that P.W. 18, P.W. 21 and P.W. 33 were not accomplices, although he went on to warn them of the need for corroboration of an accomplice's evidence. It was also contended by counsel that the learned Appellate justices failed to consider this ground and consequently failed to make a pronouncement on it.

[p.88]

In law, an accomplice simpliciter is a person who is involved in the actual commission of the crime charged, whether as principal or accessory in felony or persons committing, procuring or aiding and abetting in the case of misdemeanor. A police spy is not an accomplice for this purpose.

An accomplice is always a competent witness for the prosecution, although the fact of a witness being an accomplice detracts materially from his credit. The uncorroborated evidence of an accomplice is admissible in law; but where an accomplice gives evidence for the prosecution, it is the duty of the Judge to warn the jury that although they may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule although a rule of practice has now become a rule of law.

Where the Judge fails to warn the jury in accordance with this rule, the conviction will be quashed even if in fact there be ample corroborative evidence. Where the Judge has given the jury an adequate warning on corroboration and has explained to them what is meant in law by corroboration, it is not necessary that he should point out to the jury the pieces of evidence which can amount to corroboration. In law an accomplice cannot corroborate the evidence of another accomplice.

Corroboration of a witness's testimony must be afforded by independent evidence which affects the defendant by connecting or tending to connect him with the offence charged. It must be evidence which implicates him, that is, which tends to confirm in some material particular not only that the offence was committed, but also that the defendant committed it.

It is for the Judge to decide whether there is any evidence to show that a witness can be regarded as an accomplice, and it is for the jury to determine whether the witness is infact an accomplice. Is there any Justification in the criticism of the learned trial Judge of a misdirection by him in law in this regard? Did the learned trial [p.89] Judge misdirect the jury in holding that there was no evidence capable of regarding P.W.18, P.W.21 and P.W.33 as accomplices? Did the learned trial Judge usurp the functions of the jury, by taking away from them the function of deciding whether P.W.18, P.W.21 and P.W.33 were in fact accomplices?

I have looked at the whole evidence adduced by P.W. 18, P.W.21 and P.W.33.I am also satisfied that the learned trial Judge reviewed their evidence scrupulously to the jury and explained the law applicable to the facts. I am satisfied that the learned trial Judge correctly assessed their evidence and came to the right conclusion that there was no evidence capable of pointing to P.W.18, P.W.21 and P.W.33 as accomplices. What evidence there was points to the contrary. The learned trial Judge in no way misdirected the jury in believing that P.W.18, P.W.21 and P.W.33 were not accomplices. In my view his direction was fair and proper.

Having held that the learned trial Judge did not misdirect the Jury on the question of P.W.18, P.W.21 and P.W.33, not being accomplices, the only issue here that calls for our consideration and decision is whether in all the circumstances of the case there was need for the learned trial Judge to give the warning on accomplice evidence to the jury. In my view this was unnecessary after the learned trial Judge's finding that P.W.18, P.W.21 and P.W.33 were not capable of being classed as accomplices since the evidence was lacking in this regard. Be that as it may I am satisfied that the jury were in no way

confused or misled by the learned trial Judge about the categories of the three witnesses not being accomplices and he rightly left this matter to them for their decision.

The jury were part of the trial; they saw P.W.18, P.W.21 and P.W.33, heard their evidence from the witness box and watched their demeanour. They understood the roles played by each of these witnesses and appreciated everything. Having looked at the whole [p.90] records submitted to this court, by no stretch of the imagination can anyone rightly come to the conclusion on the evidence before the court that P.W.18, P.W.21 and P.W.33 could be regarded as accomplices. In my view they made all efforts to gather information with a view of thwarting the coup plot which they ultimately succeeded in doing. They aided the Security Forces in unearthing the coup plot and their conduct on the whole could not be described as participants in the crime charged.

ALLEGED STATEMENTS MADE BY SUSPECTS AT SCENE OF ALLEGED CRIME

Counsel for Appellants contended that the alleged statements made by suspects in the instant case at the scene of the alleged crime was improper and therefore not admissible in law. Counsel relied on the case of Kojo Bodom & others v. Rex. 2 W.A.C.A. p. 390.

In my view, the facts of Kojo Bodom are exclusively referable to the circumstances of that case and cannot be said to be applicable to the facts of the instant case. In Kojo Bodom, the accused were charged with murder and convicted. They appealed against the conviction on two material grounds – one misdirection by the learned trial Judge in his summing-up to the Assessors and the reception of inadmissible evidence.

The deceased who lived at a village was reported missing. A search party was instituted by the village chief and subsequently his dead body was found hanging on a tree. Suspicion fell on four accused the perpetrators of the crime. They were then tied hand and foot and thoroughly beaten with the object of making them confess. The police were then sent for and the prisoners arrested and cautioned. They were then taken to the locus in quo where they made certain admissions. They were then formally charged with murder and each of them made a confession.

At the trial these confessions were admitted in evidence though objected to at the time. The court found that they made the confessions before a person in authority and that they were induced to make these confessions because of the severe beatings they received.

[p.91]

The court also strongly deprecated the course of action taken by the police in taking the suspects to the locus in quo for the purpose of obtaining admissions from them - that admissions were made, and were given evidence against the accused.

Suffice it to say that in the case of Kojo Bodom, all the ingredients which make an accused's confession inadmissible were present. Can the same be said of the instant case? I don't think so. In the instant case, proper caution was administered to suspects before statements were obtained from them. In the

course of ordinary Police Investigations visits were made to places mentioned in the several overt acts and not scenes of crimes simpliciter. As far as possible the proprieties were duty observed.

It should also be emphasised that this was a jury trial, where witnesses for the prosecution gave evidence as well as some of the Appellants in their own defence. The credibility of police witnesses was challenged by Appellants or counsel for Appellants about the oral statements, giving rise to trials within-a-trial. The correct process procedure was followed by the learned trial Judge after which he ruled on admissibility of these statements.

The jury as judges of fact had the opportunity of seeing and hearing these witnesses give evidence and were in position to form their own impressions. Their verdict was an indication that they believed the statements of Appellants.

As I see it, what is important and material in these circumstances irrespective of where the statements are obtained, it the paramount consideration that to be admissible, if they amount to extra judicial confession, they must meet the requirements of voluntariness, not obtained in breach of the Judges Rules. Complaints are always encountered in this regard; some true, others not so true. be that as it may, I will consider a clog on the proper exercise by the police of their investigatory function and, indeed, on the administration of justice itself if we grope ceaselessly for new expedients [p.92] however desirable in this connection. We can only hope for improvements.

In my view, these oral statements apart, there was other evidence before the jury for consideration in arriving at their verdict. The conviction of Appellants was based on the totality of the evidence adduced in court which in my judgment cannot be faulted in the instant case. It is therefore incorrect to state and indeed insupportable in law to hold that the learned trial Judge misdirected himself on the legal statue of an accused's statement made at the scene of the crime as contended by Appellants. This ground accordingly fails.

EXHIBIT JJJJ

It was also contended by learned counsel for 5th Appellant that Exh. JJJJ the unsworn statement of 1st Appellant Gabriel Mohamed Tennyson Kai-Kai did not constitute evidence against 5th Appellant, Francis Misheck Minah, and that it was a fundamental misdirection of the, learned trial Judge when he directed the jury that Exh. JJJJ, could be used against 5th Appellant. Counsel submitted further that the learned trial Judge had a legal duty to inform the jury that Exh. JJJJ was not evidence against 5th Appellant.

There is no doubt that it is a fundamental rule of evidence that statements made by one accused person either to the police or to others than statements, whether in the presence or absence of a co-accused, made in the course and pursuance of a joint criminal enterprise to which the co-accused was a party) are not evidence against a co-accused, unless the co-accused either expressly or by implication adopts the statements and thereby makes them his own: see R v. Rudd [1948] 32 Cr. App. R. 138. And it has repeatedly been that it is the duty of the judge in a jury trial to impress on the jury that the statement of the accused person not made on oath in the course of the trial is not evidence against a co-accused, and

must be entirely disregarded: See R v. Gunewardene [1951] 35 Or. App. R. 80, a decision of the English Court of Appeal, where [p.93]

Lord Goddard L.C.J. said inter alia at p. 91:

"If no separate trial is ordered, it is the duty of the Judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded".

However, it is the recognised and universal principle of law that, whereas a statement made in the absence of the accused person by a co-defendant cannot be evidence against the accused person, yet it that co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then his sworn evidence becomes evidence for all purposes in the case including that of being evidence against the accused person. This has neither been altered nor detracted from the decision in Meredith and others (1943) 29 Cr. App. R. 40. The headnote to that case states a course which it may be desirable to adopt in directing the jury on a joint trial in certain cases. The headnote is in the following terms:

"Where several prisoners are tried jointly and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly becomes evidence against his co-prisoners they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him".

[p.94]

On the principles stated above Exh. JJJJ cannot therefore without more be evidence against 5th Appellant. However, at the joint trial in the High Court, 1st Appellant herein, Gabriel Mohamed Tennyson Kai-Kai, maker of Exh. JJJJ, elected to give evidence on oath in his own defence from the witness-box. his sworn evidence from the witness-box became evidence for all proposes in the case including that of being evidence against the accused.

It was seriously contended by counsel for 5th Appellant, that when the 1st Appellant gave evidence on oath from the witness-box, he retracted his prior incriminating statement against 5th Appellant, that is Exh. JJJJ. Was there a retraction of Exh. JJJJ by 1st Appellant? I have to look for an answer from the records of proceedings furnished to this Court.

Now what is the meaning of the word “retract”? The Oxford Universal Dictionary Illustrated 3rd Ed. Vol. II 1970 Re-Print defines the “retract” as follows: To withdraw, recall, revoke, rescind. Funk and Wagnalls Standard Dictionary of the English Language, International Edition defines the word “retract” as follows: To take back (an assertion, accusation, admission); make a disavowal (of), recant.

I have read these records closely, but regrettably, I have failed to find any evidence of a reteraction of Exh. JJJJ. From the records, far from retracting Exh. JJJJ as contended by counsel for 5th Appellant, 1st Appellant in his evidence from the witness-box in relation to Exh. JJJJ, stopped short, conveniently

picking extracts here and there, supposedly in the sanguine hope of extracting himself from the conspiracy charge, and not in our view, with a motive of helping 5th Appellant. In his evidence from the witness-box, 1st Appellant gave extracts here and there from Exh. JJJ of conversations which took place between himself, 5th Appellant and Jamil Sahid Mohamed in Jamil's sitting room down stairs.

[p.95]

Like 1st Appellant, 5th Appellant also made a voluntary cautioned statement Exh. HHHH. He elected to give evidence on oath from the witness-box. He challenged portions of Exh. JJJJ; statement of 1st Appellant where he had mentioned his name. 5th Appellant also denied on oath the testimony of 1st Appellant.

The question arising from this situation is, whether it was correct and. proper for the learned trial Judge to leave these matters to the jury for their consideration in arriving at their verdict. In my view, it was the duty of the Judge to leave the matters to the jury to decide, and this was what he did.

In the light of the authorities, we are satisfied that the learned trial Judge did not misdirect the jury in the circumstances. There was nothing to show on the records that 1st Appellant retracted Exh. JJJJ.

EXHIBIT ZZZZQ

Counsel for 1st Appellant submitted to us that their Lordships in the Court of Appeal erred in law in holding that Exh. ZZZZQ, the tape recording of the voice of 1st Appellant Gabriel Mohamed Tennyson Kai-Kai was properly admitted in evidence and therefore did not prejudice the Appellant's trial, thereby depriving him of an acquittal. it was also contended that the circulation of the transcript of Exh. ZZZZQ amongst the jury without proper proof of it was illegal and prejudicial to Appellant's case. Counsel submitted that the pre-requisites for the admissibility of the tape recording were absent. He itemized the following requirements as conditions precedent to the admissibility of the tape recording in evidence.

(i) The accuracy of the tape recording must be proved.

(ii) The voice recorded must be properly identified.

(iii) The evidence must be relevant.

(iv) Exh. ZZZZQ must come from proper custody.

[p.96]

Counsel referred to the authority of R v Maqsud Ali, R v Ashiq Hussain [1962] 2 All E.R. p. 464. As to whether the pre-requisites referred to by learned counsel were established in the instant case the following passage from the Judgment of Marshall J. can serve as a useful guide as it is germain to the issues contended in the present appeal – See p. 469:

"What is clear to this Court is that this case appears to have raised for the first time in the grounds of appeal the question whether a tape recording is admissible in law. Counsel for the Appellants did not seem eager to argue the matter with any great force or in any real detail, but the court nevertheless invited Counsel for the Crown to address the court, if he desired, on the issue and this he has done. We think that the time has come when this court should state its view of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are constructed. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise would not be picked up by the naked eye have been admitted and now there are devices for picking up, transmitting, and recording conversations. We can see no different in principle between a tape recording and a photograph.

[p.97]

In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged".

Was Exh. ZZZZQ, the tape recording relevant in the instant case? The answer is a clear yes, since it touches and concerns overt act 24 of Count 1 of the indictment which is in the following terms:

"On or about 19th March, 1987 in Freetown Gabriel Mohamed Tennyson Kai-Kai wrote a speech in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means which speech contained measures pertaining to the taking over of the Government of Sierra Leone and was recorded on a cassette:.

First Appellant gave evidence on his own behalf from the witness box. The jury saw him and heard his voice distinctly as he gave his evidence-in-chief and also answered questions under cross-examination.

[p.98]

P.W. 26 Seth Amedofo who tendered Exh. ZZZZQ and in whose custody it had been, knew 1st Appellant very well and both had been on terms of familiarity over a long period. First Appellant was therefore no stranger to P.W.26 and he, P.W.26 was capable and qualified enough to identify his voice with relative ease and confidence.

It will be pertinent to point out that Exh. ZZZZQ was played in open court in the presence and hearing of the jury, the learned trial judge and 1st Appellant among others. It was contended by Appellant that the

cassette did not belong to him, 1twas not his property since it did not bear his initials nor his signature, as the other cassettes over which he claimed ownership. It was also contended by counsel for Appellant that since the jury were left unaided by the non-production of an expert evidence to positively identify the voice on Exh. ZZZZQ as that of the 1st Appellant, it would be wrong and unsafe to conclude without more that that was the voice of 1st Appellant.

Counsel submitted that Johnson J. was in error in failing to distinguish between Maksud's case and the instant case, in that in Maksud's case one of the Appellants admitted that the recorded voice whereas in the instant case the 1st Appellant denied that the voice was his.

With respect to learned counsel, this submission is not borne out by the records in this case, particularly Exh. GGGG, the cautioned statement of the 1st Appellant in which he admitted the authorship of ZZZZQ. In Exh. GGGG 1st Appellant said inter alia:

"In one of our meetings they asked that I prepare a speech to reflect their views and the views of the people of this country at this point in time. They demanded to see it in a subsequent meeting. Since some of them were suspicious of the negative aspect of this plan I then decided to please them by preparing a speech and recording it on a cassette tape and to hold on to it.

[p.99]

In a subsequent meeting I had the privilege to play the cassette to only few and read the draft to the greater number of the group. That was the cassette played to me and the group on 23.4.87 in the office of Mr. Prince Cole, Commissioner C.I.D. That was my voice and it was done to impress on them that it was not something negative but rather positive. This was to let them be assured as some of them were getting very suspicious of the negative aspect of the whole plan"

In the light of the foregoing synopsis, it seems to me very clear that all the pre-requisites laid down by learned counsel and also those postulated in Maksud's case were met in the instant case. In the light of clear evidence to the effect, I would regard the suggestion rather preposterous that the surest and safest way o£ identifying the voice of 1st Appellant on Exb. ZZZZQ is through the medium of an expert evidence. In my view the evidence in this regard is not worth any such frolic. The reception of the evidence complained of is not wrongful and was not in any way prejudicial to 1st Appellant.

I am also satisfied that the circulation of the transcript of the tape recording to the jury was proper as a matter of administrative convenience needing no consent from counselor Appellant. I find no justification in the criticism of the learned Appellate Justice. I am satisfied that Exh. ZZZZQ., the recorded cassette, was properly received in evidence.

[p.100]

I have already considered what I think are the more important and serious contentions raised by this appeal. These cover a wide range a complaints as can be seen in appropriate places in this judgment. These considerations apart, nearly all the Appellants in this appeal, in one way or the other, criticised the learned trial Judge's summing-up referring to appropriate passages in the summing-up.

Indeed the summing-up in this case was rather long and tedious, running into nearly 200 type-written pages. It was contended by Appellants that the learned trial Judge's summing-up, did not adequately or fairly put the case of the defence to the jury. They also complained of strong and unfair comments on the part of the learned trial Judge. The records of the learned trial Judge's summing-up were furnished to this Court and we scrupulously read through them.

It seems to me, however, that Counsel for Appellants on the whole, have looked at the summing-up from a narrow compass. This is regrettable. I think that the proper approach is to look at the summing-up as a whole in determining whether it contains misdirections or other matters verging on a miscarriage of justice.

In this regard the words of Lord Goddard L.C.J. in R v Linzee [1956] 3 All E.R. 980 at p. 982 are in point:

“In every Judge's summing-up or nearly some sentence can be found of which one every Judge's summing-up if one goes through it with a magnifying glass can say that it is not quite accurate or that something else ought to have been said. The fact is that one should not look at the summing-up in that way.

[p.101]

The summing-up must be taken as a whole and it must be seen that there is no mis-statement of law".

It has also been authoritatively said over and over again that there is no set formula for a summing-up. In McGreevy v. D.P.P. (1973) 1 W.L.R. 276 H.L. Lord Morris of Borth-Y-Gest said, at p. 281:

"The particular form and style of a summing-up provided it contains what must on any view be certain essential elements, must depend not, only upon the particular features of a particular case but also upon the view formed by and style that will be fair and reasonable and helpful”.

Strong comments by the learned trial Judge in summing-up cannot be equated with unfairness or usurpation of the functions of the jury. A Judge is entitled to express his opinions and to make strong comments on questions of fact as long as he leaves the issues to the jury to decide. In this connection I find it appropriate to re-echo the words of Channel J. in R v. Cohen & Bateman (1909) 2 Cr. App. R. He said at p. 208 – 209, 197 C.C.A

“In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevance of questions of fact, and it is therefore right that the jury should have the assistance of the judge.

It is not wrong for the judge to give confident opinions upon questions of fact.

[p.102]

It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The

mere finding, therefore, of every confident expressions in the summing-up does not show that it is an improper one. When one is considering the effect of a summing-up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact".

A direction in a criminal trial cannot always maintain the precise balance which people sometimes think a direction to a jury should preserve. The learned trial Judge finds it necessary because the facts compel him to direct the jury in such a way as to indicate to them his opinion, having told them that they are judges of fact. A conviction cannot be quashed because a summing-up is adverse to a particular defendant. The only question is whether the case for the defence was fairly been put before the jury.

As was aptly said in the judgment of the New South Wales Court of Criminal Appeal in Reg. v. Ali (1981) 6 A Crim. R. 161 inter alia,

"A summing-up must present a balanced account of the conflicting cases but when one case is strong and the other is weak, it does not follow that a balanced summing-up will be achieved by under-weighting the strong case and over-weighting the weak case. If one case is strong and the other is weak, then a balanced account inevitably will reflect the strength of the one and the weakness of the other".

[p.103]

On the general ground that the verdict is unreasonable or cannot be supported having regard to the evidence, this Court is not entitled to reverse the verdict of the jury, unless no reasonable jury properly directed could have returned that verdict. We are not entitled to substitute our views for that of the jury. It is pertinent to refer to the dicta of Lord Morris of Borth-Y-Gest in McGreevy v. D.P.P. (supra) where he said at p. 281:

"The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from' it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence will not proceed further to consider whether the effect of that piece of evidence is to point to the guilt or is returned or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt"

The substance of the Appellants case was put before the jury, and the jury having heard the whole of the evidence, were in a position on proper direction to come to their verdict which they did by convicting the Appellants. There was ample evidence against the [p.104] Appellants on which the jury could convict on all counts, and by their verdict it must be assumed that they did not accept their defence. The Court of Appeal confirmed the convictions.

Indeed, there are misdirections in the learned trial Judge's summing-up. It has been said over and over again that there is not perfect summing-up. In our opinion therefore, the arguments which have been directed to us, powerful as they are, fail.

We approach the question whether or not it is our duty to apply to proviso here by considering whether the evidence was overwhelming and whether a jury properly directed in this case could have come to any other verdict other than that of guilty.

In those circumstances we are quite satisfied that there was here no miscarriage of justice, that the proviso ought to be applied and the appeals against convictions and sentence are dismissed.

[p.105]

WARNE J.S.C.

I wish to add a few words of my own in support of the judgment of the Learned Chief Justice.

Much work and effort have been exerted by both sides in presenting their arguments to this court, indeed great scholarship has been displayed as well. As a result, I wish to congratulate Counsel both for the Appellants and the State/Respondent for such dedication to duty in the interest' of their respective clients.

Having listened avidly to their various submissions, I wish to emphasize certain points which the learned Chief Justice has already dealt with in his judgment and put clearly on record that the laws of Sierra Leone are those contained in Section 125 (1) of the Constitution of Sierra Leone, Act No. 12 of 19780

They are "(1) The Laws of Sierra Leone shall comprise—

(a) This Constitution;

(b) enactments made by or under the authority of Parliament established by this Constitution;

(c) Any Orders, Rules and Regulations made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;

(d) The existing law;

(e) the common law.

For the purpose of the opinion I am going to express in my judgment, I will also state sub section 2 of Section 125 herein. It provides:

"(2) the common law of Sierra Leone shall comprise the rules of law generally known as the doctrines of equity; and rules of customary law including those determined by the superior Court of Judicature".

[p.106]

During the course of the arguments, some counsel for some of the Appellants left me with the impression that they may have lost sight of what the laws of Sierra Leone are. This brings me to the gravamen of the contention of counsel for Appellants who were convicted for the offence of Treason.

It is pertinent to refer to the particulars of the Offence which the learned Chief Justice has stated in his judgment. I only wish to highlight the substantive offence for which the Appellants were indicted in count1 ".....on the 1st day of June, 1986 and on diverse days between that day and the 23rd day of March 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means. (Emphasis mine).

The offence is the preparation to over throw the Government of Sierra Leone by unlawful means, and Section 3 (1)(a) of Act No. 10 of 1963 as amended state that it is treason.

Warton's Law lexicon defined treason as "to betray. An offence against the duty of allegiance and the highest known crime; for it aims at the very destruction of the very Commonwealth itself".

Having a clear view of what the offence of treason is, I will now deal with the contention of Counsel. They argued with great tenacity that since no provision is made in the Treason and State Offences Act No. 10 of 1963 as amended, the laying of overt acts in Count 1 in the indictment, is bad in law. They argued further that there is no justification in law for the laying of overt acts in count 1. I agree there is no provision in the said Act for the laying of overt acts in a count defective? I do not think so. They are, in my opinion further particular of the particulars of offence in the indictment regarding Count 1.

In Section 2 of Act No.10 of 1963, it is stated that "Offence under this Act" includes any act, omission or other thing punishable under this Act.

[p.107]

The Appellants have been charged under S3 (1) (a) of the said Act. What is the justification for the laying of overt acts in Count 1? The answer, in my view is contained in the Criminal procedure Act No. 32 of 1965 Section 3 and 51.

Section 3 provides the following:

"Without prejudice to the provisions of any enactment, all criminal offences shall be enquired into, tried and otherwise dealt with according to the provisions of this Act"

The relevant provision of this Act is Section 51 to which the learned Chief Justice has already referred. I will only emphasise the following words in section 51 (1) "together with such particulars as may be necessary for giving reasonable information as to the nature of the charge".

Sub section 2 is even clearer and I will repeat it "(2) notwithstanding any rule of law or practice, an information shall, subject to the provisions of this Act, not be opened to objection in respect of its form or contents if it is framed in accordance with the rules under this Act". (Emphasis mine).

The rules under this Act are contained in the Frist Schedule in The Criminal procedure Rules – Rule 3 (1) (2) and (4).

The above provisions to which I have referred are part of the Laws of Sierra Leone, vide section 125 act No. 12 of 1978.

In my view, the contention of Counsel are untenable and the overt acts are properly and justifiably laid according to law.

The cases of Lansana and 11 others (1970-71) A.L.R. (S.L. Series) 186; Fornah and 14 others Cr. App. 31/74 of 30th April 1975 (unreported). Have been cited by Counsel in support of their contentions. In these cases, the issue of the laying of overt acts in a court for the offence of treason was never decided nor was a [p.108] definitive opinion expressed by the Court of Appeal. However, Luke J.S.C. (as he then was) in the case of Fornah and 14 others made an attempt to address the issue. Suffice it to say, in all these cases overt acts were laid in the count for treason. It seems to me, this practice, as Hon. Mr. justice Luke termed it in the Fornah and 14 others case, has been adopted by the State in the instant case. Be that as it may, it is a practice which has its foundation in law. This ground of appeal fails.

Is proof of one overt act sufficient to ground the conviction for treason?

Counsel for the Appellants have argued forcefully that the charge of the Learned Trial Judge to the jury that the proof of one overt act is sufficient to found a conviction for treason is bad in law. This is indeed the direction of the Learned Trial Judge to the Jury. The Court of Appeal, it seems to me agreed with the Judge.

It is my view, that the Court of Appeal did not advert its attention to the repeal of the Treason Act of 1351 that by Section 19 of the Treason and State Offences Act No. 10 of 1963 as amended. It is provided in the Treason Act of 1351 that the proof of one overt act was sufficient to ground a conviction for the offence of treason. This act, having been repealed by Act No. 10 of 1963 (supra) we are now to look through our Act to see what proof is required for offences committed under the said Act.

Under the laws of Sierra Leone, of which the said Act is one, the proof required for any criminal offence is proof beyond reasonable doubt. As a result, in the instant case, what the prosecution was required to prove was the substantive offence of preparation to overthrow the Government of Sierra Leone by unlawful means, which is treason. The proof was proof beyond reasonable doubt. I have already opined that overt acts are not charges but further particulars of the particulars of offence. As an adjunct to these particulars, the overt acts have been laid.

[p.109]

It is my view that, where evidence has been lead by the prosecution is support of the overt acts, that will suffice, if such evidence proves any of the overt act beyond reasonable doubt.

Counsel for Appellants have further contended that some of the overt acts as laid create offences specifically provided for in Section 17 of the Treason and State Offences Act No. 10 of 1963 as amended.

Section 17 provides as follows:

"Any person who attempts to commit any offence under this Act, or solicits, or incites or endeavours to persuade another person to commit an offence, or aids or abets or does any act preparatory to the commission of an offence under this Act, shall be deemed to have committed such offence and on conviction shall be liable to the same punishment and to be proceeded against in the same manner as if he had committed the offence".

It is at once clear that this is an all embracing section which covers every section of the Act that creates an offence. The operative words in Section 17 are "shall be deemed to have committed such offence…….". (emphasis mine). "Deemed" has not been interpreted under the Act but "offence" has been, and I have already referred to it.

In my view, deemed means "regarded as" or "considered to be". In my opinion, separate offences are not created by Section 17. The contention is untenable. Be that as it may, I have already opined that the overt acts are not laid as charges. As such, they cannot be deemed to be offences under the Act. At the expense of repetition they are further particulars of the particulars of offence.

[p.110]

On the totality of the evidence, the overts acts have been proved beyond reasonable doubt.

MISPRISION OF TREASON

Counsel for the Appellants who were convicted for the offence of misprision of treason have argued that misprision of treason is not an offence in sierra Leone. They have relied on the obiter dictum of Tambiah J.A. in the case of Lansana and eleven others (supra). This oibiter is not the law nor is it, with respect to the learned Justice, persuasive.

The charge has been laid in breach of the common law.

This offence is a misdemeanor at common law and carries a maximum penalty of life imprisonment.

Counsel for the 14th Appellant has also contended that the sentence of seven years imprisonment imposed on the 14th Appellant is inordinately long and excessive.

It is trite law that the common law is part of the laws of Sierra Leone – vide section 125 of Act No. 12 of 1978. The common Law is not static but must continue to develop, as it has, over the years.

In support of my view, I refer to the case of R.V Turner and others (1975) 61 Cr. App. R 67 et seq, where Milnoo J. referred to the speech of Lord Reid in Myers v Director of Public Prosecutions (1965) A.C. 1001 at 1021E a case in which it was sought to extend the band or reception of hearsay in evidence – Lord Reid said – "The common law must be developed to meet the changing economic conditions and habits of thought; and I would not be deterred by expressions of opinion in this House in old cases. But that there are limits to what can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations that must

be left to legislation". I entirely agree with the learned law Lord and I adopt the statement. In my view, this pronouncement is applicable in every case where the common law exists as in the case of the inadmissibility or hearsay evidence.

[p.111]

I will now consider the case against the 13th and 14th Appellants respectively.

Both have appealed against conviction and the 14th Appellant has appealed against sentence as well.

I believe Counsel conceded that Misprision of Treason is an offence in Sierra Leone. However, Counsel for 13th Appellant has submitted that the prosecution have failed to prove the case against the Appellant. That in the evidence against the 13th Appellant P.W. 18 Mustapha Sheriff testified inter alia as follows:…….. At about 6 p.m. we joined a taxi the 12th accused alighted at Congo Cross and I continued and went to jay's Bar at Aberdeen Road Texaco. Whilst there O.C. Benji (17th accused identified) came into the bar. I served him a pint of beer and then a second. I called him to a corner and told him that people had called me about a coup, but I had not yet received information as I had not yet seen weapons and arms. I told him if I received full information either on the 21st or the 22nd March, 1987, I would be informing him again. He said O.K. and went outside".

Counsel for the Appellant said this evidence did not support Count III in the Indictment.

At a cursory glance at the evidence, it would seem the contention and arguments are cogent, compelling and persuasive.

There are several schools of thought as to what evidence would be sufficient to ground a conviction for the offence of misprision of treason.

There is one school which is of the view that the accused/appellant must not only know that treason is being planned or has been committed, but he must know the perpetrators of the treason.

[p.112]

There is yet another school of thought which holds the view that accused/appellant having known that treason is being planned or has been committed, he has a duty to disclose this intelligence to the authorities within a reasonable time what he knows even though he does not know the perpetrators.

There is yet the other school of thought which holds the view that when once the accused/appellant knows that treason is being planned, threatened or committed, he should with due diligence ascertain the facts and disclose those facts to the authorities even though he is not aware of where the traitors will strike, when they will strike or who they are.

In my opinion, these various schools of thought are clear manifestations of the development of the common law.

In this entangled web, how do we determine the issue in the Sierra Leone contest, that is to say, under the common law of Sierra Leone. I will address the issue in this wise- by referring to a local expression – "If one has been bitten by a snake, he should be wary of a worm". The English idiom is "Once bitten twice shy".

Here was a Senior Police Officer, to whom an information has been passed on by a member of the Republic of Sierra Leone Military Forces about a coup plot; he decided to go home because, he was not only hungry, but to await further information from the same source. In fact, the information, albeit scanty, was passed on to an appropriate authority. In my view, he the 13th appellant ought not to have allowed the informant to disappear from his sight. In his capacity as a Senior Police Officer, he should have been alerted there and then and make further investigation. The history of coups and abortive coups in this country since Independence in 1961 is proverbial and should be fresh in the minds of every responsible citizen. The 13th appellant did not pursue the matter as he ought to have. If he had, he would soon have known if it was a hoax or a fact. If it was a hoax,

[p.113]

Mustapha Sheriff would have been charged for public mischief, but it was a fact , he would have been duty bound to inform higher authorities failure to pursue the information further was in my view, criminal negligence. What if Mustapha Sheriff, had not gone back to give him further information, as in fact, he was prevented from doing? Would he have gone in search of Sheriff? Perhaps! However as it turned out he never made any effort to seek Sheriff. In my opinion, his inertia, compounded his criminal folly.

I subscribe to the school of thought which holds the view that when once a person knows that treason is being planned or committed, with due diligence ascertain the facts and disclose that information to the authorities even though he does not know who the traitors are, where they will strike or when they will strike.

I think this is the common sense view of interpreting the common law.

In my opinion, the 13th Appellant was justifiably convicted for the offence of misprision of treason. His appeal therefore fails.

The 14th Appellant appealed against his conviction and sentence. The evidence against the 14th Appellant is overwhelming. He was involved in the preparation to overthrow the Government of Sierra Leone by unlawful means, until he himself realized it was a difficult undertaking. In his voluntarily cautioned statement Exhibit "FF" he said, inter alia, "I told him I was not going to join in any plan with O/C Kai-Kai to overthrow the Government of Sierra Leone because O/C Kai-Kai is a frustrated man and if he had any good intention, he should have done so at the time he was carrying rank and not at this moment when the authorities have demoted him in rank.

At this stage, Tarawally told me that he was thinking about the same issue and that O/C Kai-Kai had certain secret which he fails to reveal to us and he also will not join in the plan. He further told me that he was going in search of Massaquoi to warn him not to join in them plot

[p.114]

Since then I did not see any of them again. I never thought of revealing this information to authority because the whole plan seemed to have been impossible for a single Police Officer to stand and fight to overthrow the Government of Sierra Leone. O/C Kai-Kai never gave me any amount to keep this information as a secret". (Emphasis mine).

It is a trite law that what the 14th Appellant said about Tarawally is not evidence against him; but what he said about his involvement is not only evidence against himself, but purely a jury matter. The jury found him guilty of the offence as charged and, in my view, I don't think the verdict ought to be disturbed and I will not disturb it. it is small wonder he was not charged for treason but the prosecution had a right to prefer what charge they wished.

As to the appeal against sentence I will examine the circumstances in order to determine whether the sentence is inordinately long. I think it will be useful to look at the history of the custodial sentence as a punishment under the common law. "Imprisonment as a punishment was alien to the common law of England". This was a statement made by Lord Justice Lawton in the case of Tuner and others (supra). The Learned Law Lord had this to Say:

"We have reminded ourselves that imprisonment as a punishment was alien to the common law of England".

We here are operating, inter alia, under the common law of England and Sierra Leone. The principles enunciated by the Learned Law Lord which should guide the Courts in passing sentence for serious crimes is contained in the case of Turner & others (supra). The Learned Law Lord continued.

"It was the task of judges under the Commission of General Gaol Delivery to clear the goals and not to fill them with convicted offenders".

[p.115]

The Learned Judge then went through the history of punishment for offence committed by individuals against the State and eventually he came to the point where terms of imprisonment became a deterrent.

It is to be noted that Corporal punishment was in existence in England until abolished by the Criminal Justice Act of 1948.

The Learned Judge then opined what should be the appropriate deterrence for grave crimes involving violence or threat of violence. It became clear that these offences deserved long terms of imprisonment.

The judge then referred to the abolition of the death penalty which had an effect upon the length of sentences.

The judge then went on to say:

“since there is now no death penalty, the only sentence which can be imposed for the most serious crime known to English law, treason apart, is that of life imprisonment. With very rare exceptions, those who are sentenced to life imprisonment are discharged from prison at some time. The date when they are discharged depends upon the circumstance of the offence…….

…….

Very few, however, are kept in custody after about 15 years.

This has created a difficult sentencing problem for the courts……

……..

because it seems to us it is not in the public interest that even for grave crimes, sentences should be passed which do not correlate sensible and fairly with the time in prison which is likely to be served by somebody who has committed murder in circumstances in which there were no mitigating circumstances.

[p.116]

There is another aspect of this problem we have to bear in mind. Grave crimes fall into categories. There are some which are wholly abnormal. These circumstances are horrifying. They may endanger the State. What is to be done with those who commit such crimes? (Emphasis mine). There are other crimes which are very grave but which cannot be regarded as normal”.

The Learned Judge then gave examples of the two categories of crime then added, "The problem has been whether crimes of gravity but common occurrence, should be treated as abnormal crimes. We have come to the conclusion that they should not. They fall into category of their own which calls for sentences lower than those which would be appropriate for crimes of an abnormal character”.

I will deal with the appeal against sentence by the 14th Appellant guided by the principles propounded by Lawton L.J. and adopt the ratio decidendi which I think will be useful to courts trying criminal cases.

The death sentence still exists in Sierra Leone for murder or treason. There is therefore no need to measure the sentence passed on the 14th Appellant against the sentence for murder or treason. It is however necessary to determine what category to place the offence of misprision of treason.

In any civilized society, where the rule of law exists, misprision of treason is a grave crime. It is a grave crime in Sierra Leone. It is a crime which endangers the very existence of the State. For such a crime I will consider the maximum sentence which is life imprisonment as against the circumstance in which the

offence was committed. It is one of the gravest offences know to the laws of Sierra Leone yet it carries a lower sentence than that for the offence of murder.

[p.117]

In considering whether the sentence is inordinately long, one must bear also in mind the frequency with which such offence is committed and ensure whatever sentence is imposed will be a deterrent to others.

In the twenty-eight years of the Independence of Sierra Leone, there have been as many coups and abortive coups as there have been general elections. The several attempts to overthrow the Government of Sierra Leone by unlawful means are not only disturbing but intolerable. It is reprehensible that persons who know of a coup plot or that treason has been committed should conceal this intelligence from authorities. I think they should feel the full weight of the law.

In the case of the 14th Appellant he did not only attend a meetings where the coup was formulated, he only reneged, because he felt it was impossible of success.

I do not think there are any mitigating circumstances why the court should interfere with the sentence imposed n the Appellant. The sentence of 7 years is not inordinately long. The appeal is therefore dismissed.

HERESAY EVIDENCE

Counsel for the 5th Appellant has criticized the learned trial judge and the Court of Appeal for receiving in evidence the evidence of DW20 because it was hearsay evidence. Hearsay evidence ought not to be admissible in a criminal trial unless it forms part of the res gestae. Vide the case of Teper V.R. (1952) 2 A.E.R. 447 at 449- In this case the learned judge said “and the evidence shall only be admitted if it satisfies the strictest test of close association with the crime in time, place and circumstances”. This case was decided in the Privy Council. Lord Normand in his opinion said “The rule against the admission of hearing evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness [p.118] an accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour will throw on his testimony is lost. Nevertheless, the rule admits of certain guarded and limited exceptions, one of which is that words may be proved when they form part of the “res gestae”. I entirely agree with the Learned Law Lord.

In the instant case, the evidence of DW20 ought to have been excluded because it was hearsay evidence and did not form part of the res gestae. This rule applies even to the evidence of a witness called by the Defence. The Criticism by Counsel is justified. Nevertheless the question arises, did the inadmissible evidence preclude the court from considering the other evidence that was available? I do not think so. In my view, there was other admissible evidence against the 5th Appellant which the jury considered.

EVIDENCE OF MUSTAPHA SHERIFF

Counsel of Appellants have contended that the evidence of Mustapha Sheriff P.W. 18 was that of an accomplice and that the learned trial Judge misdirected the jury in this regard.

The foundation of the prosecution's case against all the Apellants was the evidence of Mustapha Sheriff. No doubt, Sheriff was at once a villain and a hero, depending on whether his evidence was for the prosecution or against the Appellants. The evidence of Sheriff was clear, succinct and to the point. The cross-examination of the witness by Counsel for some of the Appellants did not address the gravemen of the charge. On the contrary, some of the questions were not only irrelevant but very insulting and scandalous.

Was Sheriff an accomplice, the learned trial judge did not think he was and directed the jury accordingly and the jury by their verdict did not think that he was an accomplice. I do not think he was either.

[p.119]

In view of the number of accused persons before the trial court, each one being represented by Counsel, I think it is appropriate to call in aid the case of R v Turner & others (1975) 61 Cr. App. R. 67 et seq.

There are several issues in that case which have similarities to the instant case e.g. Several accused persons on the same indictment, the length of the trial hearsay evidence by defence witness, principal witness being tainted as accomplice, oral statements being made by accused persons to police and given in evidence and the complaint of inordinately long sentence.

The Turner & others case was one involving bank robbers. One of the robbers became Crown witness. As a result of his statements to the police, his accomplices were apprehended, prosecuted and many of them convicted and received long prison sentences. The ex bank robber who was the Crown witness, was called Smalls. In that case, Smalls was not only an accomplice, but the Prosecution, the Defence and the judge and jury knew he was an accomplice. Among some of the issues which emerged at the trial were those which I have already mentioned and I believe they are analogous to some of the issues in the instant case. How did the court address these issues?

With regard to hearsay evidence, the Court held that it is inadmissible even when the res gestae.

No doubt the trial of the instant case was indeed a lengthy one. There must be a way by which this can be obviated in the future. A lengthy trial is a strain on those involved – the judge whose responsibility it is to take notes of the evidence in long hand; the jury who has to sit out and listen attentively – and in the instant case, were kept together in one place for the duration of the trial; and above all the expense of the trial to the taxpayers. These are disturbing features which ought to be considered by all the authorities concerned.

[p.120]

Be that as it may, I will continue to highlight the portions of the judgment which are germaine to the instant case.

There has been serious complaints by Counsel for Appellants that it was improper for statements to be obtained by investigators from suspects at alleged scenes of crime where prosecution is pending. They have relied on the case of R v Kojo Bodom and others 2 W.A.C.A 380 at 391.

In answer to the complaints, I will re-echo the words of Lawton L.J. in the case of Turner and others (supra). The said "Apart altogether from the problem of length and expense there was the problem of evidence of a number of police officers as to oral statements (colloquially known as verbals) which the accused are said to have made after arrest. Defence Counsel had to challenge this evidence if their instruction from their clients made challenges necessary. As almost happens in this class of case at the Central Criminal Court (but not so commonly on circuit) nearly all the defending Counsel challenged the credibility f the police witnesses giving evidence about oral statements. They were severally accused of lying, bribery, fabricating and planting evidence, perjury in the case, the theft of LE 25,000, threatening witnesses, Assault and drunkenness. The existing practice followed by the police for putting this kind of evidence before courts almost inevitably leads to attacks on the credibility of police officers if the evidence is true, as it usually is, the jury is greatly helped. It is a matter of human experience which has long then recognized, that wrong doers who are about to be revealed for what they are, often find relief from their inner tensions by talking about what they have done. In our judgment and experience this is a common explanation of oral admissions made at or about the time of arrest and later retracted. But if the evidence of such oral admissions is untrue, as regrettably it sometimes is, defendants are unjustly and unfairly put at risk". In the instant case, the oral statements [p.121] of the appellants which were made to the police officers and given in evidence were vigorously tested in cross-examination. It seems to me that the statements were challenged because they were admissions which were damaging to the case for some of the appellants. However, some of the appellants gave evidence in their own defence and the jury had the opportunity of seeing and hearing the witnesses and they were the judges of facts. The verdict is indicative of the fact that they believed the statement. The case of Kodjo Bodom & others, I regret to say, is not helpful to appellants in his case. I adopt the statement and observations of Layton L.J. and in my view, I can find nothing unsafe or unsatisfactory about the convictions of the appellant even if they were based on the statements made to the police officers and the convictions were not based solely on those statement.

MISDIRECTIONS/MISCARRIAGE OF JUSTICE

Counsel for the appellants have complained forcefully that the learned trial judge misdirected the jury in law and in fact and as such the appellants were deprived of the chance of acquittal. Before considering the passages referred to I will cite the case of R v Wolf 10 Cr. App. R. 107 where it was stated - "An isolated incorrect passage in a summing-up is not sufficient ground for quashing a conviction if the court is satisfied that the jury appreciate the proper questions for them". I do agree that this is the common sense and correct approach.

In a jury trial, it is a presumption that the jurors follow the proceedings and fully understand the evidence. However, in a short and simple trial, if the learned trial judge fails to assist the jury in the summing-up by not reviewing the evidence, the court will not quash the convictions on that ground simpliciter. The situation is different in a lengthy and complicated trial. The instant case is in the latter

category. The summing-up in the instant case, is copious and to be certain extent, repetitive. If the learned trial judge misdirected [p.122] the jury on a question of law, the convictions would needs be quashed.

If it is a misdirection on a question of facts, the convictions need not be quashed,unless the misdirection is such that it will be tantamount to a substantial miscarriage of justice.

Ground 8 of the grounds of appeal filed on behalf of the 1st appellant seems to epitomize the contentions of some of the other appellants.

Ground 8 states:

“Their Lordships exoneration of the trial Judge's bias and prejudice during the conduct of the trial is manifestly unjust and unfair to the appellants thus resulting in a substantial miscarriage of justice, as such blatant bias and prejudice disabled the trial Judge from rendering that much needed assistance to the jury to guide them in their deliberations in reaching a free, impartial and an unbiased verdict”.

Counsel then proceeded to cite twenty five passages in the summing-up which he felt were prejudicial to the appellant.

On a cursory glance at the ground of appeal, it seems to me that the contention is about the manner in which the learned trial judge reviewed the evidence and his comments on the evidence.

Let me here and now remind ourselves that the learned trial judge is part and parcel of the trial court, albeit, in the position of an umpire. Strong comments by the learned trial judge on the evidence is no justification for any scathing attack upon the person of the judge or his conduct of the case. Strong comments are permissible provided the judge does not usurp the functions of the jury.

having said this, I will now consider the passages complained of. In considering these passages, I will only comment on those which I believe are prejudicial to the interest of the appellant.

[p.123]

(1) “Some of these statements are what the law would describe as confession statements.

Others are evasive and others still denials”.

In my view, this direction to the jury is equivocal. Voluntary cautioned statement by accused are either confessions or denials or confessions and justification. If the statement is evasive it is tantamount to a denial. It is again not clear whether the Judge was commenting on the confession statement as being evasive or whether the denials ware evasive. I think the direction is unclear and the complaint is tenable.

(8) “Gentlemen of the jury, a lie told out of Court may amount to corroboration of the case against the person who tells the lie and there is no obvious reason why lies told on a certain type told in evidence of an accused should not have similar effect. The contrivance of falsehood can sometimes only be

explained on the footing that the contriver is anxious to conceal his guilt although this is not always so. There is a clear distinction between a lie told out of court and evidence given in the witness box which the jury reject as incapable of belief or as otherwise unreliable".

I believe in this passage, the judge was referring to false statements made by a prisoner. I will here refer to the 35th Edit. of Archbold, Criminal Pleading Evidence and practice Paragraph 1301 under the rubric "False statement made by the prisoner". It states: "A false statement made by the prisoner to the police or before the commencement of proceedings is not necessarily corroboration, but may be so. Whether it is or is not capable of affording corroboration must depend on al the circumstances of the particular case.

[p.124]

A lie may afford corroboration if it gives to a proved opportunity a different complexion from that which such opportunity would otherwise have borne: Vide.

Credland v Knowler, 35 Cr. App. R. 48 (D.C.) approving dicta in Jones v Thomas (1934) 1 K,B. 323 at 327. 2330".

The learned trial Judge was no doubt charging the jury to reject the evidences of the 1st appellant as not being wholly reliable in view of the fact that he had made statement previously to the police that did not corroborate the evidence on oath. I do not think he assisted the jury by the direction he gave them. I must say, with respect to the learned trial Judge, it took me some time to unravel the passage. No doubt the 1st appellant had made voluntary statements to the police implicating other co-accused persons. When he testified on oath, he varied his story regarding some co-accused person. It was the duty of the Judge to direct the jury that the statement implicating the co-accused was not evidence against them but only the evidence on oath bought to be considered. Regrettably the Judge's direction to the jury was not only a mouthful but it was clearly a misdirection.

10. "Here is the 1st accused who said in his statement to the police what he alleged 5th accused said during that conversation in furtherance of the common design to overthrow the Government of Sierra Leone. After he had been with the 5th accused and after they have been coming to Court it would appear that he decided to pick out at few words out of that conversation and testified in that witness box that that was all that the 5th accused said. In doing so he offered no explanation for the clear contradiction. When you read exhibit JJJJ you will see that he picked out only one sentence out of that statement and gave evidence about that only.

[p.125]

Why did he leave these out when testifying?

What then is the inference you can draw from that behaviour gentlemen of the jury"?

This charge to the, jury was rather unfortunate. The passage is fraught with flaws. I say unfortunate, because it is a basic principle of evidence that unsworn statements made by an accused implicating a co-

accused in his absence is not admissible against the co-accused nor is it evidence against him. Here was the learned trial Judge charging the jury in clear unmistakable language to consider such statement in its entirety, to wit, Exhibit "JJJJ' when he gave evidence on oath. This is clearly a misdirection which militates against the 5th appellant, not the 1st appellant, be that as it may, it is a misdirection.

(14) “It was the 1st accused you will recall

……..…

…….

He has told you in his statement what part some of the sixteen accused men played in the preparation to overthrow the Government of Sierra Leone. All what he has told you is part of the prosecution's case which if you believe beyond reasonable doubt could lend you to consider a verdict of guilty against those of whom you are satisfied took part in their common design”.

[p.126]

The learned trial judge, in his attempt to emphasize the common design of the sixteen appellants, fell into error by charging the jury that what 1st appellant said in his unsworn statement implicating the other fifteen appellants was evidence against them. This was only evidence against himself. This is another case of a misdirection.

(15) “This is a situation which I find myself unable to understand, if someone is being investigated regarding an offence and he confesses to that offence how can he then be made a prosecution witness; who then will be made the accused?.....……

……

……. ……

Having ruled that all these statements are admissible at law and they have been admitted as evidence, they form part of the evidence in this case”.

With respect to the learned trial Judge, I find the opening statement incredible. I think the learned trial Judge may have been unaware of a long line of cases, more particularly – cases involving the offence of conspiracy where one of the conspirators had been given immunity from prosecution and used as a prosecution witness, and also where someone had been convicted and subsequently used as prosecution witness. Two cases are aptly in point here –Turner and others (supra) where Smalls was made a witness for the Crown where he had confessed to being part of the bank robbers; and the case of Shamwana and others decided in Zambia on 2nd April, 1985.

In the latter case, the principal witness for the prosecution was Major General Christopher Kabwe, P.W.5, who was at the material time, head of the Zambia Air Force (ZAF) in his capacity as Chief of Staff.

[p.127]

P.W 5 had jointly been arraigned with the appellants but was later granted immunity against prosecution. A nolle prosequi was entered in his favour and he became a State witness. He was rightly presented by the prosecution as an accomplice witness and so support for his evidence became necessary. There is also the Supreme Court App. No. 2/77 intitled DaisyA. Venn Vs. The State, where the Principal witness for the State was one Kpake who was an accomplice. He had earlier been convicted and sentenced to a term of imprisonment. The Judgment was delivered on the 14th December, 1977 (Unreported)

The learned trial Judge, having ruled that the statements were admissible at law and therefore formed part of the evidence in the case, was in duty bound to warn the jury that what one accused said against a co-accused in his statement was not evidence against the co-accused.

I lament that this passage is also a misdirection.

(16) “That the 1st accused told them that the weapons were delivered to him at the garage of the 12th accused at Banana Water and he had the weapons loaded into his car and he drove off with the weapons to his Spur Road Residence that subsequently Jaward sent more weapons to him by the same Arabic agent whom the 12th accused accompanied to his residence and at about mid-night he instructed the 12th accused to take the weapons to his residence at 42B Waterloo Street and he called the 11th accused to escort the 12th accused to Waterloo Street…… Why the 1st accused did not wait until day-break? Why, what was the untold urgency for three bags of rice to have been transferred from 'Spur Road to Waterloo. Street at that time of the night? Could it have been three bags full of something else?"

[p.128]

I will repent that what 1st Appellant told P.W.1 about 12th and 11th appellants was not evidence against them and the Judge should have warned the jury accordingly. 'This was a misdirection to put this bit of evidence to them for their consideration. As far as the last portion is concerned, it was a valid comment.

Having considered the various passages complained of, I will now address the issue of the several misdirections.

In my opinion, they amount to a miscarriage of justice. Ought the appeal to be allowed as a result? I do not think so. Counsel contended that such miscarriage of justice deprived the 1st appellant of the chance of an acquittal.

Let me say, it is a principle in an Appellate Court that it is for the Appellant in a criminal appeal to satisfy the court that a substantial miscarriage of justice has occurred for the court to dismiss the appeal.

I draw support for my opinion by referring to Section 58(2) of Courts Act No. 31 of Courts Act No. 31 of 1965 as amended by Act No. 3 of 1976. It provide the following:

"(2) On an appeal against conviction the Court of Appeal, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, may (a) either dismiss the appeal, or (b) order the appellant to be retried by a court of competent jurisdiction, if they consider that no substantial miscarriage of justice has actually occurred".

I do not think the jury, by their verdict, were in any doubt as to the conclusiveness of the totality of the evidence against the 1st appellant. I do not think there was any substantial miscarriage of justice to justify the reversal of the judgment of the court below.

[p.129]

I will not adopt the ratio decidendi in the case of R v Sydney Augustus Wann? Cr. App. R. 135 at 138 and 139, in support of my view. In that case the Lord Chief Justice, Lord Alverstone had this to say:—

"In a summing-up the facts may not be stated fully or may be staged incorrectly, without any misdirection on any question of law a mere mis-statement is clearly not a misdirection on any question of law. A mere mis-statement is clearly not a misdirection when the case has been fully heard by the jury, and as to omission, he must be satisfied that it is such that it is reasonable and probable that the jury was misled, in which case there might be a miscarriage of justice. But as I said in delivering the judgment of this Court, "One has to be very careful in dealing with a case of alleged misdirection to appreciate the lines on which a case is conducted as omission to direct the jury on a point which was not taken at the trial if no injustice is done (Meyer 1 Cr. App. R at 11, 1908). The effect of the case on this subject is stated in Ross on the Court of Criminal Appeal at P. 113 as follows: "To have any effect in itself the mis-statement of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no mis-statements."

With the alteration of the one word "possible" to "probable", we think that the statement is correct."

[p.130]

The statement of Lord Alverstone, in the judgment, is as valid today as it was in 1908 and 1912.

The sum total of Counsel's complaint is that the learned trial Judge failed to direct the jury properly or at all. I do not think the jury were misled as a result. In my view, they appreciated the case against the 1st appellant and would have returned the same verdict had there been a proper direction.

Mr. Berewa, Counsel for the 5th Appa11ant has also complained about certain passages in the summing-up which he submitted were misdirections by the learned trial Judge.

I have gone through the passages and I find that these passages dealt with statements made by the 1st Appellant against the 5th Appellant. I agree with Counsel that the learned trial Judge failed to warn the jury that these statements were not evidence against the 5th Appellant. However, these were complaints made by Counsel in the Court below. Counsel has urged on this court that the Court of Appeal erred in law in upholding the convictions of the 5th Appellants in spite of these misdirections. Counsel has referred to the judgments of Thompson-Davis, J.A. and Johnson J. to support his contention.

It seems, to me that the Court of Appeal addressed the issue of common design within the context of the proof of criminal conspiracy vis a vis the acts and declarations of one accused as they affect the involvement of a co-accused.

In the judgment of Thomson-Davies J.A. , on this point, the learned judge had this to say: “However it is well settled principle of our laws that a man’s confession or admission is evidence against himself and not against his co-prisoner, unless he makes the statement his own. It is also well settled in law that “a statement made in the absence of an accused person by one of his co-prisoners is not and cannot be evidence for all purposes of the case”.

[p.131]

Archbold 36th Ed. para 1127 p. 421, - R v Rudd 1948 32 Cr. App. R explaining R.V. Meredith, Bluston and Bramley, 1943, 29 Cr. App. R p. 40. So too statements of conspirators are not admissible against another, unless they be in furtherance of the conspiracy. R. v Frank Pepper and Annie Ellen Platt 1921 3 K.B. p. 167. I must also have recourse to para 869 of Halsbury 3rd Ed. Vol. 10 p. 475, which reads:—

"Statements made, like the acts done, by one of several accomplices or co-conspirators in pursuance of the common design, are evidence against the others". – R v Blake 1844 6 Q.B. 126, and R v Besman 1868 11 Cox C.C. but statements which are not made in pursuance of the common design are not evidence against the others”.

In Archbold 35th Edition paragraph 4074, we find as follows:

"Before evidence can be given of the acts of one conspirator against another the existence of the conspiracy must be proved and also the fact that the parties were members of the same conspiracy and that the act in question was done in furtherance of the common design".

Once the conspiracy has been fairly established by the evidence whatever is said or done by either of the accused person in pursuance of the common design, is both in law and common sense to be considered as the act of all the conspirators”, Thompson-Davies J. A. then referred to two other cases in support of his opinion and said,

“There is no merit in the complaint”.

It seems to me that the point which had been argued in this Court, had been dealt with the Court of Appeal.

However, in my opinion the totality of the evidence justifies the conviction of the 5th Appellant. I agree with Thompson-Davies, J.A., there is no merit in the complaint.

[p.132]

In my opinion, I do not think the Court of Appeal considered that a substantial miscarriage of Justice had actually occurred in spite of the misdirections by the learned trial Judge to the jury, consequently, the

Court of Appeal dismissed the appeals. I do not think so either. I draw support for my opinion from the case, of the King v Henry Beecham (1921) 3 K B 464 at 471.

“In that case the defendant was charged with manslaughter, it being by driving his motor car at an excessive speed he ran down and killed a boy. The defendant in cross-examination was repeatedly asked and pressed to answer the question whether he did not buy the motor car because it was capable of being driven at high speed, and he at last replied, "It did not appeal to me for that reason because I do not care for driving at high rate of speed myself". The Prosecution treating that statement given by the defendant of his good character as a driver, then asked him whether he had not been, repeatedly convicted of driving to the public danger, and the defendant, being required by the Judge to reply, admitted that was so. The defendant was convicted. On appeal:—

Held, that the method of cross-examination by which the defendant was led to make the above-quoted statement could not be approved, that by led to make the above-quoted statement in the circumstances he could not be taken to have given evidence of his, good character" within the meaning of the Criminal Evidence Act, 1898 S. 1 (f) (ii) and therefore he ought not to have been asked or required to answer the question as to his previous conviction and that his evidence regarding them was inadmissible. Held, however, that under the Criminal Appeal Act, 1907 S.4 Sub. S.1, proviso, notwithstanding that the above point ought to be decided in favour of the defendant, the appeal should be dismissed, in as much as, having regard to the other evidence given at the trial no substantial miscarriage of justice had actually occurred”.

[p.133]

A number of contentions which can be described as jury points, were advanced in support of the appeals. These included criticisms of the summing-up for failure to remind the jury of some of the arguments advanced on behalf of the appellants. It is not proposed to deal with all of them again in detail. The learned trial judge was not required to do any in my judgment he dealt adequately in his summing-up of the case for and against the appellants.

CONCLUSION

The summing-up of the case by the learned trial judge may not be impeccable, and certainly is not.

However, we must take into account the length of the trial, the number of accused persons, the several objections of Counsel for the number of accused persons, the several objections of Counsel for the defence, some warranted and some absolutely unwarranted, and the advantage the judge and jury had to see and hear the several witnesses both for the prosecution and the defence, to restrict this court from being minutely critical. Nevertheless, the Court of Appeal made a determined and critical scrutiny of the whole proceedings. We, on our part, had had our burden lightened by the work of the Court of Appeal. Where there are lacunae we have endeavoured in the circumstance to fill the lacunae.

I do not propose to examine in detail again the course of the trial as Counsel for appellants have urged, not the summing-up by the learned trial Judge even though counsel for appellants have covered it with

a large blanket of submissions under misdirections and bias. But having read through the whole proceedings, I have come to the clear conclusion that the learned trial Judge's summing-up is not open to the charge of bias. There are passages in it which are open to the criticisms, these, we have dealt with. But the summing-up must be viewed as a whole, and upon this view of it, I am satisfied that the several appellants were guilty of the offences, as charged.

[p.134]

In support of what I have said about the Summing-up, I will refer to the case of R v Linzee and R v O'Driscoll (1956) 3 All E.R. 980 at p. 982 where Lord Gaddard succinctly stated the functions of the Court of Criminal Appeal. He said:—

"We have to see that the summing-up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the facts for the prosecution and states fairly the nature and evidence of the defence. It is not necessary to go into the evidence of every witness. The Court has to be reminded to the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. it is not our function to retry the case because we do not see the witness, and no Court of Appeal does re-try the case in the sense of substitution themselves either for a Jury in a civil case or for a court martial in the case of one of the Services".

The notes of the summing-up furnished to the Court of Appeal and to this court, show that the learned trial Judge fairly put the salient points to the jury. He referred to the defence of alibi put forward by the 5th and 12th appellants and rightly pointed out that the burden of disproving the alibi is on the prosecution.

It is therefore a matter of regret that the charge of bias should be made against the trial Judge.

An accused must have a fair trial, and in my view the appellants had a fair trial.

[p.135]

The appeals of the appellants are therefore dismissed. I have had the opportunity of reading the judgment of the Learned Chief Justice and I entirely agree with the conclusions and the reasons leading to these conclusions

(SGD.)

Hon. Justice S.C.E. Warne, JSC

CASES REFERRED TO

1. Mohamed Sorie Fornah And Others V. The State, Cr. App. 31/74

2. R V. Thistlewood (1820) 33 St. Tr. 681).

3. Shamwana V. The People (1985) L.R.C. (Criminal) P. 120.

4. Mattaka & Others Vs. The People, E.A.L.R. (1963) P, 627.

5. Mallon V. Allon (1964) 1 Q.B.385; (1963) 3 All E.R. 843.

6. David Lasana & 11 Others V. Regina (1970-71) A.L.R. (S.L.) 186.

7. Willes J. In Mulcahy V. The Queen (1868) L.R. 3h. L. 306 At 317.

8. R V. Brisac, Grose J. Said: (1803) 4 East P. 164 At P. 171.

9. Queen V. Aspinall (1876) 2 Q.B.D. 48 Brett J .A. Said At P. 58.

10. Mulcahy V. The Queen (Supra).

11. Lansana & 11 Others V. Regina (Supra).

12. R V. Greenfield (1973) 3 All E.R. 1050.

13. Ogwanweka Ona V. The State - Nigeria W.L.R. 1985 P. 164.

14. Teper V. R [1952] A.C. 480.

15. Mcgreevy V. D.P.P. [1972] Cr. App. R. 424.

16. Woolmington V. D.P.P. (1935) 57. Cr App. R 72.

17. Mcgreevt V. D.P.P. (1972).

18. Ona V. The State.

19. R V Taylor [1928] 21 Cr. App. R. At P. 20.

20. Subramanian V Public Prosecutor [1956] 1 W.L.R. 965.

21. Kojo Bodom & Others V. Rex. 2 W.A.C.A. P. 390.

22. R V. Rudd [1948] 32 Cr. App. R. 138.

23. R V. Gunewardene [1951] 35 Or. App. R. 80.

24. R V Maqsud Ali

25. R V Ashiq Hussain [1962] 2 All E.R. P. 464.

26. R V Linzee [1956] 3 All E.R. 980 at P. 982.

27. R V. Cohen & Bateman (1909) 2 Cr. App. R.

28. Reg. V. Ali (1981) 6 A Crim. R. 161

29. R.V Turner And Others (1975) 61 Cr. App. R 67

30. Myers V Director of Public Prosecutions (1965) A.C. 1001 at 1021

31. Teper V.R. (1952) 2 A.E.R. 447 at 449.

32. R V Kojo Bodom And Others 2 W.A.C.A 380 At 391.

33. Credland V Knowler, 35 Cr. App. R. 48 (D.C.)

34. Jones V Thomas (1934) 1 K,B. 323 At 327. 2330".

35. Venn Vs. The State.

36. R V Sydney Augustus Wann Cr. App. R. 135 at 138 and 139

37. R V Rudd 1948 32 Cr. App. R

38. R.V Frank Pepper and Annie Ellen Platt 1921 3 K.B. P. 167.

39. R V Blake 1844 6 Q.B. 126,

40. R V Besman 1868 11 Cox C.C.

41. R V O'driscoll (1956) 3 All E.R. 980 at P. 982.

STATUTES REFERRED TO

1. S. 3(1)(A) of The Treason and State Offences Act, No. 10 of 1963.

2. S.74 of The Courts Act. No. 31 of 1965.

3. Criminal Procedure Act. 1965 S.3 Part 1, captioned, "General Provisions Procedure".

4. S. 125 of the Constitution of Sierra Leone Act. No. 12 of 1978.

5. Section 135 of the Tanzanian Criminal Code

ISATU KAMARA v. THE ATTORNEY GENERAL

[SC. MISC. APP. NO. 4/92] [p.137-147]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 11 AUGUST 1992

CORAM: MR. JUSTICE S.M.F. KUTUBU, C.J - (PRESIDING);

MRS. JUSTICE A.V.A. AWUNOR- RENNER, J.S.C.;

MR. JUSTICE M.O ADORPHY, J.A

BETWEEN:—

ISATU KAMARA - APPLICANT

VS

THE ATTORNEY GENERAL - RESPONDENT

SOLICITORS:—

A. F. SERRY-KAMAL, ESQ., with him F. M.

DABO, ESQ., of Counsel for the Applicant.

MISS G. ATTIBA-DAVIES of Counsel for the Respondent.

RULING delivered this 11th day of August, 1992 by KUTUBU, C.J. - PRESIDING.

RULING

These certiorari proceedings are brought on behalf of the Applicant, Isatu Kamara, by Learned Counsel, Abdul Franklin Serry Kamal for an Order of certiorari to quash the order of the Nylander Commission of Inquiry given on the 8th day of July, 1992, resulting in the conviction and imprisonment of Applicant, a witness before the said Commission for a period of 21 days.

The grounds of the application according to the statement dated 9th July, 1992 inter alia are as follows :—

[p.138]

1. That the Commission exceeded its jurisdiction in convicting and sentencing applicant.

2. That the Commission acted in excess of jurisdiction in convicting and sentencing applicant.

3. That the Commission acted ultra vires in convicting applicant summarily.

Applicant relies on the Affidavits of Isatu Kamara and Fode Maclean Dabo both sworn to on the 24th day of July, 1992 and filed together with the exhibits. Exhibit "A" herein is the Certified True Copy of the record of proceedings of the Nylander Commission of Inquiry, dated. 8th July, 1992, touching and bearing on Isatu Kamara:

It is necessary, we think, to give in brief form, the origin and source of the Nylander Commission of Inquiry; and the facts relating to these proceedings before us. Suffice it to say that the Lynton Nylander

Commission of Inquiry is a creature of statute, established by the National Provisional Ruling Council (N.P.R.C.), in exercise of the powers conferred upon it by Sections 2 and 6 of the Commissions of Inquiry Act, CAP.54 Laws of Sierra Leone, 1960 as adapted by the Proclamation entitled "THE ADMINISTRATION OF SIERRA LEONE (NATIONAL PROVISIONAL RULING COUNCIL) PROCLAMATION, 1992 P.N. NO.20 of 1992, with the following terms of reference:—

1. To inquire into and investigate the financial administration from the 1st day of June, 1986 to the 22nd day of September, 1991 of [p.139] Government Ministers or Departments, Local Authorities, Parastatals including Public Corporations and the Bank of Sierra Leone, or Commissions or Councils established under the Constitution, and ascertain —

(a) whether or not any malpractices or irregularities were committed by any person with respect to those activities;

(b) the nature and extent of the malpractices and irregularities;

(c) the sums of money, and the identities of persons involved in such malpractices and irregularities.

2. To inquire into and investigate any persons or matters as from time to time be referred to the Commission by the National Provisional Ruling Council.

Isatu Kamara, applicant herein, and a witness before the Nylander Commission of Inquiry was on Wednesday, 8th of July, 1992 found guilty of perjury and sentenced to 21 days imprisonment at the Central Prisons, Pademba Road, Freetown, under Section 3(a) of the National Provisional Ruling Council Decree No.4, 1992 - Commissions of Inquiry (Additional Powers) Decree, 1992.

Section 3(a) of N.P.R.C. Decree NO,.4 of 1992 states:—

“Any person who makes any false statement to any Commission issued under the Commissions of Inquiry Act, knowing those statements [p.140] to be false or which he has no reason to believe to be true shall be guilty of contempt, punishable by imprisonment or fine.

It will suffice to state at this juncture that the offence of perjury in the Commissions of Inquiry Act CAP. 54. Laws of Sierra Leone, 1960 is created by Section 11 of that Act - and it states: —

Section 11 — "Any witness who shall willfully give false evidence in any such inquiry concerning the subject matter of such inquiry shall be guilty of perjury and be liable to be prosecuted and punished accordingly”.

On 10th July, 1992 an application for leave to apply for an order of certiorari was made to this Court by Isatu Kamara against the orders of Hon. Mr. Justice Lynton B. O. Nylander dated 8th July, 1992 between:—

ISATU KAMARA - APPLICANT

AND

ATTORNEY GENERAL - RESPONDENT

In the said application: Counsel sought to invoke the supervisory jurisdiction of this Court under Section 125 of the Constitution of Sierra Leone, 1991 Act No.6 of 1991 and also Section 148 of the said Constitution which deals with the powers, rights and privileges of Commissions of Inquiry.

Section 125 of the Constitution of Sierra Leone states:

[p.141]

"The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directives orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers".

Section 2(1) of the PROCLAMATION - THE ADMINISTRATION. OF SIERRA LEONE (NATIONAL PROVISIONAL RULING COUNCIL) PROCLAMATION, 1992, Public Notice No. 20 of 1992 provides for the suspension of certain provisions of the Constitution Sierra Leone Act No.6 of 1991. It states:—

"All provisions of the Constitution of Sierra Leone, 1991 which came into operation on the 1st day of October, 1991 which are inconsistent or in conflict with this Proclamation or any Decree made thereunder shall be deemed to have been suspended with effect from the 29th day of April, 1992"

As far as we are aware, Section 125 of the Constitution of Sierra Leone 1991, Act No.6 of 1991, which invests this Court with supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority has not been suspended and is still operative.

[p.142]

Counsel for applicant complained of passages here and there in exhibit"A" the record of proceedings of the Nylander Commission of Inquiry touching and bearing on applicant Isatu Kamara. We have carefully looked at these passages.

For the purposes of this ruling, and to avoid prolivity, we have thought it expedient to reproduce verbatim, only the exchanges which took place between the Chairman and the applicant, after the Commission had decided to find the latter guilty of perjury. It runs thus:

Mr. Chairman : The Commission has decided that you are guilty of perjury.

Mrs. Kamara : Can I say something my Lord?

Chairman : Will you wait, I have finished with that. I have just specified two points in which we are not at one with. You said you started in 1991 and we are satisfied that you started before then. You said that you were given a letter from Mr. Sheriff, though he says that he could not recall, but categorically said that the Managing Director directed him then. This is what we say, we have found you

guilty of perjury contrary to Sections 3A of the decree, 1992. As such, I will not levy the ultimate or maximum punishment which this section calls for, but from here, forthwith, you will be taken to [p.143] the State Prison at Pademba Road, where you will be kept until July, 29th and you will be brought here again for the continuation of the examination. Have you got anything left? Let the Officers come and take custody of her.

Mrs. Kamara : My Lord can I say something or can I explain myself?

Mr. Chairman : When we come back.

We have taken this step for purposes of clarity and to put things in their proper perspectives.

The issue before this Court is whether his Lordship Lynton B. O. Nylander had jurisdiction to find applicant guilty of perjury under Section 3(a) of the National Provisional Ruling Council Decree No.4, 1992 - Commissions of Inquiry (Additional Powers) Decree, 1992 as he did. I am constrained once more to refer to the provisions of Section 3(a) of N.P.R.C. Decree No.4 of 1992 which states:

"Any person who makes any false statements to any Commission issued under the Commissions of Inquiry Act knowing those statements to be false or which he has no reason to believe to be true, shall be guilty of contempt."

From the foregoing, I can only say, with respect, that Hon. Chairman acted in error in finding applicant guilty perjury instead of contempt as provided by Section 3(a) N.P.R.C. Decree No.4 of 1992, thereby acting in excess of [p.144] jurisdiction.

Even if the Hon. Chairman had jurisdiction to find the applicant guilty of perjury, certain procedure must be followed before conviction and sentence.

It is provided by Section 11 of the Commission of Inquiry Act CAP.54 Laws of Sierra Leone, 1960 as follows:—

"Any witness who shall willfully give false evidence, in any such inquiry concerning the subject-matter of such inquiry shall be guilty of perjury, and shall be liable to be prosecuted and punished accordingly.

The prosecution will then be a matter for the Attorney General and the Director of Public Prosecutions to prefer a charge against the accused who will be tried by the High Court accordingly.

The rationale in my view in resorting to the expedient of an offence of contempt in Section 3(a) of Decree No.4 of 1992 is to make for the speedy despatch of the Commissions work, and to obviate the delay that would result in prosecutions under perjury, the contempt procedure being simpler and less irksome.

IN JOHNSON V. REGINAM ALR (S.L.) Series 1970 - 71 Court of Appeal (Cr. App. No.18/70) an appeal against conviction for contempt, Sir Samuel Bankole Jones - President of the Court of Appeal delivering the judgment of the Court inter. alia said at P.124 lines 23 - 33.

“All the authorities are agreed that when a judge has made up his mind to invoke the summary process for committing [p.145] for contempt, the following procedure should be followed. Firstly, the judge should make the person concerned aware of the pith of the charge against him. Secondly, the person should be given an opportunity to show cause why he should not be so committed. He may then say anything by way of excuse, explanation or possibly correction of any misapprehension as to what has in fact been said or done. It is of the utmost importance that this opportunity should be given, and unless that is done the committal would be unlawful.”

This brings me to the principles of natural justice, the violation of which was a ground of complaint. The applicant that the procedure adopted by the Chairman of the commission in refusing to listen to her before sentencing her to imprisonment was an infringement of the principles of natural justice.

Indeed, there are fundamental principles which govern judicial and quasi - judicial inquiries, and one of these is “the audi alteram partem” rule, that is, a party to judicial proceedings should not be condemned unheard. No one who has a case or against whom an unfavourable decision is given will believe he has been fairly treated if in the course of his trial in any quasi- judicial proceedings leading to his conviction and sentenced is refused hearing.

We have carefully read the records of the proceedings in this, matter, and taking all the circumstances into consideration it seems to us that the procedure, unwittingly no doubt, adopted [p.146] by Chairman Nylander in refusing to hear applicant before sentence, thereby not making it plain and manifest that justice was done, was bad. A judicial or quasi-judicial decision reached by a tribunal in violation of the rules of natural justice may be quashed on certiorari .

Miss Attiba-Davies, Counsel for Respondent argued with force that applicant was only committed to prison and as such, she was not convicted. This was countered by applicant that committal to prison and sentence to prison are both convictions and referred to the reported case of In re: MANNI, 1964 - 66 ALR (S.L.) Series, Court of Appeal for Sierra Leone P.557 - Cr. App. No.23/66; where the Court of Appeal invited arguments from Counsel before application was made for leave to appeal in that matter, the case of a contemmnor who had been convicted by the then Supreme Court (High Court).

The question was whether there existed in law a right of appeal to the Court of Appeal. Both sides agreed that there was. It was held by that Court that an order of the High Court of committal for a criminal, contempt amounts to a conviction and the Court of Appeal therefore has jurisdiction to entertain an appeal against the order.

We are satisfied that this view was a correct one.

In view or the above reasons, we hold that this is a proper case in which the application for an order of certiorari ought to be granted and we so grant.

[p.147]

The proceedings therefore are hereby quashed.

And we direct that the applicant be forthwith discharged from custody in respect of her conviction and commitment thereunder.

(SGD)

S. M. F. KUTUBU – CHIEF JUSTICE

I agree

(SGD)

A.V.A. AWUNOR-RENNER - J.S.C.

I agree

(SGD)

M. O. ADOPHY – J.A.

CASES REFERRED TO

1. Johnson V. Reginam Alr (S.L.) Series 1970 - 71 Court of Appeal (Cr. App. No.18/70)

STATUTES REFERRED TO

1. Sections 2 and 6 of The Commissions of Inquiry Act, Cap.54 , Laws of Sierra Leone, 1960

2. National Provisional Ruling Council Decree No.4, 1992.

3. Commissions of Inquiry Act Cap. 54. Laws of Sierra Leone, 1960

4. Commissions of Inquiry (Additional Powers) Decree, 1992.

5. Section 125 of The Constitution of Sierra Leone 1991, Act No.6 of 1991

MOMOH DOWU v. CHIEF SAMUKA KATEU & ORS.

[Sc. Civ. App. No. 11/81] [p.12-22]

DIVISION : THE SUPREME COURT OF SIERRA LEONE

DATE: 18 MARCH 1985

CORAM: MR. JUSTICE E. LIVESEY LUKE, J.S.C., PRESIDING JUDGE;

MR. JUSTICE C.A. HARDING, J.S.C.;

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.;

MR. JUSTICE S. BECCLES DAVIES, J.S.C.;

MR. JUSTICE S.C.E. WARNE, J.A.

MOMOH DOWU - APPELLANT

And

CHIEF SAMUKA KATEU &. ORS. - RESPONDENTS

Garvas J. Betts, Esq. for the Appellant

Dr. H.M. Joko Smart for the Respondent

JUDGMENT

C.A. HARDING, J.S.C.

This appeal concerns a dispute relating to farming land situated in the Nongowa Chiefdom Kenema District in the Eastern Province. The parties to the dispute are the people of Mano Kortuhun (the "Appellants") and the people of Komande Lowoma (the "Respondents").

Action was first instituted in the Nongowa Local Court in March, 1972 by the people of Lowoma against the people of Mano Kortuhun for planting in their bush (i.e. farm land) without authority. The disputed bush is situated between the two villages i.e. Komende Lowama and Mano Kortuhun. The action was heard by the Nongowa Local Court between May and November, 1972. Judgment was given in favour of the people of Komende Lowoma in November, 1972. The people of Mano Kortuhun appealed to the Group Local Appeal Court at Kennema. The appeal was heard by the Group Local Appeal Court consisting of six chiefs sitting at Kenema in September, 1973. In the course of hearing of the appeal the Court accompanied by the parties and their witnesses visited the land in dispute. The Court delivered judgment in December, 1973, allowing the appeal and awarding compensation to the people of Mano Kortuhun. The people of Komende Lowoma appealed to the District Appeal Court. The District Appeal Court was presided over by Mr. M.O. Taju Deen, then Principal Magistrate, assisted by two assessors. The hearing of the Appeal commenced in November, 1974 and concluded on 25th July 1975 [p.13] when the assessors gave their opinions. In the course, of the hearing the Court visited the land in dispute on two separate occasions. The Magistrate delivered Judgment on 22nd October, 1975 confirming the decision of the Group Local Appeal Court but making a supplementary order in relation to a portion of the land in dispute.

The people of the Mano Kortuhun being aggrieved by the decision of the District Appeal Court appealed to the Local Appeals Division of the High Court. The complaint of the appellants was directed against the supplementary order made by the District Appeal Court. The order of that Court was in the following terms:—

“In accordance with S. 33(1) (a) & (f) of Act No.20 of 1963, the District Appeal Court confirm the decision of the Group Local Appeal Court with the following supplementary order: From Lowoma up to Botey stream; from Botey to the path of the palm tree (i.e. the palm tree pointed during our second Locus-in-quo) to be returned to the people of Lowoma as claimed by them as it had been previously given them by the people of Mano Kortuhun and they had been working on it for over 25 years now. The District Appeal Court is not going to upset the decision of the Group Appeal Court, but the swamp after road leading to the palm tree should go to the people of Mano Kortuhun, and all lands from the palm tree leading to Mano Kortuhun belongs to the people of Mano Kortuhun No order as to costs. Each party bears its own costs."

It will be useful to set out the grounds of appeal relied on by the people of Mano Kortuhun in their appeal to the Local Appeals Division of the High Court. They were as follows:—

[p.14]

"(a) The supplementary order made by the District Appeal Court is inconsistent with and derogatory of the decision of the Group Local Appeal Court, a decision which the District Appeal Court expressly stated it was confirming.

(b) The supplementary order is wrong in law in that in effect, it upturns and subverts the very decision which the District Appeal Court stated it was confirming.

(c) The said supplementary order is wrong and unreasonable and cannot be supported having regard to the evidence.”

The appeal was heard by Golley J. (as he then was) sitting with two assessors, at Kenema in May, 1978. Judgment was delivered in December, 1978 allowing the appeal and setting aside the supplementary order made by the District Appeal Court. The people of Komende Lowoma being dissatisfied with the decision of the Local Courts Division of the High Court appealed to the Court of Appeal. The appeal was heard by the Court of Appeal (Marcus Cole, Navo and Turay JJ.A) in October, 1980. The main contention of the appellant in the Court of Appeal was that any appellate court has jurisdiction to vary the decision of a lower court and that the District Appeal Court had acted within its powers in varying the decision of the Group Local Appeal Court. Judgment was delivered in October, 1981 allowing the appeal.

The people of Mano Kortuhun have now appealed to this …… appellants. Learned Counsel on both sides argued all of them before us. However it is unnecessary to deal with them individually. It will be sufficient to deal with the two important issues raised by the appeal, namely—

(i) Whether the order made by the District Appeal Court was indeed a Supplementary order

[p.15]

(ii) Whether the evidence supports the supplementary order made by the District Appeal Court.

With regard to the first issue it will be recalled that in making its order dated 22nd October, 1975 (quoted above) the District Appeal Court relied on Section 33(1) of the Local Courts

Act,(Ref No.207 1963)1963.That subsection reads—

"33(1) on an appeal any Appeal Court may –

(a) confirm the judgment, order or sentence of the Court below;

(b) substitute for the judgment, order or sentence of the Court below any judgment, order or sentence which might lawfully have been made at first instance ;

(c) remit the case to (the original court or any other court of similar jurisdiction for rehearing;

(d) make any such order as to costs off the proceedings both in the Appeal Court and in the Courts below as may be just;

(e) exercise any powers which might lawfully have been exercised by the Courts below;

(f) make any such supplementary or consequential orders as the justice of the case may require."

The Court stated that "in accordance with Section 33 1(a) and (f) of Act No. 20 of 1963" it confirmed the decision of the Group Appeal Court "with the following supplementary order." In other words, the Court, acting under sub-paragraph (1)(a), confirmed the Judgment of the Group Appeal Court, and acting under sub-paragraph (1) (f), made a supplementary order. The Judge in the Local Appeal Division of the High Court held that the effect of the supplementary order made by the District Appeal Court was to [p.16] derogate from the order of the same court confirming the judgment of the Group Local Appeal Court. The Court of Appeal on the other hand, held in effect that the order made by the District Appeal Court after confirming the decision of the Group Appeal Court was a consequential order.

Mr. Garvas Betts, Learned Counsel for the Appellants, argued before us that the effect of the supplementary order made by the District Appeal Court was to vary the order made by the Group Appeal Court. He submitted that the powers conferred by the various paragraphs of the subsection could not be exercised in such a way as to make contradictory orders or orders which have the effect of nullifying each other. He further submitted that the supplementary order made by the District Appeal Court had the effect of nullifying the order confirming the decision of the Group Local Appeal Court.

Dr. Joko Smart, Learned Counsel for the Respondents, conceded that the District Appeal Court was inconsistent in using the word "confirm" followed by the word "supplementary". He however submitted that from the records, it was clear that the intention of the Magistrate who presided over the District Appeal Court was to accept only part and not the whole of the decision of the Group Appeal Court. He further submitted that the intention of the Magistrate was to accept the decision of the Group Appeal Court substantially and to vary it in order to accommodate the supplementary order following his visit to the land in dispute.

I shall first dispose of the question whether an Appellate Court acting under the powers conferred on it by Section 33(1) of the Local Court Act, 1963 can, while confirming the judgment of the lower court, proceed to make a supplementary order or a consequential order.

In my opinion supplementary or consequential orders are ancillary to an order confirming a judgment. Therefore a court has power to make a supplementary order or a consequential order after making an order confirming the judgment of the Lower Court (which for convenience, I shall call the principal order").

[p.17]

But it is important to emphasize that a' "supplementary order" and a “Consequential order" are not one and the same thing. A supplementary order, as the name implies, is an order which supplies a defect in the principal order. On the other hand a consequential order is an order which follows as a result of the principal order.

Let me take for example a case for possession of a house, where the Lower Court granted possession of the house to the respondent and merely stated the street where the house is situated without stating the number of the house or its boundaries. In such a case an Appellate Court may supply the defect by making a supplementary order specifying the number of the house and/or describing the boundaries of the land on which the house is situated. The Court may at the same time make a consequential order, for instance ordering the appellant to refund to the respondent damages or compensation previously paid to him by virtue of a court order.

The next question is whether a supplementary order or a consequential order can conflict with or vary the principal order confirming a judgment. As stated earlier, a supplementary order or a consequential order is ancillary to the principal order. In my opinion therefore by their very nature a supplementary order and a consequential order are subservient and subordinate to the principal order and they cannot derogate from, or vary or conflict with the principal order. Therefore once an order has been made confirming a judgment of a lower court an Appellate Court may proceed to make orders ancillary to – principle order. Such orders may properly be called supplementary or consequential as the case may be. But the court may not make any such orders which have the effect of derogating from the principal order made. And the court may not get over this prohibition by the device of clothing the offending order as "supplementary" or "consequential". Similarly if the court substitutes a judgment for the judgment of the court below, it may not make any supplementary or consequential order which give the effect of derogating from the main judgment (as substituted).

[p.18]

I shall now proceed to consider whether the supplementary order" made by the Magistrate was indeed a supplementary order. The order has been set out above. The Magistrate stated in no uncertain terms that the District Court confirmed the decision of the court below. He said inter alia:— "The District Appeal Court confirm the decision of the Group Appeal Court …….. The District Appeal Court is not going to upset the decision of the Group Appeal Court”.

It will be useful to set out the relevant part of the Judgment of the Group Appeal Court. It suffice to quote from the concluding paragraphs of the well reasoned and exhaustive Judgment of the court.

They read:—

"24, According to the full inspection of the respondents' boundary in this disputed bush we the members of this court, it was observed with grave concern that there is nothing to prove to we (sic) the members of this court that his boundary is the actual boundary between Komende and Mano Kortunhun as according to native law and custom we all know what should be on a boundary between two towns…….

26. This court do believe when the appellant said one Moriba begged this bush for the people of Mano Kortunhun which is the natural home for (sic) the said Moriba. The appellant told this court that when this bush was given to Moriba, Moriba and his children planted cocoa there. The cocoa planted was inspected by we (sic) the members of this court and while on inspection the appellant he said bush and therefore that will not mean that the people of Komende are the owners of the said bush because Moriba [p.19] Moriba planted cocoa there. According to native law and custom, a nephew will be given a bush from the maternal side and that nephew will not now claim that bush because of that. This court rely on it as fact that the bush was begged when the said cocoa was planted. …….

28 This also proves to this court that this Soryama deserted village belongs to Mano Kortuhun.

29. That the boundary laid by the appellant Momoh Dowu of Mano Kortuhun from Mbote stream on to a bunch of bambo trees, on to the Gbondi tree, on with Mbote across the Mbote swamp, on to Mdorwei tree, on to the source of Songeyei, down with Songeyei, running to Sorya, joining Yumbu stream straight with Yumba to the boundary is therefore accepted as the actual boundary in this disputed bush between Komende and Mano Kortuhun having carefully viewed the boundaries well according to native law and custom governing boundaries between two towns.

30. That the cocoa planted in the said bush by the late Moriba and his children which bush was begged from the people of Mano Kortuhun should from the date of this decision remain the property of the children of late Moriba. Decision. In view of the above facts, findings, coupled with careful examination of this case, we the members of this court unanimously say without fear or favour that the respondent Chief Samuka Kateu is wrong…… We also order that the decision of the Local Court has been reversed".

[p.20]

This was clearly a judgment upholding the boundaries claimed by the appellants, rejecting the boundaries claimed by the respondents, declaring that the land in dispute belonged to the appellants and at the same time declaring that the cocoa trees planted on the land were the property of the children of Moriba and finally dismissing the claim of the respondents.

That was the Judgment against which an appeal was lodged to the District Appeal Court. And that was the judgment which the District Appeal Court confirmed. Having confirmed that judgment, the District

Appeal Court then proceeded to order that a portion of land "be returned to the people of Lowoma as claimed by them". Without doubt this was an order granting part of the respondents' claim which had already been dismissed by the Group Local Appeal Court and which dismissal had been confirmed by the District Appeal Court. This was an order taking away from the appellants part of which had been granted them by the judgment confirming the dismissal of the respondents' claim. This was an order derogating from the judgment in favour of the appellants. In my judgment such an order could not by any process of reasoning be classified as a supplementary or a consequential order. It was an invalid order and should be set aside.

Having reached this conclusion, it is not necessary to consider the second issue. I shall however deal with it very briefly. The respondents' claim was for the recovery of the land. The respondents' case was that they had acquired the land by conquest over seventy years ago, that is before the British declared a protectorate over that part of Sierra Leone now known as the Provinces. The case for the appellants was that they had originally brushed the land and that there had never been any adverse claim against their right to the occupation of the land. So the issue between two parties was which of them had a better claim to the land. Starting from the Local Court and up to the District Appeal Court each party called witnesses to prove their respective claims and also to identify the boundaries of the land Claimed by them. The Group Local Appeal Court exhaustively considered the evidence, in the course of which they rejected the [p.21] evidence of the respondents and their witnesses including the evidence given by them relating to the boundaries, and accepted the evidence of the appellants and their witnesses including the evidence relating to the boundaries, and came to the conclusion that the land in dispute belonged to the appellants. The District Appeal Court also considered all the evidence including the evidence adduced before the Lower Courts and rejected the evidence led on behalf of the respondents and accepted the evidence led on behalf of the appellants. Indeed, the whole trend of the judgment of the District Appeal Court up to the stage at which the offending supplementary order was made was in support of the appellants' claim. It seems illogical that having discredited the evidence of the respondents, rejected their claim and given considerable weight to the evidence of the appellants, for the Court to then make an about face turn and say that part of the land belonged to the respondents.

It would appear that that change of front on the part of the District Appeal Court was as a result of the second locus in quo. It is not clear from the recorded evidence of that visit what factors influenced the Court. The reason given by the Court for giving part of the land to the respondents was that "it had been previously given them by the people of Mano Kortuhun and they had been working on it for over 25 years now". This reason is untenable for two reasons. First, it was not part of the case of the respondents that the land in dispute was given to them by the appellants. Their case was that they had acquired it by conquest. Secondly, the evidence does not support the assertion that the appellants had at any time given the land to the respondents. In fact the evidence of the respondents was that the appellants had never owned that land and that they (the respondents) had always owned it.

It is relevant to mention that the appellants admitted that they had allowed one Moriba, their nephew, to plant cocoa trees on part of the land. The respondents did not claim to derive their title through Moriba. So this admission was of no avail to the respondents. The Group Local Appeal court held that the [p.22] arrangement between the appellants and Moriba was in accordance to native law and

custom, and proceeded to order that cocoa planted in the bush by late Moriba and his children" should remain the property of the children of late Moriba. It has not been suggested that this order was not In accordance with native law and custom. My understanding of the order of the Group Local Appeal Court is that the land is the property of the appellants but that the cocoa trees planted by Moriba on part of the land belong to Moriba's children. Accordingly the children of Moriba have the right of reaping the cocoa and generally enjoy the fruits of the cocoa trees but that does not mean that they are the owners of the land. This right, in my opinion, is in the nature of the right known in Roman Law as usufruct. Such a right is recognized by our customary law.

Before concluding this judgment, it is necessary, to refer to an issue raised by the Court of Appeal in their judgment. The Court expressed the view that the respondents were entitled to the land in dispute by reason of long user. With respect to the members of that Court, that was not an issue before the Court of Appeal because it was never raised in either of the two Grounds of Appeal or canvassed before that Court, and in any case, the case advanced by the respondents and the evidence adduced do not warrant the application of that doctrine.

For these reasons, I would allow the appeal, set aside the Judgment of the Court of Appeal and restore the judgment of the Local Division of the High Court setting aside the supplementary order made by the District Appeal Court and confirming the judgment of the Group Local Appeal Court.

(SGD.)

E. Livesey Luke

Chief Justice

STATUTE REFERRED TO

1. Section 33(1) Of The Local Court Act, 1963

MOHAMED LAMIN SEISAY & SAMBA JALLOH v. THE STATE

[S.C. CR. APP. No. 1/84; S.C. CR. App. No. 2/84] [p.23-39]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 9 JULY 1986

CORAM: MR. JUSTICE C.A. HARDING, J.S.C. - PRESIDING;

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.;

MR. JUSTICE O.M. GOLLEY, J.A.

BETWEEN:

MOHAMED LAMIN SEISAY - APPELLANTS

(ALIAS PITTY)

AND

SAMBA JALLOH

vs

THE STATE - RESPONDENT

B. MACAULAY (JNR) for 2nd Appellant

H. TEJAN JALLOH (MISS) for The State

JUDGMENT DELIVERED THIS 9TH DAY OF JULY 1986

A. AWUNOR-RENNER. J.S.C.

The appellants were convicted at the Kenema High Court on the 1st day of October 1976 before Navo J. as he then was, and a jury, for the murder of one Albert Samba on the 2nd day of May 1976 at Lowoma Village in the Lower Bambara Chiefdom, Kenema District and sentenced to death. They appealed to the Court of Appeal and judgment was delivered on the 10th day of November 1981 dismissing . the appeal and affirming the conviction and sentence of the High Court. It is against that decision that the appellants have now appealed to this Court on the following grounds viz:—

On behalf of the 1st appellant:

(a) That the Court of Appeal for Sierra Leone was wrong in Law in holding that the verdict was not reasonable nor could it not be supported having regard to the evidence adduced at the trial.

(b) That the Court of Appeal was wrong in Law when it held that the Learned Trial Judge's direction to the jury that if there in any doubt, I am not saying any fanciful doubt, but if there is any substantial doubt, you should resolve that doubt in favour of the accused persons and let them go free was in order.

[p.24]

(c) That the Court was wrong in lay when it held that there was no evidence to leave to the jury for the consideration of the issue of provocation and or self defence.

On behalf of the 2nd appellant:

(a) The Court of Appeal erred in law in holding that the appellants defence of alibi was properly put to the jury

(b) The Court of Appeal erred in law in holding that the learned trial judge had not misdirected the jury on the grounds of implied malice.

(c) The Court of Appeal erred in law in holding that the learned trial judge had not misdirected the jury as to the standard of proof imposed upon the prosecution.

The 1st appellant was not represented by Counsel, however the Court took cognizance of his grounds of appeal that were before us.

The facts so far according to the prosecution and defence as it is necessary to state them are as follows:

On the night of the 1st May 1976 at Lowoma Village in the Lower Bambara Chiefdom the deceased Albert Samba staged a dance at the Barri. One Kene Samba was at the dance helping the deceased to sell tickets at the entrance to the Barri. His wife Elizabeth Jah (alias Binta Samba) was also present running the bar. Later on that same night Mohamed Daramy 2nd accused in the High Court who is now dead came and sat by Kene Samba; when he was questioned about his ticket he said that he had bought one earlier in the evening but had lost it. An argument ensued between the deceased and Mohamad Daramy which later on resulted in a Fight between the two of them. Binta held the deceased by his trousers and then took him out side. By that time 1st and 2nd appellants were standing outside and as Binta took the deceased away the 1st appellant was heard saying "Let us go and finish with the dog"; as the deceased was [p.25] being taken away he was overtaken by the two appellants and Daramy, They crossed in front of them. The second appellant than kicked Binta on her stomach and the 1st appellant broke a bottle on a stone and stabbed the deceased on the right side of his neck. He was then taken into a house whence he later died. Both appellants did not give any evidence or call witnesses but relied on the statements which they made to the Police and which were tendered in evidence in the High Court. The 1st appellant in his statement denied being present at the scene of the alleged incident; in fact he claimed that he was not in Lowoma Village at all but in Tokpombu II Village in the Tongo area where he spent the day and evening in the company of one Alpha jalloh and some other people until 1 a.m. when he retired to bed and woke up at 7 a.m. on the Sunday the 2nd day of May 1976.

The 2nd appellant also alleged that he too was not at the scene but that he spent the night at the house of one Pa Momoh Kpakateh. The other inmates of the house he claimed including the 1st appellant want out at about 10 p.m. and that he was alone in the house until the early hours of the morning when the 1st appellant returned to the house panting; there was blood on the 1st appellant's shirt and when he 2nd appellant questioned him about it the 1st appellant stated that he had been involved in a fight with some one who had bitten him. He was later on arrested and charged.

Three grounds of appeal have been urged on behalf of the 2nd appellant: however I propose only to deal with those which in my opinion are substantial.

The second ground of appeal raised by Berthan Macaulay (Jnr) counsel for the 2nd appellant was that the Court of Appeal erred in law in holding that the learned trial judge had not misdirected the jury on the grounds of implied malice. He referred this Court to what the Court of Appeal had to say about malice aforethought and I quote:—

“Counsel for the 1st and 3rd appellants had submitted that the judge's direction on malice aforethought with particular [p.26] reference to Implied malice is erroneous. Appellants' Counsel had submitted that the Judge had employed the subjective test in directing the jury on whether there was implied malice or not he should have used the objective test as propounded in Sahr Nbambay and others.

The Judge did not fall into the error as he, did not direct the jury that it was the subjective test that they had to apply. I agree with Counsel for the state that he merely gave an example of a factual situation that could amount to implied malice I find no merit in this ground.”

He further referred this Court to quotations from the summing up of the Learned Trial Judge and again I quote—

“Then we come to the most important ingredient with malice aforethought.

The death must be with malice aforethought. What does that mean?

Malice does not mean premeditation. We have two categories of malice, express malice and implied malice. In the case of express malice there is an intention to cause death, or cause grievous bodily harm to any person, whether such person is the person killed or not. Now you make up your mind and say 'I am going to kill some body’. I will take my gun. I am going to shoot at A. If you shoot at A and A dies that is express malice. You had it in mind to do something which will cause grievous bodily harm to A or which may cause the death of the person against whom you inflict or on whom you inflict injuries etc.

He then continued to explain what is meant by express malice. On the question of implied malice the learned trial judge directed the jury in this way.

"Implied malice in many cases where no malice is expressed or openly intended, the law will imply it from a deliberately cruel act committed by a person against another."

[p.27]

“Deliberately cruel act although you did not intend to kill somebody but do a deliberate cruel act, and that act causes his death, you are guilty of murder because the ingredient of implied malice would have been provided.”

“It may be implied where death occurs as a result of a voluntary act of the prisoner which was intended and unprovoked. You were not provoked to do what you have done. I will deal with provocation later on. It must be unprovoked. The law will imply malice from your action and if death occurs or if death results. It is implied that you had malice aforethought you will be found guilty of murder.”

"All the other ingredients in murder are in manslaughter except that in manslaughter the prosecution need not prove malice aforethought. That is perhaps the most important ingredient in the case of murder. The prosecution must prove malice either express or implied."

Mr. Macaulay (Jnr) further contended that the learned trial judge in his direction to the jury on the question of implied malice should have explained what this meant to them in simple language and not

merely read out ipssisima verba the contents of Archibold Criminal Pleadings Evidence and Practice Thirty-Fifth edition at page 918 paragraph 2487 under the rubric. "Implied malice" to them which states as follows:

"In many cases where no malice is expressed or openly indicated the law will imply it from a deliberate cruel act committed by one person against another. It may be implied where death occurs as a result of a voluntary act of the prisoner which was (1) intentional and (2) unprovoked."

[p.28]

He referred the Court to several cases in support of his proposition namely Feika v. Regina C.A. 1968/1969. A.L.R. (S.L.) 342 at page 345, H. V. Kargbo same volume at paga 354 and also Sumana v. R. 1970-1971, A.L.R. (S.L.) at page 306 at 316. He also submitted that the trial judge having directed the Jury on implied malice failed to relate that direction to the evidence which had been led relying on the following cases - R. v Finch 12 C. App. Reports at page 77. Sallu Mansaray v The State unreported Supreme Court Criminal Appeal 1/80. The learned trial judge he said seemed to feel that there was implied malice since he speaks of voluntary act and deliberately cruel act and was also equating the actus reus with mens rea. In his reply he alleged further that the learned trial judge did not refer to any evidence which would suggest express malice or implied malice but simply read the law to them and that he made no attempt to direct the jury as to whether this was express or implied malice. Counsel for the respondent Miss Tejan Jalloh stated that express malice and implied malice are components of malice aforethought. She expressed the view that the learned trial judge only referred to implied malice through an abundance of caution and that what was relevant in this case was express malice. She also referred to the case of Sallu Mansaray supra.

Let me now examine some of the authorities cited by Counsel for the respondent as far as they relate to ground 2 of this appeal. In Feika v ReRegina supra, a Court of Appeal decision, one of the grounds of appeal was that the trial judge misdirected the jury on provocation by reading from a text book. It was held in that case that in directing the jury on the law applicable to the case being tried the judge should not resort to reading passages from a text book without more. In Kargbo v. Regina 1968/69 A.L.R. (S.L.) also another Court of Appeal decision at page 354 two of the grounds of appeal were (1) that the learned trial judge failed to direct the Jury adequately on the defence of provocation and (2) that he did not give proper direction with regard to the right of self defence. It was held that a judge in his summing-up should [p.29] not confine his direction on the law to reading from a legal text book, it is his duty to explain in simple language the principle of law applicable to the case, to consider the questions raised by the prosecution and defence respectively and to direct the jury on how to apply the law to the facts. I quote from the judgment of Tambiah 3.A. at page 358 —

"Unfortunately there is misdirection as well as non—direction in the summing-up of the learned trial judge. He adopted a procedurewhich has been condemned both by this Court and the Court of Appeal in England. He read passages from Archibold without analysing the obstruse prepositions of law stated therein. Members of the jury are laymen who have no training in the law and liable to be confused when passages from a text book are read to them. They will not be in a position to comprehend the difficult

questions of law applicable to the facts of a case. It is the duty of a judge to explain in simple language the principles of law applicable to the case and to direct them on how to apply the law to the facts."

See also the cases of Sumana v R. reported in 1970/71 A.L.R. (S.L.) at page 306 and at page 316. R. u. Finch reported in 12 Cr. App. Rep. at page 77. Sallu Mansaray u The State S.C. Cr. App. No.1/80 unreported. In my opinion the authorities cited above clearly support the contention that it is not sufficient merely to direct the Jury on the law of a case; they are entitled as well to the judges' assistance on facts and it is also his duty to explain to them in simple language the principles of law applicable to the case in the circumstances.

In the present case I feel that the jury were deprived of the assistance of the learned trial judge in his summing-up. Indeed he proceeded to give them the definition of what was express malice and also tried to explain the meaning of this to them but he further went on to confuse the jury and misled them by bringing in the definition of implied malice and not bothering to explain this to them in simple language and by also not telling them which of the two, [p.30] express or implied malice was applicable in the present circumstances. He had failed in his duty by omitting to direct the Jury sufficiently oh this point. I cannot say whether the jury properly directed would have convicted him. I would therefore allow the appeal on this ground.

The next ground of appeal of the 2nd appellant is a much more serious one and deals with the learned trial judge's misdirecting the jury as to the standard of proof imposed upon the prosecution. This ground of appeal is common to both appellants and it is my view that it can be dealt with conveniently together. In a nut shell Berthan Macaulay (Jnr) for the 2nd appellant submitted that the learned trial judge misdirected the jury on the standard of proof required in a criminal case by equating the words "reasonable doubt" with "substantial doubt". He submitted further that one cannot say that the phrase reasonable doubt is synonymous with the phrase substantial doubt. He contended that by using the word substantial doubt the Court was imposing a lower standard of proof upon the prosecution. He also called the Court's attention to certain portions in the summing up about which he was complaining and relied on the following authorities in support of this last ground of appeal, Moroma v Regina 1964/66 A.L.R. (S.L.) at page 542 at page 547,R.v.Sumners (1953) Cr. App. R. at page 16. Finally he ended up by saying that the case of Bater v Bater relied on by the Court of Appeal was a case involving a divorce petition and had no relevance with the standard of proof in a criminal matter. Miss Tejan-Jalloh for respondent contended that no particular form of words are needed as long as the trial judge puts the case adequately that will suffice, she also relied on R. v Sumners supra and invited the Court to apply the provisions of sub-sec. 2 of sec.58 of the Court's Act number 30 of 1965. On the other hand Mr. Macaulay however urged this Court to reject the question of applying the provisions of sub section 2 of sect 58 of the Court's Act supra as he said that each case should depend on its own facts as regards misdirections and non-directions.

[p.31]

The following directions on the burden and standard of proof were given by the learned trial judge in his summing-up and I quota:—

(1) "It is for the prosecution to prove their case beyond reasonable doubt. If that doubt exists either from the case for the prosecution, or is created by the defence, and you find out that it is a reasonable doubt and not a fanciful doubt the law requires you to resolve that doubt in favour of the accused persons."

(2) "If you have any, substantial doubt let them go free."

(3) "If there is any doubt, I am not saying a fanciful doubt, but if there is any substantial doubt you should resolve that doubt in favour of the accused persons and let them go free."

(4) "If they do, then you may say, those discrepancies may cause considerable doubts reasonable doubt — but so far as the prosecution is concerned they say 1st accused said, "You wait let us go and do away with the dog."

(5) "If you take into consideration the various discrepancies in his evidence and you say that taking these witnesses evidence into consideration there is substantial doubt in your minds, I am not saying fanciful doubts. If it creates any doubts in your mind, you are bound to resolve that doubt In favour of the accused persons."

(6) "If it goes to the root of the case it destroys the case for the prosecution completely or creates a substantial doubt in your minds than you are bound to resolve that doubt in favour of the accused persons. If they do not shake your conscience that a substantial doubt has been created it is for you to say Oh, yes he may have made a mistake here and there."

[p.32]

(7) '' But it is for you again to say 'whether there is a substantial discrepancy that created a doubt in your minds. If it does then, of course you will say it does not make us think this way or that way, therefore the benefit must go to the accused persons."

Having referred to extracts from the summing-up it now remains for me to examine certain reported cases dealing with the burden and standard of proof. In all criminal trials it is the duty of trial judge to direct the jury that on the evidence the prosecution must prove the guilt of the accused to their satisfaction before, they convict and that the onus of proof rests upon the prosecution; this must be made quite clear to the jury in no uncertain terms. In the case of R. v Raymond Blackburn reported in volume 39 of the Criminal Appeal reports at page 84, S. Gorman J. in delivering the judgment of the Court had this to say and I quote:—

"It is for the judge to deal properly with the question of the burden of proof. One matter is quite clear. It cannot be said and this Court does not intend to say that any particular form of words is absolutely necessary or, the Court is concerned with the question whether, whatever form of words was used it was made quite clear to the jury that it was for the prosecution to establish the guilt of the prisoner and if the guilt of the prisoner is not established the prisoner must as of right and not by way of favour be found not guilty. This Court does not subscribe to the view that a particular form of words of necessity

means that the summing up was right or that the absence of a particular form of words necessarily means that it was wrong."

See also the case of Koroma v. R. reported in (1964/66) A.L.R. (S.L.) at page 582.

In the case of Woolmington v D.P.P. 1935 A.C. at page 462 at page 481: A House of Lord's decision expressly approved the direction to a jury that "the prosecution must prove the case beyond reasonable doubt.

[p.33]

In the case of R. v Hepworth and Norman Fearnly reported in volume 39 Cr. App. Reports at page 152. The case of R. u Summers 36. Cr. App. R. at page 14 was commented on and approved. In that case the learned recorder in his summing up failed to direct the jury adequately as to the burden of proof and the standard of proof required. It was held that there was no set formula for explaining to the jury in a summing-up that the burden of proof lies on the prosecution. To tell them that they must be satisfied by the evidence so that they must be satisfied by the evidence so that they can feel sure that the prosecution has established the guilty of the prisoner is appropriate, merely to tell the jury that they must be satisfied with regards to the prisoners guilt is insufficient. The use also of the phrase "reasonable doubt" is better avoided.

I think that it will be appropriate for me to refer to a portion in the judgment Goddard L.C.J which I think is relevant to the present case in my view. I quote:

"Another complaint that is made in this case is that the recorder used only the word "satisfied". It may be especially in view of the number of cases recently in which this question has arisen, that I misled Courts when I said in R. v. Summers 36 Cr. Appeal R. at page 14, at page 15, and I still adhere to it – that I think it is very unfortunate to talk to juries about reasonable doubt, because the explanation given of what is and what is not reasonable doubt are so vary often extraordinary difficult to follow and it is very difficult to tell a jury what is a reasonable doubt. To tell a Jury that it must not be a fanciful doubt is no real guidance. To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey such a particular standard; one member of the jury might say that he would hesitate over something and another member might say that something would not [p.34] cause him to hesitate at all. I therefore suggested in that case, that it would be better to use some other expression, which I meant that should be conveyed to the Jury that they should convict only if they feel sure of the guilt of the accuser. In some cases the words "satisfied" has been used. It is said that a jury in a civil case has to be satisfied and, therefore one is laying down the same principles as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards if one said in a criminal case to a Jury: "You must be satisfied beyond reasonable doubt" and one could also say: “You must be completely satisfied” or better still, “You must feel sure of the prisoner’s guilt.” But I desire to repeat what I said in the case of Kritz 33 Cr. App. R. at page 169 at page 177; It is not the particular formula of words that matter; it is the effect of the summing-up. If the jury are charged with one set of words or in another and are made to understand that they have to b. satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all

the time on the prosecution and not on the defence" "that is enough" I shall be very sorry if it were thought that case should depend on the use of a particular formula or particular word Dr words. The point is that the Jury should be directed First that the onus is always on the prosecution. Secondly before they convict they must feel sure of the prisoner's guilt. If that is done that is enough."

In the latter cases of McGreevy v. D.P.P. (1973) 1 W.L.R. at page 276 and R. v Sang (1979) 2 All E.R. at page 1223, it was stated that it must "be made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt". It is now submitted that this is the proper direction to give on the standard of proof laid on the prosecution to prove guilt.

[p.35]

Counsel for the 2nd appellant had also argued that the learned trial judge in portions of his summing-up had not only appeared to place the burden of proof on the appellant but that he had failed to put the narrow issue as outlined in the case of R. v Murtagh and Kennedy reported in 39 Cr. App. R. at page 72 and at page 83. In that case there had been a charge of murder and the defence relied on was that of an accident. The convictions were squashed on the grounds that the jury had not been specifically directed to acquit if the explanation of the defendants left them in any doubt. Justice Hibery in delivering the judgment of the Court at page 83 had this to say and I quote:

"Having regard to the evidence it is pre-eminently a case were it was essential for the judge to make clear to the Jury three possible positions in which the jury might find themselves, bearing in mind throughout that it was not for the accused to establish their innocence that is to say:

(1) If they accepted the explanation of the accused they must acquit.

(2) Short of accepting that explanation if it left them in doubt they must acquit.

(3) On consideration of the whole of the evidence they must be satisfied of the guilt of the accused of one or other of the crimes alleged against them."

In order to appreciate counsel for the 2nd appellant's submission on this point I need to make references to certain other passages of the summing-up by the learned trial judge. In these passages he directed them as follows, I quote:

"Then perhaps it is left for you to say that this was planted on him. It is left with you to say whether he was saying the truth. That because of his sore leg it was not possible for him to go to the dance.

He was not there. His story is correct ……. you may believe his story where he said that another said [p.36] no if we take him along he would be able to show where the other colleagues are. If this is the case, then of course it may create a substantial doubt in your minds so far as the third accused is concerned."

Later on in the summing up he said and again I quote:—

"His defence is that he did not go out at all.

He was in bed that is an alibi. He was in bed he did not go out. Well it is for you to say that you believe him that he did not go out that night. It is for you to believe him that because of his sore foot he would not have gone out. If you come to that belief then he is free out of the whole thing he gets out of the whole thing. The defence is short and simple. I did not go out that is his defence etc."

Put in the briefest form the question i.e. whether the words used by the learned trial judge in directing the jury in his summing-up on the question of the burden and standard of proof was a misdirection He repeatedly used the words "If you believe him" in the passages referred to above and that if they believed his story this might create a substantial doubt in their minds, so that apart from the judge using the words "If you believe his story" etc. the fact that an accused person is lying does not necessarily mean that he is guilty or that he may be convicted without more. See the case of Seisay and Siaffa v. R. reported in 1967-1968 African Law Reports (Sierra Leone) Series at page 323. The burden remains on the prosecution to prove the guilt of the prisoner and it is the judge's duty. to make this quite clear to the jury and if the prosecution fails the prisoner must be acquitted.

Bearing in mind the passages referred to supra the authorities cited above together with the fact that the learned trial judge had also told the jury that that appellants were relying on their statements it is my considered view that the learned trial Judge was shifting the burden of proof on to the shoulders of the 2nd appellant when he told them that if they believed the story of the 2nd appellant they must set him free. This to me was clearly a misdirection.

[p.37]

The burden of proof still rests upon the prosecution, Apart from this, after making it clear to the jury upon whom the burden of proof lies, it is also the learned trial Judge's duty to direct them on the standard of proof that is required in a criminal case. It is my opinion that he failed to do so. His use of the words reasonable doubt , fanciful doubt and substantial doubt referred to in the passage quoted above may have caused a lot of confusion in the minds of the Jury. As a matter of fact by using the words substantial doubt he was imposing a lower standard of proof on the prosecution. A case is never proved if the summing-up leaves the Jury in any doubt. It is stated in Archibold Thirty-fifth Edition at 361 paragraph 1001 and I quote:

"That if an explanation is given by or on behalf of the prisoner which raises in the minds of the Jury a reasonable doubt as to his guilt, he is entitled to be. acquitted because if upon the whole of the evidence in the case, the jury are left in any reasonable state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

Finally let me end by saying that a summing-up must not be ambiguous in anyway. As stated supra the jury must be directed in no uncertain terms upon whom the burden of proof lies and that before they convict they must be satisfied so that they feel sure of the prisoner's guilt; this was the formula often used. See the cases of R. v Kritz (1950) 1 K.B. at page B2 and R. v. Summers (1952) 1 All E.R. at page 1059.

However in 1912 in the case of Mcgreevy v D.P.P. supra the House of Lords stipulated that the proper direction to be given on the standard of proof is that it must be made plain to the jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt - thus approving the ruling in the House of Lords in the case of Woolmington v D.P.P. supra.

[p.38]

I had stated earlier that it would be convenient for me to deal with the 2nd ground of appeal of the 1st appellant with the 3rd ground of appeal of the 2nd appellant together as they are both similar. The 1st appellant had also relied on his statements which had been tendered in evidence and his complaint as regards this ground of appeal was against the use of the words substantial doubt and fanciful doubt etc. in the summing up. I do not propose to go into details but will adopt the reasons given and the cases referred to supra on behalf of the 2nd appellant as well.

In view of the above I have therefore come to a clear conclusion under the circumstances that there were fundamental miseducation as well as non-direction contained in the summing up of the learned trial Judge to the Jury and that he did not adequately direct them as regards the burden and standard of proof as far as both appellants were concerned. Finally he also failed, to direct them that whatever view they took of the explanations given by the appellants in their statements and on the whole of the evidence in this case that they must acquit if the explanations given by both appellants left in any doubt. It therefore follows that their appeal on this particular ground must succeed.

On the other hand I find no merit in the other grounds of appeal of both appellants.

This Court has been invited by Miss Tejan Jalloh to apply the provisions of sub-section 2 of sec.58 of ……

This section states as follows—

I quote:—

"On an appeal against conviction the Court of Appeal may act not withstanding that they are of opinion that the point raised may be decided in favour of the appellant dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

In 1976 a further amendment was made to See 58 (2) of the Courts Act supra giving the Court of Appeal power to order a new trial as an alternative to dismissing the appeal if they feel that no substantial miscarriage of justice has occurred which means that the [p.39] the Position as it is now is that the Court of Appeal may either dismiss the appeal or order a new trial if they are' satisfied that no substantial miscarriage of justice has occurred.

However I find myself unable to apply either of these two provisions and say that there was no substantial miscarriage of justice because in the present circumstances it is impossible to say that the jury would necessarily have come to the same conclusion had they been properly directed; there is

clearly a serious misdirection here and I am also of the opinion that the omission of the judge to direct the jury adequately may have brought about the verdict.

For the reasons which I have given above, I cannot allow the conviction of both appellants to stand and would allow the appeal and set aside the convictions.

Appeal of both appellants allowed. Convictions quashed, sentence set aside.

(SGD)

(Hon. Mr. Justice C.A. Harding –

Justice of the Supreme Court(Presiding)

(SGD.)

(Hon. Mrs. Justice A.V.A. Awunor-Renner, JS.C.)

I agree

(SGD.)

(Hon. Mr. Justice O.M. Golley, J.A.)

CASES REFERRED TO

1. Feika V. Regina C.A. 1968/1969. A.L.R. (S.L.) 342 at Page 345,

2. H. V. Kargbo Same Volume at Paga 354.

3. Sumana V. R. 1970-1971, A.L.R. (S.L.) at Page 306 At 316.

4. R. V Finch 12 C. App. Reports at Page 77.

5. Sumana V R. Reported In 1970/71 A.L.R. (S.L.)

6. R. V. Finch Reported In 12 Cr. App. Rep. at Page 77.

7. Sallu Mansaray V The State S.C. Cr. App. No.1/80.

8. Moroma V Regina 1964/66 A.L.R. (S.L.) At Page 542 at Page 547.

9. R.V.Sumners (1953) Cr. App. R. at Page 16.

10. R. V Raymond Blackburn Reported In Volume 39 of The Criminal Appeal Reports at Page 84.

11. Koroma V. R. Reported In (1964/66) A.L.R. (S.L.)

12. Woolmington V D.P.P. 1935 A.C. At Page 462 At Page 481.

13. R. V Hepworth and Norman Fearnly Reported In Volume 39 Cr. App. Reports at Page

14. R. V. Summers 36 Cr. Appeal R. at Page 14.

15. Mcgreevy V. D.P.P. (1973) 1 W.L.R. at Page 276.

16. R. V Sang (1979) 2 All E.R. At Page 1223.

17. R. V Murtagh and Kennedy Reported In 39 Cr. App. R. at Page 72

18. R. V Kritz (1950) 1 K.B.

19. R. V. Summers (1952) 1 All E.R. at Page 1059

STATUTES REFERRED TO

1. Sub-Sec. 2 of Sec.58 of The Court's Act Number 30 of 1965

THE STATE v. LT. COL. C.M. DEEN

[MISC. APP. 1/95] [p.148-150]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE:

CORAM: MR. JUSTICE S. BECCLES DAVIES- AG. C.J. – PRESIDING;

MR. JUSTICE S.C.E. WARNE, J.S.C.;

MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

THE STAFF - RESPONDENT

VS.

LT. COL. C. M. DEEN (RETIRED) - APPLICANT

F. M. DABOR, Esq., for Applicant

JUDGMENT

BECCLES DAVIES, AG. C.J.

This is an ex parte application on behalf of the applicant Lt. Colonel C.M. Deen for the following orders—

“1. That leave be granted to the applicant to apply for an order of certiorari to bring to this Honourrble Court the indictment dated 24th November 1994 preferred against the applicant herein and all subsequent proceedings in the Court-Martial holden as Military Headquarters, Wilkinson Road, Freetown and the ruling delivered by the Honourable Justice E.A. Thomas, Judge Advocate on the 19th day of December 1994 pursuant to a no case submission made by the defence on behalf of the applicant in the matter intituled the State vs Lt. Col. C.M. Deen (retired) for the purpose of quashing the same.

2. That the trial of the applicant presently going on before the Military Court-Martial at the Military Headquarters, Wilkinson Road, Freetown be [p.149] stayed pending the herring and determination of this application.

3. Any further order the Court may deem fit to make.”

The grounds upon which relief is sought are:

“1. That the applicant not being subject to military law by virtue of section 117 (3) of the Republic of Sierra Leone Military Forces act No. 34 of 1961 as amended the Court-martial has no jurisdiction to try him on counts 1 & 2 of the indictment dated 24th November 1994

2. Assuming without conceding that the applicant is subject to military law the indictment should not be signed by a State Counsel. That S. 138 of the Criminal Procedure Act No. 32 of 1965 is not applicable in this case.

3. The Statement of Offence of Counts 3 & 4 of the indictment do not create any offence as they fail to refer to S. 72 of Republic of Sierra Leone military Forces Act No. 34 of 1961.

4. That Counts 1,2,3,4, & 5 are uncertain and duplicitous and do not comply with Rule 65 of the Rules of Procedure (Army) 1956”

The question for resolution in this case is ‘whether or not this Court can entertain this application.’ The answer is No. The original Section 129 of the Republic of Sierra Leone Military Forces Act 1961, was repealed and replaced by section 5 of the Republic of Sierra Leone Military Forces (Amendment) Act 1971 which provides –

[p.150]

"5. The principal Act is hereby amended by the insertion of the following new section immediately after section 128 thereof –

129. The decision of a Court-Martial shall not be questioned in any court of law.”

This Court cannot having regard to the above provision which is imperative in terms of …… entertain this application. The courts of Sierra Leone are forbidden to entertain it

It is consequently struck out.

(SGD)

Mr. .Justice S. Beccles Davies..

I agree

(SGD)

Mr. Justice S.C.E. Warne

I agree

(SGD)

Mr. Justice E.C. Thompson-Davis

CASE REFERRED TO

1. The State Vs Lt. Col. C.M. Deen (Retired)

STATUTES REFERRED TO

1. S. 72 Of Republic of Sierra Leone Military Forces Act No. 34 of 1961.

2. Rule 65 of The Rules of Procedure (Army) 1956

THE STATE v. THE HONOURABLE MR. JUSTICE F.C. GBOW

[SC. MISC. APP. NO. 6/93A & B] [p.151-159]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 22 JUNE 1994

CORAM: MR. JUSTICE S. BECCLES-DAVIES - AG. C.J. – PRESIDING;

MRS. JUSTICE A V.A. AWUNOR-RENNER , J.S.C.;

MR JUSTICE: S. C.E. WARNE, J.S.C.;

MR. JUSTICE: E.C. THOMPSON-DAVIS, J.S.C.;

MR., JUSTICE G. GELAGA-KING, J.S.C.

BETWEEN:—

THE STATE - APPLICANT

AND

THE HONOURABLE MR. JUS'I'ICE F. C. GBOW, JUDGE - RESPONDENT

EX PARTE JULIUS SPENCER

DONALD JOHN

ALFRED PAYITIE CONTEH

MOHAMED BANGURA

ALUSINE KARGBO BASHIRU - APPLICANTS

AND

IN THE MATTER OF AN APPLICATION BY JULIUS SPENCER, DONALD JOHN, PAYITIE CONTEH, MOHAMED BANGURA AND ALUSINE KARGBO BASIRU FOR ORDERS OF MANDAMUS PROHIBITION ANID CER'I'IORARI AND OTHER CONSEQUENTIAL ORDERS AND DIRECTIONS

AND

IN THE MATTER OF A RULLING MADE THE 3RD DAY OF DECEMBER, 1993 BY THE HONOURABLE JUSTICE F.C. GBOW, JUSTICE IN THE HIGH COURT OF SIERRA LEONE IN CRIMINAL INFORMATION DATED THE 19TH DAY OF OCTOBER, 1993 FILLED IN THE FREETOWN HIGH COURT

BETWEEN:—

THE STATE

AND

JULIUS SPENCER

DONALD JOHN

ALFRED PAYITIE CONTEH

MOHAMED BANGURA

ALUSINE KARGBO BASIRU

AND

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 28(3), 24 & 125 OF THE CONSTITUTION OF SIERRA LEONE ACT NO. 6 OF 1991

AND

IN THE MATTER OF ALLEGED CONTRAVENTIONS OF SECTION 23(1) (4) & (5) (B) OF THE SAID CONSTITUTION AND SECTION 25 THEREOF

Garvas J. Betts Esq., with him S.E. Berewa Esq., N.E. Browne-Marke Esq., and Jesse Gording Esq., for the Applicants

N.D. Tejan-Solo Esq., D.P.P. with him G. Atiba Davies (Ms.) C.V.M Cambell Esq., A.F. Serry-Kamal Esq., and Valesius V. Thomas Esq., of Counsel for the State/Respondent.

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RULLING

BECCLES DAVIES, AG. C.J.

On 12 January, 1994 we granted leave to the applicants to apply for the orders of Mandamus, Prohibition and Certiorari respectively. They have now applied for these orders.

The History

The applicants were arraigned on 17 November 1993 before Gbow J, on a nine count indictment dated 19, October 1993. They were charged with the following offences:—

i. Seditious publication

ii. Publishing Defamatory Libel

iii. Publishing False Reports likely to injure the reputation of the Government of Sierra Leone

iv. Knowingly publishing a false defamatory libel

v. Publishing a false report likely to disturb the public peace.

The Application

After the 1st applicant's plea to the first count of the indictment had been recorded by the learned trial Judge, Mr. Betts applied to make certain submissions pursuant to section 28 (3) of the Constitution of Sierra Leone 1991, ("the Constitution") and in the words of the learned Judge "humbly invited the Court of its own motion, to refer the several questions raised to the Supreme Court of Sierra Leone for a pronouncement". The issues raised by Mr. Betts were that—

1. The defence were being denied a fair hearing contrary to section 23 (1) of the Constitution in view of the extensive pretrial publicity of the facts involved in the trial.

2. The accused were being presumed to be guilty of the offences with which they were charged and that that presumption had arisen consequent upon the wide pretrial publicity in the media contrary to Section 23 (4) of the Constitution,

3. The contravention of section 25 (1) of the Constitution.

That section provides:—

[p.153]

“Except with the his own consent, no person shall be hindered in his enjoinment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning:

Provided that no person other than the Government or any person or body authorised by the President shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever”.

4. Section 28 (1) and (3) of the Public Order Act contravened section 25 (1) of the Constitution. I have already set out section 25 (1) of the Constitution in 3 above. Section 28 (1) of the Pubic Order Act 1965 states:—

“On the trial of an offence of libel against sections 26 or 27, the accused having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefits that the said matters charged should be published; and to entitle the accused to give evidence of the truth of such matters charged as a defence to such charge it shall be necessary for the accused in pleading to the said charge, to allege in writing the truth of the said matters charged in the manner now, required in pleading a fair comment and justification to an action for a defamation and [p.154] further to allege in writing that it was for the public benefit that the said matters charged should be published and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof”

Section 28 (3) provides:—

“The matter charged in the alleged libel complained of by such charge shall be presumed to be false, and the truth thereof shall in no case be inquired into in the absence of such plea as mentioned in subsection (1)”

The basis of the alleged contravention is the Ex-Officio information on which the accused were being tried, the proofs of evidence and all those matters pertaining to the trial.

5. Section 28 (1) and (3) of the Public Order Act set above, contravene Section 23(1), (4) and 5 (b) of the Constitution. Section 23 (1), (4) and (5) (b) provide—

“(1) Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing with a reasonable time by an independent and impartial court established by law.

(4) Every person who is charged with a criminal offence, shall be presumed to be innocent until he is proved, or has pleaded guilty:

Provided that nothing contained in evidence under the authority of any law shall be held to be inconsistent with or in contravention of this subsection, to the extent that the law in question imposes on any person charged as aforesaid the burden of proving particular facts.

[p.155]

(5) Every person who is charged with a criminal offence—

(a)……

(b) shall be given adequate time and facilities for the preparation of his defence";…….

Provided that nothing contained in or done authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question prohibits legal representation in a Local court".

6. The contravention of Section 11 of the Constitution which provides:

"The press, radio and television and other agencies of the mass media shall at all times, be free to uphold the fundamental objectives contained in this Constitution and highlight the responsibility and accountability of the government to the people".

Mr. Brown-Marke, (representing the 5th accused) adopted Mr. Bett's submissions on the alleged contraventions of the Constitution

The judge's Ruling

The learned judge declined Mr. Betts' humble invitation for a reference of the alleged contraventions to this court for its decision.

His reasons for refusing the request fall under five main headings, namely:—

i. The application (request) ought to have been made under section 28 (1) of the Constitution.

ii. Section 127 was more germaine to the issues raised.

iii. The availability of other remedies under section 28 (2) (b).

iv. The application was not properly before him.

v. Even if there were any infringements of the accused's fundamental rights, they did not occur in the proceedings before the court.

[p.156]

Section 28 (1) and 28 (3) 127 (1)

Section 28 (1) of the Constitution under which the judge had declared as appropriate to counsel's request provides:—

"Subject to the provisions of sub-section (4) if any of the provisions of sections 16 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him by any person (or in the case of a person who is detained, of any other person alleges such a contravention in relation to the detained person), the, without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person), may apply by motion to the Supreme court for redress".

Sub Section 4 referred to in this section deals with the rules of practice and procedure and any other additional powers conferred by parliament on the Supreme Court for exercising the jurisdiction conferred under Section 28.

Section 127

The provisions of section 127 (1) which the judge considered to be more gremaine to counsel's request states:—

"A person who alleges that an enactment of any thing contained in or done under the authority of that or any other enactment is inconsistent with or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect." (Emphais supplied).

Section 28(3)

Counsel's request was made pursuant to section 28(3) which provides:—

"If in any proceedings in any court other than the Supreme Court, any question arises out of the contravention of any of the provisions of section 16 to 27 inclusive, that court may and shall if any [p.157] party to the proceedings so requests, refer the question to the Supreme Court".

I make the following brief observations on the above provisions:

(i) Section 28 (1) caters for situations where there are no proceedings in which alleged contraventions could be raised; in such situations the applicant applies directly to the Supreme Court for redress; this is in contradistinction to section 28 (3) which allows such matters to be raised in proceedings "in any court other than the Supreme Court".

Section 28 (1) stipulates an application by motion for redress, whilst section 28 (3) USGS the word "request" with regard to a deserved reference to this court.

(ii) Sections 127 relates to any alleged inconsistency with or contravention of any provision of the constitution. This provision would be appropriate in relation to Mr. Betts' allegation that section 8 (1)

and (3) and the Public Order Act 1965 infringed the provisions of Sections 23 (1) (4) and 23 (5) (b) of the Constitution.

(iii) There were criminal proceedings instituted by the State against the accused persons. The proceedings were being heard by the judge (there had been the consent to file the indictment, the arraignment of the accused, the taking of pleas). Most of the issues raised by Counsel for the accused fall within sections 16 to 2'1 of the Constitution. The learned judge had held alternatively, that been even if there had been infringements of the accused's fundamental rights, those infringements did not occur in the proceedings by him.

[p.158]

I find myself unable to agree with the Learned judge. Allegations of denial of a fair trial and presumption of guilt in consequence of an alleged pre-trial publicity as well as inadequacy of time and facilities for the preparation of the accused's defence, before trial are matters which naturally occur before and not in the course of proceedings; they could properly be raised in the proceedings to which they relate.

The learned judge was obliged by the provisions of section 28 (3) to refer the issues raised by Counsel for determination by this court. The request was properly made under section 28 (3).

We order:—

1. That the said Ruling dated 17 November 1993 be removed into the Supreme Court and that the learned judge to send forthwith the said Ruling or a copy thereof under his hand to the Registrar of the Supreme Court and thereupon the said Ruling be quashed.

2. The questions raised by Counsel for the accused which fall within the provisions of sections 16 to27 of the Constitution be referred to this court on or before 4 July 1994 for determination pursuant to section 28 (3) of the said Constitution and Rule 99 of the Rules of the Supreme Court.

3. The High Court be prohibited, and it is hereby prohibited from further hearing and determining the proceedings founded on criminal Information dated 19 October 1993 pending the Determination by the Supreme Court of the aforesaid Reference.

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4. The parties to these proceedings do file their case pursuant to the Rule 99 (3) of the Rules of the Supreme Court on or before 14th Ju1y1994.

(SGD.)

Hon. Justice S. Beccles-Davies, Ag. C.J.

I agree

(SGD.)

Sgd. Hon. Mrs. Justice A.V.A. Awunor-Renner, J

I agree

(SGD.)

Hon. Justice S.C.E. Warne, J.S.C.

I agree

(SGD.)

Hon. Justice E.C. Thompson-Davis, J.S.C.

I agree

(SGD.)

Hon. Justice G. Gelaga-King, J.A.

STATUTES REFERRED TO

1. Section 28 (3) Of The Constitution Of Sierra Leone 1991,

2. Section 28 (1) and (3) of The Public Order Act.

1986-2001

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ALPHABETICAL LISTING

ABU BLACK LUGBO v. REV. ARCHIBALD GAMBALA JOHN

[p.209-212]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 22 SEPTEMBER 1999

CORAM: HON. MR. JUSTICE S. BECCLES DAVIES, C.J.

HON. MR. JUSTICE S.C.E. WARNE, J.S.C.

HON. MR. JUSTICE A. B. TIMBO, J.A.

BETWEEN:

ABU BLACK LUGBO — DEFENDANT/APPLICANT

AND

REV. ARCHIBALD GAMBALA JOHN — PLAINTIFF/RESPONDENT

A.F. Serry-Kamal Esq. for Applicant

Dr. Marcus Jones for-Respondent

RULING

BECCLES DAVIES

This application is made under Rule 60 of the Rules of this Court, for a stay of execution of a judgment of the Court of Appeal dated 17 June 1993.

The history

The Reverend Archibald Gambala John as executor of the estate of the late Reverend Gustavus Ademu John, instituted proceedings against the defendants Abu Black, Allie Fofana and Lamin Dankeh (the applicants' herein) that he is entitled in fee simple in possession to all that piece or parcel of land lying and being at Floregusta Farm, Off Kissy Road, Freetown in the Western Area of Sierra Leone and bounded as follows — On the North by a stream 1065 feet and by property now or lately in the

possession of W. Cole and otherwise 545 feet, on the East by private property and State property 406.1 feet, on the South by State property 1527.8 feet, and on the West by property now or lately in the possession of Fourah Bay College 237.2 feet and as to its position dimension and boundaries is more particularly shown verged RED in survey plan numbered L.S. 517/81 comprising in all an area of 7.6270 acres.

[p.210]

The matter was heard by Galley J in the High Court. The learned Judge dismissed the plaintiff's claim on the ground that the latter had "failed to prove his claim."

The plaintiff appealed to the Court of Appeal against the learned Judge's judgment. The appeal was heard by the Court (Thompson-Davis, J.S.C., Adophy and Gelaga-King, JJ.A). The Court reversed Golley J's judgment, declaring the plaintiff the owner of the land in dispute.

The defendants have appealed to this Court, on four grounds. An application was then made to the Court of Appeal for a stay of execution of its judgment; the application was refused.

The application

This application is made in consequence of the Court of Appeal's refusal to grant a stay of execution. Rule 60 under which this application is made provides —

"60(1) A civil appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Supreme Court or Court of Appeal may otherwise order.

(2) Subject to the provisions of these Rules and to any other enactment governing the same, an application for the stay of execution or proceedings shall first be made to the Court of Appeal and if that Court refuses to grant the application, the applicant shall be entitled to renew the application before the Supreme Court for determination."

The defendants seek the following orders —

"1. An interim stay of execution of the judgment of this Honourable Court dated the 17 day of June 1993 pending the hearing and determination of this application.

[p.211]

2. An Order that the execution of the judgment dated the 17 day of June 1993 and all subsequent proceedings thereto be stayed pending the hearing and determination of the Defendants/Respondents appeal to the Supreme Court of Sierra Leone.

3. And also for an Order that the costs of and occasioned by this application be costs in the cause."

The Issue

The issue here is whether from the facts deposed, this Court can grant a stay of execution pending the determination of the substantive matter before it. Dr. Marcus-Jones, Counsel for the plaintiff has submitted that there must be exceptional circumstances arising out of the application to enable this Court to grant the application. Dr. Marcus-Jones has urged this Court to adopt the practice in appeals from the English Court of Appeal to the House of Lords. The notes to Order 58 rule 12 (1960 English Practice) under the rubric 'Stay pending appeal to the House of Lords' state —

"A stay will not be granted save in very exceptional circumstances, such as where execution would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal ……"

Mr. Turay for the defendants (applicants) submitted that there were exceptional circumstances in this case, as untold hardship would be done to 'bona fide purchasers for value' who are not parties to the action

The expression "very exceptional circumstances' has not been defined.

The example given in the notes in my view are not exhaustive. Each application must turn on its own peculiar facts. THE SHORTER OXFORD ENGLISH DICTIONARY defines 'exceptional' as

[p.212]

"Of the nature of or forming an exception; unusual."

Some twenty-eight Deeds of Conveyance had been executed by the defendant. Abu Black to different purchasers since 1982. There is contention as to the quantum of the land he owned. I am of the view that the circumstances on this case are very unusual and that a stay of execution of the judgment of the Court of Appeal ought to be granted pending the determination of the substantive appeal by this Court.

I would grant the application and make the following Orders—

1. The damages of Le500,000 awarded by the Court of Appeal to be paid to plaintiff respondent; the amount to be refunded in case the appeal succeeds.

3. The costs awarded by the Court of Appeal in that Court and in the Court below if already taxed should be paid to the plaintiff's solicitor on his personal undertaking to refund them if the appeal succeeds.

The costs of this application to the plaintiff in any event.

SGD.

Hon. Justice S. Beccles Davis C.J

SGD.

Hon. Justice S.C.E Warne. J.S.C

SGD.

Hon. Mr. Justice A.B. Timbo JSC.

ABU BLACK LUGBU & 2 ORS AND REV. ARCHIBALD GAMBALA & 2 ORS

[SC. CIV APP 5/93] [p.282-284]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 20 JANUARY 2000

CORAM: MR. JUSTICE D.E.F. LUKE, C.J.

MR JUSTICE AB.TIMBO, JSC

MR. JUSTICE H.MJOKO SMART, JSC

MR. JUSTICE. C.WARNE, JSC

MRS.JUSTICE V.A.D.WRIGHT, JA

BETWEEN:

ABU BLACK LUGBU

ALLIE FOF ANAH

LAMIN DAINKEH - APPLICANTS

AND

REV. ARCHIBALD GAMBALA

JOHN (EXECUTOR OF THE

ESTATE OF THE LATE REV.

GUSTAVUS ADEMU JOHN - RESPONDENT

A.F.SERR Y-KAMAL, ESQ., FOR APPLICANTS

R.A.CAESAR, ESQ, FOR THE RESPONDENT

RULING

JOKO SMART JSC

A Motion Paper allegedly taken out by E.M. Turay but signed by A. F. Serry Kamal for E. M. Turay as Solicitor for the Applicants dated the 20lh day of October 1999 and filed in the Registry of the Supreme Court on an application made pursuant to section 126(b) of the Constitution of Sierra Leone, Act NO.6 Of 1991 (hereafter called the Constitution) and Rule] 03 of the Rules of the Supreme Court, Public Notice No. 1 of 1982 (hereafter called the Rules) seeks an order from this Honourable Court that the order made by this Court dated the 22nd day of September] 999 be varied, discharged or reversed and that the appeal be restored.

The grounds on which the application is made are:

1. That the Court failed to consider that an application for a stay of execution had been argued by the appellants and respondent before the full court and the court had granted a stay of execution of the judgment of the Cowl of Appeal.

2. That in the light of the above proceedings there was abundant evidence before the court to show that the appeal was being prosecuted by the appellants.

3. That there was evidence before the court that both the court and the respondent had waived compliance with Rule 35 of the Supreme Court Rule.

[p.283]

The Motion is supported by the affidavit of A. F. Serry Kamal dated the 20th day of October 1999 and it contains seven exhibits numbered A to G.

On the 4th day of November 1,999, at the hearing of the application Counsel sought to amend the Motion Paper by the substitution of grounds in place of the grounds in the original Notice of Motion and to use two affidavits in addition to the original affidavit in support of the Motion. The application for amendment was refused.

All the papers filed in the application appear to have been engrossed and signed by Serry Kamal describing himself in paragraph one of his affidavit as Solicitor for the second and third applicants but generally signing for E. M. Turay in the body of the Notice of Motion and the backing of all the papers.

Before I go into the merit of the application, I find it necessary to address what has become the unorthodox practice of some solicitors, possibly as a matter of convenience, to sign notices of motion, summonses, pleadings and other court documents “for” other solicitors When one solicitor acts as such for another, whose document is it? Is the signatory acting as agent for the other? If so, does he or his principal have the authority of the client? A solicitor/client relationship is personal and sometimes it may have adverse effect on the solicitor, for example, liability for negligence and breach of trust, a thing which one solicitor cannot transfer to another. Besides, the solicitor/agent signing for another will be acting without the authority of the client and in addition to his being liable to the client as an intermeddler he may also find himself liable to a third party for breach of implied warranty of authority. A solicitor in a firm can sign for the other solicitors in his firm since it is an incidence of partnership that he is both principal and agent for the others. The current practice whereby one solicitor signs for

another when they are not in partnership which I have highlighted is not supported by law. There are certain situations as in the case of appeals in which the Rules of court permit a solicitor to sign on behalf of his client

But a rule which allows one solicitor to act as an agent for another when they are not in partnership to enable him to act on behalf of the other's client still has to be drawn to my attention. I opine that in order to avoid any noxious consequences, the Rules of the High Court which are applicable in this case by virtue of Rule 98 of the Supreme Court 1982 provide for change of solicitor whereby the client gives his written consent to the appointment of a new solicitor in substitution for the old thus severing the personal relationship with him and establishing a new one with the present. This practice should be followed rather than the current one.

Having said that, I will proceed to the heart of the application. Mr. Serry Kamal vigorously argued the original application underlining the fact that there was a reserved judgment of the Court on an application for a stay of execution when the appeal was struck out for non-compliance with Rule 35(2). This was the central plank of his complaint and he infers that both the court sitting with three Justices and the respondent were aware of it at the time that the appeal was struck out. This is a serious indictment of the court which Counsel could not substantiate since neither he nor a member of his firm nor his clients appeared. The papers in which the applicants en devoured to comply' with Rule 35(2) were filed after the appeal had been struck out for non-compliance with the Rule. It was like shutting the stable after the horse had bolted.

[p.284]

This application is in my view on all fours with that made before this Court in Mohamed Juma Jalloh v. T Krishnakumar, unreported, Se. Mice. App. 2/99 ruling delivered on the 26th day of October 1999.except that the grounds in support were different. In that case, there was no appearance by the applicant when the appeal was struck out for non-compliance with Rule 35 and he later applied to the full Court invoking section 126(b) of the Constitution and Rule 103 leading fresh evidence in support of the restoration of the appeal.

Section 126(b) of the Constitution provides for an application to be made to the full court consisting of five Justices when an applicant is not satisfied with an order made by the court comprising three Justices and Rule 103 gives a discretion to the Court to allow an appeal to proceed even though there has been non-compliance with Rules or any other rule or practice if the non-compliance is not with and it is in the interest of justice that the non-compliance is waived.

In the Mohamed Juma Jalloh case hereinbefore referred to Warne JSC delivering the unanimous ruling of the Court had this to say:

“There is no evidence before this Court to show that when the matter came up before the court made up of three Justices that Rule 3 5(1) & (2) of the Rules had been complied with; consequently the court struck out the appeal”

On the interpretation of section 126(b) of the Constitution, Warne JSC further said:

“In my view this subsection presupposes that the three Justices erred in law or otherwise to enable the applicant to invoke the provision of section 126(b) of the Constitution. On the record of proceeding as it stands before the court of three Justices, there was no submission or argument before the court of three Justices before the court struck out the appeal.”

In the instant case, the grounds on which the applicants are relying presuppose that there was an appearance by them before the three justices and there was an argument of the application. “This was not ,the case. The argument now put forward is new as was in the Mohamed Juma Jalloh case. Such argument could have been relevant when the application came up before the three Justices but by then the applicants and their Solicitor had not Shown up. The Rules must be strictly observed It is only in situation where an applicant appear or he is represented by counsel at the hearing for striking out the appeal and reasons are adduced to the satisfaction of the court that the appeal should stand despite non-compliance with the Rules as was the case in Castrol Ltd. v. John Michael, SC. 1/98. Unreported a ruling of this court dated the 30th day of September 1999, that the court might be persuaded to exercise its discretion and save the appeal.

In the light of what I have said, the application is dismissed with costs assessed at Le 500,000 to the respondent herein.

SGD.

CASES REFERRED TO

1. Castrol Ltd. v. John Michael, SC. 1/98. (unreported)

ALL PEOPLE'S CONGRESS v. NASMOS MINISTRY OF SOCIAL WELFAREYOUTH AND SPORTS

[SC. NO. 4/96] [p.224-268]

DIVISION: SUPREME COURT, OF SIERRA LEONE

DATE: 26 OCTOBER 1999

CORAM: HON. MR. JUSTICE D.E.F. LUKE, CHIEF JUSTICE

HON. MR. JUSTICE A.B. TIMBO, JSC

HON. MR. JUSTICE H.M. JOKO-SMART, JSC

HON. MRS. JUSTICE V.A.D. WRIGHT, JA

HON. MR. JUSTICE M.E. TOLLA-THOMSON, JA

BETWEEN:

ALL PEOPLE'S CONGRESS — PLAINTIFF

AND

NASMOS

MINISTRY OF SOCIAL WELFARE

YOUTH AND SPORTS — DEFENDANTS

CONSTITUTIONAL REFERENCE BY WAY OF CASE STATED

A.F. SERRY KAMAL ESQ. FOR PLAINTIFF

J.G. KOBBA ESQ. FOR DEFENDANTS

JUDGMENT

DESMOND E.F. LUKE, C.J.

This is a Constitutional reference by way of case stated by Nylander J, a Judge of the High Court pursuant to Sec. 124(2) of the Constitution of Sierra Lone Act No. 6 of 1991.

Sec. 142 (2) provides as follows:—

"Where any question relating to any matter or question as is referred to in Subsection (i) arises in any proceeding in any court, other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination, and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

[p.225]

The Plaintiff, one of the recognised political parties represented in our Parliament initiated this action by a writ of summons dated the 9th day of April 1996 against the Defendants herein. The first Defendant is an Organization set up by the military government known as the National Association for Mobilization Secretariat. The second Defendant is one of the Ministries in existence at that time. The Plaintiff's claim against the Defendants:

1. Damage for trespass

2. Recovery of possession of the premises known as 39 Siaka Stevens Street, Freetown

3. Mense profit at the rate of Le4,000,000.00 per annum from the 29th April 1992 until possession is yielded

4. Damages for conversion of air conditioners – Le10,000,000.00

5. Damages for malicious damage

6. Cost of restoring premises — Le16,000,000.00

7. Interest on the aforesaid amounts and damages at the rate of 32% per annum until payment.

8. A perpetual injunction to restrain the Defendants whether by himself his servant or agents however called from entering or remaining on the property known as 39 Siaka Stevens Street, Freetown or any part thereof.

9. Any further or other relief.

10. Costs

J.G. Kobba, Esq., State Counsel for the Defendants by a motion dated the 30th April 1996 sought to set the said writ "aside for irregularity and/or informality on the ground that the Plaintiff herein failed to comply with the Provision of Petition of Right, Cap. 23 of the Laws of Sierra Leone in that he issued a writ of summons against NASMOS AND THE MINISTRY OF SOCIAL WELFARE YOUTH AND SPORTS." At the hearing of the Motion, Counsel representing the Defendants submitted that the Honourable Court had no jurisdiction to try this matter because the plaintiff have failed to comply with Cap. 23 titled "Petitions of Right" of the Laws of Sierra Leone 1960 S. 4 of the said Legislation, makes provision how the suit is to commence; and S. 5 makes provision for fiat before prosecution. Counsel read out and explained the relevant sections in his argument that the present writ was irregularly issued. The court was asked therefore to set aside the writ as prayed.

[p.226]

In answer to this application, Counsel Serry-Kamal, Esq., representing the plaintiffs referred the court to S. 133(i) of the Constitution of Sierra Leone 1991. This section reads as follows:—

"Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right."

Counsel rested his argument on this sub-section and asked the court to dismiss the application.

Counsel for the defendants then asked for an adjournment to prepare his Reply.

At the resumed hearing defendant's Counsel submitted that S. 133 (1) of the 1991 Constitution provides certain Rights which are not in dispute. But S. 133 (2) states that Parliament shall make provision for the exercise of such rights. This sub-section reads as follows:—

"Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section."

Counsel pointed out that S. 133(1) is not operative until S. 133(2) is effected by Parliament. In the interim all claims against the Government must comply with Cap. 23 of the Laws of Sierra Leone. Counsel urges the Court to grant his application as prayed.

Whereupon the learned trial judge ruled as follows:—

The legal interpretation in my view spins around the present effect of S. 133(1) of the 1991 Constitution and what effect S. 133 (2) has on it presently. As this to my mind touches on the interpretation of S. 133 as a whole. Presently, I hereby invoke S. 124 (2) of the 1991 Constitution which reads as follows:—

"Where any question relating to any matter or question as is referred to in Subsection (i) (Interpretation of the Constitution) arises in any proceedings in any court, other than the Supreme Court, the court shall stay proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which, the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

I therefore pose the following question for the Supreme Court:—

[p.227]

1. Is S. 133 (1) of the 1991 Constitution in operative until S. 133 (2) is effected by Parliament?

2. If the answer is in the negative, can the High Court Rules apply to put into operation S. 133(1) in the absence of Parliament effecting S. 133(2)?

3. What is the state of a party's right, as at present in relation to S. 133(2).

This matter before the Court is stayed until the Supreme Court's decision is received. Proceedings stayed.

(Sgd.) Nylander J.

Before seeking to answer the question posed by the learned trial Judge, it seems to me that it would be helpful to consider the position of claims by private persons against the Government prior to the 1st October 1991 when the present Constitution of Sierra Leone Act No. 6 of 1991 came into being.

EXISTING LAW PRIOR TO 1ST OCTOBER 1991

The existing law prior to 1st October 1991 is to be found in Cap. 23 of the Laws of Sierra Leone 1960 Section 3, 4, and 5 of which read as follows:-

3. All claims against the general Government of the Colony, or against the Government of any other Colony, being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act, 1947, by petition, manifestation, or plea of right, may, with the consent of the Governor, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff, against the Attorney General as defendant, or such other officer as the Governor may from time to time designate for that purpose.

Section 4 makes provision how the suit is to commence:—

4. The claimant under this Ordinance shall not issue a writ of summons, but the suit shall be commenced by the filing of a statement of claim in the Supreme Court, and the delivering of a copy thereof at the office of the Attorney General, or other officer designated as aforesaid, and no fee shall be payable on filing or delivering such statement.

And section 5 makes provision for the fiat before prosecution:—

[p.228]

5. The Registrar shall forthwith transmit the statement of claim to the Attorney General, and the same shall be laid before the Governor. In case the Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court, with the fiat of the Governor endorsed thereon, and the claim shall be prosecuted in the Supreme Court.

It is to be noted:—

FIRSTLY — that only claims being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act 1947, by petition manifestation or plea or right could with the consent of the appropriate office be preferred.

SECONDLY — that such claims were severally restricted and applied mainly to some contracts which the Crown by itself, its servants or agents had entered into as well as to some compensation for property of the subject taken by the Crown either arbitrary or under Statute (See A.G. v. De Keyere Hotel [1920] A.C. 508 Feather v. the Queen 1865 6 B & S 257)

THIRDLY — that in tort the party aggrieved had no remedy against the Crown — A.G. v. De Keyere Hotel [1920] A.C. 508.

And FOURTHLY — that the grant of a fiat or the use of the process know as Petition of Right was required.

HOW DID SEC. 133 OF THE CONSTITUTION OF SIERRA LEONE ACT No.6 OF 1991 SEC 133 (I) & (II) AFFECT THE POSITION?

Section 133 reads:—

133 (1) Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right.

(2) Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section.

[p.229]

Whereas the possible claim against the Government prior to 1st October 1991 were severally restricted as outlined above and were further encumbered with the procedure of use the process known as

Petition of Right and the grant of a fiat to my mind the plain and unambiguous words of Sec. 133. Subsection (1):—

Undoubtedly remove all such restrictions and encumbrances as existed prior to October 1, 1991

However, Sec. 133 consists not only of subsection (i) but also subsection (ii) which reads: —

(2) Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section.

Parliament has not to date passed any such legislation — which raises the question what happens to the unrestricted rights granted by sec. 133 subsection (i) in the absence of legislation envisaged by subsection 133(2).

In constructing section 133 I intend to be guided by the following considerations:

1. Sec. 133 is to be construed as a whole. We cannot construe Sec. 133 as if subsection (2) were not there. Otherwise we would not be interpreting the Constitution — we would be rewriting it. And even Parliament the law makers cannot rewrite Sec. 133 without the peoples consent since Sec. 133 is an entrenched clause — vide Sec. 108 (3) of the Constitution.

I intend to be further guided by THE MODERN VIEW – as regards construction of instruments so eloquently stated by Lord Halsbury L.C. in 1888 in the case of Leader v. Duffey [1888] 13 APP. Cas 294 at 302

"All these refinements and nice distinction of words appear to me to be inconsistent with the modern view — which is I think in accordance with reason and common sense — that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention [p.230] apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

This "reason and common sense" approach to documentary interpretation is still to be found in the words of Lord L.J. in the case of Oliver Ashworth (Holdings) Ltd v. Ballard (Kent) Ltd. [1999] 2 ALL E.R. 791 when discussing the distinction between literal and purposive approaches to the interpretation of Statutes. This is what he says: —

"It is nowadays misleading — and perhaps it always was to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts or Parliament. The difference between the purposive and literal construction is in truth one of degree only ..... the real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other"

In this matter, by S. 133 (1) Parliament enacted that—

"where a person has a claim against the Government, that claim may be enforced as of right....."

My quotation stops at this point in the text because in S. 133 (1) the substantive enactment is that a claim against the Government may be enforced as of right.

The words "as of right" are followed by these words—

"by proceedings taken against the Government for that purpose, [without the grant of a fiat or use of the process known as "Petition of Right."]

The words in square brackets indicate the previous Crown proceedings restrictions or fetters on claims against the Crown are abolished. This is necessarily so if enforcement of a claim against the Government is as of right.

[p.231]

Then this new right unfettered by any restrictive direction is to be enforced "by proceedings taken against the Government for that purpose."

Thus unless the Constitution itself indicated expressly or by necessary implication that the new unrestricted right is to be effective only as from some future date or after some further condition has been satisfied than that new right comes into being on the 1st October 1991, the date the Constitution came into operations.

Does Sec. 133 (2) expressly or by necessary implication delay the coming into effective operation of the new unrestricted right? What sec. 133 (2) says is—

"Parliament shall by an Act of Parliament make provision for the exercise of the jurisdiction under this section."

Such provision might for example have been to the effect that claims to enforce the new unfettered right were to be considered by a specially constituted court or courts.

For example, it might have been thought appropriate to set up a Court like the U.S. Federal Court of claims with exclusive jurisdiction to try some or all of the jurisdictional statute might have said that all such claims should be tried in the Supreme Court but by 3 Judges of that Court sitting together. But Parliament could not take away nor in other way derogate from the new unrestricted rights created by Sec. 133 (1) — an entrenched clause of the Constitution. Parliament may say what Courts are to have jurisdiction to hear and determine claims to enforce the new unrestricted rights, and it is, of course, open to Parliament to prescribe by Statute procedural rules which are to apply; but an ordinary alternative is for rule or court, and not an Act of Parliament, to spell out the procedure in the Court for bringing the proceedings. That ordinary alternative is not excluded by anything in S. 133 or elsewhere.

I am therefore unable to find in 133 (2) any express or implied condition postponing the availability of the new unrestricted rights until Parliament has enacted a further Statute prescribing which Court or Courts are to exercise jurisdiction to hear and determine claims for enforcement of the new unrestricted rights.

[p.232]

Parliament has failed to enact a definitive Statute specifying which Courts are to exercise jurisdiction over claims to exercise the new unrestricted rights and has not imposed any delaying or suspensory condition postponing the enforcement of the claims.

In my judgement therefore, the Courts must hear and determine any claim to the new unfettered rights granted by the Constitution under Sec. 133 (1). Parliament has not yet enacted any restriction upon the courts or constituted any court which may exercise the jurisdiction and unless and until it does, the claims must be heard and determined in the ordinary courts of the land in the ordinary manner. Such proceedings are in the language of S.133 (1) "proceedings taken against the Government" for the enforcement as of right of the claims referred to in S. 133(1). For the courts to refuse to entertain such proceedings would be to deny the new unrestricted rights conferred by the Constitution in S. 133 (1).

For the aforestated reasons, it is my opinion that:

The answer to the 1st of the questions posed by the learned trial Judge is No.

The answer to the 2nd question is — Yes

The answer to the 3rd question is — provided by Sec. 133 (1) of the Constitution.

The right "may be enforced as of right by proceedings taken against the Government for that purpose."

SGD.

A.B. TIMBO JSC

CONSTITUTIONAL REFERENCE BY WAY OF CASE STATED

The Plaintiffs, the All People's Congress issued a writ of summons against what were then known as NASMOS and the Ministry of Social Welfare Youth and Sports. NASMOS was the shortened name of National Association for Mobilization Secretariat. It was an appendage of the said Ministry during the reign of the National Provisional Ruling Council.

The Plaintiffs' claimed against the Defendants.

"(1) Recovery of possession of the premises known as 39 Siaka Stevens Street, Freetown.

(2) Mense profit at the rate of Le4,000,000.00 per annum from the 29th April 1992 until possession is yielded.

(3) Damage for trespass.

(4) A perpetual injunction to restrain the Defendants whether by himself his servant or agents however called from entering or remaining on the said property.

(5) Damages for conversion of air conditioners

(6) Malicious damage

(7) Interest".

On the 30th of April 1996, the Defendants filed a motion in the High Court seeking the following orders:

[p.234]

“(1) That the above-mentioned writ be set aside for irregularity and for informality on the grounds that the Plaintiffs herein failed to comply with the provision of the Petition of Right Cap. 23 of the laws of Sierra Leone in that he issued a writ of summons against NASMOS and the Ministry of Social Welfare, Youth and Sports.

(2) That the Plaintiff’s pay the cost of the application".

The Plaintiffs were represented by Mr. A.F. Serry-Kamal while state counsel J.G. Kobba Esq. acted for the Defendants. When the motion came up for hearing Mr. Kobba submitted that the Court had no jursidiction to try the matter because the Plaintiffs had failed to comply with the requirements of section 3, 4 & 5 of the Petition of Right (Cap. 23.)

Section 3 confers on private individuals the right to sue the State but only after first obtaining the fiat of the Attorney General. Section 4 on its part, lays down the mode of commencement of such proceedings. This only requires the filing of a statement of claim, while section 5 deals with the method of transmission of the statement of claim and the endorsement of the fiat of the Attorney General thereon. Because of such non-compliance, counsel for the Defendants urged the court to set aside the writ of summons.

Mr. Serry-Kamal on the other hand maintained that the application should be dismissed because not only had section 133 (1) of the Constitution impliedly repealed section 3, 4 & 5 of Cap. 23, but it had also made it no longer necessary for a claimant to obtain the prior consent of the Attorney General before the institution of proceedings against the State.

[p.235]

More specifically, section 133(1) provides,

“Where a person has a claim against the Government that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right”.

The motion was adjourned for state counsel to rely to Mr. Serry Kamal's submission when the court resumed. Mr. Kobba, while conceding that section 113 (1) of the Constitution gave litigants the right to sue the Government without first getting or obtaining the fiat of the Attorney General, argued that the exercise of such right was limited by the provisions of section 133 (2) which stipulate that,

“Parliament shall by an Act of Parliament make provision for the exercise of the jursidiction under this section”.

So, Mr. Kobba contended that until such time as Parliament takes the necessary steps to implement subsection 133 (2) the commencement of all claims against the State must conform with the requirements of the provisions of Cap. 23 section 3. 4 & 5.

At this junction, and being a question of law, the court suspended the proceedings as demanded by section 124 (2) of the Constitution and referred the matter to the Supreme Court.

According to this sub-section

“Where any question relating to any matter or question as is referred to in sub-section (1) (Interpretation of the Constitution) arises in any proceedings in any Court, other than the Supreme Court, that Court shall stay proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the matter [p.236] in accordance with the decision of the Supreme Court”.

The learned trial judge then posed the following three questions for the consideration of the Court.

“(1) Is section 133 (1) of the 1991 Constitution in operative until section 133 (2) is effected by Parliament?

(2) If the answer is in the negative, can the High Court Rules apply to put into operation section 133 (1) in the absence of Parliament affecting section 133 (2).

(3) What is the state of the parties right as at present in relation to section 133 (1)?

In the Supreme Court we invited counsel on both sides to file their case in writing and thereafter, they more or less repeated their arguments and submissions in the High Court.

Since this is the first time the interpretation of section 133 (1) has come before the Court, it is important that one does more than merely give straight-forward answers to the questions referred to us. I hope, I will be forgiven for making extensive references to other jursidiction than might otherwise be necessary.

The immediate consideration that comes to mind is, what approach should the Court in interpreting a constitutional as opposed to a statutory provision adopt?

There is certainly no unanimity in practice here. The approaches seem to vary from jurisdiction to jurisdiction and sometimes, like Canada, even from period to period.

[p.237]

The conflict has always centered around the question whether the Constitution is to be treated as an ordinary statute to be 1nterpreted in accordance with the ordinary (restrictive) rules or statutory construction or whether it is something more - a “Constitutional statute” and so deserves a more “beneficial” interpretation.

The Privy Council's construction of the British North America Act of 1861 in Att - General for Canada V.A.G. for Ontario (1937) A.C. 326 (P.C.) vividly demonstrated that body's often reluctant attitude towards differentiating between constitutional and statutory documents.

Again in Colonial Sugar Refining Co. v Att Gen (1914) AC, 231 (PC) the Privy Council observed that the Canadian Constitution is just another piece of British legislation. See also Bank of Toronto V Lambe (1887) 12 AC, 575.

Chief Justice Marshall on his part seemed to suggest a different standard ought to apply in construing constitutional provisions when he said in Moculloch v Maryland 1705, 4 Wheaton 316 (1819) at page 136 11we must not forget that it is Constitution we are expounding”. Lord Sankey 1n his famous dictum in British Coal Corporation V The King (1935) 500 (PC) expressedly recognised that,

“In interpreting a Constitution or organic statute such as the British North America Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted”.

Five years earlier in 1930, he had declared in Attorney General for Canada that,

“The British North America Act planted in Canada a living tree capable of growth and explanation within [p.238] its natural limits. The object of the Act was to grant a Constitution to Canada. Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction: but rather to give it a large and liberal interpretation”- Edwards v Attorney General for Canada (1930) AC 124, 136 PC

And in the celebrated Indian case of Gopalan v The State of Madras (1950) SCR 88 while adopting the language of an Austra1ian decision(A.G. for New South Wales v Brewery Employees Union) (1908) 6 C L R 469, Chief Justice Kania observed that,

“Although we are to interpret words of the Constitution as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are made and not a mere Act which declares what the law is to be”.

In Adegbenro v Akintola (1963) AC 614 (PC) the Nigerian Supreme Court displayed far greater imagination than the Judicial Committee of the Privy Council in regarding the Constitution as something more than a British Government law.

I will next come to what I believe is the thrust of Mr. Kobba's argument that section 133 sub-sections (1) & (2) of the Constitution should be read conjunctively and not in isolation of each other.

I do accept that as a general rule of constructions a Constitution like a statute must be read as a whole. In other words the entire [p.239] Constitution should be examined for the purpose of determining the intention of each section or part. This is what is often referred to as the principle of harmonious construction. Its aim is no doubt, to reconcile different provisions of the Constitution.

Thus in State of Madras V Champakam (1951) SCR 525 and Qutreshi V State of Bihar (1958) SC 731 the Indian Supreme Court held that the Directive Principles of State Policy enshrined in the Construction have to be construed and implemented in such a manner as not to take away or abridge the fundamental rights of the individual. Likewise, that" Court has ruled that though Hindi is the national language and Article 351 of the Indian Constitution makes special provision directing the State to promote the spread of Hindi such object cannot be achieved by any means which violate the protection of the interests of minorities guaranteed by Articles 29 and 30 - see State of Bombay V Bombay Education Society (1955) sea 568

However, it is a cardinal principle of construction too that where the words of a section are clear,

"No rule of construction can require that ..... it shall be necessary to introduce another part of the statute which speaks with leas perspective and of which the words may be capable of such construction as by possibility to diminish the efficacy of the provisions of the Act-Vide Warburton V Loveland (1828) 1 H & B 448.

And finally in the words of the Supreme Court of India.

"If two constructions are possible, then the court must adopt that which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory"— State of Punjob V Ajaib singh (1953) S C R 254.

Mr. Serry-Kamal in his submission appealed to the Court not to read section 133(1) together with section 133 (2). He said the two [p.240] subsections should be treated separately. He further submitted that in so far as Cap. 23 is concerned it is only section 3, 4 & 5, therefore that are inconsistent with the provisions of section 133 (1) and to the extent of that inconsistency are rendered void by section 171 (15) of the Constitution. The rest of the provisions in Cap. 23 according to him remain valid and operational, more particularly, section 8 which provides that,

"So far as the same may be applicable, and except in so far as may be inconsistent with this Act all the powers, authorities and provisions contained in the Courts Act, or in any enactment extending or amending the same and the practice and course of procedure of the High Court, shall extend apply to all suits and proceedings by or against the Government and in all such suits, costs may be awarded in the same manner as in suits between private persons"

I find Mr. Serry-Kamal's argument attractive and I will agree with him that section 133 (1) of the Constitution has impliedly repealed and replaced sections 3, 4 & 5 of Cap. 23. It is my further view that until such period as Parliament brings 1nto operation the provisions of section 133 (2) the correct

procedure applicable to suits brought under section 133 (1) is that prescribed under the existing law i.e. section 8 of Cap. 23. Under the English Crown Proceedings Act 1947, in principle it is the normal procedure in civil litigation that applies.

To hold otherwise will, I believe, work great hardship on would be litigants who may have legitimate claims against the state and are eager to pursue them. I beg to differ with counsel for the Defendants contention that claimants against the Government have to pursue their rights by means of the laborious and long-winded process under sections 3, 4 & 5 of the Petition of High Court requiring, among other things, the prior consent of the Attorney General. What happens if the fiat of the Attorney General is not forthcoming? Would that not surely leave the poor litigant in limbo?

[p.241]

To all intents and purposes section 133 (1) has for the first time conferred a new right - that of being able to commence an action against the government without having previously obtained the Attorney General's fiat. That right must not be fettered simply because Par1iament has not over a period of nine years or so thought it worth-the-while to prescribe rules and regulations for the exercise of jurisdiction under section 133 (2).

Let me now examine the position of the "existing law" vis-a-vis the Constitution.

Section 170 (1) of the Constitution states that the laws of Sierra Leone shall comprise:—

"(a)……

(b) ……..

(c) ……

(d) the existing law

(e)……..

and by section 176 "existing law" is defined as,

"Any Act, rule, regulation or other such instrument made in the pursuance of or continuing in operation under the existing Constitution and having effect as part of the laws of Sierra Leone or of any part thereof immediately before the commencement of this Constitution (or any" Act of the Parliament of the United Kingdom or Order of Her Majesty in Council so having effect and may be continued with such Modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution as if it had been made under this Constitution

Section 171 (1) then went on to say,

"The existing law shall, not withstanding the repeal of the Constitution of Sierra Leone Act, 1978, have effect after the entry into force of this Constitution as if they had been made in pursuance of this

Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into [p.242] conformity with this Constitution".

The Constitution having this clearly and copiously explained the position of the existing law, I do not see the reason why this Court cannot apply that part of Cap. 23 which has not been either expressly or impliedly revoked, such as section 8 in particular, to give meaning and teeth to the provisions of section 133 (1).

As an exponent of the liberal approach myself, I hold the view that section 133 (2) of the Constitution must be interpreted in a manner that will not impede the fulfilment of the right granted by section 133 (1). It could hardly have been in the contemplation of the makers of the Constitution that what they had given by the right hand they had taken away with the left. Moreover, when one reads section 133 (1) side by side with the provisions of section 21, dealing with the protection from deprivation of property and section 28, the enforcement section, the case for giving effect to section 133 (1) inspite of section 133 (2) becomes even more compelling. The main complaint here is that the Plaintiffs' property had been compulsorily acquired by the Defendants. Indeed, the Plaintiff's could have applied to the Supreme Court by motion under section 28 for redress. The fact that they had chosen to proceed under section 133 (1) should not prejudice their chances of success simply because Parliament had failed to pass the necessary legislation under section 133 (2)

I will end by reverting to the specific questions posed by Nylander J - i.e.

"(1) Is section 133 (1) of the 1999 Constitution inoperative until S133 (2) is effected by Parliament?

My answer is NO.

(2) If the answer is in the negative, can the High Court Rules apply to put into operation S133 (1) in the absence of Parliament effecting S133 (2)?

My answer is YES

[p.243]

(3) What is the state of a parties right, as at present in relation to S133 (1).

This question is by no means clear. In any case because of what I have already said in (1) & (2) above, I do not think I need to answer it.

[SGD.]

Hon. Mr. Justice A.B. Timbo. JSC

JOKO SMART J.S.C.

This is a constitutional reference to the Supreme Court made by Nylander J. sitting as judge in the High Court pursuant to s. 124(2) of the Constitution of Sierra Leone, 1991, Act no. 6 of 1991 which reads:

“Where any question relating to any matter or question as is referred to in subsection (1) arises in any proceeding in any court, other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the case in [p.245] accordance with the decision of the Supreme Court.”

Subsection 124 (1)(a) vests original jurisdiction in the Supreme Court to determine the matter raised in s. 124(2). It provides as follows:

“The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction, to the exclusion of all Courts—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution.

The main thrust of this reference is the interpretation of s.133 of the Constitution which states:

(1) Where a person has a claim against the Government that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petitions of Right

(2) Parliament shall, by an Act of Parliament make provision for the exercise of jurisdiction under this section.

The background to the reference

An action was begun in the High Court between ALL PEOPLE'S CONGRESS Plaintiff and NATIONAL ACTION FOR SOCIAL MOBILIZATION SECRETARIAT (NASMOS) and MINISTER OF SOCIAL WELFARE, YOUTH AND SPORTS - defendants., by writ of summons dated 9th day of April 1996 . In the action, the Plaintiffs claims against the defendants were, inter alia,

1. Recovery of possession of premises known as 39 Siaka Stevens Street, Freetown.

2. Mense profits at the rate of Le, 4,000,000 per annum from 29 April 1992 until possession is yielded up,

3. Damages for trespass.

4. A perpetual injunction to restrain the defendants whether by themselves, their servants or agents howsoever called from entering or remaining on the said property.

5. Damages for conversion of air conditioners.

6. Malicious damage

7. Interest.

On the 30th day of April 1996 the defendants filed a Motion in the High Court [p.246] praying for the following orders:—

1. That the said wit of summons be set aside for irregularity and for informality on the grounds that the plaintiff failed to comply with the provisions of the Petitions of Right Act, chapter 23 of the laws of Sierra Leone, 1960, in that the plaintiff issued a writ of summons against NASMOS and the Ministry of Social Welfare Youth and Sports.

2. That the plaintiff pays the costs of the application.

At the hearing of the application, Counsel for the defendants submitted that the Court had no jurisdiction to try the case because the plaintiff had failed to comply with the Petitions of Right Act, CAP. 23, articulating that s. 4 of the said Act prescribed the manner of commencement of a suit against Government and that s.5 of the Act made provision for a fiat to be obtained before an action could be commenced against the defendants. In answer, Counsel for the plaintiff referred to s.133(1) of the Constitution submitting that the plaintiff did not require a fiat or process by petition of right and that that process had been abolished from the date that the Constitution came into force. In reply to Plaintiff Counsel's counter submission, Counsel for the defendants stressed that Parliament has not as yet passed an Act for the conferment of jurisdiction as provided for under s.133(2) of the Constitution, and he urged the Court to rule that s.133(1) becomes operative only when s.133(2) has been complied with.

It is against this background that Nylander J. saw a need for the interpretation of the two subsections of s.133 and stayed proceedings and made this reference in accordance with s.124(2) of the Constitution posing the following questions for determination:

1. Is s.133(1) of the Constitution inoperative until s.133(2) is effected by Parliament?

2. If the answer is in the negative, can the High Court Rules apply to put in operation s.133(1) in the absence of Parliament effecting s.133(2).?

3. What is the state of a party's right as at present in relation to s.133(1)?

In order to illuminate the process of interpretation of the two subsections of s.133, I find it necessary first to outline the law on the type of rights for which a person could sue Government before the passage of the 1991 Constitution.

Proceedings against Government prior to 1991

The home-grown legislation was the Petitions of Right Act, cap. 23 of the laws of Sierra Leone 1960. S. 3 of the Act provided:—

All claims against the Government of the Colony or against [p.247] the Government of any other Colony, being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act 1947, by petition, manifestation, or plea of right, may, with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney General as defendant, or such other officer as the Governor may from time to time designate for that purpose".

For clarity of purpose, it should be born in mind that under the Interpretation Act 1971 and the Law (Adaptation) Act 1972, Sierra Leone, the Attorney General and the High Court replaced the Colony, Governor and Supreme Court mutatis mutandis in the Petitions of Right Act.

What s.3 of the Act achieved was to transplant to Sierra Leone English law on the rights inherent in private citizens against the sovereign when they suffered wrongs at his hands. As an aid to the complete understanding of the issue before us I find it relevant to ascertain even in broad outline what the law was on suing the Crown.

Under the common law, there were two main rules governing the liability of the Crown and its servants. One was a substantive rule of law and the other was procedural. I shall deal with the latter in due course but for now I will adumbrate the former. The substantive rule was that the King can do no wrong expressed in the Latin maxim Rex non potest peccare. It was an ancient and fundamental principle of the unwritten English Constitution. Though in a personal sense the King was deemed to be incapable of doing wrong, yet some of his acts could in themselves be contrary to law, and on that account, the law could step in and set them aside. The King was considered as a benevolent lord who when it came to certain rights of his subjects in some respects would not be seen to trapple upon them with impunity.

With the emergence of government departments when the Crown, through its servants acting on its behalf, descended into the commercial arena, it became essential that the Crown should at least be made liable to its subject for contracts into which it entered with them.(See Thomas v. The Queen (1874) LR 10 QB 31; Rederiaktiebolget Amphitrite v. The King [1921] 3 KB 500 at p. 503 per Rowlatt .1.) But it was not for every type of contract that redress was available to the subject for its breach; liability depended on the terms of the contract as the case may be. If, for example, the contract provided for money to be paid out of funds voted by Parliament and no vote was made there was no remedy. (See Churchard v The Queen (1865) 1 Q.B. 173).

There was also liability for compensation for property of the subject taken by the [p.248] Crown either arbitrarily or under statute. (See Attorney General v. De Keyser's Royal Hotel [1920] A.C. 508; Feather v. The Queen (1865) 6 B & S 257). In this regard, fat the Crown to be liable under statute, the statute must impose an obligation on it expressly or by implication. (See Cooper v. Hawkins [1904] 2 K.B. 164; Hornsey Urban District Council v. Hennell [1902] 2 K.B.73).

Outside these two grey areas, the subject did not have recourse against the crown for its wrongs. I will briefly mention some of these areas of disadvantage. One was the defence of executive necessity which was available to the Crown for its future action if it was dictated by the needs of the community. Under this defence the Crown could not by contract hamper its freedom of action in matters which concerned the welfare of the state. Thus in the Amphitrite case [1921] 3 K.B. 500 Rowlatt J. held that an undertaking given by the British Government to neutral ships during World War 1 that if they sent their ships to British ports with a particular cargo they would not be detained, was not binding on the government and that it was free to withdraw the undertaking and refuse clearance on the ground that the Crown was not competent to make a contract which would have the effect of limiting its power of executive action in the future. Rowlatt J. however, made a reservation that the defence would not be

applicable to ordinary commercial contracts. (See [1921] 3 K.B. 500 at p.503): Denning J. (as he then was) commenting on the stance of Rowlatt J. placed limitations on the defence holding that it only availed the Crown where there was an implied term in a contract to that effect or that it was the true meaning of the contract that the defence should apply. (See Minister of Pensions v. Robertson [1949] 1 K.B. 227 at p.231).

Further, there was no remedy at common law for wrongful dismissal by the Crown of its servants. (See Dunn v. The Queen [1896]1 QB 117 per Lord Herschell at p. 120; Acton J. in Leaman v. The King [1920] 3 K.B.663). No mense profit was payable by the Crown for the recovery of possession of property unless there was a contract for such payment or statute provided as such. (See Attorney General v. De Keyser's Royal Hotel [1920] A.C. 508); there could also be no order for the restitution of property although the, court could make a declaration that the subject/plaintiff was entitled to the property as against the Crown. Furthermore, equitable remedies like injunction and decree of specific performance were not available against the Crown nor could there be discovery of documents against it if to do so would be injurious to the interest of the public. (See Ellis v. Home Office [1953] 2 Q.B. 135). There was no period of limitation for actions by the Crown except that for the recovery of land the period was 60 years reduced to 30 years by the Limitation Act 1939 instead of the ordinary period of 12 years. Finally, the most frequent wrongs that were suffered by the subject were tortious for which there was no remedy. (See Attorney General v. De Keyser's Royal Hotel [1920] A.C. 508 per Lord Dunedin at p.522 and per Lord Atkinson at p. 532; Cockburn CJ in Feather v. The Queen (1865) 6 B & S 257, ER 1191 at p. 1205.)

[p.249]

Now to the procedural rule. So far as this was concerned, the party aggrieved by the Crown did not go straight to court as the King could not be sued in his own courts but had to use the process of petition of right. The procedure was regulated by the Petition of Right Act 1860 enacted only to simplify the process and not to create new rights which the subject did not enjoy before. This was the preliminary step in the commencement of an action after which the normal process of litigation in a court of civil jurisdiction followed.

After this historical background it is appropriate at this stage to determine what is “government” as it is claimed by the defendants herein that they are arms of the Government of Sierra Leone.

Government of Sierra Leone.

The Interpretation Act No. 8 of 1971 defines government as “the Government of Sierra Leone (which shall be deemed to be a person) and includes, where appropriate, any authority by which executive power of the State is duly exercised in a particular case”. There is no doubt that the second defendant is part of the Government of Sierra Leone as it exercises some executive power of the State under the Constitution. (See s. 53(1) and s.53(5) of the Constitution). I have taken the pains to go into this definition in order to draw attention to the identities of the defendants. While I am satisfied that the 2nd defendant answers to that description I am not sure about the 2nd defendant. This and the question whether the proper parties are before the Court as defendants are matters for the trial Court.

The main issues in this reference

Before this Court, counsel for the defendants made two contentions. One is that s. 3, 4 and 5 of the Petition of Right Act, have been violated by the plaintiff. The other is that s. 133(1) and s. 133(2) should be read conjointly to such an extent as to reach the conclusion that s.133 becomes operative only when Parliament has complied with s.133(2). He submitted that there will be an ambiguity if the sections are to be read independently and he cited authorities in support. I shall presently deal with the second contention.

One of the cases Counsel relied upon is Canada Sugar Refining Company Ltd v. The Queen [1898] A.C. 735. This was an appeal from the Canadian Court of Appeal to the Privy Council. In this case the Attorney General of Canada instituted an action against the Canadian Sugar Refining Company to recover customs duty on sugar imported by the company into Canada by a steamship called the Cynthiana. The principal question before the courts was the date of importation of the sugar into the country. The ship had set out from Antwerp in Holland bound for Montreal. Its [p.250] first call in Canada was at the port of North Sydney in Cape Breton on 29 April 1895 where it stopped allegedly to coal before proceeding to Montreal. At port North Sydney the shipmaster made two reports for entry and exit of the ship on the same day that the ship entered and left and he received a customs certificate of clearance. Eventually, when the ship reached its final destination the collector of customs charged duty as from the date of entry into Montreal which was 3 May 1895 and cancelled the clearance certificate issued at the intermediate port. The contention of the Sugar Company was that duty ought to have been levied up to the date of entry into the country at port North Sydney and that between that entry and the final destination the goods should have been cleared duty free. The whole issue revolved on the interpretation of s.150 of the Canadian Customs Act 1896 as to the ascertainment of the precise date of importation. The section provided:

“Whenever, on the levying of any duty, or for any other purpose, it becomes necessary to determine the precise time of the importation or exportation of any goods, or of the arrival or departure of any vessel, such importation, if made by sea, coastwise or by inland navigation in any decked vessel , shall be deemed to have been completed from the time that the vessel in which such goods were imported came within the limits of the port at which they ought to be reported, and if made by land or by inland navigation in any undecked vessel, then, from the time such goods were brought within the limits of Canada”

The respondent Company further submitted that having regard to the context and other sections of the Act, “the words” the port at which they ought to be reported" in section 150 meant the port at which the effective report was to be made for the purpose of importation. Dismissing the contention of the respondent, the Privy Council held that upon interpretation of s.150, the port of importation was Montreal and not port North Sydney. It was then that Lord Davey made the following remark on statutory interpretation on which Counsel for the defendants herein has placed much premium.

“Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, s9 far as possible to make a consistent enactment of the whole statute or series of statues

relating to the subject matter" (Canadian Sugar Refining Company Ltd v. The Queen [1898] AC 735 at p.741) Much as I regard this as a very persuasive statement of law I do not see how it can be of assistance to the defendants herein in support of their contentions put before this Court. The Privy Council in the Canadian case was concerned with the [p.251] precise interpretation of the words "the port at which they ought to be reported" and from the spirit and intendment of the Customs Act and all the regulations on customs duty they reached the conclusion that the port of importation must be the port of the final discharge of the cargo. The factual situation is not the same as the case before this Court.

The defendants' second support is Curtis v. Stovin [1889] 22 QBD 512. In this case the English Court of Appeal was faced with the task of interpreting s.65 of the County Courts Act 1888 which made the following provision:

"Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed L 100 it shall be lawful for either party to the action at any time to apply to a judge of the High Court to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto, and on the hearing of the application the judge shall order such action to be tried accordingly."

In construing this section, Lord Esher held the view that the legislature had misdescribed the court to which the transfer was to be made and that the legislature did it in such a way as, to show that there was a misdescription of the court. Nevertheless, he thought that the alternative clause which followed "or in any court convenient thereto" was helpful in the construction inasmuch as it referred to a locality which must be the county court in the district in which the parties were. resident. (See Curtis v. Stovin [1889] 22 QBD 512 at p. 517). Bowen L.J. in the same case applied the ut res magis valeat quam pereat rule, and stressed that " if we were to hold that under s. 65 the judge has no power to order that an action shall be tried in a county court unless it is an action which as regards the amount claimed, might have been commenced in a county court, we should be making nonsense of the section." We must avoid such a construction, if the language will admit of our doing so" he emphasised (See Curtis v. Stovin [1889] 22 QBD 512 at p.517). As will be seen in due course, these dicta, to say the least, are of no assistance to the defendants in the interpretation of the subject- matter before us.

Charles Leader & Anor. v. George Duffey (1888) 13 App. cases 294 is another authority on which counsel for the defendants based his argument. In that case the Privy Council was asked to interpret a clause in a settlement which gave property "unto or for the benefit of all and every or anyone or more child or children, or any grand child pr grand children, or other issue then in being of the said intended marriage". The bone of contention was whether the word "then" applied to persons in being at the time of the death of the tenant for life or to persons in being at any time that the settlement took effect. Lord Herschell gave the precise meaning of the word "then in being" to be equivalent to "in esse" that is to say born or about to be [p.252] born, and he concluded that the words were, according to the natural construction of the language used, connected only with the words which immediately preceded them and not with the earlier limb of the sentence.(Charles Leader & Anor v. George Duffey (1888) 13 App. Case 294 at p. 305). On the construction of instruments generally, Lord Halsbury LC emphatically at page

301 of the report observed that “whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained but the whole instrument must be looked at to ascertain what is the meaning of the instrument taken as a whole in order to give effect to the intention of the framer of it” . This is what I intend to do when I come to the interpretation part in this judgment but I do not think that it will also be helpful to the defendants.

The next case for review is Attorney General for Canada v.Hallett & Carey Ltd [1952] AC 427 in which the respondents before the Privy Council challenged the validity of the order in council of the Governor of Manitoba which resulted in the compulsory acquisition of his barley during the Second World War The National Emergency Transitional Powers Act 1945 provided by its s. 2(1) that:

“The Governor in Council may do and authorize such acts and things and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or, advisable for the purpose of a monitoring, controlling and regulating supplies and services, prices, transportation use, and occupation of property rentals, employments, salaries and wages to ensure economic stability and in orderly transaction to conditions of peace”

In exercise of the powers conferred by s. 2(1) of the 1945 Act, the Order-in Council in question was made providing that "all oats and barley in commercial positions in Canada with certain specified exceptions are hereby vested in the Canadian Wheat Board". Delivering the judgment of the Privy Council Lord Radcliffe held that for the expropriation order to be invalid in law it must be attacked by showing that the Act truly interpreted did not give the Governor the power to carry out what he had purported to achieve. His Lordship first questioned the interpretation given to the Order-in Council by the trial court in Manitoba and by the Court of Appeal to the effect that the Act allowed the continuance of existing powers only and that there was no portion in it giving power to extend the controls, as propositions which imposed a construction that flew in the face of the words of the Act. (see Attorney General for Canada v. Hallett & Carey Ltd [1952] AC 427 at p.446). In this case Lord Radcliffe raised an issue which is very relevant to the matter before this Court and to which I will return when dealu1g with s.133(2) of our Construction [p.253] specifically. It is this: “Where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed”. (Attorney General for Canada v. Hallett & Carey Ltd [1952] AC 427 at p.450).

The last case that Counsel for the defendants urged us to accept as authority for his propositions is Magor Rural District Council v. Newport Corporation [1950] 2 All ER 1226. I do not find much in this case to merit a detailed treatment. But I am inclined to agree with the dissenting judgment of Denning LJ (-as he then was) when he said:

“We do not sit here to pull the language of Parliament to pieces and make nonsense of it. This is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and carry it out, and we do this better by filling in the gaps and making sense of the enactment than opening it up to destructive analysis”.([1950] 2 All ER 1226 at p.1236).

I am deeply influenced by this statement of Denning LJ and I see no reason why I should not follow it in this Court.

The interpretation of s.133(1) and s. 133(2).

Next the crux of the reference. Two rules of statutory construction must, in my judgment, be considered in this case. One is the Literal Rule and the other the Purposive Rule. If the words in a statute are themselves precise and unambiguous then no more can be necessary than to expound these words in their natural and ordinary senses.(See Sussex Peerage case (1844) 11 Cl & F 85; 8 ER 1034). But it sometimes happens that the ordinary words in themselves may be misleading and in order to make assurance doubly sure it might be necessary to examine the context including the subject matter the scope, purpose and; if need be, the background of the legislation in order to give effect to the true purpose of the legislation. (See Pepper v. Hart [1993] 1 All ER 42 at p.50 per Lord Griffith). This, I apprehend, is the Current trend in statutory interpretation and it is encapsulated in the judgment of Laws LJ in the English Court of Appeal case of Oliver Ashworth (Holdings) Ltd v. Ballard (Kent) Ltd [1999] 2 All ER 791 with which I cannot agree more. This was what he said:

“It is nowadays misleading - and perhaps it always was to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts of Parliament. The difference between purposive and literal construction is in truth one of degree only. On [p.254] received doctrine we spend our professional lives construing legislation purposively in as much we are enjoined at every turn to ascertain the intention of Parliament. The real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. Frequently there will be no opposition between the two, and then no difficulty arises. Where there is a potential clash , the conventional approach has been to give at least very great and often decisive weight to the literal meaning of the enacting words. I will not here go into the details or merits of the shift of emphasis, save broadly to recognise its virtue and its vice. Its virtue is that the legislator's true purpose may be more accurately ascertained. Its vice is that the certainty and accessibility of the law may be reduced or compromised. The common law, which regulates the interpretation of legislation has to balance these considerations “([l999] 2 All ER 791 at p.805).

Thus ambiguity may arise when a word has an ordinary meaning but it also has a latent meaning known only to the person who utters it within a particular context in which he uses it. In this case the context determines the real meaning. Shakespeare affords us with a light-hearted example in the following conversation between two of his characters in The Two Gentlemen of Verona (Act 2 s.5).

Launce: I'll but lean, and my staff understands me.

Speed: It stands under thee indeed.

Launce: Why, stand-under and under-stand is all one.

Still on ambiguity, Laws LJ gave classic examples of how it can create difficulties:

“This concept of ambiguity is not, to my mind, free of difficulty. an expression is strictly ambiguous when, entirely shorn of their context, the words in question are equally capable as a matter of language of meaning at least two different things. In Marlowe's Edward 11 there is the message 'Edward to kill fear not to do the deed is good'. With a comma after 'fear', it tells the recipient not to kill the King; if the comma is after 'not', it commends his murder. With no comma at all, it is in the true sense ambiguous. But this kind of strict ambiguity cannot be the whole reach of what their Lordships meant in HRH Prince Ernest Augustus of Hanover's case, since they considered that it is always necessary to look at the context of the Act in every case; [p.255] and it is by no means in every case that such a strict or internal ambiguity arises. There is however a different sense of ambiguity. It arises where although the words as a matter of language are clear enough, there may be a question as to the scope or subject matter of their intended reference. In the sixth century BC Croesus King of Lydia sent to the oracle at Delphi to divine his likely fortunes if he crossed the river Halys, the boundary of his own kingdom, and attacked the Persian Empire. Herodotus in book 1 of the Histories tells us that the oracle sent back the answer, 'If you cross the Halys you will destroy a great realm'. Thinking this is a good portent Croesus crossed it. But the realm he destroyed was his own; he was utterly defeated by Cyrus King of Persia, and his capital Sardis, was taken” ([1999] 2 All ER 791 at p.807).

I have gone into great length in quoting these passages from the judgment of Laws LJ which I fully endorse and adopt in order to help determine whether there is any ambiguity in s.133(1) and s.133(2) of the Constitution taking them Singularly or conjointly. Counsel for the defendants conceded that s. 133(1) conferred upon citizens unlimited rights to sue Government outright if these rights are infringed; his contention was that the enjoyment of these rights is postponed until Parliament passes a jurisdictional Act as contemplated by s. 133(2). To resolve this, I will go back first to the English Crown Proceedings Act 1947. S. 1 of this Act restated that only those rights which the subject possessed at common law for which he could sue the Crown by a petition of right were now suable as of right without the process of a petition of right reads:

“Where any person has a claim against the Crown after the commencement of this Act, and if this Act had not been passed, the claim might have been enforced, subject to the grant of his Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for the purpose in accordance with the provisions of this Act. “(Emphasis mine).

It is clear from the words 1 have underlined that the section did not confer any additional rights on a person other than those that he possessed under the common law. The section merely abolished the petition of right process. In order to confer more right on the subject, for example, the right to sue in tort, provisions were made in other sections of the Act. It is certain from the omission from s.133(1) of the Constitution of the underlined words in section 1 of the Crown Proceedings Act, [p.256] that the Sierra Leone Parliament intended to make the Government answerable to the subject for all wrongs as if the Government was any other person. This may be in recognition of the fact that a Government in a republic with a written Constitution does not enjoy any more rights than those conferred by the Constitution thus curtailing the common law prerogatives of the sovereign. No wonder Mr. Kobba,

Counsel for the defendants, did not go into the question as to what rights were recognised by s.133(1) but accepted the section as a fait accompli merely arguing that the section comes into operation only when a jurisdictional Act has been passed by Parliament. .

In bringing this action without using the petition of right process, Mr. Kobba argued that the plaintiff violated ss. 3,4 & 5 of the Petitions of Right Act. These are the sections that incorporated the petition of right process into the Sierra Leone legal system and dealt with the preliminary process of obtaining the fiat and filing of a statement of claim. It is a fact that the plaintiff has not gone through this process, its contention being that that process has been abolished by s.133(1) of the Constitution. Mr. Serry Kamal, Counsel for the plaintiff, submitted that s.133(1) came into full force on 1st day of October 1991 when the whole Constitution came into force. Unless I find a reservation in the Constitution that this particular subsection should be postponed to another date for its life, I see no reason why I should disagree with Mr. Kamal on this point. The language of s.133(1) is plain and I have read it literally. S. 133(2) too is clear which again I have read literally. The purpose of the legislature was to abolish the petition of right process. Having found this and taking both sections together, I am unable to see any inconsistency or ambiguity between them in order to sit here and help Counsel for the defendants pull the language of the Constitution into pieces and make nonsense of it, if I may borrow that expression once more from Denning LJ (as he then was) (See Magor Rural District Council v. Newport Corporation [1950] 2 All ER 1226 at p. 1236). It seems to me that Mr. Kobba's argument that the coming into force of s.13 3(1) is postponed until Parliament has performed the duty imposed upon it by s.133(2) might have had some weight if there were words in s.133(1) to suggest that both subsection were linked contemporaneously and that the one was dependent on the other, for example, words like "subject to the provisions of subsection (2) prefacing s.133(1). But I do not find such words in order to persuade me to lean on the side of the defendants.

Mr. Kamal further submitted that ss. 3, 4 & 5 of the Petition of Right Act are inconsistent with s.l33(l) of the Constitution which I hold is now in force, basing his argument on s.171 (15) of the Constitution which provides:

“The Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provisions of this [p.257] Constitution shall, to the extent of the inconsistency, be void and of no effect.”(my emphasis).

On the basis of my finding that s.133(1) is now in force I hold that ss. 3, 4 & 5 of the Petitions of Right Act are inconsistent with it and are therefore now void.

The next issue is to determine the fate of the subsequent provisions of the Petitions of Right Act. Have these provisions also been repealed by S s.133(1) of the Constitution? I apprehend that ss. 6, 7, & 8, the remaining sections of cap. 23 have not been expressly repealed by s. 133(1). If that is so, have they been repealed by implication? On implied repeals of statutes, Craies on Statutes, 7th Edition, Fifth Impression, 1985 at p.366 had this to say:

“Where two Act are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier. The court leans against implying repeals unless two Acts are so plainly repugnant to each other

that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together. Before coming to the conclusion that there is a repeal by implication the court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the latter, imply the repeal of an express prior enactment -i.e. the repeal must, if not express, flow from necessary implication."

I accept this statement as the correct principle of law and I adopt it. In my judgment, the Constitution has not expressly repealed the Petitions of Right Act. Sections 3, 4, & 5 have been repealed by implication because they were found to be inconsistent with s.133(1). Can the same thing be said of ss.6, 7, & 8? They read"

6. All documents, which, in a suit of the same nature between private parties, would be required to be served upon the defendants, shall be delivered at the office of the Attorney General, or other officer designated as aforesaid.

7. Whenever in any suit)a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall by warrant under his hand direct the amount awarded by such decree to be paid, and in the case of any other decree under the seal of the Court shall be transmitted by the same to be carried into effect; or in case [p.258] he shall think fit, he may direct that any competent appeal shall be entered and prosecuted against any decree.

8. So far as the same may be applicable, and except in so far as may be inconsistent with this Ordinance, all the powers, authorities and provisions contained in the Courts Ordinance, or in any enactment extending or amending the same, and the practice and course of procedure of the Supreme Court, shall extend and apply to all suits and proceedings by or against the Government, and in all such suits costs may be awarded in the same manner as in suits between private parties.

Are these sections inconsistent with s. 133(1) and/or s.133(2)? I do not think so. I hold that they have not been repealed either expressly or by implication. In the absence of an Act of Parliament pursuant to s.133(2), in my judgment, the existing law must be resorted to. As can be seen from the Petitions of Right Act, s.6 merely nominates the person on whom documents should be served; s.7 establishes the process of levy of execution and s.8 provides the procedure to follow after the subject had obtained the fiat when he should avail himself of the normal procedure in civil litigation. The Courts Act cap 7 of the Laws of Sierra Leone 1960 referred to in s.8 has now been replaced by the Courts Act 1965, Act no.31 of 1965 which makes provision for trial in the courts of judicature. The framers of the Constitution must have had at the back of their minds that there cannot be a vacuum in the law when they made transitional provisions in the Constitution. The Constitution states:

S. 177(1). The existing law shall, notwithstanding the repeal of the Constitution of Sierra Leone Act 1978, have effect after the entry into' force of this Constitution as if they had been made in pursuance of this Constitution and shall be read and construed with such modification, adaptation, qualification and exceptions as may be necessary to bring them in conformity with this Constitution.

S. 177(2).”Where any matter that falls to be prescribed or otherwise provided for under this Constitution or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the commencement of this Constitution by or under the existing commencement of this Constitution have effect with such codification, alteration, qualification and exceptions [p.259] as may be necessary to bring it into conformity with this Constitution or as the case may be, by the other authority or person.”

The Constitution by its s._176 defines “existing law” as

“any Act, rule, regulation, order or other such instrument made in pursuance of, or continuing in operation under, the existing Constitution and having effect as part of the laws of Sierra Leone or of any part thereof immediately before the commencement of this Constitution.”

Conclusion

In a democratic society the Constitution of a state is the grundnorm of its legal system and all other laws derive their validity and efficacy from it. The Constitution is usually a small instrument which does not embrace the details of all the laws governing the state. At most it deals with specific matters like the operation of the three arms of “government” in the wider context - the legislature, the executive and the judiciary, and finance, leaving details of laws in other respects to specific Acts of Parliament and subsidiary legislation. A new Constitution in many instances only engenders changes in the existing Constitution to accommodate the political dictates of the day but leaves the bulk of the existing law untouched. It does not intend to' create a vacuum in the law and so the making of transitional provisions maintaining the status quo ante in areas not specifically altered. The framers of the 1991 Constitution must have been aware of this principle when they enacted Chapter XIV of the Constitution which contains ss. 176 and 177. Indeed, Parliament has not as yet passed legislation to provide for a new jurisdiction governing actions by persons against government but that does not mean that private citizens are to be deprived of remedy against government with the abolition of the fiat and the petition of right procedure. I have earlier in this judgment referred to the dictum of Lord Radcliffe in Attorney General for Canada v. Hallett & Carey Ltd [1952] AC 427 at p. 450 that “where the import of some instrument is inconclusive the court may properly lean in favour of an interpretation that leaves private right undisturbed". I adopt and apply it to this case. In my judgment, the Constitution did not repeal the Petitions of Right Act in its entirety it repealed the substantive law provision in s.3 and only the fiat and its concommitant process in ss. 4 & 5. This was what was accomplished by s. 133(1). The procedure under ss. 6, 7, & 8 remain untouched and it is the procedure to follow in the presence of parliamentary inactivity. These sections prescribe the procedure under the existing law and in my judgment they are applicable to this case which is the fons et origo of this reference.

[p.260]

I will now answer the questions which Nylander J. posed for directions from this Court.

1. To question 1 the answer in the negative.

2. The answer to question 2 is in the affirmative.

3. The party has all the rights available to him as if he were suing another private person

I order that these answers be sent to the trial Court for the appropriate step to be taken.

SGD.

WRIGHT, J A.

This is a constitutional reference by way of cases stated to the Supreme Court made by Nylander J. sitting in the High Court in which he referred the following questions.

(1) Is sec. 133(1) of the 1991 Constitution in operative until sec.133(2) is effected by Parliament?

(2) If the answer is in the negative can the High Court Rules apply to put into operation sec.133 (1) in the absence of Parliament effecting sec.133 (2)

(3) What is the state of the parties right as at present in relation to sec.133?

I have had the advantage of reading some of the judgments delivered by my learned brothers so I shall not go into the background of the case or the arguments raised by counsel on both sides.

The Interpretation Act No.8 of 1971 defines government as "the Government of Sierra Leone (which shall be deemed to be a person) and includes where appropriate any authority by which executive power of the state is duly exercised in a particular case". I am of the opinion that [p.262] both defendants answer to that description see sec.53(1) and sec.53(5) of the constitution, although this is not before the court.

The gravamen of this matter is the interpretation of section 133(1) and section 133(2) of the constitution of Sierra. Leone Act No.6 of 1991.

I hold the view that sections 3, 4 and 5 of the Petition of Right Act are void and inconsistent with. sec.133 (1) of the constitution which is now in force considering sec. 171 (15) of the constitution which provides "The Constitution shall be the Supreme Law of Sierra Leone and any other law found to be inconsistent with any provisions of this constitution shall, to the extent of the inconsistency be void and of no effect.

I also hold that sections 6, 7 and 8 of the Petition of Right Act has not been repealed by implication by section 133(1) and so is not Inconsistent with the constitution, and is still applicable.

Section 177(1) of the Constitution states: The existing law shall notwithstanding the repealed of the constitution of Sierra Leone Act 1978, have effect after the entering of this constitution as if they have, been made in pursuance of this constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with the constitution.

Section 177(2) where any matter that fails to be prescribed or otherwise provided for under this constitution by parliament or by any other authority or is prescribed or provided for by or under an existing law (including any amendment to any such law made under this Section) or otherwise prescribed or provided for immediately before the commencement of this Constitution by or under the existing Constitution, that prescription or provision shall as from the commencement of this constitution have effect with such modifications, alterations, qualifications and exceptions as may be necessary to bring it into conformity with this constitution as if it had been made under this constitution by Parliament or as the case may be, by the other authority or person"

The constitution by its section 176 defines "existing law" as:

"any Act, Rule, Regulation, order or other such instrument made in pursuance or continuing in operation under, the existing constitution and having [p.263] effect as part of the law of' Sierra Leone or any part thereof "immediately before the commencement of this constitution".

As I said earlier the procedure under sections 6, 7 and 8 of the petition of Right have not been repealed and so prescribe the procedure under the existing law which is applicable in this case

I have perused several authorities including Oliver Ashworth (Holdings) Ltd. vs. Ballard (Kent) Ltd. 1999 2 A.E.R. 79, Attorney General for Canada vs. Halcet & Carey Ltd. 1952 AC.427, Canada. Sugar Refining Co. VR 1898 AC. 735 in deciding whether section 133(1) and section 133(2) of the constitution should be ready singularly or conjunctively and to decide whether section 133(1) is incorporative until Section 133(2) is effected by Parliament.

In the Sussex Peerage claim (1844) II CL & F85, 143 The judges said:

"If any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid and the ground and cause of making the statute absolute, and to have recourse to the preamble, which according to Chief Justice Dyer in Stoweb vs. Lord Zouch 1562 Floud 353 is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress." Quoted and approved by Lord

Halsbury L.C in Income Tax Commissioner vs. Pen 1891 A.C.531. See Craies on Statute Law 7th Edition page 203.

In Magor and St. Melons Rural District Council vs. New Port Corporation 1950 2 A.E.R. 1226 Lord. Denning L.J. said

"I confess that I find it difficult to deal with these questions of interpretation in the abstract. I like to see their practical application."

In my view it was obvious that the intention of the constitution was that the claims could be brought against the government as considered necessary in accordance with sec.133 (1) of the constitution which reads:

[p.264]

“Where a person has a claim against the government, that claim may be enforced as of right by proceedings taken against the government for that purpose, without the grant of a fiat or the use of the process known as petition of Right.

The fact that the constitution further goes to say in sec. 133(2) “Parliament shall by an Act of Parliament make provisions for the exercise of jurisdiction under this section” does not preclude actions in claim against the government being taken nor is there any express intention that the taking of such action is dependent on parliament making such provision. It is my view that the Section stating that parliament should make such provision is merely to give assurance of a systematized approach as to the practice and procedural steps for taking such action.

In answer to the question which Nylander J. posed for directions to this court

1. To question 1 the answer is in the negative.

2. The answer to question 2 is in the affirmative.

3. The party has all rights available to him as when he is suing another private person.

SGD.

V.A.D. WRIGHT, JA.

TOLLA THOMPSON, JA

I have had the opportunity and the privilege of reading the judgment of my lord the Chief Justice and my learned brothers and sister. I agree with them. I only wish to add my own humble view.

I do not intend to give a narration of the background to this matter as it has already been set out with-lucidity in the judgement of my lord the Chief Justice and my brother Joko Smart JSC. I adopt their accounts. I shall therefore keep this judgement as short as possible.

This matter came to this Court by way of a constitutional reference pursuant to Sec. 124 of the 1999 Constitution Act No. 6 of 1999 and Rule 99 of the Supreme Court Rules 1982 respectively, in which Nylander J posed the following questions for the determination of this Court:

1. Is Section 133(1) of The Constitution inoperative until Section 133(2) is effected by Parliament?

2. If the answer is in the negative can the High Court Rules apply to put into operation Sec. 133(1) in the absence of Parliament effecting Sec. 133(2)?

[p.266]

3. What is the state of the party's right as at present in relation to Sec. 133(1)?

The arguments by Mr. Kobbs learned counsel for the defendant and Mr. Serry Kamal learned counsel for the plaintiff contained novel and interesting points of law, which deserves close consideration.

After listening to their respective submissions and perusing the various authorities cited and those own research unearth. I shall endeavour as best as possible to state the contentions in a summary form in order to isolate and accentuate the issues before me for a clearer elucidation questions to be determined.

The questions posed in this reference matter are most important as they relate to one of the entrenched clauses of the 1991 Constitution Act. No. 6 of 1991 (which I shall henceforth refer to as The Constitution) and obviously of great public importance. Before answering the questions vis-a-vis Sec. 133, I shall endeavour to ascertain the intention of The Constitution. In this respect I think it is necessary to set out in extenso Sec. 133 of the Constitution.

Sec. 133 states:

1) Where a person has a claim against the Government that claim may be enforced as of right by proceedings taken against the Government for that purpose without the grant of a fiat or the use of the process known as a Petition of Right

2) Parliament shall by an Act of Parliament make provision for the exercise of the jurisdiction under this section

I pause here in this judgment to make two observations the first observation is that Sec. 133(1} of The Constitution is part of Sec. 1 of part 1 of the Crown Proceedings Act 1947 which repealed the Petition of Rights Act in England. Part 1 of the Act deals the substantive Law. The next observation is that there is no proviso or clause qualifying the provisions under Sec. 133(1). In my view, in the absence of such a proviso, I will be right to come to the conclusion that Sec. 133(1) came into effect at the date when the Constitution as a whole came into force i.e., 1st October 1991.

Having thus recorded these two observations I shall now proceed with the judgment.

In my judgement the words in Sec. 133(1) are so plain, clear and unambiguous that they hardly need any interpretation to ascertain the intention of The Constitution. If peradventure I am said to be wrong in the view I have expressed, I intend to be guided by authoritative decisions on the canons of interpretation.

In the Sussex Peerage Claim [l844] 11 Cl & F85. Tindale CJ said:

“If the words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in the natural and ordinary sense The words themselves in such a case best declare the intention of the law giver”

[p.267]

Lord Simonds in Magor and St Mellons Rural District Council [1952] Ac 189 at page 191 said:

"We sit here to find the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense than by opening, it to destructive analysis"

Coming home Livesey Luke C.J. in Chanrai & Co. Ltd. v Palmer [1970-71] ALR (SL) 391 at 404 had this to say:

"In my judgement if the words used in a statute are plain and unambiguous the court is bound to construe them in their ordinary sense having regard to the contest"

I am persuaded by dicta of these eminent jurists on this point and I shall adopt them, in interpretation of Sec. 133(1). It seems obvious to me using the ordinary sense approach that the intention of The Constitution is to give a person the unqualified right to sue the government or a government department as he would another private person.

The question I now wish to consider is how the right to sue created under Sec. 133(1) can be perused in the light of Sec. 133(2)? Mr. Kobba in his argument was emphatic that the right to, sue created under Sec. 133(1) cannot be invoked until parliament enacts the jurisdictional provision pursuant to Sec. 133(2). He submitted that Sec. 133(1) and 133(2) must be used conjointly, failing which litigant should resort to Sec. 3, 4 and 5 of chapter 23 of the laws of Sierra Leone.

Mr. Serry Kamal on the other hand in a precise and succinct manner submitted that Sec. 3, 4, and 5 of chapter 23 have been repealed by Sec 133(1) by implication. Section, 4 and 5 of chapter 23 are inconsistent with Sec. 133(1) in view of Sec. 171 (15) of The Constitution. He also said that by Sec. 176 of The Constitution the other sections of Chapter 23 are still in existence and for the commencement of an action Sec. 8 of chapter 23 would apply.

I propose to deal first, with the issue of implied repeal of Sections 3, 4 and 5 of chapter 23 by Sec. 133(1).

It was said in Canada Southern Railway Co. v International Bridge Co. [1883] AC 723 "where two acts of a legislature are to be read together the court must construe every part of each of them as if it has been contained in one act, unless there is some manifest discrepancy making it necessary to hold that the later act has to some extent modified something found in the earlier act".

The test was laid down in the case of Westham Church Wardens v. Fourth City Montreal Building Society [1892] 2 QBD 654.

"Are the later act so Inconsistent with, or repugnant to the provision of an earlier act that the two cannot stand together?"

Since Sec. 133(1) of The Constitution has created an unqualified right to sue the government and the provisions of Secs.3, 4, and 5 were the method employed to pursue a claim against the government it is crystal clear to me that "these two cannot stand together"

Afortiori, the coup de grace on this point is to be found in Sec. 171 (15) of The Constitution, which states

“this constitution shall be the Supreme-law of Sierra Leone and any other law found to be inconsistent with any provision of this constitution shall to the extent of the inconsistency be void and of no effect”.

[p.268]

I agree with Mr. Serry Kamal that Sec. 133(1) of The Constitution has repealed the provisions contain in Sec. 3, 4 and 5 of chapter 23 they are also inconsistent with Sec. 133(1) of The Constitution. I therefore hold that the provisions of Secs. 3, 4 and 5 are void and of no effect.

I now come to Mr. Kobba's submission that the right to sue pursuant to Sec. 133(1) cannot be invoked until Parliament enact the jurisdictional provision under Sec. 133(2). As he puts it, the two must be used conjointly and not independently.

With respect to Mr. Kobba, I cannot accord Sec. 133(1) such a restricted effect. What I think ought to be done is to look elsewhere within the context of The Constitution.

It follows therefore that Secs.6, 7 and 8 of chapter 23, which in my view have not been repeated fall within the ambits of Sections 176 and 177 of The Constitution and they can conveniently be applied to give effect to Sec. 133(1) of The Constitution.

In the result I shall answer questions posed by Nylander J. in this manner:

To question 1 The answer is negative

To question 2 The answer is in the affirmative

To question 3 The parties have their rights as if suing any other private person.

SGD.

CASES REFERRED TO

1. A.G. v. De Keyere Hotel [1920] A.C. 508

2. Feather v. the Queen 1865 6 B & S 257

3. Leader v. Duffey [1888] 13 APP. Cas 294 at 302

4. Oliver Ashworth (Holdings) Ltd v. Ballard (Kent) Ltd. [1999] 2 ALL E.R. 791

5. General for Canada V.A.G. for Ontario (1937) A.C. 326 (P.C.)

6. Colonial Sugar Refining Co. v Att Gen (1914) AC, 231 (PC)

7. Bank of Toronto V Lambe (1887) 12 AC, 575.

8. Moculloch v Maryland 1705, 4 Wheaton 316 (1819) at page 136

9. British Coal Corporation v The King (1935) 500 (PC)

10. Edwards v Attorney General for Canada (1930) AC 124, 136 PC

11. Gopalan v The State of Madras (1950) SCR 88

12. A.G. for New South Wales v Brewery Employees Union) (1908) 6 C L R 469

13. Adegbenro v Akintola (1963) AC 614 (PC)

14. State of Madras v Champakam (1951) SCR 525

15. Qutreshi v State of Bihar (1958) SC 731

16. State of Bombay v Bombay Education Society (1955) sea 568

17. Act-Vide Warburton v Loveland (1828) 1 H & B 448.

18. Punjob v Ajaib singh (1953) S C R 254

19. Thomas v. The Queen (1874) LR 10 QB 31;

20. Rederiaktiebolget Amphitrite v. The King [1921] 3 KB 500 at p. 503 per Rowlatt .1.)

21. Churchard v The Queen (1865) 1 Q.B. 173)

22. Attorney General v. De Keyser's Royal Hotel [1920] A.C. 508;

23. Feather v. The Queen (1865) 6 B & S 257

24. Cooper v. Hawkins [1904] 2 K.B. 164;

25. Hornsey Urban District Council v. Hennell [1902] 2 K.B.73).

26. [1921] 3 K.B. 500 at p.503

27. Minister of Pensions v. Robertson [1949] 1 K.B. 227 at p.231

28. Dunn v. The Queen [1896]1 QB 117 per Lord Herschell at p. 120;

29. Acton J. in Leaman v. The King [1920] 3 K.B.663

30. Ellis v. Home Office [1953] 2 Q.B. 135

31. Cockburn CJ in Feather v. The Queen (1865) 6 B & S 257, ER 1191 at p. 1205

32. Canada Sugar Refining Company Ltd v. The Queen [1898] A.C. 735

33. Curtis v. Stovin [1889] 22 QBD 512

34. Curtis v. Stovin [1889] 22 QBD 512 at p. 517

35. Charles Leader & Anor. v. George Duffey (1888) 13 App. cases 294

36. Attorney General for Canada v.Hallett & Carey Ltd [1952] AC 427

37. Sussex Peerage case (1844) 11 Cl & F 85; 8 ER 1034

38. Pepper v. Hart [1993] 1 All ER 42 at p.50 per Lord Griffith

39. [l999] 2 All ER 791 at p.805

40. Magor Rural District Council v. Newport Corporation [1950] 2 All ER 1226 at p. 1236

41. Canada v. Hallett & Carey Ltd [1952] AC 427 at p. 450

42. Oliver Ashworth (Holdings) Ltd. vs. Ballard (Kent) Ltd. 1999 2 A.E.R. 79

43. Canada vs. Halcet & Carey Ltd. 1952 AC.427,

44. Canada Sugar Refining Co. VR 1898 AC. 735

45. Income Tax Commissioner vs. Pen 1891 A.C.531

46. St. Melons Rural District Council vs. New Port Corporation 1950 2 A.E.R. 1226 Lord

47. Chanrai & Co. Ltd. v Palmer [1970-71] ALR (SL) 391 at 404

47. Westham Church Wardens v. Fourth City Montreal Building Society [1892] 2 QBD 654.

STATUTES REFERRED TO

1. Crown Proceedings Act 1947

2. Act 1971 and the Law (Adaptation) Act 1972

3. The Interpretation Act No.8 of 1971

AMADU KANU v. CYRIL WALTER SAWYER & 2 ORS.

[SC. MICS. APP. NO. 2/93] [p.155-158]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 16 MARCH 1993

CORAM: HON. MR. JUSTICE S. M. F. KUTUBU, C.J., PRESIDING

HON. MR. JUSTICE S. BECCLES DAVIES, JSC.

HON. MRS. JUSTICE V.A. WRIGHT, JA.

BETWEEN

AMADU KANU APPELLANT

Vs.

CYRIL WALTER SAWYER RESPONDENTS

SAIBU KAMARA

ALHAJI WURIE JALLOH

SC. MISC. APP. NO. 2/93

SOLICITORS:—

R. AWOONOR-RENNER ESQ., with him SHEKU M.

TOURE ESQ., for Appellant/Applicant.

DR. H.M. JOKO-SMART. for Respondents.

RULING delivered this 16th day of March, 1993 by KUTUBU, C.J., PRESIDING

RULING

This is an application by R. Awoonor-Renner Esq., counsel for Appellant/Applicant for stay of execution of the order contained in the Ruling of the Honourable Thompson-Davies J.S.C. delivered in the Court of Appeal of Sierra Leone on the 4th day of March, 1993 and for all subsequent proceedings to be stayed until the determination of Appeal in the Court of Appeal. The application is supported by the Affidavit of Amadu Kanu. Applicant herein, sworn at Freetown on 10th day of March, 1993 and filed.

At the threshold of this application preliminary objection was taken by Dr. H.M. Joko-Smart counsel for Respondent on the ground of non-compliance by counsel for Applicant of the mandatory provisions of Rule 60 of the Rules of the Supreme Court, 1982 (P.N. No. 1 of 1982).

Rule 60 (1) states: —

[p.156]

"A civil appeal shall not operate as stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Supreme Court or the Court of Appeal may otherwise order".

Rule 60 (2) states: —

"Subject to the provisions of these Rules and to any other enactment governing the same, an application for stay of execution or proceedings shall first be made to the Court of Appeal and if that Court refuses

to grant the application the Applicant shall be entitled to renew the application before the Supreme Court for determination."

Has counsel for Applicant complied with the mandatory provisions of the afore-mentioned Rules in the instant application? If the answer is in the negative can the Supreme Court entertain this Application without causing violence to the Rules? Has the Court any discretion in the matter if it takes the view that the mandatory provisions have not been complied with?

Counsel for Applicant with candour conceded the point that resort was not had to the Supreme Court Rules in the instant application, but nevertheless, based his application on the grounds of concurrent jurisdiction of both the Supreme Court and the Court of Appeal in this regard. Afortiori, that as time was of the essence he proceeded under the provisions of the Constitution of Sierra Leone 1991 Act No. 6 of 1991 namely, Section 123 which overrides the Rules. What does the Section say?

Section 123 (1) (a) states:—

"An appeal shall lie from a judgement, decree or order of the Court of Appeal to the Supreme Court (a) as of right in any civil cause or matter.

Section 123 (2) —

"Notwithstanding the provisions of subsection (1) the Supreme Court shall have power to entertain any application for special leave to appeal in any cause or matter civil or criminal, to the Supreme Court, and to grant such leave accordingly".

[p.157]

The purported application before this Court is for stay of execution of the order contained in the Ruling of the Honourable Thompson-Davis delivered in the Court of Appeal of Sierra Leone on the 4th day of March, 1993. It is not an appeal or an application for special leave to appeal. I cannot therefore see how this provision of the Constitution can avail counsel in this application.

Rule 60 is of obvious advantage to an applicant in stay of execution of proceedings. The rationale behind it is to give an applicant two chances, one in the Court below, the Appeal Court in this instance and another in the Supreme Court, should the Court of Appeal refuse to grant the Application sought. Applicant will therefore have the advantage of a second bite rather than jumping his gun to his detriment or risk.

The order of the Court of Appeal was give on 4th March to take effect on the 15th March, 1993 eleven days from the date of the said order. Counsel for Applicant depressed that since time was of the essence compliance with Rule 60 of the Supreme Court Rules would not have been to his advantage, as execution would have been effected, thereby making the proceedings nugatory. In our view eleven days was a reasonable time within which an application for stay would have been made to the Court of Appeal in the first instance. On refusal a second application would be made to the Supreme Court.

In an application for stay of execution this Court has always taken the view that there should be no short cut to the procedure; the mandatory provisions should be complied with. Nothing has changed the view of this Honourable Court in that regard.

[p.158]

Now what are the consequences of failure to comply with the mandatory provisions of Rule 60 of the Supreme Court Rules? In the instance case has the proper foundation been laid, a condition precedent for us to entertain this purpoted application? The answer is in the negative. In the circumstances the application is struck out.

Court - Costs awarded Le30,000.00.

SGD.

S.M.F. KUTUBU-CHIEF JUSTICE

I agree.

S. BECCLES DAVIES – JSC.

I agree.

SGD.

V.A. WRIGHT – JA.

CASTROL LIMITED AND JOHN MICHAEL MOTORS LIMITED

[SC. CIV.APP.1/98] [p.280-281]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE:

CORAM: MR JUSTICE D.E.F LUKE, C.J. PRESIDING

MR. JUSTICE H.M JOKO SMART, J.S.C

MR. JUSTICE N.D.ALHADI, J.S.C

BETWWEN:

CASTROL LIMITED APPLICANT

AND

JOHN MICHEAL MOTORS LIMITED RESPONDENT

APPLICANT'S SOLICITORS – BASMA & MACAULEY

RESPONDENT'S SOLICITORS –F.A GABBIDON

RULING

DESMOND E.F. LUKE. C.J

A notice of Appeal herein dated 10th November 1998 was lodged (filed) on the 11th November 1998. Thereafter no further steps were taken.

Pursuant to Rule 31(i) of the rules of the Supreme Court the appeal was entered on a list of Supreme Court for motion on the 18th December 1998 due notice whereof was given to the parties.

On the 18th December 1998, the matter was adjourned to the 6th of January 1999 when the invasion of Free Town prevented the Courts from sitting on that date and for some time thereafter. The matter was subsequently listed for mention on Tuesday 21st September 1999.

When counsel for the Appellant, Berthan Macauley (Jnr) was asked to address the court on compliance or non compliance with Rules 35 of the Rules of the Supreme Court, he conceded that Rule 35(2) has not been complied with. Whereupon he requested and was granted and adjournment to with a view to remedy the said non-compliance

[p.281]

The case of Gatti & Shoosmith is authority for the unfettered discretion of the Court where dealing with mistake on the part of legal adviser but doe not otherwise provides solace for non-compliance with the Rules of Court - especially where there is no ambiguity.

Parties seeking to come before the Court would be well advised not to think that the discretion provided by Rule 103 will necessarily be exercised in every situation. Whether the matter shall be so treated must depend upon on the facts of each individual case

I am satisfied the interest of justice was served by our allowing the appellant to remedy the non-compliance.

In as much as it appears that on the facts of this case it is one where the discretion of the Court ought to be exercised, the appellant will accordingly be allowed to prosecute the appeal.

DR. HARRY WILL AND ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[SC.MISC 6/99] [p.285-292]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 20 JANAURY, 2000

CORAM : MR. JUSTICE D.B.F. LUKE , C.J.

MR. JUSTICE A.B.TIMBO, J.S.C.

MR. JUSTICE S.C.E WARNE, J.S.C.

MR. JUSTICE E.C.THOMSON-DAVIS, J.S.C.

MR. JUSTICE. N.D. ALHADI, J.A.

BETWEEN:—

DR HARRY WILL APPLICANT

AND

ATTORNEY GENERAL AND MINISTER OF JUSTICE RESPONDENT

DR. BU-BUAKEI JABBI FOR THE APPLICANT

S. E. BEREWA ESQ., ATTORNEY GENERALWITH HIM

P.B. KEBBIE DIRECTOR OF PUBLIC PROSECUTIONS (FOR THE RESPONDENT)

RULING

WARNE J.S.C.

Dr. JABBI COUSEL for the applicant attempted to seek leave to amend the Notice of motion filed on the 29th day of October 1999 by adding a fifth relief and filing a supplement affidavit in support thereof.

The learned Attorney-General Counsel for the Respondent objected to the Motion being heard. He submitted that, to file a supplemental Affidavit and to use it in support of the motion cannot be a relief. He further submitted that this is an admission that the papers before the court were not completed before being filed this he argued, cannot be done and he refers to Rules 88 and 89 of the Supreme Court P.N No 1 of 1982 (hereinafter referred to as Rules).

Dr. Jabbi the sought leave to withdraw the original application and leave the file a supplemental Affidavit exhibiting the drawn up order of the High Court dated 18th October, 1999

Before counsel could proceed with the application, the Learned Attorney-General raised a Preliminary Objection to the Motion being entertained by the court. He submitted that from some of the reliefs sought, the Motion is for the original jurisdiction of the Court to be invoked. He argued that in order to do that, the relevant provision is Rule 89(1) of the Rules is applicable. This rule specified the use of

form8, which council ahs failed to apply. Reliefs for declaration should be by originating [p.286] Notice of Motion, he submitted. The Attorney –General further submitted that there are three areas where the original jurisdiction of the court can be invoked that is to say

(1) Reference under Section 28 of the constitution of Sierra Leone Act No.6 of 1991 (hereinafter referred to as the Constitution) Section 124 of the Constitution and also section 127 of the constitution. He went on to submit that the Rules applicable in these instances are Rules 89 and 99 of the Rules, Rule 98 of the Rules is in applicable for reliefs for the Declaration he added. The Attorney-General has urged the court that a number of the reliefs sought are not properly before the court since the relevant rules of procedure have not yet been complied with. The Attorney-General urged the court to dismiss the motion because the court lacks jurisdiction.

In answer to the objection, Dr. Jabbi in his usual forthright manner, submitted that the objection is totally misconceived. He argued that the application is concerned with the supervisory jurisdiction of the court. Counsel categorically submitted I quote:" The declaration is in the same vein. I submitted that declaratory orders as to say any relief or remedy under the constitution whether or not they include relief under section 28, and 127 are perfectly appropriate under 125 of the constitution. Counsel cited the case of SC.MISC.APP No.6/93 Justice F.C Gbow Vs Julius Spencer and others in support of his submission. Let me say here and now that, that case does not bind the court. Vide section 122(2)of the constitution. Counsel further argued that the Reference jurisdiction is distinct from original or supervisory jurisdiction. This submission of counsel leaves me at a loss to relate it to the foregoing submission that the declaration reliefs sought are perfectly appropriate under the instant motion. Be that as it may, I will consider all the reliefs sought in due course in order to determine if they can all be entertained in the same motion. Counsel finally submitted that Rules 5 and 98 of the Rules are both residual and orders of Declaration are ancillary orders and urged court to ignore the objection.

The attorney General replied that declaratory orders are not ancillary reliefs but substantive reliefs and these cannot be made ancillary to a prerogative order.

In order to juxtapose these forceful submissions of both counsel, it is imperative that I reiterate the relies, I quote, "In the matter of an [p.287] application by Dr. Harry Will under section 125 of the constitution of Sierra Leone Act No 6 of 1991 for leave to apply for orders of Certiorari and prohibition and for related declaration. In the matter or two rulings given on 18th October 1999 by Hon. Mr. Justice M.O.Teju-Deen (High Court Judge) in proceedings on the criminal Information dated 30th August 1999 filed in the High Court of Sierra Leone Holden at Freetown and intituled – "The state Vs. Dr. Harry will, Lamin Feika, Bockarie Kakay (Trading as Mariama and Sons (a FIRM). As amended.

BETWEEN

"Dr. Harry Will Applicant

And

Attorney-General and Minister of Justice Respondent

STATEMENT ACCOMPANYIN EX PARTEMOTION FOR LEAVE

TO APPLY FOR THE ORDERSFOR OF CERTIORARI, PROHIBITION ETC

PURSUANT TO ORDERS 59. RULE 3(2) OF THE (ENGLISH)

SUPREME COURT RULES 1960

NAME AND DESCRIPTION OF APPLICANT

Dr. Harry Will, of No. 8, Spur Road, Wilberforce Freetown, and 1st Accused in the aforesaid Criminal Information dated 30th August, 1999-

RELIEFE SOUGHT

1. The Applicant desires leave to apply for the following orders

(a) CERTIORARI to remove into this Honourable Supreme court for the purpose of being quashed TWO Rulings given by the Hon. Mr. Justice M. O. Taju-Deen (High. Court Judge) on 18th October, 1999 in proceedings on the aforesaid Criminal Information of 30th August 1999 as amended.

(b) Additionally PROBATION restraining the High Court from further hearing and determining proceeding founded on the aforesaid Criminal Information, in so far as the applicant herein and 1st Accused therein is thereby affected, until determination by the Supreme Court of the substantive application for which leave shall have been granted herein, or until the Supreme Court shall otherwise order.

[p.288]

2. Additionally, A DECLARATION, to the effect that the 1st private to subsection (1) of section 136 of the Criminal Procedure Act, No.32 of 1965 as amended by Act No. 1 of 1970

(a) is inconsistent and. irreconcilable with the mandatory and Overriding provisions in Section 108 and the substantive part of Subsection (1) of Section 136 respectively of the Criminal Procedure Act 1965, amended as aforesaid and/or

(b) was and is inconsistent and irreconcilable with the mandatory and overriding provisions in, and, and was accordingly implicitly repealed by section 1 of the courts (Amendments) Act, No.2 of 1981 and/or

(c) was enacted in excess of Ultra vires of the powers thereto conferred on Parliament by law at the time of its enactment

And accordingly was and is invalid, null and void, thereby depriving and denying the high court of all the jurisdiction to try the applicant herein as the 1st Accused or at all on the aforesaid Criminal Information dated 30th August 199, as amended, in so far as the indictment depending on the said Criminal Information was preferred pursuant to the said 1st proviso to Subsection(1) of section 136 of the criminal procedure Act 1965 amended as aforesaid

3. (1) Additionally A DECLARATION to the effect that the provisions in Subsection (3) of Section 146 of the Criminal Procedure Act, No 32 of 1965, takes precedence over and thereby override the provisions in Subsection (2) of section 144 of the said Criminal Procedure Act as amended by section 3 of the act No.11 of 1981

(2) Additionally A DECLARATION to the effect that the learned Presiding Judge in the trial of the Applicant herein, inter alia on the Criminal Information or Indictment dated 30th August,1999 as amended , erred in law in holding in proceedings thereon on 18th October 1999:—

(a) that an application had been duly made to the court for trail by judge alone in terms of Subsection (20 of section 144 of the Criminal Procedure Act 1965, amended as aforesaid by the learned Attorney-General of justice having merely Filed such application without [p.289] Subsequently moving the court to that effect in viva vose proceeding before the Court.

(b) that where in pursuant of subsection (3) of section 146 of the aforesaid Criminal Procedure Act 1965, one of three accused persons charged jointly duly elects to be tried by judge alone and another both of the other accused persons elect or elect to be tried with judge and jury, the judge nevertheless has jurisdiction and /or discretion to rule and/or order that the said three accused persons shall be jointly tried by judge alone

(3) Additionally, A DECLARATION to the effect that, in the circumstances adumbrated in subsection 3(1) and 3(2) hereof and in light of the 1st Accused's (i.e. Applicant's) election to be tried by judge and jury in pursuant of subsection (3) of section 146 of the Criminal Procedure Act 1965 aforesaid, the decisions by the learned judge alone together with the other accused persons or at all, were inconsistent with and in contravention of Sierra Leone, Act No.6 1993, and that the said decisions are accordingly infringement or likely infringement of the 1sts Accused's (i.e. applicant's fundamental human right to "fair hearing" under the said subsection 23 (1) of the constitution and so are accordingly invalid, void and of no effect in terms of subsection (15) of section 171 of the said 1991 constitution.

(4) Additionally an order of PROHIBITION restarting the High Court from further hearing proceedings found on the aforesaid Criminal. Information or Indictment dated 30th August 1999, as amended, on the basis of a trial by judge alone".

The reliefs sought can be put 'under three headings—

(1) Prerogative Orders under Section 125 of the Constitution

(2) Breach of the fundamental human right and freedoms of the individual i.e the applicant.

(3) Parliament acting in excess of jurisdiction

[p.290]

I am satisfied that the prerogative orders could be sought pursuant to the provisions in section 125 of the constitution. Counsel for the applicant is no doubt prosecuting this application pursuant to section 125 of the constitution which provides the following:

"125 The Supreme Court shall have supervisory jurisdiction over all other courts in Sierra Leone and over any other adjudication authority: and in exercise of its supervisory jurisdiction shall have no power to issue such directions orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibitions as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers". There is no contention between both sides that the court has such supervisory powers as contained in section 125, supra and the court can consider exparte motion for leave to issue orders of certiorari and prohibitions simpliciter. Where additional reliefs are sought for the interpretation of provisions of the Constitution the provisions in section124 of the constitution applies. It provides that the Supreme Court shall save as otherwise provided in section 122 of the Constitution have original jurisdiction to the exclusive of all other courts:—

(a) in all matters relating to the enforcement or interpretation of any provision of this constitution and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law under this Constitution.

(2) Where any question relating to any matter or question as is referred to in subsection (1) arises in any proceedings in any court, other than the Supreme Court, that the Court shall stay the proceedings and refer the question of law involved to the Supreme Court for the determination and the court in which it arose shall dispose of the case in accordance with the decision of the Supreme court".

The provisions in Section 124 are quite and unequivocal.

Section 124 was available to be utilized-by counsel for the applicant but he advised himself to entangle an application for leave to issue prerogative orders with one for interpretation of provisions in the constitution i.e. 23(1) and section 171(12) and whether Parliament acted in excess of the powers conferred upon it.

I opine, that the Constitution clearly empowers the court to determine [p.291] if Parliament acted in excess of the power conferred upon it by the constitution – Vide section 124 supra. Counsel for the applicant has not produced any cogent authority to support his submission that the instant notice of motion is tenable. The rules of the court governing some of the reliefs sought and how application can be made are also clear and unequivocal-vide Rule 89(1) which states "save as otherwise provided, in these Rules an action brought to involve the original jurisdiction of the court shall be commenced by Originating notice of Motion in Form 8 set out in the First Schedule to these Rules which shall be signed by the plaintiff or his counsel".

Form 8 provides in the body the following:—

“TAKE NOTICE that the Supreme Court of Sierra Leone will be moved at the expiration of 21 days from the service upon you of this notice or soon thereafter as counsel can be heard for the following reliefs pursuant to section 104 of the constitution of Sierra Leone, 1978 namely ……..”

Section 104 of that constitution is now replaced by section 124 of the constitution of 1991.

In my view what counsel for the applicant has done is not only irregular but he has attempted to achieve three types of fundamental reliefs by a process unknown to the law. The constitution and rules must be complied with.

Parliament in its wisdom, enacted sections 124 and 125 to meet the situations therein spelt out. The side notes to these two sections are clear indications of what Parliament enacted.

The side notes to section 124 is “Interpretation of the constitution “and that to section 125 is Supervisory Jurisdiction”.

The notice of motion before the court as its stands is one where the leave of the court is mandatory-vide section 125 on the other hand an application made pursuant to section 124 is as of right

Counsel for the applicant has invoked the provision Rule 98 of the rules. I agree with him, it is residual. Rule 98 provides “where [p.292] no provisions is expressly made in these Rules relating to the Original , and Supervisory Jurisdiction of the Supreme Court the practice and procedure for the time being of the High Court shall apply mutantis mutandis

In my view, this rule could not invoked because the court lacks jurisdiction to hear and determine the Notice of Notion because it is not properly before the court.

The court cannot and will not make a severance between the relief for leave to issue any order relating to and concerning the orders of certiorari and Prohibition and. those relating to and concerning the declaratory relief sought. What is the consequence of the culdesac which counsel for the applicant has created? In my View the Notice of Motion ought to be dismissed and is accordingly dismissed with costs.

(Sgd)

Sydney Warne

J.S.C.

CASES REFERRED TO

1. SC.MISC.APP No.6/93 Justice F.C Gbow Vs Julius Spencer

STATUTES REFERRED TO

1. Rules 88 and 89 of the Supreme Court P.N No 1 of 1982

2. Section 28 of the constitution of Sierra Leone Act No.6 of 1991

3. Section 136 of the Criminal Procedure Act, No.32 of 1965 as amended by Act No. 1 of 1970

4. Subsection (20 of section 144 of the Criminal Procedure Act 1965,

DR. HARRY WILL AND ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[SC.MISC 6/99] [p.366-375]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 20 JANAURY, 2000

CORAM : MR. JUSTICE D.B.F. LUKE , C.J.

MR. JUSTICE A.B.TIMBO, J.S.C.

MR. JUSTICE S.C.E WARNE, J.S.C.

MR. JUSTICE E.C.THOMSON-DAVIS, J.S.C.

MR. JUSTICE. N.D. ALHADI, J.A.

BETWEEN:—

DR HARRY WILL APPLICANT

AND

ATTORNEY GENERAL AND MINISTER OF JUSTICE RESPONDENT

DR. BU-BUAKEI JABBI FOR THE APPLICANT

S. E. BEREWA ESQ., ATTORNEY GENERALWITH HIM

P.B. KEBBIE DIRECTOR OF PUBLIC PROSECUTIONS (FOR THE RESPONDENT)

RULING

WARNE J.S.C.

DR. JABBI COUNSEL for the applicant attempted to seek leave to amend the Notice of Motion filed on the 29th day of October, 1999 by adding a fifth relief and filing a Supplemental Affidavit in support thereof.

The Learned attorney general Counsel for the Respondent objected to the Motion being [p.367] heard. He submitted that to file a supplemental Affidavit and to use it in support of the Motion cannot be a relief. He further submitted that this is an admission that the papers before the court were not

completed before being filed - this he argued, cannot be done and he refers to Rules 88 and 89 of the Rules of the Supreme Court P. No.1 of 1982 (hereinafter referred to as the Rules.)

Dr. Jabbi then sought leave to withdraw the Original application and leave to file a supplemental affidavit exhibiting the Drawn Up Order of the High Court dated 18th October 1999.

Before Counsel could proceed with application, the Learned Attorney-General raised a Preliminary Objection to the Motion being entertained the court. He submitted that from some of the relief sought; the Motion is for the Original Jurisdiction of the Court to be invoked. He argued that in order to do that, the relevant provision Rule 89(1) of the Rules is applicable. This rule specifies the use of forum 8, which counsel has failed to apply. Reliefs for declarations should be by Originating.

Notice of Motion, he submitted. The Attorney General further submitted that there are three areas where the original jurisdiction of the court can be invoked that is to say:—

(1) Referenced Under section 28(1) of the constitution of Sierra Leone Act No. 6 of 1991 (hereafter referred to as the Constitution) and also section 127 of the Constitution. He went on to submit that the Rules applicable in these instance are rules 89 and 99 of the rules, Rule 98 of the Rules is inapplicable for reliefs for the Declaration he added. The Attorney general has urged the Court that a number of the reliefs sought are not properly before the court since the relevant rules of procedure have not been complied with. The attorney General finally urged the court to dismiss the motion because the court lacks jurisdiction.

In answer to the objection, Dr. Jabbi in his usual forthright manner submitted that the [p.368]

objection is totally misconceived. He urged that the application is concerned with the supervisory jurisdiction of the court. Counsel categorically submitted I quote: "The declarations are in the same vein. I submitted that declaratory orders as to any relief or remedy under the Constitution whether or not the include relief under sections 28, and 127 are perfectly appropriate Under 125 of the Constitution." Counsel cited the case of Sc.MISC.APP.No.61/93 — Justice F.C. Gbow Vs. Julius Spencer and Others in support of his submissions. Let me say here and now that, that case does not bind the court — vide section 122(2) of the constitution. Counsel further argued that the reference jurisdiction is distinct from original and supervisory Jurisdiction. This submission of counsel leaves me at a loss to relate it to the foregoing submission that the declaration reliefs sought are perfectly sought in due course in order to determine if they can all be entertained in the same motion. Counsel finally submitted that rules 5 and 98 of the Rules are both residual and orders of declaration are ancillary orders and urged court to ignore the objection.

The Attorney general replied that declaratory orders are not ancillary reliefs but substantive reliefs and these cannot be made ancillary to prerogative order.

In order to juxtapose these forceful submissions of both counsels, it is imperative that I reiterate the reliefs. I quote: "In the matter of an application by Dr. Harry Will Under Section 125 of the Constitution of Sierra Leone Act No.6 of 1991 for leave to apply for Orders of certiorari and prohibition and for

related declarations, orders or directions. In the matter or two rulings given on 18th October 1999 by the Hon. Mr. Justice M.O. Taju-Deen (High Court Judge) in proceedings on the criminal Information dated 30th August 1999 filed in the high court of Sierra Leone holden at Freetown and instituted — "The State Vs. Dr. Harry Will, Lamin feika, Bockarie Kakay (Trading as Mariama and Sons (A FIRM): As amended.

BETWEEN:

Dr. Harry will — APPLICANT

And

Attorney General and Minister of Justice — Respondent

STATEMENT ACCOMPANYING EX PARTE MOTION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION. ETC.

PURSUANT TO ORDER 59, RULE 3(2) OF THE (ENGLISH) SUPREME COURT RULES 1960

NAME AND DESCRIPTION OF APPLICANT

DR. Harry Will, of No. 8, Spur road, Wilberforce, Freetown, and 1st accused in the aforesaid criminal Information dated 30th august, 199.

RELIEF SOUGHT

1. The Applicant desires leave to apply for the following orders:

(a) CERTIORARI to remove into this Honourable Supreme Court for the purpose of being quashed TWO Rulings given by the Hon. Mr Justice M.O. Taju-Deen (High Court Judge) on 18th October 1999 in proceedings on the aforesaid Criminal Information of 30th August 1999 as amended.

(b) Additionally, PROHIBITION restraining the High Court from further hearing and determining proceedings founded on the aforesaid criminal Information, in so far as the Applicant herein and 1st Accused therein is thereby affected, until determination by the supreme court of the substantive application for which leave shall have been granted herein, or until the supreme Court shall other-wise order.

2. Additionally, A DECLARATION to the effect that the 1st Proviso to subsection (1) of section 136 of the Criminal Procedure Act, No. 32 of 1965, as amended by act No.1 of 1970.

[p.370]

(a) is inconsistent and irreconcilable with the mandatory and overriding provisions in section 108 and the substantive part of subsection (1) of section 136 respectively of the criminal Procedure act 1965, amended as aforesaid: and/or

(b) was and is inconsistent and irreconcilable with the mandatory and overriding provisions in, and was accordingly impliedly repealed by, Section 1 of the Courts (Amendment) Act, No. 2 of 1981; and/or

(c) was enacted in exacted in excess or Ultra vires of the powers thereto conferred on Parliament by law at the time of its enactment.

And accordingly was and is invalid, null and void, thereby depriving and denying the High Court of all jurisdiction to try the Applicant herein as 1st accused or at all on the aforesaid Criminal Information dated 30th August 1999, as amended, in so far as the indictment depending on the said 1st proviso to Subsection (1) of Section 136 of the Criminal Procedure Act 1965 amended as aforesaid.

3. (1) Additionally, A DECLARATION to the effect that the provisions in Subsection (3) of Section 146 of the Criminal Procedure Act, No 32 of 1965, No. 32 of 1965, take precedence and priority over, and thereby override, the provisions in Subsection (2) of Section 144 of the said Criminal Procedure Act as amended by Section 3 of Act No.11 of 1981.

(2) Additionally A DECLARATION to the effect that the Learned presiding Judge in the Trial of the Applicant herein, inter alia, on the Criminal Information or Indictment dated 30th August, 1999, as amended, erred in law in holding in proceedings thereon on 18th October, 1999:—

(a) that an application had been duly made to the Court for trial by Judge alone in terms of Subsection (2) of Section 144 of the [p.371] criminal Procedure Act 1965, amended as aforesaid, by the Learned attorney General and Minister of Justice having merely filed such application without subsequently moving the Court to that effect in viva voce proceedings before the Court;

(b) that where, in pursuant of subsection (3) of section 146 of the aforesaid criminal Procedure Act 1965, one of three accused persons charged jointly duly elects to be tried by judge alone and another or both of the other accused persons elects or elect to be tried with judge and jury, the judge nevertheless has jurisdiction and/or discretion to rule and/or order that the said three accused persons shall be jointly tried by judge alone.

3. Additionally, A DECLARATION to the effect that, in the circumstances adumbrated in sub-paragraphs (3(10 and 3(2) hereof and in light of the 1st Accused's (i.e. Applicant's) election to the tried by judge and jury in pursuant of subsection (3) of section 146 of the criminal Procedure act 1965 aforesaid, the decisions by the Learned Presiding judge that the 1st Accused shall be tried by Judge alone together with the other accused persons or at all and in assuming jurisdiction to so try the said 1st Accused (Le Applicant herein) among others or at all, were inconsistent with and in contravention of the provisions in subsection (10 of section 23 of the constitution of Sierra Leone, Act. No.6 of 1991, and that the said decisions are accordingly infringements or likely infringements of the 1st Accused (i.e. Applicant's) fundamental human right to a "fair hearing' under the said subsection 23 (10 of the constitution and so are accordingly invalid, void and of no effect in terms of subsection (15) of section 171 of the said 1991 Constitution.

4. Additionally an order of PROHIBITION restraining the High Court from further hearing proceedings founded on the aforesaid criminal information or [p.372] Indictment dated 30th august 1999, as amended, on the basis of a trial by judge alone."

The reliefs sought can be put under three headings:—

(1) Prerogative Orders under Section 125 of the constitution

(2) Breach of the fundamental human right and freedoms of the individual i.e. the applicant.

(3) Parliament acting in excess of jurisdiction.

I am satisfied that the prerogative orders could be sought pursuant to the provisions in section 125 of the Constitution. Counsel for the applicant is no doubt prosecuting this application pursuant to section 125 of the Constitution, which provides the following:

"125 The supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directions orders or writs including writs of habeas corpus, orders of certisoeri, mandamus and prohibition as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers." There is no contention between both sides that the court has such supervisory power as contained in section 125,supra; and the court can consider an expert motion for leave to issue orders of certiorari and prohibition simpliciter. Where additional reliefs are sought the interpretation of provisions of the Constitution the provision in section 124 of the Constitution applies. It provides that "The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction to the exclusive of all other courts:—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution; and

[p.373]

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law under this Constitution.

(2) Where any question relating to any matter or question as is referred to in subsection (1) arises in any proceedings in any Court, other than the Supreme Court, that Court shall stay the proceedings and refer thee question of law involved to the Supreme court for determination; and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

The provisions in section 124 are quite and unequivocal.

Section 124 was available to be utilized by counsel for the applicant, but he advised himself to entangle an application for leave to issue prerogative orders

with one for interpretation of provisions in the Constitution i.e. section 23(1) and section 171 (15) and whether Parliament acted in excess of the powers conferred upon it. I opine, that the Constitution

clearly empowers the court to determine if Parliament acted in excess of the powers conferred upon it by the constitution clearly empowers the Court to determine if Parliament acted in excess of the powers conferred upon it by the Constitution — Vide section 124 supra. Counsel for the applicant has not produced any cogent authority to support his submissions that the instant notice of motion is tenable. The rules of court governing some of the reliefs sought and how application can be made are also clear and unequivocal-vide rule 89(10 which states: "save as otherwise provided, in these rules an action brought to involve the original jurisdiction of the Court shall be commenced by Origination Notice pf Notion in from 8 set out in the first Schedule to these Rules which shall be signed by the plaintiff or his counsel."

[p.374]

Form 8 provides in the body the following:—

"TAKR NOTICE that the supreme Court of Sierra Leone will be moved at the expiration of 21 days from the service upon you of this notice or so soon thereafter as Counsel can be heard for the following reliefs pursuant to the section 04 of the Constitution of Sierra Leone, 1978 name……"

Section 104 of that Constitution is now replaced by section 124 of the Constitution of 1991.

In my view what counsel for the applicant had done is not only irregular but he has attempted to achieve three types of fundamental reliefs by a process unknown to the law —The Constitution and rules must be complied with.

Parliament, in its wisdom, enacted sections 124 and 125 to meet the situations therein spelt out. The side notes to these two sections are clear indications of what Parliament enacted. The side note section 124 is "Interpretation of the Constitution" and that to section 125 is "Supervisory Jurisdiction."

The notice of motion before the court as it stands is one where the leave of the Court is mandatory -vide section 125; on the other hand an application made pursuant to section 124 is as of right.

Counsel for the applicant has invoked the provision of Rule 98 of the rules. I agree with him, it is residual. Rule 98 provides "Where no provision expressly made in these Rules relating to the Original and supervisory Jurisdiction of the Supreme Court the practice and procedure for the time being of the High Court shall apply mutantis mutandis."

In my view, this rule could not be invoked because the Court lacks jurisdiction to hear and determine the Notice of Motion because it is not properly before the Court.

[p.375]

The Court cannot and will not make a severance between the reliefs for leave to issue and order relating to and concerning the orders of certiorari and Prohibition and those relating to and concerning the declaratory reliefs sought. What is the consequence of the cul-desac which counsel for the applicant has created? In my view the Notice of Motion ought to be dismissed and is accordingly dismissed with costs.

(Sgd)

Sydney Warne J.S.C.

CASES REFERRED TO

1. Sc.MISC.APP.No.61/93 - Justice F.C. Gbow Vs. Julius Spencer and Others

STATUTES REFERRED TO

1. section 28(1) of the constitution of Sierra Leone Act No.6 of 1991

2. Subsection (3) of Section 146 of the Criminal Procedure Act, No 32 of 1965, No. 32 of 1965

3. Subsection (2) of Section 144 of the said Criminal Procedure Act as amended by Section 3 of Act No.11 of 1981

DR. HARRY WILL AND ATTORNEY-GENERAL & MINISTER OF JUSTICE

[SC. MISC. APP. NO. 7/99] [p.298-305]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23 MARCH 2000

CORAM: MR. JUSTICE D.E.F. LUKE - C.J.

MR. JUSTICE M.O. ADOPHY - J.S.C.

MR. JUSTICE A.B. TIMBO - J.S.C.

MR. JUSTICE H.M. JOKO-SMART - J.S.C.

MR. JUSTICE S.C.E. WARNE - J.S.C

IN THE MATTER OF AN APPLICATION UNDER SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE, ACT NO. 6 OF 1991 AND RULE 5 (1) & (2) OF THE SUPREME COURT RULES. 1982 FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS, PROHIBITION AND DECLARATION AND FOR ANCILLARY ORDERS OR DIRECTIONS.

IN THE MATTER OF A RULING GIVEN ON 11TH OCTOBER 1999 BY THE PRESIDING JUDGE:

IN HIGH COURT NO. 3, THE HONOURABLE MR. JUSTICE M.O. TAJU-DEEN (JUDGE), IN PROCEEDINGS ON THE CRIMINAL INFORMATION DATED 30TH AUGUST 1999 PENDING IN THE SAID HIGH COURT HOLDEN IN FREETOWN AND INTITULED STATE Vs. DB. HARRY WILL, LAMINA PEIKA, BOCKARIE KAKAY (TRADING AS MARIAMA & SONS (A FIRM))".

BETWEEN:—

DR. HARRY WILL - APPLICANT

AND

ATTORNEY-GENERAL & MINISTER OF JUSTICE - RESFONDENT

DR. BU-BUAKEI JABBI - FOR THE APPLICANT

A.G. SOLOMON BEREWAH, D.P.P. B. KEBBIE AND P. SCHWARZ - FOR THE RESPONDENT

RULING

LUKE, C.J.

This is an application by way of motion for leave to apply for orders of certiorari, mandamus, prohibition and related declarations and directions in respect of the ruling given on 11th October 1999 by the learned Presiding Judge in proceedings on the aforesaid Criminal Information dated 30th August 1999.

Stay of Proceedings founded on the Criminal Information aforesaid and at present pending in the High Court aforesaid, until determination by the Supreme Court of the substantive application for which leave is being sought herein, it and when such leave is granted, or until further order in respect thereof by this honourable Court.

[p.299]

A direction, if necessary, as to the appropriate format for citation of parties in the title or heading of an application for leave to apply for orders of certiorari etc. other than the format as to citation of parties to this application as set out in the above title or heading hereof in circumstances where the leave being sought is in respect of a decision, judgment or order made or given by a Judge presiding in a matter pending in the High Court of Sierra Leone, in view of the provisions in section 125 and subsection 120 (9) respectively of the Constitution of Sierra Leone 1991; and that the format as directed herein by this honourable Court, if different from the citation of parties hereto in the above title or heading, be used in the substantive application for orders of certiorari. etc. for which leave shall have been granted to the Applicant herein, if and shen so granted.

Notice was given that at the hearing of the motion, Applicant will seek, by Counsels Dr. Bu-Buakei-Jabbi, to use and rely on the statement accompanying the application and the Affidavit of Dr. Bu-Buakei-Jabbi sworn on the 25th day of November 1999 and filed herewith.

However, when this matter first came before the Court on the 20th January 2000 Dr. Jabbi for the Applicant could not proceed and requested an adjournment since he wished to ask leave to amend both the Notice of Motion paper as well as the Statement accompanying the Motion paper. All adjournment to the 9th February 2000 was consequently granted.

On the adjourned date, the leave to amend both the Motion paper and the Statement accompanying it was requested. Taking cognizance of the papers filed the leave to amend sought herein and other

related proceedings, the Court ordered Service of the Motion and other papers herein on the Respondent the Attorney General and Minister of Justice against the adjourned date —- Tuesday 15th February 2000.

On the said date the applicants request for leave to amend both the Notice of Motion; paper and the Statement accompanying it was granted.

The Applicant's Counsel's request for an adjournment to file the necessary amended papers was granted and the matter further adjourned to Thursday 17th February 2000.

[p.300]

Counsel for the Applicant on the 17th February urged the Court to grant the leave to apply for the prerogative orders of certiorari, mandamus and prohibition and related directions in respect of the ruling given on the 11th October 1999 by the learned Presiding Judge in proceedings on the aforesaid Criminal Information dated 30th August 1999; to grant a Stay of Proceedings in the Court below founded thereof and directions. Counsel sought to rely on Sec. 125 of the 1991 Constitution. Rules 5 (1) & (2) and Rule 98 of the Rules of the Supreme Court 1982 Ord. 52 r. 3 of the High Court Rules and English Rules 1960 Ord. 5 and especially 3, 4 to 10.

In seeking to persuade the Court to grant the reliefs sought, Counsel relied on the Affidavit sworn on the 25th November 1999 by Dr. Bu-Buakie Jabbi especially paras 4 to 9 thereof and the accompanying statement as amended. Counsel went on to cite the White Book 1960 Ord. 59 r. 3at p. 1725, stating that at this the leave stage of the application for the prerogative orders his duty to make a plausible case had been discharged. Consequently, he prayed the Court to grant the leave and the Stay of Proceedings.

The Attorney-General on 'behalf of the Respondent submitted that the Applicant's application for leave for the prerogative orders to issue was misconceived. He further submitted that the High Court presided over by Justice M.O. Taju-Deen has jurisdiction under See. 132 (1) of the 1991 Constitution, and that jurisdiction had not been exceeded to justify an application such as being currently made: that prerogative orders in Sec. 125 of , the Constitution should not be used to frustrate· the work of the Courts below especially the High Court: And that the mere couching of the matter as a Constitutional matter does not automatically entitle an accused person to have the matter referred to the Supreme Court. The Attorney-General further submitted that it is not every infringement of the law or the Constitution that amounts to a violation of fundamental rights of Sections 16-27 of the Constitution to justify a reference to the Supreme Court under Section 28 (3).

The Attorney-General argued that ''if the Judge erred at all it is an appealable matter" thus laying no foundation for granting leave for the prerogative order of certiorari which applies only for an error of law apparent on the face of the record quoting

The Republic Vs the High Court of Kumasi 1986 L.R.C. (Const) 610 at p. 618.

[p.301]

The Attorney-General then followed Applicant's Counsel into the labyrinth of whether or not a fair hearing had been obtained in High Court No. 3 presided over by Hon. Mr. Justice M.O. Taju-Deen; whether or not "the 1st proviso to sub-section (1) of Sec. 136 of the Criminal Procedure Act No. 32 of 1965 as amended by Act No. 1 of 1970 -

(a) was enacted in excess or ultra vires of the powers thereto conferred on Parliament by law at the time;

(b) was and is incompatible with the provisions in Sec. 15 (a) and sub-section (1) of Section 23 of the Constitution of Sierra Leone Act No. 6 of 1991;

(c) violates the principle of contradiction vis-avis the substantive part of subsection (1) of Section 136 of the said Criminal Procedure Act 1965 as amended;

and was and is accordingly invalid, null and void in terms of subsection (4) of the Interpretation Act No. 7 of 1965 and of subsection 15 of Section 171 of the Constitution of S.L. 1991, respectively, as the case may be."

The learned Attorney finally submitted that the present matter was not a proper case to come before this Court as the Applicant has not even made out a prima facie case for granting the leave. That the High Court acted properly and within its jurisdiction in refusing to quash the indictment on the grounds given by the Applicant. And the High Court properly refused the reliefs sought.

Counsel for the Applicant in reply submitted that moat if not all of the Counsel for the Respondent's arguments were premature in that they raised issue and dealt with matters belonging to the second stage of the application for prerogative orders i.e. the stage after leave has been granted, whereas the motion presently being argued related to the leave or threshold stage.

In my opinion this Court is not required to enter the labyrinth constructed by Applicant's Counsel. For this the leave stage of the application for the prerogative writs of certiorari, mandamus and prohibition a prima facie arguable case for leave to be granted will suffice.

[p.302]

The Court must first be satisfied that the Applicant has 'some genuine locus standi" to appear before it - whether as "a person aggrieved" or one "having a particular grievance" or one having a "specific legal right" or "a sufficient interest." If so satisfied and a prima facie cue, albeit a somewhat flimsy one exists, this could suffice to allow the Court to exercise its direction in granting the leave to apply for the Orders.

In the words of Lord Diplock in the case of I.R.C. v Federation of Self Employed 1981 2 A.E.R. 93 at p. 106:

(At the leave stage) "If on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the

applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for that relief."

In my view this dictum is a correct statement of what is required at the leave stage; and I adopt it.

In this case, the applicant Dr. Harry Will is one of the three accused persons standing trial in High Court No. 3 as such I find that he is a person having a sufficient interest in the matter to which the application relates. Having looked at the papers filed herein and listened to the submissions of learned counsel, I also find that a prima facie arguable case exists.

As such, I will grant the leave requested to apply for the Orders of Certiorari, Mandamus and Prohibition in respect of the Ruling given on 11th October 1999 by the learned Presiding Judge in proceedings on the aforesaid Criminal Information dated 30th August 1999.

I do not grant the stay of Proceedings requested.

In respect of the request for directions:- It is my opinion that no one single format for citation of parties in the title or heading of an application for leave to apply for Orders of Certiorari etc. will necessarily fit each and every set of circumstances Counsel asking to appear before the Supreme Court would be well advised not to violate the Constitution or any other substantive law, rule or court or settled practice.

[p.303]

In the instant case, although I am still not fully convinced that it is entirely necessary to give such directions, Counsel would do well to ensure that the format used in the substantive application sufficiently identifies the matter pending in the High Court for any Orders that might issue to apply to and only to the said proceedings.

Suffice it to say that in the instant case the parties shall be The State vs. High Court No. 3 (ex parte Dr. Harry Will)

SGD.

[p.304]

DESMOND LUKE, C.J

(1) Leave granted to apply for certiorari. (2) I do not grant a Stay of Execution.

(3) Applicant to ensure that the title is amended.

CONTEMPT PROCEEDINGS

The Court draws attention to Dr. Jabbi to a letter dated 15.3.2000 asking him to show why the content thereof should not be deemed to be contemptuous of the court. Letter read part of the proceedings

Dr. Jabbi defended his letter and apologized.

A.G as an officer of the Court states the gravity of the contempt.

Contempt proceedings are stood down.

Court resumes at 11.30a.m.

Court: The matter was stood down. Dr. Jabbi's letter written on the 15.3.2000 has been read out. Dr. Jabbi was given the opportunity to purge his contempt.

Dr. Jabbi is given and opportunity to say something before the judgment of this Court is delivered.

D. Bu-Buakei – As I said earlier, the letter was not by any stretch of the imagination intended to be contemptuous. I have profoundest respect not only for the Supreme Court of Sierra Leone but for every member individually and personally of the Supreme Court of Sierra Leone and indeed for all the courts, Justices and officers of the Judiciary of Sierra Leone. Far be it from me to ever contemplate the contempt towards [p.305] any of the officers of the Court. I have not consciously or intentionally done so in the said letter of 15th March, 2000. However, the effect of the said letter having being what to my surprise it has turned out to be, I have to accept your Lordship's view of the effect. And I crave the indulgence or your Lordship to accept that very sincere Apology and to treat the contempt though unintended, as sincerely and effectively purged. As a practitioner before this Court, I have always shown the greatest courtesy and respect in my appearance before your Lordship. I believe the same is true in my relationship and appearance before other jurisdictions. I urge your Lordship to take Judicial notice of that past conduct of mine both in this Court and in my other interaction with your Lordships. I did not intend to be contemptuous towards this Court. I very much regret that the said letter has given that effect. I accept that view of the matter. And I unreserved1y withdraw the parts of the letter that have given that effect. The contempt 1n the letter is not a contempt in the face of the Court. I would never knowingly commit such a contempt in the face of the court. The said contempt being what it is, I respectfully urge your Lordships to accept my unreserved apologies for it and to also accept my plea that it be totally withdrawn and effaced both from the records and your memories. And I hereby make solemn undertaking that neither in my thought nor in my conduct before this or any other Court in this jurisdiction or towards any judicial officer in that capacity nor in any other from whatsoever will I ever do anything smacking of such contempt or indeed amount1ng to such contempt. My Lords, on the basis of my acceptance of the effect of the letter as unintentionally amounting to a contempt and on the basis of my unreserved acceptance of that effect and the parts of the letter and on the basis of my apology and undertaking I urge your lordships to graciously treat the contempt as purged and you withhold the ultimate sanction that you might otherwise be inclined to impose. I can only finally leave my self at your mercy.

The Court by a unanimous verdict finds you guilty of contempt of this Court. Do you have anything to say before sentence?

Jabbi: I am at the mercy of the Court.

Sentenced to 1 day's imprisonment

(SGD)

D.E.F. LUKE

CHIEF JUSTICE

(SGD)

M. O. ADOPHY, JSC

(SGD)

A. B. TIMBO, JSC

(SGD)

H. M. JOKO-SMART, JSC

SGD.

HON. MR. JUSTICE S.C.E. WARNE, JSC

CASES REFERRED TO

1. The Republic Vs the High Court of Kumasi 1986 L.R.C. (Const) 610 at p. 618

2. I.R.C. v Federation of Self Employed 1981 2 A.E.R. 93 at p. 106

STATUTES REFERRED TO

1. Sub-section (1) of Sec. 136 of the Criminal Procedure Act No. 32 of 1965 as amended by Act No. 1 of 1970

2. subsection (1) of Section 136 of the said Criminal Procedure Act 1965

3. subsection (4) of the Interpretation Act No. 7 of 1965 and of subsection 15 of Section 171 of the Constitution of S.L. 1991

EX-PARTE MUCTARU OLA TAJU-DEEN v. THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION & 2 ORS.

[SC. MISC. APP. 1/2001] [p.376-387]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23 FEBRUARY 2001

CORAM: HON. MR. JUSTICE D.E.F. LUKE

HON. MR. JUSTICE A.B. TIMBO

HON. MRS. JUSTICE A.V.D. WRIGHT

HON. MR. JUSTICE H.M. JOKO SMART

HON. JUSTICE S.C.E. WARNE

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE 1991

AND

In the matter of an application under section 125 of the Constitution of Sierra Leone Act No.6 of 1991 and under the Common law for leave to apply for an Order of Prohibition and for directions and consequential Orders.

AND

In the matter of the English Supreme Court Rules AND

In the matter of the Anti-Corruption Act 2000 AND IN THE MATTER

BETWEEN:

EX-PARTE MUCTARU OLA TAJU-DEEN — Applicant

AND

The COMMISSIONER of the Anti-Corruption Commission — 1st Respondent

AND

THE ST ATE represented by THE LEARNED

ATTORNEY -GENERAL AND MINISTER OF JUSTICE — 2nd Respondent

AND

THE HON. MRS. JUSTICE P A TRICIA MACAULEY — 3rd Respondent

C. Doe-Smith, Esq. and T.M. Terry, Esq. for Applicant

S.E. Berewa, Esq. Attorney-General,

B.S. Kebbie, Esq., D.P.P, L.M. Farmah, Esq.,

Senior State Counsel & M. Sesay, Esq., Counsel for Respondents

Judgment date the 23rd day of February 2001.

JUDGMENT

JOKO SMART, JSC:

This application a link in a chain of Motions before this court by the same applicant seeking, among other things, an order the effect of which is to put an end to his current trial in the High Court before the Hon. Mrs. Justice Patricia Macauley. Following the ruling of this Court on 18 [p.377] January 2001 whereby an Order nisi previously granted to the applicant to pursue certiorari proceedings was discharged, the applicant appears to have abandoned that course of action and has opted to proceed with Prohibition and a Motion for various Declarations. The present application is the one dealing with Prohibition. We decided to defer a hearing of the Motion for Declarations to a later stage.

The applicant is not happy with Mrs. Justice Patricia Macauley presiding over his trial in a criminal matter in the High Court because, in his view, there is a likelihood of her being biased. The trial is by judge alone. This apart, the applicant wants to be rid of the whole indictment against him because he alleges that there were certain defects in the preliminary proceedings leading to a Report of the Anti-Corruption Commission, a body established under the Anti-Corruption act, Act No.1 of 2000, which report the Attorney-General formed the basis of the indictment. I will give details of these defects later on in this ruling.

We decided to make the application for leave inter parties and invited written arguments on the two issues from both the Applicant and the Respondents. Having perused the written arguments we granted the leave and we limited the oral arguments to the question of bias only as we were satisfied that the written arguments were sufficient to make us reach a decision on the second leg of the application.

Prohibition, like the other prerogative orders of certiorari and mandamus, lies when there is a defect in the process by which a decision of a subordinate court is reached; it is not concerned with the merits of the decision itself. Speaking on judicial review generally, of which prohibition is a part, Lord Hailsham of St. Marylebone underscores the point in North Wales Police v Evans f1982U ALL ER 141, 143:

"The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the court".

Prohibition can therefore lie where there is a complaint of bias against a judge trying a matter. This is jurisdictional as bias goes to the root of the judicial process. But if the grievance is about a defect in a system before a matter went before the judge there are other considerations to be taken into account. I shall elaborate on this when I come to the second leg of the application.

[p.378]

Bias

The applicant's allegation of bias by the Hon. Mrs. Justice Patricia Macauley is founded on two incidents: one allegedly took place in the Chambers of the applicant himself at the time when he was a judge sitting on a criminal trial, i.e., The State vs. Hon. Dr. Harry Will and Others, and the other in the Chambers of Mrs. Justice Macauley. In respect of the first, the applicant complains that Mrs. Justice Macauley made certain remarks to him as reported in his exhibit MOTD 19 attached to his affidavit sworn the 11th January 200 I and filed in support of this application. The remarks were that there were rumours in Freetown that the applicant would not find the accused persons he was trying guilty. The applicant now claims that these remarks may very well haunt Mrs. Macauley now trying him since there is a nexus with the indictment on which he is standing trial. The nexus is that the substratum of the indictment relates to his dealings with one of the accused persons, Bockari Kakay, who was the only accused that was eventually found not guilty by the judge. There is no suggestion that at the time that the alleged remarks were made there was any inkling that the applicant might one day be charged with offences having a nexus with that trial. Indeed, Mr. Terry, Counsel for the applicant forcefully put before us that only a clairvoyant, and Mrs. Macauley is not one such person, would have at the time that the remarks were made, known that the applicant would be in his present predicament. Mr. Terry therefore lays more emphasis on likelihood of bias rather that on naked bias. In his supplemental affidavit sworn to the 12 February 2001 in opposition to the application, Lahai Momoh Farmah deposed that Mrs. Justice Macauley denied making the remarks complained of. I will not go into the merits of this denial as I regard it as hearsay.

The other incident, as I have mentioned earlier, happened in the chambers of Mrs. Macualey. The applicant complains that the judge ordered her Registrar to remove from her file in the criminal case against the applicant an affidavit dated 21 November 2000 sworn to by the applicant. This complaint is supported by an affidavit sworn to the 11th January 2001 by Michael Turay, a clerk in the office of Mr. Terry, who deposed that he presented the said affidavit to Felix Koroma, the Registrar attached to the court of Mrs. Macauley. The applicant's said affidavit was not exhibited in the affidavit of Michael Turay. Turay's affidavit repeated verbatim his affidavit sworn to the 7th day of December 2000 in support of a Notice of Motion of the same day. There is no denial by the respondents that a document was removed from the file at the instance of the judge but there is a contention with regard to the nature of the document. Felix Koroma, the registrar, deposed in his affidavit of the 30th January 2001 that the document which he received from Michael Turay was a Notice of Motion in the High Court captioned: MISC.APP.228/2000 D.No12:

BETWEEN: THE STATE — Respondent AND HON. MR. JUSTICE M.O TAJU-DEEN — Applicant. [p.379]

The said Notice of Motion, Koroma says, is exhibit "A" of the affidavit of Lahai Momoh Farmah sworn to on 30th January 2001 in opposition to this application. That Notice of Motion is supported by an affidavit sworn to by the applicant herein and it contains two exhibits. One is a letter written by the applicant to the Chief Justice which contains the alleged remarks by Mrs. Macauley (exhibit MOTD 1). This affidavit is the same as exhibit MOTD 19 of the affidavit of the applicant in support of his present application before us. The other exhibit (MOTD2) is the affidavit of Michael Turay dated the 7th December 2000 which is also the same as his affidavit of the 11th January 2001. I must say that there

has been total prolixity in the filing of affidavits many of which are repetitive but this cannot be allowed to obfuscate an issue which appears to me to be very simple.

I consider it unnecessary, in reaching a conclusion as to a likelihood of bias, to determine which document was actually delivered to the clerk of Mrs. Justice Macauley and which she ordered to be expunged from her court records and be returned to the source from which it came. What I consider to be relevant is whether or not the disputed document regularly found its place in the file of the judge. If the answer is in the negative then the question of bias cannot arise. I will describe the regular process by which documents filed in the office of the Master & Registrar find their places in judges' files. I knew it during my 32 years practice at the bar and I have no reason to believe that it has changed. In the case of an affidavit relating to a matter before a judge, the original and a copy are put in the judge's file by the filing officer in the office of the Master and Registrar and the file is collected by the Registrar attached to the judge or is taken to him or her by another officer in the filing office. F or all other documents requiring a fresh allocation to a judge like a Miscellaneous Application, a separate file is opened and the application is placed there. Then the file is sent by the Master and Registrar to the Chief Justice or the Justice of Supreme Court responsible for the allocation of cases for assignment to a judge. It is after the assignment that the case file containing the original document together with a copy finds itself in the chambers of the judge taken there by the Registrar attached to the judge or some officer of the filing office. In neither case is it regular for a solicitor's clerk to take the original and copy document intended for the judge's file to the chambers of the judge and request the Registrar to place them in the judge's file. This being the case, I opine that Mrs. Justice Macauley rightly ordered the document whatever it was to be removed from her file and returned. The question about her motive in doing so becomes to me irrelevant. I therefore find that bias cannot be imputed to her in the circumstances.

The only incident left to consider for the allegation of bias is the first I will do so by beginning with the law on bias.

[p.37]

The law on bias.

Speaking on bias, Lord Cranworth, L.C. had this to say in Ranger v. Great Western R. v. Co. 5 H.L. 72, 98:

"A judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent."

But in Franklin v. Minister of Town and Country Planning [1949] A.C. 87. 1 03, Lord Thankerton gives a much limited connotation to the word bias. He says:

"The use of the word bias should be confined to its proper sphere; its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office as an

arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute."

Bias is presumed if a judge has an interest, pecuniary or otherwise and he is automatically disqualified from sitting in judgment over a case concerning that interest. This is in line with the principle that a man shall not be a judge in his own cause expressed by the Latin maxim nemo judex in sua causa. This has been established as far back as 1852. Thus in Dimes v. Proprietors of Grand Junction Canal (1852) 3 HL Cas. 759. 10 ER 301, Lord Cottenham, the then Lord Chancellor, owned substantial shares in the defendant company. In an action against the company, Lord Cottenham sat on appeal from a judgment in favour of the company, which he affirmed. On an appeal to the House of Lords, it was held that Lord Cottenham was disqualified form sitting as a judge in the case because of the financial interest which he had in the suit. A very significant modem example is that of Lord Hoffmann in the case of R. v Bow Street Metropolitan Stipendiary Magistrate & Ors. ex parte Pinochet Ugarte (No.2) [1999] 1 ALL ER 577 in which the House of Lord set aside its own previous judgment, in [1998] 4 ALL ER 897 because Lord Hoffmann sat on the case when he was at that time a director and chairperson of Amnesty International Charity Limited, a subsidiary of Amnesty International that was a party in the action.

[p.380]

In Pinochet's case, like the instant case before us, no allegation of actual bias was made and established against Lord Hoffmann. What was in issue is the likelihood of bias. This case was preceded by a stream of cases beginning with R. v Rand (1866) LR 1 OB 230 in which Blackhurn J. expressed the view that a real likelihood of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating then was incapacitated by interest from doing so. In R. (De Vesci) v. Queen's County JJ. [1908] 2IR.271 Lord O'Brien took a further step to explain the contents of "bias". He said: "by bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be real evidence to satisfy (the court) that there was a real likelihood of bias". Two years later, in R. (Donoghue) b. County Cork JJ [1910] 2 IR 271 275 Lord O' Brien elaborated on bias as follows: I do not think that the mere vague suspicion of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be different if suspicion rested on reasonable grounds, but certainly merely flimsy, elusive, morbid suspicion should not be permitted to form a ground of decision"

In R. v. Nailsworth Licensing Justices, ex parte Bird [1953] 2 Q.B.D 652, the court did not mention these last three cases but Goddard C.J. at page 654 expressed the view on bias as follows:—

"It is not something which raises doubt in somebody's mind that is enough to cause an order or a judgement to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject matter before the court which he does not disclose, has always been held to be enough to upset the decision of the court, but merely that a justice may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so".

In this case, one of three justices on a licensing committee hearing of an application for off-licence had previously been a signatory of a petition by members of the local community in favour of the licence. She signed the petition some weeks before the date of the hearing when she was shopping at a store known as Price's Stores. She was not originally scheduled to be on the committee hearing the application but on the day before the application was to be heard she was requested to take the place on the bench of other justices who were unable to attend the court the next day. She was not informed that any licensing application was due to be heard and she was not given details of the court's list for that day. She could not remember signing the petition and so she did not inform the other two justices that she had signed it. At the hearing of the application the petition was tendered in support of the application. It was objected to by those who opposed the application. The objection was overruled [p.382] and the petition was tendered in evidence. It was not read out in court nor was it handed to the justices for their inspection. While the justices were in retirement to consider the decision, it was observed that one of them had previously signed the petition. The justices returned into the court and announced that they have granted the licence. It was at this juncture that objection was raised that one of the justices had signed the petition but the justices declined to alter their decision. On a motion to the Queen's Bench Division for an order of certiorari to quash the justices' order on the ground of bias, it was held that although it was undesirable that a justice who had signed a petition should sit and adjudicated on the subject-matter of the petition, to justify setting aside that decision there must be something in the nature of real bias; merely that a justice might be thought to have formed some opinion on the subject-matter which she is called upon to decide was not a ground on which the decision could be set aside. Because both the applicant and the respondents have relied heavily on this case I will come back to it.

R. v. Camborne Justices: Ex parte Pearce [1954] 2 ALL ER 850 is another case worth mentioning. In this case Slade J. sitting in the Queen's Bench Division with two other judges, Lord Goddard C.J. and Cassels J., in a unanimous judgement of the court, applied the dictum of Blackburn J. in R. v. Rand (ante), adopted the views of Lord O'Brien (ante), and subscribed the following dicta which I find very illuminating for a decision of the case before us. "This court is of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the part complaining, but from such further fact as he might readily have ascertained and easily verified in the course of his enquiries." (at page 855). Slade J concludes his judgement with a caution on the indiscriminate application of the famous aphorism of Lord Hewart that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:

"The frequency with which allegations of bias have come before courts in recent times seems to indicate that the reminder of Lord Hewart, C.J., R. v Sussex JJ. Ex p. McCarthy [1924] 1 K.B. 259 is being urged as a warrant for quashing convictions or invalidation of orders on quite unsubstantial grounds and, indeed, in some cases on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J. is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done." (at page 855).

This is as far as I consider it necessary to delve into English case law on bias for the purpose of the instant case. Apart from two reported cases, (See Foulah v. Kolifa Rowala Tribal Authority 1950 -56 ALR

S.L. 142; Hon. T.S. [p.383] Brewa v. Tuberville & Ors. SLLR 1960 — 61, 111) in which dicta were expressed by Luke, Ag. J. and Bankole Jones J respectively on the possible application of the nemo judex in sua causa principle to Local Court members who are customary court judges if the evidence warranted it, but there was no such evidence to warrant applying it, local judicial precedent involving superior court judges is lacking on bias. This is therefore one appropriate area in which I can legitimately borrow a leaf from English common law bearing in mind that that law is our residuary law pursuant to section 170 of the 1991 Constitution. I will therefore adopt the various dicta expressed in those cases as I find them apposite to the case before us.

The oral presentation

With their written presentation as their coin of vantage and the time limitation we imposed on them, counsel on both sides merely highlighted their positions of strength. I will therefore summarise here their arguments. With regard to the first incident, for the applicant, Mr. Terry did not go beyond his written exposition save that he assisted this court with his statement that Mrs. Justice Macauley might not even have remembered while sitting on his client's case that she made those remarks and that was one of the reasons that he deemed it necessary to file the affidavit which gave rise to the second incident in order to jug her memory that she did make those remarks. No further evidence is adduced to substantiate the allegation of likelihood of bias. So far as the other incident is concerned, Mr. Terry stressed that the removal of the affidavit from the file on the instruction of the judge is what constitutes bias on her part when taken in combination with the first incident. It must be noted that Mr. Terry never intended to use the affidavit at the trial. Mr Berewa for the respondents contended that the document that was removed was Miscellaneous Application 228/2000. I have already ruled that the nature of the document is irrelevant for the present purpose.

Both parties have relied heavily on the cases of R. v. Nailsworth Licensine Justices, ex parte Bird [1953] 2 ALL ER 652 and R. v. Cam borne Justices ex parte Pearce [1954] 2 ALL ER 850. But Mr. Terry distinguishes the Bird case from the instant case in that while no objection was raised to Alice Waine sitting on the licensing committee even though the solicitors for the objectors knew at that time that she had signed the petition and only raised their objection after a decision had been reached, in the instant case, his client had objected to the judge trying him right from the beginning of the trial and before verdict. I disagree with Mr Terry that the decision in the Bird case would have been different even if the objection to Alice Waine had been taken before the committee pronounced its decision. A careful perusal of that case warrants my conclusion. In dismissing the application, this was what Goddard C.J. said:—

[p.384]

"Having carefully considered the affidavits, we refuse the order on two grounds - (i) because we do not think it was established that there was any real bias on the part of this justice or that there was anything done which would make it appear improper, and not merely undesirable, for her to sit (and we have no reason to suppose that she would have signed this petition if she had known she was going to sit):, (ii) because we think there was ample opportunity for any objection to have been made before the was given."

As can clearly be seen, the two grounds are independent. It is the first ground that is of great importance in this application.

Before reaching a conclusion on bias let me go back to the case of Franklin v. Minister of Town and Country Planning [1949] A.C. 87, the facts of which will throw more insight on my judgment. Parliament had given the minister of Town and Country Planning power to establish new towns. Pursuant to that power, the Minister made an Order designating Stevenage as a new town. The order was challenged by Franklin and others who had objected to the creation of the new town one of the grounds being that the Minister was biased when he made the Order. The facts in support of the allegation of bias are that, before the Act of Parliament pursuant to which the Order was made, the Minister had made a statement in speeches that the designation of Stevenages as a new town would be carried through. Further facts however disclosed that when the New Towns Act was passed, the Minister, before making the Order, caused the draft of the Order to be published and notices to be sent out inviting objections. When the objections were received he set up an independent public local inquiry and a report of the enquiry submitted. He acted on the strength of the report on the enquiry itself. The Court held that a likelihood of bias in the making of the order could not be inferred from the previous statements made by the Minister. It was then that Lord Thankerton made the statements with which I started the law on bias in this ruling.

From all the arguments presented to this Court, I apprehend that further facts have not been given by the applicant in order to support the allegation of a likelihood of bias on the part of Mrs. Justice Macauley. I have already concluded that the judge was right in ordering the removal of the disputed document from her file. Without this second incident, the allegation in the first incident is paralysed. Rumour mongering has become a past-time activity in our society today. Many of them are innocently conveyed only to whet the appetite. When there is an unsavoury rumour about a person it takes only a friend or a faithful colleague to acquaint him with it. Others spread the rumour to create more excitement than an earthquake. Counsel for the applicant made the case much simpler for us when he conceded that but for his attempt to jug the memory of the judge she would not even have remembered making the [p.385] remarks. Bias is concerned with what operates in the mind of the person accused of it. Based on the authorities which I have considered in this ruling and on my own judgment, I do not think that the alleged remarks alone, in the circumstances, create a likelihood of bias. I will therefore dismiss this leg of the application.

The trouble with the Anti-Corruption Commission

In this application as it was with the application for certiorari, the Anti Corruption Commission is again under fire. In a nutshell, the complaint is that (i) the Commission was not properly constituted according to law in that the deputy Commissioner had not been appointed up to the time that the applicant was charged with a 12 count Indictment on which he is standing trial: (ii) there is a breach of the principles of natural justice in that he did not appear before the Commission before findings were made against him and a report sent to the Attorney-General upon which the Indictment was preferred: (iii) there is a violation of some mandatory provisions of the Anti-Corruption Act under which the findings were made.

As I mentioned at the beginning of this ruling, having allowed ourselves the luxury of reading through the notice of Motion and the written arguments by counsel on both sides, we decided that we can give a ruling on this issue without listening to any further oral arguments.

The law is replete with authorities on the non-availability of the orders of prohibition, certiorari or mandamus when there are other remedies open to the applicant. Sir John Donaldson M.R. in R. v Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 ALL ER 257, 262 made the following observation on the point.:

"It is a cardinal principle that, save in the most exceptional circumstances that (the judicial review) jurisdiction will not be exercised where other remedies were available and have not been used."

In another case, R. V. Chief Constable of Merseyside Police, exp. Calveley Ors. [1986] 1 ALL ER 257 at 260 Donaldson M.R. in clarification of his previous statement said:

"(It) does not support the proposition that judicial review is not available when there is an alternative remedy by way of appeal. It asserts simply that the court, in the exercise of its discretion will very rarely make this remedy available in these circumstance."

In the same case, May L.J. subscribed to the view when he said:

[p.386]

"I think that one must guard against granting judicial review in cases where there is an alternative appeal route merely because it may be more effective and convenient to do so." (at page 265).

In Preston v. IRC [1985] 2 ALL ER 327, two law lords made similar pronouncements on judicial review. Lord Scarman said.

"A remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal." (at page 330)

Lord Templeman followed suit when he said:

"Judicial review should not be granted when an alternative remedy is available" (at page 337).

Of course, the authorities do not completely shut the door against the prerogative orders when there is an alternative remedy to pursue. Even in the presence of an alternative remedy, the court has a discretion to prefer judicial review but only in exceptional cases. One exception is when on the face of a decision it is clearly made without jurisdiction or in consequence of an error of law. See speech of Lord Widgery C.J. in R.V. Hillington London Borough, ex parte Royce Homes Ltd. [1974] 2 ALL ER 643, 649. A second exception is when the process is in breach of natural justice. See the dictum of Lord Hailsham, L.C. in R. v. Chief Constable of the North South Police v. Evans (ante). However, two other law Lords have given a signal warning on this exception. Lord Evershed in Ridge v. Baldwin [1963] 2 ALL EAR 66, 91 has pointed out the "danger of usurpation of power on the part of the courts under the pretext of

having regard to the principles of natural justice". The warning is taken up by Lord Brightman in Chief Constable of the North Wales Police v. Evans [1982] 3 ALL ER 141, 154: "Judicial review is not concerned with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, that court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurpation of power."

After this brief excursion into English law let me now return home in the bid to lay the matter to rest. In Regina v. Commissioner of Police, ex parte Macaulav 1968 -69 ALR S.L. 8, Cole Ag. C.J. sitting in the High Court on an application for certiorari where the complaint was that there was a defect in the committal proceedings before a trial in the high court, ruled that the remedy was not obtainable and that the proper step which the applicant should have taken was to bring the defect to the trial court I think that this is a sound and correct exposition of the law. Defects in all matters concerned with [p.387] preliminary proceedings before a case goes on trial should first be brought to

the attention of the trial court and if the complainant is dissatisfied with the decision of that court his remedy is to appeal and not to by-pass that process and resort to a superior court for a review.

In the instant case, there is no evidence before this court that the allegations against the Anti-Corruption Commission were brought to the attention of the trial judge in the criminal case for a ruling. If this had been done, the appropriate remedy would have been an appeal against an adverse ruling. In the present circumstances, there cannot be a straight application to the Supreme Court under section 125 of the Constitution for the court to exercise its supervisory jurisdiction having regard to what had previously transpired in the court of Massally J., which was not the court trying the applicant, as evidenced by exhibit MOTD 10 in the applicant's affidavit in support of this Motion. The Affidavit is the judgment of Massally J. that the Anti-Corruption Commission is neither a court nor an adjudicating body against which the High Court can exercise supervisory powers under section 134 of the Constitution. The question now is. Can the applicant leave that decision on the record not having appealed against it and apply to this Court under section 125 of the Constitution to re-open the same question that has been decided upon by the High Court? The answer is no. The trouble with the Anti-Corruption Commission can only be resolved by this Court when the Court is able to rule that that body is a court or an adjudicating body but this Court cannot do so in the prevailing circumstances.

Conclusion

In the light of all what I have said, the application is dismissed

SGD.

H.M. Joko Smart JSC

SGD.

I agree

Hon. Mr. Justice D.E.F. Luke CJ

SGD.

I agree

Hon. Mr. Justice A.B. Timbo JSC

SGD.

I agree

Hon. Mr. Justice V.A.D. Wright JSC

SGD.

I agree

Hon. Mr. Justice S.C.E. Warne JSC

CASES REFERRED TO

1. North Wales Police v Evans f1982U ALL ER 141, 143

2. Ranger v. Great Western R. v. Co. 5 H.L. 72, 98

3. Franklin v. Minister of Town and Country Planning [1949] A.C. 87. 1 03

4. Dimes v. Proprietors of Grand Junction Canal (1852) 3 HL Cas. 759. 10 ER 301

5. R. v Bow Street Metropolitan Stipendiary Magistrate & Ors. ex parte Pinochet Ugarte (No.2) [1999] 1 ALL ER 577

6. R. v Rand (1866) LR 1 OB 230

7. In R. (De Vesci) v. Queen's County JJ. [1908] 2IR.271

8. R. (Donoghue) b. County Cork JJ [1910] 2 IR 271 275

9. R. v. Nailsworth Licensing Justices, ex parte Bird [1953] 2 Q.B.D 652

10. R. v. Camborne Justices: Ex parte Pearce [1954] 2 ALL ER 850

11. R. v Sussex JJ. Ex p. McCarthy [1924] 1 K.B. 259

12. Foulah v. Kolifa Rowala Tribal Authority 1950 -56 ALR S.L. 142;

13. Hon. T.S. [p.383] Brewa v. Tuberville & Ors. SLLR 1960 - 61, 111

14. R. v. Nailsworth Licensine Justices, ex parte Bird [1953] 2 ALL ER 652

15. R. v. Cam borne Justices ex parte Pearce [1954] 2 ALL ER 850.

16. Franklin v. Minister of Town and Country Planning [1949] A.C. 87

17. R. v Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 ALL ER 257, 262

18. R. V. Chief Constable of Merseyside Police, exp. Calveley Ors. [1986] 1 ALL ER 257 at 260

19. Preston v. IRC [1985] 2 ALL ER 327

20. R.V. Hillington London Borough, ex parte Royce Homes Ltd. [1974] 2 ALL ER 643, 649

21. R. v. Chief Constable of the North South Police v. Evans (ante)

22. Ridge v. Baldwin [1963] 2 ALL EAR 66, 91

23. Chief Constable of the North Wales Police v. Evans [1982] 3 ALL ER 141, 154

24. Regina v. Commissioner of Police, ex parte Macaulav 1968 -69 ALR S.L. 8

EXPARTE MUCTARU OLA TAJU-DEEN v. THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION & 2 ORS.

[SC. MISC. APP. 6/2000] [p.325-327]

DIVISION: SUPREME COURT, SIERRA LEONE

IN THE SUPREME COURT OF SIERRA LEONE

AND

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE 1991 ACT NO. 6 OF 1991.

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE ACT NO. 6 OF 1991 AND UNDER THE COMMON LAW FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND FOR DIRECTIONS AND CONSEQUENTIAL ORDERS AND IN T~ MATTER OF THE ENGLISH SUPREME COURT RULES

AND

IN THE MATTER OF THE ANTI-CORRUPTION ACT 2000 AND IN THE MATTER

BETWEEN:

EXPARTE MUCTARU OLA TAJU-DEEN - APPLICANT

AND

THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION

8 WESLEY STREET

FREETOWN - 1ST RESPONDENT

AND

THE ANTI-CORRUPTION COMMISSION

8 WESLEY STREET

FREETOWN - 2ND RESPONDENT

AND THE STATE represented by THE LEARNED ATTORNEY-GENERA

LAND MINISTER OF JUSTICE

3RD FLOOR, GUMA BUILDING

LAMINA SANKOH STREET

FREETOWN. - 3RD RESPONDENT

T.M. TERRY, ESQ., FOR THE APPLICANT.

RULING

D.E.F. LUKE, C.J.

This is an ex parte Notice of Motion by the Applicant herein seeking the following Orders:—

(1) An Order granting leave to the Applicant herein Muctaru Ola Taju-Deen for an Order of Certiorari to issue both under the Common Law and Section 125 of the 1991 Constitution of Sierra Leone to bring up to the Supreme Court for the purposes of its being quashed the purported Report and/or the purported undated Extracts of the alleged Findings of the Anti-Corruption Commission signed by the Commissioner of the Anti-Corruption Commission that evidence exists of alleged Non existing offences against the Plaintiff herein under a Non-Existing Act to wit the Purported Anti-Corruption Commission Act 2000 upon grounds of failure to observe one of [p.326] the fundamental principles of natural Justice, Committal of Error of law on the Face of the Records and several other Errors of Law, want of Jurisdiction and/or excess of jurisdiction, as set forth and contained in the Copy Statement herewith exhibited to the affidavit in Support of this Application.

(2) An Interim Stay of the Criminal Proceedings Holden at High Court No. 1 before the Hon. Mrs. Justice Patricia Macauley in the case Between THE STATE vs. HONOURABLE JUSTICE MUCTARU OLA TAJU-DEEN pending the hearing and determination of the application for the Order of Certiorari if the leave is granted by the Honourable Supreme Court under the first order prayed for above.

(3) Such further OR other Orders as this Honourable Court may deem fit to make.

(4) That the costs of and occasioned by this application be costs in the cause.

Multiple arguments were advanced in support of the application. Suffice it to say That having heard the arguments of Mr. Terence Terry Counsel for the Applicant and having given due consideration thereto and to the papers filed herein, I am satisfied that the Applicant has a locus standi and has established a prima facie arguable case for an Order of Certiorari to issue.

I will therefore grant the leave sought and the Orders as prayed for in paras. (2),(3) and (4)'" Order (2) is refused.

As regards Order (3),

I make the following Orders:

(1) That the Respondents be served the relevant papers within four days of this order

(2) That the application for the Order of Certiorari be heard on the 2nd day of January, 2001.

I agree

[p.327]

SGD.

HON. MR. JUSTICE D.E.F. LUKE, C.J.

SGD.

HON. MR. JUSTICE H.M. JOKO-SMART, JSC.

I agree.

SGD.

HON. MR. JUSTICE S.C.E. WARNE, J.S.C.

FODAY B. M. SAWI v THE STATE

[SC. SC.APP.NO. 1/93] [p.313-20]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 24 OCTOBER 2000

CORAM: HON. MR. JUSTICE D. E. F. LUKE, C.J.

HON. MR. JUSTICE A. B. TIMBO, J.S.C

HON. MR. JUSTICE H. M. JOKO-SMART, J.S.C

HON. MR. JUSTICE S. C. E. WARNE

HON. MRS. JUSTICE V. A. D. WRIGHT

BETWEEN

O.V. ROBIN-MASON ESQ., FOR THE APPELLANT

S. A. BAH ESQ., FOR THE RESPONDENT

JUDGEMENT DELIVERED THE 24 DAY OF OCTOBER 2000

TIMBO, J.S.C

The Appellant was arraigned on a two-count Indictment in the Freetown High Court presided over by William Johnson J (sitting alone) with the following offences:—

(1) Larceny contrary to Regulation 38 (a) of the Public Economic Emergency Regulations 1987 (P.N. No.2S of 1987)

(2) Fraudulent Conversion of property contrary to Regulation 39(b) of the Public Economic Emergency Regulations 1987 (P.M. NO.25 of 1987).

[p.314]

At the end of the trial the appellant was found guilty on both counts and sentenced to: Le400,000.00 fine or 10 years imprisonment on Count 1 and Le40,000.00 fine or 1 year imprisonment on Count 2, both terms of imprisonment to run consecutively .

Being' dissatisfied with the decision of the learned trial judge, the Appellant appealed on both counts. The court of Appeal unanimously allowed the appeal in respect of the second count and accordingly quashed the conviction and sentence. The court was, on the other hand, divided as to the first count. Thompson-Davis JSC and Adophy JA (as he then was) while dismissing the appeal, Taju-Deen J.A. on his part, was of the opinion that the Appellant was equally not guilty on this Count and ought to be acquitted and discharged. So we are here concerned with only Count 1.

The circumstances, which gave rise to Count 1, were briefly as follows: the Appellant was at all material times Permanent Secretary in the Ministry of Works, Freetown. He had pioneered a building project known as the Daru Rest House Project. While the building was still under construction he managed to procure certain items of furniture for the said house. He directed that the said furniture should be delivered to his official residence at Kingharman Road, Brookfields instead of to the Government Store in Freetown. This was sometime in March 1987. Inside the same month the Appellant wrote to the Area Engineer in Kenema informing him of the acquisition of the furniture and promised that he would be

sending them to him for safekeeping to await the completion of the Daru Rest House. He had not done so up till August 1987 when the matter was reported to the police in Freetown. The C. I. D. subsequently found the furniture in a house the Appellant was erecting not far away from his official quarters where the furniture had originally been off-loaded. All the pieces of furniture were however untouched. None had been installed in the Appellant's new house.

In his statement to the police the Appellant said among other things, that he had kept the furniture in his house because he was afraid that they would be stolen if left in any of the designated Government stores. Furthermore, he told the police that he had in fact dispatched eight of the chairs to Daru on loan for the official opening of the Daru Rural Bank (another project partly funded through his efforts) by His Excellency the President with specific instructions that they should be put in a secluded area after the opening ceremony.

The Appellant filed three grounds of appeal to this court. When the hearing commenced before us, counsel for the Appellant sought and was granted leave to argue only the third ground thus abandoning the other two Grounds. Ground three states:

"The Court of Appeal did not apply the proper legal test relating to intent to deprive permanently in so far as it relates to the charge of Larceny with which the Appellant was convicted and [p.315] thus wrongly held that the essential ingredient of the offence charged that is, the intent to deprive permanently was proved directly or inferentially by the prosecution"'

More particularly, counsel submitted that the test as laid down by the Court of Appeal was incomplete in so far as it failed to address the issue as to the time the intent to deprive permanently if any, was formed. This was what Adophy J. A. (as he then was) said in reading the judgment of the Court at page 177 of the typed record.

"It is accepted that to sustain this element, the thief must intend to deprive the owner not temporarily but permanently of his property. Regrettably, there seems not to be any statutory definition of the words "intention of permanently depriving". In respect of this, the learned trial judge said inter alia, "these issues can only be resolved by inferences to be drawn from the evidence adduced hereinl1• Learned counsel for the State dealing with this submitted and quite rightly that to prove that ingredient one can only infer whether the accused had the intention to permanently deprive."

Regulation 38(a) under which the Appellant was charged in Count 1 stipulates,

"38 Every person who—

(1) Steals any chattel money or valuable security belonging to or in the possession of the Government, Local Authority or a Public Corporation or entrusted to or received or taken into possession by such person by virtue of his employment..... shall be guilty of an offence".

And by Section 1(1) of the Larceny Act, 1916,

"a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof".

It is remarkable that at no time did Adophy J. A. (as he then was) stress that the intent permanently to deprive the owner must be formed the time at which the taking away occurs as stated in Section 1(1) of the Larceny Act 1916. This point is also emphasised in Archbold Criminal Pleading Evidence and Practice 35 Edition paragraph 1471 at page 596.

There is no doubt that there was an asportation of the furniture by the Appellant. But was the necessary animus furandi (the mental element) present at the time of such taking or for that matter, at any other time? The [p.316] evidence indeed disclosed that the Appellant gave orders for the delivery of the furniture to his quarters rather than to a Government store. He however explained the reasons for doing so. In his evidence in-chief he stated that:

"From experience, a lot of thieving had been going on in Government stores and quarters. For example, at the Kissy Second Highway Store, a lot of thieving was done there. I had to draft in the Military to provide twenty-four hours security. The Lodge at Hill Station was vandalized and the case was in court. P. K. Lodge was also vandalised and had to be refurbished. At Kissy Central Stores, several battery chargers were stolen. The Government stores were not safe because I was promoting the Daru Rest House through the Area Engineer and the Daru Rural Bank through the promoters of which I was one, I decided to keep the items myself..... I kept the furniture to make sure they were safe. The items would have gone if the project had been completed".

Mrs. Kona Koroma his deputy also said in her evidence that during this period they had reports of in-sufficiency of security in some of their quarters and stores. Under 'cross-examination by Mr. Terrence Terry, Counsel for, the Appellant in the High Court, she admitted that she raised no objections when the Appellant instructed her to convey the furniture to his residence. In answer to another question by defence counsel, she told the court that,

"If the goods are delivered to the stores and they are stolen, the Permanent Secretary and the Storekeeper would take full' responsibility therefor".

She even went further to say that if she was' Permanent Secretary her first and foremost task would be to ensure the safety of goods ordered and that the burden was especially heavier when the goods had to leave Freetown for Daru. Concluding her testimony she agreed it was not unusual to keep Government property temporarily before eventual delivery to their final destination.

Turning to the crucial question whether the Appellant had the necessary intention permanently to deprive the Government of Sierra Leone of the ownership of the furniture at the time he received them or more accurately when he caused them to be delivered at his residence, we will clearly see from the evidence that there was no such intention on the side of the Appellant. This is supported by the story of the Area Engineer, Ishmael Kebbay the third prosecution witness who said during his examination in-chief,

"I recall March, 1987 — I heard from the accused in connection with the furnishing of the repaired building. He told me that he had secured some furniture for the building (Rest House), which would [p.317] be sent to me later. The Accused said that he would send the furniture after the completion of the repairs".

There was no evidence before the Court that the repairs to the building at Daru had been completed and that the Appellant had refused to release the furniture,. On the contrary, the Court was informed that the repairs had been delayed due to lack of funds.

Moreover, Sonny Julius Musa, the Manager of the Daru Rural Bank had emphasised in his testimony that when he received the eight chairs from the Appellant he was given strict orders to secure them properly as they were for the Rest House. The C.I.D themselves found the chairs were not in general use but had been kept separately in a safe place by the Manager. Even the tenth prosecution witness, Sonny Kangoma the cabinet maker from Daru, narrated in court that sometime in 1987 when he had cause to live with the Appellant on a short visit to Freetown, he saw the furniture in the Appellant's new house and that the Appellant had told him that they were for the Daru Rest House and that he would eventually transfer them to Daru upon the successful completion of the building scheme.

As was contended by Mr. S. E. Berewa, counsel for the Appellant in the Court of Appeal, not once had the Appellant asserted any claim of right over the furniture or made any attempt to dispose of them or treat them as his own property. The presence of these factors, in my view, would surely negative any intention on the, part of the Appellant to deprive the Sierra Leone Government permanently of the use of the furniture.

Thus in Rv Hudson (1943) 29 CR. App. R. 65 where a letter containing a cheque was by mistake delivered to the prisoner who had received it innocently, the court held that the prisoner did not receive the cheque until he had opened the letter and discovered it contained a cheque. If at that time he formed the animus furandi in relation to the cheque then he would be guilty of Larceny of the cheque. Vide also Maynes V. Cooper (1950 40 Cr. App. R. 198.

Likewise in Ruse V Read (1949) I All E. R. 398. Here the respondent while on leave went to spend part of his holiday with his mother in Sidmouth, Devon, England on the 30th June 1948. Coincidentally, an amusement fair was being held on that same day in the village. Around 9 p.m. one Raymond Purchase rode his bicycle to the fair and left it by the wall near the entrance and went inside. Fifteen minutes or so later on his way back he discovered to his amazement that the bicycle was no longer there. Meanwhile, the respondent while on his way to the fair ground visited several public houses and had plenty to drink. On his way out, the respondent saw the bicycle. He removed it and rode it for two hours. He then became sober. But not knowing what to do with the bicycle he took it home and placed it in the Lane at the back of his mother's house. The following day, he got panicky. So he drove the bicycle to the railway station and consigned it by rail to York [p.318] addressing the label thus "Mr. Read, York Railway Station, to be collected". Upon being arraigned for the larceny of the bicycle the respondent argued that when he took the machine he did not realise because of his drunken condition, the consequences of his action and it was to get rid of it that he sent it to the York Railway Station. It

however became clear later that he had no intention of going to the said railway station to collect it. The justices held that the respondent had no intention at the time of taking the bicycle to permanently deprive the owner of his property and so was incapable of forming such an intention. He was found not guilty and duly discharged. On appeal by the prosecution, the King's Bench Division (Lord Goddard O. Humphrey's and Finermore J. J. held the initial taking of the bicycle by the respondent being a trespass (though not felonious, there being no animus furandi) the sending away of the bicycle to York Railway Station the next day was a clear manifestation of the respondent's intention to. deprive the owner permanently of his property and therefore he should have been convicted and they so ordered.

Even under the English Theft Act 1968 it is still the law that the appropriation must be followed by an intention on the part of the accused to permanently deprive the owner of the property alleged to be stolen. This point was heavily underscored by Edmond Davies LJ. In RV. Easmon (1971) 1 ALL. ER 945. The facts were somehow interesting. On the evening of the 27th December, 1969 a certain woman police Sgt. Crooks together with two other plain clothes officers went to the Metropolitan Cinema in Victoria, London. She sat in the aisle seat and placed her handbag by her side on the floor. She attached the said bag to her right wrist using a piece of black cloth. One of the officers occupied the inside seat next to her. During the interval, when the lights were put on, they saw the Appellant sitting on the aisle seat in the row immediately at the back of Sgt. Crooks but the seat next to him was vacant. Shortly after the light had been switched off Sgt. Crooks felt the 'string tied to her wrist tightened. She then at once passed a prearranged signal to one of her friends, P. C. Hensman. The cotton string was pulled a second time but so hard that she had to break it off. Within a few seconds the officers heard the rustle of tissues and the sound of the handbag being closed. The Appellant then rose from his seat and went to the toilet. When the officers turned round they saw Sgt. Crooks' handbag lying on the floor behind her seat and in front of the seat previously occupied by the Appellant who had meanwhile moved to another part of the cinema hall. The contents of the bag were all in order not one had been removed. When confronted by the police officers about the theft of the handbag and contents the Appellant flatly denied having anything to do with that. He was later charged with the theft of handbag and contents under section 1(a) of the Theft Act 1968.

Edmund Davies L.J. delivering the judgement of the Court of Appeal, which reversed 'the decision of the lower court had this to say at page 947.

[p.319]

"In the respective view of this court, the jury were misdirected. In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. If the appropriator has it in mind merely to deprive the owner of such of his property as on examination proves worth taking and then finding that the booty is to him valueless then leaves it ready at hand to be repossessed by the owner he has not stolen".

Continuing, the learned justice of appeal opined;

"If a dishonest postal sorter picks up a pile of letters intending to steal any which are registered, but on finding that none of them are, replaces them he has stolen nothing".

Edmund Davies U. maintained this was so in spite of section 6(1) of the theft Act 1968 which provides that,

"A. person appropriating property belonging to another without meaning the other permanently to lose the thing itself is never the less to be regarded as having the intention of permanently depriving the other of it if his intention is to treat it as his own to dispose of regardless of the other's rights".

The Court of Appeal further held that the Appellant could not even be convicted of attempted theft unless it was proved that he was animated by the same intention permanently to deprive as in the case of the full offence.

I am not oblivious of the fact that the English authorities I have cited in this judgement are merely persuasive and not binding on us. That notwithstanding, I see a lot of good sense in them and so I adopt them.

As we have seen in Ruse V. Read (infra) the Appellant was convicted because as soon as he consigned the bicycle to York Railway Station when he had no intention of ever collecting it from there it became obvious from that moment he intended to deprive the owner permanently of the use of his property. The situation is different, altogether in the instant case. Here, all along the Appellant denied that he ever intended to deprive the Government of Sierra Leone of the use of the furniture. He explained throughout that he took the furniture to his residence purely because he did not want them to be stolen, nor did he conceal the fact that these items of furniture were with him for safekeeping. He informed the Area Engineer immediately after he had received them. The fact that he kept them from March to August 1987 does not in my considered opinion alter the situation in any way. According to the Area Engineer, the Appellant said he would send the furniture when the repairs to the building were finished. We have heard that the building had not been· completed up to the period the Appellant was arrested. The police found the eight chairs the Appellant sent to Daru well secured. So too the rest of the furniture they retrieved from the Appellant's new house. They [p.320] were all intact not a single piece had been utilised. No evidence was ever led to indicate that the Appellant had done some act, which was inconsistent with the Government's ownership of the furniture. The Appellant was steadfast in his denial that he delivered the furniture to his residence for any other purpose than to protect them from being carted away.

I have taken considerable care and pains to analyse the salient features of the evidence as well as the law applicable in this appeal. Had the court of first instance and the Court of Appeal done the same, I have no doubt their conclusions would have been completely different. Be that as it may, 1 regret I cannot accept that there was evidence either direct or indirect from which it could be inferred that the Appellant had intended at the time he took delivery of the furniture or at any time thereafter, to deprive permanently the Government of Sierra Leone of the ownership of the furniture, the subject-matter of the charge in Count 1.

The appeal is therefore allowed. The Appellant is acquitted and discharged. The fine of Le400, 000.00 if already paid should be refunded.

Let me say before I end, the dissenting opinion of Taju-Deen J.A. has regrettably been of no assistance to us in this court. It contains nothing of significance.

(Sg)

Hon. Mr. Justice A. B. Timbo, JSC

I agree.

(Sg)

Hon. Mr. Justice D.E.D. Luke, C.J.

I agree.

(Sg)

Hon. Mr. Justice H. M. Joko-Smart JSC

I agree.

(Sg)

Hon. Mr. Justice S.C.E. Warne JSC.

I agree.

(Sg)

Hon. Mrs. Justice V.A.D. Wright, JA.

HON. KAKPINDI JAMIRU MP & HON. JOSEPH SALLUL CONTEH MP AND DR. JOHN KAREFA-SMART MD

[SC.3/97][p.293-297]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 16 FEBRUARY 2000

CORAM: MR. JUSTICE D.E.F. LUKE - C.J.

MR. JUSTICE A.E. TIMBO - J.S.C.

MR. JUSTICE H.M. JOKO-SMART - J.S.C.

MR. JUSTICE S.C.E. WARNE - J.S.C.

MR. JUSTICE E.C. THOMPSON-DAVIS - J.S.C.

IN THE MATTER OF AN APPLICATION BY HON. KAKPINDI JAMIRU MP AND HON. JOSEPH SALLU CONTEH MP FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITITION AND FOR DECLARATIONS.

IN THE MATTER OF A DECISION OR ORDER DATED 2ND APRIL 1997 MADE EY HON. MR. JUSTICE A.E. RASHID JUDGE OF TEE HIGH COURT OF JUSTICE OF SIERRA LEONE.

IN THE MATTER. OF AN APPLICATION BY DR. JOHN KAREFA-SMART MD TO THE HIGH

COURT FOR AN INTERLOCUTORY INJUNCTION IN RESPECT OF AN ACTION PENDING THEREIN BTEWEEN THE SAID DR. JOHN KAREFA-SMART MD (PLAINTIFF) AND JAMES SULAIMAN BANGURA AND 13 OTHERS (DEFENDANT), BEING CIVIL SUIT NO.CC.149 97 K. NO. 22 ALSO PENDING IN THE SAID HIGH COURT.

BETWEEN

HON. KAKPINDI JAMIRU MP - 1ST APPLICANT

20D Off Pratt Streets,

New England, Freetown

HON. JOSEPH SALLU CONTES MP - 2ND APPLICANT

2 Off Aberdeen Road, Lumley

Freetown.

- AND -

Dr. JOHN KAREFA-SMART MD

20 Pipe Line, Juba Hill,

Lumley, Freetown.

Dr. Bu-Buakei Jabbi for the Applicants

N.D. Tejan Cole Esq., for the Respondent.

RULING

TIMBO, JSC.

This is an application by notice of motion dated the 4th day of February 2000 that the proceedings in the action known as SC3/97 be continued between Hon. Ibrahim Bashiru Kanu MP as the first Applicant in the place of the 1st applicant Hon. Kakpindi Jamiru (Deceased) and the 2nd applicant Hon Joseph Sallu Conteh MP. therein on the one part [p.294] and the respondent herein on the other part. The substantive SC.3/97 seeks among other things, an order for Certiorari to remove into the Supreme Court

and to quash the decision or order of the Hon Justice A.B. Rashid High Court Judge made on the 22nd day of April 1997 to the effect that the High Court has jurisdiction to hear and determine an application for interlocutory injunction pursuant to order 37 rule 10 of the High Court Rules 1960 and subsection (3) of section 78 of the Constitution of Sierra. Leone 1991 in respect of the action titled CC: 149/97 IC. No. 22 pending before the said High Court.

The application has been necessiated by the death of Hon. Kakpindi Jamiru the 1st applicant in the substantive application.

At first, counsel informed the court that the application was made in pursuance of Rule 98 of the Supreme Court Rules 1982. (PN No.1 of 1982) and the High Court Rules Order 13 rules 2 & 4 and order 24 rule 6. It was only after he had been reminded by the Bench of Rule 37 of our rules that he hesitatingly referred to that rule.

The first question that arises for determination therefore is, which rule governs this application - is it rule 37 or rule 98?

Rule 37 provides that:

“An application for an order for Revivor or Substitution shall be accompanied by an affidavit sworn by the applicant or where the applicant is represented by a legal practitioner the said affidavit shall be sworn by such legal practitioner showing who is the proper person to be substituted or entered on the record. in the place of or in addition to a party who has died or undergone a change of status”.

[p.295]

Rule 98 which is ever so familiar, on its part reads:

“Where no provision is expressly made in these rules relating to the Original and Supervisory Jurisdiction of the Supreme Court the practice and procedure for the time being of the High Court shall apply “mutatis mutandi.” The fact that rule 37 falls under the rubric “Civil Appeals Generally” does not in my opinion, preclude, in any manner, its application to circumstances other than -appeals in the Supreme Court. The rule is quite explicit. It deliberately uses the word “Applicant”. It is intended to deal with the kind of situation that has arisen here.

Having thus held that, it is rule 37 that is applicable, has counsel fulfilled the 'prescriptions of that rule?

In the present application, Dr. Bu Buakei Jabbi has failed to show any where in his supporting affidavit, as is required by rule 37, that the Hon. Ibrahim Bashiru Kanu MP is the proper person to be substituted in the place of the deceased 1st applicant except to describe him vaguely in paragraph 5 thereof as the successor in interest to the late Hon. Kakpindi Jamiru and filing his consent to so act. The only interest it would appear that is common between the proposed 1st applicant and the deceased he seeks to replace is that at one time they were both Members of Parliament together.

This application can be contrasted with that made in the Supreme Court not so long ago in Civil Appeal No.3/87

BETWEEN:

AUGUSTA KAI MUNA - APPLICANT

AND

JLA BRODES GRANT

[p.296]

AND

JOHN ADAMA - RESPONDENTS

There, while the appeal was still pending in the Supreme Court and before the Actual commencement of the proceedings, all two respondents died. Dr. Ade- Renner Thomas, counsel for the relatives of both respondents applied to the court by Notice of Motion dated 22/5/92 to have the deceased respondents substituted by their personal representatives. The application was brought under rule 37. The order for substitution 'Was granted readily by the Supreme Court.

Unlike what Dr Bu-Buakei Jabbi has done, Dr. Ade Renner Thomas deposed in very clear language in paragraph 3 of his affidavit;

“3 that the High Court of Sierra Leone (Probate Jurisdiction) granted Probate of the Will of the First respondent herein to Weabah Smith on the 2nd day of April 1992 and also granted Letters of Administration of the estate of the second respondent to Francis Bannerman (alias Adama) on the 28th day of April 1992.

Copies of the said Probate and Letters of Administration were also produced and. marked. ART 1 and ART 2 respectively.

The mere consent by the Hon. Ibrahim Bashiru Kanu MP to act is not sufficient to cloth him with the necessary capacity to continue with the proceedings begun by the deceased 1st applicant.

[p.297]

In the circumstances, I will accordingly refuse the application, and it is so refused. Costs assessed at Le 500,00/00 to be paid personally by counsel.

(SGD.)

A. B. TIMBO JSC.

I agree.

(SGD)

Hon. Justice D.E.F. Luke, CJ

I agree.

(SGD)

I agree

Hon. Justice H. M. Joko-Smart, JSC

I agree.

(SGD)

Hon. Justice S.C.E. Warne, JSC.

I agree.

(SGD)

Hon Justice E.C. Thompson-Davies JSC

HARRY MASON v. OLATUNGI WILSON

[SC. CIV. APP. 2/87] [p.178-203]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 14 JULY 1995

CORAM: HON. MR. JUSTICE S. BECCLES DAVIES, AG. CJ.

HON. MR. JUSTICE S.C.E. WARNE, JSC

HON. MR. JUSTICE E.C. THOMPSON-DAVIS, JSC

HON. MR. JUSTICE G. GELAGA-KING, JA.

HON. MRS. JUSTICE A.B. TIMBO

BETWEEN

HARRY MASON APPELLANT

Vs

OLATUNGI WILSON RESPONDENT

DR. ADE RENNER-THOMAS FOR APPELLANT

DR. H.M. JOKO-SMART FOR RESPONDENT.

JUDGMENT delivered this 14 day of July 1995

WARNE, J.S.C.

This is an appeal against the judgment of the Court of Appeal delivered on the 19th day of November, 1986.

This Appellant, being aggrieved with the judgment, filed two grounds of appeal namely: (1) The court of Appeal was wrong in resting its decision solely on a ground not set forth by the Appellant and without the parties having had sufficient opportunity of contesting the case on that ground.

(2) The several conclusions of the Court of Appeal on the question of illegality are wrong in law particularly having regard to the absence of evidence that the Plaintiff acted outside the law."

The Statement of Claim was that: "The Plaintiff's claim against the Defendant is for the sum of US 79620 dollars being money payable by the Defendant to the Plaintiff for money had [p.179] and received by the Defendant for the use of the Plaintiff, interest and costs."

The Particulars, inter alia, state:

"(21 On or about the 2nd day of October, 1984 at the request of the Defendant. the Plaintiff paid the sum of US 79,620 (Seventy nine Thousand Six Hundred and Twenty United States Dollars) in the Defendant's Bank Account at Bank of Credit and Commerce International at 135 Earls Court Road. London England for use in connection with the Plaintiff's said business."

The Plaintiff claims:—

(1) The said sum of US 79620/00 Dollars.

(2) Interest on the said sum of US 79620 Dollars at the rate of 22per centum per annum from the 2nd day of October, 1984 till payment or Judgment.

(3) Further or other relief.

(4) Costs."

I shall hereinafter refer in this judgment to the Appellant as Plaintiff and the Respondent as Defendant.

The Statement of claim, in my view, is infelicitously worded. As a result, the Defendant sought further and better particulars. The defendant, however, denied the claim. Issue was joined and the cause went to trial before Thomas. J. He gave Judgment for the plaintiff. Against that Judgment, the Defendant appealed to the Court of Appeal which consisted of Navo, Turay and Adophy JJA.

The facts of the case are simple. The Plaintiff is a precious metals Broker, Bullion Dealer and Refiner resident

at 4 Prince Albert Street Brighton in England in the United Kingdom. In his field of business, he wrote to the Chamber of Mines in Freetown to find out about alluvial gold dealers in Sierra Leone. The copy letter was received in evidence and for ease of reference I will here Quote the letter and the [p.180] reply which he received and were tendered in evidence.

The letter is addressed to: —

"J.T. Nottidge Esq.,

Executive Officer

Sierra Leone Chamber of Mines

Spiritus House

Freetown

Dear Sir,

We are a gold purchasing company in the transaction of precious metals for a considerable number of clients, most of whom are situated in the United Kingdom.

We are currently involved in the implementation of a statistical study of certain countries located throughout the African Continent. It is appreciated by ourselves that your country is involved considerably in the production of gold, and we feel that because of our interest in alluvial gold, we would like to consider offering a precious metal purchasing and refining facility.

We would therefore ask for your assistance in providing full details, where possible, of individuals and companies who are currently involved in this field, and that might be willing, at least, to negotiate possible transactions.

There are a wide range of services that we can offer and we would like the opportunity to discuss this locally with interested parties, at some date in the near future.

We therefore look forward to receiving your reply. Any information given will of course, be treated confidentially and your help in this matter is very much appreciated.

Yours sincerely

(SGD)

H. Mason"

[p.181]

In reply the Plaintiff received Ex "B" which is a list of authorised Alluvial Gold Dealers. In that list was No. 11 Mr. Tungi Wilson - 35, Pademba Road Freetown Sierra Leone'. There is no dispute that Mr. Tungi Wilson is the Defendant herein.

As a result the Plaintiff wrote to the Defendant a letter dated 12th July, 1984 which reads;

"Mr. Tungi Wilson

35, Pademda Road

Freetown

Sierra Leone.

Dear Sir,

We have been corresponding with the Sierra Leone Chamber

of Mines, and Mr. J.T. Nottidge Executive Officer has stated that you are currently involved in purchasing alluvial gold.

However, as Sierra Leone is considerably involved in the production of gold, and because of our interest in this field, we would like to consider offering a precious metal purchasing and refining facility. We are obviously unsure of your existing arrangements, although we believe that a large percentage of the gold generated in your country is directed to Swiss Refineries.

We realise that the only way to effectively commence business dealings, is to be given the opportunity to discuss locally all aspects with you. To this end, we envisage a visit to Freetown shortly, and therefore, we would welcome your comments in order that we can make arrangements for meeting with you to negotiate all considerations regarding the business.

Finally, any terms and conditions offered will only be treated in strict confidence, but will be extremely competitive because of our good connection with the London Gold Market.

We therefore look forward to receiving your reply in the very near future.

Yours faithfully

(SGD.)

H. Mason"

The Defendant replied by letter dated 25/7/1984 and it was headed

"Tisco Enterprises

Bankers

Barclays Bank

Congo Cross

Our Ref..... Your Ref.....

35, Pademba Road Tel. 23988

Tel. 3520

Freetown

Rep. of Sierra Leone

Date 25/7/1984

Mr. H. Mason

4, Prince Albert Street, Brighton

East Sussex United Kingdom

Dear Sir,

Your letter reached me and all contents were well understood". I am involved in Purchasing Alluvial Gold.

Your request in Purchasing Gold from me is cordially granted. As you have stated in your letter the only way to commence business dealings with me is to make a visit to Freetown as soon as possible.

State by telex the date of your arrival so that I can meet you at the Air Port and arrange a meeting with you to negotiate all considerations regarding the Business.

I am looking forward to your arrival in Freetown. You are welcome at any time

Bye for now.

Yours faithful1y

(SGD.)

T. Wilson"

The Plaintiff by letter dated 31st July 1984 sought further [p.183] details from the Defendant thus - current sales of alluvial gold i.e. volumes available, say on a monthly basis, how monetary values are transferred, bank(s) involved, and whether or not the Ministry of Mines is involved in assessing purity levels.

.....

The Defendant promptly replied to part of the details required by telex dated 2nd August 1984. The Plaintiff did not travel to Freetown, he sent a representative, one Anthony John Powell. The Plaintiff had written to all the seventeen individuals or companies mentioned in the list sent to him by Mr. Nottidge. Suffice it to say, he was now negotiating with the Defendant.

Anthony John Powell was put in touch with the Defendant with whom he negotiated for the purchase of 10Kilos of Alluvial Gold valued at 79620 US Dollars. This transaction was concluded as a result of several telegraphic messages between Anthony John Powell and Mr. Mason, the Plaintiff. Consequently, the 79620 us Dollar were paid into the Bank Account of Defendant at the Bank of Credit and Commerce International 135 Earls Court Road in London. The defendant agreed the money was paid into his account but contended he gave Anthony John Powell 8.5 Kilos of Gold in exchange. There were several requests made for the refund of the 79620 US Dollars from Defendant, but to no avail.

The Court of Appeal considered the evidence in support of the claim and the submission of both Counsel, and before Judgment was delivered made this observation.

"Court. This was not made a ground of appeal. But pursuant to Rule 9 sub-rule 6 of the Rules of Court, we invite Counsel to address us on whether this transaction is not rooted, or its performance tainted with, illegality thus making the Maxim Ex Turpi causa oritur actio applicable.

If so, can our courts lend aid to either party in the performance or enforcement."

The whole appeal turns mainly on the question of illegality. Dr. Renner-Thomas, Counsel for the Plaintiff, has taken issue with [p.184] that observation of the Court of .Appeal. Counsel referred Court to Rule 9 sub-rule 6 of P.N. No. 29 of 1985 which provides:

"Notwithstanding the foregoing provisions of this rule, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

Provided that the Court shall not rest its decision on a ground not set forth by the appellant unless the parties had sufficient opportunity of contesting the case on that ground" [Emphasis mine]

Counsel submitted that since the appeal had not been contested on the ground of illegality, the parties should have been give sufficient opportunity to argue that ground. He submitted, that was not so. He argued that Counsel for the defendant had completed his argument when the observation was made by the Court of Appeal. He urged the Court to give the word "sufficient" its ordinary meaning.

Counsel submitted that Counsel for defendant had completed his argument when the question of illegality was put to him.

In my view, this submission is not tenable. The record is quite clear. When the question of illegality was posed by the Court, Counsel for plaintiff replied thus:

"I submit that there is nothing illegal to buy gold in Sierra Leone. It could be illegal if the person selling is not a licensed dealer. I submit that where a statute provides that person could not enter a contract

except he is licensed to do so then the effect of not being licensed, will depend on the construction of the statute or the intention of Parliament. Read Mamoud Ispahani (1921) K.B. 716, Rep. 217 St John's Shipping Corporation v Joseph Rand Ltd. (1957) 1 Q.B. 267; 1956 3 W.L.R. 870".

The foregoing shows clearly that Counsel replied to the observation of the Court of Appeal. Was Counsel given sufficient opportunity to contest the ground of illegality? I will first of all give sufficient opportunity its ordinary meaning and then [p.185] decide if such opportunity was given to the parties.

According to the Concise Oxford Dictionary - "Sufficient" means: sufficing, adequate; and Opportunity means: a good chance, a favourable occasion, a change or opening offered by circumstances, good fortune."

Did the Court give Counsel an adequate opportunity to contest the question of illegality? In my view, Counsel was given sufficient opportunity to contest the issue of illegality. If more time was needed by Counsel, he should have applied to the Court for such time to answer the point.

Counsel contends that Counsel for defendant replied to the ground of illegality when replying to his submissions. I see nothing wrong in this procedure.

In fact, Counsel for defendant justly and rightly disposed of the issue of illegality in his reply. This was what Counsel for defendant said in his submission: —

"By excluding contract the Defendant was denied such legal Defence as might be open to him. I submit further that even so the Trial Court could of its own motion have raised the question of illegality. Bull v .Chapman (1853) 8 Lich 444 22 L.J.E. at 257 Snell v Unity Finance Co. Ltd. (1964) 2 Q.B."

In my view the record is quite clear. Both parties had. s1fficient opportunity to contend the ground of illegality.

The complaint of Counsel for the Plaintiff is unfounded and that ground of appeal fails.

Having disposed of this ground I will now turn my attention to Ground 2 of the Grounds of Appeal. This is more substantial and creates greater difficulty in resolving.

Counsel on both sides have been of considerable help to the Court by furnishing the Court with some useful authorities.

Counsel for plaintiff has made the following submissions:

that there was no evidence of illegality in the contract. There was no burden on the Plaintiff to prove that he was an authorised dealer in gold. Counsel, however, conceded that even though neither party to the dispute may have raised the question of illegality, the Court suo moto, can raise [p.186] it if the contract is tainted with illegality. Counsel submitted that before the Court can do that several conditions should be fulfilled before the Court can raise the issue.

In support of that submission, Counsel cited several legal authorities; among them were North Western Salt Co. Ltd. v. Electrolyte Co. Ltd. H.L. (1914/1915) A.E.R. 752 at 756,759, 760, 761 and Peterson v Tuboku-Metzger (1964/1966 A.L.R. (SL) 442 at 449 and Chitty on Contract Vol. 1, 24 Edit. Para. 1059.

Counsel finally submitted that there is no evidence to support the findings of the Court of Appeal and that the conclusions are wrong and the Judgment of the High Court be restored.

In response to the submissions of Counsel for the plaintiff Counsel for the defendant has urged the Court to adopt one of these courses —

(1) If the appeal is dismissed that is the end of the matter

(2) If allowed, the Judgment of High Court cannot stand; if so, then

(3) The case has to be remitted to the Court of Appeal for rehearing, because the Court of Appeal did not decide the Case on the substantive grounds of Appeal Counsel cited the case of North western Salt Co. Ltd. (supra) I have already disposed of Ground (1) of the Grounds of Appeal and will now consider the submissions of Counsel in reply to Ground (2). Counsel submitted there was evidence before the Court that the Plaintiff was not an authorised dealer.

Counsel contended that both vendor and purchaser should be authorised dealers and he refers to the Exchange Control Act.

Cap. 265 Section 3 (1). Counsel submitted further that if the name of the Plaintiff is not on the list of authorised dealers, he is not an authorised dealer and has cited these case of Nabieu Amadu v. Alah Sidiki (1972/1973 A.L.R. (S.L.) 42.

[p.187]

Counsel submitted that the whole transaction was shrouded in secrecy as a result the Plaintiff sued in quasi-contract. Counsel urged that the laws of Sierra Leone were violated and the whole purpose of the legislation was to combat smuggling and tax evasion. Counsel finally submitted that it was irrelevant by what term the transaction is called.

What I have to consider are the following points—

(1) Was there a contract between the plaintiff and the Defendant

(2) If there was a contract, was it an illegal contract ab initio?

(3) If it was an illegal contract ab initio, can it be enforced by either party?

(4) Can an innocent party sue on such an illegal contract to recover money had and received?

(5) Was there any evidence on which the Court of Appeal based its decision?

I will endeavour to resolve the points posed supra.

In order to determine if there was a contract between the parties, I must go back to the correspondence between the parties. Money was alleged to have been transferred to the defendant. Before the plaintiff came into contact with the defendant, he wrote a letter to the Executive Officer, Chamber of Mines identifying his line of business and said he needed assistance in meeting interested parties with a view to offering a range of services in that line of business - gold and precious metals. In reply, he received a list of authorised alluvial gold dealers. In that list, was the name of the defendant. As a result the plaintiff wrote to the defendant. It will be pertinent to refer to the letter plaintiff wrote to the defendant (EX 'C') hereinbefore mentioned.

The defendant promptly replied. In the end the plaintiff set a representative to the defendant. After some negotiations between the defendant and the representative of the plaintiff the sum of 79620 US Dollars was sent to the defendant agreed that there was a transaction offer for the sale of gold to the representative and [p.188] the quantity was about 8.5Kilos or a little over for the price of 79620 us Dollars. Subsequently, defendant received the purchase price which was 79620 US Dollars. However, he insisted that the gold was given to the representative of the plaintiff. The Court of Appeal held that "This is a clear case of a contract entered into on behalf of the plaintiff (a discl principal), by Powell his Agent and the defendant". I agree,

There was, no doubt, a contract between the plaintiff and the defendant.

The Court of Appeal, however, having found that there was contract between the parties had this to say per Navo J .A.

"In the light of the above submission and indeed the entire circumstances of this case, I make bold to say that in my view the agreement to pay the sum of 79620 United States Dollars into the Bank Account of the Appellant Wilson, which agreement was contracted by the Appellant and the Respondent through his Agent Anthony J. Powell and performed by the Respondent Mason by paying the amount into the Bank of Credit and Commerce International Ltd at Earls Court Road London for 10 kilos Alluvial Gold was a deliberate and calculated devise to eclipse and by-pass the Exchange Control Regulations cited earlier. by Mr. T.S. Johnson. thus depriving this country of much needed foreign exchange. The transaction call it money had and received or what you like is clearly not only illegal is also against Public Policy and thus making the Maxim Exturpi causa non oritur actio applicable. "

[Emphasis mine]

The Court of Appeal having made such positive findings disturbed the findings of fact made by the High Court. An Appellate Court ought not to disturb findings of fact, of a lower court unless the findings are clearly wrong and cannot be supported in law - Benmax v. Austin Motor Co. Ltd. (1955) All E.R. 326

In that case Viscount Simmonds at p. 327 said:

[p.189]

"In such a case a distinction should be made between facts deposed to by witnesses and found by the Court; and inferences of facts drawn therefrom by the Court"

In the instant case, the positive findings of fact were made the High Court as a result of the deposed to by the witnesses.

These were the findings of the Judge in the High Court. The Learned trial Judge said among other things:

"Has the defendant been unjustly enriched at the plaintiff's expense? A finding of fact is called for here. From the evidence adduced on both sides about the delivery or non-de livery of the gold, the issue one way or the other must be resolved by the relative weight to be attached to the evidence on each side. It is all a question of credibility. I have carefully watched the demeanor of the witnesses when testifying the mode of response to questions as they were put to them in examination in chief or cross examination. I have also considered the content of the exhibits along side the oral testimony of the witnesses, whether there were inconsistencies in the evidence of the one side and whether such in-consistencies are material. I have also taken great care not to be influenced by extraneous matters and irrelevant pieces of evidence, but to weigh and consider adequately the evidence in its entirety I hold the plaintiff and his witnesses as credible witnesses. The defendants' evidence cannot be relied upon because of material inconsistencies in his evidence."

The learned trial Judge then highlighted several passages of the defendant's evidence which he considered were inconsistencies

The Judge went on to say "On the other hand the plaintiff

and his witness in my view told a consistent story". He accordingly spelt out these several passages in the evidence.

[p.190]

Finally, the learned trial Judge said "Having considered the case as a whole I hold that the plaintiff has proved his case on a balance of probabilities".

There was no evidence on which the Court of Appeal made its findings.

I see no reason to disturb the findings of fact made by the learned trial Judge. Having said that, I will now consider the law under which the Court of Appeal grounded its decision.

It is the Exchange Control Act. Cap. 265 of the Laws of Sierra Leone as amended. The title is "An Act to confer power: and impose duties and restrictions, in relation to gold, current payments, securities, debts, and the import, export, transfer and settlement of property and for purposes connected with the matters aforesaid". The Act does not create an offence per se.

It confers powers and imposes duties and restrictions.

In this regard, the Court of Appeal referred to the

Exchange Control (Amendment) Act 1965" Section 3 (1) which

provides:

"Except with the permission of the Minister no person other than an authorised dealer shall in Sierra Leone, and no other person resident in Sierra Leone other than an authorised dealer, shall, outside Sierra Leone, buy or borrow any gold or currency of a Non-Scheduled territory from or sell or lend any gold or currency of a Non-Scheduled Territory to any person other than an authorised dealer."

The Court of Appeal having invoked in aid the Exchange Control (Amendment) Act, 1965, more particularly section 3 (1), the learned justices, with respect, misapplied the law. The contract between the plaintiff and the defendant was executed in Sierra Leone (Emphasis mine). The contract therefore is governed by the laws of Sierra Leone. Section 3 (1) of the said Act of 1965 refers to dealings in "gold or currency of a Non-Scheduled Territory". Sierra Leone is listed as one of the Scheduled Territories in the First Schedule of the Act. Section 3 (1) refers.

[p.191]

In the light of the correspondence between the plaintiff and the defendant, can the Court lend its aid to the plaintiff I think it can.

After the initial correspondence between the plaintiff and defendant which created the contract, there were several others which show that nothing was, "shrouded in secrecy", on the part of the plaintiff as counsel for the defendant urged the Court to believe.

The following communications passed between the plaintiff-defendant and the representative of plaintiff and the son of plaintiff and defendant respectively

(1) "84-08-2, 17 .07

877173 Syss E.C. 9

3550 P.S. NT SL

JGX

TLX 877173

ATTN MR. MASON

TLX Received to your second letter dated 31st July, 1984. Volume available 10-15 weekly basis purity 92 - 93 per cent

I will be travelling to Europe so I will be in Freetown on the 1st week in September.

Regards

T. Wilson".

(2) 8.10.84

877173 Suss ec 9

3520 VISINT SL

Representative O. Powell to H. Mason

Good Evening

Thank you for your recent TLX for the convenience of our transaction. Pls. can you when transferring funds credit us Dollars. Tungi has been operating his fingures on an exchange rate of USD 1 pound Sterling. Please confirm acceptability. Calculate [p.192] figure to be USD 79630. When transferring funds pls. request Tungi's Bank to advise direct of credit made to account. Tony" "Please read USD 1.2. one pound sterling 977172 SUSSED 9 3520 visint sl.

(3) "H Mason to Powell 1.10.84

Thank you for your telex and am fully aware of the situation. I am prepared to arrange funds to Mr Wilson's Account in London providing that when I do so, you physically have the material in your possession..... ..... Regards.

Harry"

(4) Harry Mason to Powell 1.10.84

Very pleased to speak to you on the telephone this morning. Latest gold price was 280.00 sterling. Hope you can arrange a deal with Mr. Wilson. Keep me informed. How you want payment made and any other further developments. Looking forward to meet you both on Friday.

Keep up the good work.

Regards

Harry."

1.10.84.

(5) "Powell to Harry Mason,

Our telephone conversation this morning refers.

We are to purchase material gross weight 10.00000 Kilos based on price 280 sterling per oz (90002.00 per kilo). 206.39 (6635.00 per kilo). Total value of 66350.00 sterling. Can transfer funds to this value. You have bank details. Due to change of plans I will be returning to U.K. with Tungi

B. Cal departing here Friday 5th October.....
.....

Kindest regards

Tony"

(6) "H. Mason to Powell 1.10.84

Thank you for your letter and am pleased that you have concluded a deal with Mr. Wilson. An arranging transfer of funds A.S.AP. Confirm by return if this consignment can be sold on tomorrow. Fix as price has slightly dropped. Please telephone me

Regards

Harry".

2.10.84

(7) Mason to Powell

Thank you for your latest telex received this morning. We accept the fact that Mr. Wilson wants the transaction in US Dollars and am arranging for USD 79620 to be transferred to Mr. Wilson's A/C in London.

As we have to purchase dollars this will take a day or two. But the sum will definitely be in his account by Thursday and his Bank will confirm.

Urgent you confirm by return telex in order that we c an sell forward and arrange transfer of funds .....

Regards Harry"

In a subsequent telex from H. Mason to Powell he said:

Please confirm. gross weight of consignment. As previous telexes as state 10.5 Kg. we understand the figure of USD 79620 was based on the gross weight of 10.5 Kg.

We have arranged transfer of funds . Regards

Harry".

Powe1l to Mason

2.10.54

(9) .....

.....

[p.194]

However clarification as requested. Reaffirm gross weight of consignment 10 kilos.

(Le 321.5 ozs).

Regards

A. J .P.

Mason to Powell

2.10.84"

10. "Telex received and understood. Have arranged Transfer of USD 79620 to Mr. Wilson's Account. Necessary action on re-affirmed figures.

Regards

Harry"

Powell to Mason

4.10.84

11. "In view of delay can you please telephone your Bank and request that they advise time of credit to Mr. Wilson's A/C in London. It is imperative that we have this information A.S.A..P

.....

Regards

A. J. P

Mason to Powell

12. "On information received by my Bank Funds were transferred at Approx 15.30 hrs. BST today.

Regards.

Harry"

H. Mason to Powell

13. "This is to reaffirm that the sum of USD 79620 was credited to Mr. Wilson's Account with the Bank of Credit & Commerce International at Approx. 15.39 hrs. BST on Tuesday 4th Oct. If he was not informed of this the blame lies entirely with the Bank due to their incompetence

.....

Regards

Harry"

[p.195]

Powell to Mason

15.10.84

"Telex received. I will make my own way home from Gatwick. I will speak to you during the day. No further communication please unwind deal with chess. You are to be re-imbursed.

Regards"

Mason to Powell

15.10.84

15. "Have you watertight and 100 per cent guarantee that I will be re-imbursed for my money.

Your comments by return telex will be appreciated.

Harry"

Mason to Powell

16 "You still have not guaranteed how I am going to get my money back.

Harry"

17. Mason to Wilson 23.10.84

"We now understand that the funds made available in have now been transferred to

Freetown. When will it be convenient for us to collect the outstanding consignment (10Kg.) We will also like to purchase a further consignment and on this occassion we will have funds with us.....

.....

N.B. Mr. Larmie, if you are there please could you acknowledge receipt of this information so that we get an immediate feed back on how well we have been received".

18. Wilson to Mason

7.11.84

"Got your message from Mr. Larmie, After my last telephone conversation with you was unable to collect my Jeep from the garage. Have got it now and proceeding today will contact you from Guinea.

[p.196]

Regards

Tungi Wilson"

19. 14.11. 84

Wilson to Mason

"Please phone me at Hotel Gbesia Conakry Tel Nos. 46-47, 46-40-40, 46-40-45 you may also

TLX No. 2112 Attn. Mr. Coum Bassa for Tunji Wilson.

Regards

Tunji Wilson"

20. Mason to Wilson

14.11.84

"Due to the uncertainty of your intensions I have decided to send my son Michael and Tony to Freetown to clarify the position. They will be arriving Thursday morning 15 November. It would be appreciated if you could have them met at the airport.

Best wishes.

Harry Mason".

21. Wilson to Mason

14.11.84

"Come down in Guinea immediately I have committed myself with some people who have 40 of G.A. am in hotel Gbessia Conakry Guinea. Am trying to cover up the business. Explain

details when you arrive in Guinea .....

.....

R.G.T. Wilson"

22. Michael Mason to Wilson

5.12.84

Dear Tunji

Please confirm by return your intensions for arriving in England and when you expect the situation to be resolved.

Regards.

Michael Mason

[p.197]

23. Wilson to Mason

7. 12. 84

"I should have travel this week to see you but unfortunately all the flights are completely booked unless after the Christmas Vacation.

I will call you from Antwerp. Regards.

T Tisco".

24. Mason to Wilson

10.12.84

"Thank you for your Telex. Regret you are unable to see us before Xmas. However we look

forward to our meeting after the holidays

.....

.....

Harry Mason and Family"

25. Secretary to Mason for his attention

7.1.85

"Mr. Wilson is not coming to the office this week because he is very ill and unable to work".

Regards

Secretary"

As a result of this message from the Secretary of defendant the plaintiff sought other means of getting through to the defendant. In his evidence, plaintiff said "I telephoned the defendant from the U.K. about the refunding of my money 79620 U.S. Dollars. I got to know the defendant telephone number because it is stated in his letter head. The defendant was in Freetown when I made the telephone call. I personally dialled the defendant's number, a girl answered the telephone. I asked for the defendant, he came on the line. I said first what happened to my gold? or words to that effect. The reply came don't worry you will be refunded. I replied "when?"

[p.198]

Then he said, I have diamonds which I can sell which will enable me to refund the money. After that, I did not hear anything for a week or two. I phoned him again and he promised to send the 10 Kilos to me by a Mr. Kakay who would be travelling on a B. CAL flight.

These telephone conversations took place after Mr. Powell had returned to London without the gold.

After the telephone conversations I received a Telex about the arrival of Mr. Kakay in London."

This telex was tendered in evidence and it was dated 26. 10. 84 and reads:

"Attn. Mr. Tony Powell

Pl. meet Mr Kakay (the gentleman who took you to the airport) at Gatwick airport on Friday Nov.3. He will be arriving by BCAL.

Regards

Tisco Enterprises".

.....

The plaintiff's evidence continues "Mr. Kakay did not ARRIVE IN London as expected. I then sent my son and Mr. Powell to Freetown to see what was going on. I have heard of (missing line) Mr. Larmie from whose office the defendant used to send telex messages to me. I do not know a Mr. Leopold. I have heard of him.

I spoke to someone on the telephone who identified himself to me as a Mr. Leopold. I spoke to him about the 10 Kilos of gold".

As can be seen from the evidence the situation was becoming very desperate for the plaintiff. How did he come to know about Mr. Kakay? It was through the defendant and Mr. Powell. Both Powell and Michael Mason had met Mr. Leopold in London at his Leopold's request. In his evidence Michael Mason said "I also know one Mr. S. Leopold. He is not in Court. I came to know him in London. Before I came to Freetown last year he telephoned to say he wanted to meet Mr Powell and myself. I met him in Hackney in London sometime [p.199] in October, 1984-. I am aware that my father and his partners were involved on a transaction with the defendant. He asked Mr. Leopold about the money 79620 U.S. Dollars owed to Mr. Harry Mason by the defendant. He said he would look into the matter as he was related to the defendant somehow. I believe Mr. Leopold was married or getting married to the defendant's mother. Mr. Powell was present at the time."

Mr. Powell in his testimony also referred to this meeting with Leopold and also the expected arrival of Mr. Kakay in London with the 10 Kilos of gold. The plaintiff was informed of this encounter with Mr. Leopold vis-a-vis his business transaction with the defendant. Mr. Powell said "I told Mr. Leopold about the background of the transaction with the defendant. Mr. Leopold said we need not worry, we would get the gold, suggesting that defendant would perform his own side of the agreement ultimately;

Mr. Leopold said that he knew the defendant's mother, very very well.

The plaintiff felt he could seek the assistance of Mr. Leopold to recover his money. He therefore sent him a telex dated 18.1.85 which reads:

"Attn. Mr. Leopold

The situation with Mr Wilson has still not been resolved. We have not received any gold or refund for the money which was deposited in his London Account last October. As we understand your company was involved in transferring the funds from London to Freetown. We respectfully request your help and cooperation in settling this matter.

Kindest regards

Harry Mason"

[p.200]

In reply, Mr. Leopold sent a telex message to Mr. Mason, the plaintiff, which to say the least, is devastating. It is dated 21.1.85. This is the telex.

"ATTN. MR. HARRY MASON - 21.1.85

Many tks yr TLK of Jan 18 we are. indeed surprised to learn that your business with Mr. Wilson has still not been concluded.

Tony and your son were here sometime last November and phoned us from their hotel but never made any personal contact with us since then we have not heard from them and assumed that everything was O.K. You have been misinformed about our involvement in transfer of yr money. It is important that we inform you that Mr. Wilson authorised his bankers in London to transfer the amount you made available to him to a local-merchant Mr. Mohamed Gebara's account with the Soho Branch of Barclays Bank. Mr. Mohamed. Gebara in turn paid Mr. Wilson here in Freetown in Leones at double the official Bank rate of exchange. Pls feel free to ascertain the fact of the transfer from your bankers·. Our company was certainly never RPT never involved with any transfers. Nevertheless, we shall contact Mr. Wilson immediately to find out the position and revert soonest.

Sincere regards

S .L. Leopold".

On the 26.10.84 the defendant had sent a telex to Powell in England to meet Mr. Kakay, at Gatwick airport on Friday November 3 who will be arriving in England by BCAL.

This is the evidence Powell gave: I should meet Mr. Kakay on 3/11/84 at Gatwick. The purpose was to meet Mr. Kakay to receive the 10 kilos of gold at the airport'. I know this from a telephone conversation with the defendant [p.201] on 15/10/84. I informed the plaintiff about the telex and the plaintiff's son Michael accompanied me to Gatwick in the hope of meeting Mr. Kakay at the airport.

As I see it, Powell knew the man he was going to meet at Gatwick on 3rd November.

Powell continued his evidence by saying:-

"Mr. Kakay did not arrive on the flight according to information received from the BCAL computerised reservations at Gatwick. As far as I know Mr. Kakay did not arrive in London at all."

The evidence of the plaintiff and Powell show clearly that the defendant was not willing to fulfil his side of the contract.

The defendant admitted in evidence, that he received 79620 US Dollars. What did he receive the money for? I have no doubt in my mind that it was the purchase price for the 10 kilos of gold agreed upon by both parties. For a clearer picture, I will quote the evidence of defendant - he said: - "I eventually received the 79620 U.S. Dollars in the form of Leones in Freetown. I received the equivalent in Leones of 79620 US Dollars at the end of October 1984. I received the equivalent in the sum of Le440,000.00 or thereabout. The said sum of Le440,000.00 was received by me at the Barclays Bank Wilberforce Street . I now say that the 79620 US Dollars were paid by my bank in London to Mr. Mohamed Gebara of Wilberforce Street who in turn gave me their equivalent in Leones in Freetown."

This bit of the evidence of defendant confirms the content of the telex of Leopold to Mason that the defendant had indeed received the equivalent in Leones of the 79620 US Dollars.

In spite of this overwhelming bit of evidence, the Court of Appeal made findings of fact which were not supported by the evidence. The Court of Appeal allowed the appeal on the grounds "that the transaction between plaintiff/respondent was entered into or tainted with illegality thus making the maxim 'Ex turpi [p.202] causa non-oritur actio applicable." I do not agree with the findings of the Court of Appeal. The Communications between the parties and agent of the plaintiff and the son of the plaintiff show clearly that the plaintiff was an innocent victim of a well thought out-scheme to deprive him of his money with impunity. In such a case, the innocent victim is entitled to recover whatever consideration passed under the contract. The judgment of the Court of Appeal was delivered on the 19th November 1986. It is interesting to note that the Court based its decision on Public Notices that had been revoked — that is to say P.N No. 47 of 1973 P.N. No. 57 of 1974. The current PN is No. 5 of 1977.

The object of the Exchange Control Act is "to confer powers, and impose duties and restrictions in relation to gold". The maxim was invoked, without justification.

In the instant case, there was a legally binding contract between the plaintiff and the defendant. There is abundant evidence that the defendant failed to fulfil his side of the contract; that is to say to hand over the 10 Ki1os of gold agreed upon for the price of 79.620 United States Dollars to the plaintiff or to refund the said amount. In fact, there is evidence that the defendant received double the exchange rate for the dollars in Leones. There is evidence that the defendant attempted to get more money from the plaintiff, in order to effect other business transactions to enable him to get funds to reimburse the plaintiff.

In my opinion, the plaintiff dealt with the defendant in an honest and business like manner, albeit, through his agent Powel

On the contrary, the defendant was not honest in his dealings with the plaintiff. He wove a web of deceitful communications to deprive the plaintiff of his money. I am satisfied there is no moral turpitude on the part of the plaintiff to prevent him from recovering the sum of 79620 US Dollars from defendant.

Ground II of the appeal therefore succeeds.

[p.203]

I will therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the High Court. The defendant shall pay to the plaintiff the costs occasioned by this appeal and the costs in the court below, such costs to be taxed.

SGD.

S.C.E. WARNE, JSC

SGD.

BECCLES DAVIES, AG. CJ.

SGD.

THOMPSON-DAVIS, JSC

SGD.

G. GELAGA-KING, JA.

SGD.

A.B. TIMBO

CASES REFERRED TO

1. North Western Salt Co. Ltd. v. Electrolyte Co. Ltd. H.L. (1914/1915) A.E.R. 752 at 756,759, 760, 761

2. Peterson v Tuboku-Metzger (1964/1966 A.L.R. (SL) 442 at 449

3. Nabieu Amadu v. Alah Sidiki (1972/1973 A.L.R. (S.L.) 42

4. Benmax v. Austin Motor Co. Ltd. (1955) All E.R. 326

STATUTES REFERRED TO

1. Exchange Control Act. Cap. 265

2. Exchange Control (Amendment) Act 1965" Section 3 (1)

ISATU KAMARA v. THE ATTORNEY GENERAL

[SC. MICS. APP. NO. 4/92] [p.144-154]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 11 AUGUST 2007

CORAM: HON. MR. JUSTICE S.M.F. KUTUBU

HON. MRS. JUSTICE A. V.A. AWUNOR-RENNER

HON. MR. JUSTICE M. O. ADOPHY

BETWEEN:

ISATU KAMARA APPLICANT

Vs.

THE ATTORNEY GENERAL RESPONDENT

SOLICITORS:

A.F. SERRY-KAMAL, ESQ., with him F. M.

DABO, ESQ., of Counsel for the Applicant.

MISS G. ATTIIBA-DAVIES of Counsel for the Respondent.

RULING delivered this 11th day of August, 1992 by KUTUBU, C.J., PRESIDING.

RULING

These certiorari proceedings are brought on behalf of the Applicant, Isatu Kamara, by Learned Counsel, Abdul Franklin Serry Kamal for an Order of certiorari to quash the order of the Nylander Commission of Inquiry given on the 8th day of July, 1992, resulting in the conviction and imprisonment of Applicant, a witness before the said Commission for a period of 21 days.

The grounds of the application according to the statement dated 9th July, 1992 inter alia are as follows:—

[p.145]

1. That the Commission exceeded its jurisdiction in convicting and sentencing applicant.

2. That the Commission acted in excess of jurisdiction in convicting and sentencing applicant.

3. That the Commission acted ultra vires in convicting applicant summarily.

Applicant relies on the Affidavits of Isatu Kamara and Fode Maclean Dabo both sworn to on the 24th day of July, 1992 and filed together with the exhibits. Exhibit "A" herein is the Certified True Copy of the record of proceedings of the Nylander Commission of Inquiry; dated 8th July, 1992, touching and bearing on Isatu Kamara.

It is necessary, we think; to give in brief form, the origin and source of the Nylander Commission of Inquiry; and the facts relating to these proceedings before us. Suffice it to say that the Lynton Nylander Commission of Inquiry is a creature of statute, established by the National Provisional Ruling Council (N.P.R.C.), in exercise of the powers conferred upon it by Section 2 and 6 of the Commissions of Inquiry Act, CAP.54 Laws of Sierra Leone, 1960 as adapted by the Proclamation entitled "THE ADMINISTRATION OF SIERRA LEONE (NATIONAL PROVISIONAL RULING COUNCIL) PROCLAMATION, 1992 P.N. NO.20 of 1992, with the following terms of reference:—

1. To inquire into and investigate the financial administration from the 1st day of June, 1986 to the 22nd day of September, 1991 of [p.146] Government Ministers or Departments, Local Authorities, Parastatals including Public Corporations and the Bank of Sierra Leone, or Commissions or Councils established under the Constitution, and ascertain —

(a) whether or not any malpractices or irregularities were committed by any person with respect to those activities;

(b) the nature and extent of the malpractices and irregularities;

(c) the sums of money, and the identities of persons involved in such malpractices and irregularities,

2. To inquire into and investigate any persons or matters as from time to time be referred to the Commission by the National Provisional Ruling Council.

Isatu Kamara, applicant herein, and a witness before the Nylander Commission of Inquiry was on Wednesday, 8th day of July, 1992 found guilty of perjury and sentenced to 21 days imprisonment at the Central Prisons, Pademba Road, Freetown, under Section 3(a) of the National Provisional Ruling Council Decree No.4, 1992 - Commissions of Inquiry (Additional Powers) Decree, 1992.

Section 3(a) of N.P.R.C. Decree No.4 of 1992 states:

"Any person who makes any false statement to any Commission issued under the Commissions of Inquiry Act, knowing those statements [p.147] to be false or which he has no reason to believe to be true) shall be guilty of contempt punishable by imprisonment or fine.

It will suffice to state at this juncture that the offence of perjury in the Commissions of Inquiry Act CAP, 54 Laws of Sierra Leone, 1960 is created by Section 11 of that Act — and it states :—

Section 11 —

"Any witness who shall wilfully give false evidence in any such inquiry concerning the subject matter of such inquiry shall be guilty of perjury and be liable to be prosecuted and punished accordingly".

On 10th July, 1992 an application for leave to apply for an order of certiorari was made to this Court by Isatu Kamara against the orders of Hon. Mr. Justice Lynton B. O. Nylander dated 8th July, 1992 between :—

ISATU KAMARA — APPLICANT

AND

ATTORNEY GENERAL — RESPONDENT

In the said application, Counsel sought to invoke the supervisory jurisdiction of this Court under Section 125 of the Constitution of Sierra Leone, 1991 Act No.6 of 1991 and also Section 148 of the said Constitution which deals with the powers, rights and privileges of Commissions of Inquiry.

Section 125 of the Constitution of Sierra Leone states:

[p.148]

"The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directives orders or writs including writs of habeas corpus orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers".

Section 2 (1) of the PROCLAMATION —THE ADMINISTRATION OF SIERRA LEONE (NATIONAL PROVISIONAL RULING COUNCIL) PROCLAMATION, 1992, Public Notice No.20 of 1992 provides

for the suspension of certain provisions of the Constitution of Sierra Leone Act No.6 of 1991. It states:—

"All provisions of the Constitution of Sierra Leone, 1991 which came into operation on the 1st day of October, 1991 which are inconsistent or in conflict with this Proclamation or any Decree made thereunder shall be deemed to have been suspended with effect from the 29th day of April, 1992".

As far as we are aware, Section 125 of the Constitution of Sierra Leone 1991, Act No. 6. of 1991, which invests this Court with supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority has not been suspended and is still operative.

[p.149]

Counsel for applicant complained of passages here and there in exhibit "A" the record of proceedings of the Nylander Commission of Inquiry touching and bearing on applicant Isatu Kamara. We have carefully looked at these passages.

For the purposes of this ruling, and to avoid prolivity, we have thought it expedient to reproduce verbatim, only the exchanges which took place between the Chairman and the applicant, after the Commission had decided to find the latter guilty of perjury. It runs thus:

Mr. Chairman: The Commission has decided that you are guilty of perjury.

Mrs Kamara: Can I say something my Lord?

Chairman: Will you wait, I have finished with that. I have just specified two points in which we are not at one with. You said you started in 1991 and we are satisfied that you started before then. You said that you were given a letter from Mr. Sheriff, though he says that he could not recall, but categorically said that the Managing Director directed him then. This is what we say, we have found you guilty of perjury contrary to sections 3A of the decree, 1992. As such, I will not levy the ultimate or maximum punishment which this section calls for, but from here, forthwith, you will be taken to [p.150] the State Prison at Pademba Road, where you will be kept until July, 29th and you will be brought here again for the continuation of the examination. Have you got anything left? Let the Officers come and take custody of her.

Mrs Kamara: My Lord can I say something or can I explain myself?

Mr. Chairman: When we come back.

We have taken this step for purposes of clarity and to put things in their proper perspectives.

The issue before this Court is whether his Lordship

Lynton B. O. Nylander had jurisdiction to find applicant guilty of perjury under Section 3(a) of the National Provisional Ruling Council Decree No.4, 1992 —Commissions of Inquiry (Additional Powers) Decree, 1992 as he did. I am constrained once more to refer to the provisions of Section 3(a) of N.P.R.C. Decree No.4 of 1992 which states:

"Any person who makes any false statements to any Commission issued under the Commissions of Inquiry Act knowing those statements to be false or which he has no reason to believe to be true, shall be guilty of contempt."

From the foregoing, I can only say, with respect, that the Hon. Chairman acted in error in finding applicant guilty of perjury instead of contempt as provided by Section 3(a) of N.P.R.C. Decree No.4 of 1992, thereby acting in excess of [p.151] jurisdiction

Even if the Hon. Chairman had jurisdiction to find the applicant guilty of perjury, certain procedure must be followed before conviction and sentence.

It is provided by Section 11 of the Commission of Inquiry Act CAP.54 Laws of Sierra Leone, 1960 as follows:—

"Any witness who shall wilfully give false evidence, in any such inquiry concerning the subject-matter of such inquiry shall be guilty of perjury, and shall be liable to be prosecuted and punished accordingly".

The prosecution will then be a matter for the Attorney-General and the Director of Public Prosecutions to prefer a charge against the accused who will be tried by the High Court accordingly.

The rationale in my view in resorting to the expedient of an offence of contempt in Section 3(a) of Decree No.4 of 1992 is to make for the speedy despatch of the Commissions work, and to obviate the delay that would result in prosecutions under perjury, the contempt procedure being simpler and less irksome.

IN JOHNSON V. REGINAM ALR (S.L.) Series. 1970 - 71 Court of Appeal (Cr. App. No.18/70) an appeal against conviction for contempt, Sir Samuel Bankole Jones - President of the Court of Appeal delivering the judgment of the Court inter alia said at p.124 lines 23 - 33.

"All the authorities are agreed that when a judge has made up his mind to invoke the summary process for committing [p.152] for contempt, the following procedure should be followed. Firstly, the judge should make the person concerned aware of the pith of the charge against him. Secondly, the person, should be given an opportunity to show cause why he should not be so committed. He may then say anything by way of excuse, 'explanation or possibly correction of any misapprehension as to what has in fact been said or done. It is of the utmost importance that this opportunity should be given, and unless that is done the committal would be unlawful."

This brings me to the principles of natural justice, the violation of which was a ground of complaint. The applicant complained that the procedure adopted by the Chairman of the Commission in refusing to listen to her before sentencing her to imprisonment was an infringement of the principles of natural justice.

Indeed, there are fundamental principles which govern judicial and quasi- judicial inquiries, and one of these is the "audi alteram partem" rule, that is, a party to judicial proceedings Should not be condemned unheard. No one who has a case or against whom an unfavourable decision is given will believe he has been fairly treated if in the course of his trial in any quasi - judicial proceedings leading to his conviction and sentenced is refused hearing.

We have carefully read the records of the proceedings in this matter, and taking all the circumstances into consideration, it seems to us that the procedure, unwittingly no doubt, adopted [p.153] by Chairman Nylander in refusing to hear applicant

before sentence, thereby not making it plain and manifest that justice was done, was bad. A judicial or quasi-judicial decision reached by a tribunal in violation of the rules of natural justice may be quashed on certiorari

Miss Attiba-Davies, Counsel for Respondent argued with force that applicant was only committed to prison and as such, she was not convicted. This was countered by applicant that committal to prison and sentence to prison are both convictions and referred to the reported case of In re: MANNI, 1964 - 66

ALR (S.L.) Series, Court of Appeal for Sierra Leone p.557 - Cr. App. No.28/66; where the Court of Appeal invited arguments from Counsel before application was made for leave to appeal in that matter, the case of a contemmor who had been convicted by the then Supreme Court (High Court).

The question was whether there existed in law a right of appeal to the Court of Appeal. Both sides agreed that there was. It was held by that Court that an order of the High Court, of committal for a criminal, contempt amounts to a conviction and the Court of Appeal therefore has jurisdiction to entertain an appeal against the order.

We are satisfied that this view was a correct one.

In view of the above reasons, we hold that this is a proper case in which the application for an order of certiorari ought to be granted and we so grant.

[p.154]

The proceedings therefore are hereby quashed.

And we direct that the applicant be forthwith discharged from custody in respect of her conviction and commitment thereunder.

SGD.

S. M. F. KUTUBU - CHIEF JUSTICE

I agree.

SGD.

A.V.A. AWUNOR-RENNER, J.S.C

SGD.

I agree.

SGD

M. O. ADOPHY, J.S.C

JAMES TAMBA v. MOMOH KAI

[CIV. APP. 3/84] [p.129-143]

DIVISION : SUPREME COURT, SIERRA LEONE

DATE : 19 FEBRUARY 1992

CORAM: THE HON. JUSTICE S. M. F. KUTUBU, C.J., PRESIDING

THE HON. MR. JUSTICE C. A. HARDING, J.S.C.

THE HON. JUSTICE A. V. A. AWUNOR-RENNER, J.S.C.

THE HON. JUSTICE S. B. DAVIES, J.S.C.

THE HON.SYDNEY C.E. WARNE, J.S.C.

JAMES TAMBA — APPELLANT

VS.

MOMOH KAI — RESPONDENT

F.M. CAREW ESQ. For the Appellant

E.J. AKAR ESQ. for the Respondent

JUDGMENT

WARNE: J.S.C.

This is an appeal against the judgment of the Court of Appeal delivered on the 6th day of April, 1984 reversing the judgment of the High Court Delivered on the 22nd day of November, 1980. James Tamba (the Appellant herein) by writ of Summons dated 10th October, 1977 made a claim against Momoh Kai (the Respondent herein) for:

(a) Damages for trespass, and

(b) An injunction

The facts of the cased are as follows:

By Deed of Conveyance dated 2nd October, 1968, one Grant Sallu Bundu sold a certain piece or parcel of land situate and lying off City Road Wellington in the western Area of (the republic of) Sierra Leone to one Momoh Kamara. The land was demarcated in the said Conveyance thus, on the North by Private property 150.0 feet: on the South by Access Road 149.5 feet: on the east by the remaining portion of the said land then in the possession of the vendor 74.1 feet. The conveyance was tendered in evidence and marked Exh. “J” Momoh Kamara divided this land into three plots and sold one plot to James Camara Macauley. The Deed of conveyance [p.130] was dated 1st May, 1971 and a Copy was tendered in evidence and marked Exhibit “F 2".

On the 8th April, 1974, Momoh Kamara sold another portion of the Said land to Momoh Kai. This Conveyance was tendered and Harked Exh. "E".

On the 15th October, 1975, James Camara Macauley sold his piece of land to Momoh Kai. A Copy of the Conveyance was tendered and Marked Exh "G 2".

During the negotiation for the sa1e of Land by Momoh Kamara firstly to James Camara Macauley and secondly to the Respondent, the Appellant was the “go between”.

After Exhibit "G 2" had, been executed between James Camara Macauley and the Respondent, the Respondent said that was the said piece of 1and he bought from Momoh Kamara. Momoh Kamara had since died. The Respondent subsequently reported the matter to the C. I .D. and claimed from the Appellant the sum of Le1,637.50 for expense incurred on the land transaction.

The Appellant paid Respondent the money and Respondent subsequently executed a Deed of conveyance in favour of Appellant which was tendered in evidence as Exh. “A”.

Exhibit "A." is the subject matter of the dispute between Appellant and Respondent.

The History of the Proceedings is as follows:—

A writ of Summons issued on 10th October, 1977 was accompanied by a Statement of Claim. I will herein set out what I consider to be the material Paragraphs:—

"3. That by-Indenture of Conveyance dated the 8th day of April, 1974 expressed to be made between Momoh Kamara (Principal or plaintiff) of the first part and Momoh Kai (Defendant herein) of the other part, and registered as No 310 at Page 143 in volume 266 in the Book of Conveyance in the office of the Registrar General, Freetown, the said land was conveyed to the Defendant.

[p.131]

4. That after the execution of the said Indenture of conveyance someone laid claim to the said land which caused defendant to report plaintiff to the criminal Investigation Department of police in Freetown.

5. That the police on receipt of Defendant’s report against Plaintiff regarding the sale of said land, requested plaintiff to return the purchase price of the said land plus all expenses incurred by defendant which Plaintiff willingly did.

6. By an indenture of conveyance bearing date the 20th day of September, 1976 expressed to be made between Momoh Kai (defendant herein) Seaman of No. 66 soldier street, Freetown of the first part and James Tamba Seaman of No. 8D Cemetery Road, Congo Town, Freetown of the other part and registered as No. 972 at P.144 in Volume 287 in the Book of Conveyances in the Office of the Registered-General, Freetown the said land was re-conveyance by the Defendant herein to the Plaintiff herein for Le1,637.50.

7. That in spite of the said Conveyance of the said land the Defendant has trespassed on Plaintiff’s land by erecting permanent building structures on the said land without the consent of the Plaintiff.

8. The plaintiff therefore claims:—

(a) Damages for trespass

(b) An injunction against the defendant, his agents and servants from committing further acts of trespass.

(c) An order ordering Defendant to demolish all structures erected on the said land.

(d) Damages for mense profit at the sum of Le1,000 per annum.

(e) And for any other relief which this Honourable Court may deem fit in interest of Justice."

[p.132]

The respondent duly filed a defence which was subsequently amended.

The amended Defence was in the following terms:—

"1. The defendant admits Paragraphs 1 to 5 of the Statement of Claim filed herein.

2. The Defendant avers that he was induced by C.I.D. officers to sign the conveyance bearing date of the 20th day of September, 1976 and expressed to be made between Momoh Kai (Defendant herein) Seaman and James Tamba (Plaintiff herein) as stated in paragraph 6 of the statement of claim filed herein but denies selling the said land therein described in the said Conveyance to the Plaintiff.

3. The Defendant will further contend that the sum of Le1,637.50 paid by the Plaintiff to the Defendant was merely a refund by the said defendant to the Plaintiff of the land originally to the plaintiff of the purchase price of the land originally to the Plaintiff of the land originally bought from Momoh Kamara in Conveyance registered as number 310 at page 143 in volume 266 of the Books of conveyances in the office of the Registrar-General plus other expenses incurred in the improvement of the said land and that the defendant was not selling his land to the Plaintiff and had no reason to do so.

4. The Defendant will contend that he is the Legal and rightful owner of the said Property for which he holds a valid and registered conveyance fore the said Property dated 15th day of October, 1975 and registered as No. 922 at page 48 in volume 279 in the books of Conveyance in the Office of the Registrar-General."

The plaintiff filed an amended reply and made the following avertments:—

"1. The Plaintiff says that paragraph 2 of the amended Defence is a complete contradiction of admission already made in paragraph 1 respectively of Defence and amended Defence.

[p.133]

2. The plaintiff denies Defendants in paragraph 2 of Amended Defence and puts him to strict proof of his allegation.

3. Save as is herein expressly admitted the Plaintiff denies each and every allegation of fact contanined as if the same were set out seriatim and specifically traversed."

In due course, the action went to trial, the trial commenced on 21st December, 1978 before Alghali J. (as he then was). Both parties were represented by counsel. The plaintiff testified and called one witness Frederick Cornelius Macauley, a surveyor. Five witnesses testified on behalf of the defendant including the defendant himself. They were Miss Henrietta Aubee of the office of the Register-General, Mr. James Seisay Kamara, Mr. Lysias McEwen a surveyor, and Mr. Gustavis Fowler a Deputy Assistant Registrar, Magistrate court.

Counsel for both parties addressed the Learned Trial Judge on the 4th and 11th June, 1979 respectively, at the end of which the Learned Judge reserved Judgment. Judgment was delivered on the 22nd November, 1980. The Judgment was in favour of the Appellant. The learned Judge made the following orders:—

"(1) That damages of Le500 be awarded against Defendant.

(2) That the Defendant, his servant or Agents are restrained from entering the said land or to commit further trespass to the land.

(3) That what is upon the land belongs to the land.

(4) That the costs of this Action to be paid to Plaintiff. Such costs to be taxed."

The Respondent appealed to the court of Appeal on nine grounds:—

I will therefore state grounds 1, 2, 9 which I think will suffice for the purpose of the Appeal. They are "(1) The Learned Trial Judge erred in law and fact when he held, that the Appellant/Defendant made a valid sale on his land to Respondent's admission in his statement of claim that the land was re-conveyed to him after he had refunded Appellant's original purchase money for the land sold to Appellant by Momoh Kamara (deceased) but not the land sold to Appellant by James Camara Macauley.

[p.134]

(2) The Learned Trial Judge erred in Law when he failed to properly consider Appellant's Defence or consider them at all.

(9) The judgment of the High Court was against the weight of the evidence."

The hearing of the Appeal commenced before SHORT, NAVO and TURAY J.J.A. on 19th October, 1982 and ended on 28th March, 1984 when judgment of the High Court was reversed. Judgment was delivered on 6th April, 1984 allowing the Appeal and setting aside the judgment and orders of the High Court.

It is against that judgment that the Appellant has appealed to this Court. Several grounds of Appeal were filed on behalf of the Appellant and argued before us by his counsel. It was not necessary to set them out. Suffice it to say that the material issues raised in this appeal may be formulated thus:—

(1) Was exhibit "A" a legally executed conveyance of land situate and lying off Main Road Wellington by Respondent to Appellant?

(2) Was the identity of the land conveyed to appellant by Respondent clearly and unequivocally defined? If the answer is in the affirmative, the

(3) Did respondent commit an act of trespass on the land?

(4) If Respondent committed an act of trespass on the land, is Appellant entitled to damages and an Injunction?

(5) Is Appellant entitled to any other relief?

I will now proceed to consider these several issues:

It will be convenient to consider the first and second together. It will be re-called that the land was originally owned by Momoh Kamara (deceased). He authorised the Appellant to sell the land on his behalf. Appellant divided the land into three plots. He sold one Plot to James Camara Macauley, one plot to the Respondent and one plot to Kelfala Kanu. The dispute arose as to whether the plot he sold to James Camara Macauley was the same plot sold to the Respondent. The deed of conveyance in respect of the Plot sold to a James Camara Macauley was tendered in evidence as Exhibit "F 2". This was dated 15th May, 1971. The survey plan LS.196/67. The hearing on the beacons were Q.5/71; Q.6/71; Q.7/71; Q.8/71 and it is stated thereon certified true copy 21A/71.

[p.135]

The dimension is as follows:— 75 feet by 50 feet by 75 feet by 50 feet.

The deed of conveyance in respect of the land sold to the Respondent was tendered and marked Exhibit "E". This was dated 8th April, 1974. The survey Plan on Exhibit "E" was IS.1535/73 which is a re-Survey of plan IS.21A/71. The bearing on the beacons were Q.5/71; Q.6/71; Q.7/71; Q/71.

The dimension is as follows: 74 feet by 50; 75 feet by 49.6 feet.

After James Camara Macauley had purchased the plot mentioned above, he went to the land in 1977 and found out that it was Appellant who erecting the store. After making some representations to Momoh Kamara, the vendor, he decided to sell the land to Appellant for Le1,000. the offer was accepted, but later , after he had received the money, he said he returned it to him. He said he did this only to confirm that he owned the land. James Camara Macauley said, he later found another store being erected on the same land which he discovered was being erected by Respondent. He consulted a solicitor; action was being when he decided to sell the land to the Respondent. He sold the land to Respondent and executed a deed of Conveyance which was tendered as Exhibit "G 2".

I will now consider Exhibit “G 2“.

There is a Survey Plan attached to Exhibit “G 2”. It is marked LS. 1533/75 it is a sub-division of survey plan LS.196/67. The beacons on the plan are marked Q.5/71; Q.6/71; Q.7/71; Q.8/71. The dimension is 50.0 feet by 75.0 feet by 50.0 feet by 75.0 feet.

The various plans are very revealing except for a difference of the .6 feet on survey plan LS. 1535/73 attached to Exhibit “E”; the other particulars are identical.

In his evidence, James Camara Macauley said “I later came to know that P.W 1 sold my land to Momoh Kai (Defendant). It was in the year between 1974 -75. Yes the only compromise was to sell the same land to Momoh Kai though I know P.W. 1 had sold it to him. Yes Momoh Kai told me that this land I was claiming was sold to him by P.W. 1 I see Exhibit “A” it is a conveyance from Momoh Kai to James Tamba.”

P.W. 1 is the Appellant and Momoh Kai is the Respondent. What did Respondent say in respect of this transaction with James Camara Macauley. Kamara through P.W.1. I paid for the land through P.W.1 to Momoh Kamara. I paid Le600.00. A conveyance was executed in my favour. There was a dispute concerning this land.

[p.136]

I later summon by D.W. 2 for the said land, he claiming ownership of the said land. Before the dispute arose I had build a store on the land I bought. The store was demolished so I reported P.W.1. Later Momoh Kamara P.W.1. told me to build store again as I am the owner of the land, so I erected a store again. I then start to build a dwelling house on the land. D.W.2 issued a Writ against me. I went to the Registrar-General’s Office I discovered the same land which I had bought from Momoh Kamara through P.W.1 was in fact registered under the name of D.W.2 as the owner. As a result, I contacted D.W.2 concerning the said land telling him that I now realised he is the registered owner of the land. I later re-negotiated to purchase the land from D.W.2 for Le1,470.00 after which a conveyance was executed in my favour.”

It will be observed that the foregoing evidence was given by and on behalf of the Respondent. It is necessary to consider the evidence of the Appellant in this regard. He states “the land which was given to me tobe sold by Momoh Kamara I divided into three portions. The 1st plot is the portion I sold to James Macauley also known as James Camara Macauley. The middle plot I sold to Momoh kai the Defendant and plot furtherest I sold to Kalfala Kanu. I executed a conveyance to defendant Momoh Kai on 8th April, 1974 ……

The defendant paid Le600 for the plot. After the conveyance was executed in 1975 I was invited to C.I.D. Headquarters. I met Defendant there. I was asked if I know him. I answered in the affirmative. I was asked if there was any dealings between us about land at Wellington off main motor Road. I told them he gave me money for land to Momoh Kamara. I told them he paid Le600.00 to the said Momoh Kamara

(defendant) (deceased). He now wants Le1,637.50 for the same land sold previously to him for Le600.00. He said he had developed the land.

I paid this amount of Le1, 637.50 to the C.I.D. Headquarters and Defendant handed over all the document to me again.

The defendant re-conveyed the land to me in 1976 of the same land. The conveyance was executed to me in my name. This conveyance — tendered no objection — Exhibit "A".

[p.137]

This is a convenient point to examine Exhibit "A". Exhibit "A" is a Deed of Conveyance made between Momoh Kai and James Tamba. The survey plan is marked LS.1766/75 and is a re-survey of LS.21A/71.

The beacons are marked Q.5/71; Q.6/71; Q.7/71; Q8/71. The dimension is shown as 50 feet by 74 feet by 49.6 feet by 75 feet. The common feature which runs through the various plans mentioned above is the markings on the beacons, that is to say, Q.5/71; Q.6/71; Q.7/71; Q8/71.

When Respondent was executing Deed of conveyance Exhibit "A" he well knew he was doing although he testified that he was forced into signing the document by the C.I.D.

It must be recalled that it was the Respondent who invited the C.I.D. into a purely civil matter.

How can he be heard to say that undue influence was brought to bear on him to sign the document. The Respondent had already received Le1,637.50 (one thousand sic hundred and thirty-seven Leones fifty Centsw) for what Respondent called "my money expense were incurred were refunded to me by P.W.1 ……

……
……

At the C.I.D.; as a result of my complaint to them P.W.1 refunded Le1,600.00 plus this included capital expenses incurred on the land." The inference I can draw from the evidence is that the Respondent having discovered that he cannot enjoy the free and undisturbed possession of t6he land in dispute, opted voluntarily to dispose of it; to the Appellant who originally got him involved in the whole transaction. I do not agree with the court of Appeal, when it declared that:

"The Conveyance referred to in Exhibit "A" is the purported re-conveyance by Momoh Kai to James Tamba dated 20th September, 1976." In my view, Exhibit "A" was a genuine and legally executed conveyance voluntarily made by Respondent. The answer to the first issue, is therefore, in the affirmative.

[p.138]

There is abundance evidence that the identity of the land was never in doubt. The evidence of the Appellant, the evidence of the Respondent, the evidence of James Camara Macauley, the evidence of

Mr. McEwen the surveyor and the various Exhibits tendered, that is to say, Exhibits “A”, “F 2”, G2, “E” speak eloquently of the identity and give clear demarcation of its boundary.

Apart from the evidence of the Appellant, the Respondent himself conceded that land he conveyed to the Appellant and demarcated in the plan on Exhibit “A” was the plot sold to him originally by James Camara Macauley. He conceded also that was the piece or parcel of land James Camara Macauley sold to him.

The evidence of Mr. M’cewen is too cogent to be ignored. I am surprised that the court of Appeal was not attracted by such evidence. Indeed the Court of Appeal dismissed the evidence of both Surveyors summarily. In my view, the court of Appeal misdirected itself on the evidence touching and concerning the identity of the land. It is quite that if the Court had carefully considered the survey plans on the various exhibits culminating in Exhibit “A” and the evidence of Mr. McEwen, the identity of the land would have been crystal clear to the court of Appeal.

Even Exhibit “C” which was tendered as an encroachment plan is in the perimeter of land enclosed by beacons .5/71; Q.6/71; Q.7/71; Q8/71.

In my view, the Court of Appeal did not attach much weight to the survey plans, which respect was unfortunate. The learned Trial Judge considered them and the identity of the land into which the land of Momoh Kamara was divided and given in evidence, in my opinion, misled the court of Appeal. The powers of the Court of Appeal to disturb a finding of fact by the trial Judge has been well established by a series of decisions over the years. These powers are exercised on well established principles:—

See the case of Powell v. Streatham Manor Nursing Home A.E.R. Reprint (1935) 58. The head note states:— “On an Appeal from the decision of a judge sitting without a Jury the jurisdiction of the Court of Appeal is free and un restricted. The court has the same right is free and unrestricted. The court has the same right as the Trial Judge to come to decisions on issues of fact as well as of law. But the court is still a Court of [p.139] Appeal, and in exercising it’s functions it is subject to the inevitable qualifications of that position.

Where the question is one of credibility, where either story told in the witness box may be true, where the probabilities and possibilities are evenly balanced, and where the personal motives and interests of the parties cannot but affect their testimony, an Appellant Court should be reluctant to differ from the Judge who has seen and heard the witnesses and has had the opportunity of watching their demeanour, unless it is clearly shown that he has fallen in error.”

This was a case decided in the House of Lords; among the law Lords who gave concurring judgments was Lord Wright. In his judgment the Learned Law Lord referred to the principles laid down in Clarke v. Edinburgh and District Tramways Co. (1914) S.C. 775 and then said:—

“Two principles are, I think, beyond controversy.. First it is, I think, clear that in an Appeal of this character — that is from a decision of a Trial Judge based on the opinion of the trustworthiness of

witness whom he has seen — The Court of Appeal; “IN order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.”

The Julia Bland v. Ross (1860) 14 Moore P.C.C. at p.235 per Lord Kingsdown, cited with approval by Lord Summer (1927) A.C. at p.47. And secondly, the court has no right to ignore that facts the judge has found on his impression of the credibility of the witnesses and proceed to the case on paper on its own view of the probabilities as if there has been no oral hearing. Lord Summer protested against such a course being taken; he thus stated (1927) A.C. at p.50 what were to his mind the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial Judge.

"(i) Does it appear from the President’s judgment that he made full use of the opportunity given him by hearing the viva voce evidence?

[p.140]

(ii) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute a governing fact which in relating to others has created a wrong impression or any specific misunderstanding or disregard of a material fact or any extreme or over whelming pressure that has had the same effect?

Did the Court of Appeal give head to the above guidelines? I do not think so. See also the case Dr. C. W. Seymour-Wilson v. Musa Abess Civ. App. No.5/79 decided in this court on the 17th day of June, 1981 (unreported) Luke C.J. said at p. 66. “There is no doubt that an Appellate court power to evaluate the evidence led in the court below reach its own conclusion and in a suitable case to reverse, the findings of fact of a trial Judge. But those powers are exercisable on well settled principles and an appellate Court will not disturb the findings of fact of a Trial Judge unless those principles are applicable. The principles have been frequently stated locally and in other common wealth countries.

In view of what I have stated above, there was not justifiable reason for the court of appeal to disturb the finding of fact of the Learned Trial Judge. “Having found that the identity of the land is not in doubt, I will now consider whether the Appellant was in possession of the land. I have already found that the Appellant was armed with a validity executed conveyance relating to the land i.e. exhibit “A”. However he is not claiming for a Declaration of Title, he is claiming for trespass to a place or parcel of land based on Exhibit “A”.

In order to prove trespass the Appellant must show by evidence that he was in possession of the land.

“Trespass to land is an entry upon or any direct and immediate act or interference with the possession of land.”

[p.141]

This was so stated by Mrs. Justice A.V.A. Awunor-Renner in the Case of Momoh Seisay v. Amadu Kargbo and others Sup. Court Civ.App. No. 1/82 deliverd on the 31st December, 1984 (unreported). The Learned Justice then referred to two passages of Halburys Laws of England 3rd Edition Volume 38 at p. 739 para. 1205 and p. 744 para. 1214. She then referred to the case of Wuta ofei v. Danquah (1961) 2 W.L.R. 1238, and Bristow v. Cormmican (1878) 3 A.C. 641 at 637: and Ocean Estates v. Norman Pinder (1969) 2 W.L.R. 1364. After the Learned Justice had stated the principles of law enunciated in those Cases; She had this to say:—

"Actual Possession is a question of fact which consists of an intention to possess the land in question and exercise control over the land. The type of control which should be exercised over the land would vary with the nature of the land and the use of the land in question."

I entirely agree with the learned Justice and would not add anything more. The standard of proof required in a case of trespass based on title to land is much higher than that based on possession. See the case of Dustant E. John and Another v. William Stafford and others Sup. Court Civ. App. No. 1/75. Judgment delivered 13th July, 1976 per Betts J.S.C. page 11 – p. 12 (unreported). This judgment is very instructive and the ratio decidendi can be applied with equal force in the instant case. "The Respondent in his Statement of Defence has claimed "that he is the legal and rightful owner of the said property dated 15th day of October 1975 registered as No. 922 at page 48 in volume 279 in the Books of Conveyances in the office of the Registrar General." The respondent gave evidence in support of his claim.

In another, case Dr. Seymour-Wilson v. Musa Abess Civ. App. No. 5/79 decided in the court of appeal on 17th June, 1981 (unreported) above the Learned Chief Justice referring to the case of Kokilinye v. Odu (1935) 2 W.A.C.A. 336 at 337 – 338 said inter alia, "Quite apart from the Rule first stated above it is relevant to mention that the Defendant pleaded in his Defence that he was in possession of the Disputed land. That Plea is in accordance with order XVIII Rule 20 of the High Court Rules. The effect of such Plea is a denial of the allegations of facts in the statement of Claim."

The learned Chief Justice then referred to the case of Danford v.

McAnulty (1883) 8 App. Cas. 456."

[p.142]

Has the Appellant proved the averment that he was in possession? In my opinion, he has by virtue of Exhibit "A". The Learned Trial Judge did not make any specific finding that the Appellant was in possession at the time of the trespass by Respondent. Nevertheless, the Learned Trial Judge mad e a positive finding of fact that Appellant was legal owner of the land by virtue of Exhibit "A". I do not think this finding ought to have been disturbed by the Court of Appeal. This is a complete disregard of the principles laid down over the years where a court of Appeal can disturb a finding of fact by a trial Judge. The court of Appeal deprived itself of the opportunity of disturbing this finding of fact when it held that "The real "res" for identification in this case was which of the three plots of land being off main Motor Road, Wellington NOT THE LAND OFF Main Motor Road Wellington. This in my respectful view, was the

crux of the matter which eluded the learned Trial Judge's attention nor did it elude my attention either. The evidence is clear and unmistakable.

For the reasons I have stated above, I will give the answer to the third issue in the affirmative and hold that the Respondent committed an act of trespass on the land owned by Appellant.

Is the Appellant entitled to Damages and Injunction? I believe he is entitled to Damages and the injunction prayed for.

No evidence was given to warrant a relief for mesne profit. In the circumstances I will allow the Appeal, set aside the judgment and orders of the court of appeal, restore the Judgment of the High Court in Respect of trespass and the consequent Damages awarded and the injunction ordered.

[p.142]

I will also award Taxed costs to the appellant incurred in the High Court and the Court of Appeal respectively. Costs occasioned by this Appeal to the Appellant assessed at Le50,000.

(SGD.)

HON.SYDNEY C.E. WARNE

JUSTICE OF THE SUPREME COURT

I agree.

(SGD.)

HON. JUSTICE S.M.F. KUTUBU

CHIEF JUSTICE

I agree.

(SGD.)

HON. JUSTICE A.V.A. AWUNOR-RENNER

JUSTICE OF THE SUPREME COURT

I agree.

(SGD.)

HON. JUSTICE S. B. DAVIES

JUSTICE OF THE SUPREME COURT

CASES REFERRED TO

1. Danford v. McAnulty (1883) 8 App. Cas. 456.

KADIATU JALLOH vs. NATIONAL INSURANCE CO. LTD.

[SC. Misc. App. No. 2/96] [p.1-2]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 18 MARCH 1986

CORAM: MR. JUSTICE C.A. HARDING, J.S.C. - PRESIDING

MRS. JUSTICE A.V.A. AWUNOR-RENNER - J .S.C.

MR. JUSTICE S. BECCLES DAVIES - J.S.C.

KADIATU JALLOH - APPLICANT

VS.

NATIONAL INSURANCE CO. LTD - - RESPONDENT

Gibson Okeke Esq., for Applicant

Mrs. Shanineh Bash-Taqi, for Respondent

RULING

BECCLES DAVIES.J.S.C.

The applicant Madam Kadiatu Jalloh seeks leave to issue an Order of Certiorari to remove into this Honourable Court for the purpose of being quashed an Order or judgment dated the 31st day of January 1986 authorising the National Insurance Company Limited No. 18/20 Walpole Street for possession of No.14 Wallpole Street the Matrimonial home of the applicant and THREE OTHER WIVES of the late Alhaji Abubakar Jalloh of No.14, Walpole Street." The order or judgment dated 31st January 1986 referred to in the application was made by the High Court.

The power of this Court to issue an order of certiorari is to be found in section 105 of the Constitution of Sierra Leone 1978 (Act No. 12 of 1978).

Section 105 provides—

"The Supreme Court shall have supervising jurisdiction over all other Courts in Sierra Leone and over any adjudicat1ng authority; and in exercise of its supervisory jurisdictions shall have power to issue such directions, orders or writs [p.2] or orders in the nature of habeas corpus, certiorari, mandamus or

prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers."

The applicant has involved the provision of Section 105. The Order of Certiorari lies at the instance of an aggrieved party for the purpose or removing the proceedings of the inferior Courts of record or other persons or bodies of persons exercising judicial and quasi-judicial functions and determining whether such proceedings shal1 be quashed, or to quash them. It will issue to quash a determination for want or excess of jurisdiction, error on the face of the record, breach of the rules of natural justice, or where the determination was procured by fraud, col1usion or perjury.

The proceedings which are the subject of this application were commenced and concluded in the High Court. Final judgment was entered for the respondents. Several grounds have been urged in the applicant's statement. The short point to be decided is can an order for certiorari be made quashing the judgments of inferior courts of civil jurisdiction? The answer to that question is No. (See Halsbury's Laws of England 3rd Ed. Vol at page 130.) Where it is stated that certiorari does not lie to quash the judgment of inferior court of civil jurisdiction. See also LAWES v HUTCHINSON (1835) 3 DOWL 506 at pp. 508.

In the circumstances the application for leave is refused.

[Sgd.]

(Hon. Mr. Justice S. Beccles Davies. Jsc)

I agree.

(Hon. Mr. Justice C.A. Harding. JSC) P.J.

I agree.

(Hon. Mrs. Justice A.V.A. Awunor-Renner J

CASES REFERRED TO

1. Lawes v Hutchinson (1835) 3 DOWL 506 at pp. 508

STATUTES REFERRED TO

1. Section 105 of the Constitution of Sierra Leone 1978 (Act No. 12 of 1978)

2. Halsbury's Laws of England 3rd Ed. Vol at page 130

KORA SESAY & 2 ORS. v. ALLIE M. KAMARA & 2 ORS.

[MICS. APP. 6/96] [p.213-223]

DIVISION: SUPREME COURT, OF SIERRA LEONE

DATE: 30 SEPTEMBER 1999

CORAM: HON. MR. JUSTICE D.E.F. LUKE

HON. MR. JUSTICE H.M. JOKO SMART

HON. MR. JUSTICE N.D. ALHADI

BETWEEN:

KORA SESAY

ABDUL SESAY

DURA CONTEH — APPLICANTS/APPELLANTS

AND

ALLIE M KAMARA

KONDO KAMARA

SANTIGIE KAMARA — RESPONDENTS

A.F. Serry Kamal Esq., for Applicants

A Renner-Thomas Esq., & O.C. Nylander Esq., for Respondents.

RULING

JOKO SMART J.S.C

INTRODUCTION

This is an application for an enlargement of time to appeal against the judgment of the Court of Appeal dated the 2nd day of April 1996 made pursuant to Rule 26 (4) of the Supreme Court Rules (Public Notice No. l of 1982) (the Rules). The Notice of Motion was dated the 31st day of July 1996 and was lodged at the Registry on the 1st day of August 1996 but was listed for hearing on 22nd September 1999. No reason has been adduced for the interim between the date of lodgement and the date of hearing. It seems to me that there was a serious administrative lapse but it is my considered view that the lapse should in no way affect the computation of time in deciding whether or not the application should be granted or refused. The application is supported by two affidavits; one by Kora Sesay, the 1st Applicant dated the 31st day of July 1996, and the other by Mr. Seny Kama1 solicitor for the Applicants dated the 24th day of September 1999. At the hearing of the application on 22nd September 1999, Mr. Kamal sought the leave of the Court to file a Supplemental Affidavit and leave was granted.

[p.214]

THE ISSUE

The Notice of Motion was taken out over three months after the date of delivery of the judgment against which it is sought to appeal Rule 26 (1) of the Rules provides:

"Where an appeal lies as of right the Appellant shall lodge his notice of appeal within three months from the date of the judgment appealed against unless the Supreme Court shall enlarge the time".

This provision is mandatory.

However, in order to allow a concession to Appellants who do not fulfil the provisions of Rule 26 (1) but who have acceptable explanatory reasons for non-compliance, Rule 26 (4) stipulates, inter alia, that

"No application for enlargement of time for appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every application for enlargement of time shall be by motion supported by an affidavit settin

g forth good and substantial reasons for the application and by Grounds of Appeal which prima facie show good cause for leave to be granted".

The application is made within the time allowed by Rule 26 (4) but compliance with the time alone is not sufficient for the application to be granted. Rule 26 (4) explicitly imposes three conditions after the fulfillment of which the Court may exercise its discretion to enlarge the time for appeal.

1. An affidavit in support of the application must be sworn.

2. The affidavit must set forth good and substantial reasons.

3. The proposed Grounds of Appeal must be good on the face of the application.

THE APPLICANTS

There are three Applicants but only one of them, the 1st Applicant, has filed an affidavit. Paragraph 3 of the said affidavit mentions one Abdul Sesay as having 'been taken ill some time in June and was taken up country where he died. During the hearing of the application on the 22nd September, 1999 when asked by the Court whether that Abdul Sesay was the same as the 2nd Applicant, Mr. Kamal, Counsel for the Applicants replied that he was the same person. When again Counsel was asked why he did not appeal within the time allowed by Rule 26 (1) his candid and correct reply was that he could not have done so without the authority of the Applicants. In my judgment, I find it inconceivable how then Counsel could have made an application on behalf of the 2nd Applicant who according to the affidavit of the 1st Applicant was not aware of the judgment of the Court of appeal and was dead at the time of the Notice of Motion for enlargement of time, a fact confirmed by Counsel himself. I therefore find that the application of the 2nd Applicant is not properly before the Court. Similarly, in his Supplemental Affidavit, Mr. Kamal deposed that the 3rd Applicant is dead (date of death unspecified). I cannot see how this

application can be made by the 3rd [p.215] Applicant too. Dead men do not tell tales. The correct procedure would have been , for the personal representatives of the deceased, if any, to make an application for an order of substitution and then an application for enlargement of time provided the deceased were alive at the date of the application but died subsequently.

Rule 37 of the rules makes this provision. It stipulates:

"An application for an Order for Rivivor or Substitution shall be accompanied by an affidavit sworn by the Applicant or where the Applicant is represented by a legal practitioner the said affidavit shall be sworn by such legal practitioner showing who is the proper person to be substituted, or entered, on the record in place of,

or in addition to a party who has died or undergone a change of status".

On this ground too, I hold that the application of the 3rd Applicant is not properly before the Court.

Before I leave the issue of competence let me deal with one connected matter which in my opinion needs mention. I observe from the two affidavits filed herein that the subject matter of the dispute between the parties is land. One significant question that requires an answer is whether the 1st Applicant as survivor of the other Applicants could have made this application without the intervention of the personal representatives of the two deceased parties. As a matter of law if there are more than one party to a dispute as either Plaintiffs or Defendants and judgment is given against one side and all but one of the losers choose not to appeal against the judgment, the remainder can legitimately do so but it all depends on the interest of that person in the subject matter of the case. As I have already mentioned ownership of land is in issue in this case and the land is claimed by both the Applicants and the Respondents. It is not clear from the affidavits filed what was the interest that each of the Applicants held in the land. I can see however from Mr. Kamal's affidavit that they were claiming a freehold estate in the land, but nothing more can be gathered from it whether they were claiming as tenants-in-common or as joint-tenants. If they held as tenants-in-common each party had a distinct fixed and undivided share in it and the 1st Applicant could appeal without the intervention of the personal representatives of the deceased and would therefore correctly have made; this application alone. (See R.E. Megarry: A Manual of The Law of Real Property 2nd ed. p.241). But if they held as joint-tenants he could not do so. The position with regard to joint tenancies is clearly stated in Blackstone's Commentaries Vol. 2 (1766) at page 182 which I regard as the correct statement of the law;' it reads. "In all actions relating to their estate, one joint-tenant cannot sue or be sued without joining the others".

AFFIDAVIT OF 1ST APPLICANT

I have already stated that one of the conditions on which the Court will exercise its discretion to enlarge the time is that the Affidavit in support of the Application must set forth good and substantial reasons for the application. I will now summarise the reasons preferred by the 1st Applicant as follows:—

1. The judgment in the Court of Appeal had been reserved for over two years and he did not think that judgment would be given at the time that it was given.

2. He went up country with a sick and dying man and stayed there until after the 40th day ceremony.

3. If the 2nd Applicant had not died and the roads were safe he would not have stayed for the length of time that he took.

4. He was not aware of the date of the judgment unti1 he went to his solicitor after he had returned from up country.

I will now dilate on these reasons to see whether they meet the requirement, of good and substantial reasons. The Reader's Digest Universal 'Dictionary, 1987 defines "good reason" as a reason that is "genuine or real" Stroud's Judicial Dictionary Vol. 4 Third Edition, states that the adjective "substantial" is "a word of no fixed meaning, it is an unsatisfactory medium for carrying the idea of some , ascertainable proposition of the whole (Terry's Motors, Ltd v. Rinder [1984] S.A.S.R. 167)" Goodness and substantiality are words of value judgment about which much ink has been spilt by relativist philosophers throughout the ages and I am inclined to agree with Ashurst J. who in delivering the judgment of the Court in R. V. Stubbs, 2 T.R. 395, said, "The word 'substantial' is a relative term". In Palser v. Grinling [1948] 1 ALL E.R. 1 Vicount Simon in the English House of Lords said" One of the primary meanings of substantial is equivalent to considerable, solid or big; it is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence" (see [1948] 1 ALL E.R. 1 at p. 11). In my judgment, for a reason to be good and substantial within the context in which I am dealing, it must not only be genuine on the face of it but it must also be reasonable and so convincing that a reasonable man can conclude that the Applicant had done all that was possible to avoid the default. Evidence of a family tie between the 1st Applicant and the deceased, the death certificate of the deceased or an acceptable explanatory statement for its non production, notification by the 1st Applicant to his solicitor of his pending departure to the provinces and of his forwarding address, the time that elapsed between the date of the delivery of the judgment and the date that he left for the provinces, and the date of his return to Freetown are factors which, might be in favour of the 1st Applicant.

I will now consider whether the 1st Applicant has provided the requisite evidence for this Court to be able to exercise its discretion in his favour. He has not established any family tie between himself and the 2nd Applicant. I shall elaborate on this issue later in this ruling. He deposed that he went up country without informing his Solicitor and only got to know about the judgment on his return. Obliquely, his reason for doing so was that the judgment had been reserved since "about mid 1993'. While I do not approve or disapprove of delays in the delivery of judgment in these present times taking into consideration the conditions under which my brothers work, I apprehend that it is incumbent upon litigants to inform their solicitors of their movements and changes of addresses when they have cases pending in the Courts. Failure to do so is at their peril. It is only in exceptional cases like sickness and deprivation of complete freedom of movement in circumstances that they are unable to contact a relative or mend or a well-wisher to inform their solicitor of their dilemma that such failure becomes excusable.

[p.216]

I will now proceed to the time factor. The 1st Applicant alleges that the 2nd Applicant was taken ill some time in June (the exact date unspecified) and that the deceased died thereafter (the exact date unspecified). He stayed up country until the 40th day ceremony and thereafter returned to Freetown (against the exact date unspecified). I shall return to the ceremony later in this ruling. As time is of the essence in this application it is of the absolute necessity that the Applicant's solicitor should have ensured that he obtained from his client the dates of these events as exactly as possible. I shall nevertheless endeavour to compute the time but before I do so I will refer to another aspect of uncertainty in the time frame of events. The 1st Applicant deposed that his solicitor told him that the judgment had been reserved since about mid 1993. Here again no precise date is given. This imprecision, in, my judgment, should not have occurred since the Applicant's solicitor who prepared the affidavit should have obtained the precise date from the records of the case so as to make the information available to his client. Alternatively, Counsel should have sworn an affidavit himself deposing to this fact (see Rule 36 of the Rules). I will now return to the computation of time. Judgment was delivered on 2nd April 1996 and the 1st Applicant left for up Country some time in June. There is a time lapse of at least two months from the date of the judgment to the time that he left even if he left on 1st June 1996. A diligent solicitor, and I have no doubt that Mr. Kamal is one, should have informed his client of the judgment within the three months period. I also do not doubt that Mr. Kamal made the effort but his client had skedaddled before he sent to him for in paragraph 2 of his affidavit he deposed: "My solicitor informs me that he sent someone to find me but that he could not find my address". Which address he was referring to, his address in Freetown or up country, it is difficult to comprehend.

The 1st Applicant explained his over-stay up country as being due to the death of the deceased followed by the 40th day ceremony and the unsafeness of the road. He has not stated what made the road unsafe and which road it was leading from which town up country to Freetown. I am not oblivious of the war situation that prevailed in this country since 1991 and that from April 1997 to the present most of the roads linking Freetown with the provinces have been rendered unsafe. But I am also not oblivious of the fact that in June 1996 the 1st Applicant using the same roads went up country with a sick man, stayed until after the 40th day ceremonies which could not have taken place before 10 July 1996 and returned to Freetown on or before 31 July 1996, the date of his affidavit - a span of at most 20 days. Surely all of the roads in this country would not have been unsafe during that period. In fact by the 10 July 1996 the three month period within which to file an appeal had expired. The unsafeness of the roads is, in my judgment, therefore irrelevant.

I now come back to the family tie which I have mentioned earlier in the ruling. According to the customs and traditions of many ethnic communities in this country the appropriate place for a man to die and be buried is his home town or village. Migration has resulted in the exodus of many ethnic groups from rural to urban areas in quest of employment opportunities and other greener pastures. It is therefore common ground that while in Freetown and a member of a migrant ethnic group is overtaken by 'illness which is likely to be fatal, he is taken to his home town or village where the rest of his relatives reside. It is a common belief among these groups, a belief which I am not competent to accept, challenge or denounce, that native herbs and therapy in some cases, are more medicinal and potent than [p.218]

treatment available in hospitals. Furthermore, death is not only a macabre event to the living but is also an association with the departed ancestors. The combination calls for the celebration of the life of the deceased accompanied by societal ceremonies. In appropriate cases our Courts are bound to take cognisance of these customs since customary law is part of the common law of this country.

See s. 170(2) of the 1991 Constitution Act No.6 of 1991.

The 1st Applicant has not however averred that he belongs to one such ethnic group nor has he established any relationship of consanguinity or affinity between him and the 2nd Applicant despite the similarity of their surnames.

On the whole, I find that the affidavit of the 1st Applicant is vague and inadequate and the provision of Rule 26(4) of the rules with respect to good and substantial reasons for the enlargement of time has not been complied with.

THE PROPOSED GROUNDS OF APPEAL

Exhibit "A" attached to the affidavit of Kora Sesay in support of the application contains two Grounds of Appeal. They are

1. That judgment is against the weight of evidence

2. That the judgment is unreasonable and cannot be supported having regard to the evidence.

When this Court pointed out to Mr. Kamal that the two grounds are in fact only one Ground of Appeal, one being civil and the other criminal, he conceded that there was only one ground but that he decided to put both grounds ex abundanti cautela because he alleged that there have been conflicting opinions in the Court of Appeal as to which ground was appropriate in Civil Appeals. I think that this conflict, if there is any, should now be resolved once and for all.

For criminal appeals, Rule 75(2) of the Rules provides specifically, inter alia, as follows:

"No Ground of Appeal which is vague or general in terms of disclosing no reasonable ground shall be permitted except the general ground that the judgment is unreasonable or cannot be supported having regard to the evidence".

There is no similar provision in the Rules governing Civil Appeals and so there appears to be a vacuum in the law. Rule 5(2) of the rules states:

"Where no provision is expressly made by these Rules regarding the practice and procedure which shall apply to any appeal or application before the Supreme Court, the Supreme Court shall prescribe by means of practice directions such practice and procedure as in the opinion of the Supreme Court the justice of the appeal or application may require".

There has been as yet no practice direction by the Supreme Court with regard to the form that a general Ground of Appeal in civil cases should take: However, it has been the perennial practice in our Courts to adopt the appropriate wording of the general ground as it appears in ground 1 of the proposed notice of appeal of the Applicants and I see no good reason to depart from it. (See the "English Annual Practice 1960 Vol. 1p. 1660; Chitty & Jacobs, Queen's Bench Forms, 21st Edition Form 2000). This is the Ground of Appeal based on a melange of facts commonly resorted to by many a Counsel desperate for a ground of appeal as a last resort when they cannot pinpoint a specific misdirection in law substantial enough to make it a ground of its own. It has become the bountiful answer to fit all appeals just like the barber's chair that fits all buttocks — the pin buttock, the quatch buttock, the brown buttock, or any buttock, if I may borrow that expression from Shakespeare (See All's Well That Ends Well, Act 2 scene 2). In appropriate cases an appeal can succeed on this ground alone but the evidence against which the judgment is given must be weighty and overwhelming indeed.

It is my considered view that for a straight appeal under Rule 26(1) it is not necessary for the Court to look at the substance of any of the Grounds of Appeal until the appeal is heard. But for an application under Rule 26(4) of the Rules the Court is bound to consider whether the grounds prima facie show good cause for leave to be granted. In my judgment, this provision requires the Court to look at the face of the proposed Grounds of Appeal to see whether there is an arguable matter to be determined when ,the appeal is heard. This can easily be ascertained where the Ground of Appeal is against a misdirection on a point of law the particulars of which are clearly stated in the proposed grounds of appeal. But in case of a general ground of appeal being the only ground of appeal, looking at the face of the proposed ground alone will not enable the Court to ascertain whether the ground prima facie shows a good cause. It was in this vein that the Court invited Mr. Kamal to file a supplemental affidavit. The Court was mindful that the use of any additional information is not a pre-judgment of the appeal.

Having looked at the affidavit of Mr. Kamal in particular Ex "A" I find that the bone of contention of the case in both the High Court and the Court of Appeal, was the identity of the land in dispute which was purely a question of fact, the Court finding that the land claimed by the Plaintiff/Respondents was not the same land which the document of title of the Defendants/Applicants supported. It was not a question as to who had a better title. It is a well-settled principle that an Appellate Court will not disturb the findings of fact of a trial judge unless it is suggested that he has misdirected himself in law. (See Watt or Thomas v. Thomas. [1947] 1 ALL E.R. 582; Benmax v. Auston Motors Co. [1955] 1 ALL E.R. 326; Seynmour Wilson v. Musa Abess Civ. App. No. 5/79 judgment dated 17 June 1981). I have also carefully looked at Exb "B" of Mr. Kamal's affidavit which was the grounds of appeal before the Court of Appeal

They read:

1. That the judgment is against the weight of the evidence

2. That the Learned Trial Judge applied wrong principles in giving judgment jar the Plaintiffs/Respondents

3. That the Learned Trial Judge applied wrong principles in granting the Plaintiffs/Respondents relief not sought in the statement of claim.

[p.220]

The first ground is the general ground. The other grounds complain of misdirections the details of which were not stated. It suffices to say nothing more about them but to continue with the present application.

In an application for an extension of time for appealing made to the English Court of Appeal, Griffiths L.J. opined that before the Court can allow such application; ..

"All the relevant factors must be taken into account in deciding how to exercise the discretion to extend the time. Those factors include the length of delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the Defendant if the time is extended" (See Van Stillevoldt BV. V. El Carriers [1983] 1 ALL E.R. 699 at p. 704)

I adopt the view of Griffiths L.J. and I find it crucial to and apply it in this application to both the Applicants and the Respondents.

CONCLUSION

Counsel for the Respondents did not address the Court on the application and was indifferent rightly saying that it is left to the Court to exercise its discretion based on the application of the Applicants. At the end of his argument Counsel for the Applicants urged the Court to waive his non-compliance with the Rules in reliance on rule 103 which provides inter alia;

"Non-compliance on the part of an Appellant with these Rules or with any rule of practice from the time being in force shall not prevent the further prosecution of the appeal, cause, matter or reference if the supreme Court considers that such non-compliance was not wilful and that it is in the interest of justice that such non-compliance be waived. The Court may in such manner as it thinks fit direct the Appellant or any party to an appeal cause, matter or reference to remedy such non-compliance, and thereupon the appeal shall proceed".

I do not think that this Rule can be invoked in aid of the discrepancies which I have highlighted in this ruling. The application hinges on the contents of Rule 26(4) of the Rules the particulars of which have not been satisfied by the Applicants on points of law inside and outside the Rule. It is not a question of failing to comply with a procedural rule or particle which the Court can remedy by making an order to that effect.

I find that the application falls short of the provisions of Rule 26(4) and it is hereby dismissed. The cost of this application to the Respondents to be paid by the 1st Applicant assessed at Le50,000.

SGD.

JOKO SMART, JSC

[p.221]

N.D. ALHADI

By a Notice dated the 31/7/96 the applicants/Appellants applied for leave to appeal out of time and an enlargement of time within which to do so.

The judgment sought to appeal against was delivered on the 2/1/96 by the Court of appeal. By Rule 26(1) of Supreme Court Rules 1982, where an appeal lies as of right the appellant shall lodge his notice of appeal within three months from the date of judgement appealed against unless this court enlarges the time. It is clear from the application before us that no appeal has been lodged within the stipulated time referred to above. It is this failure that has necessitated this application.

Rule 26(4) provides ……. "No application for enlargement to time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every application for enlargement of time shall be by motion supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

The first part of this sub-rule is not under consideration in this application before us, since this Notice of Notion has been filed within the one month from the expiration of the time to appeal.

The whole issue now is what are the circumstances in which this court can exercise its discretion for an enlargement of time within which to file an appeal. The second part of the sub-rule requires that the affidavit in support must set forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted.

[p.222]

The good and substantial reasons given for the application are those stated in the affidavit in support by Kora Sesay wherein she deposed that in June Abdul Sesay (which also I take to be the 2nd Appellant) fell ill and she took him to the provinces where he died. That she stayed on the provinces to await the 40th day ceremony. That she did not inform her Solicitor when she was leaving. That if Abdul Sesay had not died and the roads were safe she would not have stayed in the provinces for the length of period she took. That she was not expecting the judgment to be delivered at that time since the judgment had been reserved for over two years. This in my view is an indictment against the court for it is provided in Section 120 (16) of the Constitution following— ……."

Every Court established under this Constitution deliver its decision in writing not later than three months after the conclusion of the evidence and final addresses or arguments of appeal and furnish all parties to the cause or matter determine with duly authenticated copies of the decision on the data of delivery thereof—……."

In my view, the court should not readily refuse an application under this provision of the Rules other than good reasons for the delay not been disclosed in the supporting affidavit and or the ground or grounds of appeal in this case is on the facts does not impunge its validity for consideration by this

court. Otherwise a refusal on such ground would be interpreted as this court prejudging the issues to be argued on the appeal. There might be issues where it can be shown that the trial court did not take into account all the relevant facts or that the trial judge misapprehended the evidence or drawn an inference which there is no evidence to support it — See Lofthouse vs. Leicester Corporation (1948) 64 T.J.R. 604. Again it might be that the plaintiff, the respondent herein was unable to establish his claim with that degree of certainty that is required in a Civil Suit that is with that preponderance of probability for him to succeed in his claim. In which case this court is bound to interfere with the finding of fact by the court.

The question of good reasons for not lodging the appeal within the stipulated time has to be considered not with reference to the length of time ipso facto but with reference to the circumstances of the case. The delay in this case is not unconnected with the then prevailing insecurity of the country in the provinces where the bulk of the population were held behind rebel lines and the non-availability of transportation to the capital [p.223] city. The facts deposed to by Kora Sesay in her affidavit, in my view are credible.

In conclusion, I will say that as long as there are arguable issues disclosed on the Notice of Appeal, and sufficient and relevant explanation given for the delay, a refusal to enlarge the time will manifestly prejudice the appellant's right to have his appeal adjudicated upon thereby cause manifest injustice to him.

In light of all what I have said, I will grant the application.

SGD.

Hon. Justice N.D. Albadi – J.A.

CASES REFERRED TO

1. Terry's Motors, Ltd v. Rinder [1984] S.A.S.R. 167

2. Palser v. Grinling [1948] 1 ALL E.R. 1

3. Watt or Thomas v. Thomas. [1947] 1 ALL E.R. 582;

4. Benmax v. Auston Motors Co. [1955] 1 ALL E.R. 326;

5. Seynmour Wilson v. Musa Abess Civ. App. No. 5/79 judgment dated 17 June 1981

6. Van Stillevoldt BV. v. El Carriers [1983] 1 ALL E.R. 699 at p. 704

STATUTES REFERRED TO

1. R.E. Megarry: A Manual of The Law of Real Property 2nd ed. p.241

KORA SESAY, ABDUL SESAY, DURA CONTEH v. ALLIE M. KAMATA, KONDA KAMARA, SANTIGIE KAMARA

[SC. MISC. APP. 8/99] [p.306-312]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 28 MARCH 2000

CORAM: HON. MR. JUSTICE D.E.F. LUXE, CJ

HON. MR. JUSTICE H.M.JOKO-SMART, JSC

HON. MR. JUSTICE S.C.E WARNE, JSC

HON. MR JUSTICE E.C THOMAS-DAVIS, JSC

HON. MR. JUSTICE M.E. TOLLA-THOMPSON, JA

BETWEEN

A.F. SERRY-KAMAL ESQ., FOR APPLICANTS

DR. ADE RENNER-THOMAS FOR RESPONDENTS

RULING

WARNE, JSC:

This is an application by way of a motion for an enlargement of time within which to appeal to the Supreme Court pursuant to Rule 26(4) of the Rules of the Supreme Court PN. No.1 of 1982 (herein referred to as the Rules) This is a matter which has a long history. The application was first heard by a Court of three Justices of the Supreme Court. Submissions were made before that Court and the Court refused the application by a majority of two and there was a dissenting Ruling by one Justice.

Being dissatisfied, Counsel for the applicants renewed the application before the full court of five Justices pursuant to section 126(b) of the Constitution of Sierra Leone Act No.6 of 1991 (hereafter referred to as the Constitution). There were several adjournments at the instance of, the applicants. On the 14th December 1999, the matter was struck out for want of prosecution of the action. On that date Counsel was absent without any reason given to the Court. Be that as it may, the first applicant, Kora Sesay, being present, was invited to prosecute the motion but indicated that he could not because he was unwell and cannot speak out for himself.

[p.307]

It is pertinent that, I relate the proceedings before the Court of five Justices on the 14th December 1999 Among the Justices there was Mr. Justice N.D. Alhadi JA; who gave the dissenting Ruling in the Court of three Justices herein before mentioned. These are the notes in the proceedings:—

"Serry-Kamal for the Applicant absent Dr. Ade Renner-Thomas for Respondent Kora Sesay applicant present informs court two of the applicants are dead. Kora Sesay applicant was invited by the court to proceed with the motion, this he failed to do. The matter was therefore struck out. Costs awarded to Respondent assessed at Le 100,000."

In spite of this decision, Counsel for applicant renewed his application before the full court of five Justices.

On the 20th January,. 2000 the matter came up before the full Court. Mr. Serry-Kamal for applicants was again absent, Kora Sesay 1st applicant was present. It is reported that two of the applicants were dead.

Dr. Ade Renner-Thomas, with him was Miss U. Kamara was present for the Respondent's. At that hearing Kora Sesay stated his lawyer was absent.

The Court indicated that it was minded to grant a further adjournment on condition the applicant pays the costs of Le100,000 to be paid by the firm of Serry-Kamal and Co, Solicitors.

On the 9th February 2000 the matter came up again for hearing. Mr. Serry-Kamal for applicants was present and Dr. Ade Renner-Thomas for the Respondents was also present. There was a. full blown hearing. Counsel on both sides made their submissions with conviction. I will later refer to the various submissions. The matter was adjourned to 15th February 2000. At the hearing on the 15th February 2000, Mr. Serry-Kamal was reminded that this application had been struck out on 14th December, 1999 for want of prosecution. On that same date Mr. Serry-Kamal submitted that section 126(b) of the Constitution gave him a right to hearing, and argued that the Court is not properly constituted because the application is a review not an appeal.

[p.308]

The Court ruled that it is properly constituted and adjourned the matter to 17th February 2000.

In spite of the fact that there is no provision in the Constitution and the Rules that when a Court of five Justices had struck out an application, the application can be heard again by a full court, the Court invoked its inherent jurisdiction to continue the hearing of the application in the interest of justice and furthermore that litigation must have an end.

Having said that, I will now consider the arguments put forward by both Counsels.

The motion filed is clear and unequivocal. It states, inter alia:

"an application on behalf of the aforesaid Kora. Sesay for an order that the Order of this Honourable Court dated the 30th day of September 1999 be varied, discharged or reversed by a full court pursuant to Section 126(b) of the Constitution of Sierra Leone 1999 Act Number 6 of 1991 'on the grounds that: ....."

The grounds were numbered 1 - 5 inclusive. Counsel applied for leave to abandon grounds 1- 4. Counsel for respondent did not object. The Court granted the leave accordingly, whereupon Counsel proceeded

to argue ground 5 which reads "that the applicant Kora Sesay 'be granted an enlargement of time within which to file his appeal to the Supreme Court."

This application as I have stated is made pursuant to rule 26(4) of P. N. No. 1 of 1982.

Rule 26(4) provides that:

"No application for enlargement of time in which to appeal shall be made, after the expiration of one month from the expiration of the time prescribed with which an appeal may be sought. Every application for enlargement of time shall be by motion supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal_ which prima facie show good cause for leave be granted. - (Emphasis mine) - when time is so enlarged a"' copy of the order granting such enlargement shall be annexed to the notice of appeal."

[p.309]

The rule is. clear and unequivocal Counsel for the applicant proceeded. With his submission and was granted leave to use a. supplemental affidavit sworn on 29th December, 1999. Counsel further submitted that all the documents /exhibits filed are in support of the motion.

The documents/exhibits are the following:—

The affidavit of Kora Sesay the 1st applicant herein Sworn to on 20th December 1999. Exhibit "A" is the Writ of Summons filed on 4th July, 1987. Exhibit "E" is the drawn up Order of the Court of Appeal dated 2nd April, 1996.

Exhibit "C" is the Notice of Motion to the Supreme Court for an enlargement of time in which to appeal to the Supreme Court dated 31st July, 1996.

Exhibit "D" is the Intended Notice of Appeal.

“There is also a supplemental affidavit sworn to by Abdul Franklyn Serry-Kamal on 29th December 1998 and filed herein with certain exhibits in support of the Affidavit

Exhibit A” is the Ruling of the Supreme Court delivered on the 30th September 1999 refusing the application for enlargement of ,time within which to appeal.

Dr Renner-Thomas argued forcefully that the application should be refused. He made the following submissions:—

"(1). That the oral application is a departure from the reliefs sought in the body of the motion. He submitted that the Court has power to vary, discharge or reverse order of the Court of three Justices. He argued that Mr. Serry-Kama has not shown why the Order of the Court of three should be varied, discharged or reversed.

(2) Counsel submitted further that Mr. Serry-Kamal having abandoned Grounds 1 - 4 of the reliefs sought, what purports to be the ground 5 is not a ground.

Counsel submitted that he relies on the Ruling of Joko-Smart JSC. in the Ruling of the 30th September 1999 as regards the Locus Standi of the applicants. He added that the title states three applicants and in the body of the motion there is only one applicant and there is no evidence why the two other applicants are not applying and he referred to Rule 37 of the Rules of the Supreme Court. Counsel has referred to Paragraph 6 of Exhibit "D" that there are prospective appellants including the two dead ones. Counsel referred to [p.310] paragraph 9 of the affidavit t of Kora Sesay where he deposed that that he is the owner of the Land.

(3) Counsel further submitted that the said Paragraph 9 of the affidavit of Kora Sesay when juxta posed with the prospective grounds for appeal in the Exhibit there is not any good cause why leave should be granted. Counsel argued that paragraph 9 disclosed a new cause of action and since there is no evidence that the court of three Justices made an error the Court of five Justices ought not to depart from that Ruling, he concluded.

Mr. Serry-Kamal in reply conceded that he ought to have amended his notice of motion. He thereby sought leave to make such an amendment, to which Dr. Renner-Thomas objected.

Mr. Serry-Kamal submitted that the application is not too late and will not embarrass the Respondents.

Rule 26(4) is clear and unequivocal as I have already stated. I have underlined the clauses that are relevant to the application. I will now consider the motion in the sequence in which it is presented and prosecuted. I will begin with the title . In the title, there are three applicants but the motion is, made in the name of 1st Applicant, Kora Sesay. In the affidavit Kora Sesay deposed that Abdul Sesay and Dura Conteh the 2nd and 3rd applicants are dead. No steps have been taken to replace them in the application since their claim does not abate by death. It is not enough to make the application in the name of the surviving applicant vide Rule 37 of the Rules which provides the following:—

"An application for an Order for Rivivor or Substitution shall be accompanied by an affidavit sworn by the applicant (emphasis mine) or where the applicant is represented by legal practitioner the said affidavit shall be sworn by such legal practitioner showing who is the proper person to be substituted, or entered, on the record in place of, or in addition to a party who has died or undergone a change of status."

I opine that Rule 37 is deliberately enacted to protect the estate or interest of a deceased person or one who has undergone a change of status. [p.311] Counsel for applicants has failed to invoke the provision of Rule 37 even, though he was reminded of its existence by the Court.

Be that as it may, what the motion is seeking to achieve is an order that the Order of this Honourable Court dated the 30th. day of September, 1999 by varied, discharged or reversed by the full Court pursuant to Section 126(b) of the Constitution .....

The words used in the motion are the same as those provided in Section 126 (b) aforesaid, that is to say varied, discharged or reversed.."

In order to apply any of these terms, the grounds for the relief sought must be “good and substantial reasons." These good and substantial reasons must be set forth in the affidavit of the applicant.

What is the Order to be varied discharged or reversed.?

This is contained in Exhibit “A" annexed to the affidavit of Abdul Franklyn Serry-Kamal sworn to on 29th December, 1999.

The order is "Ifind. the application falls short of the provisions of Rule 26(4) and. it is hereby dismissed.. The costs of this application to the Respondents to be paid by the 1st Applicant assessed at Le50,000

Having stated the Order of the Court of three Justices, I will consider the affidavit of Kora. Sesay in its entirety. There are sixteen paragraphs in the affidavit.

In my view the several paragraphs do not set forth good. and substantial reasons for the application to be considered favourably.

Perhaps it is necessary to reiterate paragraph 9 of the affidavit ,which

deposed the following:—

"I am the fee simple owner of the property in dispute. I vested parts of it to Abdul Sesay and Dura Conteh both deceased……..

It must be stated that there is no counterclaim to the Writ of Summons which is Exhibited as "A". In my View, this paragraph 9 raises a new cause of action, which does not help the Court to consider the credulity of the affidavit. However, the affidavit is evidence before this Court for what it is worth.

There is nothing in the Notice of Motion to indicate that the applicant is aggrieved. with the order made by the Court of three Justices.

In order to invoke the provisions of Section 126(b) of the Constitution, the applicant ought to show that he is aggrieved by the order made by the [p.312] Court of three Justices and must give grounds for being so aggrieved..

Paragraph 5 of the grounds before the Court is of no moment. It states:

"that the applicant Kora Sesay be granted an enlargement of time within which to file his Appeal to the Supreme Court."

In my view this is no ground on which to base the application. This is only begging the issue.

Again in my view, the motion has no merit and as a matter of law the documents filed lack substance" I opine, that the whole conduct of the cause is dilatory.

In my opinion. This is one notice of motion that ought not to have been argued because the papers fall far short of what is required by Rule 26(4) of the Rules. The application is refused and the motion is dismissed with costs.

Cost awarded Le250,000

(SGD)

SYDNEDY WARNE, JSC

(SGD)

D.E.F. LUXE, CJ

(SGD)

H.M.JOKO-SMART, JSC

(SGD)

E.C THOMAS-DAVIS, JSC

(SGD)

M.E. TOLLA-THOMPSON, JA

MELVIN THOMAS v. THE STATE

[CR. APP. 1/85] [p.171-177]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 14 JULY 1995

CORAM: HON. MR. JUSTICE S. BECCLES DAVIES, AG. CJ. PRESIDING

HON. MR. JUSTICE S.C.E. WARNE, JSC.

HON. MR. JUSTICE M.O. ADOPHY, J.A.

HON. MR. JUSTICE G. GELAGA-KING, JA.

HON. MRS. JUSTICE V.A. WRIGHT, J.A.

BETWEEN

MELVIN THOMAS APPELLANT

Vs.

THE STATE - RESPONDENT

APPELLANT-IN-PERSON

..... FOR THE RESPONDENT

JUDGMENT

WARNE J.S.C.

This is an appeal against the judgment of the Court of appeal delivered on the 20th day of December, 1984.

There is only one ground of appeal which reads: —

"That there was miscarriage of justice throughout the proceedings both in the High Court and the Appeal Court."

At the hearing of the appeal on Friday 26th May, 1995, the appellant argued his case in person. The State/Respondent was un-represented.

The gravamen of the argument of the appellant is that his was a case of mistaken identity. He pointed out the inconsistencies in the evidence of the two women who gave evidence against him. The appellant submitted that the identification parade at the C.I.D. was unfair because he was the tallest man among the men in the parade. The appellant concluded that he was never at the scene of the crime at the 31st of October, 1982.

On a cursory glance, the record of proceedings both in the Court of Appeal and the High Court was unsatisfactory.

The appellant was convicted in the High Court before a Judge and jury and sentenced to 25 years (twenty five years) imprisonment.

[p.172]

Against that conviction, he appealed to the Court of Appeal. Among the grounds of appeal which were before the Court was "That the verdict was unreasonable or cannot "be supported having regard to the evidence."

The argument of the appellant before the Court was submitted in writing it states "Identification was wrong. Incident took place on the 31st October, 1982, was identified a week later. Wot not have gone that way".

In answer to this submission, Counsel submitted that "issue is of identity. Identification parade was surplusage. Submits verdict is reasonable and supported "by evidence"

The judgment of the Court was reserved on that date, 8th November and delivered on 20th December, 1984. The appeal was dismiss reasons to be given later. There is no record that the reasons were ever given.

The course open to the Court of Appeal on an appeal before it contained in Section 58(1) Courts Act No. 31 of 1965.

It provides:—

(1) Subject and without prejudice to subsection (2) the Court of Appeal on any such appeal against conviction shall allow the appeal if they, think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of' justice, and in any other case shall dismiss the appeal."

It is pertinent to repeat subsection (2). Subsection (2) provides:—

"On the appeal against conviction the Court of Appeal, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, may—

(a) either dismiss the appeal or

[p.173]

(b) order the appellant to be retried by a Court of competent jurisdiction, if they consider that no substantial miscarriage of justice has actually occurred".

As I have said, the Court of Appeal dismissed the appeal without giving any reasons as Section 58 (1) and (2) hereto fore-mentioned, presupposes. Be that as it may, this Court is empowered to examine the record, consider the entire proceedings and make its own findings according to law-Section 122(3) of the Constitution of Sierra Leone Act No.6 of 1991 provides:—

"For the purposes of' hearing and determining any matter within its jurisdiction and the amendment, execution or the enforcement of any judgment or order made on any such matter, and for the purpose of any other authority expressly or by necessary implication given to it, the Supreme Court shall have all the powers, authority and jurisdiction vested in any Court established by this Constitution or any other law."

Even though Rule 98 of the Rules of this Court is subordinate to the provisions of Section 122 of the Constitution, I shall however, spell out its provisions. It provides:—

"Where no provision is expressly made in these Rules relating to the Original and Supervisory Jurisdiction of the Supreme Court the practice and procedure for the time being of the High Court shall apply mutantis mutandis."

Having said this, I shall now consider the appeal within the context of the proceedings in the High Court. In my view, the Summing Up of the Learned Trial Judge is flawed. The Court of Appeal should have seen the error in the Summing Up before dismissing the appeal summarily. In the High Court, the jury did not have the necessary assistance from the Judge to enable them [p.174] to return a ..... verdict.

There were three witnesses for the prosecution and one for the defence. The appellant relied on his voluntary statement for his defence. That statement was an alibi.

The Learned Trial Judge failed to direct the jury on the Statement and on the defence of an alibi. The law is quite clear on the point. It is essential that the defence of the prisoner shall be adequately put to the jury- R v. Mills, 25 CR. APP. R. 138 R. v. Waters (1954) Cum L.R. 147 C.C.A; on this score alone the appeal must succeed; but more on this later.

There were also inconsistencies in the evidence of the two women who gave evidence - P.W. 1 and P.W. 2. It is not enough for the Judge just to repeat the evidence of the witnesses to the jury.

P.W. 1 Sylvia Shirley Barnett said "He then threatened to return and kill us if we shouted. He then left the room. Right through the incident the accused was holding a revolver."

The other witness P.W. 2 recounting the incident, said "The accused had in his hands a gun, a knife and an iron.

In the Summing Up the Learned Trial Judge said:"According to her (P.W.1) three of the raiders entered their room including the accused in the dock. This witness asserted that it was the accused who was carrying a revolver which he pointed straight at her. I will not bother to go into the part of her evidence regarding the accused's threat to rape them. She stated that she was so terribly apprehensive of her life that she felt like giving Up."

The witness did say she was apprehensive of her life but never said she felt like giving up. The witness said "As he insisted on raping us, I told him I was from the hospital and I had my tablets with me to take. I asked accused to pass me the tablets, he did so.

As far as the evidence of the second witness was concerned, the Judge only dealt with it in passing in his Summing-Up. This was what [p.175] the Judge said "The other lady Rhoda Kona Barnett came to the witness box According to her testimony, she too was able to identify the accused because the three raiders were unmasked and as the electric lights were on she saw him clearly, I will not bother to go through her evidence as she too narrated the incident in substantially the same manner like the other lady"

In their evidence on the identity of the accused the witnesses said — P.W. 1 — "At the time when the thieves forced themselves into our room the fluorescent electric light was on. I could not remember now how the thieves were dressed but I remember they were not masked but I could clearly see the 1st accused face.....

Some time after the raid I was walking along Kortright when I came across a group of men amongst whom I saw the accused and I immediately I recognised him as one of the men who raided our flat."

In answer to cross-examination the witness said "The security, men then followed you and returned with you. I said before that I was able to recognise you by your face, your beard, and the way you stood up. Yes during the identification parade you had a red piece of cloth on your head."

On this issue of identification P.W. 2 said "About a week later P.W. 1 reported to us that she had seen the accused about. The Security Officers and P.W. 1 went after the accused, I later identified him at the College Security Post and also at the C.I.D. Headquarters. Our bedroom lights were on when the thieves entered our room unmasked

In answer to cross examination the witness said:

"I did not pick you out at an identification parade, I confirmed that you were one of our attackers."

On the issue of identification the third witness for the prosecution, the police officer, said in answer to cross examination.

"You were all given the same colour of material to tie on your head. I had received certain information about your feet. Prior to the parade, I asked you to lift up your trousers which you did but I did not notice any deep cut on your [p.176] leg. I did not take any finger print impression at the scene of the crime because there was none at the scene."

Earlier in his evidence the witness had this to say "I recall the 31st October 1982 whilst on duty at the C.I.D Headquarters a report of Robbery with Aggravation was made by one Sylvia Barnette of Flat 128 Kortright Fourah Bay College (P.W. 1 identified). I took up the investigation and went up to Fourah Bay College to the said Flat. There I observed that its back door was damaged. I entered the flat and discovered that the Parlour had been ransacked. P.W. 1 took me to their room which I noticed had been ransacked also. Outside the building I found a crow bar which P.W. 1 said did not belong to them. I took custody of it as an exhibit."

These are bits of evidence which should have been carefully put to the jury and juxtaposed with the statement of the appellant, which was, in fact, his defence.

In that case, if the Judge had done this, I do not think the jury would have returned the same verdict.

In the Summing-Up, the Judge had this to say about the evidence of the investigator:

"The third witness was the investigator who took down the voluntary cautioned statement from the accused and charged him this in brief is the prosecution's case.

The identity of the appellant and his alibi were material elements in the case. The Judge should have pointed them out to the jury.

The appellant had made a voluntary cautioned statement on which he relied as his defence. Did the judge put it adequately to the jury as he ought to have done? I do not think so. In fact, he did not. All the Judge said in the Summing-Up was "But if an accused person offers a defence jurors are bound to consider that defence alongside the prosecution's case. In this case the accused has offered a defence. Firstly, by saying he relies on his statement which he [p.177] made to the police. Secondly by giving the names of two witnesses whom he wanted to come to this Court and testify on his behalf. In my view, this is a good preface before putting to the jury such defence for what it was worth. This the Learned Trial Judge failed to do. In my opinion, this is fatal. The appellant in his statement denied ever being in the vicinity of the crime on the 31st October, 1982. The Judge only put to the jury the evidence of the defence witness. The evidence in my view was not relevant to the issue. In the Summing-Up, the Judge had this to say, "Fortunately the other was traced and he was the last man to testify in the witness box. I will draw your attention to one fact, that man said that he and others were walking along Kortright Road and they walked passed some ladies and other people and that not long thereafter a Volkswagen car drove up and a lady came out and said that man (the accused) was one of those who raided their flat sometime ago. According to that witness he asked the lady whether she was sure and the lady said she was positive and she was able to identify the accused amongst the witness and others who were there. Well this is the witness of the accused. The defence witness was not ruffled in any way, you saw him in the witness box he gave a straight forward piece of evidence. (Emphasis Mine) The comment of the Judge, in my opinion, was more prejudicial than probative.

In view of what I have said supra, I allow the appeal set aside the conviction, squash the sentence and acquit and discharge the accused.

SGD

S.C.E. WARNE, JSC.

SGD

S. BECCLES DAVIES, AG. CJ. PRESIDING

SGD

M.O. ADOPHY, J.A.

SGD

HON. MR. JUSTICE G. GELAGA-KING, JA.

SGD

V.A. WRIGHT, J.A.

MOHAMED JUMA JALLOH v. T. KRISHNAKUMAR

[SC. MICS. APP. 1/2000] [p.328-335]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 24 OCTOBER 2000

CORAM: HON. JUSTICE D.E.F. LUKE, C.J.

HON. MR. JUSTICE JOKO SMART, J.S.C.

HON. MR. JUSTICE S.C.E. W ARNE, J.S.C

HONJUSTICE E.C. THOMPSON-DAVIES, J.S.C

HON. MRJUSTICE M.E. TOLLA-THOMPSON, J.S.C

BETWEEN

MOHAMED JUMA JALLOH — APPLICANT

AND

T. KRISHNAKUMAR — RESPONDENT

Dr. Renner-Thomas, for the Appellant

E.E. Shears-Moses Esq., for the Respondent

JUDGMENT

JOKO SMART JSC

I have had the advantage of reading in draft the ruling of my learned brother E.C. Thompson-Davies JSC. I too agree that the application be dismissed. However, because I find in the said ruling a difference in approach and of opinion on the question of the applicant's locus standi before the full Court a second time, I have decided to append a few remarks of my own.

[p.329]

The main question in this application is whether the applicant can come again before the full court after the Court sitting in bane had previously heard and the Court consisting of five Justices on a fresh ground which was never canvassed and contested before the Court sitting with a panel of three Justices.

Dr. Renner-Thomas, Counsel for the applicant, relies on section 126(b) of the 1991 Constitution of Sierra Leone, Act No. 6 of 1991, and Rule 32 of the Rules of the Supreme Court, Public Notice No. of 1982 (The Rules) as the basis of the application. Section 126 (b) of the Constitution reads inter alia;

"three Justices of the Supreme Court acting in its civil jurisdiction may exercise any power vested in the Supreme Court not involving the decision of a cause or matter before the Supreme Court save that (b) in

civil matters any order, direction or decision made or given by the three Justices in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Supreme Court constituted by five Justices thereof'

This provision dealing partly with the composition of the Court in interlocutory matters has had a short but chequered history. The Constitution of Sierra Leone 1971; Act No. 6 of 1971, by section 66, established the Supreme Court in place of Her Majesty's Privy Council as the final Court of Appeal for Sierra Leone. Section 14 of the Constitution (Consequential Provisions) Act, Act No.9 of 1971, went further to provide that until the new Supreme Court was composed, its jurisdiction should be undertaken by the Court of Appeal as established under the 1971 Constitution. Pursuant to the 1971 Constitution, interlocutory matters in the Court of Appeal were heard by one Justice and his decision was subject to a review by three Justices of the Court of Appeal. When the Supreme Court was eventually set up, the Constitution of 1978, Act No. 13 of 1978 gave power to a single Justice of the Supreme Court to sit on interlocutory civil matters and his decision was subject to a review by three Justices. See Section 106 of the 1978 Constitution.

[p.330]

Finally, the 1991 Constitution increased the composition of the court to three Justices and five Justices respectively in similar circumstances. Having poured this libation to Clio, I now turn to the issues in this application.

Dr. Renner-Thomas contends that the Registrar of the Supreme Court has not complied with Rule 31 of the rules. The salient requirements of this Rule are carefully spelt out in the ruling of my brother Thompson-Davis and I do not consider it necessary to repeat them here.

The application now before us concerns essentially the interpretation of section 126 (b) of the 1991 constitution and this can be done in the light of five scenarios.

1. Whether an application in interlocutory matters can properly be made to five Justices without a first recourse to the court consisting of three Justices.

2. Whether the application can properly be made to the court consisting of five Justices without any reference to a previous application adjudicated upon by three Justices.

3. Where an application has been disposed of by three Justices whether a further application can be made to five outright without stating that the three Justices erred in law or otherwise in making their order.

4. Whether after an application has been dismissed by three Justices a further application can be made to five Justices on a point that was not canvassed before the three Justices.

5. Where an application has been disposed of by five Justices after it has previously been considered by three Justices, whether the full court can sit again on a further application on a new ground.

[p.331]

With respect to scenario one, I see nothing in the section to prevent an interlocutory matter from being decided by five Justices in the first instance. I hold the view that the section was intended to ensure that such matters are dealt with expeditiously in the absence of a full court of five. But this does not mean that if the full complement of five Justices available, the application may not be made to them. Because of the position I have taken in respect of the other scenarios, let me hasten to say that here, an applicant can rely on any ground that will enable him to support his case.

Scenarios two, three and four have a common ground and I can conveniently consider them together. For my part, it will be absurd to conceive that Parliament, aware of the limitations on the composition of the Court inherent in section 121 of the 1991 Constitution, would have created a parallel situation in which applicants can indulge in forum-shopping at will without any apparent legal reason but merely with the expectation that the full Court might be more favourable disposed to them after they have tried with the Court of three to no avail. On this issue, I cannot but agree more with Warne JSC when this matter came up previously before five Justices. At that time, in a unanimous ruling of the court, he said; "In my view, this sub-section presupposes that the three Justices erred in law or otherwise to enable the applicant to invoke the provision of section 126(b) of the Constitution." See SC Misc. App. 2/99 Mohamed Juma Jalloh v. T Krishnakumar, unreported, ruling dated 26 October 1999. Again, in another ruling of the full Court which was also unanimous, I held a similar view when I said "Section 126(b) of the Constitution provides for an application to be made to the full Court consisting of five Justices when an applicant is not satisfied with an order made by the Court comprising three Justices." Also, on the question of a new ground before the Court consisting of five Justices this was what I said in the same case;" The argument now put forward is new as was the case in the Mohamed Juma Jalloh case. Such argument could have been relevant when the application came up before the three Justices." (See se Misc. App. 5/93 Abu Black & ors. V. Rev. Archibald Gambala John (Executor of the Estate of late Rev. Gustavus Ademu John, unreported, dated 20th January 2000). What [p.332] these rulings are saying, is that a Court of five sitting to review an order of a Court of three is not the proper place to raise a new ground.

Scenario number five is the one most relevant to the present application. The applicant in this matter is coming before the full Court a second time. His Counsel has argued with the greatest candour that he has no quarrel with the full Court's ruling of the 26 October 1999 which dismissed the application. He alleges that it was as a result of that ruling that he got the green light to have the records at the Supreme Court Registry searched. When the search was conducted by Mr. Unisa Kamara, the searcher came out as if it were with the Archimedean exclamation "eureka" upon the discovery that there was no evidence on record that the Registrar of the Supreme Court had complied with the provisions of Rule 31(1) of the Rules. This finding is supported by the affidavit of Unisa Kamara sworn to on the 29th day of December 1999. It is on the basis of this discovery that the applicant has invoked the jurisdiction of the Court to be heard a second time by a court made up of five Justices. In this second application, the applicant is challenging the Order made on the 22nd September 1999 by the three Justices on the ground that the said Order was not made in strict compliance with the provisions of Rule 31 of the Rules in that there is no evidence on record that the Registrar of the Supreme Court had acted in accordance

with the provisions of that rule before the said Order was made. This is a new ground that was never canvassed in the previous proceedings.

In the first application before the five Justices, the applicant did not contend that the three Justices erred in law or otherwise. He proceeded on the basis that the Court was right in striking out the appeal, that he did not comply with Rule 35(2) of the Rules and he craved the indulgence of the Court pursuant to Rule 103 of the Rules to file the Certificate of service of the appeal as required by Rule 35(2), a thing that he had failed to do and which necessitated the striking out of the appeal. At that time the blame was on the doorstep of one M.A. Bangura. Part of the affidavit of Mohamed Juma Jalloh sworn on the 4th of October 1999 and filed in support of that application attested to this. It read:

[p.333]

"5. That I am further reliable informed by my solicitor and verily believe that one of the solicitors of Renner-Thomas & Co., M.A. Bangura, Esquire, who was handling this matter left the jurisdiction on the 15th day of July 1999 for further studies.

6. That I am further reliably informed by my Solicitor and verily believe that the said solicitor M.A. Bangura, Esquire, did not inform the other solicitors in the firm of Renner- Thomas & Co that a certificate of service had not been filed.

9. That I am reliably informed by my solicitor and verily believe that failure to file a certificate of such service was not deliberate but was due to the inadvertence on the part of the said M.A. Bangura.

This, to my mind, could have been a valid excuse for non-compliance with the Rules but the court in the first application was not moved by it, the reason being that the proper place where the excuse, a new ground, could have been raised was in the Court of three Justices. It was then that the Court formulated the rule that for an application against the order of three Justices to succeed, the applicant must show that they erred in law or otherwise. The full Court then dismissed the application. It was not struck out. Finding himself in a dilemma and in a bid to salvage the situation, the applicant in this second application now challenges the Order of the three Justices made on 22 September 1999 by raising a new ground which was never canvassed before the three Justices or even before the full Court. But can he do this successfully now in this second application before the full court? In my view, not having raised the new ground before the Court of three in the first instance as the appeal was struck off and not dismissed, what the applicant should have done was to go back to the Court of three with his new ground before ever resorting to the Court of five.

[p.334]

In my judgment the applicant has an up-hill task. By raising non-compliance with Rule 31 of the rules at this stage, he is relying on a new ground, which has never been canvassed before the Court sitting with three Justices in the first instance. The alleged ground was in existence right from the beginning of these applications and it could have been discovered with the exercise of the utmost care and diligence. This is as far as I can go on the fate of the new ground.

I agree with Counsel for the Respondent that the basic issue in this application is whether after the five Justices have dismissed the first application, the applicant can come before them again. I hold the view that he cannot. As this is the main issue on which I part company with my learned brother E.C. Thompson-Davies, JSC, I find it necessary to elaborate further. The constitutional provision in section 126(b) and the rulings of Warne JSC and mine to which I have already referred do not allow repeated appearances before the full Court in such a circumstance as the one now before us. These reasons apart, I hold that there must be an end to litigation. In the first application before this Court consisting of five Justices for the appeal to be reinstated there was a full argument by counsel on both sides on the merits of the application before it was dismissed, it was not struck out which if it had been the case there might have been a possibility for its renewal for reasons other than the discovery of a new ground. Sacrificing repetition on the altar of emphasis, I maintain that in dismissing that application, the Court categorically came to the conclusion that for an applicant to succeed before the full Court from a ruling of the Court of three it must be shown that that Court erred in law or otherwise. Unless the full Court is now prepared to exercise its constitutional right inherent in section 122(2) of the Constitution and say unequivocally that it is departing from its previous stance taken in the first application, I do not see my way through to accommodate the application with or without a new ground which has nothing to do with a mistake of law or fact by the Court sitting with three Justices.

The fact that the decision was interlocutory does not, in my view, entitle the applicant to come before the full Court again on the same issue, i.e. whether or not the appeal should [p.335] be reinstated. In taking this stance I derive additional strength from the decision of the West African Court of Appeal case of Emanuel Onalaja v. n E.A. Oshinubi 12 WACA 503. 504 in which Varity C,J. delivering the judgment of the Court said: "The Courts have not infrequently intervened to prevent the perversion to base uses of bare right to reopen matters already litigated where no estoppel per rem judicatem has been strictly observed. Thus where estoppel per rem judicatem has not been sufficiently pleaded or made out but the circumstances are such as to render re-agitation of the question formerly adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action." Having reached this conclusion. it is my considered view that the Court cannot entertain this application and adjudicate on the merit or demerit of Rule 31 of the Rules. This is not to say that this Court being the highest Court of Appeal in this land cannot adjudicate on every matter that is brought before it but in my opinion the matter must arise from an action or application in which the litigant has a locus standi and which the Court entertains. For my part, this application is not one of such situations.

H.M. JOKO-SMART, JSC.

MOHAMED LAMIN SEISAY & SAMBA JALLOH v. THE STATE

[S.C. CR.APP. No.1/84] [S.C. CR.APP. No.2/84] [p.3-19]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 9 JULY 1986

CORAM: MR. JUSTICE C.A. HARDING, J.S.C. - PRESIDING

MRS. JUSTICE A.V.A. AWUNOR-RENNER - J.S.C.

MR. JUSTICE O.M. GOLLEY - J.A.

BETWEEN:

MOHAMED LAMIN SEISAY - APPELLANTS

(ALIAS PITTY)

AND

SAMBA JALLOH

VS

THE STATE - RESPONDENT

B. MACAULAY (JNR) for 2nd Appellant

H. TEJAN JALLOH (MISS) for The State

JUDGMENT

A. AWUNOR-RENNER. J.S.C.

The appellant were convicted at the Kenema High Court on the 1st day of October 1976 before Navo J. as he then was and a jury for the murder of one Albert Samba on the 2nd day of May 1976 at Lowoma Village in the Lower Bambara Chiefdom, Kenema District and sentenced to death. They appealed to the Court of Appeal and judgment was delivered on the 10th day of November 1981 dismissing the appeal and affirming the conviction and sentence of the High Court. It is against that decision that the appellant have now appealed to this Court on the following grounds viz:—

On behalf of the 1st appellant:

That the Court of Appeal for Sierra Leone was wrong in Law in holding that the verdict was not unreasonable nor could it not be supported having regard to the evidence adduced at the trial.

That the Court of Appeal was wrong in Law when it held that the Learned Trial Judge's direction to the jury that if there is any doubt, I am not saying any fanciful doubt but if there is any substantial doubt, you should resolve that doubt in favour of the accused persons and let them go free was in order.

[p.4]

(c) that the Court was wrong in law when it held that there was no evidence to leave to the jury for the consideration of the issue of provocation and of self defence.

On behalf of the 2nd appellant:

(a) The Court of Appeal erred in law in holding that the appellant defence of alibi was properly put to the jury.

(b) The Court of Appeal erred in law in holding that the Learned trial judge had not misdirected the jury on the grounds of implied malice.

(c) The Court of Appeal erred in law in holding that the learned trial judge had not misdirected the jury as to the standard of proof imposed upon the prosecution.

The 1st Appellant was not represented by Counsel, however the Court took cognizance of his grounds of Appeal that were before us.

The facts so far according to the prosecution and defence as it is necessary to state them are as follows:

On the night of the 1st May 1976 at Lowoma Village in the Lower Bambara Chiefdom the deceased Albert Samba staged a dance at the Barri. One Kene Samba was at the dance helping the deceased to sell tickets at the entrance to the Barri. His wife Elizabeth Jah (alias Binta Samba) was also present running the bar. Later on that same night Mohamed Daramy, 2nd accused in the High Court who is now dead came and sat by Kene Samba; when he was questioned about his ticket he said that he had bought one earlier in the evening but had lost it. An argument ensued between the deceased and Mohamed Damary which later on resulted in a fight between the two of them. Binta held the deceased by his trousers and then took him outside. By that time the 1st and 2nd appellants were standing outside and as Binta took the deceased away the 1st appellant was heard saying “Let us go and finish with the dog”; as the deceased was [p.5] being taken away he was overtaken by the two appellant and Damary. They crossed in front of them. The second appellant then kicked Binta on his stomach and the 1st appellant broke a bottle on a stone and stabbed the deceased on the right side of his neck. He was then taken into a house whence he later died. Both appellants did not give evidence or call witnesses but relied on the statement which they made to the Police and which were tendered in evidence in the High Court. The 1st appellant in his statement denied being present at the scene of the alleged incident; in fact he claimed that he was not in Lowoma Village at all but in Tokpombu II Village in the Tongued area where he spent the day and evening in the company of one Alpha Jalloh and some other people until 1 a.m. when he retired to bed and woke up at 7 am on the Sunday the 2nd day of May 1976.

The 2nd appellant also alleged that he too was not at the scene but that he spent the night at the house of one Pa Momoh Kpakateh. The other inmates of the house he claimed including the 1st appellant went out at about 10 pm. and that he was alone in the house until the early hours of the morning when the 1st appellant returned to the house panting; there was blood on the 1st appellant’s shirt and when the 2nd appellant questioned him about it the 1st appellant stated that he had been involved in a fight with someone who had bitten him. He was later on arrested and charged.

Three grounds of appeal have been urged on behalf of the 2nd appellant: however I propose only to deal with those which in my opinion are substantial.

The second group of appeal raised by Berthan Macaulay (Jnr) counsel for the 2nd appellant was that the Court of Appeal erred in law in holding that the learned trial judge had not misdirected the jury on the grounds of implied malice. He referred this Court to what the Court of Appeal had to say about malice aforethought and I quote:—

"Counsel for the 1st and 3rd appellants had submitted that the judge's direction on malice aforethought with particular [p.6] reference to implied malice is erroneous. Appellants' Counsel had submitted that the Judge had employed the subjective test in directing the jury on whether there was implied malice or not he should have used the objective test as propounded in Sahr Nbambay and others.

The judge did not fall into the error as he did not direct the Jury that it was the subjective test that they had to apply. I agree with Counsel for the state that he merely gave an example of a factual situation that could amount to implied malice I find no merit in this ground."

He further referred this Court to quotations from the summing up of the Learned Trial Judge and again I quote—

"Then we come to the most important ingredient with malice aforethought.

The death must be with malice aforethought.

What does that mean?

Malice does not mean premeditation. We have two categorise of malice, express malice and implied malice. In the case of express malice there is an intention to cause death, or cause grievous bodily harm to any person, whether such person is the person killed or not.

Now you make up your mind and say 'I am going to kill somebody'. I wi11 take my gun. I am going to shoot at A. If you shoot at A and A dies that is express malice. You had it in mind to do something which will cause grievous bodily harm to A or which may cause the death of the person against whom you inflict or on whom you inflict injuries etc.

He then continued to explain what is meant by express malice. On the question of implied malice the learned trial Judge directed the jury in this way.

"Implied malice in many cases where no malice is expressed or openly intended, the law will imply it from a deliberately cruel act committed by a person against another."

[p.7]

"Deliberately cruel act although you did not intend to kill somebody but do a deliberate cruel act and that act causes his death you are guilty of murder because the in gradient of implied malice would have been provided."

"It may be implied where death occurs as a result of a voluntary act of the prisoner which was intended and unprovoked. You were not provoked to do what you have done. I will deal with provocation later

on. It must be unprovoked. The law will imply malice from your action and if death occurs or if death results. It is implied that you had malice aforethought you will be found guilty of murder."

"All the other ingredients in murder are in manslaughter except that in manslaughter the prosecution need not prove malice aforethought. That is perhaps the most important ingredient in the case of murder. The prosecution must prove malice either express or implied."

Mr. Macaulay (Jnr) further contented that the learned trial judge in his direction to the jury on the question of implied malice should have explained what this meant to them in simple language and not merely read out ipssisima verba the contents of Archibald Criminal Pleadings Evidence and Practice Thirty-fifth edition at page 918 paragraph 2487 under the rubric. "Implied malice" to them which states as follows:

"In many cases where no malice is expressed or openly indicated the law will imply it from a deliberate cruel act committed by one person against another. It may be implied where death occurs as a result of a voluntary act of the prisoner which was (1) intentional and (2) unprovoked."

[p.8]

He referred the Court to several cases in support of his proposition namely Feika v. Regina C.A. 1968/1969. A.L.R. (S.L.) 342 at page 345, R.V. Kargbo same volume at page 354 and also Sumana v. R. 1970-1971. A.L.R. (S.L.) at page 306 at 316. He also submitted that the trial judge having directed the jury on implied malice failed to relate that direction to the evidence which had been led relying on the following cases - R. v Finch 12 C. App. Reports at page 77. Sallu Mansaray v The State unreported Supreme Court Criminal Appeal 1/80. The learned trial judge he said seemed to feel that there was implied malice since he speaks of voluntary act and deliberately cruel act and was also equating the actus reus with mens rea. In his reply he alleged further that the learned trial judge did not refer to any evidence which would suggest express malice or implied malice but simply read the law to them and that he made no attempt to direct the jury as to whether this was express or implied malice. Counsel for the respondent Miss Tejan Jalloh stated that express malice and implied malice are components of malice aforethought. She expressed the view that the learned trial judge only referred to implied malice through an abundance of caution and that what was relevant in this case was express malice. She also referred to the case of Sallu Mansaray supra.

Let me now examine some of the authorities cited by Counsel for the respondent as far as they relate to ground 2 of this appeal. In Feika v Regina supra, a Court of Appeal decision, one of the grounds of appeal was that the trial judge misdirected the jury on provocation by reading from a text book. It was held in that case that in directing the jury on the law applicable to the case being tried the judge should not report to reading passages from a text book without more. In Kargbo v Regina 1968/69 A.L.R. (S.L.) also another Court of Appeal decision at page 345 two of the grounds of appeal were (1) that the learned trial judge failed to direct the jury adequately on the defence of provocation and (2) that he did not give proper direction with regard to the right of self defence. It was held that a judge in his summing up should [p.9] not confine his direction on the law to reading from a legal text book. It is his duty to explain in simple language the principle of law application to the case, to consider the question raised by

the prosecution and defence respectively and to direct the jury on how to apply the law to the facts. I quote from the judgment of Tambiah J.A. at page 358 -

"Unfortunately there is misdirection as well as non-direction in the summing up of the learned trial judge. He adopted a procedure which has been condemned both by this Court and the Court of Appeal in England. He read passages from Archibald without analyzing the obstruse proposition of law stated therein. Members of the jury are laymen who have no training in the law and liable to be confused when passages from a text book are read to them. They will not be in the position to comprehend the difficult question of law applicable to the facts of a case. It is the duty of a judge to explain in simple language the principle of law applicable to the case and to direct them on how to apply the law to the facts."

See also the cases of Sumana v R. reported in 1970/71 A.L.R. (S.L.) at page 316. R. v Finch reported in 12 Cr. App. Rep. at page 77. Sallu Mansaray v The State S.C. Cr. App. No.1/80 unreported. In my opinion the authorities cited above clearly support the contention that it is not sufficient merely to direct the jury on the law of a case; they are entitled as well as to the judges' assistant on facts and it is also his duty to explain to them in simple language the principle of law applicable to the case in the circumstances.

In the present case I feel that the jury were deprived of the assistance of the learned trial judge in his summing up. Indeed he proceeded to give them the definition of what was express malice and also tried to explain the meaning of this to them by bringing in the definition of implied malice and not bothering to explain this to them in simple language and by also not telling them which of the two, [p.10] express or implied malice was applicable in the present circumstances. He had failed in his duty by omitting to direct the jury sufficiently on this point. I cannot say whether the jury properly directed would have convicted him. I would therefore allow the appeal on this ground.

The next ground of appeal of the 2nd appellant is a much more serious one and deals with the learned trial judge's misdirecting the jury as to the standard of proof imposed upon the prosecution. This ground of appeal is common to both appellants and it is my view that it can be dealt with conveniently together. In a nut shell Berthan Macaulay (Jnr) for the 2nd appellant submitted that the learned trial judge misdirected the jury on the standard of proof required in a criminal case by equating the words "unreasonable doubt" with "substantial doubt". He submitted further that one cannot say that the phrase reasonable doubt is synonymous with the phrase substantial doubt. He contended that by using the word substantial doubt the Court was imposing a lower standard of proof upon the prosecution. He also called the Court's attention to certain portions in the summing up about which he was complaining and relied on the following authorities in support of this last ground of appeal, Noroma v Regina 1964/66 A.L.R. (S.L.) at page 542 at page 547, R v Sumners (1953) Cr. App. R. at page 16.

Finally he ended up by saying that the case of Bater v Bater relied on by the Court of Appeal was a case involving a divorce petition and had no relevance with the standard of proof in a criminal matter. Miss Tejan Jalloh for respondent contended that no particular form of words are needed as long as the trial judge puts the case adequately that will suffice, she also relied on R. v Sumners supra and invited the Court to apply the provision of sub-sec.2 of sec .58 of the Court's Act number 30 of 1965. On the other hand Mr. Macaulay however urged this Court to reject the question of applying the provisions of sub

section 2 of sec. 58 of the Court's Act supra as he said that each case should depend on its own facts as regards misdirections and non-directions.

[p.11]

The following directions on the burden and standard of proof were given by the learned trial judge in his summing up and I quote:—

(1) " It is for the prosecution to prove their case beyond reasonable doubt. If that doubt exists either from the case for the prosecution or is created by the defence, and you find out that it is a reasonable doubt and not a fanciful doubt the law requires you to resolve that doubt in favour of the accused persons."

(2) " If you have any substantial doubt let them go free."

(3) " If there is any doubt I am not saying a fanciful doubt, but if there is any substantial doubt you should resolve that doubt in favour of the accused persons and let them go free."

(4) " If they do then you may say those discrepancies may cause consideration doubts – reasonable doubts – but so far as the prosecution is concerned they say 1st accused said. You wait let us go and do away with the dog."

(5) " If you take into consideration the various discrepancies in his evidence and you say that taking these witnesses evidence into consideration there is substantial doubt in your minds. I am not saying fanciful doubts. If it creates any doubts in your mind, you are bound to resolve that doubt in favour of the accused persons."

(6) " If it goes to the root of the case it destroys the case for the prosecution completely or creates a substantial doubt in your minds then you are bound to resolve that doubt in favour of the accused persons. If they do not shake your conscience that a substantial doubt has been created it is for you to say Oh, yes he may have made a mistake here and there."

[p.12]

(7) " But it is for you again to say whether there is a substantial discrepancy that created a doubt in your minds. If it does then of course you will say it does not make us think this way or that way, therefore the benefit must go to the accused persons."

Having referred to extracts from the summing up it now remains for me to examine certain reported cases dealing with the burden and standard of proof. In all criminal trials it is the duty of the trial judge to direct the jury that on the evidence the prosecution must prove the guilt of the accused to their satisfaction before they convict and that the onus of prove rests upon the prosecution; this must be made quite clear to the jury in no uncertain terms. In the case of R. v Raymond Blackburn reported in volume 39 of the Criminal Appeal reports at page 84, S. Gorman J. in delivering the judgment of the Court had this to say and I quote:-

" It is for the judge to deal properly with the question of the burden of proof. One matter is quite clear. It cannot be said and this Court does not intend to say that any particular form of words is absolutely necessary or the Court is concerned with the question whether whatever form of words was used it was made quite clear to the jury that it was for the prosecution to establish the guilt of the prisoner and if the guilt of the prisoner is not established the prisoner must as of right and not by way of favour be found not guilty. This Court does not subscribe to the view that a particular form of words of necessity means that the summing up was right or that the absence of a particular form of words necessarily means that it was wrong."

See also the case of Koroma v R. reported in (1964/66) A.L.R. (S.L.) at page 582.

In the case of Woolmington v D.P.P. 1935 A.C. at page 462 at page 481: A House of Lord's decision expressly approved the direction to a jury that the prosecution must prove the case beyond reasonable doubt.

[p.13]

In the case of R. v Hepworth and Norman Fearnly reported in volume 39 Cr. App. Reports, at page 152. The case of R. v Summers 36. Cr. App. R. at page 14 l was commented and approved. In that case the learned recorder in his summing up failed to direct the jury adequately as to the burden of proof and the standard of proof required. It was held that there was no set formula for explaining to the jury in a summing-up that the burden of proof lies on the prosecution To tell them that they must be satisfied by the evidence so that they can feel sure that the prosecution has established the guilt of the prisoner is appropriate, merely to tell the jury that they must be satisfied with regards to the prisoners guilt is insufficient. The use also of the phrase "reasonable doubt" is better avoided.

I think that it will be appropriate for me to refer to a portion in the judgment Goddard L.C.J. which I think is relevant to the present case in my view. I quote:

"Another complaint that is made in this case is that the recorder used only the word "satisfied". It may be especially in view of the number of cases recently in which this question has arisen, that I misled Courts when l said in R. v. Summers 36 Cr. Appeal R. at page 14, at page 15 and I still adhere to it - that I think it is very unfortunate to talk to juries about reasonable doubt because the explanation given to what is and what is not a reasonable doubt are so very often extraordinarily difficult to follow and it is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is no real guidance. To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey such a particular standard; one member of the jury might say that he would hesitate over something and another member might say that something would not [p.14] cause him to hesitate at all. I therefore suggested in that case that it would be better to use some other expressions by which I meant that should convict only if they feel sure of the guilt of the accused. In some cases the words "satisfied" has been used. It is said that a jury in a civil case has to be satisfied and therefore one is laying down the same principles as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt" and one could also say: "You must be

completely satisfied" or prisoner better still, "You must feel sure of the prisoner's guilt". But I desire to repeat what I said in the case of Kritz 33 Cr. App. R. at page 169 at page 177; It is not the particular formula of words that matter; it is the effect of the summing up. If the jury are charged with one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure and that the onus is all the tome on the prosecution and not on the defence "that is enough" I shall be very sorry if it were thought that case should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first that the onus is always on the prosecution. Secondly before they convict they must feel sure of the prisoner's guilt. If that is done that is enough."

In the latter cases of McGreevy v D.P.P. (1973) 1 W.L.R. at page 276 and R. V Sang (1979) 2 All E.R. at page 1223, it was stated that it must "be made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt". It is now submitted that this is the proper direction to give on the standard of proof laid on the prosecution to prove guilt.

[p.15]

Counsel for the 2nd appellant had also argued that the learned trial judge in portions of his summing up had not only appeared to place the burden of proof on the appellant but that he had failed to put the narrow issue as outlined in the case of R. v Murtagh and Kennedy reported in39 Cr. App. R. at page 72 and at page 83. In that case there had been a charge of murder and the defence relied on was that of an accident. The convictions were quashed on the grounds that the jury had not been specifically directed to acquit if the explanation of the defendants left them in any doubt. Justice Hilbery in delivering the judgment of the Court at page 83 had this to say and I quote:

"Having regard to the evidence it is pre-eminently a case where it was essential for the judge to make clear to the jury three possible positions in which the jury might find themselves bearing in mind throughout that it was not for the accused to establish their innocence: that is to say:

(1) If they accepted the explanation of the accused, they must acquit.

(2) Short of accepting that explanation if it left them in doubt they must acquit.

(3) On consideration of the whole of the evidence they must be satisfied of the guilt of the accused of one or other of the crimes alleged against them."

In order to appreciate counsel for the 2nd appellant's submission on this point I need to make references to certain other passages of the summing up by the learned trial judge. In these passages he directed them as follows, I quote:

"Then perhaps it is left for you to say that this was planted on him. It is left with you to say whether he was saying the truth. That because of his leg it was possible for him to go to the dance.

He was not there. You may want to believe that his story is correct …….. you may believe his story where he said that another said [p.16] no if we take him along he would be able to show where the

other colleagues are. If this is the case then of course it may create a substantial doubt in your minds so far as the third accused is concerned."

Later on in the summing up he said and again I quote:—

"His defence is that he did not go out at all. He was in bed that is an alibi. He was in bed he did not go out. Well it is for you say that you believe him that he did not go out that night. It is for you to believe him that because of his sore foot he would not have gone out. If you come to that belief then he is free out of the whole thing and he gets out of the whole thing. The defence is short and simple. I did not go out that is his defence etc."

Put in the briefest form of the question is whether the words used by the learned trial judge in directing the jury in his summing up on the question of the burden and standard of proof was a misdirection. He repeatedly used the words "If you believed him" in the passages referred to above and that if they believed his story this might create a substantial doubt in their minds so that apart from the judge using the words "If you believe his story" etc the fact that an accused person is lying does not necessarily mean that he is guilty or that he may be convicted without more. See the case of Seisay and Siaffa v. R. reported in 1967-1968 African Law Reports (Sierra Leone) Series at page 323. The burden remains on the prosecution to prove the guilt of the prisoner and it is the judge's duty to make this quite clear to the jury and if the prosecution fails the prisoner must be acquitted.

Bearing in mind the passage referred to supra the authorities cited above together with the facts that the learned trial judge had also told the jury that the appellants were relying on their statements, it is my considered view that the learned trial judge was shifting the burden of proof on to the shoulders of the 2nd appellant when he told them that if they believed the story of the 2nd appellant they must set him free. This to me was clearly a misdirection.

[p.17]

The burden of proof still rests upon the prosecution. Apart from this, after making it clear to the jury whom the burden of proof lies, it is also the learned trial judge's duty to direct them on the standard of proof that is required in a criminal case. It is my opinion that he failed to do so. His use of the words reasonable doubt, fanciful doubt and substantial doubt referred to in the passages quoted above may have caused a lot of confusion in the minds of the jury. As a matter of fact by using the words substantial doubt he was imposing a lower standard of proof on the prosecution. A case is never proved if the summing up leaves the jury in any doubt. It is stated in Archibold Thirty-Fifth Edition at 361 paragraph 1001 and I quote:

"That if an explanation is given by or on behalf of the prisoner which raises in the minds of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted because if upon the whole of the evidence in the case, the jury are left in any reasonable state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

Finally let me end by saying that a summing up must not be ambiguous in anyway. As stated supra the jury must be directed in no uncertain terms upon whom the burden of lies and that before they convict they must be satisfied so that they feel sure of the prisoner's guilt; this was the formula often used. See the cases of R. v Kritz (1950) 1 K.B. at page 82 R. v Summers (1952) 1 All E.R. at page 1059.

However in 1972 in the case of McGreevy v D.P.P. supra the House of Lords stipulated that the proper direction to be given on the standard of proof is that it must be made plain to the jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt – thus approving the ruling in the House of Lords in the case of Woolmington v D.P.P. supra.

[p.18]

I had stated that it would be convenient for me to deal with the 2nd ground of appeal of the 1st appellant with the 3rd ground of appeal of the 2nd appellant together as they are both similar. The 1st appellant had also relied on his statement which had been tendered in evidence and his complaint as regards this ground of appeal was against the use of the words substantial doubt and fanciful doubt etc. in summing up. I do not propose to go into details but will adopt the reason given and the cases referred to supra on behalf of the 2nd appellant as well.

In view of the above I have therefore come to a clear conclusion under the circumstances that there were fundamental misdirections as well as non-direction contained in the summing up of the learned trial judge to the jury and that he did not adequately direct them as regards the burden and standard of proof as far as both appellants were concerned. Finally he also failed to direct them that whatever view they took of the whole of the explanations given by the appellants in their statements and on the whole of the evidence in this case that they must acquit if the explanation given by both appellants left them in any doubt. It therefore follows that their appeal on this particular ground must succeed.

On the other hand I find no merit in the other grounds of appeal of both appellants.

This Court has been invited by Miss Tejan Jalloh to apply the provisions of sub-section 2 of sec.58 of the Courts act 1965. This section states as follows:—

I quote:—

"On an appeal against conviction the Court of Appeal may act not with standing that they are of opinion that the point raised may be decided in favour of the appellant dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

In 1976 a further amendment was made to Sec 58 (2) of the Courts Act supra giving the Court of Appeal power to order a new trial as an alternative to dismissing the appeal if they feel that no substantial miscarriage of justice has occurred which means that [p.19] the position as it is now is that the Court of Appeal may either dismiss the appeal or order a new trial if they are satisfied that no substantial miscarriage of justice has occurred.

However I find myself unable to apply either of these two provisions and say that there was no substantial miscarriage of justice because in the present circumstance it is impossible to say that the jury would necessarily have come to the same conclusion had they been properly directed; there is clearly a serious misdirection here and I am also of the opinion that the omission of the judge to direct the jury adequately may have brought about the verdict.

For the reasons which I have given above I cannot allow the conviction of both appellants to stand and would allow the appeal and set aside the convictions.

Appeal of both appellants allowed. Convictions quashed, sentences set aside.

[Sgd.]

(Hon. Mr. Justice C.A. Harding – Justice

of the Supreme Court (Presiding)

[Sgd.]

(Hon. Mrs. Justice A.V.A. Awunor-Renner, JS.C.)

[Sgd.]

(Hon. Mr. Justice O.M. Golley, J.A.)

CASES REFERRED TO

1. Feika v. Regina C.A. 1968/1969. A.L.R. (S.L.) 342 at page 345,

2. R.V. Kargbo same volume at page 354

3. Sumana v. R. 1970-1971. A.L.R. (S.L.) at page 306 at 316

4. Sumana v R. reported in 1970/71 A.L.R. (S.L.) at page 316.

5. R. v Finch reported in 12 Cr. App. Rep. at page 77

6. Sallu Mansaray v The State S.C. Cr. App. No.1/80 (unreported)

7. Noroma v Regina 1964/66 A.L.R. (S.L.) at page 542 at page 547

8. R v Sumners (1953) Cr. App. R. at page 16.

9. Koroma v R. reported in (1964/66) A.L.R. (S.L.) at page 582

10. Woolmington v D.P.P. 1935 A.C. at page 462 at page 481

11. R. v Hepworth and Norman Fearnly reported in volume 39 Cr. App. Reports, at page 152. 12. R. v Summers 36. Cr. App. R. at page 14 l

13. McGreevy v D.P.P. (1973) 1 W.L.R. at page 276

14. R. V Sang (1979) 2 All E.R. at page 1223

15. R. v Kritz (1950) 1 K.B. at page 82

16. R. v Summers (1952) 1 All E.R. at page 1059

MUCTARU OLA TAJU-DEEN v. THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION & 2 ORS.

[SC MISC. APP. 6/2000] [p.338-348]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 18 JANUARY 2001

CORAM: HON. MR. JUSTICE D.E.F. LUKE, CJ

HON. MR. JUSTICE AB. TIMBO, JSC

HON. MRS. JUSTICE V.D.A WRIGHT, JSC

HON. MR. JUSTICE H.M. JOKO SMART, JSC

HON. MR. JUSTICE S.C. E. WARNE, JSC

IN THE SUPREME COURT OF SIERRA LEONE AND

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE 1991

In the matter of an application under section 125 of the Constitution of Sierra Leone, Act No.6 1991 and under the common law for leave to apply for an Order of Certiorari and for directions and consequential Orders and in the matter of the English Supreme Court Rules

And

In the Matter of the Anti-Corruption Act 2000

AND IN THE MATTER

BETWEEN

EXPARTE MUCTARU OLA TAJU-DEEN — RESPONDENT

And

THE COMMISSIONER of the Anti-Corruption

Commission — 1ST APPLICANT

THE ANTI-CORRUPTION COMMISSION — 2ND APPLICANT

And

THE STATE Represented by the ATTORNEY-GENERAL

& MINISTER OF JUSTICE — 3RD APPLICANT

Mr. S.E. Berewa, Attorney-General & Minister of Justice and

Mr. Kebbie, DPP, for the Applicants

Mr. C. Doe-Smith and Mr. T.M. Terry for the Respondent,

[p.339]

JOKO SMART. JSC

The Background

It is Government's policy to root out corruption in the public service. Pursuant to this policy the Anti-Corruption Act, 2000 Act No.1 of 2000 was passed. The Act does not discriminate between public officers by reason of positions they hold or status in the society. Even judges can fall foul with it. The legislation provides for a Commission whose functions include the investigation of instances of alleged or suspected corruption referred to it by any person or authority or which has come to its attention whether by complaint or otherwise and the taking of such steps as may be necessary for the eradication or suppression of corrupt practices. Where after an investigation, the Commissioner is of the opinion that the findings of the Commission warrant consideration by the Attorney-General and Minister of Justice as to whether criminal action may be taken thereon, he sends the report of the investigation to the Attorney-General. An adverse finding of guilt of corrupt acquisition of wealth is to be referred to the Attorney-General and Minister of Justice. If after examining the report the Attorney-General and Minister of Justice decides that there are sufficient grounds to prosecute the public officer, he pursues the case in the courts.

Sometime in July 2000, an acting judge of the High Court was suspected of having offended against the Act. That judge is the Hon. Mr. Justice Muctaru ala Taju-Deen. The Commissioner of the Anti-Corruption Commission sent a report of an investigation on the judge to the Attorney-General and Minister of Justice. The judge was eventually charged on a 12 count indictment and he appeared before the High Court. On 24 August 2000 while the trial was in one Court, Justice Taju-Deen applied to another judge of the High Court for leave to proceed on certiorari for the report of the Commission on him to be quashed. The leave was granted. On the 26 August 2000, he made a second application to the same judge for quashing the report. That application was dismissed. Later, he made a fresh ex parte application to the Supreme Court for leave to proceed on certiorari to quash the report. Leave was granted. Under the 1991 Constitution, he can apply for certiorari to the High Court (section 134) or to the Supreme Court (section 125).

The ex-parte application

On an ex-parte application made to the Supreme Court on the 6 day of December 2000 the Respondent herein then applicant sought the following orders:-

(1) An Order granting leave to the Applicant herein Muctaru ala Taju-Deen for an Order of Certiorari to issue both under the Common Law and section 125 of the 1991 Constitution of Sierra Leone to bring up to the Supreme Court for the purpose of its being quashed the purported Report and/or the purported undated Extracts of the alleged Findings of the Anti-Corruption Commission signed by the Commissioner of the Anti-Corruption that evidence exists of alleged non existing offences against the Plaintiff herein under a Non-existing Act to wit the purported Anti-Corruption Commission Act 2000 upon grounds of failure to observe one of the fundamental principles of Natural Justice, Committal of Error of Law on the face of the Records and several other errors of law, want of [p.340] jurisdiction and/or excess of jurisdiction, as set forth and contained in the copy Statement herewith exhibited to the affidavit in support of the Application.

(2) An interim Stay of the Criminal proceedings Holden at High Court No.1 before the Hon. Mrs. Justice Patricia Macauley in the case between THE STATE vs. HONOURABLE JUSTICE MUCTARU OLA TAJU-DEEN pending the hearing and determination of the application for the Order of Certiorari if the leave is granted by the Honourable Supreme Court under the first Order prayed for above.

(3) Such further OR other Orders as this Honourable Court may deem fit to make.

(4) That the costs of and occasioned by this Application be costs in the cause.

The Motion was supported by the Affidavit of Muctaru Ola Taju-Deen sworn to the 2 December 2000 to which were attached several exhibits.

On the 19 December 2000 this Court sitting with three justices granted the orders prayed for except the one in para 2 of the motion paper. The Court also made the consequential orders that the Respondents be served the relevant papers within four days of this order and that the application for the Order of Certiorari be heard on the 2 January 2001.

The application now before this Court

Before 2 January 2001, the Commissioner of the Anti-Corruption Commission, The Anticorruption Commission and The State represented by the Learned Attorney-General and Minister of Justice, the 1st, 2nd and 3rd Applicants respectively, filed a Notice of Motion dated 20 December 2000 which is the subject-matter of the Application now before us seeking an order that the Order made by this Court on the 19 December 2000 granting the respondent herein leave to apply for an order of Certiorari to issue be discharged on the following grounds:—

(1) That in making the application ex-parte resulting in the granting of the said order the respondent herein failed to make full and frank disclosure of material facts and/or did not fulfill the requirements of observing the utmost good faith in the making of the said ex-parte application in that (a) he failed to

disclose to this Honourable Court the fact that he had earlier made identical application to the High Court against the same parties and the application was dismissed by the High Court (b) in the said application the High Court had determined the issue as to whether an Order for certiorari will lie against the Anti-Corruption Commission.

(2) That the Applicant's proper course, after the earlier application referred to in (1) above had been dismissed by the High Court was, in law, not to file an identical application in this Honourable Court but to appeal against the Order of the High Court dismissing the said earlier application.

(3) That the Respondent is precluded by the doctrine of estoppel per rem judicatam from making an application the subject-matter of the application herein.

(4) Such further or other Orders as this Honourable Court may deem fit to make.

The Motion is supported by two affidavits sworn to by Lahai Momoh Farmah, Senior State Counsel. The first, sworn to on 20 December 2000, exhibits the Judge's Summons of the 26 August 2000 which the applicants alleged had been dismissed by the High Court (exhibit "A") together with nine other exhibits among which are (a) a Statement dated 26 August 2000 filed by the Applicant in support of the judge's Summons (exhibit "D"), (b) the Respondent's ex-parte Motion of the 6 December 2000 before this Court (exhibit "F") and (c) the order nisi of this Court made on the 20 December 2000 (exhibit "J"). These specific exhibits are the ones most relevant to the matter now before us. The second affidavit, a supplemental affidavit, sworn to on 30 December 2000, exhibits a certified copy of the whole proceedings in the judge's Summons. (exhibit “K") and the ruling of the judge (exhibit “L").

The respondent filed an Affidavit in Opposition dated 20 December 2000 in which he exhibited a certified extract of the proceedings in the judge's summons (exhibit "MOTD"). By this exhibit, the respondent for the first time made a clean breast to this Court of the judge's Summons.

The Arguments

Mr. Berewa, Attorney-General, Counsel for the applicants, underlined two issues as forming the nerve centre of the case for the applicants. One is that the respondent failed to disclose material facts to this Court when he made his ex parte application for an order nisi, the material fact being the proceedings of the judge's Summons which culminated in a decision. The other is that the decision by the judge in that summons raises the issue of judicata per rem in respect of the Respondent's ex parte application.

Non-Disclosure

To buttress his posture on the effect of non-disclosure, Mr. Berewa referred us to two cases: The Hagen [1908-10] All. ER 21 and The Andria r198411AII.ER 1126. In The Hagen the facts of which I find unnecessary for repetition in this judgment, Farwell LJ said at page 26:—

"In as much as the application was made ex parte, the fullest disclosure was necessary, as in all ex parte applications, and a failure to make a full disclosure would justify the court in discharging the full order, even though the party might afterwards be in a position to make another application."

In the case of The Andria, concerned with an arrest of a ship on a warrant based on an affidavit filed by the plaintiffs which failed to disclose the existence of arbitration proceedings or that arbitration was actively pursued, and the defendant's protection and indemnity club furnished an undertaking to the plaintiffs that the club would pay any sum awarded to the plaintiffs in return for the ship's release from arrest, Robert Goff LJ had this to say at page 1135:—

"Though we do not for one moment suggest any bad faith on the part of the deponent, the fact is that the affidavit sworn to lead the warrant of arrest failed to disclose facts which were material to the issue of the warrant; and, as a result of the non-disclosure, the warrant was issued and thereafter the ship was arrested. It follows, in our judgment, that the invocation by the [p.342] appellants of the court's jurisdiction to arrest the ship amounted in the circumstances of the case to an abuse of process of the court and that the club's letter of undertaking must be discharged",

Exhibits “K" and "L" of the supplemental affidavit in Opposition which provides the first inkling of what transpired before the judge, though belatedly, tells the whole story. Exhibit “K" gives in detail arguments by both sides on the objection to the jurisdiction of the court to hear the Summons on the ground that the Anti-Corruption Commission was neither a court nor an adjudicating authority and therefore the court was not competent to quash the report of its findings in exercise of its supervisory powers over inferior courts and adjudicating authorities pursuant to section 134 of the 1991 Constitution. Exhibit “L" is the ruling of the judge that the Commission was neither a court nor an adjudicating authority. On the basis of these exhibits and the authorities cited, Mr. Berewa asks for the ex parte order nisi given by us to be discharged.

In reply to this particular issue, Mr. Terry, Counsel for the respondent, made five submissions which I can glean from his several submissions. Three of them appear to be general on the whole issue in controversy and the others are specific to the question of non-disclosure. One submission is that once an order nisi has been granted the Court cannot listen to a complaint against the order before the substantive hearing for the order of certiorari but that it may do so at the hearing when it is sought to make the order absolute. The second is that if at all the Court can look into the complaint before the substantive hearing the party affected by the order nisi must show that the court was wrong in making the order. The third is that a court has a discretion to set aside its ex parte order but in doing so the court should hold a balance between the ordinary citizens inter se and the citizens on the one hand and the state on the other. For this submission he relies on a passage from the judgment of Kutubu CJ in the case of The State vs. Adel Osman and Others [1998] LRC (Const) 212 at 221. The fourth is that there is no obligation on the exparte applicant to make a full and frank disclosure of material facts but that all he needs to do is to show that he has a locus standi and to establish a prima facie case. For this submission he relies on the decision of the court in Harry Will vs. Attorney-General & Minister of Justice. Mis. App, No. &/99. (unreported. ruling delivered on 23 March 2000). The fifth submission is that the principle of full and frank disclosure is elementary but that it does not apply to certiorari proceedings. With due respect for the high quality of the research ability of counsel, I find nothing in the cases cited by him that supports the propositions which he posits. In particular, in the Harry Will case, Luke CJ merely stated the conditions on which an order can be made on an exparte application. Non-disclosure of material facts

was not in issue and therefore the Court did not address itself to it. I will come back to the first three submissions later.

Disclosure of material facts is, to my mind, incorporated into the principle of natural justice encapsulated in the doctrine of "audi alteram partem" which is cardinal in the rule of law. No man can be condemned behind his back in respect of either his person or his property. Exparte applications are merely intended to enable a litigant to have an expeditious access to the court without notifying the other party in a matter between them when that litigant's legal right is in danger and if he is to give the other party a proper notice of his intention to go to court, delay will defeat the ends of justice. Exparte applications must, to use a feline phrase, let the cat out of the bag. Disclosure of material facts when such an application is made in the absence of the other party, enables the court to bridge the lacuna created by the absence of the other party and to hold the scale evenly between them. This is the reason why an applicant must make a clean breast of material issues to [p.343] the court to which the application is made. It is a duty which the applicant owes to the court which I hold the respondent herein did not discharge when he made his exparte application. The proceedings before Massallly,J, in the High Court were very material to be disclosed to this Court when the Exparte Application was made. It might not have made any difference to the outcome of the Court's decision if that material fact was revealed. On that occasion, the Court might have exercised its discretion to ask the Applicant herein to take part in the exparte proceedings before it as it did in the Harry Will case.

Having said all this, I will go back to The Hagen case in which Lord Alverstone CJ articulated the point which I am making before discharging the exparte order.

"If I had felt that Hargrave Deane J., had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to show that he did. I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised" (at page 26).

In the light of this statement of Lord Alverstone CJ., which I fully endorse, can we say that we really exercised our discretion when the full facts were not known to us? With reluctance, I apprehend that we did not.

In the cases which I have relied upon for the effect of non-disclosure, it was an Appeal Court that had to vacate an order of a lower court. In the light of this and section 122 of our Constitution, a searching question which I now pose is whether we have the power to vacate our own order. Section 126(b) of the Constitution specifically gives us that power in civil matters that have been decided by three Justices but there is no specific provision for criminal cases. Mr. Berewa urged that we can. Mr. Terry, on the other hand, did not deny that we cannot. What he submitted is that we may do so but only if the issue is raised at the substantive hearing of his application and when it is shown that we erred in law in making the order. This leads me into the field of autonomy. On binding precedent, section 122 of the Constitution enable us, as the highest court in the land, in the interest of justice, to depart from previous decisions which we take. A restrictive interpretation of a "previous decision" is a decision that has been taken in some other cause. I would not regard an order made in an interlocutory proceedings by a court

to be a previous decision. Nevertheless, to my mind, this court or any other court has an inherent right to discharge any such order if justice requires it. This is where I agree with the third submission of Mr. Terry, the principle of which, I have stated, he perhaps inadvertently attributed to Adel Osman's case.

The estoppel Question

Mr. Berewa for the applicants articulates that when the judge dismissed the application before him the proper course for the applicant to have pursued was to appeal as provided for under section 63 of the Courts Act, 1965, Act No. 31 of 1965. That section provides for appeals from the High Court to the Court of Appeal from any decision of the Supreme Court in exercise of its prerogative or supervisory jurisdiction in criminal matters.

The learned Attorney-General argues that instead of appealing, the respondent herein came to us on certiorari on the same matter that the High Court has taken a decision upon [p.344] and we gave the respondent leave to proceed with the certiorari. He contends that, in the circumstances, the respondent is estopped from raising the same issue, if I may put his case so very simply. He referred us to several authorities on estoppel. I will mention here the ones I regard as relevant to the matter before us. In Foli and Others v. Agya-Atta and others [1976] 1 G.L.R. 194, the Court of Appeal of Ghana held that estoppel per rem judicatam applies where an action is dismissed if the dismissal involves a determination of any particular issue or question of fact or law. Amissah JA, in his judgment at page 200 of the report made the following pronouncement on estoppel adopting the view of Spence-Bower and Turner, on Res Judicata, second edition, 1969, page 28:-

"When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this inquiry depends upon whether, on reference to the record and such other materials as may; properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law in which case there is an adjudication on the question or issues; if otherwise, the dismissal decides nothing except that the party has been refuse the relief which he sought."

In another case, Thoday V. Thoday [1964] 1 All ER 341, Diplock, LJ in the English Court of Appeal, gives two instances of estoppel that will prevent a litigant from bringing an action when a previous one has been decided by a court. One is "cause of action estoppel" and the other is "issue estoppel". He defines "cause of action estoppel" as that

"Which prevents a party to an action from asserting or denying as against the other party, the existence of a particular cause of action the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties ... If the cause of action was determined to exist, Le., judgment was given on it, it is said to be merged in the same judgment. .. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does. This is simply an application of the rule of public policy." (at page 352)

He continues on issue estoppel.

"The second species which I will call 'issue estoppel' is, an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action if in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation [p.345] determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was. (at page 352)

The statement which Diplock makes refers specifically to estoppel in civil litigation. Mr. Terry argues the question of estoppel from two vantage points. One is that estoppel is not applicable to certiorari proceedings and he relies on the judgment of May LJ in R v. Secretary of State for the Environment, Ex part Hackney London Borough Council and another [1983] 3 All ER 358. where he said:

"In such Judicial review) proceedings there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the first application will have decided. Moreover, we do not think that there is in proceedings brought under RSC ord. 53 a true lis between the crown in whose name the proceedings are brought and the respondent or between the exparte applicant and the respondent. Further, we doubt whether a decision in such proceedings, in the sense necessary for issue estoppel to operate, is a final decision; the nature of the relief, in many cases, leaves open reconsideration by the statutory or other tribunal of the matter in dispute"

In his reply to this point, Mr. Berewa referred us to the decision of the Court of Appeal when this case went on appeal but he did not elaborate. After careful perusal of the case on appeal, I found that the judgment of the Divisional Court was upheld. Dunn LJ said:-

“The Divisional Court was right to hold that the doctrine of issue estoppel cannot be relied upon in applications for judicial review although the court has an inherent jurisdiction as a matter of discretion in the interest of finality not to allow a particular issue which has already been litigated to be opened. This depends on the special nature of judicial review under RSC Ord 53, which makes it different both from ordinary civil litigation inter parties and from criminal proceedings". ([1984] 1 ALL ER 956 at 964)

I am grateful to both counsel for referring me to these two reports. For my part, I agree with the premise but not with the conclusion which Mr. Terry reached. The statements which the two lord justices made should not be taken out of context. The Hackney case should be considered with circumspection. There is another case which is linked with it in a chain of events: it immediately precedes the Hackney case in the same volume of the All England Law Reports. It is R.v. Secretary of State for the Environment. ex parte Brent London Borough Council and another [19831 3 All ER 321. In that case six applicants including Hackney and Camden Borough Councils applied for and obtained orders for certiorari. An issue that was decided by the court was that on a specific date "the applicants

were entitled to receive (from the Secretary of State) the rate Support Grant order 1979 as thus increased; thus the decision (made on 26 January 1981) to reduce the applicants' rate support grants adversely affected not merely an expectation but a right to a substantial sums of money". See judgment of Ackner, LJ at pp. 354, 355.

But the judgment did not end there. It left it open to the Secretary of State, "after considering the applicants' representations, now fully documented to make any decisions he considers right," (See page 357.)

Two of the applicants in. the Brent case, i.e., Hackney and Camden, made a further application for certiorari in the Hackney case. Their complaint was, among other things, that the Secretary of State had deferred payment on their entitlements and reduced their grants and contending that their entitlement had been fixed by the judgment and that the Secretary of State was estopped by the judgment. The Secretary of State submitted that on the previous application, which the court accepted, all that was decided was that he had failed to hear last minute representations and that the court did not hold that he could not lawfully make a decision to reduce the grant. As can clearly be seen, the issues raised in the two cases were different. May LJ pointed out the difference when he said:-

"In the present case, however, we think that there are two answers to the powerful submissions on this point. (Le. issue estoppel) made by counsel for the applicants. First, although on their face the passage from the first judgment do appear to contain a finding in favour of the present applicants on the particular issue, in our opinion, a careful reading of the context in which the passages occur, makes it quite clear that the court on the first occasion was not purporting to make the finding for which counsel for the applicants contends. In the first place, the circumstances in which and the times at which the Secretary of state was liable under the Statute to make payments of rate support were not in issue on the earlier application." (at p. 365)

Going back to the prior opinions of May and Dunn LJJ, I think they should be viewed from the peculiar nature of judicial review in which the court does not determine the validity of the order of the tribunal as between the parties but merely decides as to whether there has been excess or lack of jurisdiction. This does not mean that if a legal point arises and the court takes a decision on it, an issues estoppel cannot be eventually asserted to sustain it.

I do not find it necessary to draw a line between judicial review in England and certiorari proceedings here which the learned Attorney-General tried to make. The conclusion which I have reached will be the same if I do so.

I think that what is in issues in the case before us is actually not one directly concerned with certiorari. To my mind we should not confuse certiorari proceedings with what actually transpired before Massally, J. He did not go into the question as to whether or not the Anti-Corruption Commission acted contrary to or in excess of its statutory authority. Instead, an issue was raised in what was going to be certiorari proceedings. The identity of the Commission, the body against which the judge was to make a certiorari order was in issue and the judge decided that he could not proceed with the certiorari proceedings because the Commission was neither a court nor an adjudicating authority. If he had proceeded with

certiorari, after his decision that he lacked jurisdiction, his decision thereafter would have amounted to a nullity. See Macaulay V. Commissioner of Police (1968 - 69) ALR SL 9, pae14.

It is in this vein, to my mind, that the doctrine of estoppel should be considered.

The other plank of Mr. Terry's posture on estoppel is that the dismissal of the application before Massally J. amounts to a mere refusal based on an issue during the proceedings and that no decision was taken on the merits of the application for certiorari issue i.e., the cause of action; therefore, the respondent cannot be precluded by estoppel when he comes to the Supreme Court. If I get him right, Mr. Terry is saying that there was no final [p.347] decision on the cause of action to attract estoppel. With respect to the learned Counsel, this argument is fraught with two misconceptions. First, it suggests that estoppel per rem judicatam does not apply to a final decision on an issue in an interlocutory matter. This is "issue estoppel". Both "cause of action estoppel" and "issue estoppel" need not coincide before estoppel per rem judicatam cap be raised. They are independent of each other. In reaching this conclusion, I lean heavily on the Foli and Thoday's cases herein-before mentioned and to the decision in the English Queens Bench Division case of R.v. Governor of Brixton. ex parte Osman (No.1) [1992] 1 All ER 108. This was an application for habeas corpus but the principle stated therein, in my view, applies to certiorari as well. The facts are very revealing. The applicant, Osman who was in remand at Brixton prison awaiting extradition to Hong Kong to face criminal charges made three unsuccessful applications for a writ of habeas corpus. In the third application he sought the disclosure of some official documents and he was granted. In a fourth application he sought the disclosure of nine other official documents but the court refused it on the ground of irrelevance. Osman made a fifth application in which he again sought the disclosure of the nine documents referred to in the fourth application. Thereupon, the Secretary of State moved the court for the parts of Osman's affirmations which either referred to or quoted from the nine documents to be struck out, one of the grounds being that the court's decision in the fourth application refusing further disclosure on the basis of irrelevance resulted in an issue estoppel which prevented Osman from later asserting that the documents were relevant. In the judgment of the court this was what Mann LJ said.

"The issue estoppel in this case is said to arise from the decision of this court on 20 January 1990. That was a decision on an interlocutory application. That it was a decision on an interlocutory application does not, in my judgment, disable it from an ability to give rise to an issue estoppel. I can see no reason in principle why a final decision upon an interlocutory application should not be in this regard treated as any other decision." (p. 118)

My second reason for disagreement with Mr. Terry is that it is not necessary for a court to make a final pronouncement on the merits of a case before estoppel can be invoked. If I get Mr. Terry rightly again he is referring to "cause of action estoppel" which I have held to be independent of "issue estoppel". The jurisdictional issue that the respondents articulated before the judge pivoted on the identity of the Commission. The judge made a decision on it. This, to my mind, would give rise to issue estoppel on that issue. In taking this stance, I also derive support from the judgment of Simon Tuckey, Q.C. a deputy judge of the Queens Bench Division in Palmer & Anor v. Dunford Ford (3 Firm) and Anor. [1992] 2 All ER 122, at page 129 in which he states what I regard as a correct statement of the law as follows:-

"The plaintiff contends that this was not a final decision of the court because the court did not itself pronounce on the merits of the claim. I disagree. I think that a final decision for this purpose is one which would give rise to a plea of res judicata. Such a decision is one which leaves nothing to be judicially determined or ascertained thereafter in order to render it effective."

Mr. Berewa, in his argument, emphasizes that the cause of action was in fact decided. I apprehend, with the greatest respect. that this was not done as the judge did not go into the merits of whether the Anti-Corruption Commi5sion acted within or outside its mandate conferred by the Act. Mr. Berewa referred us to Hines v. Birkbeck College (No.2) [1991] [p.348] 4 AII ER 450 but Mr. Terry did not mention it to buttress his argument on estoppel not arising when a cause of action has not been decided on its merits.In this case, the plaintiff, a professor of Economics at a college in London University, issued a writ claiming that his College had wrongfully dismissed him. The judge struck out the claim on the ground that the subject matter of the claim was exclusively within the jurisdiction of the Visitor to the College. There was no hearing on any issue. Later, the Education Reform Act 1988 came into force giving the court jurisdiction over disputes concerning the appointment or termination of the appointment of a member of the University staff. The plaintiff thereupon issued a second writ in identical terms to the first alleging wrongful dismissal. The "college and the University appl.ied without success to strike out the second action on the ground, inter alia, of res judicata. This was a case of "cause of action estoppel" but it must be noted that the court refused to go into the merit in the first instance by virtue of the fact that no jurisdiction was vested in it over such matters. It is distinguishable from the Taju-Deen case before us in that the court in the instant case ruled that it had jurisdiction to supervise inferior courts or adjudicating bodies but that the Anti-Corruption Commission was neither a court nor an adjudicating body.

In my judgment, a case of "issue estoppel" could arise if it is sought to re-open the question of the identify of the Anti-Corruption Commission as a court or adjudicating authority but not a "cause of action estoppel". I am fortified on this stance by the judgment of Diplock LJ in Fidelitas Shipping v. via Exportchleb r19651 2 All ER4. 10 where he says:

"Where the issue separately decided is not decisive of the suit, the judgment on that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance arguments or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment."

Conclusion

This is as far as I can go on the arguments presented to us by counsel on both sides. I cannot, however, at this stage, rule whether or not estoppel applies because the application before us at present is to discharge the order nisi. I uphold Mr. Terry's submissions that the appropriate stage for a determination on estoppel is at the substantive application for certiorari and I may add, at any other proceedings which the Respondent may institute. It suffices only to hold and J so hold that the application succeeds on the ground of non-disclosure of material facts.

SGD.

CAESE REFEREED TO

1. The State Vs. Honourable Justice Muctaru Ola Taju-Deen

2. The Hagen [1908-10] All. ER 21

3. The Andria r198411AII.ER 1126.

4. The State vs. Adel Osman and Others [1998] LRC (Const) 212 at 221.

5. Harry Will vs. Attorney-General & Minister of Justice. Mis. App, No. &/99. (unreported. ruling delivered on 23 March 2000)

6. Foli and Others v. Agya-Atta and others [1976] 1 G.L.R. 194

7. Thoday V. Thoday [1964] 1 All ER 341,

8. R v. Secretary of State for the Environment, Ex part Hackney London Borough Council and another [1983] 3 All ER 358

9. R.v. Secretary of State for the Environment. ex parte Brent London Borough Council and another [19831 3 All ER 321

10. Macaulay V. Commissioner of Police (1968 - 69) ALR SL 9, pae14

11. R.v. Governor of Brixton. ex parte Osman (No.1) [1992] 1 All ER 108

12. Palmer & Anor v. Dunford Ford (3 Firm) and Anor. [1992] 2 All ER 122, at page 129

13. Hines v. Birkbeck College (No.2) [1991] 4 AII ER 450

14. Fidelitas Shipping v. via Exportchleb r19651 2 All ER4. 10

MUCTARU OLA TAJU-DEEN v. THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION & ANOR.

[SC. 5/2000] [p.388-414]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3 APRIL 2001

CORAM: HONOURABLE MR. JUSTICE D.E.F. LUKE

HONOURABLE MR. JUSTICE A. B. TIMBO

HONOURABLE MR. JUSTICE V. A. D. WRIGHT

HONOURABLE MR. JUSTICE H. M. JOKO-SMART

HONOURABLE JUSTICE MR.. S. C. E. W ARNE

In the matter of an application under section 124 of the Constitution of Sierra Leone

1991, Act. No 6 of 1991

AND

In the matter of an application under section 125 of the Constitution of Sierra Leone, Act No. 60 of 1991

AND

In the matter of an application under section 170(1)(a) to (e) 170 sub-rule 2 & 4 sections 18(1), 23 sub-rule 1 and 2 and 23/(7) of the Constitution of Sierra Leone, Act No. 6 of 1991

AND

In the matter of an application under the Anti-Corruption Act. No.1 of2000

BETWEEN:

MUCTARU OLA TAJU-DEEN — PLAINTIFF

AND

THE COMMISSIONER OF THE ANTI-CORRUPTION

COMMISSION — 1ST DEFENDANT

AND

[p.389]

THE ANTI-CORRUPTION COMMISSION — 2ND DEFENDANT

AND

THE LEARNED ATTORNEY-GENERAL AND — 3RD DEFENDANT

MINISTER OF JUSTICE

C. Doe-Smith Esq. & T. M. Terry Esq. for the Plaintiff

S. E. Berewa Esq., Attorney-General & Minister of Justice B. S. Kebbie Esq., D. P. P.

L. M. Farmah Esq., Senior State Counsel and

M. Sesay, State Counsel- for the Defendants RULING DELIVERED 3RD DAY OF APRIL, 2001

RULING

TIMBO, JSC:

This is an application by Originating Notice of Motion under sections 18, 24, 124, 125, 127, and 170 of the Constitution of Sierra Leone (Act. No. 6 of 1991). The application is supported by the affidavit of the Plaintiff Muctaru Ola Taju-Deen dated the 4th day of December 2000. The said affidavit contains no less than twenty-five paragraphs to which is also attached several exhibits. A further affidavit in support was sworn to be counsel for the plaintiff Claudius Doe-Smith on the same date.

[p.390]

The present application is one in a series of three motions filed in the Supreme Court on behalf of the plaintiff. One was for an order of certiorari and the other was for prohibition.

These two have already been disposed of the Court in SC. Misc.App.6/2000 and 1/2001 respectively. What is now left is the application for the several declarations.

In view of our findings or conclusions in respect of the applications for certiorari and prohibition, I will not now be dealing with all the eleven or so declarations sought by the plaintiff.

Instead, I shall confine myself only to declarations (e) (i) and (j).

But before proceeding to consider the merits of the said three declarations, let me first give a brief background to the chain of events, which led to this multiplicity of applications.

The plaintiff is a retired justice of the court of Appeal of Sierra Leone. While on retirement he was invited and he readily accepted to serve as a judge of the superior court of judicature in certain criminal matters which were then pending in the High Court. Prominent among these, was the case of the state v. Dr. Henry Will, Lamin Feika and Bockari Kakay.

It was the outcome of the said trial that precipitated the subsequent arraignment of the plaintiff in the High Court under the newly enacted Anti-Corruption act (No.1 of 2000) this act forbids among other things, the corrupt acquisition of wealth or the taking or acceptance of advantage by public servants in the performance of their official duties.

It is an unhappy coincidence that the plaintiff happens to be the No. l person to be prosecuted under the new legislation.

[p.391]

When the present motion came before us for the first time on the 18th of January 2001, we indicated to counsel on both sides the manner we intended to proceed with the application. We told both of them to file their respective arguments and submit all relevant authorities to the Court before the next

adjourned date. Thereafter we invited counsel to address us briefly and we then adjourned for our ruling. We adopted this procedure in order to expedite the hearing of the motion.

It is important at this point to look at the essential features of the declaratory relief itself

Unlike other common law remedies, such as certiorari, prohibition and mandamus, the declaratory judgment as the name implies, merely declares the state of the law on any given subject or the right of parties to a dispute. Ordinarily, it decrees no penalty.

Although in strict law the non-compliance of a declaratory order simpliciter at common law evokes no direct legal consequences, actions taken in defiance of such order may be declared void if challenged. In a action of declaration, the plaintiff must show that he has an immediate personal interest in the proceedings. In other words, he must establish that he has a locus standi to maintain the suit. The declaratory relief is based upon the existence of a genuine dispute between the parties and must relate to existing facts and not to something that is too remote or hypothetical. Another great advantage of the declaratory judgment is that it may be made in advance of an apprehended infringement of one's private rights.

Furthermore, while the technical limitations that surround the prerogative writs of mandamus certiorari and prohibition often create stumbling blocks for intending litigants wishing to seek redress from the excesses of the administration this is not the case with the declaratory remedy, which is generally simple and flexible.

The remedy however, remains basically discretionary and as Sir Carleton Allen once observed in the 69 Lay Quarterly Review (1953) page 451 — 3,

[p.392]

"It seems improbable that……..judges Will allow it to be used by frivolous and Unmeritorious litigants."

Apart from the common law remedy of declaration, section 127(1) of the constitution specifically stipulates that,

(l) A person who alleges that an enactment or anything contained in or done under authority of that or any other enactment is in contradiction of a provision of this constitution, may at any time bring an action in the Supreme Court for a to that effect.

(2) The Supreme Court shall for the purposes of a Declaration under subsection (1) make such order and give such direction as it may consider appropriate for giving effect to or enabling effect to be given to the declaration so made.

(3) Any person to whom an order or direction is Addressed under subsection (1) by the Supreme Court shall obey and carry out the terms of the order or direction.

(4) Failure to obey or carry out the terms of an order or directed made or given under subsection (1) shall constitute a crime under this subsection."

With these preliminary remarks, I shall now revert to the three declaratory orders I have indicated I shall be examining.

[p.392]

I shall begin with declaration (e). Under this, counsel for the plaintiff Mr. Terry contended that in so far as the provisions of sections 7 (1) and 8(1) of the Anti Corruption act (Act No.1 of 2000) have been framed, they are clearly repugnant to and a violation of the express provisions of sections 120(9) and 137(4) of the constitution (Act No 6 of 1991.

Sections 9(1) and 8(1) of the Anti-Corruption Act 2000 are the sub-sections which create the twin offences of the corrupt acquisition of wealth and the soliciting or accepting of an advantage by public officer's in the execution of their official functions.

The plaintiff relied on section 127(1) of the Constitution for this declaration.

My initial reaction here is to say the plaintiff cannot seek this declaration in the face of Criminal Appeal No.9/2000 filed by the Plaintiff and still pending in the Court Appeal against the decision of the Hon. Mrs. Justice Patricia Macauley date the 14th day of December on the interpretation the same section 120(9) of the Constitution.

But since section 127(1) states unequivocally that an aggrieved party (here the plaintiff) can make the application for declaration at any time to the Supreme Court, I feel bound to entertain such application.

Having said that much, I now wish to examine the provisions of sections 120(9) and 137(4) of the Constitution in a greater detail.

Section 120(9) provides:

"(a) A judge of the Superior Court Judicature shall not be liable to any "action" or "suit" for any matter or thing done by him in the performance of his judicial functions."

[p.393]

Section 137(4) on the other hank, state as follows:

"(4) Subject to the provisions of this section, a Judge of the Supreme Court of Judicature may be removed from office only for inability to Perform the function of his office, whether arising from infirmity of mind or for stated misconduct, and shall not be so moved saved in accordance with the provisions of this section."

Mr. Terry implored the Court to give a liberal and purposive construction to the words "action" and "suit" in section 120(9) so as to include immunity from criminal proceedings. What counsel is saying, as I understand him, is that section 120(9) confers blanket immunity to a judge in respect of anything done

or said by him in the exercise of his judicial functions whether Civil or Criminal. This also seems to be the view of B.O. Nwabueze, the Learned author of "Constitutional Law of the Nigerian Republic" (1964) when he said at page 293 that,

"A judge is also immune from civil and criminal liability for anything said or done in his judicial capacity."

The Learned Attorney-General and Minister of Justice on his part argued strenuously, that section 120(9) only prohibits the institution of civil proceedings against a judge of the superior court of judicature for things done or said by him in the performance of the duties of his office.

In "Words and Phrases Legally Defined," Vol. 1 2nd edition A — C, it is stated at page 33 that,

"Action shall include every judicial proceeding instituted in any court, civil, criminal or ecclesiastical, (See British Law Ascertain Act, 1859. S.5) [p.395] Likewise, in :A Dictionary of Law" 4th edition Oxford University Press, the word ''suit'' is described as a term commonly used for any court proceedings.

It is however further observed on the same page of "Words and Phrases Legally Defined "4th edition that "action" is generally used in a more restricted or popular sense to denote a civil action commenced by writ or plaint (vide 1 Halsbury's Laws of England, 3rd edition).

By order 1 of our High Court rules, 1960, "action" Means a civil proceeding commenced by writ or In such other manner as may be prescribed by Rules or court, but does not include criminal proceedings"

There is certainly no ill1animity of opinion as to the precise purport of these two words.

Whatever definition is ascribed to the words "action" and "suit" the basic question we have to answer is whether by judicial interpretation or call it interpolation if you with, this Court can legitimately extend the meaning of either word to encompass criminal proceedings. This appears to me to be the bottom line.

We were reminded not so long ago by the Privy Council in British Coal Corporation v. The King (1935) P.C. 158 that,

"In interpreting a constituent or organic stature, that the construction most beneficial to the widest amplitude of its powers must be adopted."

Similarly, in construing the Government of India Act the same year, the Indian Supreme Court admonished that,

[p.396]

"A broad and liberal spirit should inspire those whose duty it is to interpret it."

But the court was nevertheless quick to point out that,

".....this does not imply that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory or even for the purpose of supplying omissions or correcting supposed errors."

Yet, in another Indian case, Kershara Menon v. State of Bombay, (1951) SC.R228, 232, the Supreme Court again opined:

"In argument founded on what is claimed to be the spirit of the constitution is always attractive for it has powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the constitution from the language of the constitution. What one may believe or think to be the spirit of the constitution cannot prevail if the language of the constitution does not support that vies."

When one juxtaposes sections 48(4) and 99(1) of the Constitution with section 120(9) it becomes extremely difficult if not impossible to resist the conclusion that the immunity granted to a judge of the superior court of judicature is confined purely to civil litigation. Section 48(4) and 99(1) are unambiguous as to the extent or limit of the immunity granted to the president on one side and the members of the legislature on the other. They cover immunity from both civil and criminal proceedings.

[p.397]

The fact becomes even clearer when the respective provisions of these two sub-sections are fully examined. I shall therefore set them out verbatim than otherwise might have been necessary.

Section 48 says:

"While any person holds performs the functions of the office of president no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him in his official or private capacity.

Section 99(1) on its part provides

"Subject to the provision of this section but without prejudice to the generality of section 99, no civil or criminal proceedings shall be instituted against a member of parliament in any court or place by reason of anything said by him in parliament."

The difference in phraseology between these sub-sections and section 120(9) cannot be accidental. The change of language does suggest a change of intention on the side of parliament.

The common law stance on the immunity of a judge for things said or done by him in the course of his official functions was re-echoed by Lord Denning not so long ago in Sirros v. Moore and others (1974) ALL.E.R. 776 at page 781 when the Learned Master of the Rolls had to say:

"Ever since 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a Jurisdiction which belongs to [p.398] him. The words which he speaks are protected by absolute privilege. The words which he used and the sentence which he imposes cannot be made the subject of civil proceedings against him. No matter that the judge

was under some gross error or ignorance or was actuated by envy hate or malice and all uncharitable ness, is not liable to an action ... of course, if the judge has accepted bribes or has perverted the course of justice, he can be punished in the criminal courts) emphasis mine).

Lord Denning's dictum in Sirros v. Moore may be contracted with the some-what extreme case of Gahan v. Lafitte (2842) 3 Moo.P.C.C.382 cited by T.O. Elias in his Book "British Colonial Law" (1962) at page 71.

Certain persons had exercised the office of judges under Commissions which were issued irregularly by the then Governor of St. Lucia. In an action brought against them for trespass and false imprisonment, it was held that the said judges were liable for the acts done by them while so acting.

The decision in the case could well have turned on the fact that the jurisdiction under which the judges had acted was only a pretended one.

Surely, if the legislature had intend to give immunity to judges for their criminal acts it would have been easy for it to say so as indeed it had done in the case of the president and our legislators. "Liberalism" is one thing. But to import into the Constitution words which were, from all indications, never intended to be there is another matter altogether. As hard as it might appear, I regret, I am not allowed to do so.

In fact, even if the plaintiff were immune from criminal prosecution because of section 120(9), the question would still remain whether what he is alleged to have done was done [p.399] in the course of execution of his duties as a judge of the superior court of judicature in order to attract immunity under section 120(9).

Mr. Terry's reliance on section 137(4) I think is premature. What is in issue at this stage is whether the plaintiff can be tried for the allege offences enumerated in the 12 — count indictment preferred against him. It is only when and if the plaintiff s convicted of such offences will, in my opinion, the matter of his removal for stated mis-conduct under section 137(4) arise and the full mechanism prescribe in subsections 5,6, & 7 of section 137 for his removal from office come into operation. No misconduct has so far been established against the plaintiff

I shall turn next to declaration (i)

The pith and substance of this complaint is that the plaintiff was never afforded an opportunity to defend himself before the Anti-Corruption Commission, thus contravening the audi alteram parteam rule.

This allegation was refuted by the Learned Attorney-General and Minister of Justice who state that the plaintiff had been accorded all the rights and privileges of a person being investigated under the Act is entitled to. He stressed that it was indeed the refusal of the plaintiff to co-operate with the commission that prompted the Commissioner Mr. Valentine 1. Collier to write to the Non. Chief Justice to solicit his assistance and that it was only then that the plaintiff volunteered his cautioned statement annexed to his affidavit of 4th December 2000. By so doing Mr. Berewa argued, the plaintiff had availed himself of the opportunity to be heard albeit only reluctantly.

I find the dicta of Lord Loreburn L.C. in Board v. Rice (1911) ALL.E.R. at page 189 very instructive. This was what he said,

[p.400]

"Comparatively, recent statutes have extended, if they have not originated, the practice of imposing upon departments or offices of state the duty of deciding or determining questions of various kinds..... In such cases,.....they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such question as though it were a trial.....They can obtain information in anyway they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view' (emphasis mine).

This is even less so in the instant case where the powers of the Anti-corruption Commission under the Act are restricted in the main to the investigation of corrupt practices by public servants and the submitting of reports.

Natural justice does not in my considered view always postulate a right adduce evidence or confront or cross-examine witnesses. What is of paramount importance is that a party must be afforded a fair chance to make representation against a proposed course of action. See Nakkuda Ali v. Jayaratne (1951) A.C. 66 and Ceylon University v. Fernando (1960) 1 ALL E.R. 631.

In the United States, whether oral hearing is required under "due process' in the absence of statutory provision would depend on the circumstances of the case and the particular interests affected. As was pointed out in F.C.C. v. W.J.R. (1949 337 V.S. 265 at page 276, the right to an oral hearing before administrative tribunals "is not a matter for broadside generalization and indiscriminate application." See also Golberg v. Kelly 397 V.S. 90 S. Ct. 1011, (1970) Richardson V. Wright 405 V.S. 208 (1972) Matthews v. Eldridge 96 S. Ct. 893 (1976).

[p.401]

I will now come to declaration (i). The plaintiff's counsel submitted here that the granting by the learned trial judge of an order for the plaintiff’s doctor to come to court and testify regarding the health of his client was a contravention of the provisions of section 23 (20 of the Constitution since the medical report of the plaintiff was already before her. See Exhibit M.O.T. D.6.

The crux of the matter as I perceive it, is whether it is open to the learned trial judge to go behind the plaintiff's medical certificate and cause to be examined Dr. Claudius Cole on the state of his patient's health. Did this amount to a breach of the principle of confidentiality that normally exists between Doctor and Patient?

For my part, I see no wrong do41g by the learned trial judge here because as the person in charge of the trial she was free to satisfy herself that the plaintiff was really unfit to attend court on the stated day due to ill health and that he was not simply using delaying tactics to drag or frustrate the proceedings.

There is nothing novel or unusual about this practice. In any event, section 23(2) itself requires that any such trial shall be concluded ''within a reasonable time."

On the related question of whether the Doctor should have been examined in chambers, and not in the open whilst this may be the preferred thing to do depending on the type and nature of the ailment it will be unfair to cast blame on the learned trial judge for failing to do so since she saw and read the medical report.

It may not be inappropriate whilst on this issue to refer to the head note in C.V.C. (1946) I ALL.E.R 562. It reads,

"It is in the public interest that justice should be done and for this purpose it may be necessary at time to override the [p.402] confidential relationship existing between doctor and patient."

So too, in 'Gamer v. Gamer (1920) 36 T.L.R. 196, where it was earlier held that a doctor might be compelled to give evidence that his patient was suffering from venereal disease, even though the relevant statutory regulations confer absolute secrecy on the doctor.

In the light of my respective findings above, I regret I cannot grant the declarations sought under (e) (i) & (j) by counsel for the plaintiff.

Finally I wish to thank counsel on both sides for their industry and tremendous assistance to the court throughout the hearing of these motions.

(SGD.)

A. B TIMBO, J.S.C.

[p.403-404]

V.A.D WRIGHT J.S.C.

This Originating Notice of Motion dated the 14th December 2000 is a culmination of a series of application made before this court for the orders for Certiorari and Prohibition. The application is supported by an affidavits of Muctaru Ola Taju Deen sworn to on the 4th December, 2000 and the exhibit attached and of Claudius Doe Smith sworn to on the 4th December, 2000 and of the plaintiff sworn to on the 21st day of November, 200 in the criminal case between the State vs. Muctaru Ola Taju Deen Holden at the High Court.

I wish to commend counsel on both sides, for the well-reasoned and forceful manner they presented their cases. Arguments were presented on behalf of the plaintiff herein Muctaru Taju Deen and on behalf of the 1st, 2nd, 3rd defendants. At the hearing both sides highlighted several points on the declaratory orders sought.

Although eleven declaratory orders were prayed for namely (a) to (k) as set out in the Originating Notice of Motion herein I will confine my Ruling to Orders E and 1. Nearly all the declaratory Orders prayed for

by the plaintiff have been dealt with either in the ruling given on the orders for Certiorari or Prohibition Le. Misc. App. 1/2001 dated 23.2.2002 unreported and Misc. App. 6/2000 dated 18.1. 2001 unreported.

"I will first deal with declaratory order (e) which states:—

"A Declaration to the effect that the provision of Section 7(1) and 8 (1) of the Anti corruption act. No. 1 2000 in so far as they have laid and framed as Constitution Offences against a Judge or acting Judge of the Superior Court of Judicature and in particular the Honourable Mr. Justice Muctary Ola Taju Deen are clearly repugnant to and inconsistent with the express mandatory entrenched provisions of Section 120 (9) and 137 (4) of the Constitution of Sierra Leone Act No. 6 of 1991."

[p.405]

I shall not go into the legal definition of the remedy of declaration as this was adequately dealt with in the legal argument presented on behalf of the plaintiff herein Muctaru Ola Taju-Deen in this matter. The Honourable Mrs. Justice Patricia Macauley in the Criminal trial in the High Court had given a Ruling on this Declaratory Order sought and this has been appealed against to the Court of Appeal.

It is clear that under Section 127 (1) at the Constitution of Sierra Leone Act No. 6 of 1991 which states:—

127 (1) A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provisions of this Constitution may, at any time bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purpose of a declaration under subsection (1) make such orders and give such directions as it may consider appropriate for giving effect to, or enabling effect to be given to, the declaration so made.

Since the applicant is alleging that Section 7 (10 and 8 (1) of the Anti corruption act No. t of 2000 is inconsistent with Section 120 (9) and 137 (4) of the constitution he is entitled to bring the action for a declaration to that effect. In this declaration sought we are faced with the interpretation and construction of simple words in the Constitution and I agree with Learned counsel for the plaintiff that in construing or interpreting a Constitution, the Court is not permitted to substitute its own right meaning or to give a construction to the Constitutional Provisions order than the ordinary and proper meaning of the language which the Legislature sees fit to sue. See Olalere Obdara and other vs. President Naadan West District Customary Court 1964 1ANLR 336.

[p.406]

Section 120(9) of the Constitution states that a Judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in performance of his judicial functions.

I will now look into the construction and interpretation of the words action and suit. I agree with the interpretation of the meaning of the action in Stroud's Judicial dictionary of words and Phrases 4th Edition Page 45 in the 2nd Paragraph herein is states:—

Action 1. This is a generic term and means a litigation in a Civil Court for The recovery of individual right or redress of individual wrong, inclusive in its proper legal sense, of suits by the Crown (Bradlaught vs. Clarke 8 App. Case 354).

2. For the purpose of the judicature Act "action means' a Civil Proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court.

This Interpretation is further re-inforced by the interpretation of Action in the High Court rules 1960.

"Action" means a Civil Proceeding commenced by a writ or in such other manner as may be prescribed by rules of court, but does not include Criminal Proceeding by the Crown."

In words and phrases Legally defined Volume 1: A — C Page 33 states:—

"An "Action" according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against or to restrain the commission of some wrong by another party. More concisely it may be said to be ''the legal demands of a right" or the mode of pursuing a right of [p.407] judgment." It implies the existence of parties of an alleged right, of an alleged infringement thereof (either actual or threatened) and of a court having power to enforce such right. In its wider meaning the term includes both Civil and criminal Proceedings..... It is however generally used in a more restricted or popular sense as denoting Civil action commenced by writ or plaint.

On Page 34 it states; "It may be true to say that in some cases "actions will include indictments or will include criminal information. In some cases it may, but the question is whether in this Act or Parliament it does, and when the Legislature is found using the words "by action' that work contained according to its ordinary meaning does not seem to me to include an indictment or criminal information."

In Halsbury's Laws (3rd Edition) Page 2.

Action is defined as a proceeding by which one party seeks in a court of justice to enforce some right against or to restrain the commission of some wrong by another party. In its ordinary meaning the term includes both Civil and Criminal Proceedings. It is generally used in a more restricted or popular sense as denoting a civil action commenced by a writ or plaint See. Bradlaught vs. Clarke. There are several statutory definitions thus for the purpose of the Supreme Court of Judicature (Consolidation) Act 1925 and rules of the Supreme Court it means a civil Proceeding commenced by writ, or in such other manner as may be prescribed by rules of court and does not include a criminal proceeding by the crown.

For the same purpose the word "suit" is to include "action" the old technical distinction between actions at law and suits in equity being thus rendered absolute and both "action and "suit" are to be included in the same under term "cause.

[p.408]

In words and Phrases Legally defined Volume 5 2nd edition S-Z at Page 146 states. It was argued that suit in the English version of the Hague rules meant an action in the Courts and was distinct from an

arbitration and that, if a step had been take in an arbitration in due time but no writ had been issued in the courts. The plaintiffs Claim could have defeated, if the requirement of The Hague rules had been invoked as no "suit" having been established the defendants would have been discharged from liability."

The word "suit" in Section 64 (3) of the constitution of Sierra Leone Section 64 (3)

states:

"All offenses prosecuted in the name of the republic of Sierra Leone shall be at the suit of the Attorney-General and minister of Justice or some other person authorized by him in accordance with any law governing the same.'

Having stated the different definitions given on action I opine that the work action in general includes both civil and criminal action but to my mind the test is whether Parliament intended by the words action to include criminal proceedings in Section 120 (9) of the constitution.

Section 120 (9) of the constitution states:

"All Judge of the Superior Court of Judicature shall not be liable - to any action or suit for any matter or thing done by him in the performance of his judicial functions."

Before any person can claim exception from criminal liability there must be clear and unambiguous words to that effect in a statute or constitution exempting such a person from the criminal offences from which he is seeking exemption. Such references ought to be clearly spelt so as not to admit any doubt in the application of such exemption. Such references ought to be clearly spelt so as not to admit any doubt in the application of such exemption was done in Section 48(4) of the Constitution in the case of the President and in Section 99 (1) of the constitution in the case of members of parliament.

[p.409]

Therefore in my view Parliament never intended to include criminal Proceedings to the words action in relation to Section 120(9) of the constitution.

Section 120(9) of the Constitution states:—

"All judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in the performance of his judicial functions."

Before any person can claim exception from criminal liability there must be clear and unambiguous words to that effect in a statute or constitution exempting such a person from the criminal offences from which he is seeking exemption. Such reference ought to be clearly spelt so as not to admit any doubt in the application of such exemption was done in section 48(4) of a Constitution in the case of the President and in section 99 (1) of the constitution in the case of Members of Parliament. Therefore in my view Parliament never intended to include Criminal Proceedings to the words action in relation to section 12 (9) of the constitution.

In analyzing section 120 (9) of the Constitution it must be clear what judicial functions the performance of which exempts liability whether civil or criminal. These functions are confined to a judge's role during the trial. The role of the trial judge is set out in Volume 37 of Halsbury's Page 387 at Paragraph 510 in which the judge's functions as stated to be within the body of trial and not outside a trial. Therefore the action taking a gift or reward to influence a judge's behaviour or anything done in the conduct of his office is a bribe under the Common Law. See Halsbury's Laws of England Volume 11 at Page 541 Paragraph 921.

On the question of construing statues and other documents it is that you must not imply in them what is inconsistent with the words expressly used. "Per Lord Greene MR in Re a Debtor (1948) 2 AL LLR 533 at Page 536."

[p.410]

Section 120 (9) of the Constitution of Sierra Leone clearly prohibits the institution of any civil action against a judge of the Superior Court of Judicature in respect of anything done by him in the performance of his judicial functions. I opine that the term "Criminal Proceedings which is the type of proceedings instituted by the 12 Count Indictment is used in Section23 (1) (5) (7) and (8) and 9 contrary to the terms Civil or Obligation used in Section 23 (2) and (30 of the name Constitution connoting thereby a suit or an action.

It is clear that Section 120 (9) confers on a judge of the superior court of Judicature immunity from liability in respect of whatever he does in performance of his judicial functions but can one honestly say that if a judge takes bribe in the performance of his duty he is immuned from prosecution?

Lord Denning in Sirros vs. Moore and Others (19740 3 ALR 776 Page 781 said:

"Of course if the judge has accepted bribes or been in the lease corrupt or has perverted the cause of justice he can be punished in criminal courts. In my opinion the term "criminal Proceedings" in the expression suit or action will be repugnant to the cannons of construction."

Section 137 (40 of the Constitution stipulates that:

"subject to the provisions of this Section a Judge of the Superior Court of Judicature my be removed from office. Only for inability to perform the functions of his office. Whether arising from infirmity of body or mind or for stated misconduct and shall not be removed save in accordance with the provisions of this section."

I therefore agree with learned Counsel for the defendants that Section 137 (40 of the Constitution is irrelevant since removal of the plaintiff is not in issue now, and may come late if the plaintiff is convicted.

[p.411].

In my opinion the preferment of offices under Section 7 (10 and section 8 (10 of the Anti-Corruption Act No. 1 of 2000 is not repugnant to and is not inconsistent with provisions of section 137 (40 of the Constitution.

Also Section 120 (9) do no conflict with the provisions of Section 7 and 8 of the Anti-Corruption Act.

For the reasons given this Declaratory Order sought is thereby not granted.

Declaration to the effect that the apparent refusal and OR reluctance of the Trial Judge the Honourable Miss Patricia Macauley to grant an adjournment based on Dr. Claudius Cole's medical report which was properly before her on the 2nd day of November, 2000 regarding the state of health of the plaintiff herein the accused in the criminal trial holden at the High Court No. 1 Freetown contravenes and does violence to the Provisions of section 23 (2) of the constitution of sierra Leone Act. No. 6 of 1991 in circumstances which led to the granting of an Order for the said Doctor Claudius Cole to come and prove that the accused person is not in a state to appear before the High Court.

Counsel for the plaintiff posed the question whether the Honourable Miss Patricia Macauley could go behind that report of Dr. Claudius Cole to with Exhibit "MOTD 6." The answer I submit is in the affirmative.

I will invite you to Halsbury's Laws of England 4th Edition volume 30 on Medicine paragraph 19 which states:

''the relationship between a Medical Practitioner and his patient does not excuse the practitioner whatever medical etiquette may require from the obligation, if directed to do so to given evidence in a court of law or to disclose records, or other documents in the course of legal proceedings. He is in the same position as any other person who is not specially privileged in this respect by the law. He may be summoned to give evidence in [p.412] civil and criminal causes and may be liable to be punished by contempt of court it he neglects to attend.

In Civil cases, a judge has no discretion on grounds of confidentiality alone to direct a doctor that he need not disclose information which come to him through his professional relationship with a patient. Where however such disclosure would be in breach of some ethical or social value involving the public interest the court has a discretion to uphold a refusal to disclose public evidence if it considers that on the valance the public interest is better served by excluding such evidence"

(1) The relevant law is authoritatively stated in Dv National Society for Prevention of cruelty to Children (1978) AC 171. A doctor may therefore be required to disclose on oath information which come to his through his professional relationship with a patient, and he may be committed for contempt of court if he refuses to answer"

See Garner v Garner (1920) 16 TLH 1966 where a medical practitioner who is the cause of

treating a patient under natural scheme for dealing with venereal disease, could be compelled to give evidence to that effect even though statutory regulations applied in the scheme enjoined absolute

secrecy on the medical evidence. There are several authorities on this issue which I will not go into details but is clear that every case must be governed by the particular circumstances, and the ruling of the judge will be the test.

The Hon. Miss Justice Patricia Macauley was right to refuse to grant an adjournment based on Dr. Cole's medical Report which was before her regarding the health of the plaintiff herein the accused in the criminal trial before her if she was not satisfied and she had all right to order the said Dr. Claudius Cole to appear before her to prove that the plaintiff (the accused) was not in a state to appear before her.

[p.413]

There is no legal professional privilege between doctor and patient as between solicitor and client. See Taylor's Principles and Practice Medical Jurisprudence Volume 12th edition Page 22 states:

"Doctors may feel they have a privilege not to answer certain questions put to them in a court of law, on the ground that the matters have come to their knowledge out of professional confidences with their patient. The law concedes no special privilege on this nature to members of the medical profession. Whilst admitting desire of a doctor to preserve some kind of privacy about matters communicated to him in confidence by a patient all questions must be answered provided they are relevant to the case. The only exception is where an answer might incriminate the doctor."

See Nuttal v. Nuttal (10) SOL J.605).

It is common practice in our courts for medical experts to be called to give evidence to clarify certain points on notes, medical or Scientific reports etc., and I see nothing wrong in the Hon. Mrs. Justice Patricia Macauley calling the doctor to give evidence on the report.

For the foregoing reasons the Hon. Miss Patricia Macauley was not wrong in law in not granting an adjournment sought based on the report properly before her but rather ordered the doctor to appear before her to prove that the plaintiff was not in a state to appear before the High court and clearly this is not wrong neither in law or contravened the provisions of Section 23 (20 of the 1999 Constitution. The Declaration Order sough is hereby refused.

Hon. Mrs. Justice V.A. D. Wright - J.S.C.

JOKO SMART: JSC

This Motion is the last in the trial effort of the plaintiff before this Court to stay or put an end to his current trial in the High Court presided over by Mrs. Justice Patricia Macauley. Certiorari was eventually abandoned when we discharged an Order nisi previously granted him. Prohibition did not succeed either.

[p.415]

In addition to invoking the supervisory powers of this Court under section 125 of the 1991 Constitution, the plaintiff has now explored new ground with section 127 of the Constitution by seeking declarations

with respect to certain issues connected with the Anti-Corruption Act 2000, Act No. 1 of 2000 and the Anti-Corruption Commission established pursuant to this Act. He is also asking us to use our powers under section 124 of the Constitution to say that section 120(9) of the Constitution applies to both civil actions and criminal prosecutions in respect of a judge.

In all, the plaintiff is seeking 11 declarations. By now, nothing turns on the particular facts, so I can be appropriately economical in my rehearsal of them. The first declaration is invoking our supervisory powers over the defendants herein. The second requires a ruling that the Report of the Commissioner of the Anti-Corruption Commission is invalid. The third contends that certain provisions of the Anti - Corruption Act are mandatory and that the defendants did not comply with them. The fourth argues that the Anti-Corruption Commission was not properly constituted at the time that the plaintiff was charged on an indictment based on a report of that Commission. The fifth maintains that the sections of the Anti-Corruption Act under which the plaintiff was charged are ultra vires sections 120(9) and 137(4) of the Constitution. Section 120(9) gives immunity to judges for actions and suits done in the performance of their duty while section 137(4) lays the procedure for the removal of a judge for misconduct. The sixth holds that Mrs. Patricia Macauley, the trial judge, ought to recluse herself on the ground of appearance of bias. The seventh complains of a defect in the preliminary proceedings before charges were laid against the plaintiff. This complaint is similar to that in the third declaration. The eighth is in the same vein as the second except that the plaintiff now stresses a breach of his fundamental human right to a fair hearing. The ninth essentially repeats the second with emphasis on the contravention of the audi alteram partem principle by the Commission. The tenth which is novel in the threefold proceedings hitherto instituted by the plaintiff contends that the order of the trial judge requiring the plaintiff s doctor to attend court and give evidence on the state of health of the plaintiff in support of a medical report which the doctor had issued on the plaintiff is in contravention of section 23(2) of the Constitution. The eleventh underscores the trial judge's lack of jurisdiction in conducting the trial of the plaintiff Let me say that the effect of granting any of the declarations in the manner in which they are couched is to terminate the current trial of the plaintiff.

As was with Misc. App SC 1/2001. we invited written presentations from both sides and we limited oral arguments to the highlights of their respective cases.

For the purpose of the present ruling, I can put the declarations sought by the plaintiff into two separate compartments. First, the ones which can legitimately be considered in this application having regard to our two previous rulings in Misc. App. SC 6/2000 and Misc. App. se 1/2001 together with the nature of the remedy now sought.. These break new ground. Second, the ones which can be given short shrift having regard to the rulings which have already been given in respect of certiorari and prohibition.

I shall begin with the second set. These include all the declarations except nos. (e) and (j) i.e., 5 and 10. The plaintiff must have had this set in mind when he moved the Court under section 125 of the Constitution. Under this section, this Court has supervisory jurisdiction over all other courts and adjudicating authorities in Sierra Leone. In our [p.416] rulings on the certiorari and prohibition, the supporting evidence of which are the same as these now before the Court, it was held that the remedies sought could not be given for the reasons stated in those rulings. I do not intend to repeat them here. It

is sufficient merely to draw attention to them. Ingeniously, the plaintiff has now come by way of declaratory judgment, which, in my view, cannot be given under section 125 of the Constitution as it is not a prerogative order and the reliefs sought do not involve inconsistency between a statutory provision and the Constitution.. Possibly, the plaintiff now relies on common law as section 127 is specific. I can here understand why he includes section 170 of the Constitution as the basis of his application. The common law position in the circumstances is not as clear as the plaintiff would like this Court to believe. One view is that a declaratory judgment may lie where the prerogative orders fail. This was the opinion of Lord Goddard in Pyx Granite Co. v. Ministry of Housing[i959] 3 All ER 1 at 5 where he said:" I know of no authority for saying that, if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case.", Speaking specifically of the High Court which also exercises supervisory powers o~ inferior tribunals, Upjohn LJ in Punton v. Ministry of Pensions [1963] 1 All ER 275 at 279 expressed a similar view when he said:"It appears that the High Court has jurisdiction to correct the decisions of inferior tribunals by declaration where it is alleged that the inferior tribunal has made some mistake of law". He then referred to the case of Barnard v. National Dock Labour Board [1953]1 All ER 1113 where it was held that the subject is not confined necessarily to proceedings by way of certiorari., and he continued: " Where the alleged mistake of law is said to consist in some misconstruction by the tribunal of some statutory rule or order, it is a convenient, speedy and cheap procedure to raise the question and to ask for a declaration." But in the same case, at pa2e 279. Diplock, U, concurring in the judgments of Lord Denning MR and Upjohn LJ issued the following caveat. "I do not wish it to be thought that, without further careful examination, I necessarily assent to the proposition that a declaration lies as an alternative remedy wherever certiorari would lie. I think that it must depend, or may, at any rate, depend on the statutory terms in which jurisdiction is conferred on the inferior tribunal and on the statutory effect of its decision".

There is therefore no conclusive rule that a declaration may lie even if there is an alternative course to pursue. The inconclusiveness apart, the power to make a declaratory judgment at common law is discretionary; the discretion is to be exercised with care and caution, and judicial, with regard to all the circumstances of the case. (See Halsbury, Laws of England, 3rd Edition, Volume 22 para 1611). The history of the circumstances leading to this application which is now familiar cannot be lost sight of As I observed earlier, all the supporting evidence in the previous proceedings are identical with the ones in support of the present application; Massally J. ' s ruling in the certiorari proceedings in the High Court still hovers above the Plaintiff like the sword of Damocles. The dicta expressed in favour of a declaration in the English cases to which I have referred are concerned with decisions of adjudicating authorities which are inapposite to the present case as we have not yet decided that the Anti-Corruption Commission is an adjudicating authority. Before I leave this part of my ruling let me say that the reliefs sought do not involve the interpretation of the Constitution nor are they couched with precision even if a constitutional question can be gleaned from them to warrant coming to this Court under section 124 of the Constitution for an interpretation. In reaching this conclusion. I am guided by the judgment of this Court in Wellington Distilleries v. Electrodia P. [p.417] Clarkson (Constitutional Reference) unreported Misc.App. No. 4/81 delivered on 8 April 1982 wherein Tejan JSC opined that "it should be noted that not all Constitutional questions may necessarily involve or entail the interpretation of the Constitution. The question that should be referred to the Supreme Court must relate to the interpretation of any of the

provisions of the Constitution". In the circumstances, this Court cannot give the declarations in the second set.

I now come to declarations (e) and (j) which I consider to break new ground in this series of applications.. The plaintiff has come, I believe, under section 23 (1) & (2) and sections 127 and 137(4) of the Constitution to substantiate them. I regard the inclusion of section 170(1)(a) to (e) and section 170 (2) & (4) as significant which , in my view, invites the common law as applicable law although counsel for the Plaintiff persuaded us in his argument that we should disregard this law in our interpretation of section 120(9) of the Constitution.

In support of declaration (e), the plaintiff bases his case on three premises. One is that section 7(1) and section 8(1) of the Anti-Corruption Act, No. 1 of 2000 are repugnant to sections 120(9) and 137(4) of the Constitution. The other is that a judge is immune from criminal prosecution under section 120(9) of the Constitution. The third is that if a judge does not have immunity under section 120(9), the proper procedure is that under section 137(4) of the Constitution and not a trial in court.

What gives the plaintiff a locus standi before this Court in respect of a declaration that a statute is repugnant to the Constitution is section 127 of the Constitution which provides as follows:—

"127 (1) A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purpose of a declaration under subsection (1), make such orders and give such directions as it may consider appropriate for giving effect to, or enabling effect to be given to, the declaration so made.

(3) Any person to whom an order or direction is addressed under subsection (1) by the Supreme Court shall duly obey and carry out the terms of the order or direction. (4) Failure to obey or to carry out the terms of an order or direction made or given under subsection (1) shall constitute a crime under this Constitution."

The first question that comes to mind is whether the Plaintiff can legitimately come directly to the Supreme Court for a declaration on the repugnancy question having regard to the history of the applications he has made to this Court. I apprehend that he can. The language of section 127 is clear and precise. It is the plaintiff's constitutional right to [p.418] apply to this Court for a declaration on repugnancy at any time and the fact that he has raised the issue only now does not prejudice that right. The second question is whether this Court can give a ruling on the interpretation of section 120(9) again having regard to what has transpired before the Plaintiff came to this Court for a declaration. As this question is merged in the first, I also hold that this Court can do so in the present action. As a starting point, it came to light in the application for prohibition that Macauley J in the High Court had given a ruling on the interpretation of section 120(9) of the Constitution and that there is an appeal pending in the Court of Appeal against that ruling. None of the parties herein has made a reference to that appeal nor have the defendants made it an issue in the present application. I hold that the outcome of that

appeal is irrelevant to the question now posed before this Court. I think that it would be very mischievous to hold that when the Constitution compels a person to resort to the Supreme Court for a remedy, except there is a similar provision for resort to an inferior court, he can come first to the High Court or the Court of Appeal for a determination of the very matter relegated to the Supreme Court alone. This issue has not been canvassed by either side in this case but I consider it necessary to make a ruling on it in order to remove all doubt and to justify this Court in dealing with the declaration on repugnancy.

I turn now to the gist of the declaration and I begin by stating in full the expunged provisions of the Anti-Corruption Act and the relevant sections of the Constitution. Section 7(1) of the Anti-Corruption Act enacts that:

"A public officer is guilty of the offence of corrupt acquisition of wealth if it is found, after investigation by the Commission, that he is in control or in possession of any resources or property or in receipt of the benefit of any advantage which he may reasonably be suspected of having acquired or received corruptly or in circumstances which amount to an offence under this Act. "

Section 8(1) provides that

"Any public officer who solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his (a) performing or abstaining from performing or having performed or abstained from performing any act in his capacity as a public officer;

(b) expediting, delaying, hindering or preventing or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public officer in his capacity as a public officer; or

(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body;

is guilty of an offence."

[p.419]

Section 120(9) of the Constitution states that

"A Judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in the performance of his judicial functions."

Section 137(4) stipulates that

"Subject to the provisions of this section, a Judge of the Superior Court of Judicature may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or for stated misconduct, and shall not be removed save in accordance with the provisions of this section."

The remaining provisions of the section make judges removable from office by a two thirds majority of Parliament after the stipulated procedure has been adopted. In respect of this section, Counsel for the Plaintiff contends that even if a judge is accused of a criminal act in the performance of his judicial duty, he cannot be tried by a court but is liable to removal under this section.

At common law, the authorities seem to agree on one point, i.e. that judges enjoy immunity in civil actions, as a matter of public policy, for acts performed in the course of their judicial functions. (See Lord Tenterden CJ in Garnett v. Ferrand (1827) 6 B & C 611 at 625,626. [1824-34] All ER Rep 244 at 246. ; Lord Esher MR in Anderson v. Gorrie [1895] 1 OB 670.) As Lord Denning, MR articulates the point in Sirros v. Moore and Others [1974] 3 All ER 776 at 785," the reason underlying this immunity is to ensure that they may be free in thought and independent in judgment. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction- in fact or in law-but so long that he honestly believes it to be within his jurisdiction, he should not be liable. He should not be plagued with allegations of malice or ill-will or bias or anything of the kind." But for acts coram non judice the authorities also agree that the judge is not immune to civil liability. Buckley LJ correctly draws the line between acts coram judice and those coram non judice in the following passage in Sirros v. Moore at p.787: "In determining whether a judge is liable for some act which he purports to have done in his judicial capacity, the sole question may, I think, be said to be whether it was an act coram non judice. If he were not then performing a judicial function, the act was not coram judice and the judge has no protection. If he was purporting to perform a judicial function but the matter was such that he had not jurisdiction to adjudicate on it, again the act was non coram judice because he had no authority to act as a judge for that purpose, and again he is without protection. If, however, he did the act in question in the purported performance of his judicial function and it was within his jurisdiction, then the act was [p.420] coram judice and the judge is protected." As can clearly be seen, the authorities draw a sharp line of distinction between a judicial act which is protected and a non judicial act which is not. There is therefore no absolute immunity even for civil liability.

On immunity to criminal liability, there is one authority which mentions corruption and which if the context is not carefully considered may carry the impression that a judge is not criminally liable for a crime .. It is the judgment of Crompton J in Frav v. Blackburn(1863) 3 B & S 576 at 578 which states that: "it is a principle of our law that no action will lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions." In this case the plaintiff who had obtained an interlocutory judgment against one defendant appeared before Blackburn, now the defendant, for the order nisi for costs to be made absolute. The judge refused to make the order absolute which was deliberate and contrary to law and he was sued by the plaintiff for all the costs which she had incurred. It was not a criminal case .A straightforward comment on criminal

liability came some 111 years later from Lord Denning MR in Sirros v. Moore (supra) at page782 after stating the immunity of the judge when he said: "Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal court."

A more recent pronouncement within the English common law, is that immunity inures against civil actions, at any rate, for negligence. In Arthur J.S. Hall & Co (a firm) v. Simmons [2000] 3 All ER 673, a case not directly concerned with judges but dealing specifically with the immunity of lawyers, the House of Lords, stressed that civil immunity is accorded judges and all those concerned with the administration of justice. Lord Hutton, echowing the views of his predecessors said: "A judge is given immunity because the law considers that it is in the public interest that he should not be harassed by vexatious litigation."(at page 732). With respect to criminal immunity in contradistinction with civil immunity, when a judge has erred, Lord Hobhouse expressed his views as follows: "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is being prosecuted under the criminal law."(at page 739). Lord Hobhouse's opinion bears close affinity to that of Lord Denning in Sirros v. Moore (supra).

Having considered the common law position as it exists in England, I can now conveniently . return to the crux of the declaration. The relevant words in section 120(9)for my consideration are "action" and "suit" and "in the performance of his judicial functions". I will begin with my statement in The State v. The Hon. Mr. Justice M.O. Taju- Deen. ex parte Dr. Harry Will & Ors. Misc. App. 3/99. rulin2 on 9 November. 1999 to which the plaintiff has referred as one of the authorities in support of his application. In that ruling I said" If a judge is made a party to any action he is open to liability of any sort and that liability imports a duty resting on him for which he is answerable in law. I opine that if a judge is joined in any proceedings, he is exposed to all the incidents and consequencies of litigation. Thus he can be compelled to attend to answer allegations made against him and he can be amenable to the payment of costs." I later had cause to refer to this statement in the Foundation Day Lecture of the Sierra Leone Law School which I delivered on 23 February 2000, when I said: "In Sierra Leone [p.421] it is arguable that section 120(9) of the Constitution gives a blanket immunity to judges in respect of crimes. This is debatable but I do not think that Parliament would have, at any rate, condoned the commission of corrupt practices by judges and let them go free. The Anti-Corruption Act, 2000 now specifically includes judges and magistrates within the meaning of public officers who may be tried for corrupt practices". Little did I know then that some day I will be called upon to give a judicial ruling on the section.

Counsel for the plaintiff calls upon this Court to give a wide meaning to "suit" and "action" to include criminal as well as civil matters. He contends that the rights provided under this section are vested in that they are the same as those in the repealed 1978 Constitution and he exhorts this court not to take away these vested rights, relying on Akar v. Attorney-General, 1968-69 ALR S.L,274. I agree with his premise but not with his conclusion as the latter has no bearing on the meaning of the two words because no authorities have been cited to show the meanings that had been attributed to those words under the 1978 Constitution, which we should not depart from. In Akar's case, an Act of Parliament sought to deprive Akar of his citizenship which had been conferred on him by the Constitution. It is not the same case here. Be that as it may, I agree with plaintiff's counsel that we must adopt a liberal and

purposive approach in interpreting provisions of the Constitution. In particular, I derive inspiration from the dicta of Denning L.J in Seaford Court Estates Ltd. v. Asher [1949] 2 All ER 155 at 164 where he said:

"A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written words so as to give <force and life' to the intention of the legislature. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

With this statement of Denning L.J as my guiding principle, I will now tackle the meanings of "suit" and "action". Section 120(9) is not as clear as section 48 (4) of the Constitution which removes any doubt about the immunity of the President as it clearly states that he is immune from both civil and criminal proceedings while he holds or performs the functions of his office as President. For judges, we have to look to other sources for more guidance. Mr. Teny drew our attention to the Nigerian case of Egbe v. Adefarasin and Another. We were not provided with a full report of that case but from the extract which he gave us, I observe that the Supreme Court of Nigeria was making a ruling on civil immunity of a judge and not on criminal immunity. The Court relied on English authorities some of which I have already mentioned in this ruling, in particular [p.422] the opinion of Buckley LJ in Sirros v. Moore. Another case, The Merak, T.B. & S Batchelor & Co. Ltd (Owners of Cargo on the Merak) v. Owners of S.S. Merak [1965] 1 All ER 230 upon which the plaintiff has relied is not helpful to his application as this case simply decided that for the purpose of the one year period of limitation in bringing actions under the Hague Rules, the term “action" includes arbitration .. Further, Mr. Terry refers to the meaning of "action" in Words and Phrases Legally Defined Volume 1 2nd Edition as "including every judicial proceeding instituted in any Court, civil, criminal or ecclesiastical", but this definition is derived from a statute, i.e., The British Law Ascertainment Act 1859, section 5. However, Counsel did not draw our attention to one definition of an "action" in Words and Phrases Legally Defined where it is stated that "Action in its wider meaning includes both civil and criminal proceedings." But the same Book goes on to say that "action" "is, however, generally used in a more restricted and popular sense as denoting a civil action". The consensus of all the definitions cited in this Book is that an action means civil proceeding. Jowitt's Dictionary of English Law Volume 1 throws more light on the meaning of "action". It says that "in early times, actions were divided into criminal and civil ... In modem times, however, 'action' always meant a civil action." In our High Court Rules "action" is defined as a civil proceeding commenced by writ, but does not include a criminal proceeding. The face of a writ of summons contains the phrase "action at the suit of' There in no reference to suit or action in the Criminal Procedure Act .On the meaning of "suit" the plaintiff seeks comfort from section 64(3) of the Constitution which provides that all offences prosecuted in the name of the Republic of Sierra Leone shall be at the suit of the Attorney-General and Minster of Justice. The word "suit" in this context, in my opinion, simply means "instance"

and does not refer to the nature of the proceeding. Counsel for the defendants cited most of the preceding authorities to canvass that "action or suit" does not include criminal proceedings.

It is now left for me to decide. I do not think that my task is to give the words "action" and "suit" meanings different from those that have been attributed to them from the beginning of legal history to the present times. Rather, my task is to ascertain these meanings and apply them within the context of our Constitution. The use of the words "action" and "suit" at common law has historical antecedents dating as far back as the period before the Judicature Acts 1873-75. Originally, when the common law courts were different from the court of equity the word "action" was confined to refer to proceedings in a court of law, commencing with the writ. "Suit", on the other hand, referred to proceedings in chancery commencing with a petition and it included petitions for criminal wrongs ... The term later became to mean any legal proceeding of a civil kind brought by one person against another. (See Coke on Littleton 291a.). With the merger of law and equity both terms are now being used interchangeably in civil litigation. The preferred term for a criminal litigation nowadays is a prosecution although, "action" is also commonly used. I think that for the interpretation of a constitution a liberal and wide construction is to be preferred but at the same time for some provisions of the constitution, the demands of public policy cannot be completely abandoned. Taking a cue from the several meanings of "action or suit" which I have been able to come across in this ruling I hold that "action or suit" can refer to both civil proceedings and a prosecution for a crime. However, I find it inconceivable that by enacting section 120(9) of the Constitution, Parliament intended to exempt a judge from a crime committed by him when he is occupying the seat of justice and the crime has no bearing [p.423] on the case that he sits upon. A judge owes a special duty to the community to ensure that justice is done in a trial which he conducts. Immunity is afforded him in order to avoid harassment by disgruntled persons who have been tried by him and not for his personal benefit. It is in this context that I view section 120(9). The immunity does not entitle a judge to go on an escapade of his own. For such activity, it is my opinion that he will not be acting in the performance of his judicial functions. I will regard acts that are in the course of arriving at a verdict or judgment even if they are done maliciously or negligently to assist one party and not the other as being done in the performance of his judicial functions provided that he does not derive some financial or proprietary interest from them. But such acts will be few indeed if one can find them. For example the commission of a criminal libel against any person in a judgment is an act in the performance of a judge's functions which I regard as not being actionable but a judge taking a bribe or any advantage for his own benefit so that he can pursue a line of action in a case on which he sits is something that I regard as being outside his judicial functions and not within his jurisdiction. If he engages in such activity, his personal interest is in conflict with his duty. Every democratic society frowns upon such a conduct in a person called upon to sit in judgment over others. Corruption is a pernicious, spreading evil in society which the legislature cannot condone in any body . In this connection, I refer to section 6 (5) of the Constitution which enacts that : "The State shall take all steps to eradicate all corrupt practices." I consider it the duty of the courts in interpreting a constitution like ours to consider its provisions as so inter-related as to give effect to the expressed intention of Parliament as gathered from the language used and the apparent policy of the enactment. It is in this light, and bearing in mind section 6(5) that I interpret section 120(9) ut res magis valeat quam pereat and exclude corruption from its ambit. On this score and uno flatu, I am in complete agreement with Lord Denning M.R in Sirros v.

Moore (supra) on the criminal liability of a judge for corruption.. I therefore hold that sections 7(1) and 8(1) of the Anti-Corruption Act dealing with corrupt practices are not inconsistent with section 120(9) of the Constitution.

The next question is whether a court is the proper forum for the trial of a judge who has committed a crime. Counsel for the Plaintiff says that the proper venue is Parliament under section 137(4) of the Constitution. This section speaks of removal for misconduct among other things. A crime, to my mind constitutes misconduct which may warrant the removal of a judge under this section but I do not think that removal is the only remedy. The fact that a judge may be removed from office because he has committed a crime does not absolves him from being prosecuted for that crime. If this were not the case the section would have said so in no uncertain terms. Apart from this, it is not every crime that a judge commits that is tantamount to misconduct warranting removal under this section. It will be preposterous, for example, to hold that this section can be invoked to remove a judge for a single serious traffic offence.

I now come to declaration (j). whereby the plaintiff contends that the refusal and/or reluctance of the trial judge to grant an adjournment based on Dr. Claudius Cole's medical report regarding the state of health of the Plaintiff in circumstances which led to the doctor being summoned to substantiate his report on the unfitness of the plaintiff to appear in court contravenes section 23(2) of the 1991 Constitution. It reads:

[p.424]

"Any court or other authority prescribed by law for the determination of the existence or extent of civil rights or obligations shall be independent and impartial; and where proceedings for such determination are instituted by or against any person or authority or the Government before such court or authority, the case shall be given fair hearing within a reasonable time."

Although counsel for the plaintiff did not specifically say so he seems to be basing his case on the doctor/patient privilege. I fail to see how such privilege can apply in this matter. The point at issue is not a doctor being compelled to reveal the state of health of his patient which may be a secret to both of them and which may attract privilege. The alleged state of health of the plaintiff was no longer a secret between him and his doctor when the latter issued the medical report. What was then in issue before the trial court was, in my view, the credibility of that report. The examination of witnesses on reports prepared by them is an essential element of our legal system for the ascertainment of veracity. This apart, I do not see how appropriately counsel's argument tallies with section 23(2).. I cannot find any impartiality on the part of the trial judge in ordering the appearance of the doctor.

My conclusion therefore is that the declarations be refused and I so order.

HON. JUSTICE H.R. JOKSRE, JSC.

HONOURABLE MRS. JUST

[p.425-426]

S.C.E. WARNE

This Originating Notice of Motion filed on the 4th day of December 2000 is a culmination of a series of application that have come before this Court over the past five months. In the series as in the instantmotion, theparties are the same or nearly the same. The end desire of all the applications is to stop the trial of the Hon. Mr. M.O. Taju Deen on Corruption Charges.

The application is made pursuant to Section 124, 125, 127, 170(1) (a) to (e), 170 Sub-Rule 2, 4 and 23 Sub Rule 1 & 2 of the Constitution of Sierra Leone Act No. 6 of 1991.

Let me observe that the several sections referred to leave me rather uncertain as to what section is relevant for a declaration to be made by this Court. The application becomes more perplexing when the court is asked to make declaration pursuant to a sub rule of the Constitution. The Constitution is not Subsidiary Legislation.

Be that as it may, the power of this Court to pronounce a declaratory Judgment or Order is contained in section 127 (1) of the said Constitution which provides "person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect."

Among the series of application made to this Court, was one for certiorari where leave was granted and later discharged; and another for Prohibition which was refused. The contents of the affidavits and statements in support of the instant motion are similar in most respects as these in the previous applications mentioned above.

There are eleven declarations sought, only the Declaration under paragraph (e) had not been previously considered by this Court. In the case of paragraph (j), I do not think it is one which attracts a declaratory order. This is a clear case of admissibility of evidence. Section 23(2) of Act. No. 6 of 1991 has no relevance to admissibility of evidence in a [p.427] criminal trial. The right of the trial judge to order the appearance of a witness to testify has nothing to do with a declaratory order. Section 23(2) states: "Any court or other authority prescribed by law for the determination of the existence or extent of civil rights or obligations shall be independent and impartial; and where proceedings for such determination are instituted by or against any person or authority or the Government before such Court or authority the case shall be given fair hearing within a reasonable time."

Let me hasten to say that I can find no evidence in the affidavit or the statement filed herein that the calling of a witness is s criminal trial has done any violence to section 23(20 aforesaid. In my view this is clearly an abuse of due process. If anything this particular application under paragraph G) is not in anyway aiding "a fair hearing within a reasonable time", albeit, that the section has nothing to do with the declaratory order being sought.

This Court has given two considered rulings toughing and concerning the Declaratory Orders sought in paragraphs (a) (b) (c) (d) (t) (g) (h) (i) (g) vide unreported Rulings of 18th January 2001 and unreported Ruling of 23rd February 2001.

It only remains for me to consider whether a declaratory order should be mad with regard to paragraph (e).

Paragraph (e) states:— A Declaration to the effect that the provisions of section 7(1) and 8(1) of the Anti Corruption Act No. I of2000 in so far as they have been laid and framed as Constituting Offences against a judge or Acting Judge of the Superior Court of Judicature and in particular the Honourable Mr. Justice Muctaru Ola Taju Deen are clearly repugnant to and inconsistent with the express mandatory entrenched provisions of Section l20(a) and 137 (4) of the Constitution of Sierra Leone Act No.6 of 1991.

In spite of the fact that the paragraph is infelicitously worded, I shall consider it for what it is worth.

[p.428]

S.120 (9) states: A Judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in the performance of his judicial functions. "

I opine that this is a Salutary provision of the Constitution. Mr. Terry has also referred to Section 137 (4) of the Constitution which states:

"Subject to the provision of this section, a judge of the Superior Court of Judicature may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or for stated misconduct, and shall not be removed save in accordance with the provision of this section."

The plaintiff is not being removed from office for any of the reasons stated section 137(4).

The plaintiff has been charged with a criminal offence under the Anti-Corruption Act No. I of 2000. While the charge is pending he cannot be moved from office. It is a trite principle to law that an accused is innocent until proved guilty vide section 23(4) of the Constitution: It provides "Every person who is charged with criminal offence shall be presumed to be innocent until he is proved, or has pleaded guilty."

I hold that S.137 (4) is not germane to the issue before the Court. I will now refer to Sections 7(1) and 8 (1) of the Anti corruption Act No. I, 2000 which Mr. Terry argued "are clearly repugnant to and inconsistent with the express mandatory provisions of Sections 120(a) and 237 (4) of the Constitution of Sierra Leone Act No. 6 of 1991." Section 7 (1) provides "A public officer is guilty of the offence of corrupt acquisition of wealth if it is found after investigation by the Commission that he is in control or possession of any resources or property or in receipt of the benefit of any advantage which he may reasonably be suspected of having acquired or received corruptly or in [p.429] circumstances which amount to an offence under this Act" 8(1) provided (a) Any public officer who solicits or accepts any

advantage as an inducement to or reward for or otherwise on account of his performing or having performed or abstained from performing any act in his capacity as a public officer:

(b) .....

(c) .....

is guilty of an offence.

I have for convenience stated the statutory provisions which I consider necessary in this application and having regard to the arguments that have addressed to us, it may now be convenient to state in chronological order how the questions between the Plaintiff and the Defendants arose.

Briefly the Plaintiff was the trial judge in the case of the state V. Dr. Harry Will and two others. At the end of the Trial, Dr. Harry Will and the 2nd accused were found guilty of the offence charged but the third accused one Bockari Kakay was found not guilty of the offences and he was acquitted and discharged. The Attorney-General Mr. Solomon Berewa led the prosecution in the case. In the course of time the Attorney-General laid on Indictment against the Plaintiff contrary to section 7 (1) and section 8(1) of the Anti-Corruption Act No. I of 2000. The Plaintiff pleaded not guilty to all the charges. Mr. Terry, during the pendency of the trial moved the High Court pursuant to section 134 of the Constitution to have indictment quashed by an order of certiorari section 134 provides: The High Court of Justices shall have supervisory jurisdiction over all inferior and traditional courts in sierra Leone and any adjudicating authority and in the exercise of its supervisory jurisdiction shall have power to issue such directions, writs and orders, including writs of habeas Corpus, and order of certiorari, mandamus and prohibition as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers."

[p.430]

The High Court ruled that the Anti-Corruption Commission was not an adjudicating authority. The Plaintiff proceeded to the Supreme Court for leave to issue an order of certiorari. Leave was granted but later discharged for failing to disclose that such application had been made in the High Court. The Plaintiff again moved the Supreme Court for an Order of Prohibition on several grounds, inter alia, that the trial judge should be prevented form continuing with the trial because of bias or the likelihood of bias. The motion was refused. The instant motion, as I have said earlier is a culmination of the multiplicity of motions before this Court.

In my view, declaration may be granted in all cases where there is a dispute between a plaintiff and a defendant, and a claim for a declaration in a convenient method of dealing with such dispute, I think the view for a declaratory judgement is that which is stated by Lord Sterndale N.B. In Hason V. Radcliffe Urban District Council (1922) 2 Ch. 90 at 507.

These are the words of Lord Sterndale M.R

"Further, the defendants are a statutory body, which has purported to interfere with a contract made between two parties, and I adhere to my judgment in Guaranty Trust Co. of New York V Hamming and Company in which although I had the misfortune to disagree with Lord Wrenbury I said that a number of declarations had been made in my opinion, rightly made, as to the rights of parties under contracts, without waiting for some events to happen, as for instance, for a ship to arrive at its destination, in order to determine result of the contracts, and what the exact causes of the action might be.

In my opinion under R.S.C. Order 23 Rule 5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited by its own discretion. The direction should of course be exercised judicially.

But it seems to me that the discretion is very wide.....

[p.431]

This is a quotation by Greer L.J. in the case of Cooper V. Wilson in (1937) 2 K.B. at 720 at 754."

It seems to me that declaratory judgment can be granted to parties who have disputes and I subscribe to the opinion of the Learned Law Lord, Lord Sterndale M.R.

In my opinion there is no dispute between two parties to warrant a declaration of any kind under section 127 of the Constitution. We derive our power specifically in this instant case from section 127 of the Constitution.

It is necessary to consider the function of the Commission. Under Part II of the Anti Corruption Act. No. I of 2000, Section 5 (1) spells out the object for which the Commission is established and it is to investigate instances of alleged or suspected corruption referred to it by any person or authority or which had come to its attention, whether by complaint or otherwise and to take such steps as may be necessary for the eradication or suppression of corrupt practices.

Having spelt out what the functions of the commission are, I will now consider the Sections which Mr. Terry complians about. If section 7 (1) and 8 (1) are clearly repugnant to and inconsistent with the provisions of section 120 (9) and 137 (40 of the Constitution, a fortiori, the entire Act that is to say the Anti-Corruption Act No. 10f2000 is repugnant to and inconsistent with the said Section 120 (9) and 137 (40 of the Constitutions.

I do think this view is right because of the functions of the Commission expressed in section 5 (1) of the Anti-Corruption Act No. 1 of 2000. The powers of the Commission are wide. In my view, the Act is enacted to protect the integrity of the State. This is an unequivocal Act to insure that no person is above the law.

In my view, I do think section 7 (10 and 8 (1) of the Anti corruption act No. (1) of2000 are inconsistent with or in contravention of Section 120 (9) is specifically enacted to provide protection, indeed immunity for judges who are performing their judicial [p.432] functions with honesty, dignity and impartiality. Moreover, it is enacted to prevent ill disposed persons or even unsuccessful litigants from bringing suits

against judges who have acted within their jurisdiction. This protection and immunity are grounded in antiquity. In my view. Mr. Terry has misconceived the object of Parliament in enacting Section 120 (9) of the Constitution and thereby has been misled into relating the provisions therein to the provisions in Section137 (4) of the Constitution. This is rather unfortunate. Sections 7 and 8 of the Anti corruption Act No. 1 of 2000 were not enacted to entrap judges in their judicial capacity but they are to ensure that public officer are brought to justice where they have betrayed their trust.

I will refuse the motion in its entirety and dismiss the application.

HONOURABLE JUSTICE S.C.E. W ARNE J.S.C.

CASES REFERRED TO

1. British Coal Corporation v. The King (1935) P.C. 158

2. Kershara Menon v. State of Bombay, (1951) SC.R228, 232

3. Sirros v. Moore and others (1974) ALL.E.R. 776 at page 781

4. Gahan v. Lafitte (2842) 3 Moo.P.C.C.382

5. Board v. Rice (1911) ALL.E.R. at page 189

6. Nakkuda Ali v. Jayaratne (1951) A.C. 66

7. Ceylon University v. Fernando (1960) 1 ALL E.R. 631

8. F.C.C. v. W.J.R. (1949 337 V.S. 265 at page 276

9. Golberg v. Kelly 397 V.S. 90 S. Ct. 1011, (1970)

10. Richardson v. Wright 405 V.S. 208 (1972)

11. Matthews v. Eldridge 96 S. Ct. 893 (1976).

12. Sirros vs. Moore and Others (19740 3 ALR 776 Page 781

13. Garner v Garner (1920) 16 TLH 1966

14. Nuttal v. Nuttal (10) SOL J.605)

15. Pyx Granite Co. v. Ministry of Housing[i959] 3 All ER 1 at 5

16. Punton v. Ministry of Pensions [1963] 1 All ER 275 at 279

17. Barnard v. National Dock Labour Board [1953]1 All ER 1113

18. Wellington Distilleries v. Electrodia P. Clarkson (Constitutional Reference) (unreported) Misc.App. No. 4/81 delivered on 8 April 1982

19. Garnett v. Ferrand (1827) 6 B & C 611 at 625,626. [1824-34] All ER Rep 244 at 246.

20. Anderson v. Gorrie [1895] 1 OB 670.)

21. Sirros v. Moore and Others [1974] 3 All ER 776 at 785

22. Sirros v. Moore at p.787

23. Frav v. Blackburn(1863) 3 B & S 576 at 578

24. Arthur J.S. Hall & Co (a firm) v. Simmons [2000] 3 All ER 673

25. The State v. The Hon. Mr. Justice M.O. Taju- Deen. ex parte Dr. Harry Will & Ors. Misc. App. 3/99. rulin2 on 9 November. 1999

26. Akar v. Attorney-General, 1968-69 ALR S.L,274

27. Seaford Court Estates Ltd. v. Asher [1949] 2 All ER 155 at 164

28. The Merak, T.B. & S Batchelor & Co. Ltd (Owners of Cargo on the Merak) v. Owners of S.S. Merak [1965] 1 All ER 230

29. Hason V. Radcliffe Urban District Council (1922) 2 Ch. 90 at 507

30. Cooper V. Wilson in (1937) 2 K.B. at 720 at 754

STATUTES REFERRED TO

1. Sections 7 (1) and 8(1) of the Anti Corruption act (Act No.1 of 2000)

2. Sections 120(9) and 137(4) of the constitution (Act No 6 of 1991)

NIGERIAN NATIONAL SHIPPING LINES LTD. vs. ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES)

[S.C. CIV. APP. NO. 3/88] [p.55-97]

DIVISION: SUPREME COURT OF SIERRA LEONE

DATE: 17 FEBRUARY 1989

CORAM: MR. JUSTICE S.M.F. KUTUBU, C.J. – PRESIDING

MR. JUSTICE C.A. HARDING, J.S.C.

MRS. JUSTICE A.V.A. AWUNOR-RENNER, J.S.C.

MR. JUSTICE S.C.E. WARNE, J.S.C.

MR. JUSTICE E.C. THOMPSON-DAVIS, J.A.

BETWEEN:—

NIGERIAN NATIONAL SHIPPING LINES LTD. - APPELLANTS

Vs.

ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES) - RESPONDENTS

Garvas J. Betts Esq. and Yasmin Jusu-Sheriff for Appellants

A. J. Bishop Gooding Esq. for Respondent

JUDGMENT

KUTUBU

This is an appeal against the Ruling and Order of the Court of Appeal for Sierra Leone, delivered on the 18th day of November, 1986 by Williams J.A., upholding a preliminary objection by counsel for Respondent, on a Motion brought by counsel for Appellants, herein, the Applicant/Defendants in the court below, seeking leave to appeal against the Ruling of the High Court, delivered on the 16th day of June, 1986 by Adophy J. (as he then was).

It is, I think, necessary at the outset, that the facts of the case be ascertained, and the dates of the various steps taken be kept in mind, before considering the grounds of appeal. In order to avoid confusion in the course of this judgment, and for purposes of easy reference, I may hereafter refer to the Respondent as “plaintiff claimed from the defendants the value of certain missing/damaged goods duty, loss of profits and interest. No appearance having been entered within the prescribed time, fifty days in the instant case, interlocutory judgment in default of appearance dated 18th February, 1986 was obtained against the defendants. An Order for Assessment Proceedings was made on 6th March, 1986.

[p.56]

On 21st April, 1986 defendants entered appearance under protest and filed a Notice of Motion, dated 21st April, 1986 seeking to set aside the Judgment in Default of Appearance dated 18th February, 1986 This was struck out with costs on 27th May, 1986.

Another Notice of Motion which was filed, dated 29th May, 1986 seeking the same remedy was dismissed with costs on the 16th June, 1986 by Adophy J. (as he then was).

On 21st June, 1986 the defendants applied to the High Court for leave to appeal against the said decision. On the 11th day of July, 1986 the application for leave to appeal was refused.

Consequent upon the aforesaid refusal, the defendants on the 23rd July, 1986 applied to the Court of Appeal for leave to appeal against the decision of the, High Court dated 16th June, 1986.

When the application came up far hearing on 29th October, 1986 counsel for plaintiff raised a preliminary objection, by submitting that the Court of Appeal lacked jurisdiction to, entertain the said application, which in his submission was out of time, thus depriving that Court of jurisdiction. Counsel for plaintiff grounded, his submission on Rules 10 (1) and 10 (4) .of the Court of Appeal Rules 1985 Public Notice No 29 of 1985.

Defendants' application was dismissed by the Court of 28th day of November, 1986. In delivering the Ruling of the Court of Appeal, Williams J .A . had his to say:—

“The application before this court was dated 2ndJuly, 1986. It is for leave to appeal against the decision of the High Court: delivered en the 16th day of June, 1986.Clearly such an application is out of time in that it was made 36 days after the date on which the decision of the High Court was delivered. There is application before this Court for enlargement of time within which to apply for leave to appeal.”

[p.57]

Williams J.A concluded by saying:—

“In view of the authorities on the matter, the failure of the applicants to comply with the statutory requirements and to fulfill the statutory conditions requisite for the' purposes of the intended appeal, deprived this court of any jurisdiction to hear the application”.

It is against' that Ruling that defendants have appealed to this court on the following grounds, which I find somehow tedious to set out in full, but for a clear understanding of defendants' complaints in this appeal, I am constrained to' set them out in extenso. The following constitutes defendants' grounds of Appeal.

1. That when the learned judge said, “The application. before this court was dated 23rd July, 1986 it is far leave to appeal against the decision of the High Court delivered on the 16th June, 1986 clearly such an application is out of time in that it was made se me 36 days after the date on which the decision of the High Court was delivered,” the court thereby misconstrued the provision of Rule 10 (1) and 10 (4) of the Court of appeal Rules, Public Notice No. 29 of 1985 in treating the aid sub-rules cumulatively as required that after four' weeks after the date of the decision in respect of which leave to appeal is sought, an applicant who has applied for leave to appeal in the court below within the two weeks stipulated in Rule 10 (1), would necessarily first have to' apply tar enlargement of time, to appeal, where the court below has refused the application for leave to appeal, and such a ruling refusing leave fell outside a fourteen days after the delivery of the decision in. respect of which leave to appeal is sought.

[p.58]

2. In holding aforesaid, that the Applicant is out of time in that it was made some 36 days after the date on which the decision of the Court below was delivered,” the Court failed to construe properly or at all Rule 10(1) of the said Court of Appeal Rules, in relation to sub-rule 10 (4) and Rule 64. The misconstruction or failure to construe properly is that by its ruling the Court below failed to hold, as in law it should that where the Applicant in the High Court had filed his Notice for leave to appeal within

time such an Applicant had complied with the requirement of Rule 10 (1) and the requirement for enlargement of time in the said sub-rule would no longer apply to such an Applicant and that further, such an Applicant to whom leave is denied would be entitled to have his application determined by the Court.

3. That when the Court of Appeal held that it could "not agree more, that in law, an affidavit in opposition which was filed could not act as a waiver, the court misdirected itself in law in that such a step, with full knowledge of noncompliance "with the Rules is a fresh step and so a waiver.

4. That in holding that, lithe failure of the Applicant to comply with the statutory requirements and to fulfill the statutory conditions required for the purposes of the intended appeal," the, Court erred in law in treating an act of non-compliance as having the effect in law in making an application void rather than merely irregular, and in doing so depriving itself of the capacity to grant consequential relief to Applicants, or wrongly putting it beyond itself to consider granting such relief.

[p.59]

The reliefs sought by defendants in this Court are:—

1. Reversal of the Order of the Court of Appeal; and

2. remission of defendants' application to the Court of Appeal for hearing and determination.

From the substance of the Court of Appeal's Ruling, the grounds 0f appeal in this case and arguments of counsel before this Court, essentially, this appeal turns on the construction of Rules 10,(1), 10 (1) and Rule 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 1985. I therefore find it necessary and appropriate at this juncture to set out these Rules in extenso:—

Rule 10 (1) states:—

"Where an appeal lies by leave only, any person desiring to appeal shall apply to the Court below or to the Court by Notice of Motion within fourteen days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges the time."

Rule 10 (4) states:—

"No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of fourteen days from the expiration of the time prescribed within which an application for leave to appeal may be made application for leave to appeal may be made."

Rule 64 states:—

"Except where otherwise provided in these rules or by any other enactment, where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below, but if the Court below refuses t the application, the applicant shall be entitled to have the application determined by the Courts."

[p.60]

The issues raised in this appeal may be summarised as follows:

1. Did the Court of Appeal misconstrue the provisions of Rules 10(1), 10(4) and 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 19851

2. Was the Court of Appeal right in treating Rules 10(1) and 10(4) cumulatively as requiring that after four weeks after the date of the decision in respect of 1mich leave to appeal was sought, the defendants who had applied for leave to appeal in the court below within the statutory period of fourteen days (Rule 10(1), would necessarily have to apply for enlargement of time for leave to appeal to the Court of Appeal, where the court below had 'refused the application for leave to appeal after, fourteen days?

3. Was the Court of Appeal right in holding that the requirements for enlargement of time in Rule 10 (4) applied to defendants, even where they in the court below had filed their Notice of Motion for leave to appeal within time, as stipulated in Rule 10(1)?

4. Was the Court of Appeal right in holding that in law an affidavit in opposition which was filed by plaintiff with full knowledge of non-compliance by defendants, could not act as a waiver? "Did the affidavit in opposition constitute a fresh step in the proceeding and therefore a waiver?

5. Did the Court of Appeal err in law in treating an act of non compliance as having the effect in law in making the defendant's application for leave to appeal [p.61] void rather than merely irregular, thereby ousting the jurisdiction of the Court of Appeal to grant consequential relief to defendants?

6. Has the Court of Appeal right in its construction of Rule 10(1), thereby resulting in manifest absurdity and inconvenience to defendants?

I now consider the first three issues outlined above. The decision of the High Court dated 16th June, 1986 was an interlocutory decision, and so statutorily, defendants were obliged to apply to that court by Notice of Motion for leave to appeal against the said decision to the Court of Appeal. By virtue of Rule 10(1) both the High Court and the Court of Appeal have concurrent jurisdiction in the matter of application to these Courts for leave to appeal" for enlargement of time. Application for leave to appeal must be made within fourteen days of the date of the decision of the High Court.

Rule 64, however, provides that the application must first be made to the High Court and on refusal, to the Court of Appeal for determination. Rule 64 which in my opinion is merely procedural, is silent on the question of time since it does not stipulate time within which an applicant may apply to either the High Court or the Court of Appeal for leave to appeal. To all intents and purposes, an applicant must look to the provisions of Rules 10(1) and 10(4) for time construction.

An applicant under Rule 10(1) has to comply with the provision of Rule 10(2) which states as follows:

"Any application for leave to appeal or for enlargement of time within which an application for leave to appeal may be made, shall be supported by an affidavit setting forth good and sufficient reasons for the

application and by proposed grounds of appeal which prima facie show good cause for leave to appeal or enlargement of time within which to apply for such leave should be granted".

[p.62]

As already stated, application for leave to appeal under Rule 10(1) must be made within fourteen days of the date of the decision, unless the Court below the Court of Appeal enlarges time. Time therefore starts to run from the date of the decision. Where the fourteen days stipulated under Rule 10(1) have not yet expired, an applicant can apply for enlargement of time to the High Court, which that Court may grant, but not when time has expired, as by then the jurisdiction of the High Court would have closed.

Under Rule 10(3), where time is enlarged, a copy of the order granting enlargement shall be annexed to the application.

There appears to be no problem where the application for leave to appeal is granted within time. In my opinion, where the application is refused within the prescribed fourteen days, the applicant will have to make a fresh application for leave to appeal to the Court of Appeal. Where the application is refused after the fourteen days period specified in Rule 10(1); an applicant must apply for enlargement of time together with an application to the Court of Appeal for leave to appeal, in view of the provision of Rule 10(4), which taken together with Rule 10(1) gives the applicant twenty-eight days for time to run out.

Now how do the facts of this case reflect the observance by defendants of the statutory requirements, if at all?

On the 21st June, 1986, that is, five days after the date of the decision in the High Court dated 16th June, 1986, defendants applied to the High Court for leave to appeal to the Court of Appeal. This application fell within the statutory period of fourteen days prescribed by Rule 10(1). On the 11th July, 1986 that is, nineteen days after the application to the High Court for leave to appeal, and twenty four days from the date of the decision in the High Court, the application was refused by the High Court. On the 23rd July, 1986, that is twelve days after the date of refusal, the defendants without more, applied to the Court of Appeal for leave to appeal against the decision of the High Court dated 16th June, 1986; in all, thirty-six days from the date of that decision.

[p.63]

The Court of Appeal took the view that time having run out by virtue of Rules 10(1) and 10(4) of the Court of Appeal Rules, which cumulatively comes up to twenty eight days within which to appeal, and there being no prior application before them by defendants for enlargement of time to appeal, which would have clothed them with jurisdiction, refused to entertain the application. On this reckoning, at the time of the refusal of the High Court to grant defendants' application for leave to appeal, that is, 11th July, 1986 defendants still had four days within which to apply for enlargement of time, which the Court has power to grant even after the' expiration of the time allowed or appointed I do not support the submission of defendants, which was argued strenuously before this Court, that once an applicant has complied with the provisions of Rule 10(1), by applying to the High Court within the statutory period

of fourteen days, he there and then has no further obligation to seek enlargement of time t, appeal to the Court of Appeal, on refusal by the High Court to grant leave to 'appeal.

In my opinion, where an applicant's application under Rule 10(1) has been refused and time has already expired for making such application, it will be futile to take solace in the, assumption that he can proceed to the Court of Appeal on the bas: of his original application to the High Court, be it within time. The proper thing to do in the circumstances, knowing that the jurisdiction of the High Court has closed after its refusal to grant application for leave to appeal, is to apply to the Court of Appeal, which by virtue of Rule 10(1), has concurrent jurisdiction with the High Court. The applicant would therefore have to proceed to the Court of Appeal by fresh application to the concurrent jurisdiction of that court and not on the basis of the original application to the High Court for leave to appeal. Suffice it to say, that after refusal by the High Court no further application for enlargement of time should be made to that Court if only for want of jurisdiction.

[p.64]

As I see it, the provisions of the old Court of Appeal Rules 19?3 Public Notice No. 28 of 1973, that is Rules 10(1) (2) and 11(4) which I need not spell out, are similar to the present Rule; Rules 10(1), 10(4) and 64 Public Notice No. 29 of 1985, except that under the old Rules the applicant has fourteen days plus one month to have his application determined by the Court of Appeal. Under these Rules, where time has expired, an application for enlargement of time must be made to the Court of Appeal.

In respect of issues 1, 2 and 3 above, I hold as follows:

1. That the Court of Appeal properly construed the provisions of Rules 10(1) 10(4) and 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 1985.

2. That the Court of Appeal was right in treating Rules 10(1) and 10(4) cumulatively.

3. That the requirements for enlargement of time applied to defendants irrespective of their earlier application to the High Court for leave to appeal within time.

In arguing Ground 3 of the Grounds of Appeal defendants submitted that the affidavit in apposition filed by plaintiff with full knowledge of the alleged irregularity, that is, defendant failure to apply to the Court of Appeal for enlargment of time to appeal to the court of Appeal after refusal by the high Court was a fresh step in the proceeding, which constituted a waiver of any Irregularity on the part of defendants.

Plaintiff in his reply contended that an affidavit in opposition to an affidavit in support of an application for leave to appeal to the Court of Appeal cannot be deemed to be a waiver or jurisdiction .He submitted that the failure to comply with a statutory requirement is not a mere irregularity which may be waived by plaintiff, since it is deprived the court of appeal of jurisdiction to hear the application. He submitted further that what constitutes a waiver depends upon the nature of [p.65] irregularity this being so fundamental and therefore incurable. Plaintiff further argued that in taking the steps he took in filing the affidavit in opposition, he was acting ex abundanti cautela, since a preliminary objection was only being taken by him at the time, which might prove unsuccessful.

The Court of Appeal held that Plaintiff's affidavit in opposition did not constitute a waiver. I agree. Indeed, I find no merit in defendants' submission, as in my opinion the irregularity in this case is not a mere irregularity which can be waived by the plaintiff where there is jurisdiction, but an irregularity which calls into question the very jurisdiction of the Court of Appeal.

In determining the fourth issue outlined above I hold that plaintiff's affidavit in opposition did not constitute a fresh step in the proceedings, nor did it amount to a waiver.

The fifth issue posed, is, whether the Court of Appeal erred in law in treating an act of non-compliance, (that is, failure by defendants to apply to the Court for enlargement of time) as having the effect in law in making defendants' application for leave to appeal void rather than merely irregular.

In arguing this issue, defendants submitted that the act of non-compliance in the instant case, was a mere irregularity which did not go to jurisdiction and therefore it was wrong in law for the Court of Appeal to have deprived itself of jurisdiction.

Plaintiff maintained that the act of non-compliance was fundamental, being in contravention of statutory requirements, thereby depriving the Court of Appeal of jurisdiction. Plaintiff referred us to two authorities in support of his arguments which I consider relevant to the point- Oranye vs. Jibowu 13, W.A.C.A. (Selected Judgments of the West African Court of Appeal) p. 41 at 42 and Ohene Moore vs. Akesseh Tayee, 2.W.A.C.A. 43

[p.66]

In Oranye vs. Jibowu, the issue turned on an appeal from the Magistrate's Court where Appellants appealed out of time and had taken no step to have the time extended in accordance with the provisions of the Rules. The defects escaped the notice of everybody concerned, with the result that the judge of the Supreme Court proceeded to hear the appeal.

It was held that the irregularity could not be regarded as mere technicality, but constituted an incurable defect. The failure to comply with the statutory requirements deprived the Supreme Court of any jurisdiction to hear the appeal.

In Ohene Moore vs. Akesseh Tayee which turned, not on extent of time but failure to fulfill certain statutory requirements requisite for the purposes of an appeal, Lord Atkin in delivering the opinion of the Privy Council observed as follows;

“It is quite true that their Lordships as every other Court attempt to do substantial justica and to avoid technicalities but their Lordships, like any other Court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event and that event has occurred then it is impossible for their Lordships or for any other Court to have jurisdiction”

In my opinion these authorities reflect the correct p0sition of the law with which I have no reason to differ. In the circumstances I find no substance in defendant’s submission which must fail.

The answer to the fifth issue herein is that the Court of Appeal was right in holding that they had no jurisdiction to entertain defendant's application.

[p.67]

The last and final issue for consideration, is whether the Court of Appeal was right in its construction of Rule 10(1) of the Court of Appeal Rules, Public Notice No. 29 of 1985.

In their arguments, defendants submitted that the Court of Appeal wrongly construed Rule 10(1) thereby resulting in manifest absurdity and inconvenience. That on a proper construction the Court of Appeal would have arrived at a different conclusion.

Plaintiff on the other hand, submitted that the words of the said Rule 10(1) are plain and unambiguous, and as a result, they must be given their plain and ordinary meaning, irrespective of Consequences. He further submitted that where the language of an Act or Rule is explicit, its consequences are for Parliament and the Rules of Court Committee, and not for the Courts to consider.

The whole arguments therefore turn on the canons of interpretation for which there are many authoritative decisions. IN SUSSE PEERAGE CLAIM (1844) 11 Cl. & F.85 Tindale C.J. said:—

"If the words of a statute are, in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the lawgiver".

Cotton L.J in Reid v. Reid (1886) 31 Ch. D. 402, 407 had this to say:—

"In considering the true construction of an Act, I am not so much affected as some judges are by consequences which may arise from different constructions. Of course if the words are ambiguous and one construction leads to enormous inconvenience, and another construction does not, the one which leads to least inconvenience is to be preferred".

[p.68]

Lord Esher M.B. in R v. JUDGE OF CITY OF LONDON COURT (1892 1 Q.B. 273 said:

"If the words of an Act are clear you must follow them even though they may lead to manifest absurdity. The Court has nothing to do with the question of whether the legislature has committed an absurdity"

Lord Simons in the House of Lords - 1952 A.C. 189 said:

"The duty of the Court is to interpret the words the legislature has used; these may be ambiguous but even if they are the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited."

Continuing his Lordship said:

"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is less justifiable when it is guess-work with what material the legislature would, if it had discovered the gap, would have filled it. If a gap is discovered the remedy lies in an amending Act."

The Court of Appeal held, and rightly so, that the words of Rule 10(1) are plain and unambiguous, and so gave those words their plain and ordinary meaning. The language of the Rule quoted above is quite clear and unambiguous. If the strict application to the Rule would lead to manifest absurdity, inconvenience, hardship or financial loss to the defendants, as admittedly it appears in the instant case, the remedy lies in the hands of the Rules Committee to make the necessary amendment.

[p.69]

Having considered the various grounds of appeal in this case, and the arguments of counsel, I have come to the inevitable conclusion that these grounds are untenable and must fail. I agree with ruling of the Court of Appeal and I see no reason to disturb it. This appeal must fail.

The appeal is according dismissed with costs to Plaintiff/Respondent.

[SGD.]

S.M.F. Kutubu

Chief Justice

[p.70]

C.A. HARDING J.S.C.

This Appeal arose out of the refusal by the Court of Appeal to entertain an Application for leave to appeal against a decision of the High Court given in an interlocutory matter. The Court of Appeal declined to hear the application on the ground that it lacked Jurisdiction being that the application was made out of time.

The Brief History of the Case is as follows:—

1. On 18th February, 1986 the Respondent herein, as Plaintiff in the High Court, obtained an interlocutory judgment in Default of Appearance against the Appellants herein, the Defendants in the High Court.

2. On 29th May, 1986, the Appellants filed a Notice of Motion in the High Court seeking to set aside the Judgment in Default and to defend the Action.

3. On 16th June, 1996, the High Court gave a Ruling dismissing the Application.

4. On 21st June, 1986, the Appellants applied to the High Court for leave to appeal to the Court of Appeal against the decision of the High Court dated 16th June, 1986.

5. On 11th July, 1986 the application for leave to appeal was, refused.

[p.71]

6. On 23rd July, 1986, consequent upon the refusal aforesaid the Appellants applied to the Court of Appeal for leave to appeal.

7. On 1st November, 1986 the Court of Appeal dismissed the application on a preliminary objection and held that it had no jurisdiction to hear the application.

8. Thereafter, on application made to this Court, special Leave to Appeal against the decision of the Court of Appeal was granted to the Appellants on 18th February, 1988.

Four grounds of Appeal were filed before this Court by the Appellant. The first two in essence complained of misconstruction of the provisions of Rules 10 (1), 10 (4) and 64 of the Court of Appeal Rules, Public Notice No.29 of 1985, by the Court of Appeal when it held that "the application before this Court was dated 23rd July, 1986, it is for leave to appeal against the decision of the High Court delivered on the 18th June, 1986. Clearly, such an application is out of time in that it was made some 36 days after the date on which the decision of the High Court was delivered."

The third ground - in my view, not warranting much consideration for the purposes of this appeal complained of misdirection in law by the Court of Appeal when it held an Affidavit in opposition which was filed could not act as a waiver in that such step was "a fresh step".

The fourth ground was abandoned.

The issue briefly before this Court is under what circumstance if any at all, can the Court of Appeal entertain an application for leave to appeal if the application is made after 14 days from the date of the decision against which leave to appeal is sought.

Rule 10 (1) of the, Court of Appeal Rules, Public Notice No.29 of 1985 states:—

"10 (1) Where an appeal lies by leave only, any person desiring to appeal shall apply to the Court below or to the Court by Notice of Motion within fourteen days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges time."

[p.72]

There is no ambiguity about the words used in this provision.

It means simply that an Applicant can make his application either to the Court below, i.e. the High Court, or to the Court of Appeal within fourteen days from the date of the decision against which leave is sought unless that period is enlarged either by the Court below or by the Court of Appeal.

Rule 10 (4) prescribes:—

“10 (4) No application for the enlargement of time within which to apply for leave to Appeal shall be made after the expiration of fourteen days from the expiration of the time prescribed within which an application for leave to appeal may be made.”

Again, there is no ambiguity about the words used here. This provision deals about applications for enlargement of time as distinct from applications for leave to appeal. It makes it mandatory for an Applicant who is seeking an enlargement of time within which to apply for leave to Appeal to do so within twenty eight days from the date of the decision against which leave to appeal is sought. In my view, this provision only applies when no application whatever has been made for leave to appeal within fourteen days either to the Court below or to the Court of Appeal.

However, Rule 64 of the Court of Appeal Rules referred to above makes it obligatory for an Applicant to first make his application to the Court below and where that Court refuses the application, he shall then proceed to have the application determined by the Court of Appeal.

The provision is as follows:—

“64. Except where otherwise provided in these [p.73] Rules or by any other enactment, where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below, but if the Court below refuses the application, the Applicant shall be entitled to have the application determined by the Court.”

Here as well the provisions are quite clear - application must first be made to the Court below and it is only after that Court has refused the application that the Applicant can renew the application in the Court of Appeal. In other words the right to have the application determined by the Court of Appeal only accrues after there has been a refusal by the Court of Appeal. It cannot be otherwise because if the Court below grants the application there will be no need to go to the Court of Appeal.

Counsel for the Appellants submitted that when once an Application has been made to the High Court within fourteen das there is no further obligation on the Applicant's part to seek enlargement of time. The Applicant can always make a further application to the Court of Appeal provided he does so within reasonable time.

Counsel for the Respondents on the other hand has strenuously argued that time in any event commences to run from the date of the decision against which leave to Appeal is sough and that any prudent Solicitor, notwithstanding the fact that he has already applied to the Court below within time, should proceed to make an Application for an enlargement of time if he apprehends that fourteen days would have elapsed before a Ruling [p.74] is made as to whether or not leave is granted. I must say that attractive though this argument may sound, I find it untenable for the mere fact that Rule 64 makes it obligatory to go first to the Court below and it is only when that Court has refused leave that the Applicant “shall be entitled to have the application determined by the Court of Appeal.”

By way of comparison I would refer to Rule 7 of the Supreme Court Rules which provides that “Application for leave to Appeal must first be made to the Court of Appeal, but if leave is refused by that

Court an Application may be made for Special Leave to Appeal to the Supreme Court by Notice of Motion in that behalf filed by the intending Appellant."

Rule 10 of the same Rules provide; that "An Application for special Leave shall be filed within one month of the date of the Judgment from which leave to Appeal is sought or of the date on which leave to Appeal to the Supreme Court is refused by the Court of Appeal."

These Rules, like those of the Court of Appeal, contemplate that an application for leave must first be made to the Court of Appeal (within one month in this instance from the date of the Judgment, decision or order to be appealed from - vide Rule 69 of the Court of Appeal Rules) and it is only after leave has been refused by that Court that application for Special Leave may be made to the Supreme Court, again within one month of the date of refusal.

The Court of Appeal Rules did not specify any time limit as to when the Applicant shall be entitled to have his application determined by the court of Appeal after a refusal by the High court. In my view, a reasonable time will suffice and in this connection what is a reasonable time will depend on the [p.75] circumstances of the particular case. In the instant case, I do not think eleven days after the Court below has refused the application an unreasonable time.

Earlier on, I did refer to the third grounds of appeal; I must say that I find no merit in that ground.

For the reasons I have stated above, I would allow the Appeal, order a reversal of the Order of the Court of Appeal and remit the Application for leave to appeal to the Court of Appeal for hearing and determination by that Court. Costs to the Appellant.

[SGD]

C. A. HARDING

JUSTICE OF THE SUPREME COURT

[p.76]

A. AWUNOR-RENNER J.S.C.

This is an appeal against an order and unanimous judgment of the Sierra Leone Court of appeal made and pronounced on the 18th day of November, 1986 by the Honourable Mr. Justice S.T. Navo presiding Justice D.E.M. Williams and Justice M.S. Turay dismissing on a preliminary objection by counsel for the respondent a motion by the appellant herein the Applicant/Defendant in the Court below seeking leave to appeal against a ruling of the High Court delivered on the 16th June 1986 by the Honourable Mr. Justice M.A. Adophy.

This appeal raises questions on the construction of Rules 10(1), 10(4) and 64 of the Court of Appeal Rules P.N. Number 29 of 1985 together with sec. 108 of the Constitution Act No. 12 of 1978 & sec. 56 (1) (b) of the Courts Act No. 31 of 1965. Before I refer to their provisions I will briefly state the relevant facts.

The respondent herein the plaintiff in the High Court obtained an interlocutory judgment in default of appearance against the appellant herein on the 18th of February 1986. On the 6th day of March 1986 the respondent obtained an order from Mrs. Justice V.A.D. Wright in the High Court for assessment of general and special damages and a date was then fixed for assessment on the 14th March 1986. On the 21st day of April, 1986 the defendant entered an appearance and filed a motion seeking inter alia that the judgement in default of Appearance dated 18th day of February 1986 be set aside and that the defendants/applicant be at liberty to defend the action.

[p.77]

This motion was withdrawn and another one filed on the 29th day of May 1986. On the 16th day of June 1986, Mr. Justice Adophy gave a ruling dismissing the defendant's motion. On the 21st day of June 1986 the defendants filed a motion seeking inter alia leave to appeal to the Sierra Leone Court of Appeal against the decision of the Honourable Mr. Justice M.O. Adophy, sitting as a High Court Judge on the 16th day of June, 1986. On the 11th day of July, 1986 the Honourable Mr. Justice M.O. Adophy refused the defendant's motion for leave to appeal against his order of the 16th June 1986. Again on the 23rd day of July 1986 the defendant filed a Notice of Motion for leave to appeal to the Court of Appeal and certain interlocutory orders were made by Justice C.A. Harding sitting as a Single Judge on the 19th day of August 1986. The Court of Appeal on the 18th day of November 1986 dismissed the Defendant/Applicant's Motion to the court of Appeal for leave to apply against Mr. Justice Adophy's order of the 16th June 1986 on a preliminary objection taken by Plaintiffs/Respondents counsel on the grounds that I quote from the order made by that court:

“In view of the authorities on the matter, the failure of the applicants to comply with the statutory requirements and to fulfill the statutory conditions requisite for the purposes of the intended appeal deprived this court of any jurisdiction to hear the application.”

Later on the 17th December 1986 the Defendant/Applicant sought leave from the Court of Appeal to appeal to the Supreme Court against the Court of Appeal's refusal of the application for leave to appeal to it. This application together with the application for a stay of execution were also refused. The Hon. Mr. Justice Gelaga-King dissenting. The Supreme Court finally granted Special Leave to appeal and a stay of execution on the 18th February 1988. I think that it is now necessary for me to refer to all the relevant rules referred to by counsel for the appellants and respondents respectively. As I said before in my opinion the main issues to the determined in this appeal are the construction of rules 10(1), 10(4) [p.78] & 64 of the Court of Appeal Rules P.N. Number 29 of 1985 that is to say whether an applicant who has to obtain leave to appeal to the Court of Appeal and who has made this application for such leave to the High Court within the prescribed time that is 14 days as stipulated by rule 10 (1) of the said rule has to ask for an enlargement of time if such leave is not granted within the said period or until after the expiry of the extra period of 14 days as provided for in rule 10(4) of the afore-mentioned rules.

Rule 10(1) states the procedure to apply for leave to appeal from the High Court to the Court of Appeal and is as follows:

"Where an appeal lies by leave only, any person desiring to appeal shall apply to the court below or to the Court by notice of motion within 14 days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges time."

Rule 10(4) of the Court of appeal Rules supra provides as follows:

"No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of 14 days from the expiration of the time prescribed within which an application for leave to appeal may be made."

Another rule urged for construction is rule 64 of the same rules and this is couched in the following terms:

"Except where otherwise provided in these rules or by any other enactment; where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but if the Court below refuses the application the applicant shall be entitled to have this application determined by the Court."

[p.79]

Various arguments have been urged by counsel on both sides. I propose to refer to them briefly. Counsel for appellants contented that the principle issue has to do with the construction of P.N. Number 29 of 1985, Court of Appeal Rules particularly the construction of Rules 10(1), 10(4) and rule 64. He posed the question that where an applicant has sought leave in the High Court

to appeal within the stipulated time of 14 days whether he ought to seek an enlargement of time to make an application to the Court of Appeal for leave to appeal to the Court if the High Court makes an order after 14 days refusing him leave to appeal. He contended that there was no further obligation to seek leave for enlargement to the Court,

or to the Court of Appeal once you have already applied for leave to appeal within the stipulated time. The three rules he said must be looked at together and compared with the old rules. Time he added further ceases to rune when an applicant has filed his application for leave to appeal under 10(1) of the said rules. Mr. A. Gooding on the other hand contended that the Court of Appeal had no jurisdiction to entertain an application for leave when the intending applicant had failed to apply to the Court of Appeal within the time prescribed by rule 10(1) when a previous enlargement of time had not been asked for. The applicant he stated was clearly out of time. Rule 10(1) is unambiguous he stated and needs no extraneous aids of construction. He referred this court to the case of OHENE MORE V TAYEE reported in – 2 WACA at page 43. He further suggested that rules 11(1) and 11(6) have a hearing on the construction of rule 10(1) and this governs the time for appealing in an interlocutory matter and in a final decision. Rule 11(1) states as follows:

"No appeal shall be brought after the expiration of 14 days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision unless the court enlarges the time."

[p.80]

"Rule 11(6) also, states that no application for enlargement of time within which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought."

Let me at once say at this stage that these last two rules deal only with the time limit for appealing.

Mr. Gooding also claimed that an appeal against an interlocutory decision is an appeal as of right and referred to sec. 108(2) of the Constitution and the Courts Act sec. 56(1) a & b. section 108(2) of the Constitution provides as follows:

"Save as otherwise provided in this Constitution or any other law an appeal shall lie as of right from a judgment, decree or order of the High Court of Justice to the Court of Appeal in any cause or matter determined by the High Court of Justice."

In my opinion, an interpretation of this Section of the Constitution was given by this Court – In Misc. App. No. 31/81 in the case of James Allie & Others V The State in which the Court construed the said phrase "or any other law" to include the provisions of the Courts Act No. 31 of 1965 with particular regard to section 57. Although two of the questions posed in that reference dealt specifically with sec. 56. The Court declined to make any pronouncement on section 56 for the reason that the reference deals with a criminal matter and that section 56 concerns civil matters. It is my understanding that though section 56 was not specifically dealt with, the reasoning and consideration of the phrase "or any other law" should also be applied in this case. Section 56(1) a & b of the Courts Act states as follows:

"56(1) Subject to the provisions of this section an appeal shall lie to the court of appeal:—

(a) from any final judgment, Order or other decision of the High Court given or made in the exercise of its [p.81] original, prerogative or supervisory jurisdiction in any suit or matter.

(b) By leave of the Judge making the order or of the court of appeal, from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid."

It is my opinion therefore, that the expression "or any other law" also applies to Sec. 56 of the Courts Act and that an appeal against an interlocutory order of the High Court is by way of leave and not as of right as contended by Mr. Arnold Gooding.

One point which has to be considered at this stage was whether the application for leave to appeal was made within the prescribed period of 14 days as required by Rule 10(1) of the Court of Appeal Rules Number 29 of 1985 supra. The answer to that is yes on the facts as stated above.

Another point which also has to be considered are the provisions dealing with which court an application should be made, whether to the Court below or to the Court of Appeal. This is clearly dealt with in Rule 64 of the above rules. It is my opinion that Rule 64 deals with two matters; firstly, it states that where an application may be made to the Court below or to the Court of Appeal it should be made

in the first instance to the Court below. Secondly, it goes on to provide that where an application is refused by the Court below then the applicant is entitled to have his application determined by the Court of Appeal. In Maxwell on Interpretation of Statutes 19th Edition at pages 2 and 5 I refer to the following phrases and I quote:

(1) "If the words of a Statute are in themselves precise and unambiguous no more is necessary than to expound these words in their mutual or ordinary sense. The words themselves in such cases declaring the intention of the legislature."

[p.82]

(2) "If there is one rule of construction for statutes and other documents it is that your must not imply anything in them which is inconsistent with the words expressly used."

(3) "Where, by the use of clear and unequivocal language capable of only one meaning anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous, the underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous words used therein rather than from any notion, which may be entertained by the court as to what is just or expedient."

Reading Rules 10 & Rule 64 together, they deal with the following situations

(a) Where an applicant applies to the Court below for leave to appeal within the prescribed 14 day period.

(b) Where an applicant applies to the High Court for enlargement of time for leave to appeal to the Court of Appeal.

(c) When an applicant applies to the Court of Appeal for enlargement of time such application having been refused by the Court below.

(d) When an application for leave to appeal to the Court of Appeal where such an application has been refused by the High Court.

Reading Rules 10 & 64 it is clear from rule 10(1) that the situation referred to under (a) is that the application for leave shall be made within 14 days. Reading Rule 10(4) it is also clear that the time limit [p.83] within which an application for enlargement of time within which to apply for leave is 14 days from the expiration of the 14 days period within which an application for leave to appeal may be made.

Whereas there is a statutory time limit for the situation referred to in (a) and (b) above there is no such time limit so far as (c) and (d) are concerned; all that rule 64 has done is to put a restraint on the exercise of the right by the applicant to go the Court of Appeal by first going to the Lower Court and if leave is refused then he is entitled to apply to the Court of Appeal by first going to the Lower Court and if leave is refused he is entitled to the Court of Appeal to have application heard and that restraint cannot be removed.

Furthermore, rule 64 does not state time within which the application for the Leave to Appeal is to be made to the Court of appeal where there has been a refusal by the High Court for Leave to Appeal to the court of Appeal and the argument that the time limit is implied by Reference to Rule 10(1) which deals with Application for Leave to Appeal in the first instance is completely unfounded. This doctrine finds no support in any authority and it is in my opinion entirely alien as to how it is alleged it is to be applied. It is my opinion also that the absence of time limit within which such an application should be made to the Court of Appeal has not nullified the right which has been given to the applicant by virtue of the Constitution sec. 108 (2) and by virtue of sec. 64 itself. The Interpretation Act sec. 39(i)d or Act number 8 of 1971 also provides that "where no time is prescribed or allowed within which anything shall be done, such thing shall be done, without unreasonable delay and as often as due occasion arises."

Rule 10 – deals with the time limit within which leave to appeal and enlargement of time to etc can be made, Rule 64 deals with the application for leave to appeal/enlargement of time where there has been a refusal.

It is my opinion that rule 10(1) and (2) in so far as they deal with enlargement of time could not be called upon by the so called prudent solicitor for the following reasons:

[p.84]

An application for enlargement of time under Rule 10 is to enable applicant to apply for leave to appeal (vide Rule 10). Rule 10 does not provide for an applicant to simply file his motion papers and await the outcome of the application for leave to appeal which he has already made. What would "the Prudent Solicitor" do if his application for enlargement of time is refused and the ruling is delivered some two months after it had been made? Would be whilst awaiting the said ruling on his application for enlargement of time file another Motion addressed to the Court of Appeal asking, for enlargement of time. The position at that point in time would be as follows:

1. A pending application before the High Court for leave to appeal to the court of Appeal.

2. A pending application in the High Court for enlargement of time within which to apply for leave to appeal notwithstanding (1) above.

3. An application to the Court of Appeal for enlargement of time within which to appeal notwithstanding (1) and (2) above.

Surely that could not be the intention of Parliament.

If one were to accede to the argument of "the Prudent Solicitor" the Court below or the Court of Appeal would grant an applicant enlargement of time to do that which he has already done.

In the present case the applicant had done all that he had to do. He had filed his application for leave to appeal to the Court of Appeal within the time prescribed by rule 10(1) of the Court of Appeal rules number 29 of 1985. See the case of Waterton v. Baker reported in (1868). Law Reports Q.B. Volume 3 at page 173. In that case By 13 & 14 Vict C.61 s. 14, County Court Rules of 1857 rule 134. On appeal [p.85]

from the Country Court, the party appealing, shall, within 10 days after the determination appealed against, give notice of appeal to the other party, and also give security to the approved by the registrar for the costs of the Appeal. By country Court Rules 134, where a party proposes to give a bond by way of security, he shall give to the opposite party and the Registrar Notice of the proposed Sureties and the Registrar shall fix a day for the bond to be executed and for the other party to make any objection he may have to the Sureties. An Interpleader summons in a Country Court having been determined against the claimant on the 16th November, he on the same day gave notice of appeal and tendered a bond with sureties to the Registrar. On the 19th day of December he gave notice of the proposed sureties to the plaintiff. The Plaintiff required further information as to the sufficiency of the sureties and the claimant having been unable to obtain a definite answer as to whether or not he objected to the sureties, the Registrar on the 17th day of January fixed the 21st of January for the execution of the Bond and gave notice to the Plaintiff to make his objection if any, on that day. The Plaintiff did not appear and the bond was then executed with the original sureties: - Held that although the security had not been completed until after the 10 days yet as the appellant had done all he could to perfect it within that time and the delay was caused by the plaintiff, the appellant had complied with the requirement of Sec. 14 & Rule 134 and was entitled to have his appeal heard.

Cerkburn C.J. had this to say in his judgment:

“It would be exceedingly hard and unjust upon a party that he should be debarred from appealing because the Registrar for some cause or other, such as sickness or requiring further information is unable to complete the matter in due time and a portion of the delay occurs because the other party wants to make further enquiries; I think it would be monstrous to say in such a case that a man is to be ousted of his right to appeal which the Legislature intended him to have. I think the fair construction of the statute is that as a party so far as in [p.86] him lies must within the prescribed time offer the security and be ready to make it effectual. If he does that and afterwards complete the security he has done all that he is bound to do and he is entitled to his appeal.”

Shee J: also in the same case had this to say and I quote:

“The object of the enactment is to secure to the unsuccessful suitor an appeal by the appeal is to be allowed only in his giving security to the successful party for costs of the appeal, in order that the proceedings may bot be unduly delayed he is bound to give notice of appeal within 10 days and rule 134 provides that notice of the sureties is to be given to the successful party and to the registrar of the Court. This is all that the appellant ought to do. If he gives notice of appeal within 10 days and gives notice to the successful party and to the Registrar who his sureties are, and if the Registrar approves of them and they ultimately execute the bond, then he does all that his is called upon by sec. 14 & the rule to do.”

I have cited the above case for the principles contained therein regarding the construction and interpretation to be given where an applicant pr party has done all that he could do assuming that I am wrong in my construction of Rules 10 and 64 as set out supra. I would therefore hold on this alternative ground that the appellant herein had done all that he could do.

In the present case the applicant had applied to the Lower Court within 14 days as prescribed by Rule 10(1). He had also complied with rule 64 which states that he must first make his application to the Lower Court and if leave is refused then to the Court of Appeal. I am therefore of the view that there was nothing more he could have done. By way of contrast, let me finally refer to the previous rules of the Court of Appeal – P.N. number 28 of 1973 which states as follows:—

[p.87]

10(2) Whenever an application may be made wither to the Court below or to the Court it shall be made in the first instance to the Court below but if the Court below refuses the application the applicant shall subject to the provisions of rule 11(4) be entitled to have the application determined by the Court."

Rule 11(4) states as follows:—

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which to appeal may be brought. Every such application shall be supported by an affidavit setting forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When time is so enlarged a copy of the order granting such an enlargement shall be annexed to the Notice of Appeal."

The words "subject to the provisions of 11(4) have been rejected by the subsidiary legislation. All Appellate Courts in the Commonwealth are established by Statutes including Sierra Leone. As such their jurisdiction and powers are statutory and they cannot act without the state or subsidiary legislation thereunder. See Moore v Tayee 2 W.A.C.A.

Finally, the question now is whether the Court of Appeal had power to deprive a party of rights acquired by it under Rules 10(1) & Rules 64, of the above rules. I have not heard of any specific authority on these points. For the reasons which I have given above, I am of the view that the Court of Appeal was wrong when it stated that it had no jurisdiction to hear the application. Rule 10 deals with the High Courts jurisdiction and that of the Court of Appeal for leave to appeal and for enlargement of time. It does not deal with the excercise of the jurisdiction of the Court of Appeal where leave to appeal or an enlargement of time is refused.

[p.88]

The Court of Appeal's exercise of jurisdiction is dealt with in rule 64.

Although most of your Lordships are of a contrary opinion, for the reasons given above, I would allow the appeal. Appeal allowed in favour of the appellant and would order that the appellant's motion dated 23rd July 1986 be remitted to the Court of Appeal for a hearing.

Costs to be taxed in favour of the appellant.

[SGD.]

AWUNNOR-RENNER

[p.89-90]

WARNE J.S.C

This is an appeal against a judgment of the Court of Appeal delivered on 18th November 1986.

The application before the Court of Appeal was made pursuant to Rule 10(1) and Rule 64 of the Court of Appeal Rules Public Notice No. 29 of 1985.

Counsel for the Respondent made a preliminary objection to the application on the ground that the Court had no jurisdiction because of effluxion of time within which the application should be made.

Rule 10(1) states: "Where an appeal lies by leave only, any person desiring to appeal shall apply to the court below or to the Court by notice of motion within 14 days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges time."

From the foregoing, it is at once clear that the application could be made either to the court below or that Court. Both courts therefore, have concurrent jurisdiction. In the Rule, the time within which the application for leave is to be made is fourteen days from the date of the decision against which leave to appeal [p.91] is sought.

I must first of all determine and ascertain the date of the said decision. It is clear that the decision was made on the 16th June, 1986 by Adophy J (as he then was).

Appellant being dissatisfied with the decision of Adophy J. sought leave of the High Court for several orders including an order for leave to appeal. This was by motion filed on the 21st June, 1986.

I am satisfied this motion was filed five days from the date of the decision. The motion was duly heard and Adophy J refused the application on the 11th July 1986.

In my view when Adophy J refused the application on the 11th July 1986, the duty of the High Court was functus officio.

The appellants were then entitled to make a fresh application to the Court of Appeal for leave to appeal against the decision given on the 16th June, 1986. (vide Rule 10(1))

However, the application could not be made before the refusal of the application by this court below. vide rule 64.

Rule 64 states:

"Except where otherwise provided in these rules or by any other enactment; where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but if the Court below refuses the application the applicant shall be entitled to have this application determined by the Court."

In this rule, no time is stipulated within which the applicant is entitled to make the application to have it determined by the Court. In my view, this is deliberate, because if the application is not made within fourteen days of the decision in the Court below the applicant can apply to the Court below for an [p.92] enlargement of time vide Rule 10(1) and Rule 10(4)

Rule 10(4) states:

"No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of 14 days from the expiration of the time prescribed within which an application for leave to appeal may be made."

Rule 10(1) stipulates "fourteen days".

Counsel for Appellants has urged on the Court that when once the application is made within time to the High Court, he has no further obligation to make a further application to the Court of Appeal unless the Court below refused the Application. I do not agree, because, after the refusal by the High Court the application before the Court is for leave to appeal against the decision made in the High Court in the instant case, it was made on the 16th June 1986.

Time starts to run from the date of the decision given in the High Court. The time for making the Application to the High Court and the Court of Appeal runs together.

When as in Rule 10(1) fourteen days have expired, under Rule 10(4) the Applicant has another fourteen days within which to apply for enlargement of time. On the face of Rule 10(1) and Rule 10(4) it would appear that the applicant had been barred from making a fresh application to the Court as he was entitled under Rule 64. In my view, that cannot be the intendment of the Legislature. The Appellants were not time barred from applying for an enlargement of time within which to apply for leave to appeal.

The High Court having refused the application for leave to appeal on the 11th day of July, 1986, the appellants were entitled to make a fresh application to the Court of Appeal. This they did by filing a motion dated 23rd day of July, 1986. This was clearly out of time from the date of the decision given on 16th June, 1986.

[p.93]

In my opinion, it was obligatory on the Appellants to apply to the Court of Appeal for enlargement of time within which to have the motion filed on 23rd day of July, 1986 being heard – vide Rule 10 (1) Rule 10 (4).

On the construction of Rules 10(1), Rule 10(4) and Rule 64, the application for an enlargement of time could have been made to the Court of Appeal at the same time when the application for leave to Appeal was sought. In my view, the Appellants were time barred and unless the application for enlargement was made, the court could not grant that indulgence.

Vide Bradshaw V Warlow 32 Ch. D. (1986) 403.

In that case it was decided that the application for an enlargement of time within which to seek leave to appeal and that for leave to appeal could be made simultaneously.

In that case, the court of Appeal had to construe Order XXXIII Rule 21 of the Rules of Palatine Court of Lancaster. Rule 21 is as follows. “Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or Vice Chancellor upon such terms as may seem fit, upon an application made within six days after the time, or at the next sitting of the Court.”

The Court also considered and construed Order LI Rule 5 of the said rules which is as follows:

“The Court or Vice Chancellor shall have power to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding upon such terms, if any, as the justice of the case may require; and any such enlargement may be ordered although the application of the same is not made until after the expiration of the time stipulated or allowed”

The facts of the case are as follows:

[p.94]

“The action was brought for the recovery of a sum of money and came on for trial at Manchester on the 24th of March, 1986. The Defendants not appearing, judgment was given for the Plaintiffs with costs. The sittings of Palatine Court continued through March and April, and the Court sat for hearing motions on the 25th of March and the 5th, 12th, and 19th of April.

On the 8th of April, the Defendant gave notice of motion for the 12th of April to set aside the judgment as irregular and that the action may be restored to the paper for trial at the next sittings which would be held at Liverpool.

The motion was heard on the 19th of April, when the Vice Chancellor refused the application on the ground that it was too late. The Defendant asked for an extension of time, but the vice Chancellor was of the opinion that an application for extension of time ought to be made by a separate motion, and gave the Defendant short notice of such application.

The Defendant, however, did not give any notice, but appealed from the order of the 18th of April.

At the same time, he applied to the Court of Appeal for any extension of time for making the application to set aside the judgment .....

On the 24th of March, when the action came on, Counsel for the Defendant said he had received a telegram from his clients instructing him to ask for a postponement of the trial and upon the Vice-Chancellor refusing to accede to the application, the Counsel said he had no instructions to appear for the Defendant at the trial. Judgement was accordingly pronounced against the Defendant in his absence. No step was taken by the Defendant till the 8th of April, when he moved to set aside the judgment as before stated.

“Held, according to the true construction of Order XXXIII Rule 21 of the Rules of the Palatine Court of Lancaster a party against whom judgment has been give by default must make application to set it aside within six days if [p.95] the Court be then sitting, and it be not then sitting, on the next day on which the Court shall be sitting to hear such motions.

An application for extension of time by a party who desires to apply to set aside a judgement made against him by default, may be made at the same time when he makes the application to set aside the judgment, if the action is still pending.”

I agree with the ratio desidendi in the above mentioned case.

According to the true construction of Rule 10(1) of the Rules of the Court of Appeal, time starts to run from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges the time.

The appellants sought to have applied for an enlargement of time at the same time when the application for leave to appeal was made before the Court of Appeal. Failure to take such a step was fatal. In my opinion, the Appellant was out of time when he made his application for leave to appeal in the Court of Appeal.

In view of what I have said above grounds 1 and 2 of the grounds of appeal fail.

Counsel for the Appellants have submitted that the affidavit filed by John E. Bankole Jones on the 28th of October, 1986, was a fresh step in the proceedings and submitted that it was a waiver of any irregularity committed by the Appellants in the proceedings. Counsel has referred to Order 50 Rule 2 of the Rules of the High Court and Order 70 Rule 2 of the English Rules 1961:

Order 50 Rule 2 is as follows

“No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time; nor if the party applying has taken any fresh step after knowledge of the irregularity.

[p.96]

Order 70 Rule 2 is ipsisima verbal

These rules are not applicable to proceedings in the Court of Appeal

However, what this Court is called upon to determine is whether the Court of Appeal erred when it said “I could not agree more” in its opinion on the submission that the affidavit filed on the 28th October 1986 was not a waiver of an irregularity in the proceedings.

What was the irregularity complained of in the proceedings? That the Appellants failed to apply for an enlargement of time before applying to the Court for leave to appeal when they were out of time. Counsel for the Respondents has argued that the filing of the affidavit on the 28th October, 1986 is not a waiver.

The relevant rule is Rule 66 of the Rules of the Court of Appeal.

Rule 66 is as follows:

“Non-compliance on the part of an appellant with these rules or with any rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court considers that the non-compliance was not wilful and that it is in the interest of justice that the non-compliance should be waived.

.....

.....

when those directions were given.”

This rule clearly indicates that the issue of waiver is at the discretion of the Court to determine. The rules also spell out the perimeter within which the discretion could be exercised.

Firstly, in the instant case the appellant moved the Court of Appeal on an original motion in a fresh motion seeking leave to appeal. They were not appellants within the provision of Rule 66 or within the definition in Rule 1 of the said Rules.

Secondly, the issue of waiver is at the discretion of the Court and it is not at the instances of the parties to decide that a [p.97] step taken in the proceedings is a waiver.

Thirdly, it is for the Court to determine if the step taken in the proceedings is an irregularity, and if so, whether it can be cured without injustices, on terms.

On the contrary, if there has been a breach of a statutory provision the Court ought not to grant any indulgence to any party whatsoever, whether a step has been taken in the proceedings by the party raising the objections or not.

In the instant case, the appellants failed to comply with the provisions in Rule 10 sub-rule (1) and sub-rule (4).

In my opinion the submission of Counsel for appellants is untenable and grounds 3 & 4 therefore fail.

I will dismiss the appeal and it is dismissed with costs to the Respondents.

[SGD]

Sidney Warne,

Justice of the Supreme Courts

[p.98]

THOMPSON-DAVIS, J.A.

I have had the privilege of reading the judgments of my Lord the Learned Chief Justice and my brother Warne, J.S.C. I concur in their reasons and I wish to add my own humble views which I consider to be merely supplementary to what they said.

The questions raised by this Appeal are of some importance since they concern the interpretation of some rules of the Court of Appeal; thus leaving the impression that the Court of Appeal cannot on its own interpret its own rules.

The points agitated before us concern Rules 10(1), 10(4) and 64 of the said Rules.

Rule 10 (1) reads:

"Where an appeal lies by leave only, any person desiring to appeal shall apply to the court below or to the Court by Notice of Motion within fourteen days from the date of the [p.99] decision against which leave to appeal is sought unless the Court below or the Court enlarges time."

Rule 10(4) reads:

"No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of fourteen days from the expiration of the time prescribed within which an application for leave to appeal may be made."

And Rule 64 reads:

"Except where otherwise provided in these rules or by any other enactment; where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but if the Court below refuses the application the applicant shall be entitled to have this application determined by the Court."

The question therefore is one of the interpretation as applied to the facts of the case of these Rules.

The central issues relied on by the Appellants are that the Court of Appeal —

(a) "Misconstrued the provisions of Rule 10(1) and Rule 10(4) of the Court of Appeal Rules, P.N. No. 29 of 1985 in treating the said sub-rules cumulatively as requiring that after four weeks after the date of the decision in respect of which leave to appeal is sought, an applicant who has applied for leave to appeal in the Court below within two weeks stipulated in Rule 10(1), would [p.100] necessarily first, have to apply for enlargement of time, for leave to appeal, where the Court below has refused the application for leave to appeal, and such a ruling refusing eave fall outside of fourteen days, after the delivery of the decision in respect of which leave to appeal is sought."

(b) Failed to hold, as in law it should that where the applicant in the High Court had filed his Notice for leave to appeal within time, such an Applicant had complied with the requirements of Rule 10(1) and that the requirements for enlargement of time in the said sub-rule would not longer apply to such an Applicant to whom leave is denied would be entitled to have his application determined by the Court".

(c) That when the Court of Appeal held that it could “not agree more” that in law, an affidavit in opposition which was filed could not act as a waiver the Court misdirected itself in law in that such a step, with full knowledge of non-compliance with the Rules is a fresh step, and so a waiver”.

(d) Erred in law in treating an act of non-compliance, as having the effect in law in making an application void rather than merely irregular.....”

The appellants have therefore claimed "Reversal of the Order of the Court of Appeal and a remission of the application to the said Court for a determination and hearing”.

[p.101]

The Respondent has maintained that the decision of the Court of Appeal is right and ought to be affirmed”.

Under the said Rule 10(1) an application for leave to appeal where an appal lies by leave only must of necessity be made within 14 days from the date of the decision against which leave to appeal is sought, and such an applicant must first apply to the High Court by virtue of Rule 64. The High Court may by virtue of the said Rule 10(1) extend the time of 14 days as that is the Court before whom the proceedings will be taken. It seems clear to me that the applicant must apply to that Court for any enlargement of the period of 14 days before it expires. I shall come back to the point.

In my view, there are three possible results which can arise in the circumstances:—

(i) the application may be granted by the High Court; the applicant will then have to file a Notice of Appeal under Rule 9 and comply with Rules 11(1) & (2).

(ii) The application may be refused within the 14 day period, the applicant will then have to file a fresh application for leave to appeal to the Court of Appeal and comply with the relevant portion of Rule 10(2) – setting forth “proposed good ground of appeal which prima facie show good cause for leave to appeal”.

(iii) The application may be refused outside the 14 day period, the applicant must then apply to the Court of Appeal if the 14 day period has been enlarged, he must then comply with Rule 10(2) and annex to the application the Order granting the enlargement of time under Rule 10(3).

[p.102] I must notice at this point what appears to be a very conspicuous fallacy of the Appellants' argument. They have urged upon this court to say that "where an Appellant in the High Court had filed his notice for leave to appeal within time (14 days) such an applicant had complied with the requirement of Rule 10 (1) and that the requirement for enlargement of time in the said sub-rule would no longer apply to such an applicant……." This argument misconceives the significance of the said Rule 10 (1) & (4).

The pertinent question is how does an Applicant go to Court of Appeal if his application under the Rule 10 (1) has been refused and time for making such application has expired? Does he merely change the

title of application to read "In the Court of Appeal" and send it to that court relying on the fact that he had made a similar application in the High Court within the statutory fourteen day limit which had been refused? A procedure of this nature would hardly be creditable to the judicial process: - The first step to be taken toward the acquisition of a right to go the Court of Appeal from a refusal made under Rules 10 (1) & 64 of the Court of Appeal Rules, made by the High Court is an application for extension of time to its concurrent jurisdiction if an Applicant is out of time.

Once the High Court has refused such an application and the 14 day period mentioned in Rule 10 (1) has expired, its jurisdiction closes and an applicant has to make a fresh application to the concurrent jurisdiction of the Court of Appeal to have his application determined by it. At that stage the High Court has no jurisdiction and so no time which it could enlarge. As a general rule and subject to any specific provision to the contrary, all applications for doing any act or taking any proceedings must be done in the first instance to the court or person who has jurisdiction to deal with the substance of the matter in relation to which the extension of time for a step [p.103] to be taken is required; thus application for extension of time to appeal to the court of Appeal must be made to that court.

When one looks at the old Court of Appeal Rule (P.N. 28) of 1973 it is, patently clear that once the High Court has refused an application for leave to appeal, its jurisdiction becomes extinct and the Applicant must now apply to the Court of Appeal to have the application determined subject to its rule 11 (4), and he must apply within one month. Rules 10 (1) (2) & 11 (4) of the 1973 Rules reads:—

10 (1) Where an appeal lies by leave only any person desiring to appeal shall apply to the Court below or to the Court by notice of motion for leave within fourteen days from the date of the decision against which leave is sought.

10 (2) Whenever an application may be made either to the Court below or to the Court it shall be made in the first instance to the Court below, but if the Court below refuses the application the applicant shall subject to the provisions of rule 11 (4) be entitled to have the application determined by the Court.

11 (4) No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every such application shall be supported by an affidavit setting forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When times [p.104] is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.

What difference there is between the present and the old rules is that an Applicant has 14 days plus another 14 days under rules 10 (1) & (4) within which to have his application determined by the court of Appeal if such an application is refused by the high Court, whilst the statutory period under the old rules in the same circumstances is 14 days plus one month; in both cases an application for enlargement of time must be made to the Court of Appeal if time has expired.

What is very clear from what I believe is a true construction of the said rules is that whilst the lower Court is empowered to enlarge the period of 14 days it can only do so before that time has expired.

Another consideration which inclines me to accept this view is the provisions of O. 58, r. 14, & O. 64 r. 7 of the rules of the Supreme Court — The annual Practice.

As the court of appeal under the provision of Rule 38 of its Rules has power to refer to the Rules & Practice which were in force in that Court immediately before April 27, 1961 on matters not expressly provided for by its Rules, I have had recourse to the said O. 58, r. 14, & O. 64 r. 7 to enable me to have the appropriate intention of the said Rules 10 (1) & 64. the combined effect of these O. 58, r. 14, & O. 64 r. 7 is that while the court of Appeal has power to enlarge or abridge time, and may enlarge it even after its expiration, the High court can only enlarge the time upon application made before its expiration and no power to abridge it — Vide Re 20 Exchange Street Manchester; Austin Reed Ltd. V Royal Insurance Co. 1956 1 W.L.R. p.765.

[p.105]

It is sometime assumed that because of the provision of Rule 64 of the court of appeal Rules which makes no provision as to time, an application for enlargement of time must first be made to the Court below that is the High Court and if refused to the court of appeal. I must say that this is in my view a misinterpretation of the said Rule, the rule applies to applications which "may be made either to the court below or the Court" and I think only Rules 10 (1) & 29 seem to be within the grips of the said Rules requiring an application for extension or abridgement of time to be made to the court below or to the Court of Appeal; the application must be made to the court having jurisdiction to deal with the substance of the matter in relation to the application for enlargement of time and before whom the proceedings will be taken.

Following what I have already held I have no doubts whatsoever in saying that the decision arrived at by the court of Appeal was the true one. An Applicant seeking leave to appeal must have his application determined by the court of Appeal once it has been refused by the lower Court; if he is out of time, his first duty is to apply for an enlargement of time to the court of Appeal as that is the before whom the proceedings will be taken and it being the Court having jurisdiction to deal with the substance of the matter in relation to which the extension of time for a step to be taken. As was held in the case of Sabrah v. Governor and Attorney-General No. 2 A.L.R. (S.L.) 1957-60 p. 116, both documents — the application for extension of time to appeal should be filed together.

Where an enlargement of time has been granted, a copy of the order granting the enlargement of time must be annexed to the Notice of Appeal; as was held in Elija Speck vs. Gbassay Keister 1962 S.L.L.R. 1962. In that case Done-Edwin, J.A. had this to say [p.106] "In the circumstances the omission to follow the rules in fatal and it is my opinion that the appeal is not properly before the Court and should be struck out".

It seems clear to me that in all the circumstances, the appellant here have failed to follow the rules by applying to the Court of appeal, to have their application determined when they were out of time without first obtaining an order granting them an enlargement of time there was no appeal before the court; that omission was fatal. It could surely not have prejudiced the appellants; case if they had chosen to obtain an enlargement of time to apply to the court of appeal. On that basis the Appellants

have no rights to complain about the court of Appeal's decision, the court had no jurisdiction in the matter, it could not have adjudicated on it and therefore could not have assumed jurisdiction even where is a fresh step or waiver by the respondents of any non-compliance with any of its rules.

I am therefore of opinion that this appeal must be refused. The respondents will have the cost of this appeal; such costs to be taxed.

SGD.

E.C. THOMPSON-DAVIES, J.A

CASES REFERRED TO

1. R v. Judge Of City Of London Court (1892 1 Q.B. 273)

2. Ohene More v. Tayee reported in - 2 WACA at page 43.

3. Waterton v. Baker reported in (1868)

4. Vide Bradshaw v Warlow 32 Ch. D. (1986) 403

5. Austin Reed Ltd. v Royal Insurance Co. 1956 1 W.L.R. p.765

NIGERIAN NATIONAL SHIPPING LINES v. ABDUL AHMED

[CIV. MISC APP. 4/90] [p.107-123]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 15 AUGUST 1990

CORAM: HON MR. JUSTICE S.M.F. KUTUBU, C.J., PRESIDING

HON MR. JUSTICE S.C.E. WARNE, J.S.C.

HON MR. JUSTICE S.T. NAVO, J.S.C

BETWEEN:

NIGERIAN NATIONAL SHIPPING LINES — APPLICANTS

Vs.

ABDUL AHMED — RESPONDENTS

(TRADING AS ABDUL AZIZ ENTERPRISES)

GARVAS J. BETTS ESQ. WITH HIM MISS Y. JUSU-SHERIFF – FOR APPLICANTS

A.J.B. Gooding Esq. — for Respondents

WARNE, J.S.C.

This is an application by the applicants herein for the following Orders.

(1) Special leave to appeal against a ruling and order of the court of appeal dated the 20th of June, 1990.

(2) Stay of all proceedings in the High Court in an action No. CC 30/85. 1985. A. No. 26 Intituled Abdul Ahmed (Trading as Abdul Aziz Enterprises) plaintiff v Nigerian shipping Lines Defendants.

Facts

On the 20th, June, 1990, the High Court of Appeal dismissed an application by the Applicants herein for an order for extension of

judgment of the High Court dated 4th July, 1989. (2) Further or other relief. The orders sought in the Court of Appeal were as

follows:

[p.108]

(1) That the Defendant/Applicant be granted an extension of time to seek leave to appeal against the ruling and order of the Court of Appeal dated 29th January, 1990; (2) A stay of proceeding (Trading as Abdul Aziz Enterprises v. Nigerian Shipping Lines; (3) stay of Proceeding of the action herein; (4) Further or other relief.

On the 30th June 1989, the applicant sought leave from the Supreme Court for Orders of Mandamus, Prohibition and Certiorari. Leave was granted on the 18th July, 1989 and a stay of Proceedings in the matter was ordered by the Court. On the 7th November 1989 the Supreme Court struck out the application for the Orders of certiorari, Mandamus and prohibition.

The application before this Court is made pursuant to Section 103 (2) of the Constitution of Sierra Leone, Act No. 12 of 1978, hereinafter, referred to as “The Constitution” and Rule 6 (2) of the Rules of the Supreme Court RN No. 1 of 1982, (hereinafter referred to as 'The Rules').

In my view it is relevant that I state clearly the provisions that deals with the right of appeal to the Supreme Court. This is contained in section 103 of 'the constitution.'

Section 103 provides: —

"103 (1) An appeal shall lie from a judgment, decree or order of the Court of Appeal to the Supreme Court - (a) as of right in any civil cause or matter where the amount or value of the subject matter of the dispute is not less such an amount as may be determined by parliament; or

(b) as of right, in any criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment, decree or order of the High Court of Justice in the exercise of its original jurisdiction; or

[p.109]

(c) with the leave of the Court of Appeal in any other case or matter, civil or criminal, where the Court of Appeal is satisfied that the ease involves a substantial question of law or is of public importance.

(2) Notwithstanding the provisions of the preceding subsection the Supreme Court shall have power to entertain any application for leave to appeal in any cause or matter, civil or criminal, to the Supreme Court and to grant such leave accordingly".

The provisions in section 103 (1) and (2) are repeated in Rule 6 (1) (a), (b) and (c) and Rule 6 (2) of 'the Rules'.

With special reference to Rule 6 (2) it is clear that it enables an intending appellant to apply to this Court for 'special leave' to appeal.

In the light of the application before this Court and the submissions of Counsel for applicants, due regard must be given to Rule 7 of the Rules.

Rule 7 provides:

"An application for leave to appeal must first be made to the Court of Appeal, but if leave is refused by that Court, an application may be made for special leave to appeal to the Supreme Court by notice of motion in that behalf filled by the intending appellant".

Having stated the provisions of Rule 7. I shall now refer to Rule 8 which clearly spells out the procedure to be followed in an application for "Special Leave".

Let me here and now state that 'The Constitution' is the basic law of the land from which all other enactments spring.

The Rules provide the procedure to be followed to enable any Application to be heard.

[p.110]

In my opinion, Rules 7 and 8 must be read together. I cannot subscribe to the submission that they are separate and distinct. In my view that will not only be a narrow construction of the said rules it will violently attack the hierarchy of Courts set up under 'The constitution' the case of Solomon Demby v. Mana Kpaka. S.C. Misc App. No. 7/83 delivered on the 18th April 1984, per Beccles Davies JSC (unreported). The learned Justice had this to say:

"In order to give due regard to the hierarchy of Courts set up by Sections 101. 107. 110 of the Constitution, Rule 7 of 'The Rules' provides that an application for leave to appeal must be made in the

first instance to the Court of Appeal and if that Court refuses to grant leave sought, then application could be made to this Court for special leave to appeal".

Submissions Counsel for the applicants submitted that Section 103 (1) and section 103 (2) create different powers given to the Supreme Court She submitted that it must be different, because Section 103 (2) is a restatement in a statuary enactment of the Courts inherent power or jurisdiction. Because the Legislature cannot envisage every situation the Court, being the highest Court, is given such a power to see that justice is done. In my view the main thrust of counsel' submission, is, that throughout the long and tortuous history of this case, the applicants have never had any opportunity to argue their case on the merits. She argued that at every stage they have followed the rules of the various courts and have come to the Courts with clean hands.

Counsel for the Respondents, for his part, has submitted that (1) the application is not properly before the court; (2) there is non-compliance with Rule 7 of the Rules of the Court; (3) the application is frivolous, vexatious and an abuse of the process of the Court. Counsel then buttressed his submissions with some vigorous arguments and legal authorities.

[p.111]

Indeed, the case has a long and tortuous history. However, Counsel for the applicants has urged this Court to truncate the history of the case by restricting itself to the events that took place from the 30th June, 1989 to the date of the instant application. I find this submission rather restrictive in view of the bulk of documents before the Court, which is the record of the case in the instant application.

In 'The Rules', in Part I Interpretation:—

Rule (1) provides "In these Rules unless the context otherwise require

"Records" means the aggregate of papers relating to an appeal (including the pleadings, proceedings, (emphasis mine) evidence and Judgments) proper to be laid before the Supreme Court on the hearing of an appeal or any application (emphasis mine) which by these Rules may be made to the Supreme Court".

Suffice it to say, that this Court cannot ignore all that is before it in the instant application. In my view, justice will be better served by paying due regard to the entire record before the Court. Counsel's submission is therefore untenable. Having said that, is this application properly before the Court? I will now consider the law applicable to this application. Rule 7 of the Rules is clear and unequivocal.

The application before the Court of Appeal, inter alia, was for leave for an extension of time to appeal against the judgment of the High Court given on 4th July, 1989, which application was dismissed. There was no refusal by the Court of Appeal to grant leave to appeal to the Supreme Court. In my opinion, an application for special leave to appeal to the Supreme Court by an intending appellant, can only be made after an application had been made to the Court of Appeal and it has been refused. There has been such application to the Court of Appeal which was refused.

[p.112]

Special Leave Rule 8 provides what the notice of motion should contain It cannot be said too often that this Court is a creature of statute; indeed, so are the other Courts of the Superior Court of Judicature. This Court can only act within the confines of the Constitution, the Rules and any other law which permit it so to do.

As I see it, the applicants are asking this Court to make an absurd order. That is, to grant special leave to appeal against a non-existing order. This it cannot do. Even if there was an order, this Court has no power to grant enlargement of time within which to appeal. The applicants are urging on the Court to invoke its inherent jurisdiction. This Court can do so if it is clothed with one. I have searched the Rules but I can find no specific rule giving the Court inherent jurisdiction except what is provided for in Rule 98 of 'The Rules'.

Rule 98 provides:

"Where no provision is expressly made ,in these Rules relating to the Original and the Supervisory Jurisdiction of the Supreme Court, the ,practice and procedure for the time being of the High Court shall apply mutantis mutandis"

I will now revert to the High Court Rules. The relevant High Court provision is Order 21. rule 4.

Order 21 Rule 4 provides:

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be dismissed, or judgment to be entered accordingly, as may be just.

[p.113]

An application under this rule shall be deemed to invoke the inherent jurisdiction of the Court though not mentioned as well as that given by this rule".

The corresponding English Rule as contained in the Annual Practice is order 25 Rule 4.

Rule 4 provides:

"The Court or Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

It is clear that this Court has inherent jurisdiction to grant any orders to see that justice is done. However, this jurisdiction is not invoked in vacuo, but within settled principles of law and practice.

Several issues have been raised in this application, inter alia, that the court of Appeal was wrong in not addressing the issues before it to enable it to exercise its discretion judicially.

In her submission on the wrongful exercise of the discretion of the Court of Appeal to grant an extension of time within which to appeal, counsel for the applicants has submitted, inter alia, that the Court of Appeal was wrong when it said the applicants had been to the High Court, court of Appeal and Supreme Court in the same matter.

[p.114]

The interlocutory branches had been chopped off. No basis for the reasons the Court of Appeal gave for its conclusion", she added.

In answer to the submission, I will refer to the case of Ratnam v. Cumarasamy and Another (1965) 1 WLR, 8; (1964) 3 AER, 893, where Lord Guest said in an Appeal of the Federation of Malaya:

“The principles on which a court will act in reviewing the discretion exercised by the lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: charles Osenton & Co. v. Johnson (1941) 2 AER 245 at 257. (1942) A.C. 130 at p. 148: per Lord Wright. The Court will not interfere unless it is clearly satisfied that the, discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of Justice. Evans v. Bartlam (1937) 2 AER (646: 1937 A.C. 473 ……

……..

The rules of Court must prima facie, be Obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material Of which the Court can exercise it discretion.

If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation (emphasis mine). The only material before the Court of Appeal was the affidavit of the appellant. The grounds stated were that he [p.115] did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised on wrong principles.

The principle for which the appellant's counsel contended was that the application should be granted unless to do otherwise would result in irreparable mischief

The learned lawlord considered the extract from the judgment of Bramwell L.J., in Atwood v. Chichester (1878), 3 Q.B.D. 722 AT p. 723 and continued;

"Their Lordships note that these observations were made in reference to a case where the application was to set aside a judgment by default, which is on a different basis from an app1ication to extend the time for appealing (emphasis mine). In the one case the litigant has had no trial at all in the other he has a trial and lost. Their Lordships do not regard these observations as of general application"

I am of opinion also, that the observations of Bramwell L.J. (Supreme are not of general application, at least not in the instant case.

[p.116]

The facts contained in the various affidavits before the Court of Appeal were of such a nature, that this court cannot say the exercise of the discretion by the Court of Appeal was on a wrong principle. I am of opinion that the ratio decidendi in the case of Ratnam V. Cumarasamy (supra) is applicable in the instant case with equal force.

Under the rubric "Inherent Jurisdiction", it is stated that "The Court has jurisdiction to stay all proceedings before it which are obviously frivolous and vexatious or an abuse of its process, vide Reichel V. Magrath 14 App. Cas. 665. The Court can also remove from its file any matter improperly placed therein vide Nixon V. Laundes (1990) 2 IR.R. I.

The inherent jurisdiction is a valuable adjunct to the powers conferred on the Court by these Rules. When an app11cation is made to the inherent jurisdiction of the Court, all facts can be gone into and affidavits as to facts are admissible vide Willis V. Earl Howe (1893) 2 Ch. pp. 551, 554. Vide Remmington V. Scoles (1897) 2 Ch. 1. where it was only by extraneous evidence that Romer J., was convinced that, it was a sham defence that ought to be struck out as an abuse of the process of the Court
…….

……..

In the case of Willis V. Earl How (1893) 2 Ch. (supra) in the statement of claim of an action for ejectment, the plaintiff was heir at law of w. J. who died intestate, in 1798, and that on his death his real estate was wrongfully taken possession of by the mother of G. C. an instant, in his name under the false pretence that G.C., was the pair at law to W.J., that G.C. died an infant and that his mother continued to hold possession of the estate in the name of the estate in the name of R.G., infant, whom she falsely asserted to be the brother of G.C. but who was real1y a supposititious child
……..

……...

[p.117]

The Defendant moved to have the statement of claim struck out as frivolous and vexatious, and filed an affidavit showing that the story of R.C. being a supposititious child was publicly spoken of in newspapers and otherwise as early as 1853, and had been made the ground of previous unsuccessful actions of other claimants against the defendants and his predecessors.

Held (affirming the decision of Kekewich J.) that the allegations in the statement of claim as to the entry in 1798 on behalf of G.C. did not show a case of concealed fraud within Sect 26 of the 384 Will 4 C. 27 but only a wrongful entry under a false claim that the statute began to run against the Plaintiff's predecessors in title in 1798, and as the possession had been adverse to the Plaintiff and his predecessor ever since, the operation of the title had not been suspended by the alleged fraud in 1805: and that the Plaintiff or his predecessors might with reasonable diligence have discovered the concealed fraud, if any, more than twelve years before the commencement of the action. On these grounds the statement of claim and the action was struck out and the action dismissed as frivolous and vexatious."

In this case the emphasis was the previous unsuccessful claims that had been made by other claimants against Defendants and his successors, and the Plaintiff had slept on his right and adverse possession had given title to the Defendants. In the other case of Remmington V. Scoles (1897) 2 Ch 1, A defendant delivered a statement of defence in which he either denied or refused to admit each of the allegations in the statement of claim, but set up no case of his own. In previous proceedings in another action he admitted several of the material statements which he now denied, and had not denied any of the others:—

Held (By Homer J. and by the Court of Appeal) that though the Court will not on affidavit evidence order a pleading to struck out on the ground that the statements in are false, the circumstances in the case showed the statement of defence to be frivolous and vexatious, and which ought to be struck out as being an abuse of the

Procedure of Court.

[p.118]

These two cases are very instructive and are of persuasive influence when addressing the issue of the inherent jurisdiction of the Court. In the Remmington V. Scales (supra) Romer J. said:—

"The Court has an inherent power to prevent the abuse of legal machinery. Willis V. Earl Beauchamp 11 P.B. 63. Undoubtly therefore, the Court has power to strike out a statement of claim; but the power of the Court is not confined to that: it applies also to a statement of defence which is frivolous and vexatious and an abuse of the procedure: Reichel v. Magrath (1889) 14 App. Cas. 665. It appears to me that evidence may be received in a proper case on a motion of this kind to show that a pleading is an abuse of the process of the Court: Boswell v. Coaks (1894)6R. 167. In the present case I think the Plaintiffs are entitled by their evidence to state the circumstances which show that the statement of defence is merely an abuse of process of the court, though they are not entitled, to show by evidence generally the untruth of the statements in the statement of defence".

I agree with the learned judge and the principle of law and Practice emaciated.

In the instant case, the several affidavits filed, state the circumstances in the action, culminating in this application.

"The Court of Appeal affirmed the decision of Romer J. in the aforementioned case." The Judges in the Court of Appeal, while Recognising the right of a defendant to put in a statement of Defence not confined to denying the allegations in the statement of claim, agreed with Romer J. that where the defence is a mere sham defence, not an honest defence, but framed with a view to gain time, ought to be struck out.

[p.119]

"The Court has inherent jurisdiction to stay an action which must fail …… A judicial discretion must be used as to what proceedings are vexatious; for the Court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle. The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed .....

……

so, too, any action which the plaintiff clearly cannot prove and which is without any solid basis, may be stayed under this inherent jurisdiction as frivolous and vexatious
……..

And when any party to an action has made repeated frivolous applications to the Judge or Master, the Court has power to make an order prohibiting any further application by him without leave, vide Grape V. Doan (1887) 37 Ch. D. 168: Kinnard V. Field (1905) 2 Ch. 306. But if the action be clearly vexatious and oppressive, the proper course is to dismiss it".

I am of the opinion that the Court of Appeal considered the submission of counsel on both sides and the affidavits before the more the court and made a deliberate finding that is to say:—

"Taking therefore the peculiar nature of the case and all the other authorities cited before, we are unable to grant the reliefs sought by the applicants".

[p.120]

I see no reason why this Court should interfere with the exercise of the discretion of the Court of Appeal to refuse to grant the reliefs sought. I am satisfied the discretion was properly exercised. Indeed the Court of Appeal need not have given reason for refusing to exercise its discretion in favour of the applicants. Vide the case of Donald Macauley V. Emmanuel Shallop and Mirib Shallop SC. Misc. App. 3/8 (Unreported). In that case, the Supreme Court made this ruling per Harding J.S.C Beccles Davies J.S.C. agreeing and Awunor-Renner J.S.C. dissenting.

"I have listened carefully to the arguments of counsel on both sides and read the various affidavits thereto tiled herein. As regards the first order applied for, I do not think this is proper case calling for the exercise of my discretion to grant special leave to appeal to this court, accordingly, I would refuse special leave. Special leave to appeal to this court having been refused, it necessarily follows that no

order for a stay of execution of the judgment could be ordered by this Court. I would dismiss the application with costs to the respondent".

Having spelt out some of the principles and practice by which the Court acts when the inherent jurisdiction is invoked, I wil1 now consider its applicability in the instant case.

This is a case replete with several applications since the Writ of Summons was issued in December, 1985. The first of these was, to secure an order to enter judgment in default of appearance by the applicants. Thereafter, all the applications for some order or the other have been made either in the High Court, Court of Appeal or Supreme Court by the applicant. Some have been warranted and some unwarranted. In my 20 years in the Supreme Court of Judicature, I have yet to recall any such prolific and persistent applications as in the instant case.

[p.121]

In the instant case, it is one more attempt by the applicants to secure an order to challenge the judgment given on 4th July 1989: and I am of opinion that it is an abuse of the due process of the law. This Court ought not to permit it and will not permit the abuse of its process. From the record before the Court, this application ought to have been dismissed without Counsel being heard. It ought to be noted that the application before the Court is for the following orders:

"(1) Special leave to appeal against a ruling and order of the Court of Appeal dated 20th June, 1990.

(2) stay of all proceedings in the High Court in an action CC. 30/85. 1985, A. No. 26 — IN THE HIQH COURT OF SIERRA LEONE

BETWEEN

ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES) — PLAINTIFF

And

NIGERIAN NATIONAL SHIPPING LINES — DEFENDANTS

Pending the hearing and determination of the application and pending the hearing and determination of the proposed appeal".

Let me here and now state that the action sought to be stayed before the Court o£ Appeal, which among other orders sought, was CC. 806/85 1985 N. No 28 — Between Nigerian National Shipping Lines vs. Abdul Ahmed as amended to read Abdul Ahmed (Trading as Abdul Aziz Enterprises and Nigerian National Shipping Lines.

The High Court Cause List revealed that CC. 30/85 B. No. 4, was between Kalba Bangura vs. Samuel Carew. This being the case, how then can the Court are required to make an order in respect of a matter that had no relationship to the matter which was before the Court of Appeal.

It is either one of two things or both: — that the application was made [p.122] male fides or it was deliberate attempt to mislead the Court. Whether it is one or the other, it is clearly an abuse of the due process of the Court I shall say no more. Nevertheless, this Court in its pursuit of Fairness and in the interest of justice heard arguments on both sides

In my opinion the applicants having failed to obtain an order for an extension of time within which to appeal against the Judgment of the High Court dated the 4th July, 1989, have now come to this Court for special leave to appeal against the Ruling of the Court of Appeal for an order which is tantamount to an enlargement of time within which to appeal against the said Judgment. If this Court were to grant the orders prayed for, it would be a travesty of the law.

This Court has ruled that it has no power to grant an order for enlargement of time within which1to appeal. Vide Solomon Demby v. Mana Kpaka (supra). In that case, Beccles Davies J.S.C reviewed in the decision in the case of Gatti v. Shoesmith (1939) 3 All E. R. 916 and ruled thus:

“To be able to exercise a discretion the Court must be empowered by some rule of law or practice which then becomes the basis on which the discretion could be exercised one way or the other. There is no similar provision in the Rules of this Court giving it a blank cheque as it were to exercise its discretion to extend time within which special leave could be applied for".

I entirely agree with the ruling of the learned justice. In view of the fact that there was no application before the Court of Appeal which was refused which could be renewed under Rule 7 of the Rules,’ I am of the opinion that it was inappropriate and premature to invoke the provisions under Rule 8 of the Rules.

Finally, the applicants having 1nvoked the inherent jurisdiction of the court, the law must take its course. I will re-echo the submission of Counsel for applicants that the history of this case is not [p.123] only long and tortuous, but scandalous. Litigation must come to an end. See the case of In the Davies A.L.R. SL (1920-1936) 12 at 14; and the case of Brown v. Dean & another (1910) A.C. 373 AT6 374.

In the case of Brown v. Dean and another (1910) A.C. 373 at 374 where Lord Loreburn L.C. said:

“My Lords, the chief effect of the arguments which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine “Interest Republicae ut sit finis litium”. means at their command are easily able to exhaust the resources of a poor antagonist.

With great respect for the authority of Fletcher Moulton L.J., I am of opinion that the order of the divisional court confirmed by the majority of the Court of Appeal is perfectly right. When a litigant has obtained judgement in a Court of justice or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solids grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as presumably to be believed, and if believed would be conclusive”.

I entirely agree with the learned law lord, and adopt the pronouncement in toto.

In view of what I have said supra, I hold this application to be wholly unfounded, frivolous and vexatious and ought to be dismissed, and I accordingly dismiss the application with costs to the respondent

SGD.

SYDNEY WARNE, J.S.C

[p.124]

NAVO, J.S.C.,

By noticing of motion Misc. App. 4/90 dated the 19th day of July, 1990 the Applicant the Nigerian National Shipping lines, applies to this Court for the following orders:

1. That the Applicant be granted Special leave to appeal against the Ruling and order of the Court of Appeal in the matter:

Misc. App.50/89

IN THE COURT OF APPEAL FOR SIERRA-LEONE

BETWEEN:

NIGERIAN NATIONAL SHIPPING LINES — APPLICANT

AND

ABDUL AHMED (TRADING AS ABDUL AZIZ

ENTERPRISES) —RESPONDENT

DATED 20TH JUNE, 1990

2. A stay of all proceedings in the High Court action CC 30/85 1995 A. No. 26 IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

ABDUL AHMED(TRADING AS ABDUL AZIZ ENTERPRISES — PLAINTIFF

AND

NIGERIAN NATIONAL SHIPPING LINES – DEFENDANT

Pending the hearing and determination of this application and pending the hearing and determination of the proposed appeal. (The underlined for purposes of emphasis is mine)

[p.125]

The applicant supplied three grounds upon which special leave to appeal is sought, which if the necessity arises, I shall consider in the Ruling.

I find it necessary at this stage to state that I have had the previledge of reading in the thinking of my learned brother Warne J.S.C., with which I am in total agreement that this application fails in its entirety and should be dismissed.

The Applicant says that this application is made pursuant to Section 103(2) of the Constitution, Act. No. 12 of 1978. My learned brother Warne JSC has so exhaustively interpreted the provision of Sec. 103 of Act, No.12 of 1978 that there is very little, if anything, that I can usefully add to his exposition of that section a dissatisfied litigant to come to this court. The practise and procedure to do this is provided for under Rules 6 and 7 of the Rules of this Court, Public Notice No.1 of 1982 as follows:

"6(1) Appeal shall be from a judgment, Decree or Order of the court of Appeal to the Supreme Court

(a) ……(b)……

(c) with leaves of the court in any other cause or matter civil or criminal where the Court of Appeal is satisfied that the case involves a substantial question of law or is of public importance.

(d) …… (e)……(f)……."

7. Application for leave to Appeal must first be made to the court but if leave is refused by the Court an application may be made for Special Leave to appeal to the Supreme Court by notice of motion in that behalf filed by then intending applicant."

The provision of Rule 6(1) (c) is ipssisima verba that of s.103 (10)(c).

There is no evidence before us that the procedure in Rule 7 of these Rules was complied with in bringing this Application. Further more, the order against which still leave is sought to appeal was not drawn up and filed. The Application therefore is not properly before this court and ought to have been dismissed without asking the respondents to answer. The rules of our Court speaks in peremptory language — it says " Thou shall and if thou does not, thou art out.

But before I dismiss this Application let me consider the second order prayed for. It asks for:

"(2) A stay of all proceedings in the High Court Action CC 30/85 1985 A. No.26 IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES -PLAINTIFF

AND

NIGERIAN NATIONAL SHIPPING LINES - DEFENDANT

[p.126]

I quote extracts fro the judgment of Purcell C.J. at p.15 Purcell C.J.— after his opening remarks had this to say inter alia

"…… I can only express my surprise that Mr. Barlatt is not better informed and instructed with regard to the practice regulating appeals and the time within which such application must be made. Not only has this appeal court been in existence for nearly 10 years but the rules regulating these matters are perfectly well known and have on several occasions been discussed at length in this court."

The Learned C.J. referred to the Ghana case of AMPONDURO V. WEREKU

(1905) then 313 and went on to say

"……we are quite certain that the object of the rules was to limit the time during which an appeal could be kept hanging over a successful litigant's head, and during which he could be kept out of the fruits of his judgment."

The Learned C.J. went on to say at p. 19

"As was said by Thesager C.J.

x x x x x x x x x x

" In the interest of the public the court ought to take care that appeals are brought before it in proper time, and as between the parties it has often been remarked, in the branch of this court which sits at Lincoln's Inn, that when a judgment has been pronounced, and the time for appeal has elapsed without appeal, the successful party has a vested right to the judgment, which ought, except under every special circumstances, to be made effectual. And I think that the legislature intends that appeals from judgments should be brought within the prescribed time and that no extension of time should be granted except under very special circumstances."

x x x x x x x x x

The learned C.J. concluded his judgment in these words

"For myself I think the time has come when this court should speak with no uncertain voice on this question of these applications by a would be appellant who has merely neglected to take the advantage of the machinery which the law allows him with regard to appealing. I think that this court should let it be known that in future it will not, except under very peculiar and extraordinary circumstances, grant special leave to appeal. I do not think that this can be too widely understood or recognised. So far as the present application is concerned, and for the reasons I have already stated, I think that this application should be dismissed with costs."

[p.127]

Pending the hearing and determination of this application and pending the determination of the proposal appeal.

The order Prayed for is most interesting if not deceiving. All through these proceedings the records in this action the records speak of and the parties argued on an action amanating from writ of Summons numbered CC.806/85 1985 A.NO.26 between the parties mentioned above. That we are asked to stay proceedings in an action CC30/85 1985 A.NO.26 did not only defeat this application itself but also led us to do some research in the records, which surprisingly revealed that action CC30/85 was, or is still a matter between KABBA BANGURA VS. SAMUEL CAREW who are not parties to this application.

How on earth can we be asked to, and can we, stay all proceedings in action CC.30/85 between parties than these in the current action when they are all strangers to that action. If reference to the Bangura v. Carew case CC.30/85 was made only once in the notice of motion one would have entertained a very remote probability. That it was a mistake but it was repeated even in para 2 of the Affidavit of Yasmin Baindu Jusu Sheriff sworn to on the 19th day of July 1990 exhibit as "YBJS"?

In his Affidavit in opposition to this application Mr. A.J. Bishop Gooding has deposed, and that has not been refused, that since judgment in the original action in the High Court was Delivered in 1985 the defendant/Applicant has adopted various strategies to defeat the ends of justice and to deprive the successful Plaintiff/respondents of the fruits of his judgment. For example not less than four application have been made to the court of Appeal, six to the Supreme Court and which but for one in the Supreme Court for an order of certiorari, Mandamus and Prohibiting have been dismissed with costs which costs plus that of the trial by the High Court ordered against the applicant, have still now not been paid and that this tantamount to a deliberate attempt to defeat the ends of justice. He further asked the court to make an order that the applicant be not allowed to come by any means to this court or the courts below as there is no appeal as pending within the jurisdiction of the courts.

I have considered this application and perused also the affidavits and document filed by both parties and have come to the conclusion that they are all for leave or special leave to appeal against the judgment of the High Court and this defeats the ends of justice a gross abuse of the process of these courts. There must be an end to litigation. And it is this Court, the highest in the land, to speak loud and clear once and for all, to all who practice before our court.

On the question of application for extension of time within which to appear the Rules are quite clear and have been dismissed on umpty times in this Court and in the courts below, and all practitioners in these Court sought to be aware of. I wish only to refer to case of NICHOLAS VS. MBOYAWA (1922) A.L.R. (S.L. Series) 1930-36 (Full Court (Purcell C.J.,) Sacrey — Cookson J. and McDonnell.

[p.128]

And so do I, speaking for myself, dismiss this application with costs. The respective judgments of the High Court and the assessment Proceedings are affirmed.

"I further order that the said Applicant or any of time be not allowed to make any further application in these proceedings or either of them to this court being first obtained. And if notice of any such application shall be given without such leave being obtained, and it shall be dismissed without being heard."

SGD.

HON JUSTICE S.T. NAVO

JUSTICE OF THE SUPREME COURT

CASES REFERRED TO

1. Ratnam v. Cumarasamy and Another (1965) 1 WLR, 8; (1964) 3 AER, 893

2. Osenton & Co. v. Johnson (1941) 2 AER 245 at 257. (1942) A.C. 130 at p. 148

3. Evans v. Bartlam (1937) 2 AER (646: 1937 A.C. 473

4. Atwood v. Chichester (1878), 3 Q.B.D. 722 AT p. 723

5. Reichel v. Magrath 14 App. Cas. 665

6. Nixon v. Laundes (1990) 2 IR.R. I

7. Reichel V. Magrath 14 App. Cas. 665

8. Willis v. Earl Howe (1893) 2 Ch. pp. 551, 554

9. Remmington V. Scoles (1897) 2 Ch. 1

10. Willis V. Earl How (1893) 2 Ch. (supra)

11. Reichel v. Magrath (1889) 14 App. Cas. 665

12. Boswell v. Coaks (1894)6R. 167

13. Grape v. Doan (1887) 37 Ch. D. 168: Kinnard V. Field (1905) 2 Ch. 306

14. Donald Macauley v. Emmanuel Shallop and Mirib Shallop SC. Misc. App. 3/8 (Unreported)

15. Gatti v. Shoesmith (1939) 3 All E. R. 916

16. Brown v. Dean & another (1910) A.C. 373 AT6 374

17. Amponduro v. Wereku (1905) then 313

18. Nicholas vs. Mboyawa (1922) A.L.R. (S.L. Series) 1930-36

STATUTES REFERRED TO

1. Section 103 (2) of the Constitution of Sierra Leone, Act No. 12 of 1978

OSMAN B. CONTEH v. SIERRA LEONE DOCK WORKERS UNION

[SC. CIV. APP. NO. 5/84] [p.159-170]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 8 JULY 1994

CORAM: HON. MR JUSTICE C.A. HARDING, JSC.

HON. MRS JUSTICE A.V.A. AWUNOR-RENNER, JSC.

HON. MR JUSTICE S. BECCLES DAVIES, JSC.

HON. MR. JUSTICE EA. SHORT, JSC.

HON. MR. JUSTICE M.S. TURAY, JA.

BETWEEN

OSMAN B. CONTEH APPELLANT

Vs.

SIERRA LEONE DOCK WOKERS UNION RESPONDENTS

AWUNOR-RENNER, J.S.C.

THIS IS THE JUDGMENT OF THE COURT WITH WHICH THE OTHER MEMBERS OF THE COURT AGREE WITH THE EXCEPTION OF THE HONOURABLE JUSTICE F. A. SHORT WHO IS NOW DECEASED.

This is an appeal from the Judgment of the Court of Appeal dated the 6th day of January, 1984 reversing a judgment of the High Court dated the 20th day of October, 1982.

The facts on which the appeal turns are as follows:

The Appellant Osman Borbor Conteh had been in the Service of the Sierra Leone Dock Workers Union (hereinafter known as the "Union"), the Respondent herein, for a number of years during which period he had been elected as Assistant General Secretary and finally in November, 1971 as full time General Secretary of the Union.

[p.160]

His salary at the time was Le4000.00 per annum plus other fringe benefits.

On the 22nd day of May, 1979, the President of the Respondent Union one D.F. Kanu wrote to the Appellant as Secretary General asking him to convene a meeting of the Executive Council for Saturday the 26th day of May. The Appellant wrote back to say that that day was not convenient for him. Kanu wrote again asking him to convene the said meeting on Monday the 28th day of May, 1979 but the Meeting was not convened by the Appellant on that date. The President himself convened the meeting and it was on that date that the Executive Council wrote to the Appellant to say that he had been suspended from office with effect from that date.

He was neither present at the said meeting nor informed in writing that charges would be preferred against him at that meeting.

The Appellant was then ordered to make an inventory of the Unions' properties in his custody in the presence of the Trustees of the Union, this he refused to do and was subsequently dismissed from the office of Secretary General by the Executive Council of the Union.

The Appellant thereafter instituted this action against the Respondents asking the High Court for a declaration that the action taken by the Executive Council of the Respondent Union in suspending him on the 28th day of May, 1979 and in subsequently dismissing him on the 22nd day of September, 1979 from the Office of Secretary General of the Union were both contrary to the Rules of Natural Justice and therefore illegal and in the alternative were ultra vires the rules of the Respondent Union.

[p.161]

The Appellant further claimed arrears of salary plus other fringe benefits which he alleged he was entitled to from the date of his suspension on the 28th day of May, 1979 until the date of Judgment.

At the time of the suspension referred to, the Appellant stated that he was in receipt of a salary of:

(1) Le4000.00 per annum

(2) Transport Allowance of Le160 per month and

(3) Entertainment Allowance of Le60.00 per month.

The Respondent filed a Defence and Counterclaim against the Appellant. Judgment was however given in favour of the Appellant in the High Court but this was later reversed in the Court of Appeal substituting a Judgment in favour of the Respondent. Let me at this stage deviate and say that the Appellant's appointment and Conditions of Service were subject to the Rules of the Sierra Leone Dock Workers Union (hereinafter referred to as the "Rules") which were tendered in evidence. The Rules govern the Union and bind everyone of its members and officials, it is therefore convenient at this stage to refer to the relevant Rules in so far as they affect the position of the Appellant in this matter:

RULE 5(1) "The government of the Union shall be the Annual Conference and Subject to that authority the Executive Council.

RULE 7(5) "The Executive Council may appoint organisers and such clerical staff as it may consider necessary for the smooth working of the Union. It may suspend or dismiss any officer or member of staff.

[p.162]

for neglect of duty, dishonesty incompetence, refusal to carry out the decisions of the Executive or for any other reasons which it deems good and sufficient in the interest of the Union. It shall decide the salary of the General Secretary, Office Staff and the amount of honoraria to be paid to other officers.

RULE 8(2) The Officers of the Union shall be the President, General Secretary, Assistant Secretary, Financial Secretary, Treasurer Trustees and Auditors.

RULE 8(4) The General Secretary shall be elected by a vote of the Annual Conference and shall hold office at the pleasure of the union etc.

RULE 19(3) No member or official shall be suspended or expelled unless he has been given an opportunity to state his case personally at a meeting of the Executive Council of which he has received not less than seven days notice in writing.

The matter with which the official is charged shall be set out in such notice.

The Appellant has now appealed to this Court on the following grounds:-

(1) That the Learned Justices of Appeal wrongfully and unjustifiably usurped the functions of the Learned Trial Judge who had the advantage of seeing and hearing the witnesses in their oral testimony and had resolved violent conflicts in the evidence given by witnesses on both sides [p.163] by reversing findings of facts made by him and substituting their own impression of how the evidence should have been viewed and how the issues should have been decided, without applying or seeking guidance from any of the settled and well established legal principles contained in decisions of the Court of Appeal or the Supreme Court or indeed in any other Court for that matter setting out the criteria governing cases where an Appellate Court can properly reverse findings of fact made by the said Judge.

(2) That the Learned Justices of Appeal failed to consider adequately the various legal issues raised in the Appeal inspire of the Legal Arguments on both sides and the several authorities cited by treating the matter as being one between Master and Servant notwithstanding the fact that the matter concerned essentially members of a Trade Union and the interpretation of the Rules of a Trade Union.

(3) That the Learned Justices of Appeal failed to avert their minds to and accordingly failed to apply the several legal principles and presumptions governing the rules of Natural Justices to the instant case, thereby arriving at an erroneous Judgment.

Counsel for the Appellant argued that the Respondents failed to comply with the principles of Natural Justice and that they were therefore in breach of the audi alteram partem rule when they suspended the Appellant on the 28th day of May, 1979 and subsequently dismissed him on the 22nd day of

September, 1979 and that these actions were therefore illegal and in the alternative were ultra vires the rules of the said union.

He referred the Court to the case of RIDGE V BALDWIN and several [p.164] other authorities in his case for the Appellant. He further stated categorically that he was submitting and I quote that:

"One of the fundamental rules of Natural Justice is that man has a right to be heard: audi alteram partem.

The rule embrace the whole nature of the fair procedure or due process. The position is clear in that when a person is in a judicial or quasi judicial position to exercise judgment or administer power and does so in a manner which could affect the livelihood of another then that person is bound to comply with the principles of Natural Justice"

He also stated that the Appellant was never informed; that he was going to face charges at the meeting of the 28th April, not informed of what the charges were. He also alleged that the Appellant was never afforded the opportunity of defending himself. He also relied heavily on Rule 19 (3) of the rules of the Union, as stated supra.

Counsel for the Respondents on the other hand presented the following arguments on their behalf. He argued that Counsel for the Appellant and himself conceded that the Appellant himself was an employee of the Union' and that if that was the case the Rules of Natural Justice would only apply if there was any attempt to expel the Appellant from his Union. In the present case he said that the Appellant was dismissed from his employment. He referred to ABBOT V. SULLIVAN reported in (1952) 1 K.B. at page 189 and Rule 19 (3) Supra. He further argued that the Appellant held office at the pleasure of the Union and was never suspended or expelled by the Union. The applicable rule he contended was Rule 7 (5). He said therefore that the Appellant should not have come to Court for wrongful dismissal but for wrongful expulsion. He too referred to the case of RIDGE V BALDWIN and another reported in 1963 2 A.E.R. at page 66 and at page 71. He further claimed that the High Court and the Court of Appeal applied two principles. The High Court relied on Rule 19 (3) of the Rules of the Union and the Court of Appeal relied on Rule 7 (5) of the same rules and came to the conclusion that the [p.165] Appellant was an employee of the Union and in addition to being a member of the Union.

The rules of Natural Justice were therefore not applicable to his dismissal or suspension.

I have already referred to the relevant rules in this action and now propose to deal with the most salient points and uncontroverted facts given in the evidence so far briefly:

Let me first of all deal with the question of Natural Justice as was presented to [the Court] me by Counsel for the Appellant on his behalf. In my opinion; the gravamen of Counsel's argument was that he claimed that the Appellant had been employed as Secretary General of the Sierra Leone Dock Workers Union. He had been elected by virtue of Rule 8 (4) supra and should have remained in office at the pleasure of the Annual Conference. Had that been the case this would have bet a simple matter. See the case of TERREL & COLONIAL SECRETARY of State for the Colonies. Reported in (1953) 2 A.E.R. at Page 90.

That case involved the tenure of office of a Colonial Judge who had been dismissed and who had held office at the pleasure of the crown. On a Claim by him that he was not liable to be dismissed before he reached the age of 62 when he would be entitled to a larger pension it was held:

1. That Judges in Malaya did not held office during good behaviour but had held office at the pleasure of the crown and therefore the claimant had held office during pleasure. (continued at p.7)

2. The right of the Crown to dismiss at pleasure was a rule of law which could not be taken away by any contractualarrangement made by any Executive Officer or department of State and therefore the letter of July 5 and August 7 1930 did not constitute a contract between the claimant and the Crown that the Crown would employ him till he reached the age of 62 and therefore his claim must be dismissed.

Apart from Judges and others whose tenure of office is governed by Statute all servants and officers of the Crown hold office at pleasure [p.166] and this has been said to apply to a Colonial Judge "TERREL & SECRETARY of STATE Supra "It has always been held and I think rightly that such an officer has no right to be heard before he is dismissed and the reason is clear, as the person having the power of dismissal need not have anything against the officer, he need not give any reason".

I have cited this case to give illustrations of what is meant by "at the pleasure of"

The Appellant in this matter was not suspended and dismissed by the Union. As a. matter of fact the Appellant was first suspended by the Executive Council on the 28th day of May, 1979 in accordance with Rule 7(5) of the Rules. He was subsequently dismissed from his office as Secretary General by the same Executive Council who claimed to have acted under the same rule.

The Executive Council had power to suspend or dismiss any officer or member of Staff for neglect of duty, dishonesty, incompetence or refusal to carry out the decision of the Executive etc.

The Appellant was not only a paid up member but also an officer of the Union. He had been asked to convene a meeting of the Executive Council on the 26th day of May, 1979. This he failed to do.

A meeting was convened by the Executive Council on the 28th day of May, 1979 and it was at that meeting that the decision was taken to suspend the Appellant. He was neither present at that meeting nor told that charges would be preferred against him on that date or what the charges would be. He had no opportunity of defending himself in any way before the suspension. Later on in September he was subsequently dismissed. It is my opinion that the Executive Council was definitely in breach of the Rules of Natural Justice and legal principles of the Audi Alteram Partem Rules. What Audi Alteram Partem rule contemplates is an adequate opportunity to appear and be heard. I have come to this conclusion after considering all the evidence and legal principles relating to this matter [canvassed] adduced before this Court.

[p.167]

I do not in anyway support [agree with] the arguments put forward for the Respondents.

The Court of Appeal was clearly wrong in arriving at a different conclusion from that of the High Court without even averting their minds to the Audi Alteram Partem rule or rule 19 (3) which is in my view are more or less synonymous with that of the audi alteram partem rules.

I would also like to quote a few of the utterances made by Justice Navo – J. A. in his Judgment to support my conclusion. At one point he said and I quote:—

"It is clear, that the Respondent was not heard in his defence before he was suspended and dismissed but was he given an opportunity to be so heard? or did the occasion require the Executive to clearly sit and wait for the Respondent at his convenience to be first heard before they look the steps while they did.

There is no doubt that Justice Navo knew from the evidence that the Appellant had not been notified of the charges that would brought against him or informed him why the meeting was being held, (See page 13).

In another paragraph he further had this to say again I quote:—

"On the complaint that the appellant did not observe the rules of natural justice that is the audi alteram partem rule, there was abundant evidence, that the respondent was summoned to the meeting which discussed his suspension but in flagrant disobedience, arrogance and gross insubordination refused to attend and instead was holding an unauthorised meeting with some members of the Union at the same time the Executive meeting was held".

From these quotation it is quite clear that the Court of Appeal was quite cognisant of the fact that the Appellant was not heard in his own [p.168] defence before he was suspended and dismissed. It is also quite clear that there was a breach of the audi alteram partem rule because even though the Court of Appeal accepted that the Appellant was summoned to the meeting they refused to accept that in fact no notice of the charges which the appellant had to face was ever communicated to him in writing at least seven days before meeting at which the appellant case was considered and his subsequent dismissal.

For the reason given above, I have no alternative but to find for the appellant after considering, the evidence, the .rules and cases referred to supra, again I must say that.

On the while I do not agree with the Court of Appeal for the reasons given above and wish to add that apart from the Appellants case the Respondent in his own case and arguments presented in this matter seem to have supported the Court of Appeal in some parts by agreeing with them whole heartedly. I do not expect him [them] to behave otherwise as he [Counsel] gave his reasons for his support by stating that this was a case of Master and Servant and that the Appellant further held office at the pleasure of the Union. He further stated that the Respondent was suspended from office as General Secretary and subsequently dismissed from that post. He was neither suspended nor expelled from the Union. That distinction is absolutely necessary to be made quite apparent because the principle of natural Justice has been held not to be applicable to the original contractual relation of Master and servant as stated

above. I agree with Counsel for Respondent when he said that the appellant was dismissed by the Executive Council as secretary General but had they the right he do? The answer is no. This is in contrast to the Letter of Dismissal Exh "E". That letter states that Appellant was dismissed in pursuance of Rule 7 (5) Supra. He himself Counsel for Respondent had admitted that the Appellant" held office at the pleasure of the Union rule 8(4).

This being the case the Executive had no right to dismiss him as [p.169] Rule 8(4) is quite clear on this point as I have already explained the position Supra. The Executive Council alleged that the Appellant had been disobedient and refused to call a meeting of the Executive Council when requested to do and to make an inventory of the Unions Properties in his possession which he was requested to do and as such they had very wide powers of disciplining him. I hold that the Appellant should have been dismissed by the Annual General Council and no more.

This is not a case of Master and Servant. The Respondent's counsel relied on The Rules of the Union. In paragraph 15 of the case for the Respondent, he said;

"The Respondent consequently submits that the purpose of Rule 19(2) and 19(3) of Exh."A" was to meet the requirement.

English Law as outlined above, and further said that the provisions of the said subsections of 19(2) and 19(3) have absolutely no application in the contractual relationship of Master and Servant. After considering the rules of natural Justice and the rules of the Union as relied upon above and the evidence adduced. I hold that the declaration sought in this case ought to be granted.

1. The Appellant is entitled to his salary from the 28th day of May 1979 to the day of judgment in the High Court which is the 20th day of October 1988.

2. I allow Le. 60 a month for entertainment.

3. I allow Le. 100 a month for transport for the same period.

As regards the Defendants/Respondents Counterclaim. I would allow them the sum of Le600 which had been paid to the Appellant in respect of the Seminar, in Ghana, which did not materialize.

I would also allow them the sum of Le600 which the Appellant had not accounted for as, alleged by the Respondents. He had produced debit notes from Giani Store in support of his case that he had bought drinks for the I.T.F. Seminar. There is no receipt in support of his assertion.

[p.170]

The Appellant had paid 17 instalments totalling Le1,413.12 from May 1979 on the loan granted him by the Respondents for the purchase of his car, this I would allow him. The outstanding balance would be deducted by the Respondents from the salary due to him.

Interest to be paid to the Appellant on all monies due and owing to him under this Judgment at the rate of 5% per annum.

Costs to be paid by the Respondents to the Appellant. Such costs to be taxed

SGD

HON. MRS. JUSTICE A.V.A. AWUNOR-RENNER J.S.C

I agree.

SGD

HON. MR. JUSTICE S. BECCLES DAVIES Ag. C.J.

CASES REFERRED TO

1. Abbot V. Sullivan reported in (1952) 1 K.B. at page 189 and Rule 19 (3) Supra

REV. DANIEL ADEMU JOHN v. ABU BLACK LUGBU

[SC. MICS. APP. 4/2000][p.321-324]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 24 OCTOBER 2000

CORAM: Hon. Mr. Justice D.E. F. Luke,

Hon. Mr. Justice A.B. Timbo

Hon. Mr. Justice H.M. Joko-Smart, J.SC.

Hon. Mr. Justice S.C.E. Warne Hon. Mr. Justice V.A.D. Wright

REV. DANIEL ADEMU JOHN - APPLICANT

(ATTORNEY FOR REV. ARCHIBALD GBAMBALD JOHN)

(EXECUTOR OF THE ESTATE OF REV. CUSTAVUS ADEMU JOHN)

AND

ABU BLACK GUGBU

ALIE FOFANAH

LAMIN DAINKEH

R. A. Ceasar Esquire for the APPLICANT

A.F. Serry-Kamal Esquire FOR THE RESPONDENTS

MR. R.A. CAESAR

This is an application by way of Misc. App. 4/2000 dated 16th June 2000 in which the applicant is asking the Court that the Ruling of this Honourable Court delivered by three Justices on 22nd September 1999 granting a Stay of Execution of the judgment of the Court of Appeal dated 17 the June 1993 be varied discharged or reversed by the full Court pursuant to section 126 (b) of the Constitution of Sierra Leone (Act No. 6 of 1991 on the following grounds:

(1) That the said Ruling if not varied discharged or reversed will defeat the ends of Justice in that there is no appeal pending in the Supreme Court.

[p.322]

(2) That the orders contained in the said Ruling have not been complied with by the Respondents.

(3) That the said order presently existing is a bar preventing, the applicant from enforcing the Judgment of the Court of Appeal dated 17th June 1993 in his favour.

Applicant will rely on the affidavits of Rev. Daniel Ademu John and Roland Ade Ceasar both sworn to on the 16th June 2000 together with the exhibits annexed thereto and filed herewith.

The Exhibits are as follows:

Exh. A is a photocopy of his Power of Attorney executed by Rev. Archibald Gbambala John. Exhibit B is the Writ of Summons, C — Judgment of the Court of Appeal to the Supreme Court, E - records of the Supreme Court dated 21st September 1999 and E ruling dated 22nd September 1999.

The purpose of the Application is not to complain of an irregularity but because section 126(b) of the Constitution is the only way we can come to this Court to vary reverse or discharge its order.

Mr. Serry-Kamal does not really objects except that the affidavit of the deponent should not have been in his name.

Court: Application granted. Order of 22nd September 1999 is discharged. No order as to costs.

Hon. Mr. Justice D.E.F. Luke Chief Justice.

[p.323]

MR. R.A. CAESAR

This is an application by way of Misc. App. 4/2000 dated 16th June 2000 in which the applicant is asking the Court that the Ruling of this Honourable Court delivered by three Justices on 22nd September 1999 granting a Stay of Execution of the judgment of the Court of Appeal dated 17 the June 1993 be varied

discharged or reversed by the full Court pursuant to section 126 (b) of the Constitution of Sierra Leone (Act No. 6 of 1991 on the following grounds:

(1) That the said Ruling if not varied discharged or reversed will defeat the ends of Justice in that there is no appeal pending in the Supreme Court.

[p.324]

(2) That the orders contained in the said Ruling have not been complied with the Respondents.

(3) That the said order presently existing is a bar preventing the Applicant from enforcing the Judgment of the Court of Appeal dated 17th June, 1993 in his favour.

Applicant will rely on the affidavits of Rev Daniel Ademu John and Roland Ade Caesar both Sworn to on the 16th June, 2000 together with the exhibits annexed thereto and filed herewith.

The Exhibits are as follows:

Exh. A is a. photocopy of his Power of Attorney executed by Rev. Archibald Gbambala John Exhibit B is the Writ of Summons. C—

Judgment of the Court of Appeal, D.-Notice of Appeal to the Supreme Court, E - Records of the Supreme Court dated 21st

September, 1999 and E — Ruling dated 22nd September, 1999.

The purpose of the Application is not to complain of an irregularity but because Section 126(b) of the Constitution is the only way we can come to this Court to vary reverse or discharge its order.

Mr. Serry-Kamal does not really objects except that the affidavit of the deponent should not have been in his name.

Court:

Application granted. Order of 22nd September, 1999 is discharged. No order as to costs.

SGD.

HON. JUSTICE D.E.F. LUKE

CHIEF JUSTICE

RICHARD ZACHARIAH v. JAMAL MOROWAH

[SC. MISC. APP NO. 2/87] [p.20-24]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 23 JUNE 1987

CORAM: MR. JUSTICE S.M.F., KUTUBU - CHIEF JUSTICE, PRESIDING

MR. JUSTICE C.A. HARDING - JUSTICE OF THE SUPREME COURT

MR. JUSTICE S. BECCLES DAVIES - JUSTICE OF THE SUPREME COURT

BETWEEN:

RICHARD ZACHARIAH - APPELLANT/APPLICANT

VS

JAMAL MOROWAH - RESPONDENT/RESPONDENT

E.A. Halloway Esq. for the Appellant/Applicant

A.F. Serry Kamal Esq. for the Respondent/Respondent

RULING

BECCLES DAVIBS. J.S.C.

The Appellant/applicant by his Notice of Motion dated 24th April 1987 as amended has sought the following orders:—

1. That the order of the Court of Appeal dated the 8th day of April 1987 and all proceedings thereof be stayed pending the hearing and determination of the Appellant/Applicant's appeal to this Honourable Court - Civ App 4/87

2. That the order or the High Court dated the 17th day of March 1987 and all proceedings thereof be stayed pending the hearing and determination of the Appellant/Applicant's appeal to this Honourable Court Civ App No 4/87.

[p.21]

3. An order setting aside the Writ of Possession issued pursuant to an ex parte order of the High Court dated the 29th day of April 1987 in that the said Honourable Court lacked jurisdiction to grant such an order in interlocutory proceedings and furthermore the said writ of Possession was irregular in that it was not attested in the name of the Chief Justice of Sierra Leone.

4. An order that possession of this said shop numbered 30 Goderich Street Freetown in the Western Area of the Republic of Sierra Leone be given by the Respondent to the Appellant/Applicant and for leave to issue a Writ of Restitution in that behalf.

5. An interim stay of 1 and 2 aforementioned pending the hearing and determination of this application.

6. Any other further order as to this Honourable Court may seem just.

7. That the costs of this application be costs in the cause."

Mr. Serry Kamal raised a preliminary objection to the hearing of the application on the ground that Counsel for the Applicant had applied to the Court of Appeal under Section 56(1) (b) of the Court's Act and Rule 10 of the Court of Appeal Rules. The appeal was not properly before the Court.

[p.22]

I shall now state the facts as they appear from the papers filed by Counsel for the applicant.

The applicant as the plaintiff in the High Court had obtained judgment in default of Appearance against the Respondent (as defendant) in the High Court. That judgment was set aside by the High Court on the application of the respondent. The applicant then applied to the High Court for leave to appeal to the Court of Appeal against the order setting aside the judgment in default of appearance. Leave was refused. An application for leave to appeal was thereafter made to the Court of Appeal. That application was also refused. The applicant lodged an appeal as of right to this Court. It Is on the basis of the purported appeal to this Court that the applications there set out are founded.

As I understand Mr. Serry Kamal's objection, the appeal filed in this Court is improperly before it therefore this Court cannot properly entertain and grant the orders sought. Mr. Halloway's reply was that the judgment of the High Court was final. He consequently had a right to file an appeal without seeking leave to do so.

The perfected order of the High Court is in the following terms:—

1. That the judgment in default of appearance dated the 26th day of January 1987 be set aside.

2. That the plaintiff/respondent restores possession of the premises the subject matter of the application to the defendant/applicant within 21 days

3. That the application for leave to appeal against this order is refused.

[p.23]

4. That the application for stay of execution is refused."

Was the above order final or interlocutory? I desire assistance in answering this question from the judgment of Cotton L J in GILBERT v ENDEAN (1875) 9 Ch D 259 at pp 268, 269. The Learned Lord Justice said:-

"These applications are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

The application made by the defendant was to obtain an opportunity of appearing before the Court in order to enable that Court to decide the rights of the plaintiff and himself in respect of the subject matter of the action. The order granting that application was in my view interlocutory. It did not dispose of the rights of the parties. It endeavoured to preserve the status quo until the rights of the parties were determined.

[p.24]

There should have been an application to this Court for special leave under Rules 7 and 8 of the Rules of this Court against the Order. Had special leave been granted, this Court could have properly entertained an application for a stay of proceedings. The appeal on which the present application is based is a nullity. I would uphold Mr. Serry-Kamal's objection and strike out the application.

[Sgd.]

Hon. Justice S. Beccles Davies, J.S.C.

[Sgd.]

I agree.

Hon. Justice S.M.F. Kutubu, Chief Justice

[Sgd.]

I agree.

Hon. Justice C.A. Harding, J.S.C.

THE STATE vs. ADEL OSMAN & 5 ORS.

[SC MISC APP 1/88] [p.25-54]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 13 APRIL 1988

CORAM: MR. JUSTICE S M F KUTUBU, C J - PRESIDING

MR. JUSTICE S BECCLES DAVIES - J S C

MR. JUSTICE S C E WARNE - J S C

MR. JUSTICE M S TURAY - JUSTICE OF APPEAL

MR. JUSTICE M O ADOPHY - JUSTICE OF APPEAL

BETWEEN:

THE STATE

VS

ADEL OSMAN

SHAMSU MUSTAPHA

TAMBA DUNHAH MATTURI

GEORGE SAFFA AMARA

RICHARD EDWARD BARLAY

STEVENS MASSAQUOI

Mr. Terrence Terry for Shamsu Mustapha

Mr. Eke Halloway for Richard Edward Barlay

Hon Attorney General and Director of Public Prosecutions for The State

RULING

KUTUBU, C.J

This is a reference to the Supreme Court by way of case stated by Wright J under the provisions of Section 104(2) of the Constitution of Sierra Leone 1978 Act No 12 of 1978 (which I shall hereafter refer to as the Constitution) and Rule 99 of the Supreme Court Rules 1982 Public Notice No 1 of 1982.

[p.26]

This section of the Constitution empowering lower courts to refer matters or questions to the Supreme Court for determination reads as follows:—

"104(1) The Supreme Court shall save as otherwise provided in Sections 18 and 101 of this Constitution have original jurisdiction to the exclusion of all other courts—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law or under this Constitution.

(2) Where any question relating to any matter or question as is referred to in the preceding sub-section arises in any proceedings in court, other than the Supreme Court, that court, shall stay the proceedings and refer [p.27] the question of law involved to the Supreme Court for determination; and the court in

which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Rule 99(1) of the Rules of the Supreme Court states:—

"A reference to the court for the determination of any question, cause or matter pursuant to any provision of the Constitution or any other law shall be by way of case stated by the Court below making the reference."

At the Criminal Sessions of the High Court holden at Freetown on the 6th January, 1988 pursuant to Section 136 of the Criminal Procedure Act 1965, Act No 32 of 1965 her Ladyship gave her consent in writing for the preferment of a two count indictment against all the applicants named above, under the Public Economic Emergency Regulations 1987, Public Notice No 25 of 1987 (as amended).

On the 10th February, 1988 Mr. Terry for 2nd applicant, Shamsu Mustapha, formulated several questions for the determination of the Supreme Court pursuant to Section 104 of the Constitution. Mr Eke Halloway Counsel for 5th applicant, Richard Barlay, followed suit. The Director of Public Prosecutions Mr. Tejan-Cole for the State supported the proposed reference to the Supreme Court for determination.

[p.28]

The question of law referred by Wright J to the Supreme Court for determination are as follows:—

"1. In the light of the express mandatory provisions of Section 13(7) of the Constitution of Sierra Leone Act No 12 of 1987 can an accused person or persons inclusive of the 2nd accused person in this matter be tried and held guilty by our courts for an alleged offence or offences under the Public Economic Emergency Regulations Public Notice 25 of 1987 (as amended) in circumstances where the alleged offence or offences were not in existence at the time of the alleged act or acts which constitute the alleged offence or offences against the accused person or persons?

2. Do the provisions of Regulation 59 of the Public Economic Emergency Regulations Public Notice No 25 of 1987 (as amended) expressly or by necessary implication conflict with the express provisions of Section 13(7) and Section 13(9) of the Constitution? If the answer to that question is in the affirmative does that fact render the entire Public Economic Emergency Regulation null and void and ULTRA VIRES the Constitution?

[p.29]

3. On the true and proper construction of Section 125(6) of the Constitution Act No 12 of 1978 can it be said that the procedure followed by the Parliament of Sierra Leone in laying, publishing and bringing the Public Economic Emergency Regulations into full force was in total compliance with the express provisions of Section 125(6) of the Constitution of Sierra Leone?

4. Does Section 19 of the Constitution of Sierra Leone Act No 12 of 1978 expressly contemplate or provide for a declaration by His Excellency the President of a State of Public Economic Emergency or for a state of Public Emergency on a true and proper construction of the said Section 19 of the Constitution?

5. Does Section 19 of the Constitution of Sierra Leone contemplate or provide for the passing of resolution by Parliament for the purpose of declaring a State of Public Economic Emergency or a resolution declaring a State of Public Emergency?

[p.30]

6. In the light of Section 19 of the Constitution Act No 12 of 1978 can Parliament pass a resolution which has the effect of approving the proclamation of the State of Public Emergency declared by the President on the 2nd day of November, 1987?

7. In the light of questions 1, 2, 3, 4, 5 and 6 posed supra can a provision in a regulation to wit regulation 59 of the Public Economic Emergency Regulations Public Notice 25 of 1987 render express constitutional provisions to wit Section 13(7) and Section 13(9) of the Constitution of Sierra Leone Act No 12 of 1978 in operative notwithstanding the fact that the said regulations expost facto create crimes and punishments and destroy fair safeguards to the 2nd accused person and other accused persons as guaranteed under the Constitution?

8. In the light of questions 1, 2, 3, 4, 5, 6 and 7 supra can our courts and in particular this court be said to be vested with jurisdiction to try and pronounce the 2nd accused person guilty of offence or offences contrary to the [p.31] express provisions of Sections 13(7) and 13(9) of the Constitution having regard to the peculiar circumstances of this case?

9. Whether the 5th accused in particular could be convicted of offences against the Public Economic Emergency Regulations 1987 (as amended) in respect of things done by him before the regulations aforesaid came into force and in particular offences against Regulation 40(a) of the Public Economic Emergency Regulations (as amended) and Regulation 44 of the Public Economic Emergency (as amended)

10. Whether the Public Economic Emergency (as amended) is not ultra vires the Constitution and therefore rendered a nullity/nugatory for non-compliance with Section 125(6) and particularly (c) of sub-section 6 of Section 125.

11. Whether Section 125(6) is mandatory or directive. If mandatory whether the exercise of the powers conferred on the President and Minister of Defence under Section 19 sub-3ection 4 of the Constitution of Sierra Leone exercised [p.32] in non-compliance of Section 125 sub- section 6(c) of the Constitution of Sierra Leone render the exercise of that power valid or of any legality under the laws of the Republic.

Mr Terry submitted eight of the eleven questions, namely, questions 1-8 inclusive, while Mr Halloway submitted three questions, namely, questions 9-11 inclusive. Wright J thought it necessary to refer the aforesaid questions to the Supreme Court for determination as she considered their answers necessary for the continuation of the proceedings before her.

Mr Terry made several submissions in the course of his arguments before this court, based among others, on excess of jurisdiction, infringement of the fundamental rights and freedoms of the applicants, in particular, the 2nd applicant, under the Constitution, and also forcefully impugned the constitutional validity of the Proclamation dated 2nd November, 1987 declaring a state of Public Economic Emergency in the Republic by the President, and the Public Economic Emergency Regulations, 1987 Public Notice No 25 of 1987, made pursuant to the Proclamation. Mr Terry maintained that they did not conform with the manner, language and express provisions of the consti- tution which rendered them ultra vires and void.

[p.33]

Mr. Terry referred to the provisions of Section 19 of the Constitution and submitted that both the Proclamation and the Regulations made thereunder, were invalid and ultra vires the Constitution by reason of the introduction or importation, as he put it, of the word, "Economic", in both the Proclamation and the Regulations. In his view both the Proclamation and the Regulations would have been within the intendment and spirit of the Constitution if they had been titled "Public Emergency" and "Public Emergency Regulations" simpliciter, and no further. Such addition or importation proved fatal, he maintained.

The Proclamation referred to was in the following terms:—

PUBLIC NOTICE

PUBLIC NOTICE NO 24 OF 1987

Published 2nd November, 1987 PROCLAMATION

UNDER SECTION 19 OF THE CONSTITUTION OF SIERRA LEONE 1978 (Act No 12 of 1978)

By His Excellency

Major General Dr Joseph Saidu Momoh, President of the Republic of Sierra Leone, Supreme Head of State, Grand Commander-in-Chief of the Armed Forces, Fountain Head of Unity, Honour, Freedom and Justice.

LS

JOSEPH SAIDU MOMOH

PRESIDENT

[p.34]

WHEREAS paragraph (b) of Sub-Section (1) of Section 19 of the Constitution of Sierra Leone, 1978, provides that whenever a period of public emergency shall commence, the President may, at any time,

by Proclamation declare that a situation exists which, if it is allowed to continue, may lead to a state of public emergency in any part of or in the whole of Sierra Leone:

AND WHEREAS it appears to the President that a situation of economic crisis exists which, if it is allowed to continue may lead to a state of public emergency throughout Sierra Leone:

NOW THEREFORE, I JOSEPH SAIDU MOMOH, President of the Republic, Supreme Head of State, Grand Commander of the Order of the Republic, Commander-in-Chief of the Armed Forces, Fountain Head of Unity, Honour, Freedom and Justice, DO HEREBY by this Proclamation declare a state of Public Economic Emergency in the Republic, as from the publication hereof.

Given under my hand and the Public Seal of the State of Sierra Leone at the State House Freetown, this 2nd day of November, in the Year of Our Lord One Thousand Nine Hundred and Eighty Seven.

LONG LIVE THE STATE OF SIERRA LEONE

The Proclamation itself embraces Section 19(1)(a) and (b) of the Constitution which reads as follows:—

"Section 19(1) whenever a period of public emergency shall commence, the President may at any time, by [p.35] Proclamation which shall be published in the Gazette, declare that

(a) a state of public emergency exists either in any part or in the whole of Sierra Leone;

(b) a situation exists which, if it is allowed to continue may lead to a state of public emergency in any part of or the whole of Sierra Leone."

As I see it, the thrust and pivot of the arguments of Counsel on the respective questions submitted to this court rest with the following main questions:—

(1) Whether the use of the word "Economic", used in the Proclamation and the Regulations is outside the scope of Section 19 of the Constitution;

(2) On the assumption that the Public Economic Emergency Regulations are regular and therefore valid, whether they did not lapse after a period of ninety days thereby nullifying their effect by virtue of Section 19 of the Constitution;

[p.36]

(3) Whether the Public Economic Emergency Regulations do not conflict with the provisions of Section 13(7) and 13(9) of the Constitution, and in particular, the effect of Regulation 59 of the Public Economic Emergency Regulations on the fundamental Human Rights provisions of the Constitution having, regard to its ex post facto or retroactive nature;

(4) Whether the way and manner of bringing the Public Economic Emergency Regulations, Public Notice No 25 of 1987 (as amended) into operation, was not in conformity with Section 125 (6) of the Constitution and therefore rendered void and ultra vires the Constitution.

In answering these questions while it may well be useful to look for guidance and inspiration elsewhere, in particular, from the practice of other Commonwealth jurisdictions, it is in the end the wording of the Constitution itself, that is to be interpreted and applied. In short, the answers to these questions are to be gathered from the four corners of the Constitution.

The far-reaching source of Emergency Declaration for the determination of the questions before us is the Constitution. Section 19, empowers the President by proclamation to declare a state of public emergency.

[p.37]

It provides as follows:—

"Section 19 (1) whenever a period of public emergency shall commence, the President may at any time, by Proclamation which shall be published in the Gazette, declare that —

(a) a state of public emergency exists either in any part, or in the whole of Sierra Leone; or

(b) a situation exists which if it is allowed to continue may lead to a state of public emergency in any part of or the whole of Sierra Leone.

(2) Every declaration made under sub-section (1) of this Section shall lapse—

(a) in the case of a declaration made when Parliament is sitting at the expiration of a period of fourteen days beginning with the date of publication of the declaration, and

[p.38]

(b) in any other case, at the expiration of a period of ninety days beginning with the date of publication of the declaration.

Unless it has in the meantime been approved by or superseded by a Resolution of Parliament supported by the votes of two-thirds of the Members of Parliament.

Section 19(4) of the Constitution empowers the President to make Regulations pursuant to a proclamation of a state of public emergency and it reads:—

"During a period of public emergency the President may make such Regulations and take such measures as appear to him to be necessary or expedient for the purposes of maintaining and securing peace, order and good government in Sierra Leone or any part thereof."

Section 19(5)(d) states:

"Without prejudice to the generality of the powers conferred by sub-section (4) of this Section and notwithstanding the provisions of this Chapter the Regulations or measures may, so far as appears to the President to be necessary or expedient for any of the purposes mentioned in that sub-section—

[p.39]

(d) amend any law, suspend the operation of any law and apply any law with or without modification;

Provided that such amendment, suspension or modification shall not apply to this Constitution.

Section 19(1) does not state what is "public emergency. I therefore look for assistance in Section 156 of the Constitution which defines public emergency as follows:—

"Public Emergency" means any period during which—

(a) Sierra Leone is at war, or

(b) there is in force a proclamation issued by the President under sub-section (1) of Section 19 , or

(c) there is in force a Resolution of Parliament made under sub-section (2) of Section 16 of this Constitution.

The present state of public emergency came into being by Presidential Proclamation under Section 19(1)(b) of the Constitution that is the position referred to under Section 156(b) of the Constitution. Under the Constitution, the power of the President to declare by proclamation that

a state of public emergency exists or a situation" exists which may lead to a state of public emergency is in his absolute and unfettered discretion subject only to the provisi6ns of sub-section (2) of Section 19 supra.

[p.40]

Section 19(1)(b) also does not define "a situation".

This could be wide-ranging and encompasses a multiplicity of situations ad infinitim. It lies in the sole power and discretion of the President to determine a situation, which at any given time in his estimation, deserves a declaration by Proclamation of a state of public emergency. The exercise of this power is unquestionable and unchallengeable. The situation could be described as "Economic" "Political" —"National Disaster", and like situations, too numerous to mention here. Indeed, they are many and varied.

The President, in his Proclamation of 2nd November, 1987 Public Notice No 24 of 1987, expressly referred to the existence of a situation of "economic crises" in the country, Which if allowed continuing may lead to a state of public emergency in part or in the whole of Sierra Leone. Once the decision to declare a state of public emergency vests in the President in relation to a situation of which he is the sole determinant, his characterization of any such situation, which I regard as purely descriptive cannot derogate from the force and authority of Section 19 of the Constitution which is the "fons et origo" of the Presidents emergency powers.

It was therefore proper and correct, legitimate and constitutional for the President to characterise both the Proclamation, Public No 24 of 1987 and the Regulations, Public Notice No 25 of 1987 (as amended)

in the manner and style he did, namely, “Public Economic Emergency” and [p.41] “Public Economic Emergency Regulations”. Alternatively, it would have also been proper for the President to entitle both the Proclamation and the Regulations as “Public Emergency (Economic) and Public Emergency Regulations” (Economic). Both the Proclamation and the Public Economic Emergency Regulations are accordingly within the scope of Section 19 of the Constitution.

The question which follows this finding is, - on the assumption that the' Public Economic Emergency Regulations are regular and therefore valid, whether they did not lapse after a period of ninety days thereby nullifying their effect by virtue of Section 19 of the Constitution.

The answer to this question is, no. The position is saved by the provision of Section 18 (1) (e) of the Interpretation Act, 1971 Act No 8 of 1971 which reads as follows:—

Section 18(1) (e) The repeal or revocation of an Act, unless a contrary intention appears, shall not—

(e) affect any investigation legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed as if the Act had not been repealed.

[p.42]

Also Section 18(2) When an Act expires, lapses or otherwise ceases to have effect this section shall apply as if the Act had been repealed or revoked.

The next question for consideration is whether the Public Economic Emergency Regulations 1987 Public Notice No 25, 1987 (as amended) do not conflict with 'the provisions of Section 13(7) and 13(9) of the Constitution, and in particular the effect of Regulation 59 of the Public Economic Regulations on the fundamental Human Rights provisions of the Constitution having regard to its ex post facto or retroactive nature.

Before embarking on an answer to this question, I consider it pertinent to state in brief, the constitutional provisions in this country in regard to the fundamental rights and freedoms of the individual as by law established. Suffice it to say that the Constitution provides adequate guarantees for the fundamental rights and freedoms of the individual subject to certain safeguards. In this regard, Section 5 of Chapter 11 of the Constitution provides as follows:—

“Whereas every person in Sierra Leone is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, tribe, place of origin, colour, creed or sex but subject to respect for the rights and freedoms of others and of the [p.43] Recognised Party, and for the public interest, to each and all of the following:—

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression, of assembly and association;

and

(c) respect for his private and family life;

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others, or of the public or of the national well-being".

In short, our enjoyment of or rights to the enjoyment of such rights and freedoms as are guaranteed by the Constitution, are neither absolute nor unlimited in scope, but relative and restrictive in all its aspects. In protecting fundamental rights, the court as the guardian of the Constitution has been described as being "in the role of a sentinel on the qui vive". It protects the individual against violations of his constitutional or legal rights or misuse or abuse of power by the State of its officers.

[p.44]

In the same vein, it is the duty of the court to seek to protect the State against anti-social, disruptive conduct, by individuals or groups of persons whose purpose is to disturb the peace and good order of society or threaten the economic life of the nation. From this vantage point, the court holds the balance between the ordinary citizens inter se and the citizens on the one hand and the state on the other.

To that extent, our fundamental rights and freedoms are not only limited in scope, but circumscribed and controlled, in the interest of an orderly society under the sovereignty of the law.

Emergency situations connote abnormality, and curtailment of our rights and freedoms. This is an emergency, which empowers the President to take measures as he sees fit or necessary to control and contain a crisis situation.

In the words of Rodrigo J. in Visuvalingam & Ors v Liyanage & Ors, Supreme Court of Sri Lanka, Law Reports of the Commonwealth, 1985 Pp. 919-922 (which I adopt), "Emergency Regulations are laws to which the fundamental rights constitutionally have to give way; They take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat." An emergency is what the word means".

Coming back to the question which was posed, I find it necessary and appropriate to look at the provisions of Section 13(7) and 13(9) which falls under the Fundamental [p.45] Human Rights provisions of the Constitution. I shall in turn consider the provisions of Regulation 59 of the Public Economic Emergency Regulations, Public Notice No 25 of 1987 (as amended).

Section 13(7) provides as follows:—

"No person shall be held to be guilty of a criminal offence on account of any act or omission which did not at the time it took place, constitute such an offence and no penalty shall be imposed for any criminal

offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed."

Section 13(9) states:—

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any provisions of this Section other than (7) to the extent that the law in question authorises the talking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists before or during that p8riod of public emergency."

[p.46]

Regulation 59 of the Public Economic Emergency Regulations provides as follows:—

"Where on the coming into force of the regulations, any investigation or case relating to the subject matter of the offences specified in these regulations is pending all the provisions of these Regulations shall apply in the determination of that investigation or case."

The applicants are charged with the offence of obtaining by false pretences, and also, conspiracy under Regulations 40(a) and 44 of the Public Economic Emergency Regulations. It is trite law to mention that in our criminal procedure, an accused person is deemed to be innocent until his guilt is proved beyond reasonable doubt. Be that as it may, Section 13(4) of the Constitution provides that—

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved, or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-section, to the extent that the law in question imposes on any person charged as aforesaid the burden of proving particular facts.

[p.47]

Mr. Tejan-Cole, Director of Prosecutions, for the State, urged on us, that contrary to the submissions of Counsel for applicants, the offences complained of were not new to the criminal law of this country, and submitted with force, that they were in existence at the time the consent order was sought and obtained on 6th January, 1988 for the preferment of an indictment against, applicants in the High Court.

I have looked at the charges preferred under Regulations 40(a) and 44 of the Public Economic Emergency Regulations. On reflection, I cannot but agree with the submission of the Learned Director of Public Prosecutions that these offences existed at the time the consent order was sought and obtained and that they are still part and parcel of the criminal law c this country. I can find no legal Justification in support of the submissions of Counsel for applicants on this question I hold that the charges are correct, valid and 'properly laid.

Looking at the provisions of Section 13(7) of the Constitution it is apparent from the wording of Section 13(9) that it was intended to save Section 13(7). Regrettably, it failed in this, in the light of Section 19(11) of the Constitution which provides as follows:—

"Every Regulation made under this Section and every Order or Rule made in pursuance of such a Regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provisions of a law which is inconsistent [p.48] with any such Regulation, Order or Rule shall, whether that provision has or has not been amended, modified or suspended in its operation under any Act, cease to have effect to the extent that such Regulation, Order or Rule remains in force."

The Constitution tells us what comprises the laws of Sierra Leone. Section 125 of the Constitution provides as follows:—

Section 125(1) The laws of Sierra Leone shall comprise—

(a) this Constitution;

(b) enactments made by or under the authority of the Parliament established by this., Constitution;

(c) any Orders, Rules and Regulations made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;

(d) the existing law; and

(e) the common law.

[p.49]

Section 3(1) of the Interpretation Act No 8 of 1971 refers to an Act, and states inter alia, that "Act" or "Act of Parliament includes any Act, and any order, proclamation, rule, regulation or bye-law duly made under the authority of an Act.

The second part of Section 19(11) of the Constitution after the semi-colon7 speaks of "any provision of a law which is inconsistent with any such Regulation, Order or Rule (Emphasis mine).

In my view, to all intents and purposes, reference to "a law" in this context includes the Constitution in addition to other laws.

A fortiori, having regard to the existence of a state of public emergency, the provisions of Section 13(7), 13(9) and 19(5) are suspended during the currency of the emergency.

These provisions in my view are not sacrosanct and inviolate, but must give way in an emergency, a crisis situation, in the interest, among others, of the public and of the national well-being.

Now, as regards the question whether or not Regulation 59 of the Public Economic Emergency Regulations can operate retroactively, Counsel for applicants submitted that it cannot, on the ground that the language is not clear and precise enough to convey that intention. I disagree.

It is a cardinal rule of construction that a statute should be prospective and not retrospective, unless its language is such as plainly to require such a construction.

[p.50]

The question in each case, is whether the legislature has sufficiently expressed that intention and this can be discovered by looking to the general scope and purview of the statute and at the remedy sought to be applied. If a statute is passed for the purpose of protecting the public and also individuals it may be allowed to operate retrospectively even though it causes hardship and injustice.

When I look at the language of Regulation 59, I come to the conclusion that it is perfectly clear and unambiguous to convey the intention of retroactive operation, and I so hold. The provisions of Sections 18(1) (e) and 18(2) of the Interpretation Act No 8 of 1971 referred to supra apply accordingly.

The last question in my resume of questions for consideration is whether or not the way and manner of bringing the Public Economic Emergency Regulations, Public Notice No 25 of 1987 (as amended) into - force was in conformity with Section 125(6) of the Constitution.

Counsel for applicants with much persuasion urged on us that the provisions of Section 125(6) are mandatory and that the President has no powers to abridge time, that is to say, to act contrary to the provisions of Section 125(6)(c), requiring any Orders, Rules or Regulations to be laid before Parliament for twenty-one days before they become operational. That the non-compliance of the provisions of Section 125(6) rendered the Public Economic Emergency Regulations void and ultra vires the Constitution.

[p.51]

Section 125(6) of the Constitution referred to supra provides as follows:—

“Any Orders, Rules or Regulations made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law—

(a) shall be laid before Parliament;

(b) shall be published in the Gazette on or before the day they are so laid before Parliament;

(c) shall come into force at the expiration of a period of twenty-one days of being so laid unless Parliament before the expiration of twenty-one days annuls any such Orders Rules Regulations by the votes of not less than two-thirds of the members of Parliament.

Section 19(4) empowers the President to make Regulations pursuant to the declaration of a state of public emergency. The state of public emergency was declared on 2nd November, 1987 and the Emergency Regulations came into operation on 5th November, 1987, far short of the twenty-one days contemplated by Section 125(6) (c) of the Constitution.

Indeed, there is a conflict between the provisions of Section 19 (4) and Section 125 (6) of the Constitution, but it does not end there. While Section 125(6) is a general [p.52] provision Section 19(4) is a specific provision. Where a Section of an Act dealing with general provisions conflicts with another Section dealing with specific provisions, as in the instant case, the specific provisions shall prevail over the general provisions. Even though Section 125(6) is a later provision, it makes no difference where the earlier provisions, that is, section 19(4) are specific in their application.

Suffice it to say that while Section 19 of the Constitution contemplates an emergency, Section 125(6) envisages a situation calling for the due observance of the doctrine of Parliamentary sovereignty; that is to say, all Orders, Rules or Regulations made by any person pursuant to the Constitution shall without more be subject to Parliamentary control by being required to lay before Parliament, publish in the Gazette on or before laying, and shall become operational on the expiration of twenty-one days of being so laid unless Parliament sooner annuls by two-thirds votes of the Members.

I would answer the eleven questions submitted to this Court as follows:—

Questions — 1. The offences complained of were in existence

2. The answer to this question is in the negative. No conflict.

The subsidiary question is unnecessary.

[p.53]

3. There is no material before us to answer question No.3

4. Section 19 provides for a declaration of a state of public emergency which expression embraces a multitude of situations which can be descriptive of the type of public emergency.

5. No material having been furnished about a Resolution by Parliament under the proviso to Section 19(4,) of the Constitution, the question becomes hypothetical and an answer therefore becomes unnecessary.

6. No material having been furnished to this court, the question becomes unnecessary.

7. Regulation 59 does not create an offence. Assuming that the reference to the said regulation was intended to mean the entire' body regulations, the answer is yes.

8. The courts have jurisdiction. The offences set out in Regulations 40(a) and 44 are not contrary to the provisions of Sections 13(7) [p.54] and 13(9) of the Constitution having regard to the peculiar circumstances of this case.

9. The answer to question 9 is yes.

10. The answer to question 10 is no.

11. The question posed under 11 is academic.

Decision accordingly.

(Sgd)

Hon Mr. Justice S M F Kutubu

Chief Justice

I agree.

(Sgd)

Hon Mr. Justice S.B Davies, J S C

I agree.

(Sgd)

Hon Mr. Justice S.C.E Warne, J S C

I agree.

(Sgd)

Hon Mr. Justice M.S Turay, JA

I agree.

(Sgd)

Hon Mr. Justice M O. Adophy, JA

THE STATE v. ALGHASSIM JAH

[SC. MICS. APP. 1/94] [p.204-208]

DIVISION: SUPREME COURT, SIERRA LEONE

CORAM: HON. MR. JUSTICE S. BECCLES DAVIES, AG. C.J., PRESIDING

HON. MR. JUSTICE S.C.E. WARNE, J.S.C.

HON. MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

HON. MR. JUSTICE M.O. ADOPHY, J.A.

HON. MR. JUSTICE A.B. TIMBO, J.A.

BETWEEN:

THE STATE — RESPONDENT

VS

ALGHASSIM JAH — APPLICANT

A.F. Serry-Kamal Esq. for the Applicant

Attorney-General and SOS for the State/Respondent

JUDGMENT

BECCLES DAVIES AG. C.J.:

This is an application for an Order of certiorari to remove the indictment preferred against Lance Corporal SIA/18166316 Corporal Sidique Sallu Jah and Lance Corporal 18163974 Alghassim Jah and all proceedings subsequent thereto at the Republic of Sierra Leone Military Forces Court Martial Holden at Freetown and the ruling of the Honourable Mr. Justice E.A. Thomas, Judge Advocate, before the said Court Martial dated the 16th day of August 1993 ... for the same to be quashed, and that the entire proceedings including the conviction and sentence be set aside.

This application is made on behalf of Lance Corporal Alghassim Jah who was tried and convicted on the following indictment:—

[p.205]

STATEMENT OF OFFENCE:

Committing a Civil Offence that is to say Robbery with Aggravation, contrary to Section 23 (1) (a) of the Larceny Act 1916 (as amended)

PARTICULARS OF OFFENCE

SLA/18163974 Lance Corporal Alghassim Jah and SLA/18166316 Lance Corporal Sidique Sallu Jah soldiers of the Republic of Sierra Leone Military Forces being subject to Military Law under the Republic of Sierra Leone Military Forces Act. 1961 (as amended) on Sunday the 18th day of April, 1993 at Murraytown Freetown in the Western Area of the Republic of Sierra Leone being together robbed Berthan Macualey (Jnr.) of a car (Mercedes Benz 190E) registration No. SB 333 with its contents; that is to say one spare tyre with rim, two Ray Ban sunglasses and one radio cassette player of the value of Le8,209,000.00.

S. FANDAY

STATE COUNSEL

The applicant seeks relief on the following grounds.

1. The applicant being subject to military law, was charged with a criminal offence under the general criminal law and prosecuted before a military court-martial.

2. The applicant on being subject to military law was charged on an indictment which was signed by a State Counsel and tried before a military Court-martial.

3. The applicant being subject to military law was charged on an indictment before a military [p.206] court-martial which did not comply with military law"

Can this court grant the application? It is made under the provision of Section 125 of the Constitution of Sierra Leone 1991 ("The Constitution") which provides—

"125 The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purpose of enforcing and securing the enforcement of its supervisory powers."

The Court-martial in which the applicant was tried has its foundation in the Republic of Sierra Leone Military Forces Act 1961. It is part of the "the existing law" of Sierra Leone which is defined in Section 170 (4) of the Constitution as comprising

"..... the written and unwritten laws of Sierra Leone as they existed immediately before the date of the coming into force of this Constitution and any statutory instrument issued or made before that date which is to come into force on or after that date."

The effect of the existing law after the commencement of "the Constitution" is set out in subsection (5) of Section 170 thus

"(5) subject to the provisions of this section the operation of the existing laws shall not be affected by such commencement; and accordingly the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as [p.207] may be necessary to bring it into conformity with the provisions of this Constitution or otherwise to give effect to or enable effect to be given to any changes effected by this Constitution." [Emphasis mine]

The provisions of the Republic of Sierra Leone Military Forces Act 1961 therefore continue to be operative after the commencement of "the Constitution."

Under the law of England, there is a right of appeal to the Court of Appeal in addition to that of applying for the writs of habeas corpus and orders of mandamus, certiorari and prohibition. A similar situation existed in the law of Sierra Leone until 15th April 1971. See 129 of the Sierra Leone Military Forces Act 1961 ("the principal Act") which was operative until its subsequent repeal had contained the following provisions—

"129 Subject to the following provisions of this part, an appeal shall lie from decisions of a court-martial to the Court of Appeal with the leave of that Court."

Provided that an appeal as aforesaid shall be as of its right without leave from any decision of a court-martial involving a sentence of death.

The "Part" (Part VI) referred to in Section 129 spans Sections 129 to 147.

It deals with the right of appeal and procedure in appeals from courts-martial.

Section 6 of the Republic of Sierra Leone Military Forces (Amendment) Act 1971 ('the amending Act') which became operative on 16 April 1971, repealed Part VI of the [p.208] principal Act thereby extinguishing the right of appeal to the Court of Appeal.

Section 5 of the "the amending Act" brought into existence a new section 129. It reads —

"The principal now is hereby amended by the insertion of the following new section immediately after section 128 thereof—

129. The decisions of a court-martial shall not be questioned in any court of law."

The marginal note to that new sections states:—

"No appeal from decisions of Courts-martial".

I find Section 129 to be much wider in scope than its portrayal by the marginal note.

The language of the section is clear and unambiguous; it forbids any excursion in any form whatsoever, to any court for the purpose of examining decisions of courts-martial.

This application therefore in the light of the above provision cannot be entertained by this Court or any other Court. It is therefore dismissed.

(Sgd.)

Mr. Justice S. Beccles Davies Ag. C.J.

I agree.

(Sgd.)

Mr. Justice S.C.E. Warne J.S.C.

I agree.

(Sgd.)

Mr. Justice S.C.E. Warne J.S.C.

I agree.

(Sgd.)

Mr. Justice E.C. Thompson Davis J.S.C.

I agree.

(Sgd.)

Mr. Justice M.O. Adophy J.A.

I agree.

(Sgd.)

Mr. Justice A.B. Timbo J.A.

THE STATE v. HON. JUSTICE M.O. TAJU-DEEN

[SC. MISC. APP. 6/2001] [p.433-436]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 19 JULY 2001

CORAM: HON. MR. JUSTICE D.B.F. LUKE

HON. MR. JUSTICE A.B. TIMBO C.J. (PRESIDING)

HON. MR. JUSTICE M.O. ADOI'HY, J .S. C.

THE STATE — RESPONDENT/RESPONDE

VS.

HON. JUSTICE M.O. TAJU-DEEN — APPLICANT/APPELLANT

B.B.S. KEBBIE, ESQ. DIRECTOR OF PUBLIC PROSECUTION AND

M.M. SESAY, ESQ. — FOR THE STATE

C. DOE-SMITH, ESQ. AND T.M. TERRY, ESQ. — FOR APPLICANT/APPELLANT

RULING

C.J.

This is an application on behalf of the appellant bail pending the determination of his appeal and three other Orders as stated in the Notice of Motion dated 9th July 2001.

The application is supported by the two affidavit of the appellant to on the 9th day of July 2001 and the exhibits attached thereto marked MOTD and that sworn to on the 16th day of July 2001 and also the affidavit of Ayo M Dixon sworn to on the 10th July 2001.

The applicant was in the High Court presided over by Justice Patricia Macaulay charged and convicted of offences of corruption contrary to Sec 7(1) 8(1) of the Anti-Corruption Act No. 1 of 2000 and on 22nd day of June 2001 sentence on Counts 1, 2, 5 and 6 to a term of 1 year imprisonment concurrently and on Counts 3, 4, 7 and 8 was fined the sum of Le30,000.000 or 6 months imprisonment. Both sentences to run concurrently.

By Notice of Motion dated the 26th June 2001 the appellant applied to the

Court of Appeal for bail pending the determination o£ his appeal to that Honour Court. And by a Ruling delivered on the 5th day of July 2001 the following ord were made:—

[p.434]

"Application for bail pending the determination of the applicant's appeal is disallowed. The Registrar of the Court of Appeal to prepare the Records of Appeal in the Criminal Appeal herein within 21 days of this Order and that the said appeal be entered for hearing out of its Order in the Registrar of Appeals".

GIVEN under my hand and seal of the Court this 5th day of July, 2001.

(Sgd.) A. Showers

Registrar Court of Appeal.

The appellant now applies to this Court for bail to be granted pending the determination of his appeal before the Court of Appeal and for the Order of the Court of Appeal dated the 5th day of July in Mis. App. 15/2001. The State Respondent as----- Justice M.O. Taju-Deen — Applicant be revoked and/or varied.

Bail will not be granted pending the hearing of an appeal unless the applicant shows. To this end Terence Terry, Counsel for the applicant sought to rely on the---- affidavits filed and on various authorities cited:—

(1) FRANKLYN BUNTING-DA VIES VS. REV. J.E. HARRIS — CR APP. 26/84.

(2) ZOUZOUKO DEGUI VS. THE STATE - CR. APP. 28/80

(3) SALLAH BAHSOON vs. INSPECTOR-GENERAL OF POLICE

(4) ISATU KAMARA VS. THE ATTORNEY-GENERAL SC. MISC. APP. 4/92

OTHER CASES

(5) FREDERICK NEWBERY, BURNETT LEON ELMAN — 1931 23 CR. APP. REPORTS P. 66

(6) WILLIAM: GREGORY — 1972 20 CR. APP. P. 185

(7) ALEXANDER DAVIDSON STEWART — VOLUME 23 CR. APP. REPORTS P. 68 MARCH 23, 1931 TO JULY 1932

(8) AKRONG & ANOR vs. THE REPUBLIC — 1972 (2) G.L.R. 244

(9) REX. vs. TREOPHILUS ADENUGA TUNWASHE - VOLUME 1

Counsel argued forcefully that the complexity of the case, the impossibility of the applicant's appeal being heard before the completion of his sentence or a substantial part thereof, the desirability of having full opportunities of consulting with his legal advisers, his advanced age and the precarious state of his health;

the fact that the applicant had been acquitted on four of the original twelve counts charged; and was most likely to succeed in his appeal all constitute special and exceptional circumstances for XXX to enable the Court to grant bail pending the appeal Mr. Kebbie, Director of Public Prosecution on behalf of the Respondent likewise relied on the affidavit of Manfred Momoh Sesay and forcefully urged upon the Court that no special circumstances had been shown to warrant granting bail in this particular case and that in view of the Order of the Court of Appeal dated 5th July 2001 there would be no delay as alleged; and that there was no substance in any of the allegation relied upon by the applicant, and the authorities cited were irrelevant.

As I am satisfied that the aforesaid Order of the Court of Appeal affords the appellant an early opportunity for a full hearing of all the matters in contention herein I do not deem it necessary to make any other determination now.

Having read all the documents filed herein and having listened to the learned Counsel on both sides and taking all the circumstances of the case into consideration, I am of the view that justice to all concerned would best be served by the hearing and determination of the said appeal as soon as possible.

[p.436]

In this regard it is my view that the Court of Appeal did not err in law or otherwise in ordering that the records be prepared within 21 days Applicant’s Counsel argued that the Court of Appeal's Order that “the said appeal be entered for hearing out of its order in the Register of Appeals" did not necessarily mean it would be heard expeditiously. To clarify any doubts I confirm the Order of the Court of Appeal in its entirety — and I further order that the said appeal be entered for hearing within seven days of the preparation of the said Records of appeal.

I therefore order as follows:—

1. The appellant's application to this Court that bail be granted pending the determination of his appeal is refused.

2. That the Order of the Court of Appeal dated the 5th day of July 2001 in Mis. App. 15/2001 that:—

"Application for bail pending determination of the applicant's appeal is disallowed. The Registrar of the Court of Appeal do prepare the Records of appeal in the Criminal Appeal herein within 21 days of this Order and that the said appeal be entered for hearing out of its order in the Register of Appeals".

Is upheld.

3. That the said appeal be entered for hearing within seven days of the preparation of the said Records of Appeal.

SGD.

CASES REFERRED TO

1. Franklyn Bunting-Da Vies Vs. Rev. J.E. Harris - Cr App. 26/84.

2. Zouzouko Degui vs. The State - Cr. App. 28/80

3. Sallah Bahsoon vs. Inspector-General Of Police

4. Isatu Kamara vs. The Attorney-General Sc. Misc. App. 4/92

5. Frederick Newbery, Burnett Leon Elman - 1931 23 Cr. App. Reports P. 66

6. William: Gregory - 1972 20 Cr. App. P. 185

7. Alexander Davidson Stewart - Volume 23 Cr. App. Reports P. 68 March 23, 1931 To July 1932

8. Akrong & Anor Vs. The Republic - 1972 (2) G.L.R. 244

9. Rex. Vs. Treophilus Adenuga Tunwashe - Volume 1

THE STATE v. THE HON. MR. JUSTICE M. O. TAJU-DEEN; EX PARTE DR. HARRY WILL

[MISC. APP. 3/99] [p.269-279]

DIVISION: THE SUPREME COURT OF SIERRA LEONE

DATE: 9 NOVEMBER 1999

CORAM: MR. JUSTICE D.E.F. LUKE - CHIEF JUSTICE JSC

MR. JUSTICE H.M. JOKO SMART - JSC

MR. JUSTICE S.C . WARNE - JSC

IN THE MATTER OF AN APPLICATION BY DR HARRY WILL UNDER SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE ACT NO 6 OF 1991 FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AND FOR RELATED DECLARATIONS AND OTHER ANCILLARY OR CONSEQUENTIAL ORDERS AND DIRECTIONS.

IN THE MATTER OF A RULING GIVEN THE 11TH DAY OF OCTOBER 1999 BY THE HONOURABLE MR JUSTICE M.O.TAJU-DEEN (HIGH COURT JUDGE) IN THE CRIMINAL INFORMATION DATED 30TH AUGUST 1999 FILED IN THE HIGH COURT OF SIERRA LEONE HOLDEN AT FREETOWN AND ENTITLED 'THE STATE VS. DR. HARRY WILL, LAMINA FEIKA, BOCKARIE KAKAY (TRADING AS MARIAMA & SONS (A FIRM)'.

BETWEEN:

THE STATE - APPLICANT

AND

THE HON. MR. JUSTICEM.O.TAJU-DEEN (JUDGE) - RESPONDENT

EX PARTE DR. HARRY WILL - APPLICANT

DR. BU-BUAKEI JABBI for the Applicants.

RULING

JOKO SMART JSC

This is a Motion for LEAVE to apply for orders of certiorari mandamus and prohibition and related or consequential orders or directions in respect of the ruling given on 11th October 1999 by the Honorable Mr. Justice M.O. Taju-Deen (High Court Judge) in proceedings on a criminal information dated 30th August 1999 and for an order of stay of proceedings founded on the Criminal Information dated 30th August 1999 pending in the High Court until determination by the Supreme Court of the substantive application for which leave is granted, if and when so granted, and for such other or further orders and directions as this honourable Court may deem fit.

When the Motion came up for hearing for the first time on the 21st October 1999 the Court drew the attention of Counsel for the Applicants that the Honourable Mr. Justice M.O. Taju-Deen (Judge) has been joined in the matter as Respondent and invited Dr . Jabbi to address the Court on the legality of doing so having regard to s. 120(9) of the Constitution which provides:

'A Judge of Superior Court of Judicature shall not be liable to an action or suit for any matter or thing done by him in the performance of his judicial actions'.

Dr. Jabbi vigorously argued that a judge can properly be made a party in an action at any rate in certiorari, mandamus and prohibition proceedings and he rested his argument on the following premises.

Firstly, that in the matter:

'MISC.APP. NO. 6/93 A&B

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

THE STATE - APPLICANT

AND

HON. MR. JUSTICE F.C.GBOW, JUDGE - RESONDENT

EX PARTE JULIUS SPENCER & ORS - APPLICANTS

a similar format was used in an application before this Court sitting in banc and no objection was raised and the Court went on to rule on the remedies sought.

Secondly, that s.120(9) of the Constitution is applicable only in an action or suit in which a judge is sued personally for wrongs committed by him while performing judicial functions.

Thirdly, that even if the joining of a judge in the matter before the Court is wrongful it is an irregularity and a mere technicality which can be cured by the Court in the exercise of its discretion and allow the case to proceed in a constitutional matter of great importance and where time is of the essence.

In support of his contentions Dr. Jabbi cited passages from Noordally v. Attorney-General [1987] LRC (Const.) 599, 606; Ali v. Teaching Service Commission [1993] 3LRC 225, 229-230; Jaundou v. Attorney-General [1971] 3 WLR 13 and All Peoples' Congress v. Nasmos & Ministry of Social Welfare, Youth and Sports S.C No. 4/96 decided by this Court on 26 October 1999. After a careful analysis of these cases, I dare say, none of the propositions relied upon is relevant to the main issue herein. i.e. whether a judge in our jurisdiction can properly be made a party to an action of any sort based on allegations made against him while performing his judicial function.

With respect to Dr. Jabbi's first contention, this Court has the power to depart from a previous decision of, its own when it appears right to do so. See s. 122(2) of the Constitution. In my view, in the Spencer's case tile attention of the Court 'was presumably not adverted to the fact that the judge was made a party to the action and the matter proceeded under the mistaken premise that it was right to do so. The case cannot therefore be regarded as a precedent which this Court now sitting can follow. To do so will be in clear contravention of the Constitution.

So far as the second contention is concerned. I disagree with Counsel that the phrase shall not be liable in s. 120(9) of the Constitution is limited to actions in which the judge is sued personally for wrongs

committed by him in the performance of his judicial function. If a judge is made a party to any action he is open to liability of any sort and that liability imports a duty resting on him for which he is answerable in law. I opine that if a judge is joined in any proceeding he is exposed to all the incidents and consequences of litigation. Thus he can be compelled to attend to answer allegations made against him and can also be amenable to the payment of cost in this respect, I do not regard the joining of a judge as party to an action to be a mere technicality. Why should he made a party in certiorari proceedings? Is it not sufficient for clarity and identification if the judge's order or ruling which is challenged is cited in the title of the action a thing which I observe has been done in this before us and in Spencer's case.

In answer to the third submission, it is my considered view that making a judge a party to an action as such cannot be an irregularity. It is a nullity over which the Court cannot exercise its discretion. The [p.271] fact that the application deals with a Constitutional issue makes the situation even worse in that the Court is being urged to exercise its discretion in a matter in which a provision of the Constitution has been infringed. Our Constitution preserves the integrity of judges and any move to undermine it cannot be treated lightly. This integrity is eloquently articulated in s. 120(9) of the Constitution and in the judicial oath in the second schedule of the Constitution "whereby a judge swears inter alia, to do right to all manner of people after the laws and usages of the land without fear or favour, affection or ill will. This is the reason why judges are invested with immunity from actions. Dr. Jabbi informed the Court that there are other jurisdictions in which judges are made parties to similar actions before us. He was requested to provide authorities to substantiate this statement and all that he produced were the authorities which I have herein-before mentioned which I hold do not support that allegation. If for any reason judges in at her jurisdictions can be made parties to proceedings touching and affecting their judicial functions, our own Constitution forbids it.

I will therefore dismiss the Motion.

SGD.

S.C.E.WARNE, JSC

The application before this Court is contained in a Notice of Motion for certain reliefs; inter alia:

(1) Leave to apply for Orders of certiorari, mandamus and prohibition and related or consequentional orders or directions in respect of the ruling given on 11th October, 1999 at 10.00 hours by the Learned Judge in proceedings on the criminal information dated 30th August, 1999.

(2) An Order of Stay of Proceedings founded on Criminal Information dated 30th August, 1999 at present pending in the High Court until determination of the substantive application for which leave is granted herein, if and when so granted".

The Motion is supported by an affidavit sworn to By Bu-Buakai Jabbi on the 18th day of October, 1999."

Before the Motion could be heard Counsel sought an amendment to certain Acts of the motion which was granted.

Counsel urged the court to entertain the application inspite of the defect in the title of the cause, which on the face referred to The Hon. Mr. Justice M.O. Taju-Deen as Respondent. The title again stated that the State and Dr. Harry Will are both applicants.

On the face of the motion paper counsel avers that the affidavit herein is made pursuant to Order 59. Rule 3(2) of the (English) Supreme Court Rules 1960.

Among the other papers filed by counsel was a Statement Pursuant [p.273] to Rule 98 of the Supreme Court Rules 1982 and Rule 3 Order 52 of the High Court Rules (Sierra Leone) and Rule 3(2) of Order 59 of (English) Supreme Court Rules 1960.

The statement reads, inter alia:—

"IN THE SUPREME COURT OF SIERRA LEONE"

In the matter of an application by Dr. Harry Will under Section 125 of the Constitution of Sierra Leone Act No.6 of 1991 for leave to Apply for Orders of Certiorari Mandamus and Prohibition and for related declaration and other ancillary or consequential orders and directions.

In the matter of a Ruling given and 11th day of October 1999 by the Honourable Mr. Justice M.O. Taju-Deen (High Court Judge) in the Criminal Information dated 30th August, 1999 filed in the High Court of Sierra. Leone Holden at Freetown and entitled "The state vs. Dr. Harry Will, Lamin Feika, Bookarie Kakay Trading as Mariama. & Sons (A Firm)

BETWEEN

THE STATE - APPLICANT

AND

THE HON. MR.JUSTICE M.O. TAJU-DEEN - RESPONDENT

(JUDGE)

EX PARTE DR. HARRY WILL - APPLICATION

The said statement, averred the Grounds on which the relief is Sought:—

1. That the Learned Judge erred in law in refusing to state and refer to the Supreme Court as requested by counsel for the 1st Accused appropriate questions on the constitutional issues raised in term of sub-section (i) (c) of Section 124 and Section 15(a) and sub-Sections (1) and (2) of Section 23 of the Constitution Sierra Leone 1991 in counsel's application on behalf of the 1st Accused that the indictment be quashed as invalid, illegal and void and the 1st accused accordingly discharged, as foresaid.

2. That the Learned Judge erred in law in holding that it was not necessary for him to have in advance a draft of the proposed questions being requested to be referred to the Supreme

[p.274]

3. That, the Learned Judge erred in law in refusing to stay proceedings on Criminal Information dated 30th August, 1999 for the purpose of making the reference under subsection (3) of Section 28 of the constitution as aforesaid pending the determination of the said reference to the Supreme Court.

4. That the Learned Judge lacked jurisdiction to determine the Constitutional issue aforesaid, as he purported so to do in his Ruling on the application and submissions by counsel for the 1st accused and in his refusal to refer appropriate questions on the said issues to the Supreme Court as aforesaid and in deciding to go on with proceedings on the aforesaid Criminal Information without first making the required reference."

In arguing the issue as to whether this court can hear and determine the motion, council submits that Section 120 (9) of the Constitution, Act No.6 of 1991 applies only in cases "where an Action is brought claiming liability of a Judge done in that process." Such liability where established would normally go with sanctions and costs" vide Order 52 Rules of the High Court. He want on to submit that, even assuming that, notwithstanding the two previous submissions it would still be irregular for the judge to be mentioned as a party in the heading of an application for the exercise of the Supervisory Jurisdiction there is an authority for the court to use its discretion to allow the proceedings to go on, on the true basis especially where the provisions of the Constitution are concerned or time is of the essence and otherwise to allow leave to do an amendment. The actions which can be pursued under section 125 of the Act No.6 of 1991 are not mentioned. In reply to the court, counsel has cited certain authorities in support of his submission that the motion can be heard on its merit despite the inclusion of the name of the judge in the title of the application. The cases cited are:—

(1) Nordally v. Attorney General (1981) L.R.C. 599 SC of Mainitius.

[p.275]

(2) A.S.C. v. (Nasmos) unreported Supreme Court of Sierra Leone delivered 26th October, 1999

(3) Alie v. Teaching Service Commission (1983) L.R.C. 229-230

(4) Janudco v. Attorney-General of Suyana (1971) 3 WLR 13.

Counsel finally submits that the matter should proceed notwithstanding the defect in the Title by including the name of the Judge.

I think it will be appropriate to state the status of the High Court. This was preserved by Section 178(5) of the Constitution Act No.6 of 1991. It states "The High Court of Justice established under the provision of sub section (4) of Section 120 of this Constitution shall be successor to the High Court in being immediately before the coming into force of' this Constitution."

The High Court is therefore a creature of Statute. The creation of the court is spelt out in section 120(4) of the constitution, that is to say:—

“The Judicature shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice which shall be the Superior Court of record of Sierra Leone and which shall constitute one Superior Court of Judicature, and such other inferior and traditional courts as Parliament may by law establish. (emphasis mine)

I will now consider the jurisdiction of the High Court as provided in Section 132(1) and (5) of the Constitution. 132(1) The High Court of Justice Shall have jurisdiction in Civil and Criminal Matters and such other original appellate and other jurisdiction as may be conferred upon it by the Constitution or any other law.

(5) Any Judge of the High Court of Justice may, in accordance with the Rules of Court made in that behalf, exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court or Justice by this Constitution or any other law.”

What has the Judge Mr. Justice M.O. Taju-Deen done that he had no jurisdiction to do? 'What was before the Learned Judge, was a Criminal matter'. The law says he has jurisdiction in Civil and Criminal Matters vide Section 132(1) of the Constitution. In Exhibit “c” to the Affidavit [p.276] of Dr. Jabbi herein before mentioned - Mr. Justice M.O. Taju-Deen made a. consent order in writing under Section 136(1) of the Criminal Procedure Act No.32 of 1965 as amended for Dr. Harry Will and others to stand trial on Criminal charges. This Order was made on 31st August 1999 not as counsel deposed as having been made on 30 August, 1999. Did the Judge have power to make that order. I opine that had the power vide section 132(5) of the Constitution.

The accused were arraigned before the Learned Judge, whereupon counsel moved the court to stay proceedings on the ground that certain sections of the Constitution ought to be tested in the Supreme Court vis-a.-vis their legality and whether some of the fundamental rights of Dr. Hill had not been breached. The Learned Trial Judge made a ruling refusing the application for reference to the Supreme Court for the determination.

In my view the High Court or the Judge does not have to grant the application for reference as a matter of course. The Judge has a right to look at the provisions of the Constitution on which the application is

based. In the application as contained in Ex. “D” of the said affidavit, Counsel states:—

“My Lord, I implore and request this Honourable Court in terms, of Sub section (3) of Section 28 of the Constitution of 1991, to stay the present proceedings and refer to the Supreme Court for prior determination the questions of law involved in the above grounds of the constitutional invalidity of the said enactments and Judge's Order.”

The various enactments referred to in the applications are section 136(1) of Criminal Procedure Act 1965 as amended by Act No.1 of 1970 as having been enacted in excess or Ultra-vires of the powers conferred on

Parliament by law as per section 124(1) (b) - that section 136 of C.P.A. 1965 is inconsistent and. incompatible with the provisions of section 15(1) and section 23(1) of the Constitution, and subsection of Interpretation Act. No. 7 of 1965 section 171 (15) of the Constitution."

[p.277]

put upon Judges by such applications, which to say the least are often times misconceived and are time consuming. In my view this motion is one such misconceived application. In my opinion" this motion is an exercise in academic pursuit t and an abuse of due process of the court. The Learned Judge in the exercise of his legitimate duty under the law has been brought before this Court as a respondent thus placing him in jeopardy of being mulcted in costs which the Constitution precludes - Vide section 120 (9) of the Constitution which states:

"A Judge of the Superior Court of Judicature shall not be liable to any Action or suit for any matter or thing done by him in the performance of his judicial functions" The Hon. Mr. Justice M.O. Taju-Deen is one such judge, who from all the papers filed in the matter herein was performing such functions. He has not only been brought before this court but has been made a respondent facing two applicants. The State and Dr. Harry Will.

If the judge was minded to apply for leave to" join issue in this matter, he could not because section 120(9) of the Constitution protects him therefrom.

I think I aught to address the issue of the Supervisory powers of the Court as contained in section 125 of the constitution. It provides: "The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra. Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have popup to issue such directions, orders or writs including writs is of habeas corpus, orders of' certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers"

The supervisory powers of the Court is not spelt out in the Constitution but I opine, that the supervisory jurisdiction is the one contained in Rule 88 of the Rules of the Supreme Court PN.No.1 of 1982. which states. "(1) 'There any judgment or ruling has been reserved by any subordinate to the Supreme Court for three months or more, the Court may, on its mm motion or upon the application of a party to the action or appeal, as the case

may be, order the Lower Court concerned to deliver judgment or ruling or before a date specified in the order."

Sub-sections (2),(3) and (4) provide what should happen thereafter.

I have already opined that this application by notice of motion not only misconceived but an abuse of due person of the Court. Every [p.278] Counsel referred to the case of The State - Applicant and The Honourable Mr. Justice F.C. Gbow Judge Respondent

Ex Parte Julius Spencer

Donald John

Alfred Payitie Conteh

Mohamed Bangura.

Alusine Kargbo Bashiru Applicants.

So. Misc. App. No. 6/93 A & B unreported.

I concede that the Court entertained the application in the above cause and made the orders sought.

Be that as it may, the law does not preclude the court from revisiting the issue if subsequently brought before it, vide section 122(2) of the Constitution Act No.6 of 1991. It provides as follows: "The Supreme Court may, while treating its own previous decision as binding, depart from a previous decision when it appears right so to do, and all other courts shall be bound to follow the decision of the Supreme Court on questions of law." In the instant case, the court will perforce have to depart from the decision given in the case of The State and The Hon. Mr. Justice F.C. Gbow Ex. Parte Julius Spencer and others.

I have already said the Judge ought not, as a matter of course refer every matter to the Supreme Court it did not Seem to him right so to do.

In my view, the High Court of Justice is not a rubber stamp to grant every such application made for reference to the Supreme Court; the provisions of section 28(2) and. section 124(1) of the Constitution states clearly that the Supreme Court shall have original jurisdiction to the exclusion of all other courts - so be it, but how is the original jurisdiction of the Supreme Court invoked? Surely it is not by reference from a lower court simpliciter, I opine, it is by a notice of motion supported by an affidavit. In my opinion, this is precisely why section 127 (1) of the Constitution was enacted. The provision is "A person who alleges that an enactment or anything done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this constitution may at any time being an action in the Supreme Court for declaration to that effect." Need we say more, yes; it is necessary to remind Counsel appearing in our Courts of the strain [p.279] court has an inherent duty to protect its process. This is trite law-and I am of the view that that this court has a duty to protect its process when it is being abused and to refer to an application based on a misconception of law.

I hold the view that the court must invoke its inherent jurisdiction in such a case to prevent an abuse. The indictment before Mr. Justice Taju-Deen is on having as its foundation a consent order in writing under the hand of a judge of the High Court of Justice- where is the constitutional issue in that matter which is outside the jurisdiction of the judge. What is the constitutional issue to be resolved by the Supreme Court. I see none.

SGD

I agree.

SGD.

H. M. JOKO SMART. J.S.C.

I agree.

SGD.

B. E.F. LUKE CHIEF JUSTICE

CASES REFERRED TO

1. Noordally v. Attorney-General [1987] LRC (Const.) 599, 606;

2. Ali v. Teaching Service Commission [1993] 3LRC 225, 229-230;

3. Jaundou v. Attorney-General [1971] 3 WLR 13

4. All Peoples' Congress v. Nasmos & Ministry of Social Welfare, Youth and Sports S.C No. 4/96

5. Nordally v. Attorney General (1981) L.R.C. 599 SC of Mainitius.

6. A.S.C. v. (Nasmos) unreported Supreme Court of Sierra Leone delivered 26th October, 1999

7. Alie v. Teaching Service Commission (1983) L.R.C. 229-230

8. Janudco v. Attorney-General of Suyana (1971) 3 WLR 13.

STATE & Anor. v. THE NATIONAL COMMISSION FOR UNITY AND RECONCILAITION EX PARTE MAJOR GENERAL (RTD) M.S. TARAWALLI.

[MISC. APP. 5/2000] [p.336-337]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 5 DECEMBER 2000

IN THE SUPREME, COURT OF SIERRA LEONE:

IN THE MATTER OF THE CONSTITUTION OF SIERRA. LEONE 1991 ACT NQ.6 OF 1991

AND

IN THE MATTER OF JUSTICE BECCLES DAVIES COMMISSION OF INQUIRY

AND

IN THE MATTER OF THE SECOND REPORT ON THE NATIONAL COMMISSION FOR UNITY AND RECONCILIATION PRESIDED BY JUSTICE CROSS AND THE GOVERNMENT WHITE PAPER THEREON

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI TO QUASH THAT PART OF THE SECOND REPORT OF THE NATIONAL COMMISSION FOR UNITY AND RECONCILIATION PRESIDED BY JUSTICE CROSS AND THE GOVERNMENT WHITE PAPER THEREON IN RESPECT OF TEE PROPERTY OF MAJOR GENERAL M.S. T.A.RA.WALLI AT SPUR ROAD WILBERFORCE FREETOWN FORMERLY NUMBERED 40 THEREIN NUMBERED 16TH.

BETWEEN

THE

STATE — APPLICANT

AND

THE ATTORNEY GENERAL &

MINISTER OF JUSTICE

AND

THE NATIONAL COMMISSION FOR

UNITY AND RECONCILIATION — RESPONDENTS

EX PARTE MAJOR GENERAL (RTD)

M. S. TARAWALLI

A. F. Serry-Kamara far the interested person

AND

L. M. Farmah — for the Respondent.

Serry Kamal asks leave to use the supplemental affidavit sworn to on December 4th and also the amended notice of motion.

L.M. Farmah Leave granted

N. objection

Ex parte application on the part of Major General Tarawalli for an order granting leave to apply for an order of certiorari, to quash that Part of the second report of the Cross Commission and the Government White Paper thereon in respect of the property of Major M.S. Tarawalli at Spur Road, Freetown. formerly No. 40 Spur Road but now numbered [p.337] Relying on affidavit sworn to on the 4th December together with all the exhibits attached thereto. Exh. A — Beccles Davies Commission of Inquiry Vol. I and the Government White Paper thereon.

Exhibit B — Letter dated 25th August 1993 signed by John Benjamin.

Exh. C 1 & C 2 — Letters dated 9.7.96 and 23.8.96.

Exh.D1 & D2 — are 2nd Report of the National Commission for Unity and Reconciliation & the Government White Paper thereon.

Exh. E1, E2, & E3 — are letters dated 22.10.96 by S. Kamal, letter dated 18.10.97 by Tarawalli, to H.E. President Kabbah and letter dated 12.11.96 - Berewa to Kamal.

Exh. F — letter dated 6th April, 1999.

Exh. G — Fax — Berewa to Tarawalli.

Application is made under section 125 of the 1991 Constitution and Order 59 r 3 of the Annual Practice 1960 — relying on C.J.' s judgment in Misc. App. No. 7/99 — Harry Will V. A. G. delivered on 23rd March 2000.

National Provisional Ruling Council Decree (Repeal and Modification) Act 1996 Act No. 3 of 1996.

Court:—

Leave granted for applicant to apply for an order of certiorari to quash that part of the 2nd Report of the National Commission for Unity and Reconciliation presided by Justice Cross in respect of the property of Major M.S. Tarawalli at Spur road, Wilberforce formerly numbered 40 therein Numbered 16 H.

Signed

HON. MR. JUSTICE D.E.F. LUKE, C.J.

SGD.

HON. MR. JUSTICE H.M. JOKO-SMART, JSC.

SGD.

HON. MR. JUSTICE M.B. TOLLA-THOMPSON, JA.

2002-2005

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AGUSTA KAI MUNA v. JLAH BRODEH GRANT AND MR. ADAMA

[CIV.APP.3/87] [p.5-7]

DIVISON: SUPREME COURT, SIERRA LEONE

DATE: 4 DECEMBER 2002

CORAM: MR. JUSTICE S. BECCLES DAVIES - JSC

MRS JUSTICE A. AWUNOR-RENNER - JSC

MR. JUSTICE S.C.E. WARNE - JSC

MR. JUSTICE M.O. ADOPHY - JA

MR. JUSTICE A.B. TIMBO. - JA

BETWEEN: AUGUSTA KAI MUNA - APPELLANT

AND

JLAH BRODEH GRANT - 1ST RESPONDENT

AND

MR. ADAMA - 2ND RESPDONDENT

DR. W.S. MARCUS-JONES FOR APPELLANT

G.S. WILLIAMS ESQ. FOR RESPONDENTS

JUDGMENT

WARNE JSC.

This is an appeal against the judgment of the Court or Appeal, made up of NAVO, TURAY AND WILLIAMS JJA. delivered on Thursday 22nd day of January 1987.

THE GROUNDS OF APPEAL ARE

1. The Court of Appeal misdirected itself in law by failing to appreciate the order to recover possession of 13 Nana Kroo Street Freetown meant and could only he reasonably interpreted to mean so much of

13 Nana Kroo Street as was in the actual possession or occupation of the Second Defendant' tenant in the said premises and by construing that order to seem recovering "more relief' than was claimed.

2. The Court of Appeal erred in Law in not making an order dismissing the counterclaim.

FACTS: The facts of the case are that appellant is the owner of and is in possession and control of property No, 13 Nana Kroo Street. This property she let to three tenants. These tenants paid rent to her until one of the tenants defaulted who she evicted. This tenant one James Lewis vacated the room and put in possession the 1st Respondent. The 1st Respondent vacated the room and put in possession, the 2nd Respondent. The Appellant sought to remove the 2nd Respondent but the 1st Respondent opposed her action. both Respondents were then sued in the High Court for the possession of the room.

[p.6]

On the 14th October 1982, the High Court gave Judgment in favour of the Appellant granting her the reliefs sought. In the proceedings in the High Court, four witnesses testified for Appellant and five witnesses testified for the Defendants. At the end of the testimony, both Counsel addressed the Court. Johnson J. reviewed the evidence for the Appellant and for the Respondents and had this to say— "I accept the whole evidence of the Plaintiff and her witnesses. I do not believe or accept the evidence of the 1st Defendant and that of the witnesses for the defendant, I find as a tact, that Abigail Samson was in possession of premises 13, Nana Kroo Street and that she validly disposed of the premises to the Plaintiff, in accordance with Kroo Customary Law. In this regard, I accept the evidence of P. W.4. I do not find P.W.4 to be an interested party. I find that Abigail Samson has better right to possession of premises 13, Nana Kroo Street, I do not accept the evidence that the 1st. Defendant's father was the owner of the premises. I find that the Plaintiff in all the circumstances, has a better right to possession of the said premises than the 1st Defendant herein.

It is an established principle of law that an Appellate Court will not readily disturb the findings of facts of the Trial Court, but where the facts do not support the findings of the Trial Court or the findings have violently contravened a principle of law, or the findings are contrary to the facts or the facts have not been evaluated, the Appellate Court can interfere with such findings of facts.

In my view, the Trail Judge did not evaluate the facts adequately before his findings. To compound the flaw in the findings the Trial Judge did not consider the Counterclaim to enable him make any findings whatsoever.

In any case, the Court of Appeal has a right of rehearing the- whole case which they did.

In fairness to the Counsel for Appellant he gave several reasons why the Appeal should succeed. I will repeat them.

(1) Because the second Respondent was a tenant having no beneficial interest in premises the and led no evidence in defence of the claim against him.

(2) Because the High Court was right in finding that the Appellant had a better right to possession of the premises than the 1st Respondent.

(3) Because the Appellant was not merely owner in accordance with Kroo Customary Law but was at all material times in undisturbed possession of the premises.

(4) Because the 1st Respondent failed to establish her right to a declaration of title, damages and an injunction.

(5) Because at no time was the property vested in the 1st Respondent nor was she ever in possession of the same.

(6) Because on the totality of the evidence the Judgment of the High Court was correct and ought to be upheld and the Court of Appeal was one [p.7] sided in reversing it.

Having said this 1 will consider the proceedings in the Court of Appeal. Both parties were represented in the Court of Appeal and made their submissions.

The Court of Appeal having heard the submissions had this to say: "her claim was for recovery of possession of only a portion of the said premises, yet the Court below ordered that the Respondent "do recover possession of 13, Nana Kroo Street, Freetown from the Second Defendant."

This the Court found to be Contrary to Law. On a closer examination of the evidence and on a proper evaluation the court found that the property the Appellant was claiming was clearly defined and there was no documentary evidence to substantiate her claim. On the evidence before the court, there is evidence that the Respondent acquired the property by the Kroo Customary Law. The Court of Appeal referred to cap. 127 Laws of Sierra Leone and determined that the property in dispute is within the Kroo Reservation Area as defined in Cap. 127. In determining the acquisition of 13 Nana Kroo Street by the Appellant, The Court of Appeal found that. " The effect of the Kroo Reservation (Chapter 127) is not to make Kroo Laws and Customs prevail over the General and Common Law except in the specified case of succession on Intestacy spelt out in Rule 2 Schedule B of Kroo Reservation Act to be found at page 942 Vol. VII of the Laws of Sierra Leone." I agree with the findings of the Court of Appeal. The Court of Appeal also found that the disposal of the property No. 13 Nana Kroo Street by Abigail Samson is not valid according to Law. I find no fault with such findings. She had neither prescriptive right to dispose of the property nor legal or equitable right.

It is unfortunate that this case has dragged on for so long. The Learned Trial Judge did not make any finding on the Counterclaim nor did the Court of Appeal make a finding as well. What is the option open to this Court? In my view it is to remit the Counterclaim to the High Court for rehearing. However, what purpose will that serve? It is the duty of the Court to ensure that justice is done to litigants who come to our Courts. Since this Court can make any order vested in the High Court, I will proceed to review the case for the Respondents.

I have reviewed the whole evidence carefully and hold that on a balance of probality the 1st Respondent has failed to establish that she is the owner of property No.13 Nana Kroo Street, Freetown. I will dismiss the Counterclaim and I grant liberty to apply.

In view of what I have said supra I hold that there is no merit in Ground I of the Grounds of Appeal and it is dismissed and Ground II of the Grounds of Appeal Succeed.

[Sgd.]

SYDNEY WARNE JSC.

AMINATA CONTEH v. ALL PEOPLES CONGRESS PARTY

[SC.CIV.APP.4/2004] [p.348-352]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 27 OCTOBER 2005

CORAM: THE HONOURABLE JUSTICE DR A. RENNER-THOMAS, C.J.

THE HONOURABLE MR. JUSTICE S.C.E. WARNE, J.S.C.

THE HONOURABLE MRS. JUSTICE V.A. WRIGHT, J.S.C.

THE HONOURABLE MR. JUSTICE TOLLA-THOMPSON, J.S.C.

THE HONOURABLE MR. JUSTICE A.N.B. STRONGE, J.A.

AMINATA CONTEH — APPELLANT

AND

ALL PEOPLES CONGRESS PARTY — RESPONDENT

C.F Margai Esq. and E.E.C. Shears-Moses Esq. for the Appellant

A.F. Serry-Kamal Esq. for the Respondent

JUDGMENT

WRIGHT J.S.C.

This is an appeal from the judgment of the Court of Appeal dated the 29th day of June 2004. The respondent had issued a writ claiming possession for the recovery of the premises situate at 27 Pultney

Street, Freetown on the 7th August 2002, during the long vacation. An appearance was entered but no defence was filed. The respondent then applied for leave to enter a summary judgment in the High Court.

There was an appeal to the Court of Appeal that the High Court Judge was wrong in granting leave to sign summary judgment based on the ground that the appellant had a good defence and that there were triable issues.

There were several grounds of appeal as to whether summary judgment can be entered by the court when several triable issues have been raised before the Court and the appellant had a good defence.

The Court of Appeal based their judgment on the merits of the case and not on whether it was a case for leave to grant a summary judgment. As a result the Court of Appeal dismissed the Appeal [p.349] E. E. Shears-Moses Esq. Counsel for the appellant argued all seven grounds of appeal together. He stated that the appeal was not about the substance of the action but that it was not a proper case for summary judgment pursuant to Order Xl of the High Court Rules. He pointed out the triable issues in this matter Charles Margai Esq. also Counsel for the appellant stated that the identity of the property was not in dispute but that in the affidavit in opposition the appellant said that she had paid rent in full but that the receipts were burnt.

A.F. Serry-Kamal Esq. Counsel for the respondent stated that the property in dispute is 27 Pultney Street and not 26 Pultney Street Freetown. Therefore the answer must be that they are not one and the same property. He said that the court of Appeal rightly exercised its discretion in granting the judgment since there was no triable defence.

What are the issues involved in this case? The property in dispute is 27 Pultney Street, but the letter exhibited as AC2 to the affidavit is for 26 Pultney Street. Counsel for the appellant contended that the property was not in dispute since both sides knew the property, but Counsel for the respondent said that they were not the same property. There was no evidence to show that rent was paid to Alhaji S.A. Koroma or that the purported document was signed by him.

From the documents tendered the premises were let by Alhaji S.A. Koroma as Chairman/Leader of the A.P.C. According to the respondent the tenancy expired on the 31st August 2001, and the appellant continued to live on the premises after the expiry of the aforesaid agreement. The proceedings to evict the appellant were commenced against her because she did not vacate 27 Pultney Street despite several demands on the 31st August 2001.

Does the appellant have any triable defence? The respondent was asking for possession of the premises at 27 Pultney Street, Freetown. The appellant in her affidavit sworn on the 21st August 2002 exhibited a letter marked AC2 by the then AP.C. Chairman Alhaji S.A.T. Koroma stating that her tenancy was to be until the 31st December 2003. The notice given to her to vacate within 21 days from the 24th July 2002 was to the contrary. There was thus a triable issue if the tenancy was still subsisting. Alhaji S.A.T. Koroma never swore to an affidavit denying that he wrote Exhibit AC2.

Further to this, the notice to quit stated that the appellant was in breach of clause 6 of of the agreement. The breach was that she was putting up a permanent structure which she denied and is shown in her proposed defence which is Exhibit AC3 at page 32.

Over and above that the appellant denied signing the purported lease agreement Exhibit A FSK 3 in her paragraphs 3-7. I hold that that these are all triable issues including her putting up any structure as is even provided for in the lease agreement in paragraph 2 at page 40 of the records.

Further to that, the agreement in dispute exhibited by the Respondent agrees with the [p.350] letter of the 8th October 1998 in Exhibit ASK 9 at page 37 written by Alhaji F.B. Turay acknowledging the good work the Appellant was doing on the property. These are all triable issues that vitiate against a summary judgment pursuant to Order 11 of the High Court Rules 1960. Further evidence in support of the arguments that there are triable issues in this matter is the letter of the 24th July 2002 marked as Exhibit AC 1 at page 27. The Respondents were saying that the tenancy was to expire on the 31st January 2003 which follows that at the time a notice to quit was served her term had not expired.

Let me now turn to Order 11 Rule 1 as amended by Public Notice No 24 of 1964 which states as follows—

"(a) Where The Defendant appears to a Writ of Summons specially indorsed with or accompanied by a statement of claim of the remedy or relief to which the plaintiff claims to be entitled under Order iii Rule 6, the Plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the Plaintiff may be entitled to. The Judge thereupon, unless the Defendant by affidavit, by his own viva voce evidence or otherwise shall satisfy him that he has a good defence to the action on the merit, or shall disclose such facts as may be deemed sufficient to entitled him to defend the action generally, may make an order empowering the Plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed." The power of the court to grant leave to enter summary judgment is given by order 11 Rule 1 of the High Court Rules 1960 as amended.

The object of the order is to ensure a speedy conclusion of the matters or cases where the Plaintiff can establish clearly that the defendant has no defence or triable issues. This draconian power of the court in preventing the defendant from putting his case before the court must be used judiciously. A judge must be satisfied that there are no triable issues before exercising his discretion to grant leave to enter a summary judgment. The judge is also obliged to examine the defence in detail to ensure that there are no triable issues.

This remedy given by this order is a stringent one which is a judgment given without a trial. It was the intention when the order was framed that the affidavit so required must be a condition precedent to the exercise of the power conferred by the order to give Judgment without a trial. Therefore if an affidavit fails to satisfy the requirement of that order because the deponent cannot swear positively to the facts thereon stated may produce on the minds of the judge, who hears the matter a strong

impression that though the affidavit is not one which satisfies the terms of the order, it nevertheless indicates a strong probability that the Plaintiff has a good cause.

However recently the English Courts have gone one step further in their endeavour to ensure a speedy conclusion of matters under this order in the spirit of what it is now [p.351] commonly known as the Woolf Reform. The test is not that there should only be a triable issue but that the defence should have a real prospect of success as distinct from a fanciful prospect of success (See Swain vs Hillman and another reported in 1 All England Reports 2001 Page 91 at Page 95 paragraph J)

It is therefore the duty of the judge to examine the issues of Law and of facts raised and determine whether the defendant has a good chance of success.

The Digest 37 (3) para 3103 referred to the judgment of Vaughan Williams L J in Symon & Co VS Palmer's Stores (1903) Ltd (1912) IKB 439, 106 LT 176, C A. A condition to be satisfied in the granting of a summary judgment is that there must be an affidavit by the Plaintiff himself or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed if any, and stating that in his belief there is no defence to the action".

The position in Law has been well settled. As a general rule where a defendant shows by his affidavit that he has a reasonable ground for setting up a defence he ought to have leave to defend the claim brought by him. The court has to take into account all the circumstances of the case including triable issues in deciding whether leave to defend ought to be given (See Saw vs. Hakim 5 T L R P 72 and Jones vs Stone (1894) AC 122). The case of Jones vs Stone see above laid down the rule that where there are questions of facts in disputes, summary judgment ought not to be given under order 14 equivalent to Order 11 of the High Court Rules. See also Ofodofe vs Central Insurance Co. ((1991) 2 G L R 207.)

See also the case of Sheppards & Co vs. Wilkinson and Jarvis (1889) 6 T L R 13 C.A in which it laid down that "Summary Judgment conferred by this order must be used with care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion. Thus where a defendant has filed a defence which discloses a triable defence, it will be a travesty of justice for a court to refuse him leave to defend simply because he had not filed an affidavit in opposition responding to the fact set out already in his defence. In Jacobs vs. Booths Distillers Co. (1901) 85 LT 262.

It was stated that judgment should only be ordered under summary judgment where assuming all the facts are in favour of the defendants, they do not amount to a defence in law.

In Wellington V Mutual Society ((1880) 5AC 685 at page 690.) A defendant who raises a triable defence shall have a right to have his case tried. The Justices of the Court of Appeal with respect should not have gone into the substance of the action but as to whether or not it was a proper case for summary judgment to be granted pursuant to Order Xl of the High Court Rules. It appears that the learned Justices of Appeal acknowledged that there was a defence in their judgment even though later they said there was no defence.

[p.352]

Let me emphasize that summary judgment under Order 11 of the High Court Rules 1960 should not be given during the vacation unless both parties consent to the order see Macfoy vs. United Africa Co. Ltd. (1960 AC. House of Lords page 157) where Lord Denning dealt with the effect of delivering a statement of claim in the long vacation.

The learned Justices of the Court of Appeal should not have gone into the substantive matter and also not to have upheld the judgment since there were triable issues.

Order 11 Rule 6 of the High Court Rules 1960 states "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the court may think fit".

In determining whether leave is unconditional or conditional the judge could examine other features surrounding the case such as good or bad faith of the parties, whether the conduct of any of the parties is questionable, whether the imposition of a condition could be oppressive which could result in shutting out the defendant's ability to defend or proceed with the action. The foregoing examples are not exhaustive since circumstances may differ from case to case.

For the reasons given above the judgment of the Court of Appeal dated 7th April 2004 and the judgment of the High Court dated 12th September 2002 are hereby set aside. The matter is remitted to the High Court and the appellant is given leave to defend the matter in the High Court.

In this case I do not see any need for conditions to be imposed.

The respondent is to pay the taxed costs of this appeal and those of the Court below.

SGD.

MRS. JUSTICE V.A.D. WRIGHT

I agree

SGD.

HON MR. JUSTICE S.C.E. WARNE J.S.C.

I agree

SGD.

HON MR. JUSTICE M.E. TOLLA-THOMPSON J.S.C.

I agree

SGD.

HON MR. JUSTICE A.N.B. STRONGE J.A

CASES REFERRED TO

1. Symon & Co VS Palmer's Stores (1903) Ltd (1912) IKB 439, 106 LT 176, CA

2. Swain vs Hillman and another reported in 1 All England Reports 2001Page 91

3. Saw vs. Hakim 5 T L R P 72 and Jones vs Stone (1894) AC 122

4. Ofodofe vs Central Insurance Co. [1991] 2 G L R 207

5. Sheppards & Co vs. Wilkinson and Jarvis (1889) 6 T L R 13 C.A

6. Jacobs vs. Booths Distillers Co. (1901) 85 LT 262

7. Wellington V Mutual Society (1880) 5AC 685 at page 690.

8. Macfoy vs. United Africa Co. Ltd. (1960) AC

STATUTES REFERRED TO

1. Order Xl of the High Court Rules

2. Order 11 Rule 1 as amended by Public Notice No 24 of 1964

3. Order 11 Rule 1 of the High Court Rules 1960 as amended.

CASTROL LIMITED v. JOHN MICHAEL MOTORS LIMITED

[S.C. CIV. APP. NO:1/98] [p.232-265]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 5 JULY 2005

CORAM: HON. MR. JUSTICE A.R.D. RENNER-THOMAS, C.J.

HON. MR. JUSTICE S.C.E. W ARNE, J.S.C.

HON. MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

HON. MR. JUSTICE M.E. TOLLA THOMPSON, J.S.C.

HON. JUSTICE SIR JOHN MURIA, J.A.

BETWEEN

CASTROL LIMITED — APPELLANT

AND

JOHN MICHAEL MOTORS LIMITED — RESPONDENT

Berthan Macaulay (Jnr) Esq. for the Appellant

Abdul Tejan-Cole Esq. and Martin Michael Esq. for the Respondent

RENNER-THOMAS, C.J.

The Appellant in this Appeal, Castrol Limited (hereinafter referred to as "Castrol") is an English Company and was at all material times wholesalers of various lubricants and other allied products (hereinafter referred to as "Castrol products") in respect of which they had appointed the Respondent John Michael Motors Limited, the Respondent herein, (hereinafter referred to as "John Michael Motors") as sole distributor in Sierra Leone sometime in 1971. John Michael Motors was at all material times a local Company engaged in the business of importing, marketing and distributing the said Castrol products as well as in the sale and servicing of motor vehicles, motor cycles and other allied products.

The terms and conditions of the agreement under which John Michael Motors was appointed sole distributor of Castrol products were not pleaded nor was evidence led on the same. Until September 1987 John Michael Motors continued to act as sole distributor of Castrol products in Sierra Leone. Thereafter, it was agreed between the parties that the Second [p.233] Defendant in the High Court, Datsun Motors Limited, (hereinafter referred to as "Datsun Motors") would also be allowed to import and distribute Castrol products in Sierra Leone. It was further agreed that for each consignment of Castrol products Datsun Motors imported into Sierra Leone Castrol would pay John Michael Motors a commission of 5 per cent of the C.I.F. value of the consignment.

On the 5 day of November 1987 Castrol addressed the following communication to John Michael Motors:—

"WE HEREBY GIVE YOU NOTICE terminating the Distribution Agreement or arrangements between Castrol Limited and John Michael Motors Limited on 7th February 1988. From such date you must not hold yourself out as being authorised to distribute Castrol Limited lubricants and allied products in the Territory of Sierra Leone and you must remove from all stationery and other literature any reference to your company

being a distributor of Castrol Lubricants arid Allied Products. Castrol Limited reserves its rights against John Michael Motors Limited in respect of the outstanding sterling account of £16,238.42 payment of which we understand Mr. John Michael of 9 Cherrington Close, Shankhill Co. Dublin, Republic of Ireland has accepted primary responsibility. We put you on Notice that we reserve rights against you in the event that Mr. John Michael does not settle these outstanding amounts within next 30 days".

The document was admitted in evidence during the trial and marked as Exhibit "D2".

Quite understandably, the management of John Michael Motors was quite displeased at this development. In a letter addressed to Castrol, the General Manager of John Michael Motors stated that management was completely surprised to have received such a letter without any previous comment on the subject; He continued as follows:—

"We have been selling and distributing your products since the early 1972 even at the time when companies like Shell, BP, Mobil, Texaco were not to be competed with.

We have done a lot to push your products in this part of the world and if there is success today, it is because of our past effort. We have [p.234] been advertising, printing signs and made adverts on Television and Radio at our own expense. What Castrol has provided in terms of adverts is not even 20% what we have spent locally."

The letter was admitted evidence as Exhibit "E".

This was followed by another more detailed letter dated 26th November 1987 from Mr. John Michael to Mr Scott of Castrol. For the first time, the issue of the inadequacy of the notice to terminate the distribution agreement was raised. The reply from Castrol was contained in a letter dated 22nd January 1988 signed by Mr. Scott, as Solicitor and Assistant Legal Adviser, addressed to Mr. John Michael. First, Mr. Scott gave as reason for terminating the agreement the poor sales performance "during the last few years compared with [Castrol's] assessment of the real market potential in Sierra Leone for Castrol lubricants, if marketed aggressively". Secondly, he said Castrol's decision to terminate the agency agreement was irrevocable. Thirdly, and most importantly for this matter, Castrol refused to extend the period of notice.

Consequently, John Michael Motors instituted an action in the High Court in which Castrol was First Defendant and Datsun Motors was Second Defendant. In their amended Statement of claim John Michael Motors contended, inter alia, that in the absence of any agreed period for the termination of the distributorship agreement reasonable notice should have been twelve months rather than the three months given by Castrol. It claimed, inter alia, damages for breach of contract and £240,000/00 apparently as special damages.

At the trial the General Manager of John Michael Motors gave uncontroverted evidence of their contention that the Plaintiff Company had spent a lot of time and money in promoting Castrol products in Sierra Leone and that it stood to lose a considerable amount of profit on lost sales of Castrol products and on collateral business because of the alleged unlawful termination of the agreement. The trial Judge agreed with the contention of John Michael Motors that three months notice was unreasonable in the circumstances to terminate the agreement. He held that twelve months notice was reasonable in the circumstances of this case. However, the trial judge rejected the claim for £240,000/00 which he dealt with as special damages but went on to award the John Michael Motors [p.235] general damages of £200,000.00. Perhaps, I should mention for completeness that the trial judge allowed the claim of John Michael Motors against Datsun Motors.

Being dissatisfied with the decision of the trial judge as far as it affected them Castrol appealed to the Court of Appeal on several grounds. The Court of Appeal rejected the appeal and agreed with the trial judge that twelve months notice should have been given for the termination of the distributorship agreement instead of three months. The Court of Appeal also upheld the award of the sum of £200,000/00 as general damages. It is against this Judgment of the Court of Appeal that Castrol has appealed to this Court on the following grounds:

"(1) The Court of Appeal having failed to draw the proper and or correct inferences from the facts established at the trial wrongly affirmed the decision of the Learned Trial Judge that reasonable notice in the instant case was twelve months and that the Appellant wee in. breach of their agreement with the Respondents by not giving them twelve months notice to determine the said Agreement.

(2) The Court of Appeal in upholding the decision of the Learned Trial Judge that twelve months notice was reasonable in the instant case misdirected itself in holding that the case of DECRO-WALL INTERNATIONAL S. A. VS PRACTITIONERS IN MARKETING LIMITED (1971) 2 ALL. E. R. 216 "played a pivotal role" in that the said case was clearly distinguishable from the case before the Court and that the award of twelve months notice in that case ought not to have been replicated by the Learned Trial Judge nor confirmed by the Court of appeal in the instant case.

(3) The Court of Appeal failed to consider or adequately consider the Appellant's case on the question of reasonable notice in the circumstances of the particular case that was before the Court.

(4) The Court of Appeal in dismissing ground two (2) of the Appellant's grounds of appeal, which was couched in the following terms:—

[p.236]

"That the award of £200,000/00 (TWO HUNDRED POUNDS STERLING) awarded by the Learned Trial Judge, as damages for breach of contract on the ground of termination, is so inordinately high, in that no evidence, or insufficient evidence, was available to the Judge to justify any quantification of damages and also in view of the dismissal of the Plaintiff's claim for special damages, that it must have been an entirely erroneous estimate of the damage suffered." (emphasis mine) misdirected itself in—

(a) addressing the issues of remoteness and categorisation of damages, either as general or special damages, when the issue complained of was the quantum of damages, and

(b) referring to irrelevant matters by citing the following passage from the judgment in the case of Strom Bucks Akie Bolag vs John and Peter Hutchinson (1905) AC 515:

"I do not think the court ought to be astute in defeating an honest claim in favour of persons who have wilfully disregarded their obligations……." (emphasis mine)

In that there was no basis for such a reference and assuming without conceding that there was evidence of such a behaviour on the part of the Appellant, such conduct was totally irrelevant in deciding whether

the quantum of general damages awarded was inordinately high or not, thereby failing to property adjudicate on the issue of quantum of damages.

(5) Further and or in the alternative the Court of Appeal having referred to the dicta of Lord McNaghten in the Stroms Bucks Akie Bolag vs John & Peter Hutchinson (1905) A.C. 515 at 526 in the following terms:

"I am unable to see what difference it can make whether you claim damages generally and shew that an award of [p.237] general damages would include and cover special loss from which you seek relief, or whether you seek compensation for a special loss and shew that the loss would more than be covered or compensated by an award of special damages."

erred in upholding the award by the Learned Trial Judge of £200,000/00 (Two Hundred Thousand Pounds Sterling) as General Damages having regard to the fact that the said Learned Trial Judge had rejected the Respondent's claim for special damages, which included a general claim at large of 2 loss of sale of Castrol products" (not referable to any specific contract/agreement) of £100,000 which said claim was in the nature of general damages.

(6) The Court of Appeal misdirected itself when it held as follows:

"It is therefore justified in the circumstances that it is for the respondent to select the currency in which to make his claim seeing that such currency would most truly express the respondent loss and invariably most fully and exactly compensate him for that loss. See the Folias (1979) 1 ALL E.R. 421" (emphasis mine).

in upholding the Learned Trial judge's award of general damages in foreign currency in the sum of £200,000.00 in that in The Folias the Court had held, inter alia, that

"If then the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the Plaintiff or "which most truly expresses his loss"

and that the Respondent itself had led evidence to show that the earning from sales of Castrol products were in Leones and had not led any evidence to show that the loss of profits from future sales, as a result of the insufficient notice in sterling.

[p.238]

(7) The Court of Appeal in adjudicating upon the Appellant's appeal against the award of damages in foreign currency failed to consider or adequately consider the Appellant's case especially the authority of Attorney-General of the Republic of Ghana and Ghana National Petroleum Corporation v. Texaco Overseas Tank ships Limited (1994) 1 Lloyds Law Report 473 which was cited to the Court.

(8) The judgment is against the weight of the evidence. "

Despite these rather detailed grounds of appeal the issues to be determined by this Court could be summarized as follows:—

1. Taking into account all the circumstances of the case, was the Court of Appeal right in upholding the decision of the trial judge that twelve months notice, rather than three months notice, was reasonable for the termination of the distributorship agreement?

2. Was the Court of Appeal right in upholding the amount of £200,000.00 awarded by the trial judge as general damages?

3. Taking into account all the circumstances of the instant case, was the Court of Appeal right in upholding the decision of the trial judge to award damages in a foreign currency?

To be able to answer the first question this Court should first enquire whether there was any available evidence upon which the trial judge could have relied in reaching the conclusion that a period of twelve months rather than three months was reasonable notice for the termination of the agreement.

There are several reasons why this exercise has got to be undertaken. First, all appeals are by way of rehearing. Rule 9 (1) of the Court of Appeal Rules, Statutory Instrument No. 29 of 1985, makes this plain in the case of the Court of Appeal. Though there is no similar provision in the Rules of this Court, Statutory Instrument No.1 of 1982, this Court can apply the provision of the said Rule 9(1) as it has the same powers, authority and jurisdiction vested in any court [p.239] established by the Constitution or any other law (see Section 11 (3) of the Constitution, Act. No.6 of 1991.

The provision of Rule 9(1) of the Court of Appeal Rules was applied by this Court in the case of Amadu Wurie v. Edward Wilson Shomefun and Foday Bangura S.C. Civ. App. No.8/81, judgment delivered on the 29th day of December 1983, (unreported) in which Tejan J.S.C. stated as follows:—

"it should be noted that in rule 9 (1) of the Court of Appeal Rules, the expression "by way of rehearing " is used . The expression does not mean that the parties and their witnesses are to appear before the Court of Appeal and to give their evidence. The words "by way of rehearing" express the practice of the old Chancery appeal (which was not strictly an appeal so much as a rehearing before a higher Court). (See Quilter v Walpleson (1882) 9 Q.B.D. at page 676; see order 58 Rule 3 of the English Rules (1959) edition. It is simply a rehearing on the record."

Secondly, I am obliged by law to satisfy myself that there was evidence on which the trial judge could properly have relied in reaching the conclusion that twelve months notice as opposed to three months notice was reasonable in the circumstances of this case. I am obliged to do this notwithstanding the existence of a concurrent finding by the Court of Appeal. The decision whether there is such evidence is a question of law and the search for the answer to that question is one of those special circumstances that would justify a departure from the practice of declining to review the evidence for the third time where there are concurrent findings of two lower courts on a pure question of fact. In the case of Agip (SL.) Limited v. Edmask 1972-73 ALR S.L. 218 this Court cited with approval the dicta of Lord Thankerton to that effect in the case of Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy (1946) A.C. 508 at 521.

In dealing with this issue Acquah J.S.C (as he then was) had this say in delivering the Judgment of the Ghana Supreme Court in the case of Koglex (No. 2) v. Field (2000) SC. GLR 175 at 185:—

"The very fact that the first appellate court has confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment i.e. like the trial court is also justified by the evidence on record. For an appeal, at whatever stage, is by way of rehearing, and every appellate court has a [p.340] duty to make its own independent examination of the record of proceedings."

I cannot agree more.

Having said this, it must be pointed out that in carrying out its functions of rehearing the case an appellate court should be guided by certain principles particularly when dealing with the trial judge's findings on questions of fact. This Court has restated those principles and applied them in a long list of cases starting with El Nasr Export and Import Co. Ltd. v. Mohie El Deen Mansour SC. Civ. App. No. 3/73 judgment delivered on the 25th April, 1974. (unreported) in which this Court stated, inter alia, as follows:—

" It is true that Rule 21 of the Court of Appeal Rules 1973 (Public Notice No. 28 of 1973) [now replaced by Rule 9(1) of the present Court of Appeal Rules) gives very wide and sweeping powers to the Court of Appeal even to the extent of re-hearing the whole case. At the same time it is settled law and good sense that it should be in the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. In this connection I quote with approval the words of Lord Thankerten in WATT or THOMAS v. THOMAS (1947) A.C. at page 487 referred to in the House of Lords in the case of BENMAX v. A USTIN MOTOR Co. LTD. (1955) 1 A.E.R. 326:

1. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, because it unmistakably so [p.241] appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court".

(See also the cases of KPONUGLO v. KODADJA (1933) 2 WA. C.A. 24 and KlZIDGUv. DOMPREH (1937) 2 WA.CA. 28],)

This Court has reiterated these same guidelines in following cases:—

1. Ayo Wilson v. James Samura & Anor S.C. Civ. App No. 3/74 judgment delivered on 3rd June 1975 (unreported);

2. Seymour Wilson v. Musa Abess — S.C. Civ. App. No.5/79, judgment delivered on 17th June 1981 (unreported);

3. J.S. Bangura v. Sierra Leone Electricity Corporation S.C. Civ. App. No.10/81, judgment delivered on 5th May 1983 (unreported); and

4. Amadu Wurie v. Edward Sholl mefun Wilson {supra).

Let me hasten to say that having evaluated the findings of facts by the trial judge in the instant case and bearing in mind those guidelines laid by this Court in the authorities I have just cited I see no justifiable reason for interfering with those findings of fact which the trial judge relied on to reach the conclusion that twelve months was reasonable notice for the termination of the agreement.

Having said that the question still has to be answered whether on the facts as found the trial judge was justified inholding that twelve months notice was reasonable in the circumstances.

Indeed, quite a lot of emphasis was placed by Counsel for both parties in this appeal on the similarities on the one hand and the dissimilarities on the other hand between the facts in the instant case and those in DecroWall International SA v Practitioners in Marketing Limited [1971] 2 All ER 216. With the greatest respect to Counsel on either side,fhough I find the Decro-Wall case helpful for some of the principles stated therein the emphasis placed on the similarities by the Counsel for the Appellant on the [p.242] one hand and on the dissimilarities by Counsel fof the Respondent on the other hand was not very helpful.

Indeed, according to Buckley L.J. in the Decro-Wall case the question what is reasonable notice must be answered in the light of all the relevant surrounding circumstances of each particular case

The question of what is reasonable notice to terminate a contract came before this Court in the case of Thomas O. Vincent v. B.P (Sierra Leone) Limited, S. C. Civ. App. No. 2/81 judgment delivered on the 3rd day of April 1984 (unreported). Though that case dealt with the termination ora contract of employment I find some of the principles laid down therein helpful and I do adopt them. The basic principle to be gleaned from that case is that what is reasonable notice to determinate a contract where the parties thereto have not made any express provision is a question of fact for the Court to determine. Further, in determining that question regard must be had to the circumstances of the case.

There is also cited in the Vincent case the following passage froni Batt on Master and Servant 5th Edition at page 78:—

"Decided cases do not conclude this matter, each case must depend on its own particular facts and a previous case of similar facts is merely a guide as to the future and not binding either on the judges or the jury as governing the case to be decided".

I have no hesitation in adapting that passage to the circumstances of the instant case.

What then are the particular facts of this case? I shall first set out those found by the trial judge. In addition, I shall highlight further facts which, in my opinion, tend to lend support to the conclusion I have reached that both the trial judge and the Court of Appeal were right in concluding that three months notice was not reasonable.

The trial judge accepted the evidence of PW1 that in 1971 when the agency started Castrol was a new product in the Sierra Leone market. John Michael Motors was faced with stiff competition from other brands and it [p.243] took them time and effort between 1971 and 1979 to conquer the market. He relied particularly on the following account by PW1 :

"In the beginning Castrol was a new product and we were faced with very strong competition from other brands and as such it took us quite a long time to break into the market. We had to do a lot in terms of adverts. e.g. Radio Commercials, Newspaper Adverts, Road Signs. We also sponsored Golf Tournaments in Freetown and Yengema and we gave out lots of donations to charity, Dances and Raffles. We gave out free samples of our products to Motor Companies. The adverts went on from 1971 up to 1979. John Michael Motors spent at least £20,000.00-£30,000.00 sterling on Adverts during this period. In the late 70's up to 1986 we knew one Mr Bruce Whorley with whom we worked for a period of over ten years. He wrote us a commendable letter and thanked us for our past efforts before we left Sierra Leon. From 1971-1975 we did at least one or more containers at an average value of between £4000-£5000 sterling per container.

From 1975-79 we did between 2-4 containers per annum at an average value of between £6000-£7000 sterling per container, 1979-80 we did a total of 10 containers at an average vale of between £8000-£10000 sterling per container, 1981-84 we did no imports but in 1985, 1988 we did one container only valued around £17000 sterling, 1986 we did a total of three containers at a total value of over £40,000.00 sterling, 1987 we did only one container valued at around £11,000.00 sterling."

"At the time we were given the notice in November 1987 we already had one container of products on the high seas consigned to us. The container arrived in mid December 1987. We had just over one month to sell the goods in the container. We also had old stock that we had to get rid of and we had to make new arrangements with other sub agents and customers. Most of their booked orders were cancelled."

He found as a fact that sometime in September 1987 the parties agreed to a variation of the agreement. Under the new arrangement John Michael Motors was to cease being sole agent/distributor of Castrol products in [p.244] Sierra Leone in exchange for a commission of 5% of the value of each container of Castrol products imported into Sierra Leone by third parties.

Immediately after this variation John Michael Motors was going to order three containers of Castrol products in respect of which they were going to open letters of credit for three containers of Castrol products. As it turned out, they had only been able to open the letter of credit for just one container by the agreement was terminated in early November 1987. This container of Castrol products was in fact still on the high seas when the agreement was terminated.

The trial judge also took note of the exchange of correspondence between the parties after the termination of the agreement. He seems to have put some weight on the various issues raised by Mr. John Michael in his letter of 26th November 1987, Exh "F" addressed to Mr. Scott to which I referred earlier.

These issues related inter alia to the nature of the relationship during the 17 years the agreement had been in force. He also took into account the reason proferred by Mr, Scott, the legal adviser of Castrol, for the termination of the agreement but accepted the evidence of PW1 that the only reason why John Michael Motors did not import more Castrol products before the termination of the agreement was because of the difficulty they were experiencing in obtaining foreign exchange.

Finally, he highlighted what, strangely in my view, were apparent similarities between the facts in the instant case and those in the DecroWall as follows:—

"1. The plaintiff company in the instant case imports markets distributes and sells motor vehicles in this country.

2 On or about 1971 the 1st defendant company appointed the plaintiff company as their Sole Agents in this country to Import, market, distribute and sell their products (Castrol Products) especially lubricants.

3 The Agreement was an oral Agreement and the liabilities of the parties vis-a-vis their duties and obligations is as is shown in the Decro-Wall case;"

[p.245]

I would have hesitated to hold that based on the above findings alone the trial judge was justified in holding that twelve months notice was reasonable for terminating the agreement.

However, there are other factors which I have myself taken into account based on the circumstances of this particular case which make me inclined to share the view that twelve months notice was reasonable.

First, the only inference one can possibly draw from the fact that the parties agreed to vary the agreement in September 1987, as stated above, was that it was the intention of each side that this new agreement was to last for more than six months. It could not have been in the contemplation of the parties that this new agreement was going to be terminated without adequate notice for a reason which was already known to both parties at the time when it was entered into i.e. that John Michael Motors was having difficulties getting foreign exchange to pay for their imports of Castrol products or even for the reason ultimately proferred by the legal officer of Castrol, viz. John Michael Motors' failure to market the products "aggressively".

Secondly, the Castrol knew in November 1987 that the container ordered by John Michael Motors under the new arrangement had not yet arrived in Sierra Leone and that it would take, most probably, more than three months to dispose of the products contained therein especially in the light of the fact that Datsun Motors were also now allowed to import the same products into Sierra Leone. In addition, there

was the uncontroverted evidence of PW1 that some of the products ordered in 1986 had still not been sold at the time the agreement was terminated.

Thirdly, from the very wording of the letter of termination Castrol must have known that John Michael Motors had built up quite an outfit for the distribution and marketing of Castrol products in Sierra Leone which had to be dismantled. Not only did they not want John Michael Motors to stop importing Castrol products but they also wanted them to stop holding themselves out as distributors of Castrol products in Sierra Leone. My understanding of that is that within three months of the notice of termination John Michael Motors should have stopped offering Castrol products for sale in Sierra Leone as agents of Castrol.

[p.245]

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[p.246]

In this regard, John Michael Motors was under an obligation too remove all reference in their letter head and other Company literature to their being distributors of Castrol products in Sierra Leone. What John Michael Motors was faced with was the task of undoing in three months a network of distributorship and sub-agencies which it had been built-up over 17 years, and this at a time when one-container load of Castrol products was on the high seas en route to them and an unspecified quantity of these products still remained unsold in their stores

In the course of the arguments in this court Mr. Berthan Macaulay Jnr, Counsel for Castrol, conceded that three months notice to terminate the agreement in the instant case was not reasonable but, quite rightly, he would not be drawn into saying what, in the circumstances of this case, was reasonable. Having reviewed the evidence, and for the several reasons I have stated above, I see no reason for reversing the conclusion of the trial judge and of the Court of Appeal that reasonable notice to terminate the agreement between the parties herein should have been twelve months notice. As a result grounds 1, 2 and 3 in the amended Notice of Appeal fail.

I now turn to the second issue raised by this appeal, namely, whether the award of £200,000.00 as general damages was justified in the circumstances of this case.

I am of the view that before seeking to answer this question it is ·important to state that an appeal against an award of damages is, like appeals generally, by way of rehearing and therefore an appellate court has power to review the award. (See ldrissa Conteh vs Abdul K. Kamara S.C. Civ. App No.2/79 judgment delivered 1st April 1980 (unreported))

However, there are certain principles on which an appellate court must apply in the exercise of its power to review an award of damages by a judge sitting alone. These have been laid down in along line of cases by our courts and are well established. In the ldrissa Conteh case this court stated that:

"the rule is that an appellate court will not interfere with the award of damages unless it is satisfied that the judge acted on wrong principles [p.247] of law, or has misapprehended the facts or has made a wholly erroneous estimate of the damages to which the claimant is entitled."

This Court then went on to cite with approval dicta from the following cases;

a) Flint v. Lovell (1935) 1. K.B. 354 at 360 per Greer LJ.;

b. Owen v. Sykes (1936) 1 K.B. 192 C.A. where Greer L.J. elaborated on the rule as stated in the Flint case in the following terms: —

"it has been laid down in Flint v. Lovell that this court does not readily interfere with the estimate of damages made by a learned judge at the trial. An assessment of damages is necessarily an estimate and an estimate is necessarily a matter of degree and it seems to me that unless we come to the conclusion that the learned judge took an erroneous view of the evidence as to the damage suffered by the plaintiff

or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere".

c) Davies v Powell Duffryn Associated Collieries Limited (1942) A.C. 601 at 617 per Lord Wright that "The scale must go down heavily against the figure if the appellate court is to interfere, whether on the grounds of excess or insufficiency"

(See also Alimamy Turay v Cecilia Koroma S.C. Civ. App. 3/80 judgment delivered on the 17th December 1981, (unreported)).

I shall now proceed to apply the above principles to the facts of the instant case. According to the prayer in the amended Statement of Claim John Michael Motors claimed, inter alia, the following: —

"1. Damage for breach of the agency and distribution contract between the plaintiff and the 1st Defendant;

2) £240,000/00".

[p.248]

The breakdown of the sum of £240,000/00 was given in paragraph 13 of the Statement of Claim under the heading "Particulars of loss and damage" as follows: —

"a)Loss on sale of Castrol products; — £100,000/00;

b) Loss of profit on service of vehicles and sales of spare parts — £40,000/00;

c) Loss of sales on care, vans trucks motorcycles, generators and agricultural equipment — £60,000/00

d) Adverts and stationery — £30,000/00;

e) Re-organization of business — £10,000/00;

The trial judge treated the above as the same as "particulars of special damages" even though they were not pleaded as such.

The trial judge then went on to review the evidenced led in support of each of these items and rejected each of them. After referring to the cases of Chatin & Sons v. Epope (1963) GLR at 168 where Blay J.S.C. cited the following dicta in Benham-Carter v. Hyde Park Hotel Limited (1948) 64 TLR at 178: —

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage}' it is not enough to write down the particulars, and so to speak, throw them at the face of the Court, saying "this is what I have lost, I ask you to give me these damages." They have to prove it."

the trial judge concluded as follows: —

"In the light of the claims put forward by Counsel for the Plaintiff Company I would be bold to say that he has merely presented a list of figures which they allege was [sic] amounts they have lost without

attempting in any way to prove how he came about them and expects this Court to award them damages to the tune of these amounts claimed. I am, therefore in agreement with the submission of Counsel for the Ft Defendant Company that the Plaintiff Company's claim for special damages must fail in the circumstances".

To be able to determine whether the trial judge was right in rejecting John Michael Motors' claim for £240,000/00 by way of special damages it is [p.249] necessary to restate the basic principles of law governing the award of special damages.

First, it is important to deal with the distinction between general damages and special damages. Indeed, Counsel for the Appellant was unhappy about the use that the Court of Appeal made of the dicta of Lord McNaghten in Stroms Bruks Aktie v. John & Peter Hutchinson (1905) A.C. 515 at 526 in the following terms: —

"I am unable to see what difference it can make whether you claim damages generally and shew that an award of general damages would include and cover loss from which you seek relief, or whether you seek relief, or whether you seek compensation for a special loss and shew that the loss would more than be covered or compensated by an award of special damages."

In my view, it is useful to recognize the variety of meanings attributed to the terms "general damages" and "special damages". In McGregor on Damages 15th edition at pages 19-23 three meanings are identified:

The first meaning concerns liability coinciding with the distinction between the first and second rules in Hadley v Baxendale (1854) 9 Ex. 341 " best expressed by Lord Wright in Monarch S.S. Co. v Karlshamns Oljefabriker (1949) A.C. 196 at 221 where he said:

"the distinction drawn [viz. in Hadley v Baxendale] is between damages arising naturally (which means in the normal course of things) and cases where they are special and extraordinary circumstances beyond the reasonable provision of the parties. "

The second meaning, according to McGregor, concerns proof and is clearly illustrated in the contract case of Prehn v Royal Bank of Liverpool (1870) L.R.5 Ex. 92 where Martin B. distinguished between general damages being such as

"the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man and on the other hand special damages which are given in respect of any consequences reasonably and probably arising from the breach complained of"

[p.250]

This type of general damages according to Mcgregor is usually concerned with non-pecuniary losses which are difficult to estimate, such as injury to reputation in defamation cases or pain and suffering in personal injury claims.

The third and find distinction between general and special damages concerns pleading and evidence. In my view, this is the most relevant for the instant case. In this context, special damages is that precise amount of pecuniary loss which the claimant can prove to have resulted from the particular facts set out in his pleading. They must be specifically pleaded and strictly proved. Examples are out of pocket expenses, loss of earnings and loss of profit. If proved, they will be awarded. If not proved, they will be rejected. On the other hand, general damages in this context are given in respect of such loss as the law presumes to result from the infringement of a legal right or duty. The loss must equally be proved but, invariably, the claimant cannot quantify exactly any particular items in it.

Though the calculation is a matter for either the jury or the judge sitting alone evidence to assist the Court in doing the calculation must be given if the plaintiff wishes to obtain substantial damages on the general head. (see Mcgregor (ibid) and Chitty on Contracts 27th edition, Volume 1, pages 1199/1200 under the rubric "Kinds of Damages-General and Special Damages."

Having thus disposed of the significance of the distinction between special damages and general damages, I now turn to the law relating to the measure of damages to which the innocent party may be entitled in contract cases. This is how it is stated in Halsbury's Law of England, 4th edition, Volume 12 at pp. 262-263 in paragraph 1174:

"In cases of breach of contract the contract breaker is responsible and responsible only for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result from such breach, or of which there was a serious possibility of real damage. The requisite degree of likelihood is in general higher than in tort since the parties make their own bargain, but special knowledge may apparently affix a contract [p.251] breaker with a greater liability than a tortfeasor with no special knowledge ".

Then follows paragraph 1175 in these terms:

"The requisite degree of foresight may be attributed to the contract breaker under what is known as the rule in Hadlev v Baxendale (supra) either (1) because the damage is such as may fairly and reasonably be regarded as arising naturally, that is to say according to the usual course of things, from the breach, or (2) because of special knowledge which he had at the time of making the contract.

These principles may be regarded as two branches of one rule, and may run into each other and, indeed, be one. It is not necessary that responsibility for the relevant loss should have been assumed as a term of the contract".

Finally in paragraph 1176 we find the following statement dealing, with reasonable foresight based upon presumed or actual knowledge:.

"Subject to the principles governing the degree of likelihood necessary to render a contract breaker liable for damage, a contract breaker should be presumed to have had knowledge of the fact of everyday life when making the contract, and this includes knowledge of the general course of business and of the general circumstance of the business of the parties at that time and place.

Further, the contract breaker may be liable for consequences resulting from special circumstances brought to his notice at the time of making the contract ".

Having evaluated the evidence in support of the items claimed by the John Michael Motors totalling £240,000/00 and treated, by the trial judge as a claim for special damages, I agree with the trial judge that the various claims were not strictly proven as required by law.

Having said that, was there any basis for the learned trial judge to have awarded £200,000/00 as general damages? The trial judge did not give [p.252] any breakdown of this award. Indeed, except in the case of general damages awarded for personal injuries where it is possible and desirable to apportion the award of general damages between various accepted heads, I doubt whether a judge is obliged to give a breakdown of an award of general damages. (See dicta of Livesey Luke C.J. in the case of ldrissa Conteh v Abdul J. Kamara (supra) and Alimamy Turay v Cecilia Koroma both decisions of this Court.)

Mr. Berthan Macaulay Jr., Counsel for Castrol, the Appellant, contended that the items under "Particulars of Loss and Damage" in the amended Statement of Claim were in the nature of general damages. For reasons which I have already stated above I entirely agree with him. However, he further contended that if the trial judge had found these claims not proven for the purposes of an award of special damages he should not have taken them into account in making an award of general damages. With respect I do not agree.

First, in a claim for general damages, the amount of compensation to be awarded for any loss suffered is at large. Evidence may be given in monetary terms of the loss suffered but this can only serve as a guide to the judge or jury in calculating the quantum of damages to be awarded.

As stated earlier, in awarding general damages, particularly in contract cases, where the law presumes that some loss has resulted from the breach of contract it is not for the claimant to quantify exactly any particular item to be included in the award. All he needs to do is to adduce evidence which will assist the court in making the calculation.

There is therefore a need to evaluate the evidence in the instant case to see if there are any facts which could have guided the trial judge in assessing general damages. All the evidence of the consequences of the appellant's failure to give adequate notice came from P.W1. In my opinion, the trial judge did take cognizance of such evidence. This becomes clear in the following passage from his judgment leading up to the award of the amount of £200,000/00:—

"P.W1 Victor Sayhoun gave the evidence as to what happened to the plaintiff company as a result of the Notice of Termination of the Agency dated 5th November 1987 [as follows]: —" At the time we were giving the notice in November 1987 we already had one [p.253] container of products on the high seas consigned to us. The container arrived in mid December 1987. We had just over a month to sell the good in the container. We had to sell the container at cost price and we lost out on the profit. We also had old stock that we had to got rid off at cost price and we also lost on the profit. We had to stop selling Castrol products after February 1988. We had to remove signs and do away with letter heads that had any reference to John Michael Motors being Agent of Castrol Ltd. We had to do away with business

books such as Invoice and Cash Sales Books. Our entire business was virtually on the brinks of collapse. After February 1988 it took us at least two years to get our business back on its normal footing. We placed an order sometime between December 1987 and January 1988 that is after the notice of termination. The order was rejected outright. It was for a container of Castrol Products valued around outright. It was for a container of Castrol Produce valued around £11,000—£12,000 sterling. He lost majority of our customers as a result of the termination of the Agency. Customers used to come in with their trucks, cars, motor cycle to do servicing and buy oil, change Filters, Plugs and other parts. We used to have Agents and Sub-Agents whom we used to supply Castrol Products. As a result of the termination of the Agency we had to do some re-organisation. "

When examined on behalf of the 1st defendant the witness said: "In 1988 we had access to Castrol products from DatsunMotors although we had stopped importing from 1988-90 August. We were buying Castrol Products from our Garage. The products were available for the use of our customers. Our business was a company involved in the Importation of Motor vehicles, motorcycles, Lubricants, Garage Service, Spare Parts, Manufacturing of Steel Trucks etc. "

The trial judge then referred to Exhibit "E" the letter written by P.W.1 to Castrol after the termination of the agreement and to Exhibit "F" the reply thereto. He also referred to Exhibit "D" the letter of termination and to a passage from Salmon L.J,'s judgment in the Decro-Wall case and then concluded as follows: —

"Having said this and having taken into consideration the entire evidence and the submissions of Counsel on both sides. I award the [p.254] plaintiff company general damages of £200,000/00 and the costs of this action such costs to be taxed"

In my view, if the trial judge had properly evaluated the relevant evidence and drawn the right inferences there was no way he could have awarded the Respondents £200,000/00 as general damages.

I have in accordance with the principles stated earlier properly evaluated the evidence given on behalf of John Michael Motors which could assist this Court in assessing the general damages to be awarded for the failure of Castrol to give adequate notice for the termination of the agreement.

I shall now endeavour to apply the above principles to the particular facts of the instant case paying attention to the situation that obtained just before the termination of the agreement and to the period thereafter up till November 1988 when the requisite notice would have expired. In September 1987 the parties it would be recalled had agreed to a variation of the original agreement between Castrol, as supplier of Castrol products and John Michael Motors, as sole distributor in Sierra Leone of those products, which agreement had lasted sixteen years, that is, since 1971. During this period John Michael Motors, as wholesaler and retailer of Castrol products in Sierra Leone, had built up quite a network of market and sub-agencies for the products. According to P.W.1 between 1970 and 1980 John Michael Motors imported ten containers of Castrol products. Between 1981 and 1984 nothing was imported. In 1985 one container was imported. In 1986 John Michae1 Motors managed to import three containers load of Castrol products.

Against this background Castrol was willing to continue the relationship but on different terms. John Michael Motors was going to be allowed to import Castrol products for distribution and marketing in Sierra Leone but no longer as sole agents. To compensate them for this change in status Castrol was going to pay John Michael Motors 5% commission on the value of all Castrol products imported into Sierra Leone by third parties. Nothing else was to change.

Based on these new circumstances John Michael Motors arranged to import three container load of Castrol products into Sierra Leone. They managed to pay for one only because of the foreign exchange constraint that Castrol was aware of at the time of the variation. There then followed [p.255] the letter of termination of the relationship between the parties. This time it was to be a complete break. Not only was John Michael Motors no longer to be sole distributor of Castrol products but they were no longer to act as distributor of the products.

As a result Castrol refused to supply a second container load ordered by John Michael Motors in January 1988. On the available evidence, John Michael Motors was forced to sell the existing stock and the new stock ordered in September 1987 at cost losing the profit it would have made on the distribution and marketing of the stock in hand and the stock it was prevented from ordering because of Castrol' s breach.

John Michael Motors contend that they would have ordered between ten and twelve containers during the period the notice should have lasted i.e. between September 1987 and September 1988. Based on their track record over the years I hold that this was most improbable. The most John Michael Motors was likely to have ordered during the notice period was three containers as they did in 1986.

John Michael Motors also claims that it would have made a profit of #100,000/00 on the twelve containers. There is no evidence of what profit John Michael Motors had made in previous years. Besides, since September 1986, for the first time, John Michael Motors was being faced with competition from a third party, viz. Datsun Motors.

If John Michael Motors was to be believed on the quantum of profit it stood to make in 1986/1987 it would have earned the equivalent in leones of £8333/33 for each container ordered after the termination of the contract. But John Michael Motors has failed to take into account the diminution in their sales as a result of the competition from Datsun Motors and the 5 percent commission it was going to receive on the value of the products ordered by Datsun Motors or any other third party.

Even if the trial judge allowed John Michael Motors the full amount of profit estimated for the three containers which I have held was the maximum it was likely to order the total profit lost would have been in the region of the equivalent in leones of £25,000/00.

For all these reasons, I hold that the award of £200,000/00 was excessive and in no way justified by the evidence. I would defer the question of what [p.256] figure I would substitute in lieu of the £200,000/00 until I have answered the third question i.e. whether the trial judge was right in making the award in foreign currency instead of in leones.

Indeed, the next question I have to answer in this appeal is whether the Court of Appeal was right in upholding the award of damages by the trial judge in foreign currency, to wit, pound sterling. Before attempting to answer this question, I should state that a distinction ought to be drawn between the pronouncement of a judgment in foreign currency by our courts and the enforcement of a money judgment in any currency other than leones.

As far as the issue of enforcement is concerned, because the leone is the only legal tender in Sierra Leone, no one can compel a judgment debtor to satisfy a money judgment in any currency other than the leone. One may retort that it makes no difference then whether the judgment is pronounced in leones or in some other currency since when it comes to enforcement the only relevant currency is the leone. But on closer examination the problem is not so simple, for where a judgment is pronounced in a foreign currency and the judgment is not satisfied so that enforcement becomes necessary, this raises issues which could be problematic. The most important of these issues is the answer to the question: for the purpose of enforcement, what rate of exchange should be utilized to convert the foreign currency award into leones? Should it be the rate of exchange prevailing at the date the cause of action arose, or should it be that at the date of judgment, or yet still should it be that at the date of payment?

As illustrated in the case of Attorney-General of the Republic of Ghana and the Ghana National Petroleum Corporation v Texaco Overseas Tankships Limited (The "Texaco Melbourne") [1994] 1 Lloyd's Law Report 473 (herein after referred as "The Texaco Melbourne"), to which I shall be returning later, the answer to each of these questions could provide a result that might appear unjust depending on whether one is the judgment creditor or the judgment debtor.

However, before addressing the question of the consequences and implications of the pronouncement of a judgment in foreign currency, I have to address the fundamental question of whether our courts do have jurisdiction to pronounce a judgment in foreign currency.

[p.257]

It is significant to note that as far as my research reveals this is the first time that this issue has come up for determination by this. Court. In searching for authority my first source was statute law. As our laws now stand there is no legislation which prohibits the pronouncement by our courts of any judgment in foreign currency. In saying this, I have taken cognizance of the provisions of Exchange Control Act Cap 265 of the Laws of Sierra Leone, 1960 and amendments thereto. I have come to the conclusions that its provisions may only apply when one comes to deal with the issue of enforcement and the receipt and disposal of the proceeds of a foreign currency judgment satisfied, in a currency other than the leone.

The next source I turned to was precedent or judge-made law. As I said earlier, there is no decision of this Court bearing on the issue. As a result, I have had to look elsewhere, to those jurisdictions whose precedents have guided our decisions over the years as illustrated earlier in the instant case regarding several other issues. The most obvious source in this regard is English case law. So I pose the question: how then has the case law on this point evolved in England?

Prior to 1975, there was a basic presupposition that, procedurally, an action could not be brought in England for recovery or payment of a sum expressed in foreign currency. It could only be brought for a sum expressed in sterling, recoverable by way of damages. This was reaffirmed by the House of Lords in the leading case of Re United Railways of the Havana and Regla Warehouses, Ltd [1960] 2 All ER 332 where Viscount Simmonds had this to say:

"it is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortuous act"

Viscount Simmonds continued by stating that a claim for damages and one for debt could not be distinguished as had been contended in the Havanna case where the claim was for payment of a debt owed in dollars.

Lord Denning put it more emphatically in the following terms:

"And if there is one thing more clear in our law, it is that a claim must be made in sterling and the judgment given in sterling. We do not give [p.258] judgment in dollars any more than the United States courts give judgment in sterling." [1960] 2 All ER at 351.

But this was in 1960. By 1975 Lord Denning, sitting in the Court of Appeal in the case of Schorsch Meir Gmbh v. Hennin [1975 l All ER at 156, 157, had had a change of heart and was part of the majority of that Court which held that changed circumstances had nullified the reasons which had led the House of Lords to the formulation of the rules in the Havanna case, and that applying the maxim "cessante ratione cessat ipsa lex" made it necessary or at least permissible for that Court to declare that the rules of law so established and endorsed were no longer of binding force-in effect were abrogated

This refusal by the Court of Appeal to follow the rules laid down by the House of Lords in the Havanna case presented Bristow J. with a dilemma when he came to decide the case of Milangos v. George Frank (Textiles) Ltd [1975] 1 All ER at 1079 which dilemma he expressed in the following terms:

"I am faced with a judgment of the majority of the Court of Appeal, which in its application to the issue raised before me says that a rule of English law taken for granted by the Court of Appeal and the House of Lords for some 350 years is no longer a rule of English law"

When the Milangos case came before the House of Lords Lord Wilberforce sought to answer the question whether any fresh considerations of any substance had emerged since 1961 which should induce the House to follow a different rule from that laid down in the Havanna case. He then identified several considerations which he held were significant among which are the following:

a) The courts had evolved a procedure under which orders could be made for payment of foreign currency debts in foreign currency. The form which had been approved by the Court of Appeal in the Schorsch Meir case was expressed thus: "It is adjudged .... that the defendant do pay the plaintiff [the sum in foreign currency] or the sterling equivalent at the time of payment";

[p.259]

b) The situation as regards currency stability had substantially changed since 1961. World currency were no longer fixed or fairly stable in value but were then "floating" i.e. they no longer had fixed value from day to day and that was true of the sterling;

c) This state of facts under "b" above had become recognised in those commercial circles closely concerned with commercial contracts. In the case of Jugoslavenska Oceanska Plovidba v. Castle Investment Co Inc. [1973] 3 All ER 498 the Court of Appeal had held that an arbitration award expressed in terms of US dollars was valid;

d) In the Halcyon the Great [1973] an order had been made in admiralty for the sale of a ship in US dollars, and for the lodgement of the price in a separate dollar account.

Lord Wilberforce then continued by stating:

"These considerations and the circumstances I have set forth, when related to the arguments which moved their Lordships in the Havanna Railways case, lead me to the conclusion that, if these circumstances had been shown to exist in 1950, some at least of their Lordships, assuming always that the interests of justice in the particular case so required, would have been led, as one of them very notably has been led, to take a different view. "

His Lordship then concluded as follows;

"The law on this topic is judge made; it has been built up over the years from case to case. It is entirely within the House's duty, in the course of administering justice, to give the law a new direction in a particular case, where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it-that may be when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than courts can carry out.

This is very sound reasoning and I would readily adopt it.

[p.260]

Though after the Milangos case it became clear that English courts could pronounce judgment for a sum of money expressed in a foreign currency the matter did not end there. The next question, where there were several currencies to choose from, was the following: based on what principle was the appropriate currency to be identified? This was resolved by the House Lords in the two subsequent landmark cases decided together and reported in (1979) L Lloyds Report 1 and in (1979) A.C. 685.

The first, Owners of M V Eleqtheroma v Owners of M.V. Despina R. ('The Despina R.) was concerned with a claim 'for damages for tort whilst the second, Services Europe Atlantique Sud (Seas) of Paris v Stockholm Rederiaktiebolag Svea of Stockholm (The Folias) concerned a claim in foreign currency for damages for breach of a contract of carriage by sea. It is not necessary for present purposes to go into

the details of the principles laid down in the Despina R as they are not applicable here. On the ,other hand, the principles laid down by Lord Wilberforce in The Folias may properly be applied to the instant case. I shall state them briefly borrowing the dicta of Lord Goff in the case of The "Texaco Melbourne":

" First, it is necessary to ascertain whether there is an intention, to be derived from the terms of the contract, that damages for breach of contract should be awarded in any particular currency or currencies.

In the absence of such an intention the damage should be calculated in the currency in which the loss was felt by the plaintiff or which most truly expresses his loss".

The above principles are sound and have indeed have been frequently applied by the courts in this country in cases between landlords and tenants for the recovery of arrears of rent or mesne profits where the evidence disclosed that it had been agreed by the parties that payment of rent was to be effected in some currency other than the leone. The same is also true of admiralty cases where the practice has been to order the payment of damages or to settle maritime claims in foreign currency (see the case entitled CC487/96 lbrahim Bazzy & Sons (a firm) v. The Owners and/or Persons Interested in the Vessel "The Santiago de Cuba ", judgment of Nylander J. delivered on the 4th day of October 1996) (unreported).

[p.261]

However, it is plain from the totality of the evidence in the instant case that the parties to the distributorship agreement never intended that damages for its breach were to be awarded in any foreign currency. The currency in which the loss suffered by John Michael was felt or to put it another way the one which most truly expresses its loss was the leone. Foreign currency considerations should never have entered into the calculation of the damages due John Michael Motors for breach by Castrol of the agreement for distributorship. The measure of damages in a case of this kind is the difference between what the plaintiff would have earned if the appropriate period of notice had been given to terminate the contract less .,what he actually earned from the date of the notice until the end of the correct period of notice, in this case between September 1987 and September 1988.

It is clear in this case that the currency in which the Respondent carried on business in Sierra Leone was at all material times the leone. Whatever profit it earned was in leones. The only time a foreign currency came into the reckoning was when John Michael Motors had to settle Castrol's invoices for the supply of Castrol products.

Having said this, this Court is faced with the dilemma arising from the fact that the only available evidence of the loss suffered by John Michael Motors as a result of Castrol's breach of the distributorship agreement is in a foreign currency, viz. pounds sterling. At no time throughout the trial nor in the Court of Appeal was any attempt made to give evidence of the leone equivalent prevailing at the date of the breach. Presumably, this was what misled the trial judge in expressing the award of damages in pound sterling.

Now what are the options open to this Court? Should it ignore the available evidence and refuse to make an award because of its inability to place a leone value on the loss suffered by the Respondent? In my view this would not be just.

The proper solution, I venture to say would be, to remit the case to the High Court with a direction that it should take further evidence on the exchange rate of the pound sterling to the leone at the date the cause of action arose.

[p.262]

I also feel convinced the case ought to be remitted for another reason. Though John Michael Motors claimed interest at the trial the trial judge omitted to address this issue. In my view, the trial judge should have exercised the discretion granted to him by the Section 4 of the Law Reform (Miscellaneous Provisions) Act Cap 19 of the Laws of Sierra Leone 1960 to award interest on the amount awarded as general damages at the appropriate rate from the date of breach till the date of judgment. Such interest will compensate John Michael Motors for the delay that has occurred in this case between the date of breach and the date of judgment and for the depreciation of the leone that has taken place since the date of breach and of which this court is bound to take judicial notice. (see The "Texaco Melbourne ").

I therefore order that this case be remitted to the High Court solely for the purpose of receiving evidence as to the exchange rate between the pound sterling and the leone and as to the prime rate of interest for overdrafts prevailing, in both cases, at the date of the breach i.e. the 7th November 1987. I further order that this be done not later than the 23rd June 2005.

Thereafter, I shall make the final orders in this appeal.

This is a continuation of the judgment I started to deliver on the 13th June 2005. Pursuant to the Order made by this Court on that date that the action herein be remitted to the High Court for the sole purpose of adducing evidence as to the prime rate of interest for overdrafts prevailing on the 17th day of November 1987 as well as the rate of exchange between the leone and the pound sterling on the same date i.e. the 7th day of November 1987 the matter came up before the High Court on the 29th June 2005.

According to the certified record of proceedings at the High Court on the 29th June 2005 two additional witnesses testified in support of the Plaintiffs case. The first witness testified that the prime rate of interest for overdraft facilities at the relevant date was Le30/00 per centum per annum.

This evidence was not controverted. The second additional witness testified that the buying rate of exchange between the pound sterling and the leone as at 7th November 1987 was Le39/80 to £1/00, sterling the selling rate being Le39/99 to £1/00 sterling. This evidence was also not controverted.

[p.263]

I accept both pieces of evidence and would rely on them in arriving at a final decision in this matter as to the quantum of damages John Michael Motors the Plaintiff in the Court below should have been awarded and the rate of interest to which it is entitled.

I had earlier said that the relevant currency for the award of damages in this case is the leone. However, it is pertinent to observe that based on the additional evidence that has been adduced pursuant to the Order of this Court, it is clear that there has been a significant fluctuation in the value of the leone between the date of the breach in 1987 and the present day value of which I take judicial notice. The House of Lords was confronted with a similar situation in The "Texaco Melbourne" (1974) 1 Lloyds Law Reports 472 and this was how Lord GOFF OF CHIEVELEY addressed the issue at page 476:

"We have at all times to bear in mind that fluctuations in the relevant currency between the date of breach and the, date of judgment are not taken into account. The award of damages is assessed as at the date of breach and, the appropriate currency (usually sterling) in which that award is to be made as at date is identified. Delay between the date of breach and the date of judgment is compensated for by the award of interest (as indeed is delay in the satisfaction of the judgment). But, as I have said, no account is taken of fluctuations in the relevant currency as against other currencies between the date of breach and the date of judgment.

So, if that currency appreciates as against other currencies, no compensating reduction is made in the amount of the award,' nor is any compensating increase made if the currency depreciates. Indeed, it would in any event not be easy to select and identify another particular currency against which any such appreciation or depreciation is to be measured".

I would readily adopt the above principles in this case and hereby do so.

What rate of interest and for what period should this court award on the damages as assessed? This is governed by section 4 (1) of the Law Reform (Miscellaneous Provisions) Act, Cap 19 of the Laws of Sierra Leone 1960 which provide as follows:

"In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that shall [p.264] be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment".

In this case the cause of action arose on the 7th November 1987 and judgment was delivered by the High Court on the 23rd November 1992.

Based on the totality of the evidence before the Court, I am of the view that the award of £200,000/00 was excessive and there was no basis for making the award in pound sterling. I would therefore set aside the award of £200,000 made by the trial Judge as general damages to John Michael Motors, the plaintiff in the court below, and in lieu thereof make an award of general damages in leones. To that extent, the appeal succeeds and I make the following Orders:—

1. That Castrol, the Appellant, do pay to John Michael Motors, the Respondent, the sum of Lel,000,000/00 as general damages;

2. That the Appellant do pay the Plaintiff simple interest on the said sum of Le1,000,000/00 at the rate of Le30/00 per centum per annum from the 7th day of November 1987 till the 23rd day of November 1992, the date of the date of the judgment in the Court below;

3. Each party to bear its own costs here and in the courts below.

Let me before I close express my gratitude to Counsel on both sides for the invaluable assistance I received from them during the argument of this appeal.

SGD.

ADE RENNER- THOMAS

CHIEF JUSTICE

I agree

SGD.

[p.265]

I agree

SGD.

I agree

SGD.

I agree

SGD.

CASES REFERRED TO

1. Decro-Wall International S. A. Vs Practitioners In Marketing Limited (1971) 2 ALL. E. R. 216

2. Strom Bucks Akie Bolag vs John and Peter Hutchinson (1905) AC 515

3. Folias (1979) 1 ALL E.R. 421

4. Republic of Ghana and Ghana National Petroleum Corporation v. Texaco Overseas Tank ships Limited (1994) 1 Lloyds Law Report 473

5. Amadu Wurie v. Edward Wilson Shomefun and Foday Bangura S.C. Civ. App. No.8/81, judgment delivered on the 29th day of December 1983, (unreported)

6. Quilter v Walpleson (1882) 9 Q.B.D. at page 676

7. Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy (1946) A.C. 508 at 521.

8. Koglex (No. 2) v. Field (2000) SC. GLR 175 at 185

9. El Nasr Export and Import Co. Ltd. v. Mohie El Deen Mansour SC. Civ. App. No. 3/73 judgment delivered on the 25th April, 1974. (unreported)

10. Agip (SL.) Limited v. Edmask 1972-73 ALR S.L. 218

11. Watt Or Thomas v. Thomas (1947) A.C. at page 487

12. Benmax v. A Ustin Motor Co. LTD. (1955) 1 A.E.R. 326

13. Kponuglo v. Kodadja (1933) 2 WA. C.A. 24

14. Klzidgu V. Dompreh (1937) 2 WA.CA. 28

15. Ayo Wilson v. James Samura & Anor S.C. Civ. App No. 3/74 judgment delivered on 3rd June 1975 (unreported);

16. Seymour Wilson v. Musa Abess - S.C. Civ. App. No.5/79, judgment delivered on 17th June 1981 (unreported)

17. J.S. Bangura v. Sierra Leone Electricity Corporation S.C. Civ. App. No.10/81, judgment delivered on 5th May 1983 (unreported)

18. DecroWall International SA v Practitioners in Marketing Limited [1971] 2 All ER 216

19. Thomas O. Vincent v. B.P (Sierra Leone) Limited, S. C. Civ. App. No. 2/81 judgment delivered on the 3rd day of April 1984 (unreported)

20. ldrissa Conteh vs Abdul K. Kamara S.C. Civ. App No.2/79 judgment delivered 1st April 1980 (unreported)

21. Flint v. Lovell (1935) 1. K.B. 354 at 360

22. Owen v. Sykes (1936) 1 K.B. 192 C.A

23. Alimamy Turay v Cecilia Koroma S.C. Civ. App. 3/80 judgment delivered on the 17th December 1981, (unreported)

24. Davies v Powell Duffryn Associated Collieries Limited (1942) A.C. 601

25. Alimamy Turay v Cecilia Koroma S.C. Civ. App. 3/80 judgment delivered on the 17th December 1981, (unreported)

26. Chatin & Sons v. Epope (1963) GLR at 168

27. Benham-Carter v. Hyde Park Hotel Limited (1948) 64 TLR at 178

28. Stroms Bruks Aktie v. John & Peter Hutchinson (1905) A.C. 515

29. Hadley v Baxendale (1854) 9 Ex. 341

30. S.S. Co. v Karlshamns Oljefabriker (1949) A.C. 196 at 221

31. Prehn v Royal Bank of Liverpool (1870) L.R.5 Ex. 92

32. Re United Railways of the Havana and Regla Warehouses, Ltd [1960] 2 All ER 332

33. Schorsch Meir Gmbh v. Hennin [1975 l All ER at 156

34. Milangos v. George Frank (Textiles) Ltd [1975] 1 All ER at 1079

35. Jugoslavenska Oceanska Plovidba v. Castle Investment Co Inc. [1973] 3 All ER 498

STATUTES REFERRED TO

1. Rule 9 (1) of the Court of Appeal Rules

2. Statutory Instrument No. 29 of 1985

3. Section 11 (3) of the Constitution, Act. No.6 of 1991.

4. Rule 3 of the English Rules (1959) edition

5. Rule 21 of the Court of Appeal Rules 1973 (Public Notice No. 28 of 1973

DANIEL SANKOH v. ALHAJI DR. AHMED TEJAN KABBAH

[S.C.1/2002] [p.1-4]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 29 APRIL 2002

CORAM: MRS. JUSTICE V.A.D. WRIGHT – J.S.C.

MR. JUSTICE S.C.E.WARNE - J.S.C

MR JUSTICE M.O. ADOPHY – J.S.C.

IN THE MATTER OF THE ELECTORAL LAWS ACT NO.2 OF 2002 AND IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE (ACT. NO 6 OF 1991).

AND RULE 89 OF THE SUPREME COURT RULES 1982 (PUBLIC NOTICE (NO 1 OF 1982))

BETWEEN:

DANIEL SANKOH - PLAINTIFF

AND

ALHAJI DR. AHMED TEJAN KABBAH - DEFENDANT

Plaintiff absent

A. Renner-Thomas Esq., with him M.J. Tucker, Umaru Barrie Esq., Miss M.Dumbuya,

Ransford Johnson Esq., and E. Pabs Garnon for the Defendant/Applicant.

RULING

WRIGHT J.S.C.

This is an application on behalf of the Defendant/Applicant by way of motion dated the 15th April 2002 for the following orders:—

1. That the Originating Notice of Motion dated 11th day of April 2002 and all subsequent proceedings be set aside on the grounds of irregularity to wit:- that the same is not properly before this Honourable Court for the following reasons:

(a) The proceedings commenced by Originating Notice of Motion herein dated 11th April 2002 by the Plaintiff has failed to comply strictly with the provisions of the said section 32 (2) of the Electoral Laws Act. No.2 of 2002 as no objection to the nomination of the defendant herein has in fact been lodged with the Supreme Court within seven days of the publication of the relevant Government Notice No 129 published in the Sierra Leone Gazette No 17 of the 4th April 2002.

[p.2]

(b) That the said Originating Notice of Motion is irregular in form and content in that through it purports to invoke the Original Jurisdiction of the Supreme Court, it does not comply with. Rule 89 (1) of Public Notice No.1 of 1982 which requires such an Originating Notice of Motion to be in form 8 set out in the first schedule of the said Rules nor as required by Rule 98 of the said Supreme Court Rules Public Notice No 1 of 1982 nor does it comply with the relevant provisions of the High Court Rules governing the issue of an Originating Notice of Motion as supplimented by the Rules procedure practice and forms in force in the High Court of Justice in England on the 1st day of January 1960 in accordance with Order 52 Rule 3 of the High Court Rules.

(c) Any other or further reliefs.

(d) The costs of this application be borne by the Plaintiff,

The application is supported by the affidavits of Ransford Johnson sworn to on the 12th and 15th April 2002 respectively. There were several exhibits attached to the said affidavit including the Originating Notice of Motion dated 11th April 2002 which they are seeking to set aside and the Sierra Leone Gazette of 4th April 2002.

Counsel for the Defendant submitted that the Electoral Laws Act 2002 as amended confers original jurisdiction on the Supreme Court. The said Electoral Laws created a separate regime for the objection of candidates with the lodging of objections as required by section 32 (2) of the Electoral Laws Act 2002 as amended which is a condition precedent and must all be completed within 30 days. He reiterated that it was incumbent upon the person making the objection to fix a date promptly thereafter for the objection to be heard. Time being of the essence. He submitted that the notice of intention to object was not an objection. There was no return date in the originating notice of motion dated 11th April 2002. He further submitted that strict compliance was necessary in this case. He referred to Bennion Statutory Interpretation 1992 2nd Edition by Butterworth where directory and mandatory requirements were fully discussed. He concluded that the compliance was mandatory, and that non-compliance was fatal and incurable. He also referred to several authorities in support of his submissions.

On ground 1, the Electoral Laws Act No 2 of 2002 Sec 32 (3) states "The Government Notice referred to in sub section (1) shall direct that any citizen of Sierra Leone may lodge an objection if any, against the nomination of a presidential candidate but that such objection shall be lodged with the Supreme Court within seven days of the publication of the Government Notice.

3. Any objection against the nomination of any presidential candidate shall be heard by the Supreme Court made up of three Justices whose decision shall be given within thirty days of the lodging of the objection."

In computing time for the purposes of an Act, according to sec 39(1) (a) of the Interpretation Act 1971 No.8 of 1971 "a period reckoned by days from the happening of an event or the doing of any act or thing done shall be deemed to be exclusive of the day on which the event happens or the act or thing done.

[p.3]

The publication in the gazette stating the nomination of Alhaji Dr. Ahmed Tejan Kabbah was on the 4th April 2002. The purported originating notice of motion to object was filed oil the 11th April 2002. In view of the Electoral Laws Act No.2 of 2002 as amended section 32 (2) there was no objection filed.

I now turn to Exhibit RJ 1 which is the originating notice of motion dated 11th April 2002 which reads:

"Take Notice that at a date, time and place appointed by the Honourable Supreme Court the Applicant intends to object to the presidential nomination of Alhaji Dr. Ahmed Tejan Kabbah pursuant to section 32 (2) of the Electoral Laws Act No 2 of 2002 as amended etc."

The above does not comply with the provision of Rule 89 (1) of the Supreme Court Rules Public Notice No 1 of 1982. This rules states:

(a) Save as otherwise provided in these Rules, an action brought to invoke the original jurisdiction of the court shall be commenced by originating notice of motion in form 8 set out in the first schedule of these rules which shall be signed by the Plaintiff or his Counsel.

Is the non-compliance mandatory? In Bennion Statutory Interpretation 2nd edition by Butterworth page 28 under Section 10 mandatory and directory requirements states:

"(1) This section applies where:—

(a) a person ("the person affected") may be affected by thing done under an enactment, and

(b) the legal effectiveness of that thing is subject to the performance by the same or any other person ("the person bound") of some statutory requirement ("the relevant requirement"), and

(c) the relevant requirement is not complied with, and

(d) the intended consequence of the failure to comply is not stated in the legislation

2. In ascertaining, in a case where this section applies, the effect of the failure to comply with the relevant requirement, it is necessary to determine whether the requirement was intended by the legislature to be mandatory or merely directory. For this purpose it maybe relevant to consider whether the person affected and the person bound are the same, and whether the thing done under the enactment is beneficial or adverse to the person affected.

3. Where the relevant requirement is held to be mandatory, the failure to comply with it will invalidate the thing done under the enactment.

4. Where the relevant requirement is held to be merely directory, the failure to comply with it will not invalidate the thing done under the enactment; and the law will be applied as nearly as may be as if the requirement has been complied with" In [p.4] deciding one has to look at the consequences Parliament intended to follow when making the statute. I agree that strict compliance is mandatory in this case.

In Opong v Attorney General & Ors. in the Supreme Court of Ghana Law Reports 2000 page 275 it was unanimously held that the defendant's preliminary objection to the plantiff's writ per Bamford-Addo J.S.C. would be struck out because the requirements in Rule 45 (1) of the Supreme Court Rules 1996 (C116) were not complied with by the plaintiff, no action have been initiated by a writ. The other documents i.e. the statement of case filed by the plaintiff and an affidavit were of no consequence and the same are null and void. The plaintiff's request in the supplementary affidavit filed on 30th September 1999 that the said invalid documents should be attached to the writ filed on 30th September 1999 is misconceived. It is not for the Registrar to rectify lapses in the filing of papers for parties who failed to comply with rules of procedure, nor has he any power to do so. Neither can invalid and void documents be resurrected and given life by attaching same to a later valid document. Raman vs. Cumarasmy (1965) WLR 8 PC, Revoco Vs Prentice Hall Incorporated (1969)WLR 157, CA were cited.

Per Bamford-Addo JSC said in this case "many a time litigants and their Counsel have taken the rules of procedure lightly and ignored them altogether as if those rules were made in vain and without any purpose. Rules of procedure setting time limits are important for the administration of Justice, they are meant to prevent delays by keeping the wheels of justice rolling smoothly. If this were not so, parties would initiate actions in court and thereafter go to sleep only to wake up at their own appointed time to continue with such litigation. “I entirely agree with the decision and I adopt it.

In view of the fact that Rule 103 of the Rules of the Supreme Court is not applicable in the present matter I now turn to Rule 98 of the Supreme Court Rules which states “where no provision is expressly made in these Rules relating to the original and the supervisory jurisdiction of the Supreme Court, the practice and procedure for the time being of the High Court shall apply mutantis mutandis”.

This Rule 98(1) of the Supreme Court Rules Public No. of 1982 empowers the Court to use the practice and procedure in the High Court in the absence of a relevant rule in the Supreme Court Rules. The practice in the High Court in application before the court in trials if the plaintiff or his counsel fails to appear and reasons for their non appearance were not given to this court the matter is struck out for want of prosecution. This court has already adjourned once to allow the plaintiff to appear by himself or his counsel but he has not appeared and there was an affidavit of service filed. The law requires that a person must register an objection in the Supreme Court. If such a person or his counsel does not appear the court is left with no alternative but to strike out the originating notice of motion.

In view of what has been said supra the matter is struck out.

Signed

Mrs. Justice V.A.D. Wright JSC.

I agree.

Mr. Justice S.C.E.Warne JSC.

I agree.

Mr. Justice M.O. Adophy JSC.

CASES REFERRED TO

1. Opong v Attorney General & Ors. in the Supreme Court of Ghana Law Reports 2000 page 275

2. Raman vs. Cumarasmy (1965) WLR 8 PC

3. Revoco Vs Prentice Hall Incorporated (1969)WLR 157, CA

STATUTES REFERRED TO

1. Section 32 (2) of the Electoral Laws Act. No.2 of 2002

2. Rule 89 (1) of Public Notice No.1 of 1982

3. Order 52 Rule 3 of the High Court Rules

4. Section 39(1) (a) of the Interpretation Act 1971 No.8 of 1971

DANIEL SANKOH v. ALHAJI DR. AHMED TEJAN KABBA

[SC.1/2002] [p.28-34]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 29 APRI, 2002

CORAM: MRS. JUSTICE V.A.D. WRIGHT, J.S.C

MR. JUSTICE S.C.E. WARNE, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.S.C.

IN THE MATTER OF THE ELECTORAL LAWS ACT NO. 2 OF 2002 AND IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE (ACT NO. 6 OF 1991) AND RULE 89 OF THE SUPREME COURT RULES 1982 (PUBLIC NOTICE (NO 1 OF 1982)

BETWEEN

DANIEL SANKOH — PLAINTIFF

AND

ALHAJI DR. AHMED TEJAN KABBA — DEFENDANT

Plaintiff Absent

A. Renner-Thomas Esq., with him M.J. Tucker, Umaru Barrie Esq., Miss M.

Dumbuya, Ransford Johnson Esq. And E. Pabs Garnon for the Defendant/Applicant.

RULING

WRIGHT J.S.C.

This is an application on behalf of the Defendant/Applicant by way of motion dated the 15th April 2002 for the following orders:—

[p.29]

1. That the Originating Notice of Motion dated 11th day of April 2002 and all subsequent proceedings be set aside on the grounds of irregularity to wit: - that the same is not properly before this Honourable Court for the following reasons;

(a) The proceedings commenced by Originating Notice of Motion herein dated 11th April 2002 by the Plaintiff has failed to comply strictly with the provisions of the said section 32 (2) of the Electoral Laws Act. No. 2 of 2002 as no objection to the nomination of the defendant herein has in fact been lodged with the Supreme Court within seven days of the publication of the relevant Government Notice No. 129 published in the Sierra Leone Gazette No 17 of the 4th April 2002.

(b) That the said Originating Notice of Motion is irregular in form and content in that though it purports to invoke the Original Jurisdiction of the Supreme Court, it does not comply with Rule 89 (1) of Public Notice No 1 of 1982 which requires such an Originating Notice of Motion to be in form 8 set out in the first schedule of the said Rules nor as required by Rule 98 of the said Supreme Court Rules Public Notice No 1 of 1982 nor does it comply with the relevant provisions of the High Court Rules governing the issue of an Originating Notice of Motion as supplemented by the Rules procedure practice and forms in force in the High Court of Justice in England on the 1st day of January 1960 in accordance with Order 52 Rule 3 of the High Court Rules.

(c) Any other or further reliefs.

(d) The costs of this application be borne by the Plaintiff.

[p.30]

The application is supported by the affidavits of Ransford Johnson sworn to on the 12th and 15th April 2002 respectively. There were several exhibits attached to the said affidavit including the Origination Notice of Motion dated 11th April 2002, which they are seeking to set aside, and the Sierra Leone gazette of 4th April 2002.

Counsel for the Defendant submitted that the Electoral Laws Act 220s as amended confers original jurisdiction on the Supreme Court. The said Electoral Laws created a separate regime for the objection of candidates with the lodging of objections as required by section 32 (2) of the Electoral Laws Act 2002 as amended which is a condition precedent and must all be completed within 30 days. He reiterated that it was incumbent upon the person making the objection to fix a date promptly thereafter for the objection to be heard. Time being of the essence. He submitted that the notice of intention to object was not an objection. There was no return date in the originating notice of motion dated 11th April 2002. He further submitted that strict compliance was necessary in this case. He referred to Bennion Statutory Interpretation 1992 2nd Edition by Butterworth where directory and mandatory requirements were fully discussed. He concluded that the compliance was mandatory, and that non-compliance was fatal and incurable. He also referred to several authorities in support of his submissions.

On grounds 1, the Electoral Law No 2 of 2002 Sec. 32 (3) states "The government Notice referred to in sub section (1) shall direct that any citizen of sierra Leone may lodge an objection if any against the

nomination of a presidential candidate but that such objection shall be lodged with the Supreme Court within seven days of the publication of the Government Notice.

[p.31]

(3) Any objection against the nomination of any presidential candidate shall be heard by the Supreme Court made up of three Justices whose decision shall be given within thirty days of the lodging of the objection."

In computing time for the purposes of an Act, according to sec. 39(1) (a) of the Interpretation act 1971 No.8 of 1971· "a period reckoned by days from the happening of an event or the doing of any act or thing done shall be deemed to be exclusive or the day on which the event happens or the act or thing done.

The Publication in the gazette stating the nomination of Alhaji Dr. Ahmed Tejan Kabbah was on the 4th April 2002. The purported originating notice of motion to object was filed on the 11th April 2002. In view of the Electoral Laws act No. 2 of 2002 as amended section 32 (2) there was no objection filed.

I now turn to Exhibit RJ 1, which is the originating notice of motion dated 11th April 2002, which reads:

"Take Notice that as a date, time and place appointed by the Honourable Supreme Court the applicant intends to object to the presidential nomination of Alhaji Dr. Ahmed Tejan Kabbah pursuant to section 32 (2) of the Electoral Laws Act No 2 of 2002 as amended etc."

The above does not comply with the provision of Rule 89 (1) of the Supreme Court rules Public Notice No 1 of 1982. The rules states:

(a) Save as otherwise provided in these Rules, an action brought to invoke the original jurisdiction of the Court shall be commenced by originating notice of motion in form 8 set out in the first schedule of these [p.32] rules which shall be signed by the Plaintiff or his Counsel.

Is the non-compliance mandatory? In Bennion Statutory Interpretation 2nd edition by Butterworth page 28 under Section 10 mandatory and directory requirement states:

"(1) This section applies where:

(a) a person ("the person affected") may be affected by thing done under an enactment, and

(b) the legal effectiveness of that thing is subject to the performance by the same or any other person ("the person bound") of some statutory requirement ("the relevant requirement"), and

(c) the relevant requirement is not complied with, and

(d) the intended consequence of the failure to comply is not stated in the legislation.

2. In ascertaining, in a case where this section applies the effect of the failure to comply with the relevant requirement, it is necessary to determine whether the requirement was intended by the

legislature to be mandatory or merely directory. For this purpose it maybe relevant to consider whether the person affected and the person bound are the same, and whether the thing done under the enactment is beneficial or adverse to the person affected.

[p.33]

3. Where the relevant requirement is held to be mandatory, the failure to comply with it will invalidate the thing done under the enactment.

4. Where the relevant requirement is held to be merely directory, the failure to comply with it will not invalidate the thing done under the enactment; and the law will be applied as nearly as may be as if the requirement has been complied with". In deciding one has to look at the consequences Parliament intended to follow when making the statute, I agree that strict compliance is mandatory in this case.

In Opong v Attorney General & Ors. In the Supreme Court of Ghana Law Reports 2000 page 275 it was unanimously held that the defendant's preliminary objection to the plaintiffs writ per Bamford-Addo J.S.C. would be struck out because the requirement in Rule 45 (1) of the Supreme Court Rules 1996 (C 116) were not complied with by the plaintiff, no action having been initiated by a writ. The other documents i.e. the statement of case filed by the plaintiff and an affidavit were of no consequence and the same are null and void. The plaintiffs request in the supplementary affidavit filed on 30th September 1999 that the said invalid documents should be attached to the writ filed on 30th September 1999 is misconceived. It is not for the registrar to rectify lapses in the filing of papers for parties who failed to comply with rules of procedure, not has he any power to do so. Neither can invalid and void documents be resurrected and given life by attaching same to a later valid document. Raman vs. cumarasmy (1965) WLR 8 PC, Revoco Vs Prentice Hall Incorporated (1969) WLR 157, CA were cited.

Per Bamford-Addo JSC said in this case "many a time litigants and their Counsel have taken the rules of procedure lightly and ignored them altogether as if those rules were made in vain and without any purpose. Rules of procedure setting time limits are important for the administration of Justice, they are meant to prevent delays by keeping the wheels of justice rolling smoothly. If this were not so, parties would initiate actions in Court and thereafter go to sleep only to wake up at their own appointed time to continue with such litigation. "I entirely agree with the decision and I adopt it.

[p.34]

In view of the fact that Rule 103 of the Rules of the Supreme Court is not applicable in the present matter I now turn to rule 98 of the Supreme Court Rules which states "where no provision is expressly made in these Rules relating to the original and the supervisory jurisdiction of the Supreme Court, the practice and procedure for the time being of the High Court shall apply mutantis mutandis."

This Rule 98(1) of the Supreme Court Rules Public No. of 1982 empowers the Court to use the practice and procedure in the High Court in the absence of a relevant rule in the supreme Court Rules. The practice in the High Court in application before the Court in trials if the plaintiff or his counsel fails to appear and reasons for their non appearance were not given to this Court the matter is struck out for

want of prosecution. This Court has already adjourned once to allow the plaintiff to appear by himself or his counsel but he has not appeared and there was an affidavit of service filed. The law requires that a person must register an objection in the Supreme Court. If such a person or his counsel does not appear the Court is left with no alternative but to strike out the originating notice of motion.

In view of what has been said supra the matter is struck out.

Signed

Mrs. Justice V.A.D. Wright JSC.

I agree

Mr. Justice S.C.E. Warne JSC.

I agree

Mr. Justice M.O. Adophy JSC.

CASES REFERRED TO

1. Raman vs. cumarasmy (1965) WLR 8 PC

2. Revoco Vs Prentice Hall Incorporated (1969) WLR 157, CA

3. Opong v Attorney General & Ors. In the Supreme Court of Ghana Law Reports 2000 page 275

STATUTES REFERRED TO

1. Section 32 (2) of the Electoral Laws Act. No. 2 of 2002

2. Rule 45 (1) of the Supreme Court Rules 1996 (C 116)

EXPARTE MUCTARU OLA TAJU-DEEN v. THE COMMISSIONER OF THE ANTI-CORRUPTION COMMISSION & THE STATE

[SC MISC. APP. 6/2000] [p.10-20]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 18TH JANUARY 2001

CORAM: MR. JUSTICE D.E.F. LUKE, CJ

MR. JUSTICE AB. TIMBO, JSC

MRS. JUSTICE V.D.A WRIGHT, JSC

MR. JUSTICE H.M. JOKO SMART, JSC

MR. JUSTICE S.C. E. WARNE, JSC

IN THE SUPREME COURT OF SIERRA LEONE

AND

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE 1991

In the matter of an application under section 125 of the Constitution of Sierra Leone, Act NO.6 1991 and under the common law for leave to apply for an Order of Certiorari and for directions and consequential Orders and in the matter of the English Supreme Court Rules And

In the Matter of the Anti-Corruption Act 2000

AND IN THE MATTER

BETWEEN

EXPARTE MUCTARU OLA TAJU-DEEN	-	RESPONDENT
And		
THE COMMISSIONER of the Anti-Corruption Commission	-	1ST APPLICANT
THE ANTI-CORRUPTION COMMISSION	-	2ND APPLICANT
And		
THE STATE Represented by the ATTORNEY- GENERAL	-	3RD APPLICANT

& MINISTER OF JUSTICE

Mr. S.E. Berewa, Attorney-General & Minister of Justice and

Mr. Kebbie, DPP, for the Applicants

Mr. C. Doe-Smith and Mr. T.M. Terri for the Respondent

JUDGMENT

JOKO SMART. JSC

The Background

It is Government's policy to root out corruption in the public service. Pursuant to this policy the Anti-Corruption Act, 2000 Act NO.1 of 2000 was passed. The Act does not discriminate between public officers by reason of positions they hold or status in the society. Even judges can fall foul with it The

legislation provides for a Commission whose functions include the investigation of instances of alleged or suspected corruption referred to it by any person or authority or which has come to its attention whether by complaint or otherwise and the taking of such steps as may be necessary for the eradication or suppression of corrupt practices. Where after an investigation, the Commissioner is of the opinion that the findings of the Commission warrant consideration by the Attorney-General and Minister of Justice as to whether criminal action may be taken thereon, he sends the report of the investigation to the Attorney-General. An adverse finding of guilt of corrupt acquisition of wealth is to be referred to the Attorney-General and Minister of Justice. If after examining the report the Attorney-General and Minister of Justice decides that there are sufficient grounds to prosecute the public officer, he pursues the case in the courts.

Sometime in July 2000, an acting judge of the High Court was suspected of having offended against the Act. That judge is the Hon. Mr. Justice Muctaru Ola Taju-Deen. The Commissioner of the Anti-Corruption Commission sent a report of an investigation on the judge to the Attorney-General and Minister of Justice. The judge was eventually charged on a 12 count indictment and he appeared before the High Court. On 24 August 2000 while the trial was in one Court, Justice Taju-Deen applied to another judge of the High Court for leave to proceed on certiorari for the report of the Commission on him to be quashed. The leave was granted. On the 26 August 2000, he made a second application to the same judge for quashing the report. That application was dismissed. Later, he made a fresh exparte application to the Supreme Court for leave to proceed on certiorari to quash the report. Leave was granted. Under the 1991 Constitution, he can apply for certiorari to the High Court (section 134) or to the Supreme Court (section 125).

The ex-parte application

On an ex-parte application made to the Supreme Court on the 6 day of December 2000 the Respondent herein then applicant sought the following orders:—

(1) An Order granting leave to the Applicant herein Muctaru Ola Taju-Deen for an Order of Certiorari to issue both under the Common Law and section 125 of the 1991 Constitution of Sierra Leone to bring up to the Supreme Court for the purpose of its being quashed the purported Report and/or the purported undated Extracts of the alleged Findings of the Anti-Corruption Commission signed by the Commissioner of the Anti-Corruption that evidence exists of alleged non-existing offences against the Plaintiff herein under a Non-existing Act to wit the purported Anti-Corruption Commission Act 2000 upon grounds of failure to observe one of the fundamental principles of Natural Justice, Committal of Error of Law on the face of the Records and several other errors of law, want of [p.12] jurisdiction and/or excess of jurisdiction, as set forth and contained in the copy Statement herewith exhibited to the affidavit in support of the Application.

(2) An interim Stay of the Criminal proceedings Holden at High Court NO.1 before the Hon. Mrs Justice Patricia Macauley in the case between THE STATE vs. HONOURABLE JUSTICE MUCTARU OLA TAJU-DEEN pending the hearing and determination of the application for the Order of Certiorari if the leave is granted by the Honourable Supreme Court under the first Order prayed for above.

(3) Such further OR other Orders as this Honourable Court may deem fit to make.

(4) That the costs of and occasioned by this Application be costs in the cause.

The Motion was supported by the Affidavit of Muctaru Ola Taju-Deen sworn to the 2 December 2000 to which were attached several exhibits.

On the 19 December 2000 this Court sitting with three justices granted the orders prayed for except the one in para 2 of the motion paper. The Court also made the consequential orders that the Respondents be served the relevant papers within four days of this order and that the application for the Order of Certiorari be heard on the 2 January 2001.

The application now before this Court

Before 2 January 2001, the Commissioner of the Anti-Corruption Commission, The Anticorruption Commission and The State represented by the Learned Attorney-General and Minister of Justice, the 1st, 2nd and 3rd Applicants respectively, filed a Notice of Motion dated 20 December 2000 which is the subject-matter of the Application now before us seeking an order that the Order made by this Court on the 19 December 2000 granting the respondent herein leave to apply for an order of Certiorari to issue be discharged on the following grounds:—

(1) That in making the application ex-parte resulting in the granting of the said order the respondent herein failed to make full and frank disclosure of material facts and/or did not fulfil the requirements of observing the utmost good faith in the making of the said ex-parte application in that (a) he failed to disclose to this Honourable Court the fact that he had earlier made identical application to the High Court against the same parties and the application was dismissed by the High Court (b) in the said application the High Court had determined the issue as to whether an Order for certiorari will lie against the Anti-Corruption Commission.

(2) That the Applicant's proper course, after the earlier application referred to in (1) above had been dismissed by the High Court was, in law, not to file an identical application in this Honourable Court but to appeal against the Order of the High Court the said dismissing earlier application.

(3) That the Respondent is precluded by the doctrine of estoppel per rem judicatam from making an application the subject-matter of the application herein,

(4) Such further or other Orders as this Honourable Court may deem fit to make.

[p.13]

The Motion is supported by two affidavits sworn to by Lahai Momoh Farmah, Senior State Counsel. The first, sworn to on 20 December 2000, exhibits the Judge's Summons of the 26 August 2000 which the applicants alleged had been dismissed by the High Court (exhibit “A”) together with nine other exhibits among which are (a) a Statement dated 26 August 2000 filed by the Applicant in support of the judge's Summon's (exhibit “D”), (b) the Respondent's ex-parte Motion of the 6 December 2000 before this Court

(exhibit “F”) and (c) the order nisi of this Court made on the 20 December 2000 (exhibit “J”). These specific exhibits are the ones most relevant to the matter now before us. The second affidavit, a supplemental affidavit, sworn to on 30 December 2000, exhibits a certified copy of the whole proceedings in the judge's Summons. (exhibit “K”) and the ruling of the judge (exhibit “L”).

The respondent filed an Affidavit in Opposition dated 20 December 2000 in which he exhibited a certified extract of the proceedings in the judge's summons (exhibit “MOTD”). By this exhibit, the respondent for the first time made a clean breast to this Court of the judge's Summons.

The Arguments

Mr. Berewa, Attorney-General, Counsel for the applicants, underlined two issues as forming the nerve centre of the case for the applicants. One is that the respondent failed to disclose material facts to this Court when he made his exparte application for an order nisi, the material fact being the proceedings of the judge's Summons which culminated in a decision. The other is that the decision by the judge in that summons raises the issue of judicata per rem in respect of the Respondent's exparte application.

Non-Disclosure

To buttress his posture on the effect of non-disclosure, Mr. Berewa referred us to two cases: The Hagen 1908 — 101 All. ER 21 and The Andria 1984 ALLJI.ER 1126. In The Hagen the facts of which I find unnecessary for repetition in this judgment, Farwell LJ said at page 26:—

“In as much as the application was made exparte, the fullest disclosure was necessary, as in all exparte applications, and a failure to make a full disclosure would justify the court in discharging the full order, even though the party might afterwards be in a position to make another application.”

In the case of The Andria, concerned with an arrest of a ship on a warrant based on an affidavit filed by the plaintiffs which failed to disclose the existence of arbitration proceedings or that arbitration was actively pursued, and the defendant's protection and indemnity club furnished an undertaking to the plaintiffs that the club would pay any sum awarded to the plaintiffs in return for the ship's release from arrest, Robert Goff LJ had this to say at page 1135:—

“Though we do not for one moment suggest any bad faith on the part of the deponent, the fact is that the affidavit sworn to lead the warrant of arrest failed to disclose facts which were material to the issue of the warrant; and, as a result of the non-disclosure, the warrant was issued and thereafter the ship was arrested. It follows, in our judgment, that the invocation by the [p.14] appellants of the court's jurisdiction to arrest the ship amounted in the circumstances of the case to an abuse of process of the court and that the club's letter of undertaking must be discharged".

Exhibits “K” and “L” of the supplemental affidavit in Opposition which provides the first inkling of what transpired before the judge, though belatedly, tells the whole story. Exhibit “K” gives in detail arguments by both sides on the objection to the jurisdiction of the court to hear the Summons on the ground that the Anti-Corruption Commission was neither a court nor an adjudicating authority and therefore the court was not competent to quash the report of its findings in exercise of its supervisory powers over

inferior courts and adjudicating authorities pursuant to section 134 of the 1991 Constitution. Exhibit “L” is the ruling of the judge that the Commission was neither a court nor an adjudicating authority. On the basis of these exhibits and the authorities cited, Mr. Berewa asks for the exparte order nisi given by us to be discharged.

In reply to this particular issue, Mr. Terry, Counsel for the respondent, made five submissions which I can glean from his several submissions. Three of them appear to be general on the whole issue in controversy and the others are specific to the question of non-disclosure. One submission is that once an order nisi has been granted the Court cannot listen to a complaint against the order before the substantive hearing for the order of certiorari but that it may do so at the hearing when it is sought to make the order absolute. The second is that if at all the Court can look into the complaint before the substantive hearing, the party affected by the order nisi must show that the court was wrong in making the order. The third is that a court has a discretion to set aside its exparte order but in doing so the court should hold a balance between the ordinary citizens inter se and the citizens on the one hand and the state on the other. For this submission he relies on a passage from the judgment of Kutubu CJ in the case of The State vs. Adel Osman and Others [19881] LRC (Const) 212 at 221. The fourth is that there is no obligation on the exparte applicant to make a full and frank disclosure of material facts but that all he needs to do is to show that he has a locus standi and to establish a prima facie case. For this submission he relies on the decision of the court in Harry Will vs. Attorney-General & Minister of Justice, Mis. App. No. &/99, (unreported, ruling delivered on 23 March 2000). The fifth submission is that the principle of full and frank disclosure is elementary but that it does not apply to certiorari proceedings. With due respect for the high quality of the research ability of counsel, I find nothing in the cases cited by him that supports the propositions which he posits. In particular, in the Harry Will case, Luke CJ merely stated the conditions on which an order can be made on an exparte application. Non-disclosure of material facts was not in issue and therefore the Court did not address itself to it. I will come back to the first three submissions later.

Disclosure of material facts is, to my mind, incorporated into the principle of natural justice encapsulated in the doctrine of “audi alteram partem” which is cardinal in the rule of law. No man can be condemned behind his back in respect of either his person or his property. Exparte applications are merely intended to enable a litigant to have an expeditious access to the court without notifying the other party in a matter between them when that litigant's legal right is in danger and if he is to give the other party a proper notice of his intention to go to court, delay will defeat the ends of justice. Exparte applications must, to use a feline phrase, let the cat .out of the bag. Disclosure of material facts when such an application is made in the absence of the other party, enables the court to bridge the lacuna created by the absence of the other party and to hold the scale evenly between them. This is the reason why an applicant must make a clean breast of material issues to [p.15] the court to which the application is made. It is a duty which the applicant owes to the court which I hold the respondent herein did not discharge when he made his exparte application. The proceedings before Massallly,J, in the High Court were very material to be disclosed to this Court when the Exparte Application was made. It might not have made any difference to the outcome of the Court's decision if that material fact was

revealed. On that occasion, the Court might have exercised its discretion to ask the Applicant herein to take part in the exparte proceedings before it as it did in the Harry Will case.

Having said all this, I will go back to The Hagen case in which Lord Alverstone CJ articulated the point which I am making before discharging the exparte order.

"If I had felt that Hargrave Deane J., had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to show that he did ... I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised" (at page 26).

In the light of this statement of Lord Alverstone CJ., which I fully endorse, can we say that we really exercised our discretion when the full facts were not known to us? With reluctance, I apprehend that we did not.

In the cases which I have relied upon for the effect of non-disclosure, it was an Appeal Court that had to vacate an order of a lower court. In the light of this and section 122 of our Constitution, a searching question which I now pose is whether we have the power to vacate our own order. Section 126(b) of the Constitution specifically gives us that power in civil matters that have been decided by three Justices but there is no specific provision for criminal cases. Mr. Berewa urged that we can. Mr. Terry, on the other hand, did not deny that we cannot. What he submitted is that we may do so but only if the issue is raised at the substantive hearing of his application and when it is shown that we erred in law in making the order. This leads me into the field of autonomy. On binding precedent, section 122 of the Constitution enable us, as the highest court in the land, in the interest of justice, to depart from previous decisions which we take. A restrictive interpretation of a "previous decision" is a decision that has been taken in some other cause. I would not regard an order made in an interlocutory proceedings by a court to be a previous decision. Nevertheless, to my mind, this court or any other court has an inherent right to discharge any such order if justice requires it. This is where I agree with the third submission of Mr. Terry, the principle of which, I have stated, he perhaps inadvertently attributed to Adel Osman's case.

The estoppel question

Mr. Berewa for the applicants articulates that when the judge dismissed the application before him the proper course for the applicant to have pursued was to appeal as provided for under section 63 of the Courts Act, 1965, Act No. 31 of 1965. That section provides for appeals from the High Court to the Court of Appeal from any decision of the Supreme Court in exercise of its prerogative or supervisory jurisdiction in criminal matters.

The learned Attorney-General argues that instead of appealing, the respondent herein came to us on certiorari on the same matter that the High Court has taken a decision upon [p.16] and we gave the respondent leave to proceed with the certiorari. He contends that, in the circumstances, the respondent is estopped from raising the same issue, if I may put his case so very simply. He referred us to several authorities on estoppel. I will mention here the ones I regard as relevant to the matter before us. In Foli and Others v. Agya-Atta and others [1976] 1 G.L.R. 194, the Court of Appeal of Ghana held that estoppel

per rem judicatam applies where an action is dismissed if the dismissal involves a determination of any particular issue or question of fact or law. Amissah JA, in his judgment at page 200 of the report made the following pronouncement on estoppel adopting the view of Spence-Bower and Turner, on Res Judicata, second edition, 1969, page 28:—

“When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this inquiry depends upon whether, on reference to the record and such other materials as may; properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law in which case there is an adjudication on the question or issues; if otherwise, the dismissal decides nothing except that the party has been refuse the relief which he sought.”

In another case, Thoday V. Thoday [1964] 1 All ER 341, Diplock, LJ in the English Court of Appeal, gives two instances of estoppel that will prevent a litigant from bringing an action when a previous one has been decided by a court. One is “cause of action estoppel” and the other is “issue estoppel”. He defines “cause of action estoppel” as that

“Which prevents a party to an action from asserting or denying as against the other party, the existence of a particular cause of action the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties ... If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the same judgment. .. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does. This is simply an application of the rule of public policy." (at page 352)

He continues on issue estoppel.

“The second species which I will call 'issue estoppel' is, an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action if in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation [p.17] determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was. (at page 352)

The statement which Diplock makes refers specifically to estoppel in civil litigation. Mr. Terry argues the question of estoppel from two vantage points. One is that estoppel is not applicable to certiorari proceedings and he relies on the judgment of May LJ in R v. Secretary of State for the Environment, Ex part Hackney London Borouqh Council and another [19831] 3 All ER 358. where he said:

“In such (judicial review) proceedings there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the first application will have decided. Moreover, we do not think that there is in proceedings brought under RSC ord. 53 a true lis between the crown in whose name the proceedings are brought and the respondent or between the exparte applicant and the respondent. Further, we doubt whether a decision in such proceedings, in the sense necessary for issue estoppel to operate, is a final decision; the nature of the relief, in many cases, leaves open reconsideration by the statutory or other tribunal of the matter in dispute”

In his reply to this point, Mr. Berewa referred us to the decision of the Court of Appeal when this case went on appeal but he did not elaborate. After careful perusal of the case on appeal, I found that the judgment of the Divisional Court was upheld. Dunn LJ said:—

“The Divisional Court was right to hold that the doctrine of issue estoppel cannot be relied upon in applications for judicial review although the court has an inherent jurisdiction as a matter of discretion in the interest of finality not to allow a particular issue which has already been litigated to be opened. This depends on the special nature of judicial review under RSC Ord 53, which makes it different both from ordinary civil litigation inter partes and from criminal proceedings”. ([1984]1 ALL ER 956 at 964)

I am grateful to both counsel for referring me to these two reports. For my part, I agree with the premise but not with the conclusion which Mr. Terry reached. The statements which the two lord justices made should not be taken out of context. The Hackney case should be considered with circumspection. There is another case which is linked with it in a chain of events: it immediately precedes the Hackney case in the same volume of the All England Law Reports. It is R.v. Secretary of State for the Environment, ex parte Brent London Borouh Council and another [1983] 3 All ER 321. In that case six applicants including Hackney and Camden Borough Councils applied for and obtained orders for certiorari. An issue that was decided by the court was that on a specific date “the applicants were entitled to receive (from the Secretary of State) the rate Support Grant order 1979 as thus increased; thus the decision (made on 26 January 1981) to reduce the applicants' rate support grants adversely affected not merely an expectation but a right to a substantial sums of money”. See judgment of Ackner, LJ at pp. 354, 355.

But the judgment did not end there. It left it open to the Secretary of State, “after considering the applicants' representations, now fully documented to make any decisions he considers right," (See page 357.)

[p.18]

Two of the applicants in the Brent case, i.e., Hackney and Camden, made a further application for certiorari in the Hackney case. Their complaint was, among other things, that the Secretary of State had deferred payment on their entitlements and reduced their grants and contending that their entitlement had been fixed by the judgment and that the Secretary of State was estopped by the judgment. The Secretary of State submitted that on the previous application, which the court accepted, all that was decided was that he had failed to hear last minute representations and that the court did not hold that

he could not lawfully make a decision to reduce the grant. As can clearly be seen, the issues raised in the two cases were different. May LJ pointed out the difference when he said:—

In the present case, however, we think that there are two answers to the powerful submissions on this point. (i.e. issue estoppel) made by counsel for the applicants. First, although on their face the passage from the first judgment do appear to contain a finding in favour of the present applicants on the particular issue, in our opinion, a careful reading of the context in which the passages occur, makes it quite clear that the court on the first occasion was not purporting to make the finding for which counsel for the applicants contends. In the first place, the circumstances in which and the times at which the Secretary of state was liable under the Statute to make payments of rate support were not in issue on the earlier application." (at p. 365)

Going back to the prior opinions of May and Dunn LJJ, I think they should be viewed from the peculiar nature of judicial review in which the court does not determine the validity of the order of the tribunal as between the parties but merely decides as to whether there has been excess or lack of jurisdiction. This does not mean that if a legal point arises and the court takes a decision on it, an issues estoppel cannot be eventually asserted to sustain it.

I do not find it necessary to draw a line between judicial review in England and certiorari proceedings here which the learned Attorney-General tried to make. The conclusion which I have reached will be the same if I do so.

I think that what is in issues in the case before us is actually not one directly concerned with certiorari. To my mind we should not confuse certiorari proceedings with what actually transpired before Massally, J. He did not go into the question as to whether or not the Anti-Corruption Commission acted contrary to or in excess of its statutory authority. Instead, an issue was raised in what was going to be certiorari proceedings. The identity of the Commission, the body against which the judge was to make a certiorari order was in issue and the judge decided that he could not proceed with the certiorari proceedings because the Commission was neither a court nor an adjudicating "authority. If he had proceeded with certiorari, after his decision that he lacked jurisdiction, his decision thereafter would have amounted to a nullity. See Macaulay V. Commissioner of Police (1968-69) ALR SL 9, paqe 14.

It is in this vein, to my mind, that the doctrine of estoppel should be considered.

The other plank of Mr. Terry's posture on estoppel is that the dismissal of the application before Massally J. amounts to a mere refusal based on an issue during the proceedings and that no decision was taken on the merits of the application for certiorari issue i.e., the cause of action; therefore, the respondent cannot be precluded by estoppel when he comes to the Supreme Court. If I get him right, Mr. Terry is saying that there was no final [p.19] decision on the cause of action to attract estoppel. With respect to the learned Counsel, this argument is fraught with two misconceptions. First, it suggests that estoppel per rem judicatam does not apply to a final decision on an issue in an interlocutory matter. This is "issue estoppel". Both "cause of action estoppel" and "issue estoppel" need not coincide before estoppel per rem judicatam can be raised. They are independent of each other. In reaching this conclusion, I lean heavily on the Foli and Thoday's cases herein-before mentioned and to the decision in

the English Queens Bench Division case of R.v. Governor of Brixton, ex parte Osman (No.1) [1992] 1 All ER 108. This was an application for habeas corpus but the principle stated therein, in my view, applies to certiorari as well. The facts are very revealing. The applicant, Osman who was in remand at Brixton prison awaiting extradition to Hong Kong to face criminal charges made three unsuccessful applications for a writ of habeas corpus. In the third application he sought the disclosure of some official documents and he was granted. In a fourth application he sought the disclosure of nine other official documents but the court refused it on the ground of irrelevance. Osman made a fifth application in which he again sought the disclosure of the nine documents referred to in the fourth application. Thereupon, the Secretary of State moved the court for the parts of Osman's affirmations which either referred to or quoted from the nine documents to be struck out, one of the grounds being that the court's decision in the fourth application refusing further disclosure on the basis of irrelevance resulted in an issue estoppel which prevented Osman from later asserting that the documents were relevant. In the judgment of the court this was what Mann LJ said.

“The issue estoppel in this case is said to arise from the decision of this court on 20 January 1990. That was a decision on an interlocutory application. That it was a decision on an interlocutory application does not, in my judgment, disable it from an ability to give rise to an issue estoppel. I can see no reason in principle why a final decision upon an interlocutory application should not be in this regard treated as any other decision. (p. 118)

My second reason for disagreement with Mr. Terry is that it is not necessary for a court to make a final pronouncement on the merits of a case before estoppel can be invoked. If I get Mr. Terry rightly again he is referring to “cause of action estoppel” which I have held to be independent of “issue estoppel”. The jurisdictional issue that the respondents articulated before the judge pivoted on the identity of the Commission. The judge made a decision on it. This, to my mind, would give rise to issue estoppel on that issue. In taking this stance, I also derive support from the judgment of Simon Tuckey, Q.C. a deputy judge of the Queens Bench Division in Palmer & Anor v. Dunford Ford (a Firm) and Anor. [1992] 2 All ER 122, at page 128 in which he states what I regard as a correct statement of the law as follows:—

“The plaintiff contends that this was not a final decision of the court because the court did not itself pronounce on the merits of the claim. I disagree. I think that a final decision for this purpose is one which would give rise to a plea of res judicata. Such a decision is one which leaves nothing to be judicially determined or ascertained thereafter in order to render it effective.”

Mr. Berewa, in his argument, emphasizes that the cause of action was in fact decided. I apprehend, with the greatest respect, that this was not done as the judge did not go into the merits of whether the Anti-Corruption Commission acted within or outside its mandate conferred by the Act. Mr. Berewa referred us to Hines v. Birkbeck Colleqe (NO.2) [1991] [p.20] 4ALL ER 450 but Mr. Terry did not mention it to buttress his argument on estoppel not arising when a cause of action has not been decided on its merits. In this case, the plaintiff, a professor of Economics at a college in London University, issued a writ claiming that his College had wrongfully dismissed him. The judge struck out the claim on the ground that the subject matter of the claim was exclusively within the jurisdiction of the Visitor to the College. There was no hearing on any issue. Later, the Education Reform Act 1988 came into force giving the

court jurisdiction over disputes concerning the appointment or termination of the appointment of a member of the University staff. The plaintiff thereupon issued a second writ in identical terms to the first alleging wrongful dismissal. The college and the University applied without success to strike out the second action on the ground, inter alia, of res judicata. This was a case of "cause of action estoppel" but it must be noted that the court refused to go into the merit in the first instance by virtue of the fact that no jurisdiction was vested in it over such matters. It is distinguishable from the Taju-Deen case before us in that the court in the instant case ruled that it had jurisdiction to supervise inferior courts or adjudicating bodies but that the Anti-Corruption Commission was neither a court nor an adjudicating body.

In my judgment, a case of "issue estoppel" could arise if it is sought to re-open the question of the identify of the Anti-Corruption Commission as a court or adjudicating authority but not a "cause of action estoppel". I am fortified on this stance by the judgment of Diplock LJ in Fidelitas Shipping v. V/O Exportchleb [1965] 2 All ER 4, 10 where he says:

"Where the issue separately decided is not decisive of the suit, the judgment on that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance arguments or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment."

Conclusion

This is as far as I can go on the arguments presented to us by counsel on both sides. I cannot, however, at this stage, rule whether or not estoppel applies because the application before us at present is to discharge the order nisi. I uphold Mr. Terry's submissions that the appropriate stage for a determination on estoppel is at the substantive application for certiorari and I may add, at any other proceedings which the Respondent may institute. It suffices only to hold and I so hold that the application succeeds on the ground of non-disclosure of material facts.

CASES REFERRED TO

1. Hagen 1908 - 101 All. ER 21

2. The Andria 1984 ALLJI.ER 1126

3. The State vs. Adel Osman and Others [19881] LRC (Const) 212 at 221

4. Harry Will vs. Attorney-General & Minister of Justice, Mis. App. No. &/99, (unreported, ruling delivered on 23 March 2000)

5. Foli and Others v. Agya-Atta and others [1976] 1 G.L.R. 194

6. Thoday V. Thoday [1964] 1 All ER 341

7. R v. Secretary of State for the Environment, Ex part Hackney London Borouqh Council and another [19831] 3 All ER 358

8. R.v. Secretary of State for the Environment, ex parte Brent London Borouh Council and another [1983] 3 All ER 321

9. Macaulay V. Commissioner of Police (1968-69) ALR SL 9, paqe 14

10. R. v. Governor of Brixton, ex parte Osman (No.1) [1992] 1 All ER 108

11. Palmer & Anor v. Dunford Ford (a Firm) and Anor. [1992] 2 All ER 122

12. Hines v. Birkbeck Colleqe (NO.2) [1991] [p.20] 4ALL ER 450

13. Fidelitas Shipping v. V/O Exportchleb [1965] 2 All ER 4, 10

STATUTES REFERRED TO

1.Anti-Corruption Act, 2000 Act No.1 of 2000

2. The Constitution of 1991

ISSA HASSAN SESAY & 2 ORS. v. THE PRESIDENT OF THE SPECIAL COURT & 3 ORS.

[SC. 1/2003] [p.141-147]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 10 AUGUST 2004

CORAM: DR. JUSTICE A. B. TIMBO, C.J.

MR. JUSTICE M. E. T. THOMPSON, J.S.C.

MR. JUSTICE E. C. THOMPSON-DAVIS, J.S.C.

MRS. JUSTICE V. A. D. WRIGHT, J.S.C.

MR. JUSTICE SIR JOHN MURIA, J.A.

ISSA HASSAN SESAY (Alias Issa Sesay)

ALLIEU KONDEWA — PLAINTIFFS/RESPONDENTS

MOININA FOFANAH

AND

THE PRESIDENT OF THE SPECIAL COURT — DEFENDANTS/APPLICANTS

THE REGISTRAR OF THE SPECIAL COURT

THE PROSECUTOR OF THE SPECIAL COURT

THE ATTORNEY-GENERAL & MINISTER OF JUSTICE.

Messrs A. F. Serry Kamal and C. F. Margai for Plaintiffs/Respondents

Messrs E. A. Halloway, S. G. Kobba, L. M. Farma for Defendants/Applicants

RULING

By Notice of Motion dated the 20th July 2004 the Defendants/Applicants seek the following orders pursuant to Rule 92 (1) of the Supreme Court Rules (PN No.1 of 1982):

[p.142]

"1. An order for enlargement of time within which to file the Defendants/Applicants case.

2. An order that the statements of Defendants/Applicants case already filed herein remain on the records of this Honourable Court notwithstanding that the same were filed out of time.

3. Any other order as the Honourable Court may deem fit and expedient in the circumstances."

The Application is supported by the affidavit of Joseph G. Kobba Senior State Counsel sworn to on the 16th day of July 2004.

The facts which gave rise to this Application were as follows:

The Plaintiffs/Applicants Issa Hasan Sesay otherwise known as Issa Sesay, Alieu Kondowa and Moinina Fofanah, had filed an Originating Notice of Motion on the 1st of December 2003 asking the Court inter alia,

"1. To declare the creation of the special Court as unconstitutional and therefore null and void and is of no legal effect.

2. To order that the arrest and detention of the Plaintiffs herein by the Special Court is unconstitutional and therefore illegal.

3. To order the immediate release of the Plaintiffs from the custody of the Special Court's detention unit.

4. Any further order or other relief as this Honourable Court may deem fit and just."

[p.143]

The said Originating Notice of Motion according to Counsel for the Plaintiffs/Respondents was served on the Defendants/Applicants, the President, the Registrar and the Prosecutor of the Special Court a few days earlier and on the Attorney-General and Minister of Justice on the 10th of December 2003 respectively.

The Application for extension of time within Rule 92 (1) was made to this Court only on the 28th July 2004, a period of over 7 months.

Under Rule 92 (1) of the Supreme Court Rules (PN No. 1 of 1982)

"(1) A defendant upon whom a Notice of Motion and a statement of the plaintiffs' case are served shall, if he wishes to contest the case, within ten days of such service, or within such time as the Court upon terms may direct, file a statement of the defendant's case which shall be signed by the defendant or his Counsel."

On the 29th of December 2003, the Ag. Registrar of the Supreme Court filed a Certificate of non-compliance by the Defendants/Applicants under Rule 92 (3) which states,

"(3) If the defendant does not file his case within the time stipulated the Registrar shall issue a certificate to that effect."

The question therefore is whether this Court can properly grant an extension of time to the Defendants/Applicants within Rule 92 (1) in these circumstances to enable them file their Case.

The Attorney-General and Minister of Justice in moving the motion relied on the supporting affidavit of Joseph G Kobba already referred to Paragraphs 7 and 8 of the aforesaid affidavit state emphatically and unequivocally,

"(7) That I did not file the Statements of the Defendants' case because the Statements of the Plaintiffs' Case was not received by me nor in the Law Officers' Department;

(8) That I, in the circumstances requested a copy of the Statement of the Plaintiffs' case from the Principal Assistant to the Registrar of the Supreme Court which he gave me to enable me to prepare and file the Statement of the Defendants' case."

It is interesting to note that he did not even say when he received the Statement of the Defendants/Applicants' Case from the Principal Assistant Registrar in the Supreme Court Registry.

Paragraph 17 of Mr. Kobba's affidavit, in my view, is very attractive and therefore merits serious consideration. It states,

"17 That in the premises aforesaid and having regard to the fact that this is a Constitutional issue of public importance the interest of justice will best be served by granting the several orders in the Notice of Motion filed herein."

In argument, Mr. Eke Halloway while re-echoing this same point also observed that it would be against the principles of natural justice - (audi alterem partem) if his clients were not heard.

Mr. Charles Margai on his part submitted forcefully that the reason for the delay in filing the Statement of Defendants' case must be cogent. He said the Defendants/Applicants had been in breach of Rule 92 (1) for a period of over seven months and they have not given any valid excuse for their conduct.

Earlier Mr. Margai had applied for leave to have Mr. Kobba cross-examined on paragraphs 4, 5 and 8 of his Affidavit in support of the motion.

We refused leave because we did not consider it necessary in view of the papers already before us especially the certificate of non-compliance (Exhibit CFM1) from the Registrar's office. We know as a matter of fact that such certificate can only be filed [p.145] Registrar's office. We know as a matter of fact that such certificate can only be filed after the affidavit of service confirming service on the Attorney-General and Minister of Justice of the Originating Notice of Motion has been effected. The affidavit of the bailiff of the Supreme Court Mr. Jefferson. Williams (Exhibit CFM2) of 10/12/04 clearly confirmed service of the Notice of Motion on the Attorney-General.

In any event, there is also the letter from the Registrar of the Special Court requesting or soliciting assistance from the Attorney-General and Minister of Justice dated 8th of December 2003. Paragraphs 1 & 2 of the said letter are very revealing.

They read,

"(1) I refer to the Application brought before the Supreme Court of Sierra Leone on 28th November 2003 by 'the Plaintiffs' Issa Sesay, Allieu Kondewa and Moinina Fofanah against the President the Registrar and Prosecutor of the special Court for Sierra Leone and the Attorney-General and Minister of Justice as defendants.

(2) As you are aware the Plaintiffs are indictees of the Special Court and are currently in the custody of the Special Court. In their Application, the Plaintiffs claim that the Special Court Agreement 2002 (Ratification) Act and the statute of the Special Court for Sierra Leone contravene the Constitution of Sierra Leone. A copy of the Originating Notice of Motion is' enclosed." (emphasis)

According to that letter Mr. Joseph Kobba is the focal point for the Special Court in the Ministry of Justice.

Undoubtedly, this Court has not been treated with candour. Deponents must always remember that an affidavit is a sacred document. It must contain only statements of fact and not falsehoods.

[p.146]

The Rules of Court as observed by Lord Guest in Ratnam V Cumarasmy And Another [1964) 3 All ER at page 935 (Privy Council)

"... must, prima face, be obeyed, and, in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time limit for the conduct of litigation."

See also: Gatti V Shoosmith CA[1939]3 AllER 916; Revici V Prentiee Hall Inc. [1969] 1 AllER 772 C A at p 774; The State V Brima Daboh (27th February 1979) Supreme Court, Misc. App. 1/79 (unreported); SC 3/2002, John Sahr Yambasu and 3 ors V. Hon. Ernest Bai Koroma and 5 ors. (unreported) delivered on 22nd June 2004.

But as I have already indicated, I find paragraph 17 of Mr. Kobba's affidavit very attractive. So too is the submission of the former Attorney-General and Minister of Justice Mr. Eke Halloway that because of the constitutional and international importance of the issues raised in the principal Application this Court ought to grant the extension of time sought.

That this case is of great constitutional significance it cannot be denied. As we have seen the Defendants/Applicants are seeking the interpretation of various sections of the Constitution by this Court for the first time. The liberty of the subject is very much at stake here.

Besides, there is also the international dimension. What is the status of an International Agreement such as the one that is now being challenged under our domestic or municipal law especially after ratification?.

We all know in Britain it is the Crown which has the prerogative to enter into treaties and international agreements. In Sierra Leone as well as in other Common Law jurisdictions [p.147] on the other hand, it is the Chief Executive or the Head of State who has the sole constitutional authority to conclude treaties and international agreements. Is the exercise of such executive functions unfettered? These are some of the important issues we have been invited to look into in the substantive Application. We can I believe, only do so adequately if we have the benefit of argument of Counsel on both sides.

Indeed, there has been in-ordinate delay on the side of the Defendants/Applicants in asking for extension of time within Rule 92 (1); and there has not been any satisfactory explanation for such delay.

Nevertheless, taking all the circumstances into consideration, it is our opinion that the Court ought to allow the Attorney-General and Minister of Justice an extension of time within which to file the Statement of Case for the Defendants/Applicants.

Finally, in the interest of justice this Court will accept the Statement of Defendants/Applicants' Case already filed notwithstanding the same had been filed out of time and without leave.

I order accordingly.

Costs in the cause.

[Sgd.]

DR. A. B. TIMBO

CHIEF JUSTICE

I agree.

HON. MR. JUSTICE M. E. T. THOMPSON -J. S. C.

I agree.

HON. MR. JUSTICE E.C. THOMPSON-DAVIS – J.S.C.

I agree.

HON. MRS. JUSTICE V. A. D. WRIGHT - J. S. C.

I agree.

HON. JUSTICE SIR JOHN MURIA -J. A.

CASES REFERRED TO

1. Ratnam V Cumarasmy And Another [1964) 3 All ER at page 935

2. Gatti V Shoosmith CA[1939]3 AllER 916

3. Revici V Prentiee Hall Inc. [1969] 1 AllER 772 C A at p 774

4. The State V Brima Daboh (27th February 1979) Supreme Court, Misc. App. 1/79 (unreported)

5. SC 3/2002, John Sahr Yambasu and 3 Ors V. Hon. Ernest Bai Koroma and 5 Ors. (unreported)

STATUTE REFERRED TO

1. Rule 92 (1) of the Supreme Court Rules (PN No.1 of 1982)

ISSA HASSAN SESAY & 2 ORS. v. THE PRESIDENT OF THE SPECIAL COURT & 2 ORS

[SC 1/2003] [p.166-167]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 10TH MAY 2005

CORAM: MR. Justice Dr. Ade Renner-Thoma, C.J.

MR. JUSTICE LC. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE V.AD. WRIGHT, J.S.C.

MR. JUSTICE M.A.TOLLA THOMPSON, J.S.C.

MR. JUSTICE SIR JOHN MURIA, J.A.

BETWEEN:

ISSA HASSAN SESAY alias ISSA SESAY

ALIEU KONDEWA

MOININA FOFANAH — PLAINTIFFS

AND

THE PRESIDENT OF THE SPECIAL COURT

AND

THE REGISTRAR OF THE SPECIAL COURT

AND

THE PROSECUTOR OF THE SPECIAL COURT

AND — DEFENDANTS

THE ATTORNEY GENERAL AND MINISTER OF JUSTICE

F.M Carew Esq. Attorney-General and Minister of Justice

L.M Farmah Esq. E.E Roberts Esq., M. Sesay Esq

J.G. Kobba Esq. for the Defendant/Applicants

A.F. Serry-Kamal Esq. C.F Margai Esq. for the Plaintiffs/Respondents

RULING

RENNER-THOMAS. C.J.

HAVING READ the Notice of Motion dated 31st day of March 2005 and the affidavit in support of Joseph G. Kobba Esquire sworn to on the 31st day of March 2005 and filed herein together with exhibits attached thereto AND HAVING HEARD what was contended by the Attorney General on the behalf of the Defendants/Applicants and the arguments in opposition to the application by [p.167] A.F. Serry-

Karnal Esq. of Counsel for the Plaintiffs/Respondents, l am satisfied based on Exhibit "JG K4" attached to the said affidavit in support, to wit the Certificate of Immunity issued by the Ministry of Foreign Affairs and International Co-operation of the Republic or Sierra Leone, that the Defendants/Applicants are immune from suit.

However, for the reasons which will be given later in these proceedings, I find myself unable at this stage, and without more, to order that the names of the Defendants/Applicants be struck out of the proceedings entitled S.C 1/2003 now pending before the Court.

I make no order as to costs

A RENNER-THOMAS C J

I agree

Hon. Mr. Justice E.C. Thompson-Davis

I agree

Hon Mrs. Justice V.A.D. Wright

I agree

Hon. Mr. Justice M.E.T. Thompson

I agree

Hon. Justice Sir John Muria

ISSA HASSAN SESAY & 2 ORS. v. THE PRESIDENT OF THE SPECIAL COURT & 5 ORS.

[S. C NO. 1/2003] [p.168-184]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 14TH OCTOBER 2005

CORAM: MR. JUSTICE A.R.D. RENNER-THOMAS, CJ.

MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE M.E. TOLLA-THOMPSON, J.S.C.

MR. JUSTICE SIR JOHN MURIA, J.A.

IN THE MATTER OF APPLICATION PURSUANT OT SECTIONS 122, 124, AND 127 OF THE CONSTITUTION OF SIERRA LEONE ACT NO. 6 OF 1991 AND PART XVI, RULES OF 89-98 OF THE SUPREME COURT RULES STATUTORY INSTRUMENT, NO 1 OF 1982

AND

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE, ACT NO. 6 OF 1991, SECTIONS 122, 124,' 127, 171 (15), 120,108,40 (4), 125 AND 30 (1)

AND

IN THE MATTER OF THE SPECIAL COURT AGREEMENT 2002 (RATIFICATION) ACT 2002 (RATIFICATION) (AMENDMENT) ACT, 2002 ARTICLE 1 (1) OF THE SCHEDULE AND THE PREAMBLE THERETO, PART III SECTIONS 10, 11 (2) 29 AND ARTICLE 8(1) & (2) OF THE STATUTE OF THE SAID ACT

BETWEEN:

ISSA HASSAN SESAY aka ISSA SESAY

AND

ALLIEU KONDEWA

AND

MOININA FOFANA - PLAINTIFFS

AND

THE PRESIDENT OF THE SPECIAL COURT

AND

THE REGISTRAR OF THE SPECIAL COURT

AND

THE PROSECUTOR OF THE SPECIAL COURT

AND

THE ATTORNEY GENERAL & MINISTER OF JUSTICE - DEFENDANTS

[p.169]

AF. Serry-Kamal Esq with him C.F. Margai Esq for the Plaintiffs

Attorney-General with him J.G. Kobba Esq. L.Farmar Esq and E. Roberts Esq. for the Defendants

JUDGMENT

RENNER-THOMAS C.J.

By an Agreement between the United Nations (herein after referred to as "the UN") and the Government of Sierra Leone (herein after referred to as "the Government") dated the 16th day of January 2002 the Special Court for Sierra Leone (herein after referred to as "the Special Court") was established

"to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and sierra Leonean law committed in the territory of Sierra Leone since November, 1996.

The UN entered into the said Agreement pursuant to Security Council resolution 1315 (2000) of 14th August 2000 and on the part of the Government under the authority of the President pursuant to powers vested in him by virtue of the provision of section 40 of the Constitution of Sierra Leone, Act NO.6 of 1991 (hereinafter referred to as "the Constitution").

According to Article 1 of the Agreement the Special Court is to function in accordance with the Statute of the Special Court which Statute is annexed to the Agreement and forms an integral part thereof.

On the 29th day of March 2002 the Parliament of Sierra Leone enacted the Special Court Agreement, 2002 (Ratification) Act. No.7 of 2002 (hereinafter referred to as "the Ratification Act". In the first preambular paragraph of the Ratification Act it is recited that the Agreement is to be ratified by an Act of Parliament pursuant to by the provision to subsection 4 of section 40 of the Constitution.

[p.170]

The Special Court, acting in accordance with provisions of Part VI of the Ratification Act which deals with the arrest and delivery of persons, caused the 1st 2nd and 3rd Plaintiffs herein (hereinafter collectively referred to as "the Plaintiffs") to be arrested and detained at the Special Court Detention Centre at Jomo Kenyatta Road, New England Freetown where they are still being detained.

The Plaintiffs were subsequently indicted on various charges pursuant to the Statute of the Special Court details of which charges are contained in Exhibits CFM 21-3 respectively attached to the affidavit of Charles Francis Margai in support of the Originating Notice of Motion herein sworn to on the 28th day of November 2003 and filed herein. I need not set out the details of these charges for the purposes of this Judgment.

The Originating Notice of Motion which was filed on the 28th day of November 2003 was subsequently amended pursuant to an Order of this Court and is dated 4th March 2005. According to the amended

Originating Notice of Motion the Plaintiffs relying on Sections 122 and 127 of the Constitution, seek from this Court the following:

"(A) Interpretation of Sections 122, 124, 127, 171(15), 120, 108, 40(4), 48(4), 125 and 30(1) of the Constitution of Sierra Leone, Act No. 6 of 1991.

(2) Interpretation of the Special Court, Agreement, 2002 (Ratification) Act, 2002 as amended by the Special Court Agreement, 2002, (Ratification) (Amendment), Act, 2002; to wit-Article 1 (1) of the schedule and the preamble thereto, Sections 10, 11 (2) and 29 and Article 8(1) & (2) of the Statute thereof by the determination of the following questions:

(i) whether by creating the Special Court for Sierra Leone pursuant to Article 1(1) of the schedule and the preamble to the Special Court Agreement 2002 (Ratification) Act 2002 as amended by the Special Court Agreement 2002 (Ratification) (Amendment) Act 2002 is not a transgression of Sections 120(4), 30(1) and 108 of Act No. 6 of 1991?

(ii) Whether part 11/ Section 11 (2) of the Special Court Agreement 2002 (Ratification) Act 2002 as amended which provides that the Special Court shall not form part of the Judiciary of Sierra Leone" does not seek to clearly amend the Judicial framework and court structure in Sierra Leone and therefore contravenes Sections 120(4), 30(1) and 108 of Act 6 of 1991?

(iii) Whether section 29 of the Special Court Agreement, 2002 (Ratification). Act 2002 as amended, is not a contravention of section 48(4) OF Act NO.6 of 1991?

(iv)(a) whether Article (8)(1) & (2) of the said Statute to the Special Court Agreement, 2002 (Ratification) Act, 2002 as amended are not contradictory?

(iv)(b) And whether Article 8(2) of the said Statute is not in contravention of Section 125 of Act No. 6 of 1991?

[p.171]

DECLARATIONS SOUGHT.

(B) (1) A declaration that Article 1(1) of the schedule and preamble thereto of the Special Court Agreement, 2002 (Ratification) Act, 2002 as amended contravene Sections 120 & 30(1) of the Constitution of Sierra Leone Act NO.6 of 1991 in that it seeks to alter the Judicial framework and court structure envisaged and created by Sections 120 & 30(1) of the said Constitution Act No. 6 of 1991 and is therefore void and of no effect pursuant to Section 171(15) of Act No. 6 of 1991

(2) A declaration that Sections 10, 11 (2) and 29 of the Special Court Agreement 2002 (Ratification) Act 2002 as amended contravene Sections 120(1), 30(1) 120(4) and 122(1), 48(4) and 108 of the Constitution of Sierra Leone Act No. 6 of 1991 and therefore void and of no effect by virtue of Section 171(15) of the Constitution of Sierra Leone Act No. 6 of 1991.

(3) A declaration that Article 8(1) & (2) of the Statute (which is an integral part of the Act) of the Special Court Agreement 2002 (Ratification) Act as amended are not only contradictory but that Article 8(2) contravenes Sections 120(4), 122(1) 30(1) and 125 of the Constitution of Sierra Leone Act No. 6 of 1991 and is therefore void and of no effect pursuant to Section 171(15) of Act of No. 6 of 1991.

(4) A declaration that Section 29 of the Special Court Agreement 2002 (Ratification) Act 2002 as amended is in contravention of Section 48(4) of Act NO.6 of 1991.

(C) RELIEFS SOUGHT

1. To declare the creation of the Special Court as unconstitutional and therefore null and void and is of no legal effect.

2. To order that the arrest and detention of the Plaintiffs herein by the Special Court is unconstitutional and therefore illegal.

3. To order the immediate release of the Plaintiffs from the custody of the Special Court Detention Unit.

4. Any further order or other relief as this Honourable Court may deem fit and just."

On the 10th day of December 2003 a Statement of the Plaintiffs' case signed by Counsel for the Plaintiffs was filed pursuant to the Rules of this Court together will an affidavit in verification of the Plaintiffs' case sworn to on the 10th day of December 2003 by Charles Francis Margai Esquire. Thereafter, on the 7th day of July 2004. Joseph G, Kobba, Senior State Counsel acting a Solicitor for all four Defendants entered a Conditional Appearance for the Defendants which was to stand as unconditional after ten days unless in the meantime the Defendants had applied for and obtained an order setting aside "the proceedings herein for irregularity".

[p.172]

On the same date 7th July 2004 the Solicitor for the Defendants filed what he termed a "Notice of Intention to Raise a Preliminary Objection" on the following grounds:

1. That the first Defendant, the second Defendant, the third Defendant and the Special Court for Sierra Leone as an entity are immune from any form of legal process under Article 9 and Article 12 of the Schedule of the Special Court Agreement 2002 (Ratification) Act, 2002 Act No. 7 of 2002 to wit agreement between (the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and also section 8 (1) of the Special Court Agreement 2002 Ratification Act 2002.

2. That this Honourable Court therefore has no jurisdiction to inquire into matters raised in this motion before this court in the light of the Special Court Agreement 2002 Ratification Act No. 7 of 2002 as amended.

No application was made to this Court to set aside the proceedings within the ten days stipulated in the Conditional Appearance. Rather, on the 16th day of July 2003 the same Solicitor filed a Statement of the 1st, 2nd and 3rd Defendants' case together with an affidavit in verification of the said case. On the same date, i.e., 16th July 2003, a Statement of the 4th Defendant's case was filed by the Solicitor for the Defendants.

On the 31st day of March 2005 the 1st, 2nd and 3rd Defendant applied by Notice of Motion to this Court for an Order that their names be struck out as parties/defendants in the instant case as they were immune from any legal proceedings in any court in Sierra Leone by virtue of the following:

"a) Article 12 (1)(b) of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone signed on the 16th of January 2002;

b) The Special Court Agreement 2002 (Ratification) Act 2002 Act No. 7 of 2002;

c) Diplomatic Immunities and Privileges Act 1961 Act No. 35 of 1961;

d) Vienna Convention on Diplomatic Relation 1961;

e) Section 12 of the Special Court Agreement (Ratification) Regulation of 2004 Public Notice NO.5 of 2004."

The application was supported by the affidavit of Joseph Gomoi -Vandi Kobba sworn to on the 31st day of March 2005 to which was annexed several documents including one headed [p.173] International Cooperation to the Registrar of the Supreme Court and marked as Exhibit "JGK4". By that certificate of acting Director of the International legal and Research Division of the Ministry confirmed that:

"pursuant to Article 12(1) (b) of the Agreement entered into between the Government of Sierra Leone on the one part and the United Nations in the other part signed on the 10th January 2002 and ratified by Parliament by the Special Court Agreement 2002 (Ratification) Act 2002 establishing the Special Court for Sierra Leone, the judges, prosecutors and the Registrar together with their families forming past of their households enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic in accordance with the 1961. Vienna Convention on Diplomatic Relations"

No affidavit in opposition was filed on behalf of the Plaintiffs. The application was heard on the 26th day of April 2005 and a Ruling was delivered on the 10th day of May 2005. In delivering the Ruling of the Court I said that I was satisfied, based on the said Exhibit "JGK", that the 1st 2nd and 3rd Defendant were immune from suit.

However, for reasons which were not given at the time of the Ruling I refrained from making an Order that the names of the 1st 2nd and 3rd Defendants be struck out of the instant proceedings.

I now turn to the reasons for that decision. It is clear from Article 12(1) of the Agreement that Judges, the Prosecutor and the Registrar of the Special Court are entitled to enjoy "the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna

Convention on Diplomatic Relations". In particular, they enjoy immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention.

The Agreement, as has been shown earlier in this Judgment, became part of the municipal law of Sierra Leone by the enactment of the Ratification Act. The relevant provisions of the Vienna Convention in Diplomatic Relations dealing with the immunity from suit of diplomatic agents is contained in Article 31 of the Convention. It expressly provides that a "diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction" subject to earlier exceptions which I hold are not relevant in the instant case.

Since the 1st 2nd and 3rd Defendants were sued in their respective capacities of Judge, Registrar and Prosecutor of the Special Court I had no alternative but to hold that they were each immune from suit.

In the light of the above finding, it is my view that the 1st 2nd and 3rd Defendants need not have submitted to the jurisdiction of this Court. But they did so and went even as far as filing a statement of their case. In the circumstances it was too late to apply for their names to be [p.174] struck out as parties/ defendant. In my view the proper course should be to dismiss the action brought against them. The action against them is accordingly dismissed.

Having thus disposed of the issue of the immunity from suit of the 1st, 2nd and 3rd Defendants I now proceed to determine whether this Court's original jurisdiction has been properly invoked to enable us to entertain the Plaintiffs' claim as against the 4th Defendant, to wit, the Attorney-General and Minister of Justice.

The Plaintiffs' contention on the face of the Originating Notice of Motion is that they are relying on sections 122, 124 and 127 of the 1991 Constitution as well as Rules 89-98 of the Rules of this Court contained a Constitutional Instrument No. 1 of 1982.

For purpose of clarity I shall set out the provisions of sections 122, 124 and 127 in so far as they are relevant to the instant case. Section 122(1) provides as follows:

"The Supreme Court shall be the final Court of Appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law"

In my view, the expression "other jurisdiction "clearly includes original jurisdiction as well as supervisory and advisory jurisdiction. What is of relevance here is this Court's original jurisdiction. In the search for such jurisdiction one is referred to the Constitution itself or any other law. It is my considered view that only the Constitution .is relevant for the conferring of original jurisdiction in this Court to entertain the instant case.

To the extent that the Plaintiffs are seeking to have certain provisions of the Constitution enforced or interpreted this Court is vested not only with original jurisdiction but it is so vested to the exclusion of all other courts by the provisions of section 124 (1) of the Constitution which state as follows:

“The Supreme Court shall save as otherwise provided in section 122 of the Constitution, have original jurisdiction, to the exclusion of all other courts—

a) “in all matters relating to the enforcement or interpretation of this Constitution, and

b) “where any question arises whether an enactment was made in excess of the power conferred upon parliament or any other authority or person by law or under the Constitution”

The first limb of this provision dealing with matters relating to the enforcement or interpretation of the Constitution, was considered and applied by this Court in the case of Hinga Norman Vs Dr. Sama Banya and Others, (S.C 2/2005, Judgment delivered on the 31st day of August 2005, unreported) where I had this to say:

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Dr. Sama Banya and Others, (S.C 2/2005, Judgment delivered on the 31st day of August 2005, unreported) where I had this to say:

"This subsection not only confers original jurisdiction on the Supreme Court but it also stipulates that in respect of those matters for which original jurisdiction is thus conferred no other court shall exercise original jurisdiction. What then are those matters? According to section 124(1)(a) these are "all matters relating to the enforcement or interpretation of any provision of' the National Constitution." Giving the words in this provision their plain and natural meaning, as I am obliged to do, since I perceive. no ambiguity in the provision, as long as the matter in question relates to the enforcement or interpretation of any provision of the National Constitution original jurisdiction is vested in the Supreme Court to hear and determine it.

The first test is that the Plaintiff seeking to invoke this original jurisdiction must be able to point to some provision, any provision, of the National Constitution that is to be enforced or interpreted. The next test is to show, in addition, what act or omission makes it necessary for the provision to be enforced. The third test, in my opinion, is an alternative to the second test. The Plaintiff must otherwise show that an interpretation of the particular provision of the National Constitution identified under the first test is required as a matter of law."

Applying the test in the Hinga Norman's case to the reliefs sought under A and B in the Originating Notice of Motion I can safely state that this Court has original jurisdiction to entertain the Plaintiffs' claim herein.

The Plaintiffs' are also relying on Section 127 of the Constitution. This section was also considered by this Court in the Hinga Norman case. As I stated in that case section 127 does not by itself confer any original jurisdiction upon this Court but merely lays down the procedure for the enforcement of the Constitution in certain specific circumstances. For all the above reasons I hold that this Court has original jurisdiction to entertain the Plaintiffs' claim by interpreting and enforcing the several provisions of the Constitution set out in the Originating Notice of Motion. This Court can also properly grant the

declarations and orders sought under Band C in the Originating Notice of Motion under powers vested in it by section 127 of the Constitution.

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I shall now proceed to deal with the several matters raised in the Originating Notice of Motion but not necessarily in the order in which they are presented as, with the greatest respect to Counsel for the Plaintiffs, there is a certain amount of overlap and duplication in the said presentation.

Under A(1) the Plaintiffs invite this Court to interpret the following sections of the Constitution:

(i) 122;

(ii) 124;

(iv) 127;

(v) 171(15) ;

(vi) 120;

(vii) 108;

(viii) 40;

(ix) 48;

(x) 125; and

(xi) 30 (1)

Let me repeat what I stated in the Hinga Norman case in the passage cited earlier in this Judgment, i.e., in order to invoke this Court's original jurisdiction under section 124(1) of the Constitution, the Plaintiff must satisfy this Court that the interpretation sought is required as matter of law, for example, to clarify any ambiguity or to determine the legal effect of a particular provision.

In the light of this qualification I think I need not add anything more to what I have already said about sections 122, 124 and 127 of the Constitution in the context of the instant case.

I now turn to 171 (15) of the Constitution. Again this Court had the opportunity to consider the provision of this section in the Hinga Norman case. The view this court took of section 171 (15) of the Constitution is that it is a substantive provision which declares the Constitution to be the Supreme Law of Sierra Leone and emphasizes that status by providing that any other law which is found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void and of no effect. The procedure to be adopted where it is alleged that an enactment is invalid because of the provision of section 171 (15) of the Constitution is that laid down in section 127 of the Constitution

Section 120 of the Constitution deals with the establishment of the Judiciary in Sierra Leone. It provides for various matters relating to the jurisdiction of the Judiciary, its composition, hierarchy, independence, immunity of judges of the Superior Court of Judicature and the general functioning of the Judiciary. However, section 120 (1) sets the tone and the context in which all these matters are dealt with. According to this subsection the section is dealing with the exercise of judicial power in Sierra Leone and I comprehend that to mean within the municipal or domestic context of Sierra Leone.

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— such inferior and traditional Courts as Parliament may by law establish.

In my opinion any other Court in Sierra Leone exercising jurisdiction apart from those listed as constituting the Judicature cannot be considered as part of the Judiciary of Sierra Leone. So the definition of a Court in section 30(1) of the Constitution as "any court of Law of Sierra Leone other than a local Court or a Court constituted by or under service law" expressly excludes local courts from being part of the Judiciary as established under section 120 of the Constitution. This is so despite the fact that local courts are established by an Act of Parliament as envisaged by section 120(4) of the Constitution.

It is in the same manner that section 11 (2) of the Ratification Act expressly provides that the Special Court shall not from part of the Judiciary of Sierra Leone. I therefore hold that the Special Court is not part of the Judiciary of Sierra Leone as established by the Constitution.

I turn next to section 108 of the Constitution. This section deals with amendments of the Constitution. Section 108 (1) is an enabling provision vesting in Parliament the power to alter the Constitution. Section 108 (2) lays down the procedure generally for amendments of the Constitution whilst sections 108 (3) (4) (5) and (6) lay down the special procedure that must be followed where the amendment relates to the provisions of certain sections listed in section 108 (3) of the Constitution. These sections are commonly referred to as "entrenched clauses." Of particular relevance to the instant case are sections 120 and 122 of the Constitution.

It is contended on behalf of the Plaintiffs that by providing in section 11 (2) that the Special Court shall not form part of the Judiciary of Sierra Leone the Ratification Act has in fact amended section 120 of the Constitution without following the procedure laid down by sections 108(3) to (6) inclusive of the Constitution. Giving the latter provisions their plain and ordinary meaning there is no doubt whatsoever that the procedure laid down therein was not adhered to in enacting the Ratification Act.

Having said this, the next issue that comes up for determination is whether the enactment of section 11(2) of the Ratification Act constitutes an amendment of section 120 (1) and 120 (4) of the Constitution. According to the editors of Halsbury's Law of England:

"To amend an Act or enactment is to alter its legal meaning, whether expressly or by implication, express amendment may be textual, where the actual wording is altered or indirect" (see Halsbury's Laws of England, 4th edition, Vol.44 (1) paragraph 1289).

Clearly, this is not a case of an express textual amendment as the words contained in the said section of the Ratification Act do not in any way alter the wording of the two subsections of the Constitution earlier referred to. Could it then be said to be an indirect amendment? In my opinion, this contention could not be tenable for, clearly, the legal effect of the provision of section 11 (2) of the Ratification Act is to make the Special Court a separate and distinct entity operating outside the confines of the Judiciary of Sierra Leone and therefore not forming part of the internal structure or hierarchy of the Judiciary.

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"Furthermore, I am obliged to discountenance any suggestion that if the amendment is not express then it must be implied because section 108 (7) of the Constitution makes it plan that no Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any provisions of the Constitution unless it does so in express terms.

The next provision that the Plaintiffs are seeking to have this Court interpret is contained in section 40(4) of the Constitution which states inter alia as follows:—

" Notwithstanding any provisions of the Constitution or any other law to the contrary, the President shall, without prejudice to any such law as may for the time being be adopted by Parliament, be responsible, in addition to the functions conferred upon him by this Constitution for—

a) all constitutional matters concerning legislation; ……

b) the execution of treaties, agreement, conventions in the name of Sierra Leone;

provided that any Treaty, Agreement, or Convention executed by or under the authority of the President which relates to any matters within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorizes any expenditure out of the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament—

(1) by an enactment of Parliament; and

(2) by a resolution supported by the votes of not less than one-half of the members of Parliament"

What then is the legal meaning of this provision? To fully appreciate the legal meaning of the provision in section 40 (4) of the Constitution the section should be read as a whole. The section establishes the office of the President of Sierra Leone as, inter alia, the supreme executive authority in the country. The section then goes to outline some of the powers vested in the President in his capacity as such executive leader.

The provision then lays down certain limitations on the manner of exercise of the executive power where the action taken involves the execution of treaties, agreements and convention in the name of Sierra Leone. The limitation on the exercise by the President of the executive powers listed in the main

provision of section 40(4) consists in the requirement to have the action taken by the President ratified by Parliament if the treaty, agreement or convention relates to:—

a. any matter within the legislative competence of parliament;

b. any matter which in any way alters the laws of Sierra Leone;

c. any matter which imposes any charge on; or authorizes any expenditure out of the Consolidated Fund or any other fund in Sierra Leone; and

d. the declaration of war by the President

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The process of ratification by Parliament involves the enactment of a ratification statute (as happened in this case) or the passing of resolution supported by the votes of not less than one-half of the members of Parliament.

The question that arises for determination flowing from the legal meaning I have ascribed to the provision in section 40(4) is whether the procedure for ratification is to be read subject to the provisions of section 108(3) to 108(6) inclusive of the Constitution. Counsel for the Plaintiffs contend that where treaty, agreement or convention executed by the President in any way alters the law of Sierra Leone, and more particularly where the law that is altered happens to be one of the so-called entrenched clauses listed in section 108(3) of the Constitution then the procedure for ratification laid down in section 40(4) should be read subject to the provisions of section 108 (3) to 108(6) inclusive.

On the other hand, the learned Attorney-General submitted that there is no such requirement to be gleaned from the provision of section 40(4). He contends that as long as one or other of the procedures for obtaining Parliament's ratification laid down in the proviso to section 40(4) is followed there is nothing more to be done.

With the greatest respect to Counsel for the Plaintiffs, I cannot accept this contention for several reasons. First, there is nothing in the wording of the main provision of section 40(4) of the Constitution or in the proviso thereto which suggests that either is to be read subject to section 108.

Secondly, section 108 (3) deals with a bill for the an Act of Parliament enacting a new Constitution or altering certain provisions of the Constitution. In the case of the ratification envisaged by the proviso to section 40(4) of the Constitution there is no such restriction. The ratification envisaged could be done either by means of an enactment or by means of a simple resolution.

Thirdly, where ratification is done by means of a resolution it is expressly stated in the provision what is required for the resolution to be deemed validly passed. All that is needed is the vote of not less than one-half of the members of Parliament. This is in stark contrast to the provision of section 108(2) (b) which requires a bill for an Act of Parliament under this section of the Constitution to be supported on the second and third reading by the votes of not less two-thirds of the Members of Parliament.

For all the above reasons, I hold that for the purposes of ratification required under the provision of section 40(4) of the Constitution an enactment referred to in the said provision is to be deemed duly passed if it complies with the mode of exercising legislative power set out in section 106 of the Constitution rather than that laid down in section 108 (3) to (6) inclusive.

The next provision of the Constitution to be interpreted is that contained in section 48(4) of the Constitution. It deals with the immunity from civil and criminal process enjoyed by the President for anything done or omitted to be done by him either in his official or private [p.180] the next provision of the Constitution to be interpreted is that contained in section 48(4) of the Constitution. It deals with the immunity from civil and criminal process enjoyed by the President for anything done or omitted to be done by him either in his official or private capacity. Let me hasten to state that a distinction ought to be made between immunity from suit under domestic law on the one hand and under international law on the other hand.

A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third States except it has been waived by the State concerned. The principle was applied by the House of Lords in the Pinochet proceedings (see R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte [2002] 1 AC 61; R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) at [2002] 1 AC 119 and R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3) at [2000] 1 AC 147) and The Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium before the International Court of Justice (2002 ICJ Reports). In contrast, where the immunity is claimed by a Head of State before an international court the position to be inferred from decisions of various national courts and international tribunals, and the writings of international jurists is that there exists no a priori entitlement to claim immunity particularly from criminal process involving international crimes.

It is important to make this distinction at this stage because one of the declarations being sought by the Plaintiffs is to the effect that Section 29 of the Ratification Act which provides that the existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court is in contravention of section 48(4) of the Constitution.

Suffice it to say for now that in as much as section 48(4) relates only to immunity of the Head of State before our municipal courts it is not inconsistent with the provision of section 29 of the Ratification Act which deals with immunity before the Special Court

I turn next to section 125 of the Constitution dealing with the supervisory jurisdiction of the Supreme Court over all courts and adjudicating authorities in Sierra Leone provides as follows:

"The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority: and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and

prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers. 11

Again, the distinction between domestic courts and adjudicating authorities on the one hand and international courts and tribunals is relevant. In my opinion, it could not have been the Intention of the legislature when it enacted that provision in 1991 that it should extend to a treaty-based tribunal such as the Special Court established for a specific and limited purpose.

Finally the Origination Notice of Motion refers to the section 30(1) of the Constitution. This section seeks to define certain words used in the context of Chapter III of the Constitution [p.181] dealing with the recognition and protection of the fundamental human rights and freedoms of the individual. The only word of relevance to the instant case is "court" which is stated to mean any court of law in Sierra Leone other than a local court or a court constituted by or under service law". In my opinion, the phrase "any court of law in Sierra Leone" could only mean any domestic court established to administer law in Sierra Leone subject to the limitation imposed by the definition itself.

The plaintiffs then seek the determination of certain specific questions in so far as they relate to certain provisions of the Agreement and the Statute of the Special Court. I shall deal with these questions in the order in which they are set out in the Originating Notice of Motion.

The first question to be answered by this Court is "whether by creating the Special Court for Sierra Leone pursuant to Article 1(1) of the schedule and the preamble to the Special Court Agreement 2002 (Ratification) Act 2002 as amended by the Special Court Agreement 2002 (Ratification) Amendment Act 2002 is not a transgression of sections 120(4), 30(1) and 108 of Act No, 6 of 1991."

In the light of what I have already said about the legal meaning of sections 30(1), 108(3) to 108(6) and 120(4) of the Constitution as well as that of section 11 (2) of the Ratification Act which expressly states that the Special Court shall not form part of the Judiciary of Sierra Leone the question must be answered in the negative.

Besides, I see nothing in the provisions of sections 30(1), 108 and 120(4) of the Constitution which detracts from the powers vested in the President by Section 40(4) of the Constitution to enter into such an agreement as that concluded with the United Nations to establish the Special Court.

The second question must also be answered in the negative as it is not much different from the first which I have just answered in the negative. Besides, earlier in this judgment I had held that the provision of section 11 (2) of the Ratification Act that the Special Court shall not form part of the Judiciary of Sierra Leone "puts beyond all doubt that the intention of Parliament was that the Special Court was to be independent of the Judiciary and its establishment could not therefore be said to have altered in any way the hierarchy and structure of the Judiciary set out in section 120(4) of the Constitution. It follows therefore that if there is no amendment of section 120(4) as a result of the enactment of section 11 (2) of the Ratification Act then the question of invoking the provisions of section 108 of the Constitution simply does not arise.

The third question is whether section 29 of the Ratification Act providing that the official status of an accused could not be a bar to criminal process before the Special Court is in contravention of section 48(4) of the Constitution which makes the Head of State of Sierra Leone immune from both civil and criminal process.

The answer lies in the distinction I had earlier sought to make between immunity from process before a municipal court and immunity from process before an international court. Indeed the wording of section 29 of the Ratification Act is not dissimilar from that dealing with the same subject-matter found in the statutes of other international courts and tribunals set up [p.182] Nuremburg Tribunal, Article 6 of the Statute of the Tokyo Tribunal, Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") which is in identical terms to Article 7(2) of the ICTY statute. But of much more direct relevance is Article 27(2) of the Rome Statute setting up the International Criminal Court ("ICC") which Statute Sierra Leone has adhered to and ratified. Like the Special Court the ICC is treaty-based and it is not surprising that the wording of section 29 of the Ratification Act and Article 27(2) of the Rome Statute is virtually identical.

The inclusion of such clause in the charters/statutes of international criminal courts from Nuremberg to the ICC has met with approval in all the relevant case law such as Pinochet in the House of Lords or in the Yarodia judgment of the ICJ. In addition a majority of academic commentary supports the view that an international criminal tribunal or court, may exercise jurisdiction over a serving head of state and that such person is not entitled to claim immunity under customary international law in respect of international crimes.

For the above reasons I hold that section 29 of the Ratification Act as amended does not contravene section 48(4) of the Constitution.

The fourth question is in two parts: first, whether Articles 8(1) and 8(2) of the Statute of the Special Court are not contradictory, and secondly whether Article 8(2) of the Statute does not contravene section 125 of the Constitution.

Article 8(1) of the Statute of the Special Court states that the Special Court and the National Courts shall have concurrent jurisdiction. Article 8(2) thereof provides that the Special Court shall have primacy over the national courts of Sierra Leone.

The concepts of concurrent criminal jurisdiction and primacy of an international tribunal over national Courts are both recent developments of international law. They first made their appearance in Articles 9(1) and 9(2) of the Statutes of the ICTY and Article 8(1) and 8(2) of the Statute of the ICTR respectively.

However, in the case of the Special Court the provision relating to the concurrent jurisdiction of the two court systems is silent on the extent of the concurrence. Whereas in the case of ICTY and ICTR the international tribunals and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, in the case of the Special Court, only the Special Court has jurisdiction in respect of serious violations of international law crimes and crimes against

humanity and the concurrent jurisdiction shared by the national Courts of Sierra Leone with the Special Court is implication only in respect of crimes under Sierra Leone Law relating to sexual violence against children contrary to the provisions of the Prevention of Cruelty to Children Act, Cap 31, and malicious damage to property contrary to the provisions of the Malicious Damage Act 1861.

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In contrast, the provision of Article 8(2) of the statute of the Special Court dealing with the primacy of the Special Court over the national courts and the power of the Special Court to formally request a national court to defer to its competence is almost identical to that found in Articles 9(2) and 8 (2) of the Statutes of the ICTY and the ICTR respectively.

To be able to answer the question whether the provision for concurrent jurisdiction in the Statute of the Special Court is inconsistent with the provision conferring primacy in the Special Court over the national courts one has got to examine the circumstances in which and the reasons advanced for the insertion of primacy clauses generally in the Statutes of other international tribunals such as the ICTY and the ICTR and the Special Court.

According to the Rules of Procedure and Evidence of the ICTY, ICTR and the Special Court their Prosecutors may request a deferral in the following circumstances: (i) if proceedings already started in national Courts are regarded as in appropriate, e.g if an international crime is characterized as an ordinary crime; (ii) if the crimes before the national court raises questions of law or facts closely related to investigations on proceedings before the international tribunal.

As far as justification for the primacy concept is concerned in In re Tadic 1 ICTY Judicial Reports 3,19(1994) and In re Karadzic 1 ICTY Judicial Reports (1994-95) 851 the prosecutors placed special reliance upon the appropriateness of trying major war criminals in an international forum, and on the deleterious implications of simultaneous proceedings before multiple jurisdictions, on the availability of evidence and the willingness of witnesses to cooperate with the international prosecution authorities.

According to Yuval Shany in his book “The Competing Jurisdictions of International Courts and Tribunals" published by Oxford University Press at P.140:

" The bestowing of primacy upon the ad hoc tribunals may be explained through reference to the strong interest of the international community in collective law enforcement: in punishing war criminals and creating an effective deterrent against the commission of further atrocities……

In addition, there existed a perception that domestic courts in former Yugoslavia and Rwanda would be either unwilling or unable to bring war criminals to justice effectively, or might treat the defendants in a hostile and vindictive manner.

In sum I it is arguable that the prominent nature of international use criminal tribunals and their guarantees of procedure fairness and impartiality have created a presumption, which was valued at least at the point in time in which they were established that then national Courts to by war criminals.

The Statutes of the ad hoc tribunals have thus adopted what is essentially a "most-appropriate forum rule", which upheld the predominance of the international tribunals over their domestic counterparts (whenever primacy is insisted upon by the international prosecutors)".

[p.184]

For all the above reasons, I hold that the primacy provision contained in Article 8(2) of the Statute of the Special Court does not contradict the provision relating to concurrent jurisdiction contained in Article 8(1) of the said Statute. The final question posed by the Plaintiffs is whether Article 8(2) dealing with primacy of the Special Court does not contravene Section 125 of the Constitution dealing with the Supervisory Jurisdiction of the Supreme Court. Having held that the Special Court is not part of the Judiciary of Sierra Leone it cannot be subject like other domestic courts to the supervisory jurisdiction of the Supreme Court. The primacy provision in Article 8(2) in no way detracts from the supervisory jurisdiction of the Supreme Court. Besides the request for deferral is not made to the domestic court directly but through the Attorney-General.

In my opinion, just as the power vested in the Attorney-General by section 66 (4) (c) of the Constitution to discontinue any criminal proceedings at any stage before judgment does not detract from the jurisdiction of the court before which the matter was pending a request from the Special Court for deferral by any of our national courts, if acted upon by the Attorney General, will not detract from any of the jurisdiction of the court involved.

For this reason, I hold that the provision of Article 8(2) of the Statute of the Special Court does not contravene section 125 of the Constitution.

In the light of the several negative answers given to the questions posed by the Plaintiffs I am unable to make the various declarations and the reliefs sought in the Originating Notice of Motion.

As a result the action is hereby dismissed.

I make no order as to costs.

ADE RENNER-THOMAS, C.J.

SGD.

HON. MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

SGD.

HON. MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

SGD.

HON. MR. JUSTICE M.E. TOLLA-THOMPSON, J.SC.

SGD.

HON. JUSTICE SIR JOHN MURIA, J.A.

CASES REFERRED TO

1. R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte [2002] 1 AC 61

2. R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) at [2002] 1 AC 119

3. R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3) at [2000] 1 AC 147)

4. Democratic Republic of Congo v Belgium before the International Court of Justice (2002 ICJ Reports)

STATUTES REFERRED TO

1. Constitution of Sierra Leone, Act NO.6 of 1991

2. Special Court Agreement, 2002 (Ratification) Act. No.7 of 2002

3. Article 6 of the Statute of the Tokyo Tribunal, Article 7(2) of the Statute of the International Criminal Tribunal Yugoslavia

JOHN SAHR YAMBASU & 3 ORS v. HON. MR. ERNEST BAI KOROMA & 5 ORS.

[SC. NO. 3/2002] [p.23-27]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3RD MARCH, 2003

CORAM: MR. JUSTICE DR. A. B. TIMBO, C.J.

MR. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE S.C.E. WARNE, J.S.C.

MR. JUSTICE E.C. TROMPSON-DAVIS, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.S.C.

JOHN SAHR YAMBASU & 3 ORS. - Plaintiffs/Respondents

AND

HON. MR. ERNEST BAI KOROMA & 5 ORS. - Defendants/Applicants

Dr. Bu-buakei Jabbi - For the Plaintiffs/Respondents

Mr. T. M. Terry - For the Defendants/Applicants

RULING

TIMBO, C.J.

Mr. Terrence Terry Counsel for the Defendants/Applicants filed an originating notice of motion before this Court seeking among other things, an order for extension of time in [p.24] which to file Statement of Defendants case in pursuance of Rule 92 (1) of the Supreme Court Rules 1982 (P. No. 1 of 1982).

Dr. Bu Buakei Jabbi for the Plaintiffs/Respondents raised a preliminary objection to the hearing of the said motion. He argued that there had been non-compliance on the part of Counsel for Defendants/Applicants firstly with Rules 1,3,6 and 12 of Order 9 of the Sierra Leone High Court Rules 1960 which he said are mandatory and applicable to these proceedings by virtue of Rule 98 of our Supreme Court Rules 1982, and secondly with Rule 30 of Order 12 of the English Supreme Court Rules 1960 pursuant to Rule 3 of Order 52 of our High Court Rules 1960.

In short, Dr. Jabbi contended that Counsel for Defendants/Applicants had failed to comply with the above-mentioned rules. He said Mr. Terry must file an appearance whether conditional or unconditional to the originating notice of motion before he can be heard.

Counsel for the Plaintiffs/Respondents then proceeded to catalogue what he perceived are the purposes and functions of entry of appearance. He said firstly, it is evidence of recognition or submission to the jurisdiction of the court by the defendant. Secondly, it is a formal indication to the Court and the party on the other side that the Defendant intends to defend the action on the merits. Thirdly, it formally demonstrates to the Court and the other party that the Defendant desires to object to any invalidity or irregularity in the issue or service of the said originating process and the statement of claim or indeed to the jurisdiction of the Court itself with respect to the claims or reliefs sought by the Plaintiff and lastly, it shows whether the Defendant wishes to defend the action in person or to appear by solicitor.

More specifically, Dr. J abbi submitted that the procedure for actions in the original jurisdiction of the Supreme Court is analogous to the writs of summons procedure in the High Court. Therefore, in his submission, by virtue of Rule 98 of the Supreme Court [p.25] Rules the requirement for entry of appearance under Order 9 of the High Court Rules is also applicable to original processes in the Supreme Court.

In the result, Dr. Jabbi concluded that since the Defendants/Applicants have failed whether by themselves in person or through their solicitor to enter appearance to the Plaintiffs/Respondents' originating notice of motion, the application before us cannot or ought not to be entertained.

Mr. Terry's reply on the other hand was brief and terse. He maintained that having regard to the provisions of Rule 92 (1) it is not necessary to enter an appearance to an originating process in the Supreme Court. He said counsel for the Plaintiffs/Respondents' objection was therefore premature and must fail.

What does Rule 92 (1) say? I shall quote it verbatim because our ruling will inevitably turn on what interpretation we give to the said rule.

By this rule,

“A defendant upon whom a Notice of Motion and a Statement of the Plaintiff's case are served shall, if he wishes to contest the case, (emphasis mine) within ten days of such service, or within such time as the Court upon such terms may direct, file a statement of the defendants' case which shall be signed by the defendant or his Counsel.”

Subsection (2) of Rule 92 further specifically states,

“2 the statement of the defendant's case —

(a) shall set forth the facts and particulars, documentary evidence, or otherwise, verified by affidavit, upon which the defendant seeks to rely;

(b) shall state the names and particulars of the witnesses, if any, whom he intends to call at the hearing;

[p.26]

(c) shall state the address for service of his Counsel, where he is represented by Counsel and

(d) may also include a list of the decided cases and of the statement of law on which he seeks to rely.”

And finally by Rule 97 (1),

“The Court may after considering the statement of the Plaintiff”s case and of the defendant's case, the memorandum of agreed issues and any arguments of law, decide to determine the action and give judgment in court on a fixed date without argument or may appoint a time at which parties shall come before the Court for further hearing of the action.”

From the above, it can be seen that, our rules on the original jurisdiction of the Court are clear and specific. These have, in my view not only been expressly stated but have also been copiously and exclusively set out in Part XVI. All that a defendant who wishes to contest the matter is required to do is to file a statement of defence within the prescribed period or seek the leave of the Court for extension of time in which to do so. Rule 98 only applies where no provision is expressly made in the rules relating to the original jurisdiction of the Supreme Court.

The procedure established by those rules under Part XVI is peculiar in my opinion to original processes in the Supreme Court and are not analogous to the ordinary civil proceedings in the High Court. We will be overstretching the language of Rule 98 were we to hold otherwise. I agree, as was stated by E. W.

Patterson in his book “Jurisprudence, Men and Ideas of Law”1953 at p 559, “law is not a frozen static body of rules, but rules in a continuous process of change and adaptation; and the judge, at the final appellate level anyway, is a part -a determinant part of this dynamic process of legal evolution.”

[p.27]

Dr. Jabbi's submission is quite novel and interesting. But I do not see the reason nor the need for us to invoke here the provisions of Rule 98 in the guise of developing the law.

We thank Dr. Jabbi for his industry and resourcefulness but I am afraid his argument and authorities referred to have not persuaded us to hold in his favour. His preliminary objection is therefore overruled.

I agree

HON. JUSTICE V. A. D. WRIGHT, J.S.C.

I agree

HON. JUSTICE S. C. E. WARNE, J.S.C.

I agree

HON. JUSTICE E. C. THOMPSON-DAVIES, J.S.C.

I agree

HON. JUSTICE M. O. ADOPHY, J.S.C.

JOHN SAHR YAMBASU & 3 ORS. v. HON. MR. ERNEST BAI KOROMA & 5 ORS.

[SC. NO. 3/2002] [p.35-37]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 30TH APRIL 2003

CORAM: MR. JUSTICE DR. A. B. TIMBO, C.J.

MR. JUSTICE V.A.D. WRIGHT, JSC.

MR. JUSTICE S.C.E. W ARNE, J.S.C.

MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.S.C.

JOHN SAHR Y AMBASU & 3 ORS. — Plaintiffs/Respondents

AND

HON. MR. ERNEST BAI KOROMA & 5 ORS. — Defendants/Applicants

Dr. Bu-buakei Jabbi - For the Plaintiffs/Respondents

Mr. T. M. Terry - For the Defendants/Applicants

RULING

TIMBO, C. J.

This application was made by counsel for the defendants/applicants in pursuance to rule 92(1) of the Supreme Court rules 1982 and the inherent jurisdiction of the court. The application was supported by several affidavits to which were also attached a number of exhibits.

By rule 92 (1),

“A defendant upon whom a notice of motion and a statement of the plaintiffs case are served shall, if he wishes to contest the case, within ten days of such service or [p.36] within such time as the court upon terms may direct file a statement of the defendants' case which shall be signed by the defendant or his counsel.”

The first solicitor for the defendants/applicants had failed to file the statement of defendants' case within the prescribed period; hence the present application by Mr. Terrence Terry for extension of time within which to file his clients' case.

Dr. Bu Buakei Jabbie for the respondents/plaintiffs vehemently opposed the application and contended that

(i) There are various defects in each of the Affidavits whether supporting, supplementary or additional sworn to severally by the defendants/applicants and their solicitors.

(ii) There had been willful no-compliance by the defendants/applicants with rule 92 (1)

(iii) There had been substantial and in-ordinate delay by the defendants/applicants to seek leave to extend time within rule 92 (1) which delay had not been satisfactorily explained or indeed by the arguments of counsel.

(iv) Granting the leave sought will be tantamount to an abuse of the process of the court.

Dr. Jabbie further referred us to the cases of Ratnan V. Cumarasmy (1964) 3 All E.R. 933 and Revici V. Prentice Hall Incorporated And Others (1969) 1 All E.R. 772 to buttress his submissions.

In answer to the first contention of Dr. Bu Buakie Jabbie, Mr. Terry submitted that the objection to the alleged defects in the various affidavits filed by defendants/applicants had been taken too late in the

day. He said Dr. Jabbie ought to have taken the objection at the time he sought to put them in. This would have given him the opportunity to invoke the provisions of Order 22 Rule 12 of the High Court Rules in order to use these affidavits. Having failed to take the objection at the appropriate time he must not now be heard to be objecting to the several affidavits filed by the defendants/applicants. According to Mr. Terry the objection is even more unpardonable because Dr. Jabbie himself had extensively relied in his argument upon the facts deposed in the supplemented affidavit of Osman Foday Yansaneh sworn to on the 9th day of December 2002 at 4.00 0' Clock in the afternoon which said affidavit in all its essentials had constituted the pith and substance of the defendants/applicants' application for leave to file their case pursuant to the second limb of rule 92 (1). By so doing, Mr. Terry said counsel had waived any right he had to raise such objections.

Assuming without conceding that we are minded to reject the impugned affidavits Mr. Terry again submitted that the reasons advanced by Dr. Jabbie for asking that the affidavits be rejected are devoid of any merit whatsoever because such defects if they [p.37] existed at all only went to the form and not to the substance. Consequently their admission cannot properly be described as an abuse of the process of the Court.

We have considered the several arguments and submissions of counsel on both sides. We agree with Mr. Terry that once the affidavits complained of had been admitted without objection, Dr. Bu Buakei Jabbie is deemed to have waived his right to challenge their admission. In any case, we hold the view that Dr. Jabbie's complaints went only to the form and not to the substance of the affidavits.

Secondly, the cases of Ratnan and Revici cited by Dr. Jabbie, we believe,' were merely restating a rule of law that where there had been non-compliance within the rules, such non-compliance must be explained and there must be material upon which the Court can exercise its discretion.

The only material before the Court of Appeal in Ratnan was the appellants' affidavit in which he gave the reason for the delay as the hope for a compromise. Similarly, in the recent unreported case of Alhaji Bockarie Kakay, V. Clementina Yambasu, S.C. Misc.App:3/2002, we refused to extend the period in which to file his client's case because the explanation which counsel gave for failing to comply with the rules, we found, was rather flimsy. He simply said it was due to pressure of work in his chambers.

Unlike Ratman and Kakay, in the instant case, the defendants/applicants have in our opinion given sufficient reasons in their several affidavits for the cause of delay which was due to their first solicitor's negligence in failing to file their case within the stipulated period. We do not think either that the negligence of their solicitor should be visited on them. They acted, in our estimation with reasonable promptness in seeking the services of another solicitor when they discovered the previous one had failed to file their case on time.

The application is therefore allowed. The defendants/applicants shall file their case within seven days. Costs in the cause.

[Sgd.]

DR. A. B. TIMBO

CHIEF JUSTICE

I agree.

HON JUSTICE V.A.D. WRIGHT JSC

I agree.

HON JUSTICE S.E. WARNE JSC

I agree.

HON JUSTICE E.C. THOMPSON-DAVIES JSC

I agree.

HON JUSTICE M.O. ADOPHY JSC

JOHN SAHR YAMBASU & 3 ORS. v. HON. MR. ERNEST BAI KOROMA & 5 ORS.

[SC. NO. 3/2002] [p.76-99]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 5TH MARCH 2004

CORAM: MR. JUSTICE DR. A. B. TIMBO C.J.

MR. JUSTICE S. C. E. W ARNE - J.S.C.

MR. JUSTICE E. C. THOMPSON-DAVIS - J.S.C.

MR. JUSTICE M. O. ADOPHY - J.S.C.

MRS. JUSTICE V. A. D. WRIGHT - J.S.C.

BETWEEN:

JOHN SAHR Y AMBASU & 3 ORS. - Plaintiffs/Respondents

AND

HON. MR. ERNEST BAI KOROMA & 5 ORS. - Defendants/Applicants

Mr. Biloku Sesay for 1st Appellant

Dr. Bu-buakei Jabbi for 2nd, 3rd and 4th Plaintiffs

Mr. T. M. Terry for the Defendants

RULING

TIMBO, C. J.

The plaintiffs by originating notice of motion dated the 9th day of October 2002 sought among other things, the following declarations in pursuance of sections 122, 124 (1), 127, and 175 (15) of the that the constitution of the All Peoples Congress Party (A. P. C.) which was amended and [p.77] approved by the A. P.C. National Delegates Conference of 22nd to 24th March 2002 is illegal and of no effect because,

(i). It contravened articles 6 and 16 of the current 1995 A. P. C. Constitution.

(ii). It is ultra vires section 24 (1) of the Political Parties Act 2002 and

(iii). It is in consistent with section 35 (2) of the Constitution of Sierra Leone 1991 (Act No. 6 of 1991) for not conforming to democratic principles.

That it be further declared that,

(iv). The office of National Party Leader and Head of the A. P. C. Party purportedly established by the illegal constitution of 2nd April 2002, called ALPHACON 2002 does not exist in law.

(v). The 1st defendant the Hon. Ernest Bai Koroma Member of Parliament is not lawfully an incumbent of the purported office of National Party Leader and Head of the A P C Party the said office or position being itself illegal, non-existent and unknown to the All Peoples Congress (A. P. C.) party.

(vi). The Constitution of the All Peoples Congress Party (A. P. C.) dated the 5th December 1995 is the only lawful and current constitution of the All Peoples Congress party.

(vii). The highest leadership offices or positions in the All Peoples Congress party as established by the current 1995 A. P. C. Constitution are as follows:

[p.78]

(i). National Party Leader, and

(ii). National Party Chairman

(iii). National Vice Chairman

(viii). The changes in the following titles of office holders from those named above to those of National Party Leader and Head of the All Peoples Congress, National Party Chairman and National Vice Party Chairman respectively or any variance thereof, are ultra vires of section 24 (1) of the Political Parties Act

2002 the said changes having been effected after the A. P. C. National Delegates Conference of 22nd to 24th March 2002.

Lastly, the plaintiffs have asked the Court to grant permanent injunctions against the several incumbents of the newly created positions.

In the course of the hearing of the originating notice of motion the Court requested the parties to address it on the question of jurisdiction in view of the provisions of section 24 (1) of the Political Parties Act 2002 (Act No. 3) which provides:

"24 (1) Where a political party registered under section 12 intends to alter (a) its constitution;

(b) its rules or regulations, if any;

(c) the name or address of any of its founding members;

(d) the title, name or address of any office holder submitted to the Commission under subsection (2) of section 11;

[p.79]

(e) its name, symbol, colour or motto,

it shall notify the Commission of its intention and the Commission shall, within fourteen days after the receipt of the notification, cause to be published by Government Notice the intended alteration, and invite objections, if any, to anything contained in the intended alteration."

It was at this stage that one of our brothers, Warne J S C fell ill and was hospitalized for a period of nearly six months.

Immediately the Court resumed sittings in November 2003, we were confronted with yet another issue. The 1st plaintiff Yambasu through his Solicitor Mr. Biloku Sesay had filed a notice of discontinuance of the originating notice of motion seemingly against all six defendants.

We allowed counsel to address us on this point. He referred us to a document we are told, was written and filed by the 1st plaintiff. I shall quote it verbertim. It reads,

"From: Mr. Sahr John Yambasu Member A. P. C. Kono, Deputy

Leader/Chairman A. P. C. National,

To: The Secretary-General, A. P. C., All Members of the A P C, The Chairman,

Chief Justice, All Party District Office.

DATE: 3. 11. 03

[p.80]

I Sahr John Yambasu of Kono District has today declared at a meeting of A P C, Kono District and say as follows:

1. that I totally 3/11/03 unconditionally withdraw from all action at present in the matter between JOHN Yambasu against Hon. Ernest Bai Koroma in the Supreme Court in Sierra Leone.

2. That I completely dissociate myself From all Further Actions against Hon E. B. Koroma and others.

3. That I support present and future political party activities of Hon. Ernest Bai Koroma to be Leader of the A P C Party in the up coming General Elections. Any further discussions will be done in Freetown.

Signed: John Sahr Yambasu

Koidu Town

Kono District

Witnessed by Members present at District Meeting 3/11/03".

District C/man Kono A. P. C.

Francis Gbondo, District Secretary Kono, A. P. C.

Organising Secretary, Tamba Koroma

[p.81]

Regional C/lady - Tenneh Gbondo

Tamba Koroma - Youth Chairman."

Mr. Biloku Sesay contended that once his client had filed his notice of discontinuance against all the defendants the entire proceedings had collapsed.

The affidavit in support of the originating notice of motion was sworn to by Sahr John Yambasu on 9th of October 2002. Therefore according to Mr. Terry since Mr. Yambasu who swore to the supporting affidavit had already indicated he was withdrawing from the proceedings, such affidavit would no longer subsist and there being no supporting affidavit to the said originating notice of motion as required by Rule 89, the current proceedings must end.

In reply Dr. Bu Buakei Jabbi for the 2nd, 3rd and 4th plaintiffs submitted that the discontinuance by the first plaintiff in his notice of discontinuance dated the 24th November 2003 applies only to the 1st plaintiff and does not affect the position of the other three plaintiffs visa vis all the defendants.

Secondly, he argued that Rules 89 and 90 require that to invoke the original jurisdiction of the Supreme Court there has to be more documents of originating process than just the originating notice of motion and the supporting affidavit. There must also be filed the statement of the plaintiffs' case and an affidavit verifying same. Dr. Bu Buakei Jabbi further maintained that there is no discontinuance in law by

the 1st plaintiff before this Court. He submitted that, the supporting affidavit to the [p.82] originating notice of motion remains completely unaffected by the filing of the notice of discontinuance and consequently the whole matter remains intact and properly before the Court for hearing and determination.

He also observed that since our rules do not have express provisions for the discontinuance of original actions in the Supreme Court, the Court is compelled to invoke Order 22 rule (1) of the High Court Rules 1960.

As far as is relevant, Order 22 rule (1) provides that,

"the plaintiff may at any time before receipt of the defendant's defence, or after receipt thereof before taking any other proceedings in the action (save any interlocutory application) by notice in writing wholly discontinue the action against all or any of the defendants or withdraw any part or parts of his cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn ...

Save as in this rule otherwise provided it shall not be competent for the plaintiff to withdraw the record or discontinue the action without the leave of the Court but the Court may before, or at or after hearing or trial, upon such terms as to costs, or as to any other action, and otherwise as may be just order the action to be discontinued or any part of the alleged cause of complaint to be struck out ...."

[p.83]

Counsel was quick however to concede that after receiving the defence but before taking any substantive proceedings in the matter a plaintiff can still discontinue. But here, he argued, not only have the plaintiffs received a defence but they have thereafter taken substantive steps in the proceedings and so cannot now withdraw.

He listed the substantive steps taken by the plaintiffs after receiving the defence as follows:

1. On Thursday 15/5/03 the plaintiffs commenced their case. They were given two days to complete.

2. On Thursday 29/5/03 two weeks later the plaintiffs again continued arguments.

3. On the same day the plaintiffs were asked specifically to address the Court on,

(i). The relevance and import of section 24 of the Political Parties Act 2002

(ii). The locus standi of the plaintiffs.

Shortly after, plaintiffs submitted their arguments in writing.

Dr. Jabbi finally submitted that the supporting affidavit in an original action in the Supreme Court is not personally geared to any particular deponent. Such affidavit is a formal document and so discontinuance by the 1st plaintiff would not withdraw that affidavit from the use of the Court.

I have considered carefully the submissions of counsel on both sides.

[p.84]

The first task, as I see it, is to determine whether Order 22 rule 1 of the High Court Rules 1960 has any application in these proceedings.

Rightly Rule 98 of our Rules provides that,

“Where no provision is expressly made in these rules relating to the Original and Supervisory Jurisdiction of the Supreme Court, the practice and procedure for the time being of the High Court shall apply mutatis mutandis”,

As against this there are also the provisions of Rule 89 (1) to the effect that,

“89 (I) Save as otherwise provided in these Rules, an action brought to invoke the original jurisdiction of the Court shall be commenced by Originating Notice of Motion in Form 8 set out in the First Schedule to these Rules which shall be signed by the Plaintiff or his counsel.”

And by sub (2) of Rule 89,

“The Notice of Motion shall be supported by an affidavit setting forth as concisely as possible the nature of the relief sought by the plaintiff ...”

It will be recalled that in an earlier ruling on the 3rd of January 2003, in the substantive proceedings, we had held that while the entry of an appearance in proceedings begun by writ of summons in the High Court was absolutely necessary [p.85] this was not so in the case of actions in which the original jurisdiction of the Supreme Court is invoked. This process has its own laid down procedure. So we found Rule 98 to be totally inapplicable to the originating process of the Court. I do not therefore agree with counsel for the 2nd, 3rd and 4th plaintiffs that Order 22 rule 1 applies here by virtue of rule 98.

With respect, I do not similarly subscribe to Mr. Terry's view that because it was the 1st plaintiff who swore to the affidavit in support of the originating notice of motion his withdrawal from the action would mean the automatic end of the proceedings as there would no longer be any affidavit to support the said originating notice of motion as required by Rule 89.

From his letter of withdrawal from the suit there is no where in which it is stated that the 1st plaintiff was withdrawing with the consent of the other three plaintiffs whom he said, had authorized him to swear to the affidavit in question. Besides, the affidavit from the moment of filing it became the property of the Court and therefore part of the records which he could not withdraw. In my opinion his departure from the proceedings will not affect in any way the position of the affidavit in support of the originating notice of motion.

Furthermore, as was indicated by Dr. Bu-buakei Jabbi, apart from the affidavit in support there are also other documents required to be filed under Rule 89, such as the affidavit verifying the case for the

plaintiff. It is quite significant that this document [p.86] was sworn to on 15/1 0/02 by another of the four plaintiffs - not Sahr John Yambasu .

It was done by the 3rd plaintiff Mohamed Lamin Bangura and he did it as in the case of Mr. Yambasu with the authority and mutual behalf of all four plaintiffs.

In the circumstances, as we have here, why should the discontinuance of the action by one of four plaintiffs be discontinuance by all the others without their consent or authority?

The final question is, ought the Court to allow the 1st Plaintiff to drop out of the main proceedings because of his notice of discontinuance?

I have no hesitation in holding that he should be allowed to go. I cannot agree more with that part of the ruling of my sister Wright J S C (which I have had the opportunity of reading) when she said if a litigant decides to discontinue his action the Court must not force him to proceed with such action.

The 1st plaintiff is accordingly allowed to withdraw from the substantive proceedings. The other three have every right to proceed with their action and I so order.

[Sgd.]

HON. JUSTICE DR. A. B. TIMBO

CHIEF JUSTICE

[p.87]

WRIGHT, J.S.C.

A Notice of Discontinuance dated 20th November 2003 in the above named case was filed by the 1st Plaintiff John Sahr Yambasu: I must state here that the original action started with an originating notice of motion dated 9th day of October 2002 seeking several reliefs by the plaintiff pursuant to section 122, 124(1), 127 and 175 (5) of the Constitution of Sierra Leone Act NO. 6 of 1991. This motion was supported by an affidavit sworn to on the 9th day of October 2002 by the 1st plaintiff John Sahr Yambasu. Later after the plaintiff's case had been filed, the Registrar of this Court filed on the 6th November 2000 a notice of non-compliance with Rule 92(1) of the Supreme Court. Counsel for the defendants filed a notice of motion dated 9th December 2002 seeking leave to file a case for the defendants. On the 30th April 2003 this Court granted the defendants leave to file their case, which was later filed.

[p.88]

The Court heard arguments by Counsel for the plaintiff Dr. B. Jabbie in support of the originating notice of motion dated 9th October 2002. At the hearing on the 29th May 2003 the Court intimated both Counsel for the plaintiff and respondents that the Political Parties Act NO.3 of 2003 may be relevant in this matter. The Court had a long adjournment because of the illness of one of the Justices presiding in

this matter. At the resumed hearing on the 26th November 2003 a notice of change of Solicitor was filed for the 1st plaintiff and was replaced by Mr. Beloku Sesay.

On the 26th November 2003 Counsel for the plaintiff Mr. Beloku Sesay sought leave to discontinue the action against the defendants. Counsel for the defendants T. Terry Esq. argued that the originating notice of motion dated 9th October 2002 was supported by an affidavit sworn to by the 1st plaintiff John Sahr Yambasu as required by the Supreme Rules and since he has filed a notice of discontinuance then there is no affidavit in support of the motion which brings the matter to an end. He argued further that since the affidavit of the 1st plaintiff John Yambasu is now of no effect since the matter has been discontinued and urged the Court to strike out the originating notice of motion since the affidavit is no longer in existence.

Counsel for the 2nd, 3rd and 4th plaintiffs Dr. B. Jabbie submitted that the notice of discontinuance applied only to the 1st plaintiff and does not apply to the other plaintiffs and that affidavit of the 1st plaintiff still stands despite the notice of discontinuance. He further submitted that according to Rule 98 of the Supreme Court Rules since there are no express Rules for discontinuance then the High Court Rules 1960 applies i.e. Order 22 of the High Court Rules. He said that since the 1st plaintiff is a co-plaintiff he cannot withdraw the proceedings. He said that the affidavit is still part of the record and it has not breached the provisions of order 27(11) of the Rules of the High Court for it to be rejected by the Court.

In reply Mr. Beloku Sesay submitted in reply that the application was made in accordance with Rule 22 of the High Court Rules and that the affidavit of the 1st plaintiff goes with the notice of discontinuance and that the matter no longer exists.

Mr. T. Terry for the defendants in reply said that the issue is based on form and not on substance. He said that the notice of discontinuance of the 1st plaintiff makes the [p.89] position of the other plaintiffs fatal since there is no longer an affidavit in support of the notice of originating motion and therefore that is the end of the matter. Mr. Beloku Sesay for the 1st plaintiff adopted the submission of Mr. T. Terry for the defendants.

In my view it is never too late to discontinue an action and the Court although it has the discretion to grant leave for discontinuance must do so in a just and equitable way.

There are certain issues before this Court for resolution.

1. Whether the 1st plaintiff on the filing of the notice of discontinuance his affidavit which was filed on behalf of the other plaintiffs was withdrawn.

2. Whether the 1st plaintiff has the right to withdraw. his affidavit and effectively discontinue the action because of non-compliance with Rules 89(1) of the Supreme Court Rules when there are other plaintiffs.

To my mind he was acting as agent of the plaintiffs when he swore to the affidavit. The answers to the first and second questions are in the affirmative. I disagree with Counsel for the 2nd, 3rd, 4th plaintiffs, Dr. Jabbie that on discontinuance by the 1st plaintiff the affidavit still exists since there are other

plaintiffs. Civil action are voluntarily instituted by persons and not under by compulsion. If a litigant decides to discontinue his action I do not believe the Court must force an unwilling litigant to proceed with an action. It is not necessary for me to list the effect of a refusal to grant leave to discontinue since it is not necessary for my decision. I aver that on the discontinuance of the action by the 1st plaintiff the affidavit by the 1st plaintiff is withdrawn and no longer exists.

After the affidavit of the 1st plaintiff has been withdrawn what then is the status of the action? Under Rule 89 (2) of the Supreme Court Rules Public Notice No.1 of 1982 the originating notice shall be supported by an affidavit: Therefore in the absence of a supporting affidavit the action becomes legless and in consequence the proceeding should be terminated.

Obviously, the absence of a supporting affidavit violates Rule 89(2) and there is non-compliance with this Rule. This leads me to the next question whether the [p.90] proceedings can be saved. In my view, the action was commenced by several plaintiffs and supported by a single affidavit by the 1st plaintiff. This 1st plaintiff has by withdrawal of his affidavit impliedly discontinued his action. Does the action of the other plaintiffs survive? Rule 98 of the Supreme Court Rules enables this Court to invoke the practice and procedure of the High Court mutatis mutandis. Under Order 50 of the High Court Rules the court has the power to waive non-compliance with the rule of the Court. The history of the cases under this rule was to make a fine distinction between viodable and void irregularities. Lord Denning in Re Pritchard 1963 Ch 503 made the distinction between nullity and mere irregularities. This Court undoubtedly has the discretion to waive non-compliance with any of its rules. It will be unfair to the other plaintiffs in this action to discontinue for non-compliance with Rule 89(2) when the defect can easily be remedied by the filing of another affidavit which the Court has power to grant.

My decision is re-inforced by Ex parte Atumfuwa and Another reported in 2000 SCGLR. P.72. Leave is hereby granted to the 1st plaintiff to discontinue the action against the defendants. The Court has a discretion to waive non-compliance and leave is hereby granted to file further affidavits in support of the notice of the originating notice of motion dated 9th October 2000.

[Sgd.]

Virginia A. Wright, J.S.C.

[p.91]

Warne JSC.,

Notice of Discontinuance dated 20th November 2003 in the case of the 1st Plaintiff John Sahr Yambasu against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants was argued in this Court by Mr. Beloku Sesay for leave to be granted for such Discontinuance.

The events preceding such an application are contained in the record of proceedings as follows: Dr. Bubuakei Jabbi on behalf of all the Plaintiffs herein filed an Originating Notice of Motion dated 9th day of October 2002 seeking several reliefs pursuant to Section 122, 124(1), 127 and 175(15) of the Constitution of Sierra Leone Act No.6 of [p.92] 1991. This Motion was supported by an affidavit sworn to

by the 1st Plaintiff John Sahr Yambasu who is now seeking leave to discontinue the suit against all the defendants.

The sequence of events are as follows: On the 3rd of December 2002 Dr. Jabbi for Plaintiffs was present and said he received notice for the hearing the day before. C C B Taylor Esq., for the Defendants applied for an adjournment because Mr. Brown-Marke for the Defendants was unavailable and there was a letter from Brown-Marke seeking the adjournment, Dr. Jabbi conceded and the adjournment was granted to the 20 December 2002.

On the 10th December 2002 Dr. Jabbi appeared for the plaintiffs and T M Terry Esq., with Ms. G Thompson, 0 Kamara Esq., and C CB Taylor Esq., appeared for the Defendants as Counsel. The motion was adjourned to 20th January 2003. The record showed that on the 6th November 2002, the Registrar of the Court filed Notice on non-compliance with Rule 92(1) of the Rules of Court that 1st Defendant was a would be defendant on the 16th January 2003. T M Terry Esq., applied by Notice of Motion dated 9th December 2002 on behalf of the defendants to seek leave to file case for the Defendants. Dr. Jabbi stated that he had a preliminary objection to the motion being heard. The pith and substance of the objection is that the Defendants had failed to enter an appearance to the originating Notice of Motion. This was forcefully argued by Dr. Jabbi. He concluded that the application was not properly before the Court and should be dismissed. Mr. Terry replied that the application was made pursuant to specific rule which was Rule 92 of the S C.[p.93] Rules. Dr. Jabbi did not reply and Ruling was reserved. The Ruling was delivered on the 3rd March, 2003 and the objection was overruled.

Mr. Terry proceeded with the application pursuant to rule 92 (1) of the S C Rules, Dr. Jabbi vigorously opposed the application for leave. Mr. Terry replied with the same tenacity as Dr. Jabbi. On the 30th April 2003, Ruling was delivered by Court granting such leave to the file the defendant's case with costs assessed at Le3,500,000.

On the 15th May 2003 the Court started to hear the arguments of Dr. Jabbi in support of the Originating Notice of Motion dated 9th October 2002. During the argument, Dr. Jabbi sought leave to file certain affidavits in answer to the Defendant's case. Mr. Terry objected. The application was refused Dr. Jabbi continued his arguments. At the hearing on the 29th May 2003, the Court intimated both Counsel that the Political Parties Act, No.3 of 2003 may be relevant in this Matter.

There was a long period when the Court never sat due to the illness of (Warne JSC.) one of the Justices.

At the resumed hearing on 26 November 2003, Mr. Beloku Seisay, on behalf of the 1st Plaintiff John Sahr Yambasu sought leave to discontinue the action against all the Defendants.

[p.94]

Mr. Terry in answer to the application/submits that the application is invoking Rule 89 of the rules of this Court. He argued that the Originating Notice of Motion is not a representative action and the defendants swore to affidavit in support of their case. As regards the affidavit sworn to by the 1st Plaintiff in support of the Originating Notice of Notice that is now of no effect, because the motion has

been discontinued. Counsel urged the Court to strike out the affidavit as the Originating Notice of Motion is no longer existing. Dr. Jabbi in his submission argued that the action by the 2nd, 3rd and 4th Plaintiffs still submits because they have complied with Rules 89 and 90 of the Rules of this Court. Dr. Jabbi submits that the purported Notice of Discontinuance cannot be the foundation for the matter to be dismissed and the affidavit sworn to by 1st Plaintiff is still intact.

Counsel submits that the manner in which the proceedings were set in motion has an implication on the Notice of Discontinuance and refers to Order 22(1) of the rules of the H. C. pursuant to Rule 98 of the rules of the Court.

He submits that the 1st Plaintiff is one of several plaintiffs and is severely constrained as to his wish to discontinue or withdraw out of a number of Plaintiffs.

Counsel further submits that by the nature of the claims and the reliefs sought in the Originating Notice of Motion, the 1st Plaintiff is a necessary party having subscribed to [p.95] all the claims indivisibly to the Originating Notice of Motion and he is the only plaintiff who can be personally affected by one of the principal claims.

Counsel concluded that the Notice of Discontinuance has not complied with law and practice and the affidavit in support of the Originating Notice of Motion is still part of the record and it has not breached the provisions of Order 27(1) of the Rules of H.C. for it to be rejected by the Court.

Mr. Beloku Sesay submits in reply that he has made the application in accordance with the provisions of Order 22(1) of the Rules of H.C. Counsel concluded that by virtue of 89(2) of the rules of this Court, once the affidavit of 1st plaintiff goes, the cause or matter no longer exists.

Mr. Terry, for his part, replies that the first issue is based on form not on substance-vide Order 22 (1) of H.C. Rules. Counsel submits that the Notice of Discontinuance conforms with Order 22(i) Rules of H.C. and submits that since there is no provision in the Rules of this Court, Court can rely on its inherent jurisdiction. Counsel concludes that the position of the plaintiffs is fatal because they have no affidavit in support of their case.

Can the Court grant leave to the 1st Plaintiff to discontinue the action against all the defendants? This is the issue the Court will address. I will carefully consider the Notice [p.96] of Discontinuance to ascertain if it has complied with the applicable rules. Be that as it may, the discretion of the Court to grant such leave or not is not restricted.

The Notice of Discontinuance is dated 20th day of November 2003.

Prior to this Notice of Discontinuance being filed, several other documents were filed. There is an affidavit in opposition sworn to by one Osman Foday Yansaneh who deposed inter alia, that he is the 3rd Defendant in the matter herein and exhibited as annexures to the affidavit, a Declaration by John Sahr Yambasu the 1st Plaintiff addressed to all members of the All People's Congress Party; a letter to Dr. Bubuakei-Jabbi the solicitor for all the plaintiffs instructing him to discontinue the action against defendants herein. The 3rd defendant deposed in paragraph 4 the of following that I make this affidavit

in opposition to that sworn to by John Sahr Yambasu on 9th October at 10.30 O'clock in the forenoon in support of the Originating Notice of Motion dated 9th day of October 2002".

The affidavit herein referred to by Osman Foday Yansaneh is very significant. Paragraph (1) states "that I am deponent herein and authorized by all the plaintiff's herein to make this affidavit on the mutual behalf of all of us who are Plaintiffs in the matter intituled as above" The paragraph quoted is in the affidavit sworn to by John Sahr Yambasu 1st Plaintiff.

[p.97]

Having reiterated the sequence of events, I will now address the relevant provisions in the Rules dealing with Discontinuance of the action in this Court. There is no specific provision in our rules except rule 98 which provides: "Where no provision is expressly made in these Rules relating to the Original and Supervisory Jurisdiction of the Supreme Court, the practice and procedure for the time being in the High Court shall apply mutantis mutandas."

I now refer to the provision in the High Court rules which is Order XXII Rule (1). It is a long rule, but I shall spell out what is relevant in the instant case. Which is: "the plaintiff may, at any time before receipt of the defendants defence, or after the receipt thereof before asking any other proceeding in the action (save any interlocutory application) by notice in writing wholly discontinue the action against all or any of the defendants or withdraw any part or parts of his cause of complaint, and thereupon he shall pay such defendants costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court, but the Court, but the Court may before, or at or after hearing or trial, upon such terms as to costs, as to any other action, and otherwise as may be just order the action to be discontinued or any part of the alleged part of the alleged cause of complaint to be struck out …… [p.98] …….

The next part of this rule refers to the defendant.

It is quite clear that the 1st Plaintiff must needs have leave to discontinue the action. Mr. Beloku Sesay who has made the application to discontinue is not the original solicitor on record. We are not questioning his authority to file the notice of discontinuance since he filed a notice of change of Solicitor. Mr. Terry for the Defendants is urging the Court to accede to the application to discontinue as the affidavit is support of the Originating Notice of Motion having been sworn to by the 1st Plaintiff is no longer germaine to the issue before the Court. Mr. Beloku Sesay adopts the submission of Mr. Terry. Dr. Bububaki-Jabbie argued that notwithstanding the purported withdrawal by the 1st Plaintiff, the cause or action is still alive; if for no other reason than that 1st plaintiff was a necessary party to the cause or action.

The arguments of Counsel on both sides are very attractive. Be that as it may, I will consider this application of the 1st plaintiff to discontinue his action against all the defendants in the context of the

proceedings up to this point. As I have said, the Court had on the 3rd of March, 2003 upheld that the defendants were not obliged to file a notice of appearance to the Originating Notice of Motion before being heard. In my view, the main purpose for the use of the due process of an Originating Notice of Motion is for the expeditious disposal of a cause or matter i.e. where the res or subject matter is perishable, [p.99] or liable to destruction. The reasons given are not exhaustive, and I will add one more which is where minors may suffer irreparable harm or damage. I subscribed to the ruling of the 3rd March 2003 that notice of appearance was not necessary. If it were, all the rules applicable to a process begun by Writ of Summons. Would have applied, such as a defence, a reply (if any) counterclaim and all that it . entails, joining of issue and entry for trial. In my view, the framers of the Rules never contemplated such a laborious process in relation to an Originating Notice of Motion.

In like manner Order 22(1) of the Rules of the High Court is not applicable to an Originating Notice of Motion. In my opinion, the application to discontinuance at this stage of the proceedings is an abuse of the due process of the court. I am not unmindful of the fact that if the court were disposed to grant the application, it will be on terms; nonetheless, in view of what I have said above, this court should not permit the abuse of its process with impunity. The applicant is therefore permitted to discontinue proceedings against all the defendants on terms.

Defendants waives costs.

[Sgd.]

Sydney Warne, J.S.C

I AGREE

HON. MR. JUSTICE S. C. E WARNE

I AGREE

HON. MR. JUSTICE E. C. THOMSON-DAVIS

I AGREE

HON. MR. JUSTICE M. O. ADOPHY

I AGREE

HON. MRS. JUSTICE V. AD. WRIGHT

I AGREE

HON. JUSTICE DR. A. B. TIMBO

CASES REFERRED TO

1. Ex parte Atumfuwa and Another reported in 2000 SCGLR. P.72

2. Re Pritchard 1963 Ch 503

STATUTES REFERRED TO

1. Constitution of Sierra Leone 1991 (Act No. 6 of 1991)

2. Political Parties Act 2002 ((Act No. 3 of 2002)

3. Supreme Court Rules Public Notice No.1 of 1982

4. Order 50 of the High Court Rules

J. S. YAMBASU AND 3 ORS v. ERNEST BAI KOROMA & 5 ORS.

[S.C. 3/2002] [p.100-115]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 22ND JUNE 2004

CORAM: DR. JUSTICE A. B. TIMBO, C.J.

MR. JUSTICE S. C. E. WARNE, J.S.C.

MR. JUSTICE E. C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M. O. ADOPHY, J.S.C.

MRS. JUSTICE V. A. D. WRIGHT, J.S.C.

BETWEEN:

J. S. YAMBASU AND 3 ORS. — PLAINTIFFS

AND

ERNEST BAI KOROMA & 5 ORS. — DEFENDANTS

Dr. Bu- Buakei Jabbie for Plaintiffs

Mr. Terrence Terry for Defendants

JUDGMENT

TIMBD, C. J.

The Plaintiffs by originating notice of motion dated the 9th day of October 2002 sought among other things the following declarations in pursuance of sections 122, [p.101] 124 (1), 127, and 175 (15) of the Constitution of Sierra Leone 1991 (Act NO. 6 of 1991).

(1) That the document referred to herein as "The Constitution of the All Peoples Congress (APC) Party" amended and approved by the APC National Delegates Conference of Friday 22nd to 24th March 2002, dated 2nd April 2002 is in contravention of Articles 6 and 16 of the 1995 APC Party Constitution and is ultra vires of section 24 (1) of the Political Party's Act 2002 and is therefore null and void and has no legal effect whatsoever.

(2) That the office of "National Party Leader and Head of the APC Party" purportedly established by the illegal instrument dated 2nd April 2002 referred to therein as ALPHACON 2002 is null and void.

(3) That the 1st Defendant herein Honourable Ernest Bai Koroma Member of Parliament is NOT lawfully the holder of the purported office of "National Party Leader and Head of the APC Party."

(4) That the Constitution of the All Peoples Congress (APC) Party dated 5th December 1995 is the lawful and current Constitution of the All Peoples Congress (APC) Party and has been such lawful instrument as from 5th December 1995 up until the present moment.

[p.102]

(5) That the highest leadership offices or positions in the All Peoples Congress (APC) Party at the present time are as follows:

i. National Party Chairman Leader

ii. National Deputy Party Chairman/Leader as established by Article 6. 13. 1 and 6. 13. 6 of the current 1995 APC Constitution.

(6) That the changes in the titles of office-holders namely from "National Party Chairman Leader" and "National Deputy Party Chairman/Leader" to those of "National Party Chairman" and National Deputy Party Chairman respectively are null and void and have no legal effect, the said changes having been effected immediately after the APC National Delegates Conference of 22nd to 24th March 2002 contrary to the express provisions of section 24 (1) of the Political Parties Act 2002.

(7) That the purported replacement of the lawful incumbent by the 5th Defendant Mr. Shadrack Bola Williams as Regional Chairman, Western Area for the All Peoples Congress (APC) Party is not lawful since his appointment to and /or assumption of that office is inconsistent with Articles 6 and 16 of the current 1995 APC Constitution.

[p.103]

In this judgment, I shall confine myself to the main issue raised in the substantive application i.e. which of the two rival A P C Party Constitutions, namely that of 1995 and the one amended and approved at the Delegates Conference held between 22nd and 24th March 2002 is valid?

The other interlocutory matters raised while the proceedings were in progress such as jurisdiction, locus standi, the effect of withdrawal by one of four plaintiffs from the proceedings have already been addressed in our respective rulings of the 5th March 2004 and 20th April 2004.

The Plaintiffs by their Statement of Case dated the 17th October 2002 especially in paragraphs 3 to 9 inclusive dealt in detail with the alleged unlawful introduction of a document (Exh. 3) signed by the 1st 2nd and 4th Defendants purporting to establish and to have established a new Constitution of the All Peoples Congress (APC) Party repealing and replacing the valid and existing Constitution of the All Peoples Congress Party 1995 (Exh 2).

Counsel submitted that Exhibit 3 had failed to conform to democratic principles as enshrined in sect 35 (2) of the National Constitution and section 11 (2) (a) (iii) of the Political Parties Act 2002 and that by further virtue of the forgoing the said Exh. 3 is void and of no effect.

[p.104]

Article 6 of Exh. 2 aforesaid sets out in extenso the internal organisation, and the leadership and administrative structures of the APC Party at all levels throughout the country; while Article 16 thereof prescribes the mode, manner, method and procedure for initiating and ultimately effecting alterations or amendments of any nature whatsoever to the .APC Party Constitution.

Dr. Bu Buakei Jabbie maintained that the said Exh. 3 had radically and undemocratically altered the internal orgnisation and leadership structures of the All Peoples Congress Party from those stipulated in Article 6 of Exh. 2 by, in particular establishing such illegal and unconstitutional titles of office as the following:

National Party Leader and Head of the APC Party

National Party Chairman

National Deputy Party Chairman

which first two illegal titles had since been assumed by or assigned to the 1st and 2nd Defendants respectively thereby failing to conform to democratic principles in contravention of section 35 (2) of the 1991 Constitution.

Counsel further contended in particular, that certain elements and provisions in the said Exh. 3 are distinctly undemocratic and autocratic, for example,

(a) Articles 5. 1. 2(d) and 6. 11. 1 (iii) thereof, Le the absolute ouster or exclusion of the national courts of law in respect of litigation against the Party or its National Delegates Conference, thus failing to [p.105] conform to democratic principles as prescribed by section 35 (2) of the 1991 Constitution.

(b) Articles 8.1. 2. thereof, in its omission or deletion of the right of a fair hearing in internal Party discipline of individual members in contrast to the parallel Article 8.1. 2. (iv) of Exh. 2 and therefore in contravention of sections 23 (2) and 35 (2) of the 1991 Constitution of Sierra Leone.

(c) Articles 6.11.2 (iii) (a), 6.12.1 (v), and 8.1. 2. thereof, as to the intensely personalised role given to the "Party Leader" in the enforcement of internal discipline.

In the Statement of Case for the Defendants, the Defendants averred in paragraph 5 thereof that indeed Exh. 3 the so-called "ALPHACON 2002" Constitution together with the amendments thereto was presented to the National Delegates Conference and was approved and endorsed therein by acclamation. Furthermore, in paragraph 6 of the Statement of Defence the 3rd Defendant averred that he did in fact submit to the National Electoral Commission the 1995 All Peoples Congress Party Constitution with the proposed amendments and this new Constitution he said had been properly approved by the National Delegates Conference of 22nd to 24th March 2002 with all its amendments.

[p.106]

I pause here for a moment and ask the question, if what the 3rd Defendant stated in paragraph 6 of the Statement of Defence is correct, why was it necessary again on the 2nd June 2003 to submit the same altered Constitution to the Commission? And more significantly, this was done only when the matter was already in Court before us. As I did ask Counsel for the Defendants, could this not have been an after-thought?

In any event, no affidavit was filed by the 3rd Defendant exhibiting the first letter alleged to have been written by him as Secretary-General of the Party notifying the National Electoral Commission of the pending alterations to the 1995 All Peoples Congress Party Constitution.

All we are left with therefore is the averment by the 3rd Defendant in paragraph 6 of the Statement of Defence that this had been done.

This is certainly not credible or sufficient evidence for us to act on.

Section 24 (1) of the Political Parties Act 2002 (No. 3 of 2002) provides that,

"1. where a political party registered under section 12 intends to alter —

(a) its Constitution

(b) its rules or regulations if any;

(c) the name or address of its founding members;

[p.107]

(d) the title, name or address of any office holder submitted to the Commission under subsection (2) of section 11.

(e) Its name, symbol, colour or motto

it shall notify the Commission of its intention and the Commission shall within fourteen days after the receipt of the notification cause to be published by Government Notice the intended alteration and invite objections if any to anything contained in the intended alteration."

And by subsection (2),

"Every alteration shall come into effect (emphasis mine)—

(a) if no objection is made to the alteration one month after the publication by the Commission of the Government Notice referred to in Subsection (1); and

(b) in any other case at such time as the Commission may determine."

We are told that as soon as the Commission received the altered Constitution (Exh. 3) on 2nd June 2003 it caused a publication thereof to be made in Sierra Leone Gazette No. 28 of Thursday 19th June 2003 in Volume CXXXIV in accordance with the provisions of section 24 (1) of the Political Parties Act 2002 giving Notice of the intended amendments to the 1995 A. P. C. Party Constitution.

[p.108]

So the issue here as I see it is very simple. Did the 3rd Defendant who is the Secretary-General of the All Peoples Congress Party submit a copy of the 1995 All Peoples Congress Party Constitution with its proposed changes to the National Electoral Commission after it had been ratified at the Delegates conference of 22nd to 24th March 2002 as required by section 24 (1) of the Political Parties Act 2002?

This unfortunately, in my respectful view, had not been done. If it had, no doubt, the National Electoral Commission would have reacted accordingly as it did when it received the notice of 2nd June 2003 from the Party's Secretary-General, Mr. Osman Yansaneh.

What has emerged clearly from this sequence of events is that the provisions of the newly approved Constitution had been invoked or implemented without first complying with or going through the legal processes laid down by section 24 (1) and (2) of the Political Parties Act 2002.

Let me now come to Mr. Terrence Terry's argument in his written submissions on section 24 (1) and (2) of the Political Parties Act. He posed the question – "if the members of the Political Parties Registration Commission have up till date not yet been appointed which is the case here, can any Party or anyone for that matter still be required to notify that particular body which till date has not been set up according to law? Mr. Terry thinks not.

[p.109]

Counsel for the Defendants further submitted that for the purposes of matters arising under the Political Parties Act 2002 "Commission" means the Political Parties Registration Commission under Part 1.

This, notwithstanding, it is my opinion that until the members of the Political. Parties Registration Commission have been duly appointed it is the National Electoral Commission which should be notified

of any intended alteration of an existing Constitution of a political party registered under the proviso to section 34 (4) of the 1991 Constitution.

By this proviso the first registration of political parties after the coming into force of the 1991 Constitution was to be undertaken by the Electoral Commission.

Sending notice of intension to change the Constitution of a Political Party to the National Electoral Commission would therefore be the only sensible and proper thing to do where members of the Political Parties Registration Commission have not yet been appointed. Were it otherwise, it would mean that a Political Party would not be able to alter its Constitution and implement provisions of the new Constitution until members of the Political Parties Registration Commission have first been selected. That, I believe, will lead to absurd and grave consequences not intended by Parliament when it was enacting section 24 (1) and (2) of the Political Parties Act 2002. See S. C. No. 4/96 - Constitutional Reference - All Peoples [p.110] Congress V NASMOS and Ministry of Social Welfare, Youths and Sports delivered on 26th October, 1999 where the provisions of section 8 of Cap. 23 were applied because Parliament had not prescribed the procedure for bringing into operation section 133 of the 1991 Constitution relating to suits against the State by private individuals.

Looking therefore at both the 1995 Constitution of the All Peoples Congress Party and the one containing the proposed amendments of 2nd April 2002, it IS abundantly clear that the existing APC Constitution of 1995 had been altered.

There is also copious evidence from the various documents filed by both sides that these alterations had been invoked or implemented in contravention of section 24 (1) and (2) of the Political Parties act 2002.

In these circumstances, I hold that the 1995 all Peoples Congress Party Constitution of 2nd April 2002 is the current and only valid Constitution of the All Peoples Congress Party and that whatever was done under or in pursuance of the amended Constitution approved at the Delegates Conference held between 22nd and 24th March 2002 is illegal and void ab initio.

Consequently I will grant declarations 1, 2, 3, 4, 5, 6 and 7 sought by the Plaintiffs.

[p.111]

I have not found it necessary to make any pronouncement on whether the changes sought to be introduced into the 1995 All Peoples Congress Party Constitution contravened section 35 (2) of the 1991 National Constitution as not conforming to democratic principles because of my finding that the proposed amendments themselves had been acted upon or implemented prematurely and are therefore of no consequence.

Costs to be taxed.

[Sgd.]

HON. DR. JUSTICE A. B. TIMBO

CHIEF JUSTICE

I AGREE……..HON. MR. JUSTICE S. C. E W RNE

I AGREE …….. …..HON. MR. JUSTICE E, C. THOMSON-DAVIS

I AGREE .....HON. MR. JUSTICE M. O. ADOPHY

I AGREE ……..HON. MRS. JUSTICE V. A. D. WRIGHT

[p.112]

I have had the opportunity and privilege of reading the draft judgment of the Learned Chief Justice I entirely agree that the several declaration as prayed for be granted.

The Learned Chief Justice has started the various clauses in the Originating Notice of Motion and the relevant paragraphs in the affidavits hereof. He also referred to the verifying affidavit which referred to the plaintiff's case. I will therefore not repeat them. Be that as it may, I will like to highlight a few points of my own.

Let me here and now state the Constitution of Sierra Leone. Act No. 6 of 1991 is the basic Law of the Republic and all organs of the State derive their legitimacy there from.

There are two sections of the Constitution by which Political Parties can exist and operate. The relevant sections are 34 and 35.

Section (1) provides inter alia, "There shall be a Political Parties Regulation Committee on which shall consist of four membership appointed by the President namely

(a)……

(b)……...

(c)……

(d)……

(e)……

(f)……

[p.113]

(4) The Commission shall be responsible for the registration of all political parties and for that purpose shall make such regulations as may be necessary for the discharge of its responsibilities under this Constitution."

Provided that the first registration of political parties after coming into force after the Constitution shall be undertaken by the Electoral Commission.

In my opinion Section 35 (1) and (2) are germaine to the issue before this Court.

Section 35 (1) provides “subject to provisions of this section, political parties may be established to participate in shaping the political will of the people, to disseminate information on political ideas, and social and economic programmes of a national character, and to sponsor candidates for Presidential, Parliamentary or Local Government elections”

35 (2) provides “The internal organisation of a political party shall conform to democratic principles, and its aims, objectives purposes and programmes shall not contravene or be inconsistent with any provisions of this Constitution.” (Empasis mine)

The main thrust and pith and substance of the cases and submissions of plaintiffs are that the defendants have contravened section 35 (2) of the Constitution.

Both parties have agreed that the All Peoples Congress Party is a political party according to law.

[p.114]

The Counsel for plaintiffs have strenuously submitted that the purported amendments to the party's Constitution of 1995 which was registered with National Electoral Commission are untra vires, void and of no effect - They contend that in order to compound the invalidity of the amendment, the defendants have implemented the purported amendments.

The defendants, for their part, through their Counsel have strenuously and vigorously submitted and argued that the amendments were properly made in a National Delegates Conference on 22 - 24 March 2002 by acclamation. It is dated 5th December 1995.

The question I ask myself is which of these arguments is tenable? It is pertinent to consider the 1995 Constitution of the All Peoples Congress, how it can be amended and approved. Once we have ascertained the provision, then we can address the provisions of Political Parties Act of 2002 vis-avis sections 34 and 35 of Act No. 6 of 1991.

Exhibit 2 is the 1995 Constitution of the party annexed to the verifying affidavit of Mohamed L. Bangura, the 3rd Plaintiff herein

ARTICLE 16 of the Constitution clearly spells out how the Constitution can be amended.

It provides “AMENDMENTS TO CONSTITUTION

This Constitution or any part thereof maybe amended, rescinded, altered or additions made thereto, by resolution carried by a two-thirds majority motion at a National [p.115] Delegates Conference or as the case may be, by the National Advisory
Committee……

……

The purported amendments are contained in Exhibit 3 of the said affidavit

The Constitution of All Peoples Congress is alleged to have amended and approved by the A.P.C. National Delegates Conference of Friday 22nd to Sunday 24th March 2002; and on the face of it is stated 5th December 1995. (Amended and Approved)

There is nothing in Article 16 which speaks of "by acclamation. There is a presumption that the whole process was flawed and this presumption has not been rebutted. A vote, in my view, means by show of hands, or by secret ballot.

The Plaintiffs and their counsel submitted that the Defendants failed to comply with section 34 (10) of the Political Parties Act No. 3 of 2002.

I do not think section 24 (1) of the said Act is applicable here. The party was registered under the proviso in section 34 of the Constitution Act No. 6 of 1991. When this registration took place, the Constitution submitted to the National Electoral Commission was the 1995 Constitution. Section 34 aforesaid makes a provision for the establishment of a Political Parties Registration Commission. This is the body to which any representation can be made and where political Parties can be made and where political Parties can submit any new Constitution.

STATUTES REFERRED TO

1. Constitution of Sierra Leone 1991 (Act NO. 6 of 1991)

2. Political Parties Act No. 3 of 2002

[MISSING PAGE 116-140]

JOSEPHINE R. ELLIS, DESMOND C. O. ELLIS v. CECIL O. E. KING

[CIV .APP .NO.4/2000] [p.21-22]

DIVISION: SUPREME COURT, SIERRA LEONE LEONE

DATE: 24TH JANUARY 2003

CORAM: MR. JUSTICE S.C.E.WARNE, J.S.C.

MR JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.S.C.

BETWEEN:

JOSEPHINE R. ELLIS

DESMOND C.O.ELLIS - APPELLANTS

AND

CECIL O.E. KING - RESPONDENT

J.B. JENKINS-JOHNSTON ESQUIRE FOR THE APPELLANTS

E.E.C. SHEARS-MOSES ESQUIRE FOR THE RESPONDENT

RULING

WARNE J.S.C.

This is an application by a Notice of Motion for an appeal to be heard by this court. There is however, a certificate of non-compliance by the Registrar of the court pursuant to Rule 41(d) of the Supreme Court Rules (P.N. No. 1 of 1982.)

The certificate reads:—

“I hereby certify that the Appellants in the above appeal have not complied with Rule 41(b) of the supreme Court Rules (P.N. No 1982 as would be Appellants (emphasis mine). In short there is no Notice of Appeal before the Court. Counsel for the would- be Appellants filed an affidavit which I presume is in support of his Notice of Motion dated 18th May 2000. In that affidavit he deposed in paragraph 5 the following:—

"(5) That sometime after we had satisfied the conditions of appeal, I did receive a Notice from the Court that the records were ready and I did collect the records, but inadvertently I failed to file the Case for the Appellants within the time allowed by the Rules. That I did attempt to apply for an enlargement of time within which to file the case but withdrew same because of the inadequacy of the affidavit. Copies of the Motion and Affidavit are exhibited hereto and marked D 1 and D2 respectively”.

Exhibit Dl is a Notice of Motion asking for an enlargement of time within which to file case for the Appellants. The Notice is dated 28 October 2002. Exhibit D2 is the [p.22] affidavit in support of the motion. The Affidavit herein referred to was sworn to on 11th January 2003 and filed 13th January 2003. Counsel for the Appellants is urging the Court not to dismiss the appeal on the certificate of non-compliance by the Registrar. Counsel has invoked the provision of Rule 103 of the Rules of this Court.

Mr. Shears- Moses, Counsel for Respondent has submitted that in order to invoke the provision of Rule 103, there ought to be an application before this court. Counsel further submitted that this is not a proper situation where the court could exercise its discretion to grant leave.

In my view, when the Registrar has filed the certificate of non-compliance can Counsel for appellants be heard? This is the issue I will immediately address.

Rule 41(a) of the Rules herein states clearly “No party to an appeal shall be entitled to be heard by the Supreme Court unless he has previously filed his case in the appeal”. There has been an application before the full Court of five for an enlargement of time within which to file the Appellants case. Before the matter was heard, Counsel for Appellants withdrew the application, and the matter was struck out. In this hearing the Court ought not to have heard the Counsel for appellants. Be that as it may, there is no application before this court on which the Court can exercise its discretion.

The Registrar has invoked the provision of Rule 41 (d) which provides: “where the Appellant fails to file his case in accordance with the provisions of this rule, the Registrar of the Supreme Court shall certify such fact to the Supreme Court which may thereupon order that the appeal be dismissed with or without costs.”

Having said this, I shall perforce have to comply with the provision of Rule 41 (d) and dismiss the appeal. The appeal is accordingly dismissed.

[Sgd.]

SIDNEY WARNE, J.S.C.

STATUTE REFERRED TO

1. Supreme Court Rules (P.N. No. 1 of 1982.)

PRECIOUS MINERALS MARKETING COMPANY (S.L.) LTD. v. SHEIK ADBULAI ALEDULKALIQ BIN-RAFAAH

[CIV .APP /2000] [p.152-157]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23RD MARCH 2005

CORAM: MR. JUSTICE DR. AB. TIMBO, C.J.

MR. JUSTICE S.C.E.WARNE, J.S.C

MR. JUSTICE E. C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.S.C.

MRS. JUSTICE P.E. MACAULAY, J.A.

BETWEEN:

IN THE MATTER OF PRECIOUS MINERAL MARKETING COMPANY (SIERRA LEONE) LTD)

AND

PRECIOUS MINERALS MARKETING COMPANY

(SIERRA LEONE) LTD. APPELLANTS

AND

IN THE MATTER OF THE COMPANIES ACT CAP. 249

SHEIK ABDULAI ALEDULKALIQ BIN- RAFAAH RESPODNENT

F. M. Carew Esq. for the Appellants

D.S. Vincent Esq. for the respondent

RULING

MR. JUSTICE S.C.E. WARNE

HISTORY OF THE CASE

The process of law culminating in this appeal is as follows:— on the 23rd day of April [p.153] 1997 a Petition was filed in the High Court of Sierra Leone by one Sheik Abdullai A. Bin Raffah in respect of the Precious Minerals Marketing Company (Sierra Leone) Ltd. Incorporated on 15th September 1984 under the Companies Act (Cap 249).

The Petitioner is the Respondent herein.

For the several reasons stated in the Petition, the Petitioner prayed for the following orders:

“i That the Company be wound up by the Court under the provisions of the Companies Act Chapter 249 of the laws of Sierra Leone.

ii That the Petitioner may be granted such order as in the premises may be just

On the 29th day of April 1997, Notice of Intention to oppose the Petition was filed by the late Mr. Terrence Terry a Solicitor of the High Court on behalf of M.J. & J. Development Company Ltd. A contributory (Share Holder) of Precious Minerals Marketing Company (SL) Ltd. On the 13th day of May 1997 a sworn affidavit by one Max-Dixon, a clerk in the office of Mr. Terry challenging the jurisdiction of the court to hear the Petition for non-compliance with the mandatory provision of Rule 32 of the Winding-up Rules 1929. On the 23rd October 1998, there was a Ruling on the Preliminary objection by Stronge J(as he then was):

“1. That the Petition dated the 23rd day of April 1997 for the winding-up of the Precious Minerals Marketing Company (S.LO Limited be removed from the file in the Companies (Winding-up) office Registry. The effect of my order is that the Petition is struck out.

[p.154]

2. That the costs be paid by the Petitioner, such costs to be taxed. On the 24th November, 1998, Mr. D.S. Vincent, Solicitor for Respondents wherein made an application before Stronge J. (as he then was) for the Petition to be re-instated, this was opposed by Mr. F.M. Carew Solicitor for Appellants herein On the 18th May 1999 Mr. Justice Stronge dismissed the Motion for the re-instatement of the Petition.

On the 4th January 1999, the Respondent herein filed a Notice of Appeal against the Order of Mr. Justice Stronge which was dated 23rd day of October 1998.

Let me pause here and make certain observations. After the Order which was made to strike out the Petition made on 23rd October 1998, there was another Order made on 18th May 1999 dismissing the application for the re-instatement of the Petition. Be that as it may, was the Notice of Appeal within the time prescribed by the Rules of the Court of Appeal? I will address that matter in due course. It is to be noted that the Order of 23rd October 1998 was an Interlocutory decision. Let me also observe that, inter alia one of the reliefs sought in the Notice of Appeal is:

(ii) “That the Petition dated the 23rd day of April 1997 for the Winding-up of the Precious Minerals Marketing Company (SL) Limited which the Honourable Mr. Justice AN.B. Stronge ordered to be struck out on the 23rd day of October 1998 be reinstated in the Companies winding-up office registry”

There is no appeal against that Order dismissing the application for the re-instatement of the Petition. Can this relief be granted, when there is no appeal? I will also consider this in due course. Let me continue with the History of events. Proceedings in the Court of Appeal went on before a Court made up of Alhadi, (Deceased) Tolla Thompson, Gbow [p.155] J A, delivered their Ruling on 29th day of May, 2000 Alhadi and Gbow J.A. allowed the Appeal and Tolla-Thompson dismissed the Appeal.

The Grounds of Appeal

The Ruling and Orders of the Court of Appeal are dated 29th May 2000. The grounds of appeal are.

“i. That the Majority Decision/Ruling the Court is per incuriam as it failed or ignored the recognized and laid down Higher Judicial authorities on the effect of non-compliance of statutory provisions and case Law on this issue.

ii That the Majority Court's Decision/Ruling is wrong in Law in waiving the Mandatory Provisions of Rule 11(5) of the current Rules of the Court of Appeal.

iii That the Majority Decision/Ruling erred in Law in holding that the non-compliance with Rule 11 (5) by the Appellant was not willful and that the Court has inherent jurisdiction to waive the non-compliance of Rule 11(5) under the Court's Powers in Rule 66 of the Rules of the Court of Appeal.

iv. That Rule 14(4) of the West African Court of Appeal Rules 1950 were dissimilar to Rule 11(5) of the current rules of Court of Appeal.

v. That the Majority decision/ruling of the Court is unreasonable and cannot be supported by the facts and Law before the Court"

Before the Court, both Counsel were given opportunity to make their submissions.

Their main focus were on the Ruling of Mr. Justice Stronge of 23rd October, 1998. Was it a Interlocutory one? In my opinion, the Ruling was an interlocutory one. What was the issue before the Court of Appeal? It seems to me that the arguments on the Ruling of Mr. Justice Stronge was not really addressed in the Court of Appeal. The decisions in [p.156] The Court of Appeal ruled on the preliminary objection by Counsel for the appellant (herein) "That the appeal before the court was out of time and that deprived the Court of Jurisdiction".

I have already observed that the order appealed against was dated 23rd October 1998. The Appeal was filed and dated 4th day of January 1999. The relevant Rule in the Court of Appeal Rules P.N. 29 of 1985 is Rule 11 (1).

This rule provides: "No appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision (emphasis mine) or of three months in the case of an appeal against a final decision unless the Court enlarges the time". I have held that the ruling of Mr. Justice Stronge of 23rd October 1998 was an Interlocutory decision. As a result the appeal before the Court of Appeal was out of time.

However there was this huddle that among the reliefs sought was an order for the reinstatement of the Petition. There was no specific appeal before the court addressing that order which was one subsequently made dismissing the application for the reinstatement of the Petition of 23rd April 1997.

The grounds of Appeal before the Court were:

i. The Learned Judge erred in law when he ordered that the Petition dated 23rd day of April, 1997 for the Winding-up of the Precious Minerals Marketing Company (Sierra Leone) Limited be removed from the file in the Companies (Winding up) office registry.

ii. The Learned Judge erred in law when he ordered that the said Petition be struck out".

How can reliefs be sought for a non-existence appeal. In my view, that cannot be done.

[p.157]

On this point alone, I can safely say it will be inappropriate to accept the ruling of the Court of Appeal. The Proceedings in the Court of Appeal, with respect to the Learned Justices, were unsatisfactory. There was the filing of the Appeal out of time. The notice of appeal was infelicitously worded. There was no amendment to the grounds of appeal. The Ruling was based on the Preliminary Objection of Counsel for appellants (herein). There was no decision on the grounds of appeal before the Court for what they

were worth. In this situation what ought this Court to do. I will resort to the Constitution of Sierra Leone Act No.6 of 1991 more particularly Section 122(3) which provides the following: "For the purposes of hearing and determining any matter within its jurisdiction and the amendment, execution or the enforcement of any judgment or order made on such matter, and for the purpose of any other authority, expressly, or by necessary implication given to it, the Supreme Court shall have all the powers, authority and Jurisdiction vested in any Court established by this Constitution or any other law". As a result I am tempted to remit the matter to the Court of Appeal, but it will serve no useful purpose.

These proceedings have been prolonged for sometime. Justice demands that litigation must come to an end. I will therefore make the following orders;—

(1) The decision and the Orders made in the Court of Appeal are set aside.

(2) The Orders of the High Court made on the 23rd day of October 1998 are hereby restored.

Each party shall bear it own costs.

SYDNEY WARNE

J.S.C.

STATUTES REFERRED TO

1. Companies Act Chapter 249

2. Constitution of Sierra Leone Act No.6 of 1991

ROKEL RESOURCES (S.L.) Ltd. v. BITTANOL INTERNATIONAL TRADING COMPANY AND ASSOCIATES

[SC. CIV.APP.NO.4/88] [p.185-226]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 31 MAY 2005

CORAM: MR. JUSTICE S.M.F. KUTUBU, C.J.

MR. JUSTICE S. BECCLES DAVIES, J.S.C.

MR. JUSTICE S.C.E. WARNE, J.S.C.

MR. JUSTICE M.O. ADOPHY, J.A.

MRS. JUSTICE V.A.D. WRIGHT, J.A.

ROKEL RESOURCES (S.L.) Ltd. — APPELLANTS

VS.

BITTANOL INTERNATIONAL TRADING

COMPANY AND ASSOCIATES — RESPONDENTS

J.B. Jenkins-Johnston Esq., for the Appellants

Berthan Macaulay Jr. Esq for Respondent

WARNE, J.S.C.:

This is an appeal against the Judgment of the Court of Appeal delivered on the 2nd day of June, 1988. It was a majority judgment in a Court made up of Navo, Thompson-Davis and Gelaga King JJA., Thompson-Davis JA. dissenting. Gelaga King JA gave the principal judgment supported by Navo JA.

There are ten grounds of appeal namely:

1. That Court of Appeal was not duly or properly constituted on the 2nd June, 1988 when the Judgment was delivered contrary to the express provisions of section 107(2) of the Constitution of Sierra Leone No.12 of 1978, in that only two (2) Justices of Appeal were present and read judgments.

2. That the Respondents herein having filed their Notice and grounds of [p.186] Appeal on the yd of April, 1987, the Court of Appeal erred in Law and acted contrary to the letter and spirit of the express provisions of Rules 9 and 11 of Court of Appeal Rules Public Notice No.29 of 1985;

(a) by allowing the Respondents to abandon six (6) out of seven (7) grounds of appeal and substituting in their place two (2) completely fresh grounds of appeal not hitherto included in the original Notice of Appeal some ten (10) months after the date of the decision appealed against, which was tantamount to bringing a fresh appeal months out of time; and

(b) by entertaining arguments from Counsel on those grounds of appeal, and © by basing the substance of their decision on those grounds of appeal.

3. That when the Learned Justice of Appeal said and so held without more that:

"The Chief Justice is the effective and only Lessor and only they can grant a lease to a non-native, as long as the District Officer endorses his consent thereon, and the relevant provisions of the Act are complied with the…… perfectly valid", the Learned Justices of Appeal erred in law in that they failed to apply [p.187] section 76(1) of the Courts Act No.31 of 1965 or to observe section 125(2) of the Constitution Act No.12 of 1978.

That in arriving at their conclusion that since the lease was by Deed, it is trite in law to say that no extrinsic evidence of the intention of the party to the Deed, from his Declarations whether at the time of executing it, or before or after that time is admissible in their absence of fraud" and

"Agreement EX"A" and the plans put in evidence speak for themselves, and, admit no extrinsic evidence for their construction"

the Learned Presiding Justices misdirected themselves on the law of the exclusion of extrinsic evidence to contradict, vary or add to documents by failing to have regard to the facts of the case to the equitable and other legal exceptions to the above rule.

5. That in their constitution of Cap. 122 of the Laws of Sierra Leone, the Learned Justices of Appeal did not construe section 1 thereof properly or at all, and in the event gave the statute an application which is based wholly on English jurispundence on the Laws of trusts and infringes the applicable customary law.

6. That in all the circumstances, to hold "Bitco" had a better right of possession and stemming from a better title, because their lease was prior in time to Rokels" instrument and that Bitco had, and still has a legal estate in the land prior in time to that created by Rokel, is an error in law in that it pre-supposes and wrongly so that Cap. 256, provides for registration not merely of instruments but of title.

[p.188]

7. That the award of damages of Le6,732,000.00 was wrong in Law since there was no sufficient basis to found such a claim

8. That when the Learned Presiding Justices said with reference to Ex. "T" "undoubtedly" the judge did so in error" as the document clearly contravened or did not comply with Section 3 of the Evidence Documentary Act Cap. 26 he erred in law in rejecting the said document in that he ignored or failed to observe the provisions of section 3(2) of the Act Cap. 26 or that the said Ex. "T" was addressed to the Director of Mines whose representative in court was called upon to produce the same.

9. That the Learned Justice of Appeal having correctly stated the Law of trespass then proceeded to mis-apply the same to the facts of the instant case, to contradict themselves and to ignore settled decisions of higher courts binding on them contrary to the principle of Stare Decisis, thereby arriving at an erroneous conclusion on the issue of trespass.

10. That the Learned Justices of Appeal having held that, "…… Be that as it may I do not in any case attach much weight to the map/plan in Bitco's lease since I would have some difficulty in identifying the land from it alone" ERRED IN LAW, and decided [p.189] against the weight of the evidence when they subsequently found that……." ……. it follows from the foregoing that the land was properly leased to Bitco by the Chiefdom Council and that the land leased can be identified from the deed with sufficient certainty……."

For ease of reference, the Respondents are (hereinafter called the plaintiffs) and the Appellant are hereinafter called the Defendants). The facts of the case are, the Defendants were attracted to prospect for gold in the Kafe Simiria in the Tonkolili District in the Northern Province of Sierra Leone.

As a result, they took certain preliminary steps to that end. After they had been assured that certain areas in the Chiefdom had rich gold deposits they proceeded to negotiate with the Paramount Chief and the Chiefdom Councilors and landowners for a lease of a parcel of land in the Chiefdom. The negotiations being successful, a lease was prepared which was signed by Paramount Chief and representatives of the Chiefdom Councillors. The lease was dated 31st December, 1984 and registered in the Office of the Registrar —General. Included in the lease were a plan and a schedule delineating the land conveyed to the defendants.

In arguing the grounds of appeal, Mr. Jenkins-Johnston referred the court to the issues which he submitted are contained in the case for defendants duly filed.

Among the issues Counsel argued before this Court are the following which I considered to be important in deciding the Appeal:—

[p.190]

1. 'The subject-matter of this action being leasehold land in the Provinces, can it be properly determined without having any regard to the provisions of Section 76 of the Courts Act. No.31 of 1965 but merely and wholly on concept of English Jurisprudence and English precedents.

2. (i) Having regard to the preamble to the Provinces Lands Act. Cap. 122 as well as the provisions of Section 2(i) thereof; Is it correct to say that (Land Owners' have no role to play in the granting of a lease under the province Land Act.

(ii) To whom do the phrases "Native Communities and "Men of Note" refer as used in the Act.

3. (i) Can the Court ignore clear and direct evidence that the actual area in dispute i.e. land around Kpafaia Village was never part of the land leased to "Bitco" even though the plan tendered in Court would seem to suggest that it was? Ought the Court to act in vain or to act in a manner contrary to the interest of the Native Communities mentioned in the Provinces Land Act and likely to end in a breach of the Peace?

4. ……..

5. ……..

6. (1) Is there any evidence that the Plaintiffs Bitco were ever in clear and Exclusive Possession of the area in dispute? ……

7. ……

8. ……

9. "In all the circumstances should the Court of Appeal have allowed Bitco's Appeal?"

[p.191]

Counsel contended hat Section 76 of Courts Act No.31 of 1965 was totally disregarded by the Court of Appeal and consequently the Judgment of the Court cannot stand since it was based merely and wholly on the concept of English jurisprudence and English precedents. Counsel submitted that the subject-matter of the action being a Lease of land; in the Provinces, Section 76 of the said Act should have been given due regard.

Counsel further submitted that the Court of Appeal ought to have considered the evidence of the witnesses in the High Court vis-à-vis the lands comprising the area leased to the Plaintiffs which belonged to the native communities of the five villages within which the land in dispute existed, rather than restrict itself to the Lease EX."A".

Counsel submitted that the area in dispute was never surveyed by the Plaintiffs. Indeed, the evidence of the witnesses for the Defendants show clearly that the survey plan of the plaintiffs' did not accurately reflect the agreement between the plaintiffs' and the Chiefdom Council and as such they cannot sustain any claim based on it.

Counsel referred the Court to the Provinces Lands Act Cap. 122, more specifically to section 2 of the Act and submitted that from the evidence of both plaintiffs and defendants, "men of note" in customary practice refer to the landowners or respective heads of the native communities.

Counsel contended and submitted that the Plan on EX."A" was irregular because it had no delineations and was not signed by the Director of Surveys and Lands. The Plan breached section 25 of Cap. 256 Registration of Instruments Act. Counsel submitted that even though Cap. 256 did not expressly provide the consequences of non-compliance, it ought to be regarded as obligatory with an implied nullification of whatsoever is done contrary to its provisions. The Deed Ex. 'A' therefore is voidable.

[p.192]

Counsel submitted further that the plaintiffs, not having properly identified the land claimed which they had leased from the Chiefdom Council and since it is always a question of fact whether or not a particular parcel of land is or is not contained in a description of land contained in a lease; there must be clear evidence to assist court to determine whether the parcels are sufficiently well defined.

1. As regards possession, Counsel submitted that the Defendants were in possession and the Plaintiffs were never in possession to enable them to ground a claim for trespass. Counsel submitted that the issue of possession was a question of fact and the Court of Appeal should have given due regard to the evidence before the High Court and the findings of the Learned Trial Judge.

2. Counsel had also argued that the Court of Appeal had ignored Ex. "T" the report of the Department of Mines on their investigation into the dispute thereby failing to properly evaluate the evidence in the High Court. In relation to Grounds 9 and 10 of the Appeal - Counsel referred to the relevant pages in the case for the Defendants .. On Ground 1 referred to S.107(2) of the Constitution of 1978 Act. No.12. Counsel abandoned Ground (2) with leave of Court.

3. Counsel finally submitted that the Court of Appeal was wrong in awarding damages to the plaintiffs since they did not strictly prove special damage.

In answer to the submissions of Counsel for plaintiffs submitted that Act No.12 of 1978 Section 107(2) refers to hearing not determination and cites specifically S.36 of Act No.31 of 1965 the Courts Act.

[p.193]

In respect of Ground iii Counsel submitted that Section 76 of the said Act. No.31 of 1965 requires considerable analysis and upon such analysis there are limitations to the application of customary law by the Courts. Counsel urged the Court to decide that Section 76(1) and (2) cannot avail the Defendants. Counsel further submitted that the Court of Appeal was correct in not applying customary law in the instant case and in not taking cognizance of landowners as being relevant in the lease.

Counsel submitted that EX."A" and Ex "X" being Deeds, extrinsic evidence will not be allowed to vary or discharge the contents thereof subject to certain exceptions.

Counsel argued that Defendants cannot impugn Ex "A" because they were not parties to Ex. "A" and cannot avail themselves of Section 25 of Cap. 256.

Counsel further submitted that Cap. 122 is a statute of specific application dealing with the granting of lease in respect of land to non-natives.

Counsel submitted that the failure to comply with section 25 of Cap. 256 cannot render a lease made under section 9 of Cap. 122 dependent on the provisions set out in Cap. 256 for registration. ,

Counsel submitted that the land was clearly identified in the Deed and cited several legal authorities in support of his submission and concluded that the contention that the leased land was not properly identified is not tenable.

The Defendants filed 10 grounds of appeal. However, it is my view, that for the purpose of the appeal, the issues are:—

(1) was the land leased to the plaintiffs clearly defined?

(2) were the plaintiffs in possession of the land which they claimed was trespassed upon?

[p.194]

(3) ought the Court of Appeal to have disturbed the findings of facts made by the High Court.

(4) what principles should govern the award of damages in an action for trespass?

The facts of the case are, the Defendants were attracted to prospect for gold in the Kafe Simiria in the Tonkolili District in the Northern Province of Sierra Leone. As a result they took certain preliminary steps to that end. After they had been assured that certain areas Chiefdom had rich gold deposits they proceeded to negotiate with The Paramount Chief of the Chiefdom Councillors and landowners for a

lease of a parcel of land in the Chiefdom. The negotiations being successful, they secured a lease which was signed by the Paramount Chief and representatives of the Chiefdom Councillors. The ease was dated 31st December, 1984 and registered in the Office of the Registrar-General. Among the clauses in the lease were a plan and a schedule delineating the land conveyed to the Defendants. The plaintiffs then imported mining and processing equipments to the tune of $2,000,000 US Dollars. These equipments were transported to the site where they found the defendants mining on part of the area for which they had got concessions to mine for gold. The plaintiffs conceded that they saw a lease agreement of the Defendants which showed an overlap on the plaintiffs concession.

The Defendants for their part said, that in February, 1985 they secured a mining concession in Gbafayah in the Kafe Simiria Chiefdom in the Tonkolili District in the said Northern Province. They averred that the agreement for the concession was made [p.195] between their company and the Paramount Chief and the landowners. It is not in dispute that the Paramount Chief was one of the signatories of both leases. The Defendants I, testified that after the lease agreement had been signed, they were shown the area they were to mine. The boundaries were indicated as the Makoleh river. The Defendants ceased work when the plaintiffs got an injunction against them by the Court. The Defendants also testified that no one was in possession of the land when they had the concession and started to work on the land.

In a case of trespass to land, the plaintiff must prove the extent of his land with certainty and that he was in possession or had a right to possession when the alleged trespass took place.

In the instant case, the plaintiffs sought to prove the extent or delimitation of the land by virtue of the Lease Agreement which they secured from the Paramount Chief and Chiefdom Councillors. The Lease Agreement was tendered on EX."AI". It is significant that the Court of Appeal carefully considered the Lease Agreement of the Plaintiffs before making its findings. I will do the same. The Lease Agreement is in issue and the Court of Appeal held that since the lease was by Deed it trite law to say that no extrinsic evidence of the intention of the party to the Deed from his Declarations, whether at the time of executing it, or before or after that time, is admissible in the absence of fraud". "This is a bold pronouncement of the law and in my view it is very restrictive because the rule cannot be said to be absolute in the face of certain exceptions.

Extrinsic evidence may be given to show that the document does not represent the contract to which the parties agreed. There was clear evidence before the High Court that there were five villages involved in two transactions, that is to say, the Lease Agreement [p.196] with the Plaintiffs and the Lease Agreement with the Defendants. In such a situation, I think there must be led evidence to determine the true nature of the lease. The five villages involved in the Lease Agreement of the Plaintiffs and Defendants respectively are Masomri, Nonkosokoya, Maranda, Gbafaia and Fonkuma. From the evidence, there seems to have been a misunderstanding vis-à-vis what piece or parcel of land was leased to the Defendants and the portion that was leased to the plaintiffs.

The Court of Appeal in its judgment, said inter alia "Since the lease was by Deed, it is trite law to say that no extrinsic evidence of the intention of the party to the Deed, from his Declarations, whether at the

time of executing it, or before or after that time is admissible, in the absence of fraud". In the instant case, the Court ignored the fact that the Lease dealt with land situated in the Provinces where Cap. 122, Provinces Land Act is applicable and provisions of Section 76 Subsections 1 and 2 of Courts Act No.31 of 1965 are very relevant.

In my opinion this is a case where extrinsic evidence was desirable to ascertain the circumstances existing at the time the Lease Agreement was made; vide the case of River Wear Commissioner V. Adamson (1877) 2 Case 743 at 763. This following passage was quoted by Lord Halsbury L.C. in ButterleyV. New Hucknall Colliery (1910) A.C. 381 at 382.

"Lord Blackburn said in the case of River Wear Commissioners V. Adamson (1877) 2 App. Cases 743 at 763 "in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without enquiring further and seeing what the circumstances were in [p.197] reference to which the words were used what was the object appearing from those circumstances which the person using them had in view, for the meaning of words according to the circumstances in respect to which they were used."

The Court of Appeal in considering Exh."A" the lease, strictly confined its construction to the contents of the Deed and referred to the case of; Shore V. Wilson (1842) 9 CL + F.355 at 365.

This case is the locus classicus on the subject. This case was concerned with the interpretation of Lord Hewley Trusts for "poor and godly preachers of Christ's holy gospel" in which the opinion of the judges were taken by the House of Lords. In that case we have excerpts of the following judgments. Coleridge J. at PP. 525, 527 said "where language is used in a Deed which in its primary meaning is unambiguous and in which that meaning is not excluded by the context and is sensible with regard to extrinsic circumstance in which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that to which the writer used it; such meaning in that case conclusively states the writer's intention and no evidence is receivable to show that in fact the writer used it in any other sense or had any or had any other intention. This rule thus explained implies that it is not allowable in the case supported to adduce any evidence however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark that, though we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention rejecting which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters [p.198] have to deal with the written expression of the writer's intention and Courts of Law to carry it into effect what he has written, not what it may be surmised, on however, probable grounds that he intended only to have written." So also Parke B in the case at P.565 said "No extrinsic evidence of the intention of the party to the deed, from his declaration, whether at the time of his executing the instrument, or before or after that time, is admissible, the duty of the court being to declare what is written in the instrument, not of what was intended to have been written."

Both judges are expressing similar opinions and I agree with them. However, they have not excluded circumstances existing at the time the instrument was executed from being receivable in evidence to determine the intention of the writer. I would not exclude the circumstances either.

The Court of Appeal quoted part of the judgment of Tindel C.J. in the same case Shore V. Wilson and that of Coleridge J. ibid and said: "from those authorities I apprehend that all Bitco and the Chiefdom Council agreed is to be found within the four corners of the lease. In my judgment therefore it was unnecessary to call the extinsic evidence to which the judge referred and the judge was wrong in law to have so held". In my opinion, this is a regrettable misunderstanding of the judgment in Shore V. Wilson. I say this because of the judgment of Lord Blackburn in the case of River Wear Commissioners V. Adamson (supra). In the peculiar circumstances of the lessors and the subject matter of the lease, it would have been desirable if the land owners had been called to give evidence as regards the delimitation of the land leased to Bitco, the Plaintiffs.

[p.199]

In my view, the Court of Appeal erred when it stated that "the extrinsic evidence of the intention of party to the deed from his declarations, whether at the time of executing it, or before or after that time, is admissible, in the absence of fraud".

The lease, in the instant case, is one leasing land in the Provinces under the Provinces Land Act Cap. 122. In such a case, the Courts should never lose sight of the fact that its jurisdiction to adjudicate is derived from section 21 of the Courts Act No.31 of 1965 which provides:" Nothing in this Act should be deemed to invest the Supreme Court (High Court) with jurisdiction in regard to

(a) any action or original proceedings;

(i) to determine the title to land situated in the Provinces other than the title to leasehold granted under the Provinces Act.

(ii) ……..……..

(iii) ……..

Having been conferred with jurisdiction, the Court ought to have regard for the provisions of section 76 of the aforesaid Act. Section 76 states (1) nothing in this Act shall deprive any Court when determining matters arising in the Provinces in its civil jurisdiction, of the right to observe and enforce the observance of or shall deprive any person of the benefit of, any customary law existing in the Provinces and not being repugnant to natural justice, equity and good conscience, nor incompatible, either directly or by necessary implication, with any Act applying to the Provinces."

[p.200]

(2) Subject to subsection (3) such customary law shall, except where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in all cases and matters where it shall appear

to the Court that substantial injustices would be done to any party by a strict adherence to any law other than customary law.

(3) No party shall be entitled to claim the benefit of any customary law if it shall appear either from the express contract, or from the nature of the transaction out of which any cause or matter may have arisen that such party agreed that his obligation in connection with such transaction should be regulated exclusively by any law referred to in Section 74 or any Act of Sierra Leone; and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity and good conscience." Subsections (1) and (2) are very relevant in the instant case. In my view, these sections were specifically enacted to address such an issue as in the instant case.

The lease was executed regarding land in the Provinces, more particularly in the Kafe Simiria Chiefdom, Tonkolili District in the Northern Province in the Republic of Sierra Leone.

The Court of Appeal took the trial judge to task in that the judge in his judgment said inter alia:

"The evidence before me clearly shows that the Plaintifft claim under a Deed of Lease which gave them a colour of title. But they are relying. only on this documentary assistance. It is my view that for them to succeed in the action they have perforce to prove their title, but this they have regrettably failed to do. They have sidestepped calling the owners of the land who granted the lease to them to come forward and say both sides of Makokeh River was part of the land leased to them".

[p.201]

In interpreting the lease, the Court of Appeal, in the majority judgment went strictly according to the wording of the lease. This in my view, was in total disregard of the provisions of Section 76 of Act 31 of 1965 aforesaid. Gelaga-King J.A. said also in his judgment "No where in the Act does the word "landowner" appear. This is not surprising having regard to the preamble to which I have already referred and the Act, itself, which in effect gives the power of landowners to the Chiefdom Council. And of course, nowhere in the Act does it say that the consent of the landowner is a sinequanon to the granting of a lease. I might say that, land owners is a relevant term in the Western Area as distinct from the Provinces so far as the granting of lease is concerned. In the Western Area, land is not vested in any Chiefdom Council". It seems to me, with respect, that the Learned Justice was approbating and reprobating. He acknowledges in one breath that the Chiefdom Council is Trustee for the landowners, and, in another breath, that the consent of the landowners is not genuine (s.i.c) to the granting of a lease to non-natives. In my view, the Learned Justice, with respect, misunderstood the concept of dealing in land in the Provinces otherwise the Court of Appeal would have been guided by the provisions of section 76 of the Courts Act No.31 of 1965. Act No.31 of 1965 hereto before mentioned. In the majority judgment Gelaga King J.A. had this to say in rejecting that part of the judgment of the Learned Trial Judge where he referred to land owners.

In resolving this issue it is pertinent to point out that a distinction must be made between the granting of a lease in the Western Area of Sierra Leone and granting of a lease in the Provinces" I entirely agree. This was why section 76 aforementioned was enacted. Nevertheless, the Learned Justice of Appeal

Gelaga-King J.A. referred to the provisions in section 2(1) of the Provinces Land Act Cap 122 in rejecting the judgment of the [p.202] Learned Trial Judge. He states, "The preamble to the Act makes it clear that, unlike the Western Area, "all land in the Provinces is vested in the Chiefdom Council who hold such land for and on behalf of the native communities concerned.

The act gives further clarification defining chiefdom council under section 2(1) as follows: "Chiefdom Council means Paramount Chiefs and their Councillors and men of note or sub-chiefs and their councillors and men of note.

"Men of note" has not been defined by any statute and as far as my research goes, the definition cannot be found in this or any other enactment. In my view, "men of note include Paramount Chiefs, sub-Chiefs, Chiefdom Councillors and landowners. I cannot envisage a situation where the Chiefdom Council will convey any land, be it a leasehold or otherwise without the consent or cooperation of the owners of the land. If the landowners are ignored, it will be a recipe for disaster and civil unrest. That all lands in the Provinces are vested in the Paramount Chief and Chiefdom Councillors who hold such land for and on behalf of the native communities concerned and connote trusteeship. If the land is held in trust, the Chiefdom Council cannot deal with such lands without resort to the landowners.

In my view, the passage in the judgment of the Court of Appeal where it says, "It seems to me, therefore, perfectly clear that so called "landowners do not have a role to play in the granting of a lease under the Provinces Land Act is a misconception". The Chiefdom Council is effective lessor and only they can grant a lease to a non-native." I regret to say that the expression 'so called landowners" is a term of derogation. In my view, the decision of the Court of Appeal, with respect, frustrated and breached. Section 76 of Act No. 31 of 1965 aforesaid. In order to buttress my view I will refer to the [p.203] evidence of P.W.3 in the High Court. He gave his name as Arnold Rayan-Coker. He said, inter alia, "pursuant to Ex. D our Company decided to meet the Paramount Chief of Kafe Simiria Chiefdom and to get his approval to obtain mining concession in the said area provided no part of the said area has been assigned, subletted or leased to any other party being indigenous Sierra Leoneans or foreigners. We were able to get the approval of the Paramount Chief, the Chiefdom Councillors and landowners (emphasis mine). The approval was conveyed in writing"

Some of the landowners named were Bassie Lakoh, Yamba Kargbo and Mayo Seisay. In the Lease EX."A" the names of Bassie Lakoh and Yamba Kargbo appeared as parties who were among those who conveyed.

In my opinion, the Learned Trial Judge was justified when he opined that none of the landowners was called to testify for the plaintiffs. I am more than surprised that the Paramount Chief as the principal trustee for the landowners was not even called as a witness. In continuing his evidence P. W. 3 said..... "our Company decided to meet the Paramount Chief of Kafe Simiria Chiefdom and to get his approval to obtain mining concession.

I see Exhibit A and the plan attached to it. It is the plan of the area I have been referring to. It is the area leased to our company. It is also the area which the Paramount Chief, Chiefdom Elders and the Landowners (emphasis mine) gave concession inExhibit 'B'. The acreage of the area is 196 plots in 4.34

sq. miles." Indeed all throughout his evidence the witness kept referring to the P.C., Chiefdom Councillors and [p.204] landowners. Under cross examination, the witness said, "The area of our concession was indicated to us by the Landowners (emphasis mine.) P.W.6, Musa Bittar, in his evidence testified, inter alia, that' According to the directive given to us by the Ministry of Mines we obtained the approval from the P.C. Alimamy Bangura II of Kafe Simiria Chiefdom, his Chiefdom Councillors and the Landowners (emphasis mine) a piece of land referred to in our lease in conformity with the submitted plan attached to the said lease." P.W.7 Abubakarr Barrie said "Before a licence is issued to a company or individual first the company or the individual has to go to the Landowners (emphasis mine) and pay their fees which we call surface rent and government receipt should be issued by the 'Chiefdom clerk ..... I know that the Defendant Company had a lease from the Paramount Chief and the Landowners (emphasis mine). “Suffice it to say the landowners have a role to play in the disposition of land in the Provinces. In the instarit case, they did play a role in the lease which was granted to the Plaintiffs. In my view, the learned trial judge expressed a legitimate opinion when he said "the owners of the land who granted the lease to them to come forward and say that Makokeh River was part of the said land leased to them". The Court of Appeal dismissed the consent of the landowners as being unnecessary in granting a lease vis-avis Provincial lands. In my opinion the Court of Appeal was misguided in its Judgment and contemptuous of local custom in the disposition of Provincial lands when the learned trial judge was taken to task for expressing a legitimate opinion.

In support of my view, to ignore the consent of the landowners would be a recipe for disaster and civil unrest, I will refer to the evidence of P.W.3 Dr. Ryan Coker where he [p.205] said "I found them in the area in dispute. I was able to identify the area where I found them as part of the area for which we had got concession to mine gold……..……

……..

The people I found in the area I did not say anything to them but I later learnt that our agents were confronted with machetes and sticks (emphasis mine). Among our Agents confronted was Mr. Bongay and other agents I cannot now name. The people referred to the defendants and their agents”. D.W. 1 Mankeh Conteh testified, inter alia, that "we the landowners and the company agreed to a lease of the land and the rent to be paid annually. A document was prepared. I signed the document by affixing my thumbprint on it. One Momoh Kargbo also thumb printed so did one Brima Bangura. The P.C. and D.C. also signed in it.

I saw another company. They came to the same land we had given to Rokel Company. They came with machines. One Mr. Bongay was a surveyor who came with them. The company which is called Bitco. They brought their machines to Gbafaya Village. They passed through Gbafaya Village and went to where Rokel Company were working. As one of the owners I went to P.C. and reported the incident to him. The P.C. instructed that they remove their machines from the area. The machine was removed. It was after that Mr. Bongay came tosurvey the area. I asked him what was his right coming to survey our land. He said I should go and ask the P.C. not him. I asked him to leave the place immediately. He refused. I then sent for the young men in the town. The pegs he was burying were uprooted by the young men. He had to leave by force". MR. Bongay was P.W.4. The witness further said "He went and

complained to [p.206] the P.C. who sent for us. My people and I went. We told him we were the ones who drove Mr. Bongay from our land for surveying our land without our consent".

This bit of evidence strengthens my view that the P.C. should have been called to testify.

In my view, the Learned Trial Judge was right in holding that the consent of the landowners was necessary and desirable before the agreement was made for the lease to the plaintiffs. No doubt, in my opinion, the Learned Trial Judge adverted his mind to 576 of the Courts Acts No. 31 of 1965, aforesaid I regret to say the Court of Appeal failed to do this. The Learned Trial Judge found that the plaintiffs failed to prove their claim for trespass. The Court of Appeal reversed this finding.

In a claim for trespass, the plaintiffs need not prove title as stated in case of Gaslyn v. Williams (1720) Fortes Rep. 378. Possession alone is indeed sufficient to sue in trespass as against a wrongdoer, but it must be clear and exclusive possession (emphasis mine).

This is an action for damages for trespass to land. Trespass to and is an entry upon or any direct and immediate act of interference with the possession of land. Trespass to land is defined in Halsburys Laws of England 3rd Edition Volume 38 at 739 Paragraph 1205 as follows:

"Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, or rides or drives over it and takes possession of it or expels the person in possession or place or fixes anything on it."

[p.207]

Also in the same volume of Halsbudrys Laws of England supra at Page 744 Paragraph 1214 it is also stated as follows:—

"Trespass is any injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who was or is deemed to have been in possession either actual or constructive possession of the said land at the time of the trespass. The type of conduct necessary to evidence possession varies with the type of land, and to maintain an action against a person who never had any title to the land, the slightest amount of possession is sufficient."

In the instant case, the plaintiffs relied on the lease agreement of 31 December, 1984, that is to say, the title to the land in dispute. According to the Learned Trial Judge, they did not succeed. However, the Court of Appeal rejected the findings of the High Court. In rejecting the findings of the High Court, the Court of Appeal said, inter alia "from these authorities I apprehend that all that Bitco and the Chiefdom Council agreed, is to be found within the four corners of the lease. In my judgment therefore, it was unnecessary to call extrinsic evidence to which the judge referred and the judge was wrong in law to have so held." I have already adjudged that the, Learned Trial Judge was not wrong in law to have so held.

In order to buttress my judgment further, I will refer to Odgers on the construction of Statute 5th edition page 55 et seq the section where it states "The Deed must be read and interpreted as a whole in order to extract the meaning of any part or expression." How else can this be done? The author referred to the case of East Ham Corporation v. Suolen (1965) I.W.L.R. 30 at 43 affirmed (1966) A.C. 406 where Saln L.J. stated "we have been referred many well known rules of [p.208] construction. Many of these are artificial, some are contradictory and none is more than a guide, sometimes an uncertain one, for ascertaining the true" intention of the parties as expressed in the document under consideration. The principle, however, long ago laid down by Lord Ellenborough C.J. is of the greatest value the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentidus (i.e. from what goes before and from what follows) every part of it may be brought into action in order to collect from the whole one uniform and constant sense that may be done." In my opinion the Lease Agreement Exhibit "A" 1 does not provide that one uniform and constant sense from the whole document. The case Lord Salmon referred to by Lord Ellenborough is in Barton v. Fitzgerald (1812)15 East 530 at 541.

I will also cite the case of N.E. R1y v. Hastings (Lord) (1900) A.C. 260 at 269 where Lord Davey said, "The Deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the Deed if that interpretation does no violence to the meeting of which they are naturally susceptible."

The Court of Appeal was unable to ascertain the area of the land leased to the Plaintiffs either from the wording of the lease or the plan attached thereto; but however, found that the schedule provided sufficient proof thereof; in my view, the schedule by itself cannot be interpreted to bring it into harmony with the wording and the plan of the lease.

Be that as it may, the Court of Appeal went on to say, "What then is the area of the land in the Kafe Simiria Chiefdom leased to Bitco by the Chiefdom Council. Can the [p.109] land be identified with sufficient certainty from the Deed of Lease? Did the learned trial judge direct himself correctly on the law on this point"? The Court of Appeal then referred to a portion of the judgment of the trial judge and went on to say "But do we really need the evidence of P.W.3 and P.W.6 to identify the area or the concession in this case, or do we look for such identification in the Deed of Lease ....." In my opinion, the Court needed the evidence of P.W.3 and P.W.6 in addition to the Deed of Lease to identify the area of the concession. In support of my opinion, I will refer to certain portions of the evidence of P.W.3 and P.W.6.

P.W.3 Rayan Coker said inter alia, in cross examination, "It is correct that at the time we had the lease we did not have enough time to do proper survey by a licensed surveyor. We did not put beacons on the land to delineate the area but the area was properly delineated. We did not fence our boundaries. We did not make out the land to show that the land belonged to Bittanol. It is incorrect to say that at the time we signed the lease we did not have a correct plan of the land we were leasing. We had a proper idea of the area leased. The area was brushed to show the various demarcations or boundaries of our concessions.

Bittar P.W.6 testified, inter alia, "I am acquainted with a piece or parcel of land in Kafe Simiria Chiefdom. My company owns interest there. My company owns interest in the area for the purpose of mining gold.

According to the directions given to us by the Ministry of Mines we obtained the approval from P.C. Alimamy Bangura II of Kafe Simiria Chiefdom, his Chiefdom Councillors and the land owners for a piece or parcel of land referred to in our lease.

[p.210]

I know Kafe Simiria Chiefdom very well and particularly the area for which we had concessions. From October, 1983, to June 1986 we planned to mine an area of 1500 feet long to 300 feet wide - three feet deep, making a total of 1,350,000 cubic feet." In my view the evidence of these witnesses were necessary to comprehend the demarcation of the area contained in the lease.

Be that as it may, I will now consider the Lease itself and see if the area leased in Exh. "A" 1 is clearly defined. The Lease is EX. "A".

The Haberdum Clause states.

"The Chiefdom Council hereby demise unto the Tenants ALL THAT PIECE OR PARCEL OF LAND situate, lying and being at Kafe Simiria Chiefdom in the Tonkolili District aforesaid which piece or parcel of land and for greater dearness so as not to restrict or enlarge the description hereinbefore contained is delineated and described on the plan attached hereto and there on and specified in the schedule respectively demised for a term of 35 (thirty-five) years. (emphasis mine)". On a cursory glance it would appear that the area contains both exceptions and reservations and reservations and delimitations. What is meant by "for greater clearness and so as not restrict or enlarge the description herein contained……..

In my view, the underlined expression is not only equivocal but the delimitation on the plan and schedule is made more difficult to comprehend. I draw support for my view from the case of Dodd v. Burchell (1862) 1 Hurlstane & Collmans Reports. Where it was stated that "The quantity of land claimed by the defendant under a conveyance to him, must exactly correspond with the quantity designated by the measurement in the conveyance.

[p.211]

Held: the probability arising from the relative position of part of this land to neighboring land, that it had been conveyed by mistake, did not enable the plaintiff to show under the words be the same more or less that a similar quantity was the land conveyed."

The plaintiffs must prove its case on the strength of the evidence led in support thereof and not on the weakness of the defendants' case.

How should the court construe the underlined expression (supra). In the case of Swinburne v. Milburn (1884) 53 A.C. it is stated:" Ascertaining what the parties meant by the words used is in real function of

the Court. Lord Halsburly C. laid down two rules of construction. These are now firmly established as part of our laws and may be considered as limiting those words. One is that words, however general may be limited with respect to the subject-matter in relation to which they are used. The other is that the general words shall be restricted to the same genus as the specific words that precede them."

In the instant case, I find difficulty in relating the underlined words to the plan and the schedule contained in the lease. In order that the plaintiffs may prove their claim, the

area of land trespassed upon must be clearly defined. I see the Court of Appeal had difficulty in ascertaining the delimitations of the land claimed from the words of the lease and the plan attached thereto in the same manner as the High Court. However, the Court of Appeal referred to the schedule to ground a claim for the plaintiffs. In its judgment, the Court of Appeal said inter alia, "From the foregoing, there can be no doubt, and indeed there is none, that the piece of land leased to Bitco in Exh. "A" by the Paramount Chief and Councillors of Kafe Simiria Chiefdom with the approval of the District Officer Tonkolili District is more or less the same area subsequently granted to [p.212] Rokel in "Y" (emphasis mine). In my view there is no basis for such positive pronouncement, for this reason alone the claim of the plaintiffs should fail for uncertainty. The Court of Appeal, with respect ignored the evidence of B.W. 3 who said the plaintiffs had not, done a proper survey of the area by a licenced surveyor when defendants had started working the area. However, were they in possession of the land on the strength of their Title Exh. "A" 1. I do not think so. The area which they claimed had not been clearly demarcated. The comment on the habendum clause to which I have referred by the Court of Appeal makes interesting reading. It states: "I cannot help but comment that this clause is rather inelegantly worded and shows sent regard if not a woeful disregard, on the part of the draftsman to express lucidly a complete thought in words. He talks "so as not to restrict or enlarge the description herein before contained."

I agree entirely. I have already made my observation vis-à-vis this clause. Having made that comment the Court of Appeal after referring to the piece or parcel "herein before contained or not contained." Said "I dare say that if that was all the description of the land in the Deed, I would have no hesitation in summarily throwing the case out on that point". I agree. The Court of Appeal next considered the plan and said "I see a diagram drawn or superimposed on a map with the heading 2 sheet 44 and 45 Kafe Simkrka Chiefdom. "It is not signed by a surveyor. There are certain letters (AB, BC, CD, D etc) on certain points of the diagram, and then on a separate sheet of paper, those letters are referred to as for example.

44/45	LATITUDE	LONGITUDE	BEARING	DISTANCE
AB 849' 14"	11 45" 16"	315 50	4600 ft.	

[p.213]

If that was all I would have some difficulty in the elucidatory evidence (notice) I have already held is not admissible in the circumstances to identify the land from the map plan and table

……..

……

Be that as it may, I do not in any case attach such weight to the map/plan in Bitco lease since I would have some difficulty in identifying the land from it alone."

I agree, I would also have difficulty in identifying the land from the plan.

The Court of Appeal went on to say, "I am now left with the schedule which I also hold to be part of the Deed. It tells me that the area lies on topographical sheets 44 and 45 in the Chiefdom and gives the bearings distances from stated points, in detail and even states the geographical co-ordinates. In my Judgment, the description in the schedule affords a sufficient and satisfactory identification of the land leased to Bitco."

Can the schedule provide the answer as to whether the plaintiffs have proved their case with certainty as to the area of the land they claim? I do not think so. I will refer to the case of Dunstant E. John and another v. William Stafford and others S.C.CIV.APP.1/25 unreported. In that case, Betts J.S.C. referred to the case of Riddle v. Nicol which the Court of Appeal has cited as providing the test whether a surveyor could make a plan from the record before the Court. The decision was not limited specifically to the schedule but to the whole record of the case before the Court, vide page 10. For ease of reference. I will quote the portion of the judgment as regards this issue. 'In order to resolve the uncertainties which beat the learned trial judge he followed the principle outlined.

[p.214]

In the case, Kondilinye v. Odu 2 W.A.C.A. 336 which states that 'the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought before him to a declaration of title "and also the well known case of Sobanjo v. Oke 14 W.A.C.A. 593 which says "the burden is on the plaintiff to prove his right to title and other relief by independent means "After giving due consideration to the law and the facts before him. The learned trial Judge found he could not make the declaration." In the instant case, the Learned Trial Judge after seeing the witnesses and hearing their testimonies and also visiting the locus in quo, and giving due consideration to the law and facts before him found he could not make the declaration. It is a well established principle of law that an appellate court should not easily disturb the findings of fact of a trial Court. I will give my view on this point further on in this judgment.

Betts J.S.C. continued "In this case of Waiter Riddle v. Samuel Nicol (1971) the Court of Appeal (S.L) unreported, in which the case of Ate Kwadze and Robert Kwesi Adjie an appeal from the Provincial Commissioner's Court, cited in W.A.C.A. Vol. "X 274 it was held that before a declaration on title is given the land to which it relates must be ascertained with certainty, the test being whether a Surveyor can from the record produce an accurate plan of such land. There is also the case of Bitter v. Boome Tribal Authorities (1957-1960) A.L.R. S.L. 128 (R.B. Marke J.) this question follow:

"In Kwadze v. Adjei, already cited, the West African Court of Appeal laid down the test to be applied as regards the delimitations of land in dispute." Though this is an action for declaration of title the

principles laid down by the Court as to the necessity for defining with certainty the area in dispute, would, in my opinion, apply to the action for ejection.

[p.215]

The Court of Appeal among other things said: "The said test is whether a surveyor taking the record could produce a plan showing accurately the land to which title had been given.

"Applying these principles to this case it seems to me that the Judge was justified in coming to the conclusion he did regarding the declaration of title."

In this instant case, the claim was for trespass based on title. In the case cited per Betts J.S.C. record has not been defined or amplified. I will therefore refer to the Rules of the Supreme Court P.N. No.1 of 1982, Part 1, under Interpretation where "Record"

Means "the aggregate of papers relating to an appeal (including the pleadings proceedings, evidence Judgments) proper to be laid before the Supreme Court on the hearing of an appeal or any application which by these Rules may be made to the Supreme Court.

The cases, having decided, that if a surveyor taking the record could produce an accurate plan of the land claimed then the claim succeeds; the Court of Appeal erred in law when it decided that "the schedule affords a sufficient and satisfactory identification of the land leased to Bitco". The schedule is only part of the record.

In this instant case, the record includes the Pleadings and evidence and the judgment.

It seems to me that the Court of Appeal came to its findings by referring to part of the evidence including the lease Exhibit "A" and the judgment of the Learned Trial Judge. It is regrettable that the Court of Appeal having referred to Clause 2 of the Lease and having held that the clause was 'inelegantly worded." failed to relate this clause to the Schedule. The Court of Appeal also specifically observed the phrase "so as not to restrict or enlarge the description herein before contained." and then went on to say "There is hardly any description hereinbefore contained because the only description we have before us, "all that piece or parcel of land, situate lying and being at Kafe Simiria Chiefdom in [p.216] Tonkolili District……... That is hardly a description for the purpose of identifying the land.

I dare say that if that was all the description of the land in the Deed I would have no hesitation in summarily, throwing the case out on that point." I find it incomprehensible that having made such a pronouncement, the Court could decide that the schedule provides a sufficient and satisfactory identification of the land leased to Bitco. With respect, the Court of Appeal was wrong in law in so holding.

In my view, the Court of Appeal made unwarranted findings of fact which disturbed the findings of fact of the learned trial judge. An appellate court ought not to disturb findings of facts of a lower court unless such findings are clearly wrong and cannot be supported in law, vide the case of Benmax v. Austin Motor Ltd. (1955) All E.R. 326.

In that case Viscount Simon held at page 327 that a distinction should be made between facts deposed to by witnesses and found by the Court and inference of facts drawn by the Court.

I will also refer to the case of Watt or Thomas V. Thomas (1947) A.C. at 484. The headnote states: "When a question of facts has been tried by a jury and it is not suggested that the has misdirected himself in law, an appellate Court in reviewing the record of the evidence should attach the, greatest weight to his opinion, because he saw and heard the witness, as and should not disturb his judgment unless it is plainly unsound. The appellate [p.217] unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of the circumstances admitted or proved."..

As I have already said, the Plaintiffs have not proved their claim.

In the instant case, the positive findings of facts were made by the Learned Trial Judge as a result of facts deposed to by witnesses. These were the findings of the Judge in the High Court. The Learned Trial Judge said inter alia "The law as I understand it is that in a claim of trespass to land coupled with an injunction particularly where portion of area said to have been trespassed upon is an open space, It is of the utmost importance that there must be clear and unequivocal evidence supporting the area being claimed. I would say we need more than the bland assertion of P.W.3 and P.W.6 in this case to establish or identify the area of their concession."

The plaintiffs can have no better right or title than the owners of the land. They are claiming that the defendants are trespassers; but assuming that they were indeed, the plaintiffs in order to evict them must show a better title and cannot succeed in doing so by canvassing a title which itself has been demonstrated to be defective as regards the area being claimed. See Alhaji Adeshaye v. Shimonike (1952) 14 W.A.C.A. 86 at p. 87 it is evident that both sides have beautiful maps, the contention between the two parties is as to the ownership of the Gbafaye side of the Makokeh River. On the evidence before me, I find myself unable to say that the plaintiffs have proved their title to the disputed place and I so hold. Having so found, I hold that the plaintiffs are not entitled to claim injunction and/or mandatory injunction to restrain the defendants, by themselves, their servants or agents or otherwise"

[p.218]

It seems to me that the Court of Appeal ignored the evidence in the case or did not appreciate the principles of law relating to the award of damages.

The cases cited by the Court of Appeal did not give a clear cut approach as to the award of damages where the trespass to land was unauthorized mining; Morgan v Powell speaks of "compensation was given for all injury done to the soil by digging at p.284 per Denman C.J. "How then did the Court of Appeal award the damages when the Court acknowledged that plaintiffs did not suffer any loss for any injury done to the soil. To base the damages on the estimated value of the severed gold by the defendants is not only wrong in law, it is contrary to the rules of equity. The defendants had a right to mine in the area the plaintiffs claimed to be trespassed upon. They had incurred great expenses in putting machines on the land, they had constructed roads to the mining site. They had employed

substantial labour. They had paid fees to the Chiefdom Authorities and had been granted a lease of the area they mined. They had paid for and obtained mining licences. Mining was in full operation and had begun to mine gold from the area and had started to realise earnings therefrom. The plaintiffs interrupted production by securing a Court injunction preventing defendants continuing production. The defendants had suffered loss. Did the plaintiffs suffer any loss by the seeming trespass on what they claimed to be their area of the lease. Were they entitled to claim the value of the severed gold? I do not think so, until the gold was severed, no value could have been placed on it. In my view, if any award was to be made to the plaintiffs, the defendants were entitled to deduct their expenses.

[p.219]

Deduction of the cost of severing the mineral was laid down in Marttin v. Porter (1838) M & W. 357 that the value of the mineral as soon as it existed as a chattel formed the measure of damages and that no deduction could be made for the cost of severance.

There is however, a qualification on this general rule. In the case of Ward v. Modrewood (1841) 3 Q 3.4400. Parke B. directed the jury that:

"If there was fraud or negligence on the part of the defendant, they might give as damages under the Court in trover the value of the coals at the time they became chattels, on the principle laid down in Martin v. Porter; but if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had right to do what he did, they might give the fair value of the coals as if the coalfield had been purchased by the plaintiff."

The jury found for the latter sum. I am satisfied that was a proper, correct and appropriate award. This was later applied in the Courts of Equity vide J. Jegan v. V. Vivian (1871) L.R. 6 Ch. App. (742) See also the case of Townend V. Askern Coal Company (1934) 1 Ch. 463.

In this instant case, the defendants acted honestly in the belief that they had a right to work on the area claimed by the plaintiffs. As a result, if the High Court had found for [p.220] the plaintiffs, the award would have been based on the value of the minerals after severance less the cost of severance.

The Rule in Wood v. Moorewood is applied in the following circumstances (i) where the defendant had a bona fide belief in his title to the land in which the minerals lay as in Wood v. Moorewood (ibid) itself and hi three later cases Hilton v Woodes (1867) LRA Eq. 432, Ashton v. Stock (1877) 6 Ch. D. 719: Livingstone v. Rowards Coal Co. (1880) 5 App. Cas. 25 (2) Where the defendant had inadvertently worked into the [p.221] mine of the plaintiffs, his adjoining owner, as in Re. United Merthyr, Colleries (1872) L.R. 15 Eq. 46: (3) Where there was bona fide dispute between the plaintiff and the defendant, which dispute was in course of a long litigation that was finally decided against the defendants so as to make him a wrongdoer: as in Jegen v. Vivian (ibid) (4) Where the defendant had begun work in a mine vested in trustee in the bona fide expectation that a contract would be concluded between them giving him a Licence to work the mine having given one of the trustees notice that that expectation would be immediately acted upon by an entry on the property, but no contract was afterwards entered into.

They had a right to work on the area claimed by the plaintiffs. As a result if the High Court had found for the plaintiffs the award would have been based on the value of the minerals after severance less costs of severance.

The Rules in Wood v. Moorwood is applied in the following circumstances (1) Where the defendant had a bonafide belief in his title to the land in which the minerals lay as in wood v. Moorewood (ibid) itself and in three later cases Hilton v. Woods (1867) L.R. 4 Eq. 432, Ashton v. Stock (1877) 6 Ch. D. 719: Livingstone v. Hawyards Coal Co. (1880) 5 App. Cas. 25 (2) Where the defendant had inadvertently worked into the [p.221] mine of the plaintiff, his adjoining owner, as in Re: United Merthyr Collianlens (1872) L.R 15 Eq. 46: (3) Where there was a bonafide dispute between plaintiff and the defendant, which dispute was in course of a long litigation that was finally decided against the defendants as to make him abimitio a wrongdoer; as in Jegon v. Vivian (ibid) (4) Where the defendant had begun work in a mine vested in trespass in the bonafide expectation that a contract would be concluded between them giving him a licence to work the mine having given one of the trustees notice that that expectation would be immediately acted upon an entry, on the property, but no contract was afterwards entered into and the trustees had no power to make one; as in Trotter v. Maclean (1879) 13 .H.D. 574: (5) Where the defendants had begun to work the plaintiffs mine in the bonafide expectation that an order granting permission to work would be made in their favour by the Railway and Coal Commission, the application for the order having been filed before their trespass and the expected order being subsequently made, but the defendants had given no notice to the plaintiffs that they wee to commence working the mine as they did not know who was the owner, as in Townend v. Askern Coal Co. (ibid)".

The trend of these decisions and of this dicta in them suggests that the strict rule in Martin v. Porter (ibid) will now apply only where the trespass is willful and fraudulent, And that the qualification as stated by Parke B. in Wood v. Moorehead is now to be enlarged so as to include cases of negligence.

The above quotation is to be found in Mayne and McGregor on Damages 12th Edition Pages 598,599,600 paragraphs 687,690.

[p.222]

It is unfortunate that the Court of Appeal made short shrift of the award of damages.

I entirely agree with the principle of law relating to the award of damage vis-à-vis a claim for trespass by unauthorized mining. I adopt the ratio decidendi in the cases cited in its entirety. It is not only good in law but also in equity.

The judgment of the Court of Appeal is flawed. I will start with the preamble to the Judgment of Gelaga King J.A. which is the principal majority judgment. In the interest of charity I will refer to the preamble in full which states; Kafe Simira Chiefdom Tonkolili District is reported to be vastly rich in gold deposits. This reputation, which stretches far beyond the confines of Sierra Leone, has the backing of reliable geologists. The findings reveal that anyone with the requisite financial support or capital to exploit the huge golden resources would reap great and the nominal rewards".

In my opinion, this is an unusual approach in pronouncing a Judgment on an appeal.

However, the learned Justice did not stop there. He went on to say: "These companies — Bittanol International Trading Company Limited (Bitco) and Rokel (Sierra Leone) Limited were attracted to Kafe Simira's gold. They had the requisite financial backing.

Both companies acted speedily. Bitco in pursuance of the objective and being a non-native took certain essential preliminary steps as they were obliged to do, after which they leased a certain area of Kafe Simira. The deed of lease was signed on the 31st day of December, 1984 between Bitco and the Chiefdom Council …….

…….

Rokel in similar vein, for like purpose, and, I dare say with commensurate speed (emphasis mine) on the 21st day of February, 1985 signed an agreement by deed for a [p.223] certain area. They did so with Paramount Chief Alimamy Bangura of Mabonto Kafe Simira Chiefdom acting for and on behalf of the Chiefdom Council Paramount Chief

Alimamy Bangura was the same Paramount Chief who signed Bitco's lease."

In my opinion, the foregoing preamble to the judgment beclouded the views of the learned justice which led him to be selective in consideration of the evidence before the trial court. The preamble is not based on the evidence nor is an obliter dicta.

It seems to me that the learned justice is inferring that Rokel surreptionsly by fraud entered upon the land and started to mine.

The learned justice in the same vein went on to say "Rokel wasted no time in starting operations. They constructed access roads and employed about 100 people of the area. They took heavy machinery there. 208 caterpillars, washing plates, 4 pumps and w and extracted a lot of gold for which they started digging sometime in 1985'. It seems to me from the foregoing that Rokel had been on trial on criminal charged. He who avers must prove. Bitco sued Rokel for trespass, indeed trespass on a mining concession. The law requires they must prove their claim. What has the commensurate speed of Rokel in signing an agreement to work in the Kafe Simira's got to do with proof of trespass by Bitco. At the expense of prolixity, I will repeat that the plaintiff must prove his case on the strength of his own evidence not on the weakness of the defendant's case. In my opinion thee Court of Appeal was wrong in law to have disturbed the findings of facts by the Learned Trial Judge.

In order to compound the flow the majority judgment of the Court of Appeal, I will refer to parts of the judgment of Navo J.A. (as he then was). The learned justice said "The issue that was before the learned trial judge for consideration was a very simple and [p.224]

straight forward and on which but for the irrelevant matters the learned judge took into consideration, the necessity to come before this court on appeal might not have arisen".

In my opinion, this approach is a clear disregard and disrespect for the points taking judgment of the learned trial judge. It has been said over the years by distinguished and learned justices that an appellate court ought to pay due regard to the judgment of the trial judge who had the opportunity of seeing and hearing the witness as and in some cases visited the locus in quo. The Court of Appeal is free to draw its own inferences, form its own view where the judgment of the trial judge is clearly wrong in law or does not support the weight of the evidence. In my view this is not the case here.

It seems to me the Court of Appeal was preoccupied with the mineral resources in thee Kafe Simira Chiefdom more than with the facts of the case. The Learned Justice went on to say, "Rokel, I can rightly infer hearing of the rich mineral resources discovered by Bitco went to the same Council barely two months after they had executed Ex, "A" and -------- them incentives like supplying Mabonto Town with electric generator to supply the town with electric energy, building or ---------- a six motor road to the disputed area, offers of scholarships to school children, employment facilities to citizens of the Chiefdom etc. which are not quite outside the requirements of Cap. 122 thereby inducing to say the least the Council to enter into an agreement purporting to be a lease on the 21st February 1985 Ex. "Y" for more or less the same area leased to Bitco. I have only to add that if it is necessary to discover a reason for a sudden volte face the Paramount Chief and Chief Council of Kafe Simira Chiefdom, it is to be found, I think in the fact that a better offer had been made by Rokel after the bargain with Bitco had been concluded."

[p.225]

In my opinion, there is no basis for the learned justice to draw this inference. There is no evidence that Bitco had discovered such mineral resources in the area. Indeed there is evidence that they had not yet done any proper survey of the area leased to them nor had they secured authority to mine nor done any work on the area. It seems to me that learned justice is saying that Rokel came by night and started to plunder and reap what belonged to Bitco. Rokel are not on trial for a criminal offence. I regret that this misconception of the whole case led thee Court of Appeal to err in law in finding for Bitco. Bitco was never in clear and exclusive possession of the land claimed nor were they in the first place able to define the area with certainty as the law requires. In view of this misconception of the facts, the appeal must needs succeed.

The appeal is allowed on the following grounds: 3, 4, 5, 6, 7, 8, 9, 10.

Ground 1 has no merit and is dismissed.

Ground 2 was abandoned with leave of the court and accordingly dismissed.

As a result I set aside all the orders of the Court of Appeal, and restore the Judgment and orders of the High Court. The costs occasioned by this appeal and in the Court below are awarded to the defendants. And such costs shall be taxed.

SGD.

SYDNEY WARNE, J.S.C.

SGD.

[p.226]

THE HON. MR. JUSTICE BECCLES DAVIES, M.R.S.L.

TEL: 223511

3, REGENT ROAD

FREETOWN

SIERRA LEONE

17/5/2005

SGD.

BECCLES DAVIES

CASES REFERRED TO

1. River Wear Commissioners V. Adamson (1877) 2 App

2. East Ham Corporation v. Suolen (1965) I.W.L.R. 30 at 43 affirmed (1966) A.C. 406

3. Dodd v. Burchell (1862) 1 Hurlstane & Collmans Reports.

4. Swinburne v. Milburn (1884) 53 A.C.

5. Dunstant E. John and another v. William Stafford and others S.C.CIV.APP.1/25 (Unreported)

6. Sobanjo v. Oke 14 W.A.C.A. 59

7. Waiter Riddle v. Samuel Nicol (1971) the Court of Appeal (S.L) unreported

8. Benmax v. Austin Motor Ltd. (1955) All E.R. 326

9. Watt or Thomas V. Thomas (1947) A.C. at 484.

10. Alhaji Adeshaye v. Shimonike (1952) 14 W.A.C.A. 86

11. Marttin v. Porter (1838) M & W. 357

12. Ward v. Modrewood (1841) 3 Q 3.4400

13. Hilton v Woodes (1867) LRA Eq. 432

14. Ashton v. Stock (1877) 6 Ch. D. 719

15. Livingstone v. Rowards Coal Co. (1880) 5 App. Cas25 (2)

16. Trotter v. Maclean (1879) 13 .H.D. 574

17. Re: United Merthyr Collianlens (1872) L.R 15 Eq. 46

STATUTES REFFERED

1. Rules 9 and 11 of Court of Appeal Rules Public Notice No.29 of 1985

2. Constitution of Sierra Leone No.12 of 1978

3. Section 3 of the Evidence Documentary Act Cap. 26

4. Provinces Lands Act. Cap. 122

5. Section 25 of Cap. 256 Registration of Instruments Act

6. section 36 of Act No.31 of 1965 the Courts Act

SAMUEL HINGA NORMAN v. DR. SAMA S. BANYA & 2 ORS.

[S.C. NO. 2/2005] [p.266-343]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 31 AUGUST 2005

CORAM: MR. JUSTICE AR.D. RENNER-THOMAS, C.J.

MRS. JUSTICE V.AD. WRIGHT, J.S.C.

MR. JUSTICE M.E. TOLLA-THOMPSON, J.S.C.

JUSTICE SIH JOHN MURIA, J.A.

MR. JUSTICE JON KAMANDA, J.A.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 122; 124(1), 127 AND 171(15) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO.6 OF 1991, AND RULES 89 AND 98 INCLUSIVE OF THE SUPREME COURT RULES, STATUTORY INSTRUMENT NO.1 OF 1982.

IN THE MATTER OF SECTIONS 35(1), (2), (4) & (6); 4(b); 42(1); 43(a) & (b); 46(1); AND 76(1)(h) OF THE SAID CONSTITUTION OF SIERRA LEONE

IN THE MATTER OF SECTIONS 6, 14(1), 24, 27 AND 29 OF THE POLITICAL PARTIES ACT, NO.3 OF 2002.

IN THE MATTER OF CLAUSES 11(4); IV(A)(1); IV(A)(3)(i); IV(B)(5)(b), (c) & (i); V(1)(c) & (d); V(2)(c) & (d); VI(b) & (f), AND X OF THE CONSTITUTION OF THE SIERRA LEONE PEOPLE'S PARTY CONFERENCE OF THE SAID SLPP SLATED FOR 19-20 AUGUST AT MAKENI

BETWEEN:

SAMUEL HINGA NORMAN — PLAINTIFF

-AND-

DR. SAMA S. BANYA — 1 ST DEFENDANT

National Chairman, SLPP

Dr. PRINCE HARDING — 2ND DEFENDANT

National Secretary-General, SLPP

THE SIERRA LEONE PEOPLE'S PARTY (SLPP) 3RD DEFENDANT

(All Defendants being of 29 Rawdon Street, Freetown)

DR. BU-BUAKEI JABBI for the Plaintiff

E.A HALLOWAY ESQ.; D.B. QUEE Esq.; E.E.C. SHEARS-MOSES Esq.; and

[p.267]

A. BREWAH Esq.; for the Defendants.

JUDGMENT

RENNER-THOMAS, C.J.

The Plaintiff, Samuel Hinga Norman, describes himself for the purposes of the action herein as a member of the Sierra Leone Peoples Party, the Third Defendant herein, (hereinafter referred to as "the SLPP")

"who aspires to be Presidential Candidate at the 2007 Presidential elections, but who is keenly concerned that the pristine democratic credentials and processes of the SLPP are maintained, entered and facilitated in all its internal structure, organization, operations, programmes, activities and functioning".

The First Defendant herein, Dr. Sama Banya, is described as the National Chairman of the SLPP. The Second Defendant, Dr. Prince Harding, is described as the National Secretary-General of the SLPP. The SLPP is a political party registered pursuant to the provisions of the Constitution, Act. NO.6 of 1991 (hereinafter referred to as "the National Constitution") and the Political Parties Act, NO.3 of 2002 (hereinafter referred to as the "Political Parties Act").

Apparently, sometime in July 2005 the National Executive Council of the SLPP (hereinafter referred to as 'the NEC") held a meeting in Freetown and took a decision that a Party Conference of the SLPP was going to be held in Makeni in the Northen Region of Sierra Leone on the 19th and 20th day of August 2005. Among other things, it was proposed to elect the Presidential Nominee of the SLPP for the 2007 elections who, pursuant to Clause V(2)(c) of the 1995 Constitution of the SLPP, automatically becomes the Party Leader of the SLPP after such election.

According to the Statement of the Plaintiff's Case the Plaintiff is of the view that it is too premature to choose a Presidential Nominee for the SLPP any time in 2005 for the Presidential elections due to be held in 2007. Apparently, it was the Plaintiff's dissatisfaction with the decision of the NEC of the SLPP to go ahead with the election of the Presidential Nominee of the SLPP at the Party Conference scheduled for 19th-20th August 2005 that prompted the Plaintiff to institute these proceedings.

The Plaintiff commenced this action by way of an Originating Notice of Motion dated 27th day of July 2005 invoking the original jurisdiction of this Court, according to the title of [p.268] the action, pursuant to sections 122, 124(1), 127 and 171 (15) of the National Constitution. By this action, the Plaintiff seeks from this Court several reliefs, four by way of declarations and one injunctive, the text of which I hereby set out in extenso:—

"1. A DECLARATION to the effect that the Constitution of the Sierra Leone People's Party (SLPP) dated July 1995 (hereinafter also called "the SLPP Constitution") is the authentic currently applicable Constitution of the Sierra Leone People's Party (also herein called "the Party" or "the SLPP'J for the purposes of the functioning and operation of the Party in terms of the National Constitution and the Political Parties Act, NO.3 of 2002.

2. A DECLARATION to the effect that, where an incumbent President of the Republic of Sierra Leone was originally elected thereto in compliance with the following provisions in the respective Constitutions as cited herein be/mo/, among others, to wit.

i) as to the SLPP Constitution:

a) Clause IV (A)(3)(i) thereof,

b) Clause V(1)(c) and (d) thereof,

c) Clause V(2)(c) thereof, being under the rubrics "Duties of Officers" and "Leader", and

d) Clause VI(b) and (f), and

ii) as to the National Constitution

a) section 41 (b) thereof,

b) section 42(1) thereof," and c) section 43 thereof,

then, in that case, the following interpretive conclusions are or would be, each by itself, within the spirit, intendment, contemplation, and indeed inescapable force and effect, of the said SLPP Constitution, viz:

(1) That the SLPP Constitution makes no express or specific provision for the substantive independent existence, or for the direct nomination, election, selection, choice or identification, as the case may be, of the Leader of the [p.269] SLPP as such, but, rather, that any such nomination, election, selection, choice or identification, as the case may be, of the said Leader takes place only indirectly as a consequential or derivative issue from the process of nominating, electing, selecting, choosing or identifying, as the case may be, the Party's Presidential Nominee for the next pending national Presidential election.

(2) That the position of Leader of the SLPP is not a free-standing office or status in its own right, but rather, that it is, by virtual definition, dependent upon the position of Presidential Nominee for the said party, thereby making it so intertwined or associated with the Office of State President at any time when an SLPP member holds the said Presidency as to make the two positions indivisible and inseparable one from the other at all such times.

(3) That at any time when the SLPP is In power and/or a member thereof is the lawful Incumbent President of Sierra Leone, the two positions of Leader of the party and State President mayor can only be either held together and jointly or relinquished together and jointly, and never otherwise at any such time, so that an incumbent thereof may not selectively relinquish one of them and yet hold or seek to continue holding to the other, nor may two different persons at one and the same time or simultaneously hold the two positions separately, i.e. one position to one of them and the other to the other.

(4) That the SLPP Constitution makes no express or specific provision for the Substantive independent existence of, or for any nomination, election, selection, choice or identification (as the case may be) of, a Leader of the SLPP as such, at any time when the said Party is either not in power or not Providing the incumbent President of Sierra Leone or when a national Presidential election Is not immediately due to be held.

3. A DECLARATION to the effect that, in view of the following Party and National constitutional and other legislative provisions respectively, among others, to wit:

[p.270]

a) Clause 1/(4), IV(A)(1), IV(B)(5)(b) and (c) and (i), V(2)(c) as aforesaid, and X of the SLPP Constitution;

b) Sections 6, 14(1), 24, 27 and 29 of the Political Parties Act, NO.3 of 2002; and

c) Sections 35(2) and (4), 42(1), 43(a) and (b); 46(1), 49(4), 76(1)(h), and 171 (15) of the National Constitution,

then, in view thereof, the following interpretive conclusions are or would be, each by itself, within the spirit, intendment, contemplation, and indeed inescapable force and effect, of the said provisions respectively, viz:

(1) That as at the date of filing the application herein, there are or were at least two or three regular annual meetings and an unspecified number of possible special other meetings of the Party Conference of the SLPP still to be held before the Presidential and Parliamentary elections of 2007 are or were due to be held, to wit, the annual Party Conferences for the years 2005, 2006 and possibly 2007 and any other special or other meeting(s) of the Party Conference "as may be determined by the National Executive Council".

(2) That, without any prejudice whatsoever to the holding of the Party Conference (as such) slated for 19-20 August 2005 or at all otherwise in 2005. the nomination, election, selection, choice or identification, as the case may be, whether attempted or purported, of a Presidential Nominee and/or Leader of the SLPP at the said Party Conference, that is to say, almost two years before the Presidential and Parliamentary elections of 2007 are due to be held, has or would have or leads or would lead to the following interpretive consequences, viz:

(i) it and will in itself be grossly premature and incomportant with [p.271] democratic principles, for being inconsistent with and;:in contravention of the provisions in sections 35(2) and 43(a) and (b) of the National Constitution, and accordingly void and of no effect'

(ii) it is and will in practice be grossly unfair to certain individual members of the Party and potentially prejudicial to their interests vis-à-vis the Presidency and even to the wider related interests of the Party itself and the nation at large, in that;

a) it does and will tend to operate to prematurely preclude and exclude certain potential aspirants to that or those position(s) who, for reasons of present untimeliness or prematurity or otherwise, may not yet, as at 19-20 August 2005 or at any other time in 2005, have indicated their intentions or aspirations in respect thereof, but may be likely as at the due and proper time in 2006 or 2007 to make such intentions or aspirations publicly known at the appropriate time.

b) it is and will be likely to deprive the SLPP itself as a democratic national Party of a possible better quality or more popular Presidential candidate who, however, for reasons of present untimeliness or prematurity or otherwise, may not yet, as at 19-20 August 2005 or at any other time in 2005, have indicated his/her intentions or aspirations in respect thereof, but may wish as at the due and proper time in 2006 or 2007 to make such intentions or aspirations publicly known at the appropriate time; and it is also likely to deprive the said Party or a fairer and more informed choice of a Presidential Nominee or Candidate, thereby putting the SLPP at a possible electoral disadvantage vis-à-vis the Presidential candidates of other political parties and thus at the risk of losing the Presidential elections of 2007 against the said other parties;

c) it is and will be likely to deprive the entire nation itself and the people of Sierra Leone as a whole of a possible better quality [p.272] Presidential Candidate and potential ultimate President of

Sierra Leone who, however, for reasons of present untimeliness of prematurity or otherwise, may not yet, as at 19-20 August 2005 or at any other time in 2005, have indicated his/her intentions or aspirations in respect thereof, but may wish as at the due and proper time in 2006 or 2007 to make such intentions or aspirations publicly known at the appropriate time, with all the possible attendant risks of prejudice (arising from an inapt choice due to the said gross prematurity) to the prospects of good governance, peace and positive national economic and other development during the five to ten years following the next Presidential election;

(iii) it is or will, in any case, be tantamount to an amendment or attempted/ purported amendment of the SLPP Constitution, and accordingly inconsistent with and in contravention of the provisions in Clauses 11 (4), IV(B)(5)(b) and (c) and (i), and X of the said SLPP Constitution, and with an[y] of those of section 24 of the Political Parties Act 2002 and sections 35(2) and (4) and 76(1)(h) of the National Constitution, and therefore unlawful, void and of no effect

(3) That the positions of Leader and Deputy Leader of the SLPP, in the manner and to the extent that they have been and/or are being held by specified incumbents respectively over the past ten years or so, that is to say, since at least 1996 and uptil now, were and are so held in contravention of the provisions in section 14(1) of the Political Parties Act and sections 35(4) and 76(1)(h) of the National Constitution and so, as held, were and are void and of no effect

(4) That, in so far as and to the extent that the current SLPP Constitution remains and reads as it stands at the present time and at least up to 12 months hence, it is unlawful for the said Party to nominate, elect, select,. choose or otherwise identify, as the case may be, a Leader of the SLPP as [p.273] such, or to attempt/purport to so do, at any Party Conference or indeed at any time at all within the next 12 months from the date of filing this application.

(5) That, in view especially of the provisions of sections 14(1) of the Political Parties Act 2002, and 35(4) and 76(1)(h) of the National Constitution, a person who is for· the time being the President, the Vice-President, a Minister or a Deputy Minister in the Government under the provisions of the National Constitution may not and must not be, and ought not to be, either:

a) Leader of the SLPP, or

b) A member of the executive body or officers of the SLPP, whether national or otherwise, or

c) The National Secretary-General of the SLPP.

(6) That the position of National Secretary-General of the SLPP, in the manner and to the extent that it has been or is being held by a Minister of Government, to wit, by the 2nd Defendant herein over the past three year or so, that is to say, at least since around June 2002 and up until now, was and is so held in contravention of the provisions in section 14(1) of the Political Parties Act 2002 and sections 35(4) and 76(1)(h) of the National Constitution and so, as held, was and is void and of no effect since at least June 2002 up until now.

(7) That, in consequence of all the provisions and conclusions cited and recited in the current declaratory relief and its foregoing sub-items 3(1) to (6) inclusive herein, the SLPP as a Party is already dangerously left open and exposed to a present risk of disqualification and disestablishment applications to the Supreme Court, on the one hand by the relevant Commission for an order to cancel the registration of the Party and, on the other hand, by the Attorney-General and Minister of Justice after such cancellation for an order to wind up and dissolve the SLPP, pursuant respectively to sections 27 and 29 of the Political Parties [p.274] Act 2002.

4. A DECLARATION to the effect that the following provisions of the SLPP Constitution in so far as the respective aspects thereof as are indicated herein are concerned and to the respective extents thereof, to wit:

a) Clause V(2)(c) thereof, in so far as the stipulations "shall automatically become The Leader of the Party after such nomination. He shall be the political head of the Party and" are concerned and to the extent thereof,'

d) Clause V(1)(c) & (d) thereof, in so far as the mentions of "Leader" and "Deputy Leader" therein respectively are concerned and to the extent thereof,'

c) Clause V(2)(d) thereof; in its entirety; and

d) Clause VI(f) thereof, in so far as the stipulation "shall cease to be Leader and Deputy Leader respectively" is concerned and to the extent thereof,

Are, each and every one of them, inconsistent with and in contravention of the provisions in section 14(1) of the Political Parties Act 2002 and sections 35(4) and 76(1)(h) of the National Constitution and that the said inconsistent provisions are, to the extent of the said inconsistency, in each case as specified herein, null and void ab initio and of no effect.

5. A PERMANENT INJUNCTION restraining the 1st and 2nd Defendants (in their personal and official Party capacities alike) and 3rd Defendant herein, their servants, agents and privies, and in the case of the 3rd Defendant, in all its emanations and manifestations as organs, institutions, officers and members thereof, from nominating, electing, selecting, choosing or identifying, as the case may be, a Presidential Nominee and/or Leader of the SLPP in any shape or form or name or guise, or attempting/purporting so to do, or encouraging or causing or countenancing or shepherding or partaking in the doing of any such thing, at the Party Conference slated for 19-20 August 2005 or at all otherwise in 2005, but otherwise without any prejudice whatsoever to the holding of the said Party Conference as such.

[p.275]

6. ANY OTHER OR FURTHER RELIEF that this honourable Supreme Court would deem fit, proper and just in all the circumstances.

7. Costs of this action."

In support of the Originating Notice of Motion there is filed an affidavit of Dr. Bu-Buakei Jabbi sworn to on the 27th day of July 2005, pursuant to Rule 89 of the Rules of this Court, Constitutional Instrument NO.1 of 1982. A Statement of the Plaintiff's Case together with an affidavit in verification thereof were filed on the 3rd day of August 2005. The Defendants in turn filed a joint Statement of their case together with an affidavit in verification thereof on the 11th day of August 2005.

It should be noted in passing that the Attorney-General and Minister of Justice is not mentioned as a defendant in this action nor did he avail himself of the provision of Rule 92(4) of the Rules of this Court to file an answer to the Statement of the Plaintiff's Case.

After disposing of the Plaintiff's application for an interim injunction in the terms of tthat sought in the Originating Notice of Motion by ordering that the Defendants do give an undertaking accordingly and that the Plaintiff should give a cross-undertaking as to damages this Court ordered that oral arguments were to commence on the 17th August 2005.

Shortly after opening the case for the Plaintiff, Dr. Bu-Buakei Jabbi, with characteristic candour, conceded that the first declaration sought in the Originating Notice of Motion was not one which this Court could properly grant in its original jurisdiction. He therefore sought leave to abandon that relief which leave was granted accordingly. The application for this declaration will therefore be struck out.

In contrast, Dr. Jabbi argued strenuously that this Court has original jurisdiction, pursuant to Sections 122, 124(1), 127 and 171 (15) of the National Constitution, to grant the other four reliefs sought in the Originating Notice of Motion. For the purposes of clarity I shall set out in extenso the several provisions of the National Constitution that Dr. Jabbi argued [p.276] gave this Court original jurisdiction to grant reliefs 2 to 5 inclusive in the Originating Notice of Motion.

They are as follows:—

1. Section 122(1): "The Supreme Court shall be the final court of appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law".

2. Section 124(1): "The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction, to the exclusion of all other Courts—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution; and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law or under this Constitution",

3. Section 127(1): "A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect."

Section 127(2): "The Supreme Court shall, for the purposes of a declaration under subsection (1), make such orders and give such directions as it may consider appropriate for giving effect to, or enabling effect to be given to, the declaration so made."

4. Section 171 (15) "This Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provision of this Constitution, shall, to the extent of the inconsistency, be void and of no effect."

[p.277]

Mr. Eke Halloway, Counsel for all three Defendants, in answer to Dr. Jabbi's contention argued that none of the above provisions gives this Court original jurisdiction to entertain the Originating Notice of Motion and went further to contend that this Court lacked original jurisdiction to grant any of the reliefs sought. Mr. Halloway further argued that if this Court upheld his submissions on the question of jurisdiction then the action should be dismissed outright.

Let me hasten to state, with the greatest respect to Mr. Halloway, that even if this Court were to hold that it lacked original jurisdiction to entertain the several reliefs claimed in the Originating Notice of Motion the proper thing to do would be to strike out the Originating Notice of Motion as this court would not have gone into the merits of the Plaintiff's case and therefore could not summarily dismiss it. (see Buraimoh Oloriode & Others v. Simeon Oyebi and Others (1984) 5 SC1 and Otapo v Sunmonu (1987) 2 NWLR 587).

What then is the answer to the first vital question posed in this matter? Does this Court have original jurisdiction to entertain the Plaintiff's case?

Before setting out to answer this all important question I need to make certain clarifications regarding the use of the word "jurisdiction". A distinction ought to be made between two meanings frequently attributed to the word and which sometimes tend to lead to confusion. This distinction is aptly dealt with in the following dicta by Rickford L.J. in delivering his judgment in the case of Guaranty Trust Company of New York v. Hannay & Company ((1915) 2 KB 536 at 563):—

"The word "Jurisdiction" and the expression "the court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will not according to the settled practice do so except in a certain way and under certain circumstances."

[p.278]

Barraclough v. Brown ([1897] A. C. 615) and Westbury-on-Severn Rural Sanitary Authority v Meredith (30 Ch.D. 387) are two English cases that illustrate this distinction. In Barraclough's case, there was a real want of jurisdiction. The power to decide the dispute as to the particular subject-matter had been removed by statute from the High Court as a court of first instance and transferred to another tribunal.

In the second case, the Court could decide the dispute and give the relief sought but, by a settled practice embodied in a rule, it would not do so except under certain circumstances, i.e., if the subject-matter was of the value of £10/00 or more.

In my humble opinion, therefore, in answering the question whether this court has original jurisdiction to hear and determine the matters raised in the Originating Notice of Motion, no matter in what form and by whom they are raised, I shall be addressing the issue of jurisdiction in the first, and in the words of Pickford L.J. above, "the only correct sense of the expression", i.e., whether or not this Court is vested original jurisdiction to hear and determine the dispute between the Plaintiff and the Defendants as to the subject-matter before us.

I need to make a further clarification on the issue of the original jurisdiction of this Court. As is evident from the provisions of section 122(1) of the National Constitution quoted above, it is not only the National Constitution which endows the Supreme Court with original jurisdiction. This subsection provides that this Court "shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law" Two examples of other enactments that confer original jurisdiction upon the Supreme Court are the Electoral Laws Act, No.2 of 2002 and, of more relevance to the case, the Political Parties Act.

I now turn to the other provisions of the National Constitution relied on by Dr. Jabbi in his argument in support of the contention that this Court has original jurisdiction to entertain the matters raised in the Originating Notice of Motion.

First, there is section 171 (15) of the National Constitution. With the greatest respect to Dr. Jabbi, this section which is of utmost significance in the search for the source of law in this country vests absolutely no jurisdiction in the Supreme Court. Rather, it is a substantive provision which merely declares the National Constitution to be the supreme [p.278] law of Sierra Leone and emphasizes that status of the National Constitution by providing that any other law which is found to be inconsistent with any provision of the National Constitution shall, to the extent of the inconsistency, be void and of no effect.

It is true that the Supreme Court has got original jurisdiction to make a declaration to the effect that any law found to be inconsistent with any provision of the National Constitution renders the offending provision of that law null and void but that jurisdiction is vested in this Court by section 124(1) of the National Constitution, not even by section 127 which merely lays down the procedural rules for the making of such declarations.

Indeed, this brings me to the consideration of the legal effect of section 127(1) of the National Constitution. In my opinion, this section lays down the procedure for the enforcement of the National Constitution by this Court but only in certain specific circumstances. They are the following:

Where —

(1) any person alleges that an enactment is inconsistent with or in contravention of a provision of the National Constitution. That person may then invoke the original jurisdiction conferred upon this Court

by section 124(1) for a declaration based on section 171(15) of the National Constitution that to the extent of the inconsistency the said enactment is null and void;

(2) any person alleges that anything contained in an enactment is inconsistent with or is in contravention of any provision of the National Constitution. That person may also invoke the original jurisdiction of this Court conferred by section 124(1) for a similar declaration as under (1) above; and

(3) any person alleges that anything done under the authority of an invalid enactment or any other enactment is inconsistent with or in contravention of the National Convention. That person may equally invoke the original jurisdiction of this Court conferred by section 124(1) for a similar declaration as under (1) and (2) above.

[p.280]

As part of his argument in support of his contention that this Court has original jurisdiction to hear and determine the present action Dr. Jabbi sought to rely on what I may call "the procedural jurisdiction" in the second sense of the word "jurisdiction" as outlined in the dicta of Pickford L.J. cited above. He contended that the several matters the Plaintiff was complaining about had been done "under the authority of an enactment", that enactment in question being the SLPP 1995 Constitution, which according to him is subsidiary legislation.

With the greatest respect to Dr. Jabbi, the SLPP 1995 Constitution cannot in any sense be considered as subsidiary legislation. It was not made pursuant to any power vested in the SLPP by the Political Parties Act or any other enactment. All the Political Parties Act lays down is a requirement that the constitution of every political party shall be one of the documents to be lodged with the Political Parties Registration Commission (hereinafter referred to as "the Commission") when a political party applies for registration. Further, neither before nor after registration is the party's constitution laid before Parliament as is required by the Constitutional and Statutory Instruments Act, No 6 of 1999, for any subsidiary legislation to have the necessary binding force of law. I shall deal with this issue more fully later in this judgment.

For all the above reasons, I hold that section 127(1) of the National Constitution does not confer any original or other jurisdiction in the Supreme Court.

I now turn to section 124(1) of the National Constitution. This subsection not only confers original jurisdiction on the Supreme Court but it also stipulates that in respect of those matters for which original jurisdiction is thus conferred no other court shall exercise original jurisdiction. What then are those matters? According to section 124(1)(a) these are "all matters relating to the enforcement or interpretation of any provision of" the National Constitution." Giving the words in this provision their plain and natural meaning, as I am obliged to do, since I perceive no ambiguity in the provision, as long as the matter in question relates to the enforcement or interpretation of any provision of the National Constitution original jurisdiction is vested in the Supreme Court to hear and determine it.

[p.281]

The first test is that the Plaintiff seeking to invoke this original jurisdiction must be able to point to some provision, any provision, of the National Constitution that is to be enforced or interpreted. The next test is to show, in addition, what act or omission makes it necessary for the provision to be enforced. The third test, in my opinion, is· an alternative to the second test. The Plaintiff must otherwise show that an interpretation of the particular provision of the National Constitution identified under the first test is required as a matter of law.

Has the Plaintiff then satisfied the first test and any or both of the other two tests? As far as the first test is concerned, the Plaintiff has indeed identified several sections of the National Constitution which, according to him, have been contravened and-are to be enforced. These he listed as sections 35(2), 35(4), 42(1), 43(a), 43(b), 46(1), 49(4), 76(1)(h) and 171(15).

However, to be able to invoke the original jurisdiction the Plaintiff needs also to' pass any one or both of the other two tests. I shall analyze the several matters raised by the Plaintiff in relation to each of the sections cited by the Plaintiff to see if the requirements of the second and/or third tests are satisfied. If I am satisfied that the matter raised in respect of the particular section of the National Constitution relates to the enforcement and/or interpretation of the provision therein contained then this Court will be deemed to have original jurisdiction in respect of the matter so raised.

First, sections 41 (b), 42(1) and 43 of the National Constitution referred to in respect of the second relief sought by the Plaintiff shall be considered together. I find as a fact that it is not being alleged by the Plaintiff either in the Originating Notice of Motion or in the Statement of the Plaintiff's case or in any of the affidavits filed on behalf of the Plaintiff that any of the provisions of these sections of the National Constitution are to be enforced as a result of something done or omitted to be done by the Defendants. The Plaintiff therefore fails the second test as far as these sections are concerned.

Is there then any legal reason, because of matters raised in respect of the second relief sought by the Plaintiff in the Originating Notice of motion, which makes it necessary to interpret any of these three sections of the National Constitution? I can find no such legal reason. In my opinion, the matters raised indicate rather a need for an [p.282] interpretation of Clauses IV(A)(3)(1), V(1)(d), V(2)(C), VI(b) and VI(6) of the SLPP 1995 Constitution. This, in my view, cannot confer original jurisdiction in the Supreme Court. I therefore hold that this Court does not have original jurisdiction to grant the second relief sought by the Plaintiff. As a result the application for this relief is to be struck out.

I now turn to the third relief sought by the Plaintiff. In addition to sections 42(1), 43(a), 43(b) and 41 (b) which I have already dealt with under the second relief the Plaintiff has identified the provisions of sections 35(2), 35(4), 49(4), 76(1)(h) and 171(15) of the National Constitution as ones to be enforced or interpreted as a result of matters raised by him in support of the third relief claimed in the Originating Notice of motion.

I shall deal with sections 35(2), 35(4) and 76(1)(h) together. I shall set them out in extenso for the purpose of clarity:

Section 35(2) — "The internal organization of a political party shall conform to democratic principles, and its aims, objectives, purposes and programmes shall not contravene, or be consistent with, any provision of this Constitution."

Section 35(4) — "No political party shall have as a leader a person who is not qualified to be elected as a Member of Parliament."

Section 76(1)(h) — "No person shall be qualified for election as a member of Parliament — if he is for the time being the President, the Vice-President, a Minister or a Deputy Minister under the provisions of this Constitution."

As far as section 35(2) of the National Constitution is concerned, the Plaintiff alleges, and this remains a mere allegation, that the decision of the NEC to hold the election for a Presidential Nominee of the SLPP during the Party Conference scheduled for 19th-20th August 2005 or any time in 2005 is contrary to democratic principles and therefore tantamounts to a contravention of the provisions of section 35(2) of the National Constitution.

I hold that this is a matter relating to the enforcement of a provision of the National Constitution and therefore this Court has original jurisdiction to hear and determine it.

[p.283]

Next, I propose to deal with sections 35(4) and 76(1) (h) together as, in my opinion, they should be read together. The Plaintiff's contention relating to these sections is that the SLPP 1995 Constitution makes it possible for a person who holds any of the offices of President, Vice President, Minister or Deputy Minister under the National Constitution, and therefore not qualified for election as a member of Parliament because of the provision of Section 76(1)(h) of the National Constitution to be a leader of the SLPP in contravention of section 35(4) of the National Constitution. This clearly raises a matter relating to the enforcement of a provision of the National Constitution and therefore i hold that this Court has original jurisdiction to hear and determine the matters raised in the third relief sought in the Originating Notice of Motion.

I now turn to the fourth relief sought in the Originating Notice of Motion. In this regard, the provisions of the National Constitution cited are those in sections 35(4) and 76(1)(h) and the allegation, put briefly, is that certain provisions in the SLPP 1995 Constitution are inconsistent with the said provisions of the National Constitution as well as with section 14(1) of the Political Parties Act.

For the reasons already stated above, I hold that the said allegation raises a matter of enforcement and also, I opine, a need for the interpretation of the relevant provisions et the National Constitution so as to give this Court original jurisdiction to hear and determine the matters raised in the fourth relief claimed in the Originating Notice of Motion.

Finally, under this aspect of jurisdiction, I turn to the fifth relief sought, that for an injunction restraining the Defendants from electing a Presidential Nominee of the SLPP any time before the end of 2005. In my

view, this is a consequential relief flowing from the third relief referred to above. I therefore hold that the claim for this relief could be heard and determined in this Court's original jurisdiction.

The next type of jurisdiction dealt with in the dicta of Pickford L.J in the Guaranty Trust Bank of New York case is that which I have termed "procedural jurisdiction". It involves seeking an answer to the question whether this Court has jurisdiction to entertain this matter taking into account the manner in which this Court has been approached and the [p.284] locus standi or standing of the Plaintiff. This is the second hurdle the Plaintiff must surmount before this Court can go on to determine the merits or demerits of this action.

First, I shall deal with the manner in which the Plaintiff has presented his claim. The proceedings were instituted by way of Originating Notice of Motion dated 27th day of July 2005. According to Rule 89 of the Supreme Court Rules this is the correct procedure where the original jurisdiction of the Supreme Court is invoked. The content of the Originating Notice of Motion should correspond with that in Form 8 set out in the First Schedule to those Rules. According to that Form the reliefs are to be sought in accordance with section 104(1) of the 1978 Constitution which is ipsissima verba the provisions of section 124(1) of the present National Constitution. The Form also requires the Plaintiff to state the capacity in which he brings the action. In the instant case, this has been stated as follows:

"The Plaintiff/Applicant brings this action as a law-abiding citizen of Sierra Leone and member of the Sierra Leone People's Party(SLPP), who aspires to be Presidential Candidate for the SLPP at the 2007 Presidential elections, but who is keenly concerned that the pristine democratic credentials and processes of the SLPP are maintained, enhanced and facilitated in all its internal structure, organization, operations, programmes, activities and functioning; and that they are always consistently compliant with the valid and lawful provisions not only of its own Party Constitution, Rules, Regulations and Standing Orders but also of the Political Parties Act 2002, the national Constitution, and any other law(s) relevant and pertinent thereto .. "

It is clear from this statement that the Plaintiff brings the action in his own right and not in a representative capacity. However, Form 8 as set out in the First Schedule to the Supreme Rules makes no provision for the Plaintiff to indicate therein in what capacity the Defendant(s) are sued. However, in my opinion, this does not enable the Plaintiff to dispense with the requirement that, as a matter of practice at least, the capacity in which a defendant is sued should be indicated in the originating process. Indeed, Rule 98 of the Rules of this Court provides that where no provision is expressly made in those Rules relating to the original and supervisory jurisdiction of the Supreme Court, the [p.285] practice and procedure for the time being in force in the High Court shall apply mutantis mutandis.

Order 3 rule 4 of the High Court Rules provides that where the Plaintiff or the Defendant sues or is sued in a representative capacity the indorsement should show the capacity in which the plaintiff or defendant sues or is sued. Two factors are worth noting in respect of this rule. It is only applicable to cases where the action is commenced by a Writ of Summons. Secondly, it is the indorsement, not the title of the action, which should show the capacity of the person suing or being sued as a representative.

Both the High Court Rules and the English Rules, as contained in the 1960 Annual Practice to which according to Order 52 rule 3 one must turn in the absence of any local provision, are silent as to what should obtain where the action is commenced by an Originating Notice of Motion. In my opinion, it is sufficient, in such a case, if the capacity in which the defendant is sued is indicated either in the title of the Originating Notice of Motion or in the body of the Originating Notice of Motion or in the affidavit in support thereof.

In the instant case, an indication of the capacity in which the 1st and 2nd Defendants are sued is to be found in the body of the Originating Notice of Motion. In the fifth relief sought it is stated that the 1st and 2nd Defendants herein, Dr. Banya and Dr. Harding are being sued on their own behalf and in a representative capacity as SLPP officials. Indeed, the fifth relief is the only one that could, in the circumstances, be properly claimed against them. As a result, I hold that both the 1st and the 2nd Defendants are properly joined in this action.

The next question is whether this Court can properly grant the reliefs sought. As stated earlier the Plaintiffs seeks several declarations and an injunction. Dr. Jabbi argued strenuously that the several declarations are being sought pursuant to section 127(1) of the National Constitution and, though he did not go so far, presumably the injunction could properly be granted as a consequential relief flowing from the declarations under 127(2) of the National Constitution.

[p.286]

As stated above, the basis for Dr. Jabbi's contention is that the several declarations are sought pursuant to section 127(1) of the National Constitution because the 3rd Defendant has done something under the authority of an enactment, i.e. the constitution of the SLPP promulgated in 1995 certain Clauses of which, it is being alleged by the Plaintiff, contravene certain provisions of the National Constitution. Dr. Jabbi further argued that because the said SLPP 1995 Constitution was made pursuant to Section 11 (2)(a) of the Political Parties Act, it was therefore first, something done under the authority of an enactment within the meaning of section 127(1) of the National Constitution and, secondly, that it was subsidiary legislation.

With respect to Dr. Jabbi, I cannot accept either contention. Section 11 (2)(a) of the Political Parties Act does not authorize political parties to promulgate their respective constitutions. All it does is to require political parties to submit to the Commission two copies of their constitution and rules with their application for registration.

Secondly, even if the SLPP 1995 Constitution was made pursuant to the said section 11 (2)(a) of the Political Parties Act it could not be said to be in the nature of subsidiary legislation. According to section 170(1) of the National Constitution subsidiary legislation consists of

"any orders, rules, regulations and other statutory instrument made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law"

Further, sections 1 (1) and 1 (2) of the Constitutional and Statutory Instruments Act, NO.6 of 1999 provide as follows:-

1 (1) "Where in any Act, power is conferred on any person or authority to make any proclamation, regulation, order, rule, notice, by-law or any other instrument having the force of law that power shall be exercised by statutory instrument'.

1(2) "Subject to section 14 where the power referred to in subsection (1) is conferred by the Constitution or it is so required thereunder, the power shall be exercised by a constitutional instrument."

[p.287]

Section 3(1) further provides as follows:—

“In accordance with subsection (7) of section 170 of the Constitution, every Statutory instrument shall be laid before Parliament and shall be published in the Gazette on or before the date of being so laid.”

Finally, according to section 2 of the latter Act a Statutory Instrument laid before Parliament shall come into force at the end of twenty-one days from the date of being so laid unless before then it had been annulled by Parliament.

There is no suggestion that the SLPP 1995 Constitution was made by Public Notice, Statutory Instrument or Constitutional Instrument or that it was ever laid before Parliament. I hold therefore that the SLPP 1995 Constitution is not an enactment and for this reason the several declarations sought in the Originating Notice of Motion could not be made by this Court pursuant to 127(1) of the National Constitution.

Having said that, I must hasten to point out that this Court does have ample authority otherwise, acting in its original jurisdiction, to make the several declarations properly sought in the Originating Notice of Motion. Such authority is vested in this Court by Order 21 rule 4 of the High Court Rules which provision were not cited by either Counsel in this matter and which reads as follows:—

“No action or proceeding shall be open to objection, on the ground that a mere declaratory judgment or order is sought thereby, and the court may make bindina declarations of right whether any consequential relief is or could be claimed or not”.

For an exposition on the origin and ambit of the above rule which is ipsissima verba that found in the English Order 25 rule 5 as found in the 1960 Annual Practice see the case of Guaranty Trust Company of New York v Hannay and Company referred to earlier in this judgment and particularly the judgments of Buckley L.J. and Pickford L.J.

[p.288]

The Plaintiff having thus crossed the first procedural bari now turn to the second limb of the procedural test for jurisdiction contained in the dicta of Pickford L.J. in the Guaranty Trust Company of New York

case cited earlier in this judgment, viz, whether this Court has any jurisdiction to deal with and determine the matter herein taking into account the capacity of the Plaintiff to bring this action before us. In short, could the Plaintiff pass the test of locus standi or standing?

This test is of crucial importance for the Plaintiff's case because where a court reaches the conclusion that a plaintiff lacks locus standi or legal capacity to institute the particular proceedings before it the court is obliged to strike out the action without going into the merits of the case.

On the issue of locus standi, Fidelis Nwadialo in his book "Civil Procedure in Nigeria" 2nd edition at page 32 under the rubric "Has the person intending to sue the locus standi" has this to say:

"The term 'locus standi" denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like 'standing' or ' title to sue'. It has also been defined as the right of a party to appear and be heard on the question before any Court or tribunal. It is 'the right or competence to institute proceedings in a court for redress or assertion of a right enforceable law'."

According to the editors of the "Constitutional Law of South Africa", an authority cited by Dr. Jabbi, at Chapter 8 page 8.3 thereof:

"The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication. The word "standing" has been referred to as "a metaphor used to designate a proper party to a court action". An inquiry into standing should thus focus on the party who brings the matter before the court, not on the issues to be adjudicated."

I cannot agree more.

[p.289]

Before conducting the inquiry into the Plaintiff's standing in the instant case, I wish to make certain clarifications as to the various sources of the law governing the concept of standing.

First, I think it is important to recognize that there is a distinction between standing at common law and the various statutory provisions relating to standing in different common law jurisdictions such as England, South Africa, Nigeria, Canada, India and, of course, locally.

Secondly, according to the authorities, a distinction ought to be made between the requirement of standing in private law litigations brought, for example, to enforce private rights in contract, tort or property on the one hand and the requirement for standing in public law litigation, particularly in the field of administrative law. An example of the latter type would be an action seeking a judicial review of administrative action. In England, in particular, the question of locus standi in actions seeking a judicial review is now governed entirely by statute, to wit, the English Supreme Court Act 1981. This is exhaustively dealt with in Chapter 2 of De Smith, Woolf & Jowell's "Principles of Judicial Review" that Dr. Jabbi relied on very heavily but which, in my opinion, is not relevant in the instant case.

I shall now deal with the position at common law. The principle in English law is that in an action to enforce a private right legal capacity to sue accrues only to a person who has a legal right or whose legal right has been adversely affected or who has suffered or is likely to suffer special damage in consequence of an alleged wrong.

In an action to assert or protect a public right or to enforce the performance of a public duty, it is only the Attorney-General, as the guardian of public interest who has the requisite standing to sue. Such proceedings can either be brought at the instance of the Attorney-General or he can consent to a private person bringing a "relator action" in the name of the Attorney-General. (See Attorney-General For New South Wales v. The Brewery Employees Union (1908)6 CLR 469 at 550-581; Gouriet v Union of Post Office Workers (1977) 3 WLR 300).

[p.290]

In private law litigations, whether a person has locus standi or not seldom presents any problem. However, it is in the area of public law that there has been some major developments in most common law countries. Over the years, there has been a shift from the strict common law principle of locus standi in public law litigation which has occurred in two ways.

First, the courts in some common law jurisdictions have adopted a more modern and liberal approach in conducting the inquiry as to the locus standi of the plaintiff in public law litigations. However, in all the common law jurisdictions where this change of approach has taken place the courts have not done away with the requirement that for a person to have locus standi in an action to assert a right conferred on the public at large or to enforce a duty owed to the public he must show that he has a special interest which is personal and peculiar to him and which interest has been adversely affected by the act or omission which he seeks to challenge. Invariably, what the courts have done is to take a liberal view of what constitutes the required interest.

For example, in the Canadian case of Minister of Justice of Canada v. Borowski ([1981] 2 SCR 575, the only interest alleged by the plaintiff was that he was a concerned citizen who wanted the issue in contention to be litigated. The Supreme Court of Canada granted him standing, holding that where a plaintiff is seeking a declaration that a statute is invalid, if there is a serious issue as to its invalidity, that person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court. [See also the Canadian cases of Thorson v Attorney-General of Canada (1975) 1 SCR 138, and Nova Scotia Board of Censors v McNeil [1976] 2 SCR 265 and the Indian cases of Gupta v. Union of India, AIR 1982 SC 149; and Wadwa v. State of Bihar, AI R 1987 SC 149.)

In the case of Senator Abraham Adesanya v. The President of Federal Republic of Nigeria and others ([1981] 2 NWLR 358 the action was brought by the appellant challenging the constitutional validity of an appointment made by the President of Nigeria. The action was dismissed by the Nigerian Supreme Court on the sole ground that the appellant had no locus standi to bring the action as there were no rights peculiar or personal to him which had been infringed or injured. The Court did not even go into [p.291] the merits of the case and the issue of locus standi was taken in limine. Apparently, the decision in that

case still remains the law on locus standi in Nigeria but in the later case of Fawehinmi v. Akilu ((1987) 4 NWLR 797 the Supreme Court of Nigeria departed from the narrow approach in the Adesanya case. In granting locus standi to the appellant who had sought leave to apply for an Order of Mandamus to compel the Director of Public Prosecutions to decide whether or not to prosecute Nnamani JSC had this to say about section 6(6)(b) of the Nigerian Constitution which provision is in actual fact a codification of the common law principle on locus standi:

"It is my view that in these matters which are interlined with the criminal law, our interpretation of Section 6(6)(b) of the Constitution must be approached with a true liberal spirit in the interest of Society at large. The appellant has locus to make the application he has brought to court, and if all other conditions are fulfilled, to initiate criminal proceedings. He also has an obligation which the courts must determine and protect. In the circumstances of this case, can it be seriously argued that the appellant is not on a higher pedestal than any person to whom the law has given locus in the wider interest of the society? From the affidavit filed, the deceased was in his lifetime his friend and client."

In delivering his own judgment in the Fawehinmi case Eso J.S.C. expressly conceded that the decision was "a departure from the narrow attitude of the Supreme Court of Nigeria] in the Abraham Adesanya's case and subsequent decisions."

In contrast, in the case of Nwanko v Nwanko (1995) 2 SCNJ 44 the parties were a divorced couple and the dispute was over the proprietorship of a business registered in the couple's joint names under the Nigerian Registration of Business Act 1961. The husband was a civil servant and by virtue of paragraph 2(b) of the 5th Schedule of the 1979 Nigerian Constitution, he should not, inter alia, "be engaged or participate in the management or running of any private business, profession or trade." Paragraph 15 and 17 of the said 5th Schedule set up a Code of Conduct Bureau and a Code of Conduct Tribunal to deal with any breach of the provisions set out in the said Schedule.

[p.292]

Mrs. Nwanko had instituted an action against her former husband claiming, inter alia, an injunction restraining the husband from interfering with the running and management of the business. The Supreme Court of Nigeria held that the provisions of the said paragraph 2(b) of the 5th Schedule of the Nigerian Constitution did not create a private right or interest for which the plaintiff could claim a relief, that the purpose of the provisions was to protect public interest and that she therefore had no locus standi to claim a relief against the husband as a result of his contravention of the said provision of the Nigerian Constitution. The Court accordingly struck out the matter.

The second method by which the strict common law principle that a private person has no locus standi in an action to assert or vindicate a right conferred in the public at large has been modified is by way of statutory intervention. This time we do not have to go very far for an example, Right here in Sierra Leone, in 1991, our Parliament by enacting the provisions contained in section 127 of the National Constitution made it possible for the first time for a private litigant to institute proceedings to challenge the constitutional validity of any enactment as well as to challenge the constitutional validity of anything done under the authority of the National Constitution or any other law without any requirement that

that the person should show that he has a legal right or interest personal or peculiar to him which has been adversely affected by the act or omission which he seeks to challenge.

It is important to note that the provisions of section 127(1) of the National Constitution are only applicable in the limited factual circumstances which I have listed earlier in this judgment. In my opinion, in all other matters, whether constitutional or not, the common law principles of standing continue to apply.

This present position in Sierra Leone therefore is as stated in Halsbury's Laws of England 4th Edition Vol.1 (1) at paragraph 164 under the rubric 'Locus standi for declaratory relief':

"In an ordinary action the plaintiff claiming a declaration must have some private [p.293] legal right, or a legal interest of which the law will take cognisance and the interest must not, for example, be merely a matter of professional ethics. Except where statute otherwise provides, a private person cannot bring an ordinary action to assert a public right whether his claim is limited to declaratory relief or nor'.

This Court has recently applied this requirement of a private legal right or legal interest to ground standing in the case of Yambasu and Ors. v. Ernest Bai Koroma & Ors. (S.C.3/2002 judgment delivered on the 22nd day of June 2004, unreported)

In the judgment delivered by Wright J.S.C. she had this to say on the question of locus standi and the requirement of an interest likely to be affected:

"I disagree with learned counsel for the Defendants that the Plaintiffs do not have a locus standi in this matter. In my view, the Plaintiffs in the action do have an interest that is most likely to be affected by this action."

My understanding of that statement is that, absent such interest, the plaintiffs in that case would have lacked locus standi.

Dr. Jabbi has urged this Court to adopt the liberal approach in applying the common law principle. This would involve in effect giving locus standi to a plaintiff who claims relief not in his own personal interest but in the public interest or in the interest of a section of the public as happened in the Canadian case of Minister of Justice of Canada v. Borowski cited earlier in this judgment.

For reasons which will soon become obvious, I do not believe it is necessary in the circumstances of the instant case for me to dispose of the issue of standing on that basis and I do not desire to do. I therefore make no pronouncement on whether or not this Court should adopt the liberal approach in the inquiry for standing as advocated by Dr. Jabbi.

[p.294]

Of much greater concern to me is the question whether this Court can accord the Plaintiff locus standi in the instant case when one takes into account the several provisions of the National Constitution and the

Political Parties Act dealing with the functions and powers of the Political Parties Registration Commission.

In my opinion, sections 34 and 35 of the National Constitution should be read together with virtually all the provisions of the Political Parties Act. In section 35(6) of the National Constitution it is expressly provided that subject to the provisions of the National Constitution and in furtherance of the provisions of the said section 35 Parliament may make laws regulating the registration, functions and operation of political parties. Pursuant to this provision, in 2002, Parliament enacted the Political Parties Act, No. 3 of 2002, which, according to its short title, is:

"an Act to establish the Political Parties Registration Commission for the Registration and regulation of the conduct of political parties in accordance with sections 34 and 35 of the Constitution and to provide for related matters."

The Commission was established by virtue of section 3 of the Act and section 7 designates the Administrator and Registrar-General as Secretary to the Commission. Section 6(2) of the Act then goes on to particularize the functions of the Commission. I need to highlight those stated in Section 6(2)(a), 6(2)(b) and 6(2)(e) as they are of particular relevance in the instant case. They state the Commission's functions as follows:

6(2)(a) "to monitor the affairs or conduct of political parties so as to ensure their compliance with the Constitution, this Act and with the terms and conditions of their registration."

6(2)(b) "to monitor the accountability of political parties to their membership and to the electorate of Sierra Leone;" and

6 (2)(e) "to do all such things as will contribute to the attainment of the object stated in subsection(1)."

[p.295]

These three provisions taken together invest the Commission with tremendous powers at the same time as it imposes very great responsibilities on it. The matter does not end there. The National Constitution goes on to provide in section 34(5) that in the exercise of the functions vested in the Commission it shall not be subject to the direction or control of any person or authority. I dare say that this includes even the courts provided, of course, the Commission is carrying out its functions in the manner envisaged by the National Constitution, the Political Parties Act and the general law.

Then, there is section 27 of the Political Parties Act. This enables the Commission to apply to this Court for the ultimate sanction, when all else has failed as it were, against any political party which has contravened any provisions of the National Constitution or the Political Parties Act.

In my opinion, Section 27(1) of the Political Parties Act gives the Commission locus standi to invoke this Court's original jurisdiction where a political party has contravened any provision of the National Constitution in the same way that section 127(1) of the National Constitution gives locus standi to any person, without exception, who wishes to challenge the constitutional validity of any enactment or

anything contained in or done under the authority of that or any other enactment. Maybe, this was why Dr. Jabbi argued so strenuously that the Plaintiff was seeking the several reliefs in the Originating Notice of motion pursuant to section 127 of the National Constitution. The advantage of seeking relief under section 127 of the National Constitution is that, as I have already held in this Judgment, contrary to the position at common law, the plaintiff is not required to that he has a legal right or interest which he is seeking to enforce or protect.

In my opinion, it could not be seriously doubted that the locus standi given to the Commission by section 27(1) of the Political Parties Act is exclusive to the Commission.

It has not been alleged by the Plaintiff that the Commission has neglected or refused or is unable to carry out its functions under sections 6 and/or 27 of the Political Parties Act. The situation here is different from what obtained in the Nigerian case of Fawehinmi cited earlier in this judgment. In that case, it was shown by affidavit evidence that the appellant had requested the Director of Public Prosecutions to exercise the discretion [p.296] granted to him by statute and it was only after the Director of Public Prosecutions had replied that he had not come to a decision whether or not to prosecute that the appellant took out the proceedings for leave to apply for an order of Mandamus to compel the Director of Public Prosecutions to carry out his statutory functions. I say this because, in this country also, where a public officer or public body fails or refuses to carry out functions its functions or to exercise powers conferred by statute the law provides ample remedies open to a person affected thereby. This is how the law is stated in Halsbury's Laws of England 4th edition Volume 1 (1) at paragraph 163 under the rubric “Declaratory Judgments”:

“The remedy by declaration is available to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law, and this is so whether the determinations are judicial, disciplinary or administrative; nor is the remedy excluded by the fact that any determination is by statute made final.”

(See Taylor v. National Assistance Board [1957] 1 All E.R. 183 at 185, C.A. per Denning L.J.)

In the circumstances of this case and based on the available affidavit evidence, to grant the Plaintiff locus standi to maintain this action to ensure that the SLPP, a political party registered under the Political Parties Act, does not contravene any provision of the National Constitution, particularly section 35 thereof, would be, in my opinion, to preempt the Commission and, as it were, to allow the Plaintiff to usurp the powers of the Commission particularly when there is no allegation before us that the Commission has neglected or failed to carry out its statutory duties and the Commission has not even been made a party to this action. (See the Nigerian cases of Nwanko v. Nwanko supra; Ajakaiye v. Military Governor (1994) 9 SCNJ 102 at 119; Amaghizenween v. Eguamwense (1993) 11 SCNJ 27)

For all the above reasons, I hold that the plaintiff lacks locus standi to maintain the claim for the declarations sought as part of the third and fourth reliefs in the Originating Notice of Motion. The claim for these reliefs should therefore be struck out.

[p.297]

Finally, I turn to the fifth relief claimed in the Originating Notice of Motion, that for a permanent injunction. As I said earlier, in my opinion, this is a consequential relief which of necessity must flow from one of the several declarations sought. Ex facie, it is difficult to tell with which of the declarations sought this relief has a nexus. If it is to be attached to the declaration sought in the second relief in the Originating Notice of Motion then it must be struck out in view of my earlier pronouncement that the Plaintiff could not invoke the original jurisdiction of this Court to maintain an action for the second relief. The claim for an injunction ought also to be struck out for the same reason. Similarly, since I have held that despite the fact that this Court's original jurisdiction is properly invoked in respect of the third and fourth reliefs sought in the Originating Notice of Motion the Plaintiff still lacks locus standi to maintain the claim for said third and fourth reliefs and that, as a result, the claim for the said reliefs ought to be struck out, for the same reason, the claim for an injunction being a relief flowing consequentially from the declarations sought under the third and fourth reliefs in the Originating Notice of Motion ought also to be struck out.

I therefore make the following Orders:—

(1) The claims for the 1 stand 2nd reliefs in the Originating Notice of Motion are hereby struck out as they could not be granted in this Court's original jurisdiction;

(2) The claim for the 3rd and 4th reliefs in the Originating Notice of Motion are hereby struck out for want of locus standi on the part of the Plaintiff.

(3) In view of Orders 1 and 2 above the fifth relief in the Originating Notice of Motion that for a permanent injunction is struck out accordingly;

(4) The Defendants are hereby discharged from the Undertaking they gave to this Court on the 16th August 2005.

(5) The Cross-Undertaking as to damages given by the Plaintiff on the 16th August 2005 is to remain on the file until further Order;

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(6) Each party to bear its own costs of the proceedings so far.

(7) Liberty to apply

SGD.

A.R.D. RENNER-THOMAS, C.J.

[P.299]

V.A. WRIGHT

The plaintiff by originating motion dated 27th July 2005 sought declarations in pursuance of sections 122, 124(1), 127 and 171(15) of the Constitution of Sierra Leone Act No.6 of 1991 namely:

A DECLARATION to the effect that the Constitution of the Sierra Leones Peoples Party (SLPP) dated July 1995 (hereinafter also called the "THE SLPP CONSTITUTION") is the authentic currently applicable constitution of the Sierra Leones Peoples Party (also herein called (The Party) or the (("SLPP") for the purposes of the functioning and operation of the Party in terms of the National Constitution and the Political Parties Act, No 3 of 2002.

[p.300]

2. A DECLARATION to the effect that, where an incumbent resident of the Republic of Sierra Leone was originally elected thereto in compliance with the following provisions in respective Constitutions as cited herein below, among others, to wit:

(i) as to the SLPP Constitution

a) Clause IV(A)(3)(i) thereof

b) Clause V(1)(c) and (d) thereof

c) Clause V (2)(c) thereof, being under the rubrics "Duties of Officers" and "Leader" and

d) Clause VI (b) and (c) and

(ii) as to the National Constitution.

a) section 41 (b) thereof;

b) section 42(1) thereof; and

c) section 43 thereof,

then in that case, the following interpretive conclusions are or would be, each by itself within the spirit, intendment, contemplation, and indeed inescapable farce and effect, of the said SLPP Constitution, viz:

(1) That the SLPP Constitution makes no express or specific provision for the substantive independent existence, or for the direct nomination, election, selection, choice or identification, as the case may be, of the Leader of the SLPP as such; but, rather, that any such nomination, election, selection, choice or identification, as the case may be of the said Leader takes place only indirectly as a consequential or derivative issue from the process of nominating, electing, selecting, choosing or identifying, as the case may be, the party's Presidential Nominee for the next pending national Presidential election

(2) That the position of the Leader of the SLPP is not a free-standing office or status in its awn right: but rather, that is, by virtual definition, dependent of upon the position of Presidential nominee for the said party, thereby making it so intertwind or associated with office of State President at any time when an

(3) SLPP member holds the said Presidency as to make the two positions indivisible and inseparable one from the other at all such times.

(4) That at any time the SLPP is in power and/or a member thereof is the lawful incumbent President of Sierra Leone, the two positions of Leader of [p.301] the party and State President mayor can be either held together and jointly or relinquished together and jointly, and never otherwise at any such time, so that an incumbent thereof may not selectively relinquish one of them and yet hold and yet hold or seek to continue holding to the other, nor may two different persons at one and the same time or simultaneously hold the two positions separately, i.e. one position to one of them and the other to the other.

(5) That the SLPP Constitution makes no express or specific Provision for the substantive independent existence of or for any nomination election, selection, choice or identification (as the case may be) of, a leader of the SLPP as such, at any time when the said party is either not in power or not providing the incumbent President of Sierra Leone or when a nation Presidential election is not immediately due to be held.

3. A DECLARATION to the effect that, in view of the following party and National constitutional and other legislative provisions respectively, among others to wit:

a) Clause II(4), IV(a) (I), (IV) (5)(b) and (c) and (I), V(2)(c) as aforesaid, and X of the SLPP Constitution:

b) Section 6,14(1) 24, 27 and 29 of the Political Parties Act, No.3 of 2002:

c) Sections 35(2) and (4), 42(1) 43(a) and (b) 46(1), 49(4) 76(1)(h) and 171 (15) of the national constitution,

Then, in viz

w thereof, the following interpreting conclusion are or would be, each by itself, within the spirit, intendment, contemplation, and indeed inescapable force and effect, of the said provisions respectively, viz:

(1) That as at the date of filing the application herein, there are or were at least two or three regularly meetings and unspecified number of possible special or order meetings of the party conference of the SLPP still to be held before the Presidential and Parliamentary elections of 2007 are were due to be held, to wit the annual party conferences for the year 2005/2006 and possible 2007 and any other special or other meeting(s) of the Party Conference "as may be determined by the National Executive Council".

(2) That, without any prejudice whatever to the holding of the Party Conference (as such) slated for 19-20 August 2005 or at all otherwise in 2005)., the nomination, election, selection, choice or identification, as the case may be. Whether attempted or purported of a Presidential Nominee and/or Leader of the SLPP at the said Party Conference, that is to say, almost two years before the Presidential and Parliamentary election of 2007 are due to be held, has or would [p.302] have or leads or would lead to the following interpretive consequences and/or conclusions, viz:

(i) it is and will in itself be grossly premature and incomportant with democratic principles, for being inconsistent with and in contravention of the provisions in sections 35(2) and 43(a) and (b) of the National Constitution, and accordingly void and of no effect:'

(ii) it is and will in practice be grossly unfair to certain individual members of the Party and potentially prejudicial to their interest vis-à-vis the Presidency and even to the wider related interests of the Party and the nation at large, in that:

(a) it does and will tend to operate to prematurely preclude and exclude certain potential aspirants to that or those certain potential aspirants to that or those position(s) w ho, for reasons of present untimeliness or prematurely or otherwise, may not yet, as at 19-20 August 2005 or at, any other time in 2005, have indicated their intentions or aspirations in respect thereof, but may be likely as at the due and proper time in 2006 or 2007 to such intentions or aspirants publicly known at the appropriate time;

(b) it is and will be likely to deprive the SLPP itself as a democratic national Party of a possible better quality or more popular Presidential candidate who. However, for reasons of present untimeliness or prematurely or otherwise in 2005, have indicated his/her intentions or aspirations in respect thereof, but may wish as at the due and proper time in 2006 or 2007 to make such intentions or aspirants publicly known at the appropriate time; and it is also likely to deprive the said Party of a fairer and more informed choice a possible electoral disadvantage vis-a-vis the Presidential candidates of other political parties and thus at the risk of]({}sing the Presidential elections of 2007 against the said other parties.

(c) It is and will likely to deprive the entire nation itself and the people of Sierra Leone as a whole of a possible better quality Presidential Candidate and potential ultimate President of Sierra Leone who, however, for reasons, of present untimeliness or prematurity or otherwise may not yet, as at 19-20 August 2005 or at any other time in 2005, have indicated his/her intentions or aspirations in respect thereof, but may wish as at the due and proper time in 2006 or 3007 to make such intentions or aspirations publicly known at the appropriate time, with all the possible attendant risks of prejudice (arising from an [p.303] inapt" choice due to the said gross prematurity) to the prospects of good governance, peace and positive national economic and other development during the five to ten years following the next Presidential election;

(iii) it is or will, in any case, be tantamount to an amendment or attempted/purported

amendment of the SLPP Constitution, and accordingly inconsistent with and in contravention of the provisions in Clause 11(14), IV(A)(1), IV(B)(5)(b) and (c) and (i), and X of the said SLPP Constitution, and with and of those of those section 24 of the Political Parties Act 2002 and sections 35 (b) and (c) and (i), and X of the said SLPP Constitution, and with and of those of section 24 of the Political Parties Act 2002 and sections 35(2) and (4) and 76(1) (h) of the National Constitution and thereof unlawfully, void and of no effect.

(3) That the position of Leader and Deputy Leader of the SLPP, in the manner and to the extent that they have been and/or are being held by specified incumbents respectively over the past ten years or so, that is to say, since at least 1996 and up till now, were and are so held in contravention of the provisions in

section 14 (1) of the political parties act and sections 35 (4) and 76 (1) (h) of the national constitution and so, as held, were and are void and of no effect.

(4) That, in so far as and to the extent that the current SLPP Constitution remains and reads as its tands at the present time and at least up to 12 months hence, it is unlawful for the said Party to nominate, elect, select, choose or otherwise identify, as the case may be, a Leader of the SLPP as such, or to attempt purport to so do, at any Party Conference or indeed at any time at all within the next 12 months from the date of filling this application.

(5) That, in view especially of the provisions of sections 14 (1) of the Political Parties Act 2002, and 35 (4) and 76 (1) of the National Constitution, a person who is for the time being the President, The Vice President, a Minister or a Deputy Minister in the Government under the provisions of the National Constitution may not and most not be, and ought not to be, either:

(a) Leader of the SLPP, or

(b) A member of the executive body or officers of the SLPP, whether national or otherwise or

(c) The National Secretary-General of the SLPP.

(6) That the position of the National Secretary-General of the SLPP, in the manner and to the extent that it has been or is being held by a Minister of Government, to wit, by the 2nd Defendant herein over the past three years or so, that is to say, at least since around June 2002 and up until now, was and is so held in contravention of the provisions in section 14 (1) of the Political Parties Act 2002 [p.304] and sections 35 (4) and 76 (1) (h) of the National Constitution ans[sic] so, as held, was and is void and of no effect since at least June 2002 until now.

(7) That, in consequence of all the provisions and conclusions cited and recited in the current declaratory relief and is foregoing sub-items 3 (1) to (6) inclusive herein, the SLPP as a Party is already dangerously left open and expose to a present, risk of disqualification and disestablishment applications to the Supreme Court, on the one and by the relevant commission for an order to cancel the registration of the Party and, on the other hand, by the Attorney and the Minster of Justice after such cancellation for an order to wind up and dissolve the SLPP, pursuant respectively to sections 27 and 29 of the Political Parties Act 2002.

4. A DECLARATION to the effect that the following provisions of the SLPP Constitution, in so far as the respective aspects thereof as aee indiced herein are concerned and to the respective extents thereof, to wit.

a) Clause V(2)© thereof in so far as the stipulations" shall automatically become the Leader of the Party after such commission. He shall be the political head the Party and" are concerned and to the extent thereof.

b) Clause V(1)(c) & (d) thereof, in so far as the stipulations (shall automatically become the Leader of the Party after such nomination. He shall be political head of the Party and "are concerned to the extent thereof;

c) Clause V(2)(d) thereof, in its entirety; and

d) Clause V(f) thereof, in so far as the stipulation "shall cease to be Leader and Deputy Leader respectively" is concerned and to the extent thereof.

Are, each and every one of them, inconsistent with and in contravention of contravention of the provisions in section 14(1) of the Political Parties Act 2002 and sections 35(4) and 76(1)(h) of the National Constitution and that the said inconsistent provisions are, to the extent of the said inconsistency, in each case as specified herein, null and void ab initio and of no effect.

4. A PERMANENT INJUNCTION restraining the 1st and 2nd Defendants (in their personal and official Party capacities alike) and 3rd Defendant herein their servants, agents and privies, and in the case of the 3rd Defendant, in alt its emanations and manifestations as organs, institutions, officers and members thereof, from nominating, electing, selecting, choosing or identifying, as the case may be, a Presidential Nominee and/or Leader of the SLPP in any shape or form or name or guise, or attempting/purporting so to do, or encouraging or causing or countenancing or shepherding or partaking in the doing of any such thing, at the [p.305] Party Conference slated for 19-20 August 2005 or at all otherwise in 2005, but otherwise without any prejudice whatsoever to the holding of the said Party Conference as such.

In relation to the motion was supported by the affidavit of Dr. Bu-Buakei Jabbie sworn to on the 27th day of July 2005 interlocutary notice of motion for an interim injunction dated 4th August 2005 the 1st, 2nd and 3rd defendants/respondents gave an undertaking to this Court that the SLPP Party Conference to be held on the 19th-20th August 2005 or any other time in 2005 will not nominate or elect a Presidential Nominee or candidate and/or Leader of the Sierra Leone People's Party (SLPP) at the said Party Conference or at any other Party Conference thereafter in 2005 until the determination by this Court of the plaintiffs/applicants' substantive application contained in the originating Notice of Motion dated 27th day of July.

The Court having accepted counsel for the plaintiff/applicants offer to give a cross-undertaking undertook that the plaintiff/applicant shall abide by any order which this court may make as to damages in case this Court shall be of the opinion that the defendants/respondents shall have suffered any damages by reason of the undertaking given on the 15th August 2005 and which the plaintiff/applicant ought to pay.

The interlocutary notice of motion dated 4th August 2005 was accordingly struck out.

The plaintiff in his statement of case dated 3rd August 2005 dealt with the undemocratic principles he alleged especially paragraph 4 in which he stated that His Excellency the President, Alhaji Dr. Ahmed Tejan Kabbah, has been President of Sierra Leone since March 1996 and uptill now doubled as leader of the Sierra Lone People's Party, that the 2nd defendant herein has also been National Secretary-General

of the Party for most of that period during which he held various government ministerial offices one of which he still holds. Also that the Vice President, Mr. Solomon Berewa has held the said position since June 2002 during which period he doubled as Deputy Leader of the SLPP.

He referred to Exhibit 2 which is the SLPP Constitution and stated that it was registered at the Electoral Commission in 1995 as the Constitution of the SLPP which was in compliance with section 34 and section 35 of the Constitution of Sierra Leone.

He submitted that the Leader of the SLPP is dependent upon the position of Presidential Nominee for the party thus making it interwined with the office of the President at any time when the SLPP holds the said Presidency.

He further submitted that the provisions of section 14(1) of the Political Parties Act 2002 and 34(4) and 76(1)(h) of the National Constitution that a person who is for the time being the President, the Vice President, a Minister, Deputy Minister in the Government under the Constitution may not either be a Leader of the SLPP or a member of the [p.306] executive body or officers of the SLPP, whether national or otherwise or the National Secretary General of the SLPP.

Learned Counsel for the plaintiff Dr. Buakei Jabbi also referred to Clause V(2)(c), V(1)(c), V(2)(d) and VI(f) in Exhibit 2 i.e. the SLPP Constitution

In relief of paragraph 3(1) to (7) of the Originating Notice of motion he submitted that the party may have contrived sections 11(2) (a) (iii), 14(1) and 24(1) of the Political Parties Act and also sections 35(4) and 76(1)(h) of the 1991 Constitution of Sierra Leone

The learned counsel for the plaintiff also stated that Leader or Deputy Leader referred to in Exhibit 2 i.e. SLPP Constitution are inconsistent with and in contravention of section 14(1) of the Political Parties Act and section 35(4) and 76(1)(h) of the 1991 Constitution and is therefore void and of no effect in relation to section 171(15) of the 1991 Constitution.

Learned counsel for the plaintiff submitted that only the Supreme Court had jurisdiction to determine the issue, raised in relief 3(3)(5) & (6) in the originating notice of motion in view of the provisions in sections 124(1)(a), 127 and 171 (15) among others in the 1991 Constitution since the conduct referred to in these three subparagraphs are inconsistent and incompatable with and in contravention of section 35(4), 76(1)(h) and 35(2) of the 1991 Constitution.

In relation to the defendants case learned counsel for the defendants E.K. Halloway Esq. argued locus standi jurisdiction together. He stated that there is a modern conception on locus standi in constitutional issues from common law and that locus standi was legislated for the first time in Sierra Leone in Section 127 and 171 (15) as the modem conception of local standi. He said that he relied on section 127 of the Constitution and submitted that locus standi is recognized in constitutional matters in section 171 of the Constitution of Sierra Leone Act No.6 of 1991. The learned counsel for the plaintiff E.K. Hallway Esq said that the issues raised by the plaintiff are matters primarily of political public interest.

In the case for the 1st, 2nd and 3rd defendants it was stated that the Supreme Court lacks original jurisdiction to enforce or interprete any of the provisions of the SLPP Constitution. Therefore the Supreme Court lacks original jurisdiction to hear the application or make the 1st 2nd and 3rd declaration sought in the plaintiffs originating notice of motion dated the 27th July 2005 and filed herein.

Also that the plaintiff has no locus standi to invoke the Supreme Court's jurisdiction for the 1st 2nd and 3rd Declaration sought since the plaintiff has not shown any rights or obligations personal or peculiar to him which have been infringed. In relation to the 4th Declaration sought that the plaintiff has no locus standi to invoke the original jurisdiction of the Supreme Court since the appropriate body to invoke the Supreme [p.307] Courts jurisdiction on such matters is the Political Parties Registration Commission established by the Political Parties Act 2002.

Also that the application for a permanent injunction in the plaintiffs originating notice of motion dated the 27th day of July 2005 does not allege that the right of the plaintiff has been infringe.

EX. Halloway Esq for the defendants submitted that the Supreme Court lacked original jurisdiction to hear and determine the case made in the originating notice of motion under section 124 of the Constitution of Sierra Leone 1991 Act No. 6 of 1991 or any other section of the Constitution since the matters raised in the originating notice of motion neither relates to enforcement or interpretation of the Constitution or to a question as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority.

Learned counsel for the defendant E. K. Halloway Esq stated that the plaintiff cannot rely on sections 124 (1) section 127, and 171 (15) to vest in the Supreme Court original jurisdiction to hear and determine such application in the notice of originating summons, and also that section 34 of the Constitution of Sierra Leone makes provision for the establishment of the Political Parties Commission which confers certain powers and functions relating to the internal manner and structure of the Political Parties.

In relation to the prayer for the permanent injunction he said that the plaintiff has not shown that he has a personal or peculiar interest to be infringed at the Party Conference by the nomination of the Leader/Presidential Candidate.

The plaintiff seeks several declarations pursuant to section 122, 124(1) 127 and 171 (15) of the Constitution of Sierra Leone Act No.6 of 1991. I shall not set out these provisions as they have already been enumerated in the judgment of the learned Hon Chief Justice.

I will first deal with the question of original jurisdiction by the Supreme Court. This court has original jurisdiction under sections 122(1) and 124(1) of the Constitution of Sierra Leone Act NO.6 of 1991 and not under section 171(15) as submitted by Counsel for the plaintiff.

There appears to be some confusion in relation to section 12 of the Constitution of Sierra Leone Act No.6 of 1991. I agree with the views of the learned Hon. Chief Justice that the section only lays down

the procedure for the enforcement of the Constitution of Sierra Leone Act No.6 of 1991 in certain circumstances.

[p.308]

I will now turn to the question of whether or not this court has original jurisdiction to hear anddetern1ine matters raised in the originating notice of motion.

In Halsburg's 4th Edition Volume 10 it was stated that the declaration claimed must confer some tangible benefit on the plaintiff. There is no power to make a declaration on a subject relief in respect of which is beyond the jurisdiction of the court. There is a general power to make a declaration whether there be a cause of action or not and at the instance of any party who is interested in the subject matter of the declaration. See Guaranty Trust Co. New York vs. Hannay & Co. (1915) 2KB 536 in which it was held that the court has the power to make a declaration whether there is a cause of action or not at the interest of the party, it will, then be for the court to decide on the facts whether or not it will exercise those powers.

The plaintiff claiming a declaration must have some private legal right or legal interest of which the law will take cognizance. The plaintiff abandoned the first declaration sought legal right or legal interest of which the law will take cognizance. See Olhams Press Ltd. vs. London and Provincial Sporting News Agency (1929) Ltd. Vol.1 A E R page 217 in which it was stated that the power of the court to make declaratory judgment is a discretionary power and in every case the court must exercise its discretion on the particular case.

I do not agree with the submission of Counsel for the plaintiff that the SLPP 1995 Constitution is a subsidiary legislation since the Political Parties Act 2002, Act No.3 of 2002 states that the Constitution of every political party should be lodged with the Commission on application for registration. The definition of a subsidiary legislation is to be found in section 170(1) of the Constitution of Sierra Leone Act No.6 of 1991 and see also section 1 (1) and 1 (2) of the Constitutional and Statutory Investments Act No.6 of 1999. The plaintiff complained that sections 35(2) 35(4) 42(1) 43(a) 43(b) 46(1), 49(4) 76(1)(h) and 171(15) of the Constitution of Sierra Leone Act No.6 of 1991 has been contravened. In the 2nd relief sought by the plaintiff also referred to sections 41 (b) and 43 of the Constitution of Sierra Leone Act No.6 of 1991. The case of Guaranty Trust Company v Hannay I opine that none of these provisions are to be enforced as a result of something done or omitted to be done by the defendants all the causes IV(A)(3)(1) V(1)(c) and (d) V(2)(c), V1(b) and V1(6) in the SLPP Constitution which were raised does not give this court the original jurisdiction for the relief sought. The plaintiff has alleged that the decision of National Executive Council to hold the election for a Presidential Nominee of the SLPP during the Party Conference which should have taken place on the 19th-20th August 2005 or at anytime in 2005 is contrary to democratic principles and contravenes Section 35(2) of the Constitution of Sierra Leone Act No.9 of the Constitution of Sierra Leone section 35(2) states

"The internal originating of a political party shall conform to democratic principles, and its aims, objectives, purposes and programmes shall not contravene or be consistent with any provision of this Constitution"

[p.309]

Thus since it relates to the enforcement of a provision of the Constitution of Sierra Leone Act No.6 of 1991 this court has jurisdiction to hear and determine it. On the plaintiff's contention relating to section 35(4) and section 76 (1)(h) that under the SLPP Constitution it is possible for a person who holds any office of President, Vice President, Minister or Deputy Minister under the Constitution of Sierra Leone Act No.6 of 1991 and therefore not qualified for election as a member of Parliament because of section 76(1)(h) to be a leader of the SLPP in contravention of section (4) of the Constitution of Sierra Leone Act No.6 of 1991 I opine that this court has original jurisdiction to hear and determine the matters raised in the Third relief sought since it relates to the enforcement of a provision in the Constitution of Sierra Leone Act No.6 of 1991.

Counsel for the plaintiff rightly clearly presented his papers under the correct procedure in accordance with Rule 89 of the Supreme Court Rules Act 1982 Public Notice No.1 of 1982.

To my mind this action should have been brought in a representative capacity and not on the plaintiff's own right, Rule 98 of the Supreme Court Rules provides that where no provision is expressly made in these Rules relating to the original and supervising jurisdiction of the Supreme Court, the practice and procedure for the time being in force in the High Court shall apply mutant's mutandis.

Then Order 3 Rule 4 of the High Court Rules provides that where the plaintiff or the defendant sues or is sued in a representative capacity the endorsement should show the capacity in which the plaintiff or defendant sues or is sued.

I am of the view that it would be sufficient if the capacity in which the defendant is sued is indicated in the title of the originating notice of motion or in the body of the originating Notice of motion.

The defendants were rightly sued in a representative capacity. In relation to the 4th relief for an injunction in restraining the defendants from electing a Presidential Nominee of the SLPP anytime before the end of 2005. I am of my view and so hold that this relief could be determined in this court original jurisdiction.

Now I turn to the question of locus standi. Has the court any jurisdiction to deal with and determine the matter taking into consideration the capacity of the plaintiff to bring this action before the Supreme Court,? Counsel, for the plaintiff referred to chapter 2 of De Smith, Woolf & Jowell's Principles of Judicial Review in which a distinction was made between the requirement of standing in private law and public law according to decided cases there is a distinction between standing at common law litigations and private law legislations Counsel for the plaintiff asked this court to adopt the liberal approach in applying the common law principle.

On the concept of locus standi is whether a person who approached the court is a proper party to present the issue to the court for adjudication see cabinet of the Transitional Government for the Territory of South West Africa VS EINS 1988 (3) S.A [p.310] 369 (A) See also Otugor Gamioba & Others VS Esezi II the Ongajie and Others 1961 2 SCN 237.

In Halsbury's 4th Edition volume 10 it was stated that the plaintiff claiming a declaration must have some private legal right or a legal interest of which the law will take cognizance. A litigant is required to demonstrate some actual or threatened injury personally suffered and that the injury can be traced to the challenged action and that the injury is redressable by a decision of the Court.

In the Nigerian Constitutional Law Reports (1981) 2 N C L R. The Chief Justice in the case of Senate Abraham Ade Adesanya vs. The President of the Fedral Republic of Nigeria the Hon. Justice Victor Ovie-Whiskey said "locus standi" denotes the legal capacity to institute proceedings in the Court of Law.

On reading the authorities cited it appears that the test of applying locus standi differ in various jurisdiction.

I have had the opportunity of reading the judgment of the learned Chief Justice on the question of locus standi. In the light of the authorities quoted in my judgment. I agree with the reasons given by the learned Chief Justice for refusing the locus standi.

Since the plaintiff did not came to court in a private capacity and not in a representative capacity but as a member of the S.L.P.P. it was for him to satisfy the court that he had a special or justifiable interest or that he will suffer some injury had the Convention been held on the 19th-20th August in choosing a Presidential Candidate.

Has the plaintiff exhausted all remedies available to him? This brings to my mind the Political Parties Act 2002 whose short title reads "Being an Act establish Political Parties Registration Commission for the registration and regulation of the conduct of Political Parties in accordance with sections 34 and 35 of the Constitution and to provide for the related matter".

Section 34 and 35 of the Constitution of Sierra Leone Act No.6 of 1991 are to be read with the Political Parties Act 2002.

Section 27 of the Political Parties Act 2005 gives the Political Parties Registration Commission the exclusive right to apply to the Supreme Court, and the Act gives aggrieved persons to make complaints to the Commission about matters listed in the provisions of the Political Parties Act 2002.

I entirely agree with this aspect of the Learned Chief Justice in his judgment.

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I conclude with the words of UWAIS JSC in the case of Senator Abraham Ade Adesanifa vs. The President of the Federal Republic of Nigeria and the Hon. Justice Victor Ovie-Whiskey cited earlier.

"It is of paramount importance and indeed most desirable to encourage citizens to come to court to have the Constitution interpreted. However, this is not to say, with respect, that meddle-some interlopers, professional litigants or the like should be encouraged to sue in matters that do not directly concern them. In, my view, to do that is to open the flood gate to frivolous and vexatious proceedings I believe that such latitude is capable of creating undesirable state of affairs.

For reasons given the originating notice of motion is struck out.

I agree with the orders proposed by the Learned Chief Justice.

SGD.

V.A. WRIGHT

[p.312-313]

TOLLA THOMPSON, JSC

My Lords

I have had the opportunity to read the draft judgment of my brother the Honourable Chief Justice and I agree with him. However, I wish to articulate few words of mine.

On the 17th August 2005 the plaintiff Samuel Hinga Norman by an originating Notice of Motion, moved this court under sections 122, 124(1). 127 and 171 (15) of the Constitution of Sierra Leone, Act No. 6 of 1991, invoking the original jurisdiction of this court for several declarations and relief against the 1st defendant Dr. Sama S. Banya National Chairman Sierra Leone Peoples party, 2nd defendant Dr. Prince A. Harding, National Secretary General Sierra Leone Peoples Party and 3rd defendant the Sierra Leone Peoples Party (SLPP).

Background

The plaintiff is a fully paid up member of the Sierra Leone Peoples Party see Ex. 1. He also intends to contest the presidential election in 2007, having already declared the intention to do so. The Sierra Leone Peoples Party is the party in government at the moment. At the National Executive committee meeting held sometime ago it was decided that the 2005 party conference be held in Makeni on the 19th and 20th August 2005 at which the agenda will include the nomination and election of national officers.

Being dissatisfied with this agenda the plaintiff came to this court to seeking certain declaration and relief.

Declaration and Relief

1. A declaration to the effect that the constitution of the Sierra Leone Peoples Party (which for the purposes of this judgment I shall henceforth refer to as the SLPP) dated July 1995 is the authentic currently applicable to the constitution of the SLPP for the purposes of the functioning and operation of the party in terms of the National Constitution and the Political Parties Act No. 3 of 2002.

2. A declaration to the effect that where an incumbent President of the Republic of Sierra Leone was originally elected thereto in compliance with the following provisions in the respective constitution as cited herein below among others to wit:

i. As to the SLPP constitution

a. clause IV A(3) (1) thereof

b. clause V(I)(c) and (d) thereof

c. clause V(2) (c) thereof being under the rubric "duties of officers and leader" and

d. clause VI (b) and (f)

ii. As the national constitution

a. section 41 (b) thereof

[p.314]

b. section 42(1) thereof

c. section 43 thereof

Then in that case, the following interpretive conclusions are or would be each by itself within the spirit, intendment contemplation and indeed inescapable force and effect of the said SLPP constitution viz:

(1) That the SLPP constitution makes no express or specific provision for the substantive independent existence or for a direct nomination, election, selection choice or identification as the case may be of the leader of the SLPP as such hut rather that any such nomination, election selection' choice or identification as may be of the said leader takes place only indirectly as a consequential or derivative issue from the process of nominating, electing, selecting choosing or identifying as the case may be the party presidential nominee for the next pending national presidential election.

(2) That the position of leader of the SLPP is not a free standing office or status in its own right, but rather that it is by virtual definition, dependent upon the position of presidential nominee for the said. party thereby making it so intertwined or associated with the office of state president at any time when an SLPP member holds the said presidency as to make the two positions indivisible and inseparable one from the other at all such times.

(3) That at any time when the SLPP is in power and/or a member thereof is the lawful incumbent president of Sierra Leone, the two position of leader of the party and state president mayor can only be either held together, or jointly or relinquished together and jointly and never otherwise at any such time so that an incumbent thereof may not selectively relinquish one of them and yet hold or seek to continue holding to the other nor may two different persons at one and the same time or simultaneously hold the two positions separately Le., one position to one of them and the other to the other.

(4) That the SLPP constitution makes no express or specific provision for the substantive independent existence or for any nomination election, selection, choice or identification (as the case may be) of a leader of the SLPP as such at any time when the said party is either not in power or not providing the

incumbent president of Sierra Leone or when a national presidential election is not immediately due to be held.

(3) A declaration to the effect that, in the following party and national constitution and other legislative provisions respectively among others to wit:

a. clause IV(a)(1) IV(b)(5) and (c) and (i) Clause II(4) (c) as aforesaid and X of the SLPP constitution

b. sections 6 (14)(1) 24, 27 and 29 of the political parties Act No. 3 of 2002 and

c. sections 35(2) and (4) 42(1), 43 a and (h) 46(1) 49 (4) 76(1)(h) and 171(15) of the national constitution.

[p.315]

Then in view thereof the following conclusions are or would be each by itself, within the spirit intendment contemplation and indeed inescapable force and effect of the said provisions respectively viz:

(1) That at the date of filing the application herein there are or were at least two or three regularly annual meetings and unspecified number of possible special or other meetings of the party conference of the SLPP still to be held before the presidential and parliamentary election of 2007 are or were due to be held to within the party conference of the years 2005, 2006 and possibly 2007 and any other special or other meetings of the party conference as may be determined by the national executive committee.

(2) That without any prejudice whatsoever to the holding of the party conference (as such) stated for 19-20 August 2005 or at all otherwise in 2005 the nomination, election, selection, choice or identification as the case may be whether attempted or purported of a presidential nominee and/or leader of the SLPP at the said party conference that is to say almost two years before the presidential and parliamentary elections of 2007 are due to be held has or would have lead or would lead to the following interpretive consequences and/or conclusions viz:

i. It is and will itself be grossly premature and incomportant with democratic principles for being inconsistent with and in contravention of the provision of sections 35(2) and 43(a) and (b) of the national constitution and accordingly void and of no effect.

ii It is and in practice be grossly unfair to certain individuals, members of the party and predijucial to their interests vis-à-vis the presidency and even to the wider related interest of the party itself and the nation at large in that:

a. It does and will tend to operate to prematurely preclude, exclude certain potential aspirant to that or those position(s) who for reasons of present untimeliness or prematurely: or otherwise may not yet as at 19-20 August 2005 or any other time have indicated their intention or aspirations in respect thereof, but may be likely or at the due and proper time in 2006-2007 to make such intention or aspiration publicly known at the appropriate time.

b. It is and will be likely to deprive the SLPP itself as a democratic national party of a possible better quality or more popular presidential candidate who however for reasons at of present untimeliness or prematurely or otherwise may not yet as at 19-20 August 2005 or at any other time in 2005 have indicated his/her intentions or aspirations in respect thereof but may wish as at due and [p.316] proper time in 2006 or 2007 to make such intention or aspirations known at the appropriate time and it is also likely to deprive the said party of a fairer and more informed choice of presidential nominee or candidate, thereby putting the SLPP at a possible electoral disadvantage vis-à-vis the presidential candidates of other political parties and thus a risk of losing the presidential elections of 2007 against the said other parties.

c. It is and will be likely to deprive the entire nation itself and the people of Sierra Leone as a whole of a possible better quality presidential candidate and potential ultimate president of Sierra Leone who however for reasons of present untimeliness or prematurity or otherwise may not yet as at 19-20 August 2005 or at any other time in 2005 have indicated his/her intentions or aspirations in respect thereof but may wish at the due and proper time in 2006 or 2007 to make such intentions or aspirations publicly known at the appropriate time with all the possible attendant risk of prejudice arising from an inept choice due to the said gross prematurely to the prospect of good governance, peace and positive national economic and other development during the five to ten years following the next presidential election.

iii. It is or will in any case be tantamount to an amendment to the constitution or attempted/purported amendment of the SLPP constitution and accordingly the consent with and in contravention of the provision of clauses II (4) IV(A)(I) IVB(5)(b) and (c) and (i) and X of the said SLPP constitution and with and of those of sections 24 of the political parties Act 2002 and sections 35(2) and (4) and 76(1)(h) of the national constitution and therefore unlawful void and of no effect.

3. That the position of leader and deputy leader of the SLPP in the manner and to the extent that they have been and/or are being held by specified incumbents respectively over the past ten years or so that is to say since at least 1996 and up till now were and are so held in contravention provisions of sections 35(4) and 76(b) of the national constitution and so as held were or are void and of no effect.

4. That in so far as and to the extent that the current SLPP constitution remains and reads as it stands at the present time and at least up to the present time and at least up to 12 months hence it is unlawful for the said party to nominate, elect, select, choose or otherwise identify as the case may be a leader of the SLPP as such or to attempt/purport to do at any party conference or indeed at any time at all within the next 12 months from the date of filing this application.

[p.317]

(5) That in view especially of the provisions of section 14(1) of the Political Parties Act 2002 and 35(1) and 76(1)(h) of the national constitution a person who is for the time being president, vice, president and minister or deputy minister in the government under the provisions of the national constitution may not and must not be and ought not to be either.

a. leader of the SLPP or (b) a member of the executive body or officers of the SLPP whether national or otherwise, or

b. the National Secretary General of the SLPP

(6) That the position of the National Secretary General of the SLPP in the manner and to the extent it has been or is being held by a minister of government to wit the 2nd defendant herein over the past three years or so that is to say due around June 2002 and up till now was and is so held in contravention of the provisions in section 14(1) of the Political Parties Act 2002 and Sections 35(4) and 76(1)(h) of the National Constitution and so as held was and is void and of no effect since at least June 2002 up till now.

(7) That in consequences of all the provisions and conclusions cited and recited in the current declaratory reliefs and its forgoing sub items 3-6 inclusive herein the SLPP as a party is dangerously left open and exposed to a present risk of disqualification and disestablishment applications to· the Supreme Court on the one hand by the relevant commission for an order to cancel the party and on the other hand by the Attorney-General and Minister of Justice-after such cancellation for an order to wind up and dissolve the SLPP pursuant respectively to Section 27 and 29 of the Political Party Act 2002.

(4) A declaration to the effect that the following provisions of the SLPP constitution in so far as the respective aspects thereof as here indicated herein are concerned and to the respective extent thereof to wit.

a. V(2)(c) thereof in so far as the stipulation shall automatically become the leader of the party after such nomination and shall be the political head of the party and are concerned and to the extent thereof

b. clause V(1)(c) and (d) thereof in so far as the mentioning of "leader" and deputy leader therein respectively are concerned and to the extent thereof.

c. clause V(2)(d) thereof its entirety and

d. clause VI(f) thereof in so far as the stipulations shall cease to be leader and deputy leader respectively" is concern and to the extent thereof

Each and everyone of the inconsistent and in controventive of the [p.318] provision of 14(1) of the Political Parties Act 2002 and Sections 35(4) and 76(1)(h) of the National Constitution and that the said inconsistent provisions to the extent of the said inconsistency in each case as specified herein null and void.

(5) A permanent injunction restraining the 1st and 2nd defendants (in their personal and official party capacities alike) and the 3rd defendant herein their servant, agents and privies and in the case of the 3rd defendant in all its emanation and manifestation as organs, institution, officers and members thereof from nominating, electing, selecting, choosing or identifying as the case may be a presidential nominee and/or leader of the SLPP in any shape or form or name or guise or attempting/purporting so to do or encouraging or causing or countenancing or shepherding or partaking or the doing of such thing at the

party conference stated for 19-20 August 2005 or at all otherwise in 2005 but otherwise without prejudice whatsoever to the holding of the said party conference as such.

As regards the first declaration, both sides agreed that Ex 2 is the authentic document applicable to the SLPP. As regards the rest of the declaration, on a close scrutiny it is obvious that they revolve around the contravention of the Political Parties Act 2002 and the National Constitution 1991 in particular sections 6 and 14(1) of the Political Parties Act and Sections 34, 35(2) and (4) 42(1) 43, 46 and 76(1)(h) of the National Constitution by the SLPP Constitution.

Argument

I shall briefly state the argument and submission of the plaintiff on the 1st declaration refers to Sections 35 and 76(1)(h) and submitted that the combined affect of these two Sections is that anybody who is president, vice president, minister or deputy minister in government is barred from holding the position as leader of the SLPP. Reference was also made to the Political Parties Act 2002.

That the Supreme Court is the only court which has the jurisdiction to hear and determine the issue. In this connection he refers to Section 124(1) (a) 127 and 171(15) of the National Constitution.

On the 3rd declaration learned counsel for the plaintiff submitted that it is premature to elect a leader in 2005 when the contemplated period of vacancy is sometime in 2007. If the election is held in 2005 he will bowl out aspirant.

On the 4th declaration learned counsel submitted that certain clauses of the SLPP Constitution pertaining to the leader and deputy leader are inconsistent with Sections 14(1) of the Political Parties Act 2002 and Sections 35(4) and 76(1)(h) of the National Constitution. Therefore the clauses are null and void and of no effect.

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On the issues of jurisdiction and locus standi, Dr. Jabbie submitted that the plaintiff did not sue in a representative capacity and further said that his case is built around the modem concept of locus standi on constitutional issues and submitted that the modem concept of locus standi was legislated for the first time in Sierra Leone in Section 127 of the National Constitution.

Finally he submitted that the issues raised are matters of public political interest as expressed by the National Constitution and the Political Parties Act 2002.

Mr. E.A. Holloway learned counsel for the defendants in reply submitted that the Supreme Court lacks the jurisdiction to hear and determine the matter under, Section 124 of the National Constitution 1991 or any other Sections of the constitution as the matters raised do not relate to the (a) enforcement of any provision of the constitution (b) to question as to whether an enactment was made in excess of the powers conferred by parliament or any other authority.

The contravention of Section 34, 35 of the National Constitution and Sections 6 and 14 of the Political Parties Act 2002 by the SLPP Constitution cannot be the subject of a declaration under Section 127 of the National Constitution.

On the issue of lack of locus standi by the plaintiff, Mr. Holloway submitted that the plaintiff cannot rely on Sections 124, 127 and 171(15) to vest the Supreme Court with jurisdiction to hear and determine the matter.

He further submitted that according to Section 27 of the Political Parties Act 2002 only the political party commission can apply to the Supreme Court.

I think at this stage it is pertinent for me to say that usually (though not imperative) the related issues of lack of jurisdiction and locus standi are raised at the earliest opportunity by way of an objection to the proceedings. If it is raised at the earliest opportunity the court should not proceed to hear the matter on its merit see Macfoy v UAC 1961 AER 1169. In this case however the defendants made these issues answers to the plaintiff case, which necessitated a full blown argument by the plaintiff of his case.

In this connection, therefore it left the door open for me to consider the plaintiff case on its merit

Having said this, I shall start with the issue of jurisdiction and say the question raised by this action is whether the Supreme Court has jurisdiction to grant the declaration prayed for in the plaintiff originating notice of motion. Dr. Jabbie's contention is that the Supreme Court has. Mr. Halloway on the other hand submitted that the Supreme Court does not.

[p.320]

Jurisdiction

Jurisdiction, with reference to a country's judicial system, simply means the authority which a court has within that system to decide on matters litigated before it. It is usually conferred by the constitution of that country or statute. Therefore if a constitution of a country states that the court has no jurisdiction in certain matters it is impossible for the court to assume jurisdiction on such matters see Ohene More v Akassa Taye 2 WACA 43. But when jurisdiction is given or assumed, the court must deal with factual or real question.

In this connection I recall the words of Lord Summer in Russian Commercial and Industrial Bank v British Bank 1921 AC 438. He said inter alia at page 452:

"The question must be real not theoretical. The person raising it must have a real interest to raise it and must be able to secure a proper opponent i.e., someone presently existing who has the true interest to oppose the declaration sought"

On a close scrutiny of the above dicta the necessary criteria for a court to assume jurisdiction on any matter are:

i. there must be a real or factual question to be determined

ii. the person raising the question must have interest in the question

ii. he must also secure an opponent i.e., someone with interest in the question i.e., declaration

There is also the point of exclusion or ouster of jurisdiction. This is the removal from the court of its power to hear and determine the issue. In some jurisdiction, the exclusion clause is incorporated in the constitution of the country for example Section 94(2) of constitution forbids any act done under the rules of parliamentary procedure "shall not be inquired into by any court". In some case the jurisdiction of the court is excluded by statute or by decree. See Anisminic v Foreign Compensation Commission 1969 AC 147. Din v Attorney General of the Federation of Nigeria 1988 4 NWLR 147 a case dealing with the forfeiture of asset by the Federal Military Government. The Supreme Court held that the powers exercised by the Federal Military Government of Nigeria are not changeable.

However where a constitution or statute seeks to exclude the jurisdiction of the courts to determine certain matters it must do so in clear and unambiguous words. See Section 94(2) of the Sierra Leone Constitution Supra. Also in this connection, I shall reach the words of Viscount Simmonds in the House of lords case of Pyx Granite Co Ltd v. Ministry of Housing and local Government and Others 1960 AC P. 200, referring to the jurisdiction of a court, he said:

"It is a principle not by any means to be whitted down that the subjects recourse to her Majesty's court for the determination of his right not to be excluded except by clear words that is a fundamental rule from which I would not for my part sanction any departure"

[p.321]

I am persuaded by the above dicta and I shall adopt the principle in this case. With this principle in mind I shall now proceed to consider the issue raised.

Briefly put, the plaintiffs complaint is the contravention of Section 35(2) (4), 43 and 76(1)(h) of the National Constitution and Section 6 and 14 of the Political Parties Act 2002 by some clauses of the SLPP constitution.

I shall here under reproduce the provisions in the national constitution:

Section 35:

(2) States:

The internal organization of a political party shall conform to the democratic principles and its aims and objective purposes and programmes shall not contravene or be inconsistent with any provision of this constitution.

(4) States:

No political party shall have as a leader a person who is not qualified to be elected as a member of parliament.

Section 76:

(1) No person shall be qualified for election as a member of Parliament.

(h) If he is for the time being the President, the Vice-President a Minister, Deputy Minister under the provision of this constitution.

Section 6: Of the Political Parties Act 2002 relate to the function of the political parties commission and section 11(1) & (2) deals with the registration of political parties and what should accompany such registration. Section 14 (1) deals with the qualification of the founding member, leader of the party or member of the executive body. They must be qualified to be elected as members of parliament

The offending clauses of the SLPP Constitution 1995 are IV(3)(1) which deals with the agenda which include nomination of candidate for the Presidential Election by the party conference. VI(c) and (d) states who the national officers of the party should be included. The Leader (Presidential Nominee) and the Deputy Leader Vice Presidential Nominee) V(2) (c) and (d) relate to the determination of the Presidential nominee at party conference who shall automatically become leader of the party and his choice of the vice presidential nominee who shall become the deputy leader in consultation with National Executive Council. VI(b) deals with the national executive council's responsibility to ensure that the Party Conference nominate a candidate for the presidential election. As a result of these infractions, the, plaintiff has invoked the original jurisdiction of the Supreme Court under sections 122, 124 (1) (a), 127 and 171 (15) of the national constitution to ventilate his grievance by seeking the several declarations and a permanent injunction in his originating notice motion.

[p.322]

I shall now go on to ascertain whether this court has jurisdiction to entertain the originating notice of motion under the several provisions of the constitution referred to. I shall start with Section 122(1) of the National Constitution.

Section 122(1) states:—

"The supreme court shall be the final court of appeal in and for Sierra Leone and shall have such appellate and other jurisdiction (emphasis mine) as may be conferred upon it by this constitution or any other law"

I shall also refer to section 170(1) of the constitution — chapter XII

The laws of Sierra Leone:

It states:

The laws of Sierra Leone shall comprise:—

(a) The constitution

(b) Laws made by under the authority of Parliament as established by this constitution

(c) Any orders, rules regulation and other statutory instrument made by any person or authority pursuant to a power conferred in that behalf by this constitution or any other law

(d) The existing law

(e) The common law

Reading these two provisions together it seems to be that Section 122(1) merely tells us that jurisdiction can only be conferred by the constitution and any other law within the context of Section 170 examples Sections 124, 127 and 28 of the constitution, see 27(1) of the Political Parties act 2002. In my humble opinion Section 122 does confer original jurisdiction on this Supreme Count.

I now move on to Section 127 of the Constitution.

Sub Section 1 states:

"A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with or is in contravention of a provision of this constitution may at any time bring an action in the Supreme Court for declaration. "

The question here is whether the plaintiff can come for a declaration when he is not challenging the validity of an act.

The section is clear the act done must be under an enactment or under the authority of an enactment. In this regard I refer to chapter XIII of the constitution in particular see 171(1).

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This section defines "law" to include "any instrument having the force of law made in exercise of a power conferred by law". It also gives the meaning of "statutory instrument" as any proclamation, regulation, order, rule or other instrument (not being an act of Parliament) having the force of law. I am sure it was this sort of legislation the drafters of the national constitution had in mind, when they framed Section 127 of the constitution in the way they did i.e. to accommodate subsidiary and delegated legislation.

Dr. Jabbie however submitted that this provision can be extended to include the SLPP Constitution. I profoundly disagree. If this court were to do this it will be acting as a legislature. In this regard I shall here recall the words of Livesey Luke C.J. deceased in Chanrai vs. Co. Ltd. v Palmer 1970 -71 ALR SL 391 at 405 he said inter alia:

"In my judgment if the words used in a statute are plan and unambiguous the court is bound to construe them in their ordinary sense having regard the context"

I shall adopt this dicta and say this court cannot interfere by way of extending the provision of Section 127 to include the SLPP constitution. Worst still if the court were to interfere in the manner suggested

by Dr. Jabbie it will certainly be an infraction of Section 127 of the national constitution the very reason why Dr. Jabbie is here.

In the result I hold that Section 127 does not confer original jurisdiction on the Supreme Court.

Dr. Jabbie also invoked Section 171(15) to confer jurisdiction on the Supreme Court.

Section 171 (15) states:

"This constitution shall be the supreme law of Sierra Leone and any other law found inconsistent with any provision of the constitution shall be to the extent of the inconsistency void and of no effect"

The short but important point here is that the constitution of Sierra Leone Act N. 6 of 1991 is the grundnorm of Sierra Leone in other words it is the fundamental law of the land and Section 171(15) being a substantive enactment gives fillip to the constitution by emphasizing that the constitution is the supreme law of the land.

With respect this provision does not confer original jurisdiction on the Supreme Court.

I now come to Section 124 of the national constitution.

Section 24(1) states:

"The Supreme Court save as otherwise provided in Section 122 of the constitution have original jurisdiction to the exclusion of all other court.

(a) in all matters relating to the enforcement or interpretation of any provision of this constitution

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(b) any question arises whether an enactment was made in excess of the power conferred upon parliament or any other authority or person by law or under this constitution.

No doubt this provision gives exclusive original jurisdiction the Supreme Court on all matters relating to the enforcement and interpretation of the constitution and questions as to whether parliament, any other authority or person when making an enactment has exceeded his powers.

My brother the learned Chief Justice has exhaustively dealt with this provision in the leading judgment. It only left for me to say that Dr. Jabbie's complaint with regard to the contravention of Section 35(2 & 4) the internal organ of the political party shall conform to the democratic principles and its aim etc. shall not contravene or be in consistent with any provision of the constitution. A person who is not qualified to be elected a member of parliament cannot be a leader of a political party.

Section 76(2) — the president, vice president and minister and deputy minister are not qualified to be members of parliament.

These are matters which can be eminently taken under the original jurisdiction of the Supreme Court pursuant to Section 124 of the constitution.

I shall now go on to the next big issue i.e., the locus standi of the plaintiff.

Locus standi or legal capacity

Earlier on when I reviewed the argument of Dr. Jabbie and Mr. Halloway, I stated the two contending positions on this issue. Locus standi simply means standing or the legal capacity of a person to institute an action court. In this case that person is the plaintiff, Samuel Hinga Norman. At page 7 of his original notice of motion, he tells us in what capacity he brings this action and I quote;

"The plaintiff/applicant brings the action/application as a law abiding citizen of Sierra Leone and member of the SLPP who aspires to be presidential candidate for the SLPP at the 2007 presidential election but who is keenly concern that the pristine democratic credential and the processes of the SLPP are maintained, enhanced and facilitated in all the internal structure, organization, operation, programmes, activities and functions and they are always consistently complaint with the valid and lawful provision not only of his own party constitution, rules, regulations, standing order but also of the Political Parties Act 2002, national constitution and any other laws relevant and pertinent thereto and that they are always consistently compliant with the valid and lawful provisions not only its own Party Constitution Rules Regulations standing orders, but also of the Political Parties Act 2002 National constitution and any other laws relevant and pertinent there of.

It is clear from this expose that the plaintiff brought this action in his personal capacity he should now demonstrate to us that he has the legal capacity to institute the action in other words he has the interest in the outcome of the action. This interest I dare say has ranged

[p.325] from personal, sufficient, to public interest. In Senator Abraham Ade Adesanya v the President of Nigeria 1981 2 NWLR. It was stated that the interest must be personal. On the other hand, the Ghana Supreme Court adopted a different approach and in the case of Sam V. Attorney General of Ghana GLR. 300 Atuguba JSC said.

"As the plaintiff is a citizen of Ghana , suffices to enable him bring the personal action and I need not consider the question of locus standi in a wider dimension. Once a citizen".

Dr. Jabbie urged the court to adopt the liberal approach and stated that the plaintiff interest is public. In my view, while not agreeing with Dr. Jabbie, I think there should be a dichotomy between private rights on the one hand. and public/constitution right on the other and I opine that when public/constitutional right are involved a liberal approach should be adopted, in view of Section 127 of the National Constitution which vests locus standi on any person irrespective of personal sufficient or public interest if and when there is infraction of the provisions in the National Constitution. In this regard, I am incline to adopt a liberal approach to this question.

The plaintiff is a Sierra Leonean and a fully paid up member of the SLPP. He is. an aspirant for the Presidential election in 2007. In my humble view, I think this is enough to vest the plaintiff with standing

and I so hold. However there is this matter of the Political Parties Act 2002, which in my view cannot be treated under the locus standi of the plaintiff. Has he exhausted all his remedies before coming to us? I opine not. The infraction of the SLPP constitution is intertwined with the Political Parties act and the National Constitution and therefore Section 6(2)(d) and Section 27 (1) of the Political Parties 2002 come into play.

Section 6(2)(d) and 87(1)

Section 6(2) (d) states:

"Without prejudice to the generality of sub section the function of the commission when approach by the persons or parties concerned, to mediate any conflict or dispute between or among the leadership of any Political Party or between or among political parties ".

There is no evidence that the plaintiff ever approached the commission either orally, writing or otherwise in accordance with this section, if he had done, it· would have been a different matter.

Again Section 27(1) of the Political Parties Act 2002 states:

Section 27(1)

"Without prejudice to any other penalty prescribed by this Act or any other enactment the commission may apply to the Supreme Court for an order to cancel the registration of the Political Party which has contravened any provision of the constitution or other act".

[p.326]

In whatever circumstance, I do not think that the plaintiff should have bypassed the commission and come straight. He should have exhausted his remedy if only for the record. If the commission failed to act there should be evidence to that effect.

Conclusion

In conclusion, I would like to record certain observation, and that is the national constitution came who operation in 1991, and included in its provision, the promulgation of a political party act. This act only came into effect in 2002, some 11 years after the national constitution. This clearly demonstrates tardiness on the part of those responsible for such matters. I say no more.

Having said this, I shall return to the judgment and say the originating notice of motion ought to be struck out, that is not to say it lacks merit on the contrary on the face of it there are merits in the points raised in the originating notice of motion, but the court did not go into the matter.

In the result the originating notice of motion is struck out.

SGD.

HON MR. JUSTICE M.E. TOLLA-THOMPSON J.S.C.

[p.327-328]

MURIA J A:

This case turns on two issues, namely whether the Supreme Court has jurisdiction to hear and determine the plaintiff's claims as contained in his Originating Notice of Motion, and secondly, if the Supreme Court has jurisdiction, whether the plaintiff has the locus standi to invoke that jurisdiction. By his Originating Notice of Motion, the plaintiff has sought four declarations and a permanent injunction against the defendants. He brings this action in his personal capacity as a member of SLPP ("the SLPP").

The Background of the Case

The background circumstances to this case are set out in the judgment of His Lordship the Chief Justice. I need not rehearse them here. I need only say that the plaintiff is a fully paid-up member of the SLPP and an aspirant to be nominated a Presidential nominee for the national Presidential Election in 2007. Until March 2003 when he was arrested and detained before the Special Court of Sierra Leone, the plaintiff was a Minister of Internal Affairs in the SLPP — led Government. He is presently standing trial before the Special Court for alleged war crimes. He continues, however, to be a full-pledged member and supporter of the SLPP.

[p.329]

As a result of the planned SLPP Conference which was to be held on the 19-20 August. 2005 to, among other things, choose a Presidential Nominee and/or a Leader of the Party, the plaintiff instituted these proceedings, seeking declaratory and injunctive orders against the defendants. As it will become apparent, these discretionary orders of the Court are dependant on the plaintiff establishing, not only that this court has jurisdiction in the matter, but that he has the standing to invoke the court's jurisdiction. That is the common law position, and one which is applicable to the circumstances of Sierra Leone. I will return to this aspect of the case later in this judgment For now, I turn to the first issue of jurisdiction of the Court.

Jurisdiction of the Supreme Court·

The starting point in ascertaining the jurisdiction of the Supreme Court is the Constitution of Sierra Leone 1991 ("the National Constitution"). Part II of Chapter VII of the National Constitution sets out the provisions for the establishment and power of the Supreme Court. For our present purpose, section 124 of the National Constitution is directly relevant for our consideration. However, before I turn to that provision, let me first refer to section 122(1) of the National Constitution. That provision states:

"122(1) The Supreme Court shall be the final court of appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law:

[p.330]

Provided that notwithstanding any law to the contrary, the President may refer any Petition in which he has to give a final decision to the Supreme Court for a judicial opinion. (Emphasis is mine).

There are three aspects to this provision. Firstly it expressly states that the Supreme Court is the apex of the Judiciary in Sierra Leone and as such it is the final Court in the land that any person, citizen or non-citizen, can appeal to. Secondly, the provision provides that the Supreme Court shall also have "other jurisdiction" in addition to its appellate jurisdiction conferred on it by the Constitution or any other law. These "other jurisdiction" of the Supreme Court can be found in other provisions of the Constitution, such as Sections 28 (enforcement of protective provisions), 124 (original jurisdiction on the Interpretation of the Constitution), 125 (Supervisory jurisdiction) and 127 (Enforcement of the Constitution). Thirdly, Section 122(1) confers advisory jurisdiction to the Supreme Court which can give a judicial opinion on a matter upon Petition by the President. The provision of such advisory jurisdiction on the court is not unique to Sierra Leone. The Constitution of PNG confers power on the Supreme Court of that country to give advisory opinion. There are jurisdictions whose constitution do not conferred advisory power on the Courts, for example, the US Supreme Court, although invested with judicial review power, can adjudicate only actual cases and disputes: Marbury -v- Madison (1803) 1 Cranch 137 (USSC); Chicago -v- Wellman 12 (US) Supreme Court Reporter 400. See also Baker -v- Carr (1962) 369 US 186.

[p.331]

I briefly mention section 127 of the National Constitution which is also relied upon by the plaintiff. Dr Bu-Buakei Jabbi contended that section 127 contains the Modern Law of Locus Standi. If Counsel's argument here is to buttress his case that under this section, the Supreme Court also has original jurisdiction to hear and determine the plaintiffs claims, then it cannot be accepted. Section 127 does not confer jurisdiction on the court. However, what it does is to give a right or standing on "a person" to bring an action in the Supreme Court to challenge the constitutionality of an Act of Parliament. It will be observed that the right to bring the action is in respect of an allegation that "an enactment or anything done under the authority of that enactment" is inconsistent with or contravenes the National Constitution. This is a Constitutional requirement to be fulfilled by an applicant who seeks to rely on section 127. It is not necessarily a modern version of the test of standing as urged by Counsel.

In the present case the plaintiff is not challenging the validity or constitutionality of an Act of Parliament, rather he is challenging the validity of the provisions of the SLPP Constitution. In this regard, the plaintiff cannot take shelter under section 127 of the National Constitution. In short, section 127 does not apply in the present case.

Counsel sought to persuade this Court to enlarge the meaning of "enactment" in section 127 so as to cover the SLPP Constitution. Political Parties Constitutions do not have the elements or nature of an "enactment." Counsel's contention is clearly untenable and I reject it.

[p.332]

I return to Section 124 of the National Constitution of Sierra Leone which, as I have said earlier, is relevant here. Mr. Halloway, vehemently argued that the Supreme Court has no jurisdiction, original or otherwise, to hear and determine the plaintiffs Originating Notice of Motion in this case. I set out the provisions of section 124 and as it will be clear from the wording of that section, I cannot accede to Counsel's contention. Section 124(1) states:

"124(1) The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction, to the exclusion of all other Courts—

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution; and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority or person by law or under this Constitution."

Under this constitutional provision, the Supreme Court has exclusive original jurisdiction "in all matters" relating to the enforcement or interpretation of any provision of the National Constitution. Apart from its strict constitutional jurisdiction in the enforcement or interpretation of any provision of the National Constitution, the Supreme Court is also clothed with an added power under this section. This power is what is commonly described as judicial review jurisdiction" and this is clearly borned out by the language of paragraph (b) of section 124(1). This power is more aptly described as constitutional review since it is exercised within the framework of a written constitution, conferring [p.333] power on the Supreme Court, the highest court of Sierra Leone, to rule legislative enactments invalid or unconstitutional. It is in this sense of the review jurisdiction of the Supreme Court that the expression "judicial review" is used in this judgment.

The other instance where the power of judicial review is manifested is where the courts exercise their power of review in respect of decisions of a judicial nature, of administrative bodies and inferior tribunals as in National Joint Council for Dental Technicians, ex parte Neate [1953], QB 704. We are not concerned with this second aspect of the review power of the courts in the present case.

The plaintiff seeks a number of declarations together with an injunction. The learned Chief Justice has dealt with them in his judgment. I need not go into them here, save to say that I agree with all that his Lordship has said and determined in respect of the orders sought by the plaintiff. Among the relief sought by the plaintiff in his Originating Notice of Motion, are orders to declare that certain provisions of the National Constitution, such as sections 35(2) and (4), 43(a) and (b) and 76(1)(h), had been contravened. These are matters to which section 124(1) of the National Constitution apply. This Court is invested with the power to hear and determine such claims of noncompliance with the National Constitution. The National Constitution of Sierra Leone established the Supreme Court and invested it with the jurisdiction to deal with complaints "in all matters" relating to the enforcement and/or interpretation of the National Constitution, such as those raised by the plaintiff. The Court cannot, therefore, deprive itself of that jurisdiction. The Court has jurisdiction under section 124(1) of the [p.334] National Constitution to hear and determine those matters relating to the enforcement or interpretation of the provision of the National Constitution. Whether or not the Court exercises that jurisdiction, is another matter. It is to that aspect of the case that I now turn.

The Plaintiff's locus standi

The plaintiff's contention is that, he has the standing to invoke the jurisdiction of the Supreme Court to hear and determine his claims as set out in his Originating Notice of Motion. The plaintiffs standing, Dr Bu-Buakei Jabbi of Counsel submitted, is based on his claim that he is a fully-paid up member of SLPP, an aspirant Presidential Nominee for 2007 Presidential Elections, and that he is a Law-abiding citizen who is keenly concerned to see that SLPP upheld the democratic principles and processes in its organization and functioning, ensuring compliance with the SLPP Constitution, Political Parties Act 2002 and the National Constitution. Mr. Halloway, on the other hand, submitted that the plaintiff has no locus standi to invoke the original jurisdiction of the Supreme Court in the present case. Counsel contended that the plaintiff who had already made known that he was an aspirant to be Presidential Nominee at the scheduled SLPP Conference, suffers no disadvantage over and above the other aspirants for the same position, nor did he has any right or interest peculiar to himself which could be said to be threatened by the holding of the said Party Conference and choosing of Presidential Nominee and/or Leader of the Party. Counsel relied on the case of Odhams Press Limited v London and Provincial Sporting News Agency (1929) Limited [1936] 1 All E.R. 217. In my respectful opinion, it is on this question of standing to invoke the jurisdiction of the Court that [p.335] presents the plaintiff with an obstacle which he must overcome. He must establish his standing to sue.

It is sometimes assumed that the Courts' jurisdiction can be invoked in a matter provided such jurisdiction exists. But as Stein pointed out in his work on locus standi; L.A. Stein (ed) Locus Standi (1979)3:

"Although the very existence of Courts as an institutional mechanism for dispute settlement might suggest that anyone could require that an issue be considered by the appropriate court, rules have been enunciated by Courts which confine the right to those persons possessing a certain interest in the issue."

In other words, a person seeking to invoke the power of the court to hear him must show his interest in the matter before the court. The court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties:

Brydges -v- Brydges and Wood [1909] P 187 CA.

The plaintiff is here seeking to invoke the original jurisdiction of the Supreme Court. The Supreme Court Rules 1982 do not expressly provide in what capacity a person is entitled to seek such relief from the Court. Rule 98, however, provides that in the absence of such rule, the High Court Rules shall apply. We must therefore turn to the High Court Rules.

[p.336]

O.21, r.5, of the High Court Rules permits this Court to make declaratory orders which are properly sought before the Court. The Rule provides;

"No action or proceeding shall be open to objection, on the ground that a mere declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not".

However, a party seeking such orders must still place himself properly before the Court. He must have the legal basis for doing so. See Guaranty Trust Company of New York v Hannay and Company (1915) 2 KB 536.

In the light of the abovementioned rule, what is the appropriate test of locus standi in Sierra Leone? The authorities are varied. They range from the traditional approach to standing which depended on the type of relief sought as found in the cases of Boyce -v- Paddington Borough Council, [1903] 1 Ch. 109; Pynx Granite Co. Ltd -v- Minister of Housing and Local Government [1960] A.C. 260; R -v- Thames Magistrates' Court; Ex parte Greenbaums (1957) 55 LGR 129; R -v- Cotham [1898] 1 QB 802; R -v- Guardians of Lewisham Union [1897] 1 QB 498; R -v- Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd [1924] 1 KB 171 to the new and more liberal approach based on the test of "sufficient interest" as stated in Inland Revenue Commissioners -v- National Federation for the Self-employed and Small Business Ltd [1982] AC. 617 ("the National Federation Case"). Thus prior to 1978 when, in England, the new Rules of the Supreme Court were made, the courts had used different tests of standing in cases of judicial review of the decisions of administrative bodies. These tests [p.337] are framed in various forms such "an aggrieved person" (as in the National Federation case) the term sometime used interchangeably with "an adversely affected person" (as in R -v- Guadians of Lewisham Union), or "a person who suffers or at a risk of suffering particular harm over an above all the rest of the public" (Boyce -v- Paddington Borough Council). The position now contended for by Counsel for the plaintiff in the present case is that this Court ought and should adopt and apply the liberal test of "sufficient interest" which was expressly laid down in O.53 r 3 (7) of English Supreme Court Rules and Section 31 (3) Supreme Court Act 1981 and now widely applied, not only by the English Courts, but by the Courts in other common law jurisdictions.

Long before the new O.53 of English Supreme Court Rules and Supreme Court Act 1981 came into existence in England, in the Australian case of Crouch -v- The Commonwealth (1948) 77 CLR 339 the High Court of Australia held that the claim by the plaintiff that his business was adversely affected by the need to obtain permits under an allegedly invalid law constituted sufficient interest entitling him to sustain the action. Unlike in the present case, the plaintiff in Crouch case challenged the validity of an Act of Parliament, the Defence (Transitional Provisions) Act 1946 which purported to control the disposition of cars by requiring the plaintiff to have permits to buy cars and to sell them only to persons who had permits to purchase cars.

In the Nigerian case of J.S. Olawoyn -v- A.G, Northern Region [1961] 2 SCNLR 5 the Court refused to grant a declaration because the plaintiff had not shown that he had an interest in the subject matter. The Federal Supreme Court of Nigeria dismissed the [p.338] plaintiffs appeal, holding that he had no sufficient interest in the matter to entitle him to seek a declaration from the Court. In the Papua New Guinea case of PNG Air Pilots -v- Director of Civil Aviation [1983] PNGLR 1, the Court found that the applicants had sufficient interest because they had a "real interest" in the matter (based on the PNG Air

Pilots Association objectives) which involved economic, contractual and other interests affecting their livelihood and day to day working lives.

In the present case, if this Court were to accept the liberal approach to the test of standing urged upon it by Dr Bu-Buakei Jabbi, the plaintiff must show, not only that he has a sufficient interest in the matter that he brings to the court, but that this liberal test of "sufficient interest" is the appropriate test to be adopted in Sierra Leone when invoking the Court's power under Section 124(1) of the National Constitution. No case decided by our Courts here had been cited by Counsel on this issue. However, when looking at the cases on the test of standing from other jurisdictions, it is clear that the position is not uniform. Thus, the Courts in Sierra Leone, in particular, the Supreme Court, will have to decide the path to follow on the standing of a party who seeks to invoke the review jurisdiction of the Court in Constitutional, as well as in administrative law disputes. The Court must do so based on legal grounds. My searches in the National Constitution, Statutes and Rules of Courts have not shown any express legislative formula in this jurisdiction for the liberal approach to standing as urged by Counsel.

Apart from the clear limited test to invoke the Courts jurisdiction under section 28 of the National Constitution, where an alleged contravention of the protective provisions of [p.339] the National Constitution "has been, is being or is likely to be in relation to him" (applicant), and the specific conferring of standing on the President under section 122(1) also of the National Constitution, the only other provision that is suggestive of standing is section 127(1). However, the application of section 127(1) is limited to challenging the validity or constitutionality of an enactment or things done under such enactment. The allegations raised by the plaintiff in the present case do not come within the bounds of section 127(1). It is therefore difficult to see the basis for the liberal approach to the test of standing as urged by Counsel.

Having said that, and in view of the nature of the complaints raised by the plaintiff in his originating Notice of Motion, the general tenor as to the approach to be taken by the Courts in Sierra Leone in such a case is one where the applicant must show that he has an interest in the subject matter before the court. That interest must be one that is personal to himself, and one in which he has been adversely affected by the actions complained of. A general interest which the applicant possesses, as in the present case, in common with all members of the public or in common with other members of a section of the community cannot confer standing on him.

The position is similarly found in Nigeria, as expressed in Senator Adesanya -v- President of Nigeria [1981] 2 NCLR 358; in the United States of America, in Massachusetts -v- Melon (1923) 262 US 447; and in India, in Dwarkadas -v- Sholapur Spinning Co. (1954) S.C.A 132, and A.I.R. (1954) S.C. 119; and Charanjit Lal -v- Union of India, A.I.R. (1951) S.C. 41. In another American case of Ex parte Levitt, 302 [p.340] US 633, the Court held that a citizen, though a member of the bar of the Supreme Court of the United States, had no standing to challenge the validity of an appointment of a Justice to the Supreme Court of the United States.

I come to this conclusion having regard to the provisions of the National Constitution and Rules of, both the Supreme Court and High Court, and in the absence of any express legislative formula in support of a

liberal approach to standing in Sierra Leone. In this regard, I joined Bello JSC in his cautionary stand on this question when he said Senator Adesanya -v- President of Nigeria, at 381:

"I prefer to be on the side of caution and consequently, in my view, the question of standing ought to be decided on the very narrow compass it has been canvassed before us. I endorse the method of gradual approach in constitutional matters so that each case will be decided on its particular facts and circumstances and after the issues involved have been ventilated by the parties to their disputes".

Further, I do not loose sight of the fact that in this case the plaintiff has come to this court in his own private capacity as a member of the SLPP seeking the various declaratory orders and an injunctive order against the defendants. It is therefore all the more incumbent on him to satisfy the Court that he has a justiciable interest which may be affected by the action of the defendants in holding the planned Party Conference and conducting the businesses of the Party during that conference or that he will suffer injury [p.341] or damage as a result of the defendants' action. Of course, whether the plaintiff has sufficient justiciable interest or has suffered damage or injury as a result of the action of the defendants depends on the facts and circumstances of the case. See Bengal Immunity Co. -v- State of Bihar (1965) 2 SCR 602; Frothingham -v- Mellon (1925) 262 US 447.

In the case now before us, the plaintiff is a fully paid-up member of the SLPP. He has made known to the Party that he is an aspirant to be Presidential Nominee and/or a Leader of the Party. He comes to this court in his personal capacity to seek the various declarations and an injunction against the defendants. What legal or equitable rights or justiciable interest does he have or suffer as a consequence of the defendants' action to entitle him to invoke the original jurisdiction of this court in the matter now before the Court? In my judgment and in the light of the authorities discussed in this judgment, the plaintiff does not have any right, legal or equitable, nor any justiciable interest to be protected so as to entitle him to the orders, declaratory or injunctive, which he seeks against the defendants. He therefore has no standing in the circumstances of the present case to invoke the jurisdiction of this Court under Section 124(1) of the National Constitution.

In passing I simply wish to add that when sections 34 and 35 of the National Constitution are read together with sections 6 and 27 of the Political Parties Act 2002, it should become obvious to the plaintiff as to the proper procedure of invoking the jurisdiction of the Supreme Court if he wishes to ensure that the SLPP which is a Party registered under the Political Parties Act and of which he is a member, does not contravene the provisions [p.342] of the National Constitution. I say no more. The learned Chief Justice has dealt with this aspect in his judgment with which I entirely agree. I wish only to add that one of the fundamental rules in administrative law in relation to judicial review is the question as to whether the applicant has exhausted other remedies provided by law. Generally, the judicial review jurisdiction will not be exercised if other remedies available have not been exhausted. See R -v- Epping & Harlow General Commissioners; Ex parte Goldstraw [1983] 3 ALL ER 257. The provisions of the Political Parties Act mentioned above, in my view, provide an aggrieved person such as the plaintiff, with the statutory machinery to deal with his complaints against the defendants over the organization, operation, functioning or conduct of the SLPP under its Constitution. The plaintiff has not done that in this case. Further, there was no suggestion that the available alternative administrative remedy under

the provision of the Political Parties Act was inadequate nor was it dispositive. It may well be viewed as an abuse of process to allow the plaintiff to first exhaust judicial remedies and then revert to explore the alternative administrative remedy. This is a factor also relevant to the exercise of the Court's discretion.

Thus even if I were to find that he has standing to come to this court, I would have refused the orders he sought in the exercise of the Court's discretion under the doctrine of Exhaustion.

In the light of all that I have said, I hold that the Supreme Court has jurisdiction to hear and determine the plaintiff's claims in so far as they relate to the alleged contravention of the provisions of the National Constitution. However, the plaintiff has no standing to [p.343] invoke that jurisdiction in the circumstances of the present case. Consequently, the originating Notice of Motion must be struck out.

I agree to the orders proposed by the learned Chief Justice.

SGD.

SIR JOHN MURA, JA.

[p.344-345]

KAMANDA JA:

In light of all that has been said before me, and in the interest of time, mine must of necessity be a short judgment. My Lords, I have had the advantage of reading in draft the judgments of the Learned Chief Justice, Hon. Dr. A.R.D. Renner-Thomas, and those of the other Hon. Justices of this Court. In view of the exhaustive analysis of the law and facts by the Hon. Chief Justice, with whom I agree, there is not much I can usefully add without running the risk of being repetitious. I, nonetheless crave indulgence to add a few words of my own.

[p.346]

The Plaintiff has come to this Court on two grounds: firstly, seeking an interim injunction restraining the 1st 2nd and 3rd Defendants from nominating, electing, selecting, choosing or identifying a Presidential Nominee and/or Leader of the Sierra Leone Peoples Party (SLPP) at their party convention scheduled for 19th to 20th August, 2005 pending the determination of a suit instituted through an originating notice of motion.

Secondly, the plaintiff by the said originating notice of motion is seeking relief in the form of Declarations to be made by this court on a number of issues, and an injunction in the terms I have referred to above. The matter of the said interim injunction has been mutually settled through the provision of an undertaking and cross-undertaking by the Defendants and the Plaintiffs respectively.

On the substantive matter instituted through the originating notice of motion, the Plaintiff has relied on several provisions of (i) the Constitution of Sierra Leone 1991, (ii) The Political Parties Act No. 3 of 2002, (iii) The Constitution of the Sierra Leone People's Party. He has also cited case law and a number of text

book authorities. All of these have been forcefully canvassed with great erudition and meticulous detail by Dr. Bu-Buakei Jabbie on behalf of the Plaintiff.

[p.347]

In my judgment, the subject matter of this action hinges on the answers to the following questions:

1. Does the Plaintiff have locus standi (or 'standing') in instituting this action before this court in its original jurisdiction?

2. Does this court have original jurisdiction to entertain the plaintiffs action?

It should be pointed out that the entire case of the Defendants is built on two limbs:

1. That the Plaintiff has no standing to institute this action, and

2. That this court lacks original jurisdiction in entertaining this action, and cannot therefore grant the reliefs sought by the Plaintiff.

For the reasons given by the Hon. Chief Justice regarding how the issue of standing and jurisdiction apply to each relief, it has not been necessary for me to delve into the merits of the plaintiff's case.

I will accordingly, and in agreement with the Hon. Chief Justice and other Hon.

Members of this court, strike out the originating notice of motion.

SGD.

HON MR. JUSTICE JON KAMANDA J.A

CASES REFERRED TO

1. Buraimoh Oloriode & Others v. Simeon Oyebi and Others (1984) 5 SC1 and Otapo v Sunmonu (1987) 2 NWLR 587

2. Guaranty Trust Company of New York v. Hannay & Company ((1915) 2 KB 536 at 563

3. Barraclough v. Brown [1897] A. C. 615

4. Severn Rural Sanitary Authority v Meredith (30 Ch.D. 387)

5. Guaranty Trust Company of New York v Hannay and Company

6. Attorney-General For New South Wales v. The Brewery Employees Union (1908)6 CLR 469

7. Gouriet v Union of Post Office Workers (1977) 3 WLR 300

8. Minister of Justice of Canada v. Borowski ([1981] 2 SCR 575

9. Thorson v Attorney-General of Canada (1975) 1 SCR 138

10. Nova Scotia Board of Censors v McNeil [1976] 2 SCR 265

11. Gupta v. Union of India, AIR 1982 SC 149

12. Wadwa v. State of Bihar, AI R 1987 SC 14

13. Senator Abraham Adesanya v. The President of Federal Republic of Nigeria and others ([1981] 2 NWLR 358

14. Nwanko v Nwanko (1995) 2 SCNJ 44

15. Yambasu and Ors. v. Ernest Bai Koroma & Ors. (S.C.3/2002 judgment delivered on the 22nd day of June 2004, unreported)

16. Taylor v. National Assistance Board [1957] 1 All E.R. 183 at 185, C.A

17. Amaghizenween v. Eguamwense (1993) 11 SCNJ 27

18. Ajakaiye v. Military Governor (1994) 9 SCNJ 102

19. Otugor Gamioba & Others VS Esezi II the Ongajie and Others 1961 2 SCN 237

20. Senate Abraham Ade Adesanya vs. The President of the Fedral Republic of Nigeria (1981) 2 N C L R

21. Russian Commercial and Industrial Bank v British Bank 1921 AC 438

22. Ohene More v Akassa Taye 2 WACA 43

23. Din v Attorney General of the Federation of Nigeria 1988 4 NWLR 147

24. Pyx Granite Co Ltd v. Ministry of Housing and local Government and Others 1960 AC P. 200

25. National Joint Council for Dental Technicians, ex parte Neate [1953], QB 704

26. Odhams Press Limited v London and Provincial Sporting News Agency (1929) Limited [1936] 1 All E.R. 217

27. Brydges -v- Brydges and Wood [1909] P 187 CA

28. Guaranty Trust Company of New York v Hannay and Company (1915) 2 KB 536

29. J.S. Olawoyn -v- A.G, Northern Region [1961] 2 SCNLR 5

30. Senator Adesanya -v- President of Nigeria [1981] 2 NCLR 358

STATUTES REFERRED TO

1. Political Parties Act, NO.3 of 2002

2. Constitutional Instrument No.1 of 1982

3. Order 25 rule 5 as found in the 1960 Annual Practice

4. The Constitution of Sierra Leone Act No.6 of 1991

SHEKI BANGURA AND THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[SCC 13/96] [p.38-53]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 13TH NOVEMBER, 2003

CORAM: MR. JUSTICE D. E.F. LUKE, C.J

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE H.M JOKO SMART, J.S.C

MR. JUSTICE M.O. ADOPHY, J.S.C

MR. JUSTICE S.C.E.WARNE, J.S.C.

Sheki Bangura — Plaintiff

And

The Attorney- General and Minister of Justice — Defendant

A.L.O. Metzger for the Plaintiff

And

L.M. Farmah for the Defendant

JUDGMENT

JOKO SMART, J.S.C.

I have had the advantage of reading the draft judgment of Warne J.S.C and I agree with his conclusion. However, bearing in mind the nature of the case and a difference of approach, I deem it fit to put in a few comments of my own.

The Plaintiff was elected a Member of Parliament for the Peoples Democratic Party in a Parliamentary General Election held in February 1996. He was sworn in as a Member of Parliament on 2 April 1996. On 8 April 1996, he was nominated by his Excellency the President for appointment as a Minister of

Development and Economic Planning. Section 56(2)(c) of the Constitution of Sierra Leone 1991(the Constitution) requires the nomination to be approved by Parliament. At a preliminary meeting of the Parliamentary Committee responsible for the interview of Ministerial nominees, it was decided, among other things, that the Plaintiff should furnish to the Committee at its substantive meeting on 10 April 1996, a letter of his resignation from Parliament. He was informed of this decision by the Clerk of Parliament. Accordingly, the Plaintiff wrote the letter of resignation as follows:—

"The Hon. Speaker of Parliament 10th April 96

Parliament Building

Tower Hill

Freetown.

Dear Mr. Speaker,

Following the announcement of my nomination by His Excellency the President as Minister of Planning & Economic Development and in compliance with the Provisions of the Constitution, I hereby tender my resignation from parliament as a Member of Parliament with immediate effect.

With sentiments of highest esteem.

Yours faithfully,

Hon. S. G. Bangura"

The Committee interviewed the Plaintiff on 11 April 1996 and did not recommend his approval to the full Parliament. Consequently, Parliament did nod not approve his nomination as required by section 56(2)(c) of the Constitution.

On 11 November 1996, the Plaintiff filed an originating Notice of Motion seeking the following reliefs pursuant to section 124(1) of the Constitution, namely:

1. For the following questions to be determined:—

(a) Whether upon the proper interpretation of section 56 of the Constitution of Sierra Leone 1991 the resignation of a member of Parliament from that body is a condition precedent to the consideration of his nomination for appointment as a Minister pursuant to the said section 56.

(b) Whether the Plaintiff/ Applicant is required under the provisions of section 56 of the Constitution of Sierra Leone 1991 or any other law to resign from his seat in Parliament before his nomination for appointment as a minister could be considered for approval by Parliament

2. The Plaintiff further seeks the following declarations:—

(a) That upon the proper interpretation of section 56 of the Constitution of Sierra Leone 1991, the resignation of a member of Parliament from that body is not a condition precedent to the consideration of his nomination for appointment as a Minister pursuant to the said section 56.

[p.40]

(b) That upon the proper interpretation of section 56 of the Constitution of Sierra Leone 1991 the Plaintiff was not obliged to resign his seat in Parliament before his nomination for appointment as Minister of Development and Economic Planning could have been considered for approval by Parliament.

The real questions for determination in this application are (1) whether “nomination” and “appointment” as used in section 56 of the Constitution have the same or different meanings. (2) whether a member of Parliament's resignation of his Parliamentary seat is a condition precedent to the consideration of the Member's approval by Parliament. (3) What is the stage at which a Member of Parliament who is considered for a Ministerial position should resign his/her seat in compliance with the Constitution.(4) What is the effect of the Plaintiffs resignation on 10 April 1996.

To answer these issues it is necessary to look at the relevant provisions of the Constitution.

Section 56(1) reads:

“There shall be in addition to the office of Vice-President such other offices of Ministers and deputy Ministers as may be established by the President

Provided that no Member of Parliament shall be appointed a Minister or Deputy Minister.”

Section 56(2)(c) states:

“A person shall not be appointed a Minister or Deputy Minister unless - his nomination is approved by Parliament.”

Section 77(1)(j) provides:-

“A Member of Parliament shall vacate his seat in Parliament – if he resigns from office as a Member of Parliament by writing under his hand addressed to the Speaker, or if the office of Speaker is vacant or the Speaker is absent from Sierra Leone, to the Deputy Speaker."

Section 94(2) stipulates:—

“Notwithstanding anything to the contrary in this Constitution or in any other law contained, no decision, order or direction of Parliament or any of its Committees or the speaker relating to the rules of procedure of Parliament, or to the application or interpretation of such rules, or any act done by Parliament or by the Speaker under any rules of procedure, shall be inquired into by any court.”

[p.41]

Let me first dispose of the proviso of section 56(1). It can have only one interpretation which is that a Member of Parliament must resign his seat before he can be appointed as a Minister or Deputy Minister. What the proviso contemplates is that a member of Parliament cannot retain his seat and accept an appointment as Minister or Deputy Minister but not a taking away of the right to serve his country in the Executive arm of government. Prior to the 1991 Constitution, Ministers and Deputy Ministers were appointed from Members of Parliament and they served in the dual capacity as members of the Executive and the Legislature. To ensure that there is complete separation of powers, the 1991 Constitution now requires a Member of Parliament to vacate his seat before he can be appointed to the Executive arm of Government.

Question 1.

Mr. Metzger argues strenuously that “nomination” and “appointment” as used in section 56 must be given the ordinary and popular meanings; accordingly the two words cannot be synonymous and are different. He refers to dictionary meanings of the terms. I have carefully looked at some of these dictionary meanings and have not found them helpful in resolving the difference as they seem to show that the two words are synonymous. Webster' s Dictionary defines nomination as “an act of appointing to an office” . The American College Dictionary says that nomination is “an act of appointing”. The Readers Digest Universal Dictionary defines the verb “nominate” as “designate or appoint to an office”. In my considered view, nomination for a position is only a proposal for that position whereas an appointment to it is an offer of the position to the nominee and an acceptance of it by him with or without other formalities as the case may be. In this respect, the two words are different.

Having said this, I agree with Counsel for the Plaintiff that nomination and appointment must be given their ordinary and popular meaning but with the proviso that the meaning is clear and precise. This is a well known canon of construction of statutes. But as is pointed out by Sowa C.J. in the Ghanaian case of Tuffor v.A.G [1980] GLR. 637 at 647-648,

“A written Constitution such as ours is not an ordinary Act of Parliament.

The Constitution has its letter of law. Equally, the Constitution has its spirit. Its language, therefore, must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.”

Indeed, it was the spirit and intendment of the 1991 Constitution to break away from the past and make the appointment of Ministers and Deputy Ministers a [p.42] bipartite process between the President and Parliament. The President nominates; the nomination is approved by Parliament after which the President appoints. I think that if the framers of the Constitution had contemplated the difficulty which nomination and appointment as used in section 56 would cause they would probably have used such adjective like “effective” before “appointment” and I so hold. In doing so, I am bound to construe section 56(1) ex visceribus actus with section 77(1) (j).

I am fortified in this conclusion by the judgment of Megaw J. in Tradax S.v. Volskwagenwerk [1969] 2 All E.R 144. This was a case of arbitration. The simple facts are as follows:— According to a clause in a charterparty between the parties, the plaintiffs were to appoint their arbitrator within three months of final discharge of their cargo. The final discharge took place on 15 December 1963. The defendants contended that the Plaintiff's claim was statute-barred since they had not appointed their arbitrator before 15 March 1964. On 27 January 1964, the Plaintiffs, had by telex informed the defendants that they were nominating Mr. Chesterman as their arbitrator. Mr. Chesterman learnt of his nomination from one Clyde nominated by the defendants. On 24 July 1964 the Plaintiffs wrote to Chesterman "we have taken the liberty of appointing you as our arbitrator". On 14 August 1964 Mr. Chesterman wrote back to the Plaintiffs saying "I thank you for your letter of the 24th July, and am pleased to accept appointment as your arbitrator". The issue was whether there was an appointment of Mr. Chesterman before 15 March 1964 or only on 24 July 1964. This was how Megaw J. resolved the question:—

"The word "appoint" has many different meanings in different contexts. In the context of this Controcon arbitration clause, I am satisfied that "appointed connotes "effectively appointed". A mere nomination, unknown to the appointee, is not an appointment of him. It does not become an "appointment" merely by being communicated to the other side. It becomes an "appointment" of him as arbitrator only when he is effectively in the position of an arbitrator, clothed with the duties and authority of such. That stage of effective appointment is not reached before he has been told that it is desired to appoint him in a particular matter and he has indicated his willingness to act in that matter."

There is no gainsaying the fact that the appointment of a Minister becomes effective only when he subscribes to the oath of office.

Question 2.

Mr. Farmah, Counsel for the Defendant, submits that resignation is a condition precedent before a Member of Parliament who has been nominated for a ministerial position can appear before the Parliamentary Committee for Approval. He argues that if the Member of Parliament does not resign his/her seat, the Member will be sitting as a member of a body to approve his/her own [p.43] appointment which, in his view, contravenes the principle of natural justice that a man cannot be a judge in his own cause. I see no breach of that principle in this case because there is no evidence that the candidate for approval sits as a member of the Committee nor does he vote for the approval of his candidature when the Committee's report is presented to the full Parliament.

Question 3.

As I have already held, an appointment is effective when the appointee has subscribed to the oath of office. Resignation should be contemporaneous with the swearing in ceremony. In order to ensure that there is no time lapse between the resignation and the swearing it is necessary that the clerk of Parliament should be present at the ceremony to whom the appointee should present his letter of resignation immediately followed by the oath of office. I propose the following guidelines for the transition from a parliamentarian to a minister:—

(i) Nomination by his excellency the President.

(ii) Appearance of the nominee before Parliament.

(iii)Approval of the nomination.

(iv)Resignation from Parliament immediately preceding the oath of office as Minister.

(v) Oath of office.

Question 4.

In his letter of resignation the reason given by the Plaintiff is that he has been nominated by the President for the position of Minister of Planning & Economic Development and that he is complying with the provisions of the Constitution. But in his affidavit of 4 February 1997, he deposed that his resignation came as a result of an information by the Clerk of Parliament that it was a requirement of the Constitution. Still, in his affidavit of 4 November 1997, the Plaintiff revealed that Mr. Metzger, his solicitor, advised that he was not required by the Constitution to resign at the time that he did. Much that I am in sympathy with the Plaintiff for this voluntary act of his, if he had consulted his solicitor and taken the appropriate action before he resigned, his seat in Parliament might not have been lost. He came to court too late. Granted that according to section 94(2) of the Constitution, this court cannot enquire into any act done or purporting to have been done by Parliament or by the Speaker under any its rules of procedure. But is the interpretation of the Constitution a question of the rules of procedure of Parliament.? It is definitely not. Duster of a court's jurisdiction is not a matter of course. For the court's jurisdiction to be ousted it must be clearly shown that a particular action falls within the ouster clause. This is not the case here. As I have said earlier,if the Plaintiff had come to court and sought a declaration or an order of certiorari, mandamus or prohibition immediately when he was confronted by [p.44] the Parliamentary Committee with an interpretation of the Constitution that was palpably wrong, there would have been a different story to tell. Parliament is not a court of law and has no power to interpret the Constitution as it purported to do in this case. In this regard I respectfully agree with the views of Kabazo Chanda J. in M'membe v. Speaker [1996] 1 LRC 584, 593 when faced with a similar situation in Zambia he said:

"My position is that this purported ouster of courts' jurisdiction only refers to matters which belong purely to the internal arrangements of Parliament, such as the date the House adjourns, cost-saving measures, power to remove strangers from the House, and a myriad of other internal administrative functions. Even here, however, the courts may intervene to settle a dispute between Parliament and any aggrieved individual who claim to have suffered grave injustice caused to him by Parliament."

[p.46]

WARNE J. S. C.

This is an application by an Originating Notice of Motion for the following reliefs pursuant to Section 124 (1) of the Constitution of Sierra Leone 1991. Namely:

1. (a) whether upon the proper interpretation of Section -56 of the Constitution of Sierra Leone 1991 the resignation of a Member of Parliament from that body is a condition precedent to the consideration of his nomination of appointment as a minister pursuant to the said Section 56.

(b) Whether Plaintiff/Applicant was required under the provisions of section 56 of the Constitution of Sierra Leone or any other law to resign from his seat in Parliament before his nomination appointment as a Minister could be considered for approval by Parliament.

[p.46]

2. For the following Declarations:—

(a) that upon the proper interpretation of Section 56 of the Constitution of Sierra . Leone 1991, the resignation of a Member of Parliament from that body is not a condition precedent to the consideration on his nomination as a Minister pursuant to said section 56.

(b) that upon a proper interpretation of Section 56 of the Constitution of Sierra Leone 1991 the Plaintiff/Applicant herein was not obliged to resign his seat in Parliament before his nomination for appointment as Minister of Development and Economic Planning could have been considered for approval by Parliament.

(Both parties filed their cases according to the provisions of the Rules of the Court)

The motion is supported by the affidavit of the plaintiff sworn to on the 8th day of November 1996.

Both sides have made submissions to the Court, which I will now consider.

Mr. Metzger, Counsel for the Plaintiff has repeated in his submission what is in the Motion and the case filed, that is to say - is the resignation by a member of parliament a condition precedent to his appointment as Minister by the President of the Republic? I will address this issue shortly. Counsel has invited the Court to consider the facts on Page 4 paragraph 5 of the record which states: that the said Committee required me to produce inter alia the following documents condition precedent to the said interview to wit:—

(a) “My letter of resignation from the office of member of Parliament. This was intimated to me by the Clerk of Parliament.”

Counsel again referred to Page 115 of the. Record- this is the statement of defendants/Respondents Case; and to Page 61 of the said record -This is an affidavit sworn to by the plaintiff/Applicant dated 18th day of November 1997.

[p.47]

Counsel submits that nomination and appointment do not mean the same thing. In support of his submission Counsel has referred to Craies on Statute Law 7th edition page 96 and rules in Raydon's case

on Statute Law Page 97 and several other local authorities Taylor v Sherif 1968/69 A.L.R (S.L.) Page 35 at 44.

Among the other authorities Mr. Metzger referred to are section 76 of the Constitution of Sierra Leone and section 77 of the said constitution; He also refers to sections 94, 120 and 124 of the said Constitution and finally the case of Tradex S - A. V Volkswagen Work 1968 A.E.R. 144 at 149.

In answer to the submission of Counsel for Plaintiff, Mr. Farmah, Counsel for the defendant urges Court to see Section 56 of the Constitution of Sierra Leone. Counsel submits that there is no law requiring the applicant to resign before his nomination is considered. He further submits that the applicant was required to resign his seat before appearing before the body for his appointment to be confirmed. Counsel submits that an M. P. under Section 56 is prohibited from being appointed to the office of a Minister vide Section 56 (1); appointment includes nomination and approval, he added. Counsel further submits that immediately after approval, he appointment is deemed to have taken effect. Counsel has urged on the Court that the applicant M. P. was under the provisions of section 56(1) and 56(11) and was not required to remain an M. P. – section 56 (1) would have been contravened.

Counsel submits, secondly, that the Plaintiff must resign before his appointment, because he was a member of a body, which was vested with a constitutional duty, to scrutinizing all nominees of the President for approval as- Minister. Counsel added that the duty that the constitution places upon Parliament shall be read under section 56 (2) (c) - that duty shall be discharged fairly and Parliament cannot approve it self.

[p.48]

Counsel went on to submit that in the circumstances where the appointment would have been made, an M. P., were he to appear before that body to be confirmed as a Minister would infringe natural justice.

In reply Mr. Metzger submits that appointment takes effect when the President administers the oath and issues the warrant. Counsel concluded that natural justice does not arise in this case and refers to the cases of San Med Co v Sparkman (1943) Z A. E. R. 337 at 343; Prapeye v Morgan 1968 – 69 A. L. R. 1 at 4, 11-18; Wilson v S.L. Ports Authority, 1968-69, AL R. 68-9. Supreme Court Rules 91.

This Originating Notice of Motion is supported by an affidavit sworn to by the plaintiff on the 8th November 1996.

In it the Plaintiff deposed in Paragraphs 2, 4, 5 the following:

“2 that I was elected a member of Parliament for the peoples Democratic Part (Sorbeh) in the General Parliamentary Elections held on the 26th and 27th of February 1996. A true copy of the notice of election issued by the Interim National Electoral Commission is exhibited here and marked S.G.B. 1.

3. that I was sworn in as a member of Parliament on the 2nd April 1996 and thereafter took my seat in Parliament.

4. that I was nominated by President for appointment as Minister of Development and Economic Planning on the 8th of April 1996 and thereafter invited to submit myself for an interview by the Appointments Public Service Committee of Parliament.

5. That the said committee required me to produce inter alia the following documents as condition precedent to the said interview to that:—

[p.49]

(a) My letter of resignation from the office of Member of Parliament: this was intimated to me by the Clerk of Parliament."

These Statements in the affidavit are supported by exhibit. Exhibit S. G. B. 1., which speaks for itself. Inter Alia it reads

"In accordance with Section 12 of the Electoral Provision Decree 1995, the Interim National Electoral Commission hereby notifies you, that as a result of the votes cast in favour of the List of Candidates put up by the People's Democratic Party (P D P) Sorbeh in the Parliamentary Election held on the 26th and 27th February 1996, and having regard to the position of your name on the list you have been elected as an Ordinary Member of Parliament".

There after, this exhibit attaches to the affidavit – Exhibit S G B 2 dated 10th April 1996, which is:

"The Hon. Speaker of Parliament

Parliament Building

Tower Hill

Freetown

Dear Mr. Speaker

Following the announcement of my nomination by His Excellency the President as Minister of Planning and Economic Development and in compliance with the provisions of the Constitution, I hereby tender my resignation from Parliament as' a Member of Parliament with immediate effect.

[p.50]

With sentiments of highest esteem

Yours faithfully

Hon. S. G. Bangura."

Let me here and now consider how a Member of Parliament vacates his seat in Parliament. This is provided for in section 77.

(I) of the Constitution of Sierra Leone Act No. 6 of 1991. There are several reason by which he can vacate his seat, inter alia

(a) if he resigns from office as a Member of Parliament ,by writing under his hand addressed to the Speaker, as if the office of the Speaker is vacant or the Speaker is absent from Sierra Leone, to the Deputy speaker."

The matter does not end here. The Constitution must be viewed as a whole to use if there is any provision by which a Member of Parliament can vacate his seat.

The Plaintiff has given a reason in his letter of resignation why he is vacating his seat. He states since it was announced that His Excellency the President has nominated him as Minister of Planning and Economic development, he was resigning his seat in Parliament in compliance with the Constitution. Is there any such provision? Section 56 (1) and (2). of the said Constitution makes provision for the President to appoint Ministers,

Section 56 (1) provides:

"There shall be, in addition to the office of Vice-President, such other offices of Ministers and deputy Ministers as may be established by the President."

[p.51]

Provided that no Member of Parliament shall be appointed a Minister or Deputy Minister."

In spite of the proviso to Section 56 (1) the Plaintiff was nominated for appointment as Minister.

Under section 56. (2) "A person shall not be appointed a Minister or Deputy Minister unless:—

(a) ……..…….

(b) ……..

(c) his nomination is approved by Parliament."

In this section two words have been used by the Legislature as if they are synonymous they are nomination and appointment. In my view they are not. It is quite clear, that since the nomination is to be approved by Parliament there cannot be an appointment by the President as a matter of course. What then is the position of the Plaintiff?

He was a Member of Parliament when he was nominated to be appointed a Minister. His nomination did not contravene the proviso to section 56 (I) of the Constitution. How Parliament conducts its business is not a matter to be investigated by the Courts. This is provided for by the Section 94 (2) of the Constitution of Sierra Leone No. 6 of 1991 "Section 94 (2) Notwithstanding anything to the contrary in this Constitution or in any other law contained, no decision order or direction of Parliament or any of its Committees or the Speaker, relating to the rules of procedure of Parliament, or to the application or

implementation of such rules, or any act done or purporting to have been done by Parliament or by the Speaker under any rules of procedure, shall be enquired into by any Court."

[p.52]

This subsection is quite clear and unequivocal. This brings me to paragraph 5 of the aforesaid affidavit of the Plaintiff - At the expense of prolixity, I shall repeat the paragraph.

"5. That is said committee require me to produce inter alia the following documents:

(a) My letter of resignation from the office of Member of Parliament; this was intimated to me by the Clerk of Parliament."

Let me here and now say that it is immaterial by what means the Committee sought to conduct its business. The Courts are precluded from inquiring into any such matter. This not a question of interpreting Section 94 (2). The provision is mandatory - i.e. "shall be inquired into by any Court".

Having said this I must now deal formally with the two questions raised in the Originating Notice of Motion.

In answer, to question (a) the resignation of a Member of Parliament from that body is not a condition precedent to the consideration of his nomination for appointment as a Minister pursuant to the said Section 56.

In answer to question (b) the Plaintiff was not required under the provision of section 56 of the Constitution of Sierra Leone 1991 or any other law, to resign from his seat in Parliament before his nomination for appointment as a Minister could be considered for approval by Parliament.

In this circumstance, I will grant the declarations prayed for.

[p.53]

The letter of resignation of the Plaintiff as a Member of Parliament is well within his competence. The declarations which have been granted do not, in my view, affect the resignation by the plaintiff of his seat in Parliament.

This, I opine, is an incontrovertible fact.

Judgment accordingly.

[Sgd.]

SYDNEY WARNE

J.S.C.

CASES REFERRED TO

1. Tuffor v.A.G [1980] GLR. 637 at 647-648

2. Megaw J. in Tradax S.v. Volskwagenwerk [1969] 2 All E.R 144

3. M'membe v. Speaker [1996] 1 LRC 584

4. Taylor v Sherif 1968/69 A.L.R (S.L.) Page 35 at 44

5. San Med Co v Sparkman (1943) Z A. E. R. 337 at 343

6. Prapeye v Morgan 1968 - 69 A. L. R. 1 at 4, 11-18

7. Wilson v S.L. Ports Authority, 1968-69, AL R. 68-9

STATUTE REFERRED TO

1. Constitution of Sierra Leone Act No. 6 of 1991

TAMBA BRIMA AND THE PRESIDENT OF THE SPECIAL COURT v THE REGISTRAR OF THE SPECIAL COURT AND THE PROSECUTOR OF THE SPECIAL COURT AND THE ATTORNEY GENERAL AND MINISTER OF JUSTICE

[SC. MISC. APP. 3/2005] [p.158-165]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 26TH DAY OF APRIL 2005

CORAM: DR. JUSTICE ADE RENNER-THOMAS, C.J.

MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE TOLLA-THOMPSON, J.S.C.

MR. JUSTICE SIR JOHN MURIA, J.A.

IN THE MATTER OF AN APPLICATION FOR JOINDER OF THE PARTIES PURSUANT TO RULE 98 OF THE SUPREME COURT RULES PUBLIC NOTICE NO.1 OF 1982 AND ORDER 12 RULE 1 OF THE HIGH COURT RULES CAP 7 OF THE LAWS OF SIERRA LEONE 1960 AND RULE 89 (5) OF THE SUPREME COURT RULES PUBLIC NOTICE NO. 1 OF 1982

BETWEEN

TAMBA BRIMA -APPLICANT

AND

THE PRESIDENT OF THE SPECIAL COURT AND

THE REGISTRAR OF THE SPECIAL COURT AND

THE PROSECUTOR OF THE SPECIAL COURT - RESPONDENTS

AND

THE ATTORNEY GENERAL AND MINISTER OF JUSTCE

Hearing: 15 March 2005

Ruling: 26 April 2005

Advocates:

Ms. Glena Thompson for the Applicant.

Attorney-General with L. M. Palmer and E. Roberts for Respondents

[p.159]

RULING

MURIA JA

The applicant, Tamba Brima, is one of those among a number of indictees charged with crimes against international humanitarian law and Sierra Leonean law committed during the armed conflict in Sierra Leone on various occasions between 1997 and 1999. Two other Special Court indictees are Issa Hassan Sesay aka Issa Sesay and Moinia Fofanah who have now instituted proceedings in this Court, in SC.No.1/2003 against the establishment of the Special Court. These two indictees have also being indicted for crimes against international humanitarian law and Sierra Leonean law committed during the said armed conflict. The applicant now asks that he also be added as a plaintiff in the action S.C. No.1/2003.

The reasons for bringing this application were contained in the applicant's affidavit in support sworn to and filed with the application. It is a very scanty affidavit and basically it says that it is in his interest that he, the applicant, ought to be made a party as any decision of this Court would have impact on him. Ms. Thompson of Counsel for the applicant sought to rely on O.12 r1 of the High Court Rules and Rule 89(5) of the Supreme Court Rules. I accept that where matters are brought before the Supreme Court and no provision has been [p.160] expressly made to deal with such matters, Rule 98 of the Supreme Court Rules 1982 permits resort to the High Court Rules.

Respectively the two provisions relied on by Counsel are as follows:

“O.12, r1 — All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise.”

and

“Rule 89(5) — The Court may at any time on its own motion or on the application of a party, order that any other person be made a party to the action in addition to or in substitution for any other party”.

0.12, r1 of the High Court Rules follows closely the old English Rules 0.16 r 1 which permits a person to be joined as a plaintiff "in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist." The power to order such a joinder is, of course, discretionary. No automatic right to be joined as a plaintiff is conferred on a person in the circumstances described in 0.12 r 1 of the High Court Rules or its predecessor

R.S.C. 0.16 r 1 as pointed out by Scrutton LJ in Horwood v New Statesman Pub. Co. Ltd 141 L.T. 57.

Thus the power to add a party in an action exists under 0.12, r1 of the High Court Rules and it is discretionary. As it is not an automatic right to be added as a party, it must be shown that the person to be added is a necessary party for the [p.161] determination of the issues before the Court. To use the words of Blackburn J in De Hart v Stevenson (1876) 1 QBD 313 at 314, it must be shown that “the presence of the other plaintiffs is necessary in order to enable the Court effectually and completely to adjudicate and settle the questions involved in the action.”

0.12, r 11 is similarly worded. It provides, that:

“the names of any parties whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added.”

The question that must be asked is: Is it necessary that the applicant be joined as a party in the matter intituled SC. No.1/2003 between Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondowa and Moinia Fofana (Plaintiffs) and Defendants who are the respondents in this application? There has been divergence of views on the construction of what was then 0.16 r 11 of the English Supreme Court Rules 1961 which is 0.12 r 11 of our High Court Rules. The cases of Amon v Raphael Tuck and Sons Limited [1956] 1 All ER 273; [1956] 1 QB 357 and Fire Auto and Marine Insurance Company Limited v Greene [1964] 2 QB 687 had taken a narrow construction of the Rule. On the other hand the Courts in Gurtner v Circuit [1986] 1 All ER 328 and Re Vandervell Trusts [1969] 3 All ER 496 have taken a more liberal view of the Rules on who should be added as a party to an action. However, despite' the divergence of views as to the application of the rule, it is, clear from the cases that the legal principles [p.162] applicable to parties to an action have not changed with regard to the necessity for having before the Court the proper parties necessary for the Court effectually and completely to adjudicate and settle the question involved in the

action: See Att. Gen. v. Pontypridd Waterworks Co. [1908] 1 Ch. 388; see also Long v Crossley (1879) 13 Ch.D. 388.

To return to the question posed earlier, it is important for the applicant to show not only that he has an interest in the matter now pending before the Supreme Court in S.C No.1/2003, but that his presence before the Court as a party is necessary in order to enable the Court effectually and completely to determine the issues now before the Court. As stated by Devlin J in Amon's case, [1956] 1 All ER. at p. 287; [1956] 1 QB at p.380:

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

Each case, however, must be decided on its own facts. It is not desirable to propound general propositions in matters such as this, beyond what is necessary for the determination of the particular case, as observed by Lord Diplock in Gurtnar v Circuit, at p.336. In that case the Motor Insurer's Bureau were added as a party (defendant) because the rules of natural justice demanded that "all those who will be liable to satisfy the judgment are given an opportunity to be heard", and the Bureau were clearly such persons in that case. It was therefore necessary that the Bureau be added as a party.

[p.163]

In Re Vandervell Trusts (above) the Court also applied the wide construction of O.15 r6 which was substantially the same terms as the old O.16 r 11. Lord Denning MR said at 499:

"We will in this Court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so."

The necessity to join the Commissioners of Inland Revenue in that case was obvious. There were issues of surtax, estate duty and stamp duty which arose and must be determined as between the executors and commissioners of Inland Revenue. These issues necessitated the addition of the Commissioners as a party. As Sachs, LJ pointed out, at p.501:

"It would indeed be no tribute to our legal system if those issues could not be determined in the course of a single set of proceedings as between the executors, the trustees and the Commissioners."

Surely, as the Court found in that case, it must be just and convenient to add the

Commissioners as a party in the circumstances obtained in that case.

Bearing in mind the principles stated in the authorities cited, is the addition of the applicant as a party in SC,No.1/2003 necessary to effectually and completely decide the issues raised in that case? Is it just and convenient to add him as a party? Should he be added as a party under the rules of natural justice? There [p.164] are no issues raised by the applicant against the respondent. Presumably he relies on the

same issues as those raised by the plaintiffs in S.C. No. 1/2003. He simply wishes to be a party (obviously upon advice) since he was one of the detainees at the Special Court of Sierra Leone.

In those circumstances, even on the authorities of Gurtner v Circuit or Re Vandervell Trust, it would be difficult to say that the applicant is a necessary party and that he ought to be joined in the case now pending before the Supreme Court in SC NO.1/2003. His presence in Court in the case is, in any judgment, not necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in that case. In fact the applicant's interest in the matter will be sufficiently represented by the plaintiff's in the case, since they have the same interest particularly in the outcome of the case. In such a situation De Hart v Stevenson (above) says that another party, such as the present applicant, will not be added.

Although rule 1 of 0.12 permits a party to be added, the requirements under rule 11 of that Order must also be satisfied. The power to add a party in a case or matter before the Supreme Court is that provided under rule 89(5) of the Supreme Court Rules 1982. That power is discretionary and the Court may refuse to add a party whose presence in Court is not necessary. The present application is such a case where the discretion-of the Court can be so exercised. [p.165]

In the circumstances of the present case, the applicant cannot be said to be a necessary party and his application to be joined as a party (plaintiff) must be refused.

[Sgd.]

I agree

Hon Chief Justice Dr. Ade Renner-Thomas

[Sgd.]

I agree

Hon. Justice Thompson-Davies JSC

[Sgd.]

I agree

Hon. Justice Virginia-Wright JSC

[Sgd.]

I agree

Hon. Justice Tolla-Thompson JSC

CASES REFERRED TO

1. Horwood v New Statesman Pub. Co. Ltd 141 L.T. 57

2. SC. No.1/2003 between Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondowa and Moinia Fofana

3. Amon v Raphael Tuck and Sons Limited [1956] 1 All ER 273; [1956] 1 QB 357

4. Fire Auto and Marine Insurance Company Limited v Greene [1964] 2 QB 687

5. Gurtner v Circuit [1986] 1 All ER 328

6. Re Vandervell Trusts [1969] 3 All ER 496

7. De Hart v Stevenson (1876) 1 QBD 313

8. Horwood v New Statesman Pub. Co. Ltd 141 L.T. 57

STATUTE REFERRED TO

1. Constitution of Sierra Leone Act No. 6 of 1991

2. Rule 89(5) of the Supreme Court Rules

THE OWNERS OF THE SHIP "M.V. MACSHO STAR" v. RICHAB S. A. & ANOR

[SC.CIV. APP. 5/2000] [p.227-228]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 1 JUNE 2005

CORAM: HON. MR. JUSTICE S.C.E.WARNE, J.S.C.

HON. MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

HON. MR. JUSTICE M.E.T. THOMPSON, J.S.C.

HON. MR. JUSTICE A.N.N. STRANGE HON, J.A.

HON. MRS. JUSTICE UH. TEJAN-JALLOH, J.A.

THE OWNERS OF THE SHIP "M.V. MACSHO STAR" — APPELLANTS

AND

RICHAB S. A. & ANOR — RESPONDENTS

A.J.B. Gooding Esq., for the Appellants

N.C. Browne-Marke Esq. for the Respondents

WARNE JSC.

Counsel for the Appellants is asking this Court to deliver a ruling on a preliminary objection, which was not made, before this Court. Is this Court competent to deliver such a ruling? In answer to this question, I will refer to the Constitution of Sierra Leone Act. No 6 of 1991. The Supreme Court is a creature of statute and its composition and jurisdiction are spelt out by the said Constitution, We are well aware that the Supreme Court is the most senior Court in the State and its decision, binds all other inferior Courts We certainly do not have to be reminded that it is the highest Court in the Land. Be that as it may, I will consider some of the relevant sections of the Constitution of Sierra Leone touching and concerning the Supreme Court.

Composition Section 120 (1) provides:—

(a) The Chief Justice

(b) Not less than four other Justices of the Supreme Court and

[p.228]

(c) Such other Justices of the Superior Court of Judicature or of the Superior Courts in any State practising a body of laws similar to Sierra Leone not being more in number of Justices of the Supreme Court sitting as such as the Chief Justice may for the determination of any particular case or matter by writing under his hand request to sit in the Supreme Court may specify or until the request is withdrawn (emphasis mine)

2. The Supreme Court shall save as otherwise provided in paragraph (a) of Sub-section (6) of section 28 and section 126 of this Constitution be duly constituted for the dispatch of its business by not less than three Justices thereof" (emphasis mine)

These provisions are very clear and unequivocal. In my view who requests who sits in the Supreme Court at any time? It is the Chief Justice.

This Court has been requested to hear and determine the appeal Se. CIV. App 6/2000. Counsel for the Appellants is urging the Supreme Court to give a ruling on a preliminary objection on certain grounds of appeal. This Court as composed, is not competent to give a ruling on a matter of which it is not seised neither was the preliminary objection argued before it? Practice Directions not withstanding Counsel has quoted several legal authorities but are they relevant to the present issue? I say no. With respect r am of the view that the whole exercise has been an academic excursion.

Litigation must come to an end. The Respondents cannot be deprived of the decision of the Court of Appeal in definitely. I hasten to observe that this exercise in my opinion is an abuse of due process, This, the Supreme Court ought not to encourage and will not encourage I therefore order that the appeal shall proceed.

SGD.

S.C.E. WARNE

THE OWNERS OF THE SHIP "M.V. MASHO STAR" v. RICHAB S.A. AND ANOR.

[CC. AP. 6/2000] [p.229-231]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 5 JULY 2005

CORAM: HON. JUSTICE S.C.E. W ARNE, J.S.C.

HON. MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

HON. JUSTICE M.E. TOLLA-THOMPSON, J.S.C.

HON. JUSTICE U.M. TEJAN-JALLOH, J.A.

HON. JUSTICE AN.B. STRONGE, J.A.

BETWEEN:

THE OWNERS OF THE SHIP "M.V. MASHO STAR"

AND

RICHAB S.A. AND ANOR.

A. J. GOODING ESQ. AND BERTHAN MACAULEY ESQ. FOR THE PLAINTIFFS N. BROWNE-MARKE ESQ. FOR THE RESPONDENTS

V. A. D. WRIGHT J.S.C

On the 17th March 2005, A. J. Goading Esq, stated that at the last hearing on the 2nd February 2002 this case was adjourned for ruling pursuant to a preliminary objection dated 1st August 2002 after being argued by both sides.

N.B. Browne Marke Esq. said that he was before the court for the appeal to be argued to which A. J. Gooding replied that this court is not properly constituted to proceed with the pending appeal since this preliminary objection was heard by a panel of five judges who adjourned the preliminary objection proceedings for a ruling. The original panel has been reduced by the retirement of two judges and a new panel of five judges including three judges of the original panel has been empanelled to proceed with the appeal. He submitted that even though one or two of the Judges no longer sit on the panel of the court that was dealing with a particular matter so long as the arguments have been completed the

Supreme Court has jurisdiction to deliver the judgment or ruling. He further said that the consensus of the authorities is that in the Appellate Court the diminution of the panel by death or otherwise ought not to prevent the delivering of judgment/ruling. He cited a list of authorities including Hallam 1930 47 TLR 207 Re Leslie 1883 23 CLD P.559 and the ruling dated 23rd .March 2005 in S C. CIV.APP.5/2000. In the matter of Precious Mineral Marketing (Sierra Leone Ltd.) and Minerals Marketing Company (S.L.) Ltd unreported to establish that a judgment/ruling can be given by three Judges even though a panel of five judges heard the arguments.

N. B. Browne-Marke Esq. for the Defendants submitted that the panel of three remaining judges cannot deliver the ruling.

[p.230]

Learned Counsel further referred the Court to sections 122(2) and 126 of the Constitution 1991 Act NO.6 of 1991 and stated that all five justices should deliver the ruling. He also referred to section 120 of the Constitution and stated that the Supreme Court can depart from its own previous decision.

To my mind the question that is to be resolved is whether the present panel is properly constituted to proceed with the appeal without the resolution of the preliminary objection proceeding.

The preliminary objection dated 2nd July 2000 was argued before the original panel on various dates and adjourned for ruling. Since Ruling had yet to be delivered it is a pending interlocutory matter which needs to be resolved.

The relevant sections of the Constitution that have been referred to during the argument, these are sections 121(2), section 122(3) and 26(a) of the Constitution of Sierra Leone 1991 (Act No. 6 of 1991).

It is not uncommon for the machinery of Justice to experience break down by death resignation and removal. In the absence of specific provisions in the Rules of the Supreme Court: to cater for such eventualities resort will have to be made to other sources to enable us to resolve the issue.

From the authorities cited the death or otherwise of one of the members of the panel ought not to prevent the delivering of judgment/ruling. This is re enforced by section 40 of the Interpretation Act 1973, Lord Robert Megarry in a chapter under the rubric "a unanimous Dissent", in his book A second Miscellany-at-Law exhaustively dealt with the issue of death, resignation, elevation and retirement of members of a panel in Court.

He said "The difficulty of ascertaining whether a written judgment represents the judge's final views will not normally apply where the judge has not died but merely resigned: and in one such case after the retirement of Hill J. his reserved judgment was by consent, read by Lord Merriva1e P. See Hallam vs. Hallam (1930) 47 T.L. 207 and Re Leslie (1883) 23 Ch D 552 at page 559 where Pearson adopted as his own judgment of Fry. who had became L.J.

In Volume 10 3rd Ed Halsburys Laws of England paragraph 830 under the rubric death of a judge 2nd paragraphs reads — where one of the members of an appellate Court dies after the hearing but before

judgment has been delivered, it would seem that a Judgment written by his deceased members before death may be adopted by one of the other members as his own, if it is to stand as part of the decision of the Court.

I have considered sections 121 (2), 122(3) and 126 of the Constitution of Sierra Leone Act No. 6 OF 1991. In the case of CV. APP. 5/2000. In the matter of Precious Mineral Marketing Company (Sierra Leone) Ltd and Precious Minerals Marketing Company (Sierra Leone) Ltd. unreported in which a panel of five judges heard the arguments and [p.231] the panel was reduced by the the death of the late Hon. Justice Adophy and the retirement of the Hon. A.B. Timbo yet the ruling was delivered by the remaining three judges.

I therefore do not see any reason for this court to depart from its previous decision when this matter is similar to this one.

I am re-enforced by the decision in Hallam v Hallam cited above. I am further strengthened by SC. Civ. App No4/88 Rokel Resources (S.L.) Ltd. vs. Bittanol International Trading Company and Associates delivered on the 31st May 2005 unreported, in which two of the five judges are dead, and a retired judge concurred to the judgment.

For the reasons given I hold that the remaining judges in the original panel could deliver the ruling. Let me however state that in my opinion had Counsel for the defendants asked the Court to withdraw the preliminary objection before the appeal is heard then, the question of delivering a ruling would not have arisen.

SGD.

JUSTICE V. A. D. WRIGHT J.S.C.

I agree

SGD.

A. N. BANKOLE STRONGE J A

CASES REFERRED TO

1. Precious Mineral Marketing (Sierra Leone Ltd.) and Minerals Marketing Company (S.L.) Ltd S C. CIV.APP.5/2000 (unreported)

2. Re Leslie 1883 23 CLD P.559

3. Hallam vs. Hallam (1930) 47 T.L. 207

4. Rokel Resources (S.L.) Ltd. vs. Bittanol International Trading Company and Associates delivered on the 31st May 2005, SC. Civ. App No4/88 (Unreported)

STATUTES REFERRED TO

1. Constitution, 1991 Act No.6 of 1991

2. section 40 of the Interpretation Act 1973

THE PRESIDENT OF THE SPECIAL COURT & 3 ORS. v. ISSA HASSAN SESAY ALIAS ISHA SESAY & 2 ORS.

[SC 1/2003] [p.148-226]

DIVISION: SUPREME COURT, SIERRA LEONE

CORAM: MR. JUSTICE DR. A.B. TIMBO, C.J.

MR. JUSTICE M.E.T. THOMPSON, J.S.C.

MR. JUSTICE E.C. THOMPSON-DAVIES, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE SIR JOHN MURIA, J.A.

THE PRESIDENT OF THE SPECIAL COURT 1ST DEFENDANT/APPLICANT

THE REGISTRAR OF THE SPECIAL COURT 2ND DEFENDANT/APPLICANT

THE PROSECUTOR OF THE SPECIAL COURT 3RD DEFENDANT/APPLICANT

THE ATTORNEY GENERAL & MINISTER OF

JUSTICE 4TH DEFENDANT/APPLICANT

AND

ISSA HASSAN SESAY ALIAS ISHA SESAY 1ST PLAINTIFF/RESPONDENT

ALLIEU KONDOWA 2ND PLAINTIFF/RESPONDENT

MOINNINA FOFANA 3RD PLAINTIFF/RESPONDENT

TOLLA THOMPSON JSC

[p.149]

RULING

My Lords,

I have had the opportunity and the privilege of reading the draft ruling of my Lord the Chief Justice. I agree with him. I only wish to add a few words of my own.

This application came before us by notice of motion dated 16th day of July, 2004 for the following orders:

1. An enlargement of time within which to file the statement of the defendant's case.

2. That the statement of the defendant case already filed, herein remains on the record of this Honourable Court notwithstanding that the same were filed out of time.

3. Any other orders as this court may deem fit and expedient.

This application is supported by the sworn affidavitly by Joseph Gomoi Vandi Kobba and filed therein. In answer the respondent filed a sworn affidavit by Charles Francis Margai opposing the application.

The application is brought before this court pursuant to Rule 92(1) of the Supreme Court Rules.

The Argument

Mr. Eke Halloway the then Learned Attorney General for the applicants in his argument submitted that he relies on the affidavit in support of the application in its entirety, he further went on to submit that the substantive motion brought to this court by the plaintiff/respondent is a constitutional issue with an international connotation. It is therefore in the public interest for this court to adjudicate on it.

Mr. C.F. Margai Learned Counsel for the plaintiff/respondent opposing the application submitted that the Learned Attorney General in his affidavit has failed to advance cogent reasons for the delay and referred to the affidavit in opposition to support his submission. He urges this court to refuse the application.

Allow me to digress a little to make two preliminary observations. The first is that the Learned Attorney General omitted to apply for leave for enlargement of time on the notice of motion. The second is that in perusing the affidavit in support and in opposition I detect some degree of negligence in the preparation and compilation of these documents. For example the affidavit in support was not properly numbered; the numbering came from paragraphs 5 to 8 leaving out numbers 6 and 7. In the affidavit in opposition one of the exhibits “CFM2” - affidavit of service is dated 10th December 2001 instead 10th December 2003.

It must not be forgotten that the Supreme Court is the ultimate court in the hind and those who choose to come to it should thoroughly go over their papers before presenting them. Having said this I shall continue.

[p.150]

The Issue

This application brings into focus the courts power under rule 92(1) of the Supreme Court Rules 1982.

Rule 92(1) states:

“A defendant upon whom a notice of motion and statement of the plaintiffs case are served shall if he wishes to contest the case within ten days of such service or within such time as the court upon terms may direct file a statement of the defendants case which shall be signed by the defendant or his counsel”.

The sentence in the above rule pertinent to this application is “within such time as the court upon terms my direct”. For this sentence to have any meaning and escape from any ambiguity, I will be right to say it is a directory provision indicating the courts power to enlarge time within which to comply with Rule 92(1) on condition stipulated by the courts. It follows therefore that an applicant seeking to invoke the courts power under Rule 92(1) has to give reasons for his failure to file the statement of the defendant case within ten days as stipulated by Rule 92(1), He has now come to the court asking for more time by giving reasons in the various avernments in his affidavit in support of the application.

It is a general rule that a court will grant a “Time Order” when it appears just to do so. It will appear just to do so after due consideration of the evidence and the circumstances of the case. Will J. in interpreting the expression “just” in re. an application under the solicitors Act 1843 (1899) 80 LT p.720 had this to say.

“It must mean that which is right and fitting with regard to the public interest”.

This principle is founded upon good sense and justice. I am persuaded by it.

I have considered the submissions of Learned Counsel. I have also perused the affidavit in support and in opposition to the application.

It is obvious to me that there is tardiness on the part of the applicant in filing the statement of the defendant's case considering the eye catching importance of the substantive motion taken out by the respondents herein.

Generally, delay ought not to be countenanced if there are good reasons for such a delay as it will be compensated by the payment of cost. The court will however refused an application for the extension of time where such delay will cause irreparable hardship to the other party. See Attwood vs. Chichester 3 P. BD. p728.

I agree with Mr. Margai cogent reason must be advanced to explain the delay. This onus is not only confined on the applicant it is also the law that in objecting to an application cogent reason must also be advanced. See Sabrah v. Governor 1957-60 ALR (SL) 728.

I now turn to the affidavit in support of this application. The avemments which I think are Germane to this application can be found in Paragraphs 4,8,12 and 17.

[p.151]

Paragraph 4 states:

“That on or about the 25th of June 2004 the Principal Assistant to the Registrar of the Supreme Court informed me and I verily believed that the statements of the defendants case have not been filed”.

Paragraph 8 states:

“That in the circumstances I requested a copy of the statement of plaintiff case from the Principal Assistant to the Registrar of the Supreme Court which he gave me to enable me to prepare and file the statement of the defendant case”.

Paragraph 12 states:

“That I see a letter dated 8th December 2003 requesting the office of the Attorney General's assistance in the action herein - a Photostat copy of the said letter is now produced and shown to me marked exhibits “JGK 5”

Paragraph 17 states:

“That in the premises aforesaid and having regard to the fact that this is a constitutional issue of public importance the interest of justice will best be served by granting the several orders in the notice of motion filed herein.

I see a significant inconsistency in the avernments in paragraphs 4, 8 and 12. The duty of the Registrar of the Supreme Court in matters of this kind is clearly defined in Rule 91 of the Supreme Court Rules. In my judgment the avernments in paragraph 4 and 8 are of no moment. Indeed the applicant denied that he was not served by the respondent. He should have been put on his inquiry by paragraph 12 of his own very affidavit exhibiting “JGK5” the letter dated the 8th December from the 1st 2nd and 3rd applicants.

I therefore find it reluctant to justify the applicant delay in filing the statement of the defend case. However I shall consider this application in the light of the avernment in paragraph 17 of the affidavit in support.

I agree the substantive motion raises constitutional issue with an international connotation. In this regard I think this application ought to be granted.

In the result I grant the Orders prayed for in the notice motion.

CASES REFERRED TO

1. Attwood vs. Chichester 3 P. BD. p728

2. Sabrah v. Governor 1957-60 ALR (SL) 728

STATUTES REFERRED TO

1. Rule 92(1) of the Supreme Court Rules

2. Act 1843 (1899) 80 LT p.720

THE SIERRA LEONE BAR ASSOCIATION v. THE ATTORNEY GENERAL AND MINISTER OF JUSTICE

[SC.2/2002] [p.8-53]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 18 DECEMBER 2002

CORAM: DR. JUSTICE A. B. TIMBO, C.J.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE S.C. E. WARNE, J.S.C.

MR. JUSTICE E.C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M. O. ADOPHY, J.S.C.

THE SIERRA LEONE BAR ASSOCIATION - PLAINTIFF

AND

THE ATTORNEY GENERAL ANDMINISTER OF JUSTICE - DEFENDANT

RULING

TIMBO C.J.

At the hearing of the Originating Notice of Motion dated 28 June 2002 (SC.2/2002) Mr. Berthan Macauley Jnr. sought leave to use a supplemental affidavit filed on the 7 October 2002 further verifying the statement of Plaintiff's case. Attached to the said Affidavit are copies of Government Notices No.316, 217 & 396 published in the Sierra Leone Gazette Nos. 49 and 53 dated Tuesday 6 August 2002 and Wednesday 28 August 2002 respectively and marked YHW. 5A & B.

Dr. Ade Renner Thomas for the 2nd Respondent opposed the application on the ground that what Counsel for the Plaintiff was seeking to do was infact to amend the statement of the Plaintiff's case. If he was correct in his contention then Mr. Berthan Macauley Jnr. should have applied under rule 93 of the Supreme Court Rules (P.N. No.1 of 1982) to do the necessary amendments. By this rule "A Notice of Motion or Statement of the Plaintiffs case or the Defendant's case, as the case may be may at any time with the leave of the Court be amended on such terms as the Court may determine"

In reply, Mr. Berthan Macauley Jnr. submitted that the two documents he sought leave to use referred to acts done by His Excellency the President on the 24 May 2002. He contended that such acts only came to his knowledge after they had been published in the [p.9] gazette on the 6 and 28 August

respectively by which time he had already filed the Notice of Motion together "with the Statement of the Plaintiff's case and the verifying affidavits. He could not therefore have known the existence of those facts until their publication in the gazette. And as they form part of the Plaintiff's case, he should be allowed to use them.

We here considered the submission of both we are of the opinion that Counsel for the Plaintiffs seeks to effect here is an amendment of the Plaintiff case within rule 93.

In these circumstances we will refuse the application and it is accordingly refused,

Signed

A.B. Timbo, C.J.

I agree

V.A.D. Wright, J.S.C

I agree

S.C.E. Warne, J.S.C.

I agree

E.C. Thompson-Davis, J.S.C.

I agree

M. O. Adophy, J.S.C.

STATUTE REFERRED TO

1. Supreme Court Rules (P.N. No.1 of 1982)

THE SIERRA LEONE BAR ASSOCIATION v. THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE & EKE AHMED HALLOWAY

[S.C. 2/2002] [p.54-147]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 30TH JANUARY, 2004

CORAM: DR. JUSTICE A. B. TIMBO, C.J.

MR. JUSTICE S. C. E. WARNE, J.S.C.

MR. JUSTICE E. C. THOMPSON-DAVIS, J.S.C.

MR. JUSTICE M. O. ADOPHY, J.S.C.

MRS. JUSTICE V. A. D. WRIGHT, J.S.C.

BETWEEN:

THE SIERRA LEONE BAR ASSOCIATION - PLAINTIFF

AND

1. THE ATTORNEY-GENERAL AND - 1ST DEFENDANT

MINISTER OF JUSTICE

2. EKE AHMED HALLOWAY - 2ND DEFENDANT

Mr. Berthan Macaulay Jnr. for Plaintiff

Mr. L. M. Farmah for 1st Defendant

Dr. A. Renner- Thomas for 2nd Defendant.

JUDGMENT

TIMBO, C.J.

By Notice of Motion dated the 28th day of June Two Thousand and Two the Plaintiff sought the following reliefs pursuant to sections 122, 124 (1) (a) and 127 of the Constitution of Sierra Leone (No 6 of 1991)—

[p.55]

(1) The interpretation of sections 56, 57, 58, 59, 60 (1) and 64 (1) and (2) of the aforesaid Constitution, more specifically to determine,

(i) Whether the appointment to the office of the Attorney-General and Minister of Justice referred to in section 64 (1) and (2) is subject to the provisions of section 56 (2) of the Constitution.

(ii.) If the answer to (i) is Yes what is the effect of an appointment to such office without the approval of Parliament?

(iii.) Whether the provisions of section 56 (2) - (5) inclusive of the Constitution are applicable to the said office of the Attorney-General and Minister of Justice referred to in section 64 (1) and (2) of the Constitution.

The Plaintiff also asked for among other things,

(1) A Declaration to the effect that section 56 (2) - (5) inclusive of the Constitution apply to the office of Attorney-General and Minister of Justice referred to in sections 64 (1) and (2) and in particular,

(2) A Declaration that the appointment of the 2nd Defendant on or about the 27th May 2002 as Attorney-General and Minister of Justice without the prior approval of Parliament as stipulated in section 56 (2) of the Constitution contravened the said provision of the Constitution and is consequently null and void and of no legal effect.

[p.56]

The Plaintiff's application was supported by the affidavit of Mr. Yada Hashim Williams, Barrister and Solicitor who is also member and the Secretary-General of the Sierra Leone Bar Association, the Plaintiff herein, sworn to on the 28th day of June 2002.

By paragraph 2 of the said affidavit Mr. Williams stated that the Plaintiff is a Company limited by guarantee incorporated under the Companies Act 1960 (Cap 249) and that the Plaintiff brings the said action in its corporate name. As the name suggests the Plaintiff is the association of legal practitioners in Sierra Leone.

Clauses 3 (a) and 3 (e) of the Memorandum and Articles of Association state the objects of the Company as being,

(a) To support and protect the character status and interest of the legal profession in Sierra Leone.

(b) To originate, promote, oppose and campaign for the improvements amendments reform and interpretation of the laws of Sierra Leone and to institute, prosecute, defend, support or oppose legal proceedings aimed at achieving the same.

In the particulars of the Statement of its Case, the Plaintiff said inter alia,

“The office of the Attorney-General and Minister of Justice is of paramount importance to members of the Sierra Leone Bar Association in the exercise of their profession more so that,

[p.57]

(a) The Attorney- General and Minister of Justice is the titular Head of the Bar.

(b) The Attorney-General and Minister of Justice is a member of the Rules of Court Committee established by section 22 of the Courts Act, (No. 32 of 1965).

(c) The Attorney-General and Minister of Justice is a member of the General Legal Council established by the Legal Practitioners' Act, 2000 (No. 15 of 2000) which said body is the governing authority with regard to the legal profession in Sierra Leone.

(d) The Attorney-General and Minister of Justice is the nominal Defendant in respect of actions brought against the Government of Sierra Leone under the State Proceedings Act, 2000 (No. 14 of 2000) and the person upon whom prior notice is to be given before the commencement of action under the said Act;

(e) The Attorney-General and Minister of Justice has a very important role to play in criminal proceedings under the laws of Sierra Leone by virtue of sections 64 (3) and 66 (6) to (8) inclusive of the Constitution."

For these reasons the Plaintiff submitted that it is of the utmost importance that the validity or otherwise of the appointment of the Attorney-General and Minister of Justice on or about the 27th May, 2002 be determined by this Court.

Paragraphs (xi) and (xii) of the Plaintiff's Case are significant and I shall quote them verbatim.

[p.58]

Paragraph (xi). This avers that,

"On or about the 27th May 2002 it was announced on radio 98.1 that the 2nd Defendant, among others, had been nominated by His Excellency the President to the office of Attorney-General and Minister of Justice as a Minister subject to parliamentary approval."

More especially, the release said,

"RELEASE FROM THE OFFICE OF THE PRESIDENT"

"It has pleased His Excellency the President to make the following Appointments which according to Section 56 (2) are subject to the approval of Parliament.

MINISTERS

1. Ministry of Finance

Minister - Mr. Joseph B. Dauda

2. Ministry of Foreign Affairs and International Cooperation

Minister - Mr. Momodu Koroma

3. Attorney-General and Minister of Justice

Minister - Mr. Eke A Halloway

4. Minister of Development and Economic Planning

Minister - Mr. Mohamed B. Daramy;"

[p.59]

Paragraph (xii). By this, the Plaintiff maintained that,

“In 1996, the then Attorney-General and Minister of Justice was appointed Attorney-General and Minister of Justice after his nomination as Attorney-General and Minister of Justice had been approved by Parliament. That since 1996 to date there has not been any alterations to sections 56 and 64 of the Constitution.”

Counsel for the Plaintiff further argued that, in construing sections 56, 57, 58, 59 and 60 (1) and 64 of the Constitution the Court should give the words of these sections their natural and ordinary meaning. He also invited us to look at the entire Constitution when interpreting section 64.

Much of the argument of Plaintiff’s counsel had centred around the issue whether or not the 2nd Defendant was a Minister. In Mr. Berthan Macaulay's view the Attorney-General and Minister of Justice is clearly a Minister like any other Minister of State that there is no separate or specific provision in the Constitution relating to the oath of the Attorney-General and Minister of Justice other than the one taken by all other Ministers under section 57 which provides,

“57 A Minister or a Deputy Minister shall not enter upon the duties of his office unless he has taken and subscribed the oath for the due execution of his duties as set out in the Third Schedule.”

[p.60]

In his amended Statement of Case counsel for the Plaintiff again drew our attention to the following salient facts,

(xiii) That in Government Notice No 316 published in the Sierra Leone Gazette (Extraordinary) Volume cxxxiii No. 49 dated the 6th of August 2002 it was stated that His Excellency Alhaji Dr. Ahmed Tejan Kabbah, President, had appointed Eke Ahmed Halloway Esq. the 2nd Respondent herein, to the office of Minister in exercise of the powers vested in him by subsection (1) of section 56 of the Constitution on the 24th day of May 2002.”

(ix) That in Government Notice. No 317 published in the Sierra Leone Gazette (Extraordinary) Volume cxxxiii No. 49 dated the 6th August 2002, it was stated that His Excellency Alhaji Dr. Ahmed Tejan Kabbah, President, had appointed Eke Ahmed Halloway Esq., the 2nd Respondent herein, to be a member of the Cabinet in exercise of the powers vested in him by subsection (1) of section 59 of the Constitution on the 24th of May 2002.

(x) That in Government Notice, No. 396, published in the Sierra Leone Gazette (Extraordinary) Volume cxxxiii No. 53 dated the 28th of August 2002, it was stated that His Excellency Dr. Ahmed Tejan Kabbah, President, had appointed Eke Ahmed Halloway Esq. the 2nd Respondent herein to be Attorney-General and Minister of Justice in exercise of the powers vested in him by subsection (2) of section 64 of the Constitution on the 24th day of May 2002. That the said [p.61] Government Notice No. 396 also stated that it had cancelled Government Notices No. 316 and 317 referred to above.”

Mr. Berthan Macaulay Jnr. submitted that notwithstanding the fact that Government Notice No. 396 stated explicitly that Government Notices No. 316 and 317 had been replaced, this did not derogate from the facts alluded to in those Government Notices.

As a result, in his respectful submission, the Court is still bound to determine the legality of the appointment of the 2nd Respondent as there is no doubt that from the documents filed by the 2nd Respondent in support of his Case his appointment was made without the prior approval of Parliament.

Dr. Ade Renner- Thomas, in reply submitted that by his own admission, counsel for the Plaintiff had himself conceded that there is nothing in the entire Constitution which expressly states that section 64 (2) of the Constitution is to be read subject to the provisions of section 56 (1) and (2); and that if section 64 (2) is to be read subject to section 56 (1) and (2) at all, this can only be done by necessary implication.

On the question whether the Attorney-General and Minister of Justice is a Minister, Dr. Ade Renner Thomas had no hesitation in conceding that he is a Minister. But his contention is that the Attorney-General and Minister of Justice is very much more than a Minister. He argued that his office is 'sui generis' or unique in the sense that,

[p.62]

(a) It is established by the Constitution - unlike other Ministers, whose Ministries are created by the President under section 56 (1) in his absolute discretion. He can reduce, add to or abolish any of these portfolios. On the contrary, he cannot do this in the case of the Attorney-General and Minister of Justice.

(b) The Attorney-General and Minister of Justice quite unlike other Ministers, must have certain professional qualifications. Under section 64 (2) he must be a person qualified to hold office as a Justice of the Supreme Court. The qualifications of a Justice of the Supreme Court are set out in section 135 (3) of the Constitution; whereas other Ministers may not have any specialist qualification. For e.g., the. Minister of Health need not be a medical practitioner nor does the Minister of Agriculture necessarily have to be an agriculturist.

(c) Of all the Ministers of Government the Attorney-General and Minister of Justice is the only person apart from the President and Vice-President who is guaranteed a seat in the Cabinet - sections 64 (2).

(d) Throughout the constitutional history of Sierra Leone since Independence in 1961 there has always been a separate and distinct constitutional provision dealing with the office and appointment of the Attorney-General and Minister of Justice.

[p.63]

Dr. Renner-Thomas also referred the Court to Paragraph 75 of the National Constitutional Review Commission Report. published in March 1991, which he said had been heavily relied upon by the Plaintiff to show the "mischief', if any, which Parliament wished to cure when it enacted sections 56 and 64.

According to Mr. Macaulay Jnr., the "mischief" was to stop people from being appointed to ministerial positions and many other important offices without being vetted by the Legislature thereby providing checks and balances in the governance of the State.

Dr. Ade Renner- Thomas submitted that not every important public office was to be affected by the suggested change any way but only "a number" of them and this in his submission does not definitely include the office of Attorney-General and Minister of Justice.

Counsel for the 2nd Defendant further contended that the main concern of the Commission as exemplified in paragraphs 79 and 80 was the matter of separation of the joint or composite office of the Attorney-General and Minister of Justice. These paragraphs state as follows:

"79 As a matter of policy, we have refrained from interfering with Ministerial appointments. However, the post of Attorney-General and Minister of Justice appears in the present Constitution. In the light of [p.64] our recent experiences we believe that the potential for conflict between the Chief Justice and this Minister, who being also Attorney-General has a right to appear before the Chief Justice from time to time is very great.

80. Our recommendation therefore is that the post of Attorney General should be retained in Cabinet, and that, if His Excellency considers it necessary to appoint a Minister of Justice he should appoint some other person."

However, by enacting section 64, the recommendation to split the office of the Attorney-General and Minister of Justice had been clearly rejected.

I have carefully and painstakingly considered the several points canvassed by counsel on both sides. They all seem attractive but as I see it, the answer to the questions posed will inevitably turn in the main on the interpretation we give to the provisions of sections 56 and 64 and more importantly, whether section 64 is to be read subject to section 56.

Section 56 says,

(1) "There shall be. in addition to the office of Vice-President, such other offices of Ministers and Deputy Ministers as may be established· by the President:

[p.65]

Provided that no Member of Parliament shall be appointed Minister or Deputy Minister.

(2) A person shall not be appointed Minister or Deputy Minister unless—

(a) he is qualified to be elected as a Member of Parliament; and

(b) he has not contested and lost as a candidate in the general election immediately preceding his nomination for appointment; and

(c) his nomination is approved by Parliament."

Section 64 on the, other hand stipulates that,

"(1) There shall be an Attorney-General and Minister of Justice who shall be the principal legal adviser to the Government and a Minister.

(2) The Attorney-General and Minister of Justice shall be appointed by the President from among persons qualified to hold office as a Justice of the Supreme Court and shall have a seat in the Cabinet."

What does the expression "nomination" for "appointment" mean in section 56 (2) (b)? Do these words mean one and the same thing?

Webster's Dictionary explains the word "nomination" as an act of appointing to an office. The Readers Digest Universal Dictionary on its part defines the verb "nominate" as, [p.66] designate or appoint to an office and by the Oxford Dictionary of Current English (New Edition) "nominate" means to propose (a candidate) for election; appoint to an office. The American College Dictionary similarly defines "nomination" as an act of appointing.

I do not find these definitions particularly helpful in the case before us. As used in section 56 (2) (b) the phrase "nomination" for "appointment" must connote two different things. The context in which they are used in this subsection clearly shows that they are not interchangeable and cannot therefore be synonymous. There is a presumption that words in a statute are not used unnecessarily or without meaning or that they are tautologous or superfluous. See Halsbury's Laws of England 3td Edition Volume 36, Paragraph 583. A difference in terminology should not therefore be regarded as accidental. A change of language usually indicates a change of intention - Maxwell on the Interpretation of Statutes, 9th Edition page 324.

As I perceive it, under section 56 (2) (b) there must first be a nomination of the person proposed for the appointment and it is only after the Legislature has approved his candidature or his suitability for the post that such person is finally appointed to the designated position by the President..

It has been said,

"A broad and liberal spirit should inspire those whose duty it is to interpret it (the Constitution); but this does not imply that they are free to stretch or [p.67] pervert the language of the enactment in the interests of any legal or constitutional theory or even for the purpose of supplying omission or correcting supposed errors."

Similarly as was stated by Kania C. J. in Gopalan V. State of Madras [1950]. S C J at page 191,

"Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It

is difficult upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority."

This same point was re-echoed and empasised by the Indian Supreme Court in another case Keshava Menon V. State of Bombay [1951] S. C. R 228 at page 232 when it observed,

"an argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion; but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit [p.68] of the Constitution cannot prevail if the language of the Constitution does not support that view."

Therefore, the duty of the Court is to find out the expressed intention of the Legislature. This it can only do from the words of the enactment itself.

So, it is not at liberty to give —

"a speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity what the Legislature intended to be done, or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication." Vide Salomon V. Salomon [1897] A. C. 22 at page 38.

In other words, when the meaning of the words used by the Legislature are precise and unambiguous, as we have here, it is not the business of the courts to busy themselves in finding out what the supposed intentions of the framers were.

A cardinal principle of statutory interpretation is that a Constitution must be read as a whole with a view to determining the intention of each section. This is what is commonly referred to as the principle of harmonious construction. Its aim is no doubt, to reconcile different provisions of the Constitution.

[p.69]

This is not to say, however, that undue weight should be attached to any section except to the extent that it legitimately and expressly limits the other.

Thus in State of Madras V Champakan [1951] S C R 525 and Qutreshi V State of Bihar [1958] S. C. 731 the Indian Supreme Court decided that the Directive Principles of State Policy incorporated in the Constitution have to be interpreted and applied in a manner that will not abridge or take away the basic rights of the individual. In the same way the Court ruled in State of Bombay V. Bombay Education Society [1955] S. C. R 568 that even though Hindi is the lingua franca and Article 351 of the Indian Constitution makes especial provision requiring the State to promote the Hindi language such object cannot be achieved by any means which infringe the protection of the interests of minority groups guaranteed under Articles 29 and 30.

As agreed by counsel on both sides there is nowhere in the Constitution in which it is said categorically that section 64 (1) is to be construed subject to the provisions of section 56 (1) and (2). That being the

case why should this Court either on its own volition or be urged to hold that it was the intention of Parliament that both sections shall be read side by side?

When Parliament in its wisdom had deemed it necessary that parliamentary approval should be sought for appointment to certain public offices it had not scrupled to say so. This, it had done in no less than ten different places in the Constitution.

[p.70]

Let us take for instance the office of the Director of Public Prosecutions. By subsection (2) of section 66, Parliament did not only unequivocally enact among other things that, the Director of Public Prosecutions shall be appointed by the President but it also added expressly that such appointment shall be subject to the approval of Parliament.

In section 65, which creates the office of Solicitor General on the other hand, the words used in section 66" and subject to the approval of Parliament" are completely avoided. Nobody has ever canvassed or suggested that the Solicitor-General should be vetted by Parliament before appointment.

Why should it be different when it comes to the appointment of the Attorney- General and Minister of Justice under section 64, which has similarly eschewed the use of the said phraseology?

This is especially so as sections 64 and 65 come immediately before section 66. Can this be said to be an oversight on the part of Parliament? With respect, I do not think so. It must have been a deliberate decision of Parliament that the appointment of the Attorney General and Minister of Justice as well as the Solicitor-General, his principal assistant shall not be subjected to parliamentary screening or investigation as long as both have otherwise fulfilled the professional qualifications stipulated in sections 64 (2) and 65 (2) respectively.

[p.71]

As a matter of law the Attorney-General and Minister of Justice need not be a registered voter or a citizen of the Republic of Sierra Leone unlike the other Ministers or Deputy Ministers nominated and appointed under the provisions of section 56 where the nominee must first be on the register of voters in order to qualify to be appointed as a Minister or Deputy Minister. This difference to me further strengthens the contention of counsel for the 2nd Respondent that the office of Attorney-General and Minister of Justice is sui generis and completely distinct from that of other Ministers in section 56,

Another example of the difference in the two positions is to be found in section 115 (4) of the Constitution. While section 115 (1) deals with the remuneration of the President and certain other public officer generally, section 115 (4) specifies the offices to which section 115 (1) applies. These offices are named therein as offices of the President, Vice President, Attorney-General and Minister of Justice, Ministers, Deputy Ministers etc.

If the Attorney-General and Minister of Justice were the same person as any other Minister of State, there would certainly have been no need to name him separately in this subsection.

The fact that the Attorney-General and Minister of Justice incidentally also takes the same oath of office like the other Ministers of Government appointed under Section 56 makes no difference whatsoever. It is indisputable that the oath set out in the Third Schedule is not confined to Ministers alone. It is the same oath that Members of [p.72] Parliament and nearly all other senior public officers subscribe to including Judges, the Secretary to the President, the D. P. P., the Solicitor-General and so forth ...

There is no better illustration in my opinion, of the uniqueness of the position of the Attorney-General and Minister of Justice than what is contained in the provisions of section 66 (7) and (8) of the Constitution that,

"(7) The powers conferred upon the Attorney-General and Minister of Justice by this section shall be vested in him to the exclusion of any other person or authority.

(8) In the exercise of the powers conferred upon him by this section the Attorney General and Minister of Justice shall not be subject to the direction or control of any other person or authority."

Which other Minister of State, may I ask, is vested or conferred with such extensive or what one might be tempted to describe as absolute power under the Constitution? By section 66 (7) and (8) he is not even subject to control by the President, the highest executive authority in the land, in the execution of his duties. Constitutionally all the Head of State can do if he is not satisfied with his performance is to remove him but he cannot tell him how to perform those functions. Can this be said of other Ministers?

Certainly not.

[p.72]

It is indeed true as has been submitted by Mr. Berthan Macaulay Jnr, that Section 64 unlike section 56 is not entrenched and can be amended with much more ease. But the fact that up to the present it has not been so amended indicates, by and large, acceptance of the provisions of that section. Why should we therefore import into section 64 the words, "and subject to parliamentary approval." when Parliament since the enactment of the Constitution in 1991 had not thought it fit to do so? In my view, this is the only competent authority which can do this, being the supreme legislative body and the embodiment of the representatives of the people.

We cannot in the guise of judicial interpretation introduce something into the Constitution that cannot be found there. Section 66, as we have seen in the case of the D. P. P. clearly states that parliamentary sanction is required. On the other hand, sections 64 and 65 (for the Attorney-General and Minister of Justice and for the Solicitor-General respectively) made no such requirement a prerequisite to appointment to those offices.

We have been reminded by Mr. Berthan Macaulay Jnr. that the immediately preceding Attorney-General and Minister of Justice now the Vice-President went to Parliament for approval before finally being appointed. He further argued that the previous announcements in the two editions of the Sierra Leone Gazette Nos. 316 and 319 made reference to parliamentary approval. In my respectful opinion,

that anomaly had been cured by the subsequent publication in the Sierra Leone Gazette cancelling the earlier statements.

[p.74]

I do not see anything wrong or improper either in law or in principle in the Government correcting an error previously made as a result of some mistaken view of the law.

I now come to the specific questions posed by counsel for the Plaintiff i.e.

(i). Whether the appointment to the office of the Attorney-General and Minister of Justice referred to in section 64 (1) and (2) is subject to the provisions of section 56 (2) of the Constitution.

(ii). If the answer to (i) is Yes, what is the effect of an appointment to such office without parliamentary approval?

(iii). Whether the provision of sections 56 (2) - (5) inclusive are applicable to the said office of Attorney-General and Minister of Justice.

My straight-forward answer to the first question is that the appointment to the office of the Attorney-General and Minister of Justice referred to in section 64 (1) and (2) of the Constitution is not subject to the provisions of section 56 (2) of the Constitution.

From this it follows that the appointment of the 2nd Defendant on or about the 27th May 2002 as Attorney-General and Minister of Justice without parliamentary approval does not invalidate or nullify the said appointment.

[p.75]

On the third and last question, it is my considered view that the provisions of section 56 (2) - (5) inclusive, of the Constitution are not applicable to the office of Attorney-General and Minister of Justice referred to in section 64 (1) and (2) of the Constitution.

Consequently, the several Declarations sought by the Plaintiff are hereby refused.

Before I end, I wish to thank counsel on both sides for their industry and resourcefulness in the preparation and presentation of their Case. I however deeply regret the delay in concluding this matter which has been due largely to the incapacitation followed by prolonged periods of hospitalization of one of our brothers.

I make no order as to cost.

[Sgd.]

HON. DR. JUSTICE A. B. TIMBO

CHIEF JUSTICE

I AGREE……HON. MR. JUSTICE S. C. E. WARNE

I AGREE……HON. MR. JUSTICE E. THOMSON-DAVIS

I AGREE ……HON.. MR. JUSTICE M. O. ADOPHY.

I AGREE ……HON. MRS. JUSTICE V. A.D. WRIGHT

CASES REFERRED TO

1. Gopalan v. State of Madras [1950] S C J at page 191

2. 2. Keshava Menon V. State of Bombay [1951] S. C. R 228 at page 232

3. Vide Salomon V. Salomon [1897] A. C. 22 at page 38

4. State of Madras V Champakan [1951] S C R 525

5. Qutreshi V State of Bihar [1958] S. C. 731

6. VState of Bombay V. Bombay Education Society [1955] S. C. R 568

STATUTE REFERRED TO

1. Constitution of Sierra Leone (No 6 of 1991)

2. Companies Act 1960 (Cap 249)

3. Courts Act, (No. 32 of 1965).

4. Legal Practitioners' Act, 2000 (No. 15 of 2000)

5. State Proceedings Act, 2000 (No. 14 of 2000)

6. Halsbury's Laws of England 3td Edition Volume 36, Paragraph 583

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ALHAJI ABDULAI BANGURA AND THE COURT OF APPEAL OF SIERRA LEONE PRESIDED BY HON. MS. JUSTICE U.H. TEJAN-JALLOH, J.A, HON. MR. JUSTICE P.O. HAMILTON J.A. AND HON. MS. JUSTICE S. KOROMA J.A. AND TOUFIC HUBALLAH SIERRA LEONE NATIONAL PETROLEUM COMPANY LIMITED UMARU SAWANEH MOHAMED KAMARA AND THE ATTORNEY-GENERAL & MINISTER OF JUSTICE

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ALPHABETICAL LISTING

ALHAJI ABDULAI BANGURA & 4 ORS. v. THE ATTORNEY-GENERAL & MINISTER OF JUSTICE

[SC. MISC.APP. 4/2006] [p.98-103]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23 NOVEMBER 2006

CORAM: MR. JUSTICE S.C.E. WARNE J.S.C.

MRS. JUSTICE V.A.D. WRIGHT J.S.C.

MR. JUSTICE M.E.T. THOMPSON J.S.C.

MR, JUSTICE A.N.B. STRONGE J.A.

MR. JUSTICE S.A. ADEMOSU J.A.

BETWEEN:

ALHAJI ABDULAI BANGURA — APPLICANT

AND

THE COURT OF APPEAL OF SIERRA LEONE PRESIDED BY HON. MS. JUSTICE U.H. TEJAN-JALLOH, J.A, HON. MR. JUSTICE P.O. HAMILTON J.A. AND HON. MS. JUSTICE S. KOROMA J.A.

AND

TOUFIC HUBALLAH

SIERRA LEONE NATIONAL PETROLEUM COMPANY LIMITED

UMARU SAWANEH

MOHAMED KAMARA

AND

THE ATTORNEY-GENERAL &

MINISTER OF JUSTICE — RESPONDENT

A.F. Serry-Kamal Esq. for Applicant

E. Pabs-Garnon Esq. for 2nd Respondent

C. Taylor Esq. for 3rd Respondent

E.E. Roberts Esq. with O. Kanu for 1st, 4th and 6th Respondents

Delivered this 23rd day of Nov. 2006

RULING

WARNE JSC

[p.99]

This is an application by way of Notice of Motion dated 18th September 2006 for an Order of certiorari to remove to the Supreme Court the Order of the Court of Appeal dated the 13th day of July 2006. IN THE MATTER Civil Appeal 60/2005 for the same to be quashed.

Before the Motion could be heard, Mr. E. Pabs-Garnon, Counsel for the 2nd respondent, raised a preliminary objection which had been filed; that the Court lacked jurisdiction to entertain the Motion. In his argument, he referred to the definition of certiorari as per Jowitt English Dictionary, 2nd Edition, page 307.

He submitted that an inferior court does not include the Court of Appeal, which is the 1st Respondent. In support of this submission, he referred to the following sections 123, 125, more particularly, 120 subsection (4),Counsel further submitted that the Court of Appeal as defined in 120(4) of the

Constitution of Sierra Leone Act No. 6 of 1991 is a superior Court not an inferior Court and is not subject to an Order of Certiorari.

Counsel submitted that the order is normally sought in the High Court. He argued that a matter of this nature, is normally on appeal. Counsel conceded that this Court has supervisory jurisdiction over all other Courts: However that jurisdiction is limited to its appellate jurisdiction, he argued. Counsel cited several authorities in support of his submissions.

Counsel submitted that there is a defect in the Order being sought, that is to say, that the Court must be seised of the proceedings of the Court of Appeal.

Finally, Counsel submitted that Section 125 is only limited for the purpose of the Supreme Court exercising its supervisory powers under Rule 88 of Supreme Court Rules No. 1 of 1982.

[p.100]

In the interest of coherence I will now consider the submissions of Mr. E. Roberts for the 1st, 4th and 6th Respondents and that of Mr. C. Taylor for the 3rd Respondent.

Mr. Roberts submitted that he relies on the submission of Mr. Pabs-Garnon and that the full and entire procedure to be applied, is to be found in Order 59 of the White Book 1960.

Mr. Taylor, for his part, also relied on the argument of Mr. Pabs-Garnon. He would wish to address Section 125 of the Constitution. Counsel cited Section 120 of Act No. 6 of 1991 and Section 74 of the Courts Act No. 31 of 1965 and added that the Common Law of England applies in Sierra Leone.

Mr. Serry-Kamal submitted that by Section 122(1) of the Constitution the Supreme Court is the final Court of Appeal and Section 125 of Act No. 6 of 1991 gives the Supreme Court supervisory jurisdiction over all other Courts in Sierra Leone. He submitted that Rule 88 gives the Court additional power of supervision over all other Courts.

Counsel further submitted that the fact that they could have appealed cannot be a basis for an objection but only a factor whether the Court could grant the relief. In support of his submissions Counsel has cited Halsbury's Laws of England 3rd Edition Vol. 11 at page 130 and the case of the King v Postmaster General exparte Carmichael (1928) 1 KB 291 at 297.

Counsel finally submitted that the Order of the Court of Appeal was a nullity and an excess of jurisdiction.

The submissions of Mr. Roberts and Mr. Taylor did not advance the submissions of Mr. Pabs-Garnon beyond the issue of lack of jurisdiction of this Court to entertain the Notice of Motion. Be that as it may, I will consider all the submissions for what they are worth.

[p.101]

I believe the starting point of this Ruling turns on the jurisdiction of the Supreme Court which is to be found in Section 122(1) of the Constitution Act No.6 of 199l, which provides:

"The Supreme Court shall be the final Court of Appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law".

The Motion before this Court is being prosecuted pursuant to section 125 of the Constitution herein mentioned Section 125 is a further jurisdiction conferred by this Constitution, vide Section 122(1) Section 125 provides "The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers".

Unlike the jurisdiction of the High Court which is provided for in Section 134 of the

Constitution Act No. 6 of 1991:

The High Court of justice shall have supervisory jurisdiction over all inferior and traditional Courts in Sierra Leone and any adjudicating authority, and in the exercise of its supervisory jurisdiction shall have power to issue such directives, writs and orders, including writs of habeas corpus, and orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers",

The Supreme Court has supervisory jurisdiction over the Court of Appeal; Section 125 is clear and unequivocal. The fact that the matter is appealable does not detract from the powers conferred on the Court. In my view, the preliminary objection is a mixture of a preliminary issue and issues touching and concerning the merits of the Motion.

[p.102]

I have no doubt that by virtue of Section 122(1) and Section 125, this court has jurisdiction to entertain the motion, Rule 88(1) is irrelevant to the motion.

The amplitude of the supervisory power of the Supreme Court as conferred by Section 125 is-as wide and far-reaching as to cover any matter which is property before the Court.

Vide; "In the matter of the SC Misc. App. 6/2000

Anti Corruption Act 2000

And in the matter Between Exparte Muctaru Ola Taju Deen

Respondent and

Commissioner of the Anti Corruption Commission 1st Applicant

And the Anti Corruption Commission 2nd Applicant

And the State; This is an exparte Notice of Motion where the Supreme Court granted leave to the applicant for an Order of Certiorari to issue pursuant to Section 125 of the Constitution, Act No. 6 of 1991.

The leave having been granted the Motion for the Order of Certiorari to issue was subsequently heard by the full Supreme Court. (Unreported)"

Albeit, this was a Motion concerning an Order made by the High Court. The Court of Appeal is subordinate to the Supreme Court and by virtue of Section 125 herein before mentioned, has supervisory jurisdiction over it.

The objection is untenable.

Let the Motion be heard.

[p.103]

SGD.

MR. JUSTICE S.C.E. WARNE, J.S.C.

SGD.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

SGD.

MR. JUSTICE M.E.T. THOMPSON, J.S.C.

SGD.

MR. JUSTICE A.N.B. STRONGE, J.A.

SGD.

MR. JUSTICE S.A. ADEMOSU J.A.

CASE REFERRED TO

1. King v Postmaster General exparte Carmichael (1928) 1 KB 291 at 297

STATUTES REFERRED TO

1. Constitution of Sierra Leone Act No. 6 of 1991

2. Anti Corruption Act 2000

DR. SORIE KENNEDY CONTEH & 5 ORS. v. THE MINISTER OF LOCAL GOVERNMENT AND COMMUNITY DEVELOPMENT & 4 ORS

[p.78-97]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 10 NOVEMBER 2008

CORAM: JUSTICE A.R.D. RENNER-THOMAS,

JUSTICE SIR JOHN MURIA,

MRS. JUSTICE V.A.D. WRIGHT,

JUSTICE MR. M.E.T. THOMPSON,

MS. JUSTICE U.H. TEJAN-JALLOH,

(ORIGINAL JURISDICTION)

IN THE MATTER OF SECTION 124(1) AND SECTION 127(1) OF THE CONSTITUTION OF SIERRA LEONE ACT NO.6 OF 1991

AND

IN THE MATTER OF THE ELECTION FOR THE OFFICE OF PARAMOUNT

CHIEF OF BIRIWA CHIEFDOM. BOMBALI DISTRICT IN THE NORTHERN

PROVINCE OF THE REPUBLIC OF SIERRA LEONE, HELD ON THE

12TH AUGUST 2006

BETWEEN:

(1) DR. SORIE KENNEDY CONTEH

(2) ALBERT CONTEH

(3) PRINCE AMADU KALAWA

(4) SALIFU MANNAH KALAWA

(5) ALHAJI KINGKOMA CONTEH

(6) FODAY BABA CONTEH — PLAINTIFFS

AND

(1) THE MINISTER OF LOCAL GOVERNMENT

AND COMMUNITY DEVELOPMENT — 1ST DEFENDANT

(2) THE PROVINCIAL SECRETARY

NORTHERN PROVINCE — 2ND DEFENDANT

(3) DR. ISSA M. SHERIFF — 3RD DEFENDANT

22C EAST BROOK STREET

FREETOWN.

(4) THE ATTORNEY-GENERAL AND

MINISTER OF JUSTICE — 4TH DEFENDANT

(5) THE NATIONAL ELECTORAL

COMMISSION — 5TH DEFENDANT

J.B. JENKINS-JOHNSTON ESQ. FOR THE PLAINTIFF

F.M. CAREW ESQ., Attorney-General, OSMAN KANU Esq and ALIMAMY SESAY Esq. for the Defendants

DELIVERED THE 10TH DAY OF NOVEMBER, 2006.

JUDGMENT

RENNER-THOMAS, C.J

This is an action commenced by an Originating Notice of Motion dated 14th September, 2006 invoking the original jurisdiction of the Supreme Court of Sierra Leone pursuant to Sections 124(1) and 127(1) of the Constitution, Act. No.6 of 1991

The reliefs claimed by the Plaintiffs are the following:—

"(1) A Declaration that any Election for the Office of Paramount Chief as provided for in Section 72(5) of the Constitution, IS A PUBLIC ELECTION, the conduct and supervision of which is the responsibility of the 5th Defendant herein, as provided by Section 33 of the said Constitution of Sierra Leone.

(2) A Declaration that the Election for the Office of Paramount Chief of BIRIWA CHIEFDOM, Bombali District in the Northern Province of the Republic of Sierra Leone conducted by the 1st and 2nd Defendants on the 12th August 2006 as a result of which the 3rd Defendant was purportedly declared to

be Elected as the PARAMOUNT CHIEF of BIRIWA CHIEFDOM was conducted in contravention of Section 72(5) and Section 33 of the Constitution of Sierra Leone, and is therefore INVALID, NULL AND VOID.

(3) Consequent upon (2) above, FOR A Declaration that the Office of Paramount Chief of BIRIWA Chiefdom, Bombali District, in the Northern Province of Sierra Leone IS VACANT.

(4) (i) A Declaration that by Native Law and Custom and by tradition, any person who does not belong to a Ruling House is not eligible to contest for and be elected as Paramount Chief of any Chiefdom in Sierra Leone.

(ii) A Declaration that DR. ISSA M. SHERIFF not being a member of any of the Four(4) Established Ruling Houses of BIRIWA Chiefdom, Bombali District, Northern Province of Sierra Leone is not eligible to contest for the Office of Paramount Chief of the said BIRIWA Chiefdom.

[p.80]

(5) For An Order that an Election to the office of Paramount Chief of BIRIWA Chiefdom, Bombali District in the Northern Province of the Republic of Sierra Leone shall be conducted and supervised by the 5th Defendant In accordance with Section 33 of the Constitution of Sierra Leone on a date to be determined by the 5th Defendant herein.

(6) For Any Further or other Orders or directions as may be considered giving effect to, or enabling effect to be given to the declarations and orders heretofore made.

(7) That the Costs of this Action shall be paid by the 1st, 2nd and 3rd Defendants, such Costs to be taxed."

In addition to the affidavit of Dr. Sorie Kennedy Conteh, the first Plaintiff herein, sworn to on the 14th day of September, 2006 and filed together with the Originating Notice of Motion Counsel for the Plaintiff was given leave by the Court to rely also on the joint affidavit of the second to sixth Plaintiffs inclusive sworn to on the 6th day of October 2006 and filed herein.

On the 29th day of September 2006 the Statement of the Plaintiffs Case was filed together with the affidavit as required by Rule 90 (2) of the Rules of the Supreme Court, Constitutional Instrument No.1 of 1982. On the 10th day of October 2006, Osman Kanu, State Counsel as Solicitor for all the five Defendants herein filed a Statement of the Defendants case accompanied by the requisite affidavit pursuant to Rule 92 (2) of the said Rules of the Supreme Court.

A date was fixed for the hearing and arguments commenced on the 19th day of October 2006 and were concluded on the 20th day of October 2006. Though both the Plaintiffs and the Defendants did give an indication that they might be calling witnesses at the hearing no such witnesses were called.

Put briefly, the case for the Plaintiffs, as I understand it; is

[p.81]

(1) that any election for the office of a Paramount Chief is according to Section 33 of the Constitution, Act No.6 of 1991 is a public election should therefore be conducted and supervised by the fifth defendant, the National Electoral Commission.

(2) that as the election held by the first and second Defendants, the Minister of Local Government and Community Development and the Provincial Secretary, Northern Province, on the 12th August 2006 as a result of which the third Defendant, Dr. Issa M. Sheriff, was elected to the Office of the Paramount Chief of Biriwa Chiefdom in the Bombali District in the Northern Province of the Republic of Sierra Leone was not conducted in accordance with the provisions of the said Section 33 of the Constitution, the said election should be declared invalid, null and void and the office of the Paramount Chief of the said Biriwa Chiefdom should therefore be declared vacant.

The Plaintiff also challenged the eligibility of the third defendant to be a candidate in the said election and seek an Order of the Court directing the fifth Defendant thereafter to conduct the said elections in accordance with Section 33 of the Constitution.

The short answer of the Defendants to the Plaintiffs' case, as could be gleaned from the Statement of the Defendants' Case is first, that the election of a Paramount Chief is not a public election as envisaged by Section 33 of the Constitution and that the conduct of such an election is not governed by Sections 33 and 72(5) of the Constitution. Though not raised as part of their case, during the course of his argument, the Attorney-General on behalf of the five Defendants contended that this Court could not grant the several reliefs sought in the Originating Notice of Motion in its original jurisdiction.

[p.83]

He was allowed to raise this issue which was outside the Case for the Defendants as filed because this Court is of the view that the question as to whether the original jurisdiction had been properly invoked is one which even if not canvassed by any of the parties the Court, suo moto, can properly raise and dispose of as a matter of law.

Indeed, in my view, this issue of the original jurisdiction is one which must be dealt with as a preliminary issue because if the Court-comes to the conclusion that it lacks original jurisdiction to grant the several reliefs, sought it would-not even go into the merits of the case no matter how convincing the arguments in favour may be ex facie. (See Issa Hassan Sesay & Ors v. The President of the Special Court for Sierra Leone, SC 1/2003, judgment delivered the14th day of October 2005 and Hinga Norman v. Sama Banya, SC 2/2005, judgment delivered the 31st day of August 2005, both unreported)

The procedure adopted by this Court in the Issa Sesay v. Special Court for Sierra Leone case was to examine each relief prayed for by the plaintiff separately and individually with a view to establishing whether there was any basis for invoking the Courts original jurisdiction to grant the said relief. Where the Court comes to the conclusion that it lacks jurisdiction the proper course is not to dismiss the whole action but to have the action struck out to the extent that the Court lacks jurisdiction to grant some or all of the reliefs sought.

I am still convinced that this is the right approach and for reasons which will soon become apparent I intend to adopt it in the instant case.

In the instant case, the Plaintiffs seek to rely on sections 124(1) and 127(1) of the Constitution as the basis for invoking this courts original jurisdiction. In the Hinga Norman case (supra) this Court made a distinction between the legal effect of the provisions of section 124(1) and those of section 127(1) of the Constitution. The essential distinction is that whereas the provisions of section 124(1) are substantive vesting exclusive original jurisdiction in the Supreme Court in matters [p.84] of interpretation and enforcement of the Constitution those of Section 127(1) are purely procedural setting out the requirements for and manner in which the Constitution may be enforced by this Court.

The test to be applied where the original jurisdiction is invoked to interpret or enforce provision of the Constitution was thus stated by me in my Judgment in the Hinga Norman case (supra).

"The first test is that the Plaintiff seeking to invoke the original jurisdiction must be able to point to some provision any provision of the National Constitution that is to be enforced or interpreted. The next test is to show in addition, what act or omission makes it necessary for the provision to be enforced. The third test in my opinion, is an alternative to the second test. The Plaintiff must show that an interpretation of the particular provision of the National Constitution identified under the first test is required as a matter of law."

In the Issa Sesay case when dealing with the test for invoking the original jurisdiction of this Court for the purposes of interpretation of a substantive provision of the Constitution I cited the above dicta and reemphasized my view in the following words.

"Let me repeat what I stated in the Hinga Norman case in the passage cited earlier in this judgment i.e. in order to invoke this Court's original jurisdiction under Section 124(1) of the Constitution the plaintiff must satisfy this Court that the interpretation sought is required as a matter of Law, for example, to clarify any ambiguity or to determine the legal effect of a provision"

I may add that this Court will not allow its original jurisdiction to be invoked to interpret a provision of the Constitution in a purely hypothetical case or where [p.85] original jurisdiction to try the subject matter of the dispute is vested in some other Court and there is only a likelihood that the need for interpretation might arise in the course of the trial in that other Court. In the latter case, the jurisdiction of the other court to try the matter is not ousted merely because a question of interpretation of a provision of the Court is likely to arise in the course of the trial.

Section 124 (2) of the Constitution expressly provides for such a situation by stipulating that where a question of interpretation or even enforcement of a provision of the Constitution arises "in any proceedings in any Court, other than the Supreme Court that Court shall stay the proceedings and refer the question of law involved to the Supreme Court [not in its original jurisdiction I may add] for determination;"

I now turn to the test to be applied where the original jurisdiction of this Court is invoked to enforce compliance with a provision of the Constitution. The factual circumstances in which this could be done are spelt out in three separate sections of the Constitution. First, there is Section 28 which allows this Court's original jurisdiction to be invoked where it is alleged that there has been a violation of Sections 16 to 27 inclusive of the Constitution. Next, pursuant to Section 171 (15) the original jurisdiction of this Court could be invoked where it is alleged that any enactment is inconsistent with any provision of the Constitution. Thirdly, the original jurisdiction of this court could be invoked pursuant to Section 127 (1) where it is alleged that a statute or its content or any thing done under the authority of that or any other statute is in contravention of a provision of the Constitution.

Clearly, Sections 28 and 171 (15) are not applicable in the instant case and are not invoked by the Plaintiffs herein. In contrast, the Plaintiffs rely squarely on the provisions of Section 127(1) and by implication on those of Section 127(2) for the declarations sought in the Originating Notice of Motion.

[p.86]

For purposes of clarity I shall reproduce Section 127 of the Constitution in full. It states as follows:—

"(1) A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purpose of a declaration under subsection (1), make such orders and give such directions as it may consider appropriate for giving effect to, or enabling effect to be given to, the declaration so made.

(3) Any Person to whom an order or direction is addressed under subsection (1) by the Supreme Court shall duly obey and carry out the terms of the Order or direction.

(4) Failure to obey or to carry out the terms of an order or direction made or given under subsection (1) shall constitute a crime under this Constitution".

In the Hinga Norman case (Supra) I stated that it is important to remind oneself that the provisions of Section 127(1) of the Constitution are only applicable in the limited factual circumstances which I set out as follows:—

"Where—

(1) any person alleges that any enactment is inconsistent with or in contravention of provision of the Constitution [that] person may then invoke the Original jurisdiction conferred upon this Court by Section 124(1) for a declaration based on Section 171(15) of the Constitution that to the extent of the inconsistency the said enactment is null and void;

[p.87]

(2) any person alleges that anything contained in an enactment is inconsistent with or is in contravention of any provision of the Constitution. That person may also invoke the original jurisdiction of this Court conferred by Section 124(1) for a similar declaration as under (1) above; and

(3) any person alleges that anything done under the authority of an invalid enactment or any enactment is inconsistent with or in contravention of the Constitution. That person may equally invoke the original jurisdiction of this Court conferred by Section 124(1) for a similar deduction as under (1) and (2) above."

Thus, in the case of Ngandi T.A. Sokoyama v. The Attorney-General and Minister of Justice (SC 1/2005, judgment delivered the 6th day of September 2006, unreported) this Court held that its original jurisdiction had been properly invoked to enable it grant a declaration that the provision contained in the Provinces Act, Cap 60 of the Laws of Sierra Leone, 1960, as amended which required a plaintiff to seek the consent of the Attorney-General before bringing an action to challenge the validity of an election of a Paramount Chief was inconsistent with Section 133 (1) of the Constitution and was therefore null and void. Section 133(1) of the Constitution provides that:

"Where a person has a claim against the Government that claim may be enforced as a right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as petition of right".

Having thus set out the circumstances in which the original jurisdiction of this Court could be invoked I shall now proceed to examine the several reliefs claimed by the Plaintiffs in the instant case to ascertain whether they could properly be granted by this Court in its original jurisdiction.

The first relief sought is a declaration that any election for the office of Paramount Chief as provided for in Section 72(5) of the Constitution is a public election; the [p.88] conduct and supervision of which is the responsibility of the fifth defendant herein as provided by Section 33 of the said Constitution.

To be able to decide whether or not this relief could properly be granted by this Court in its original jurisdiction it is in my opinion necessary as a matter of law and based upon what I said above first to decide whether this Court ought to interpret Sections 33 and 72(5) of the Constitution and secondly based on the outcome of such interpretation determine whether the factual circumstances of this case is covered by the provisions of Section 127 (1) of the Constitution

For the reasons already stated above, I hold that this Court cannot properly refuse to exercise its original exclusive jurisdiction to interpret the provisions of Section 33 and 72(5) of the Constitution in the circumstances of the instant case and I shall now proceed to do so.

Section 33 of the Constitution provides as follows:—

"Subject to the provisions of this Constitution, the Electoral Commission shall be responsible for the conduct and supervision of the registration of voters for, and of, all public elections and referenda and for that purpose shall have power to make regulations by statutory instrument for the registration of voters the conduct of Presidential Parliamentary or Local Government elections and referenda, and other matters connected therewith including regulation for voting by proxy."

Counsel for the Plaintiffs urged this Court to hold that as long as an election could properly be defined as a public election it becomes the responsibility of the Electoral Commission to conduct and supervise that election. Based upon the definition he culled from the Oxford Concise Dictionary he urged this Court to conclude that any election for the office of Paramount Chief is a public election and therefore to be conducted and supervised by the Electoral Commission.

[p.89]

On the other hand, the Attorney-General, on behalf of the Defendants contended that the term "public election" in Section 33 of the Constitution cannot possibly be referable to the election of Paramount Chiefs as this was not the intention of the legislature which, in contrast to the express reference to Presidential Parliamentary, Local Government Election and referenda, made no reference to elections of Paramount Chiefs. He went on to argue that such elections are governed by customary law and usage as provided for in Section 5 of the Provinces Act, Cap 60 of the Laws of Sierra Leone, 1960 as amended.

As stated above, Counsel for the Plaintiffs made reference to the Concise Oxford Dictionary to ascertain the meaning of the term "public". I must here state that whereas recourse may properly be had to a dictionary or other work of reference to ascertain the meaning of a term used in an enactment the dictionary cited should be "well-known and authorized" (see Marquis of Camden v IRC [1914] 1KB 641 of 647, CA per Cozens-Harding M.R). Besides, the Court remains free to reach its own conclusion as to the legal meaning of a word based on other considerations.

Indeed, it is most essential in "the process of statutory interpretation to bear in mind the fundamental distinction between the literal meaning of a term or an enactment and its legal meaning. This distinction between literal meaning and legal meaning according to Benion on Statutory Interpretation "lies at the heart of the problem of statutory interpretation" (see Statutory Interpretation by Francis Benion, 3rd edition at p.343) The function of the court as interpreter of an enactment is to determine the legal meaning of the enactment, that is the meaning that correctly conveys the legislative intention. Therefore, the main object in construing an enactment is to ascertain the intention of Parliament as expressed in the enactment considering it as a whole and in its context. For this reason, the legal meaning may or may not correspond to the grammatical or literal meaning.

[p.90]

How then do we arrive at the legal meaning? According to Halsbury's Laws of England the legal meaning:

“is arrived at by applying to the enactment taken with any other relevant and admissible material, the rules, principles, presumptions and canons which govern statutory interpretation. These may be referred to as the interpretative criteria or guides to legislative intention". (See Halsbury's Laws of England, 4th edition, vol. 44(1), para. 1373)

In the next paragraph it is stated further that:

"If on an informed interpretation there is no real doubt that a particular meaning of an enactment is to be applied, that meaning is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying the interpretative criteria" (Halsbury's, supra para 1374).

In the instant case, each party is contending for a different legal meaning of the enactment contained in Section 33 of the Constitution. As it is put in Halsbury's Laws of England "when the relevant interpretative factors do not all point one way it is necessary for the Court to assess their respective weights and determine which of the opposing constructions, on balance, it favours" (Halsbury, supra, para 1378) (see also dicta of Lord Reid in Mansell 1 v Olins [1974] 1 All E.R 16 at 18, [1974] 3 WLR 835 at 837, HL, and those of Donalson M.R in Nancollas v Insurance Officer [1985].

In the light of the facts of the instant case what then are the relevant interpretative criteria applicable and what are the guides or interpretative factors weighing in favour or against such application.

The first criteria applicable in my view is what is commonly referred to in the authorities as the plain meaning rule. According to Counsel for the Plaintiffs the word "public" used to define election is capable of one meaning only i.e. the opposite of private affecting the community as a whole or a portion of the community. Based on this definition Counsel for the Plaintiffs contended that an [p.91] election for a Paramount Chief is a public election and therefore falls within the category of elections envisaged by Section 33 of the Constitution.

Let me hasten to say that there are several factors which raise a real doubt in my mind as to whether that meaning of the word public is the one intended by the legislature when it enacted section 33 of the Constitution. First, the opening words or Section 33 i.e. "subject to the provisions of this Constitution" point to the fact that the Section should not be read and construed in isolation but in the light of any other related provisions of the Constitution that may narrow or limit its meaning and operation. In my view, this is exactly what Section 72 of the Constitution does particularly Section 72(5) which provides that:

"Subject to the provisions of this Constitution and in furtherance of the provisions of this Section Parliament shall make laws for the qualification, election, powers, functions, removal and other matters connected with Chieftaincy".

The clear intention of Parliament, in my opinion, to be gleaned from Section 72(5) is that Parliament is to enact special provisions dealing inter alia with the elections of Paramount and other Chiefs. In contrast, if it was the intention of Parliament that the regime established by Section 72 was to be read together with or be dependent on that to be found in Section 33, which deals with other public elections named therein, the draftsman would have used appropriate wording such as "without prejudice to the provision of Section 33" to qualify the provisions of section 72.

Another interpretative criteria which is applicable to the instant case is that relating to the construction of general and particular enactments. Prima facia, a general enactment should receive a general construction. Thus "public elections" in Section 33 of the Constitution should cover all elections that fit into that category. However, the fact that general words are used in an enactment is not in itself

conclusive reason why every case falling literally within them should be [p.92] governed by those words and the context may indicate that they should be given a restrictive meaning.

In the instant case, Section 33 is a general enactment whereas Section 72 is a particular enactment dealing only with Chieftaincy matters. According to Halsbury's Laws of England:

"Whenever there is general enactment in an Act which, if taken in its most comprehensive sense would overrule a particular enactment in the same Act, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Act to which it may apply properly", (supra, para 1486).

This distinction is also recognized in the maxim generalia specialibus non derogant.

Another interpretative criteria that is relevant in the instant case is the linguistic canon which states that expressio unis est exclusio alterius (to express one thing is [by implication] to exclude another). This principle is applied in particular where a formula, such as "public elections" in the instant case, which in itself may or may not include a certain class is accompanied by words of extension or exception naming only some members of that class the remaining members of the class being taken to be excluded from the formula. In this case, I hold the view that words Presidential, Parliamentary, Local and referenda are words of extension accompanying the formula 'public elections" utilized by the draftsman without any specific definition of the same and thus by implication excluding others of the same or similar class..

Finally, the fact that Parliament reserved to itself in Section 72(5) the right to make laws for the qualifications, election, powers, and other matters connected with Chieftaincy as opposed to leaving it to the Electoral Commission to regulate the conduct and supervision of Chieftaincy election by statutory instrument as [p.93] under section 33 leaves me in no doubt that Parliament did not intend to have paramount Chieftaincy elections subsumed within the category of public elections dealt with in the context of Section 33 of the Constitution.

Having reached this conclusion, I do not think it is necessary for me to go further and consider whether this Court could properly make the declaration sought as the first relief in the Originating Notice of Motion.

The declaration sought as the second relief is as follows;

"that the Election for the Office of Paramount Chief of BIRIWA CHIEFDOM, Bombali District in the Northern Province of the Republic of Sierra Leone conducted by the 1st and 2nd Defendants on the 12th August 2006 as a result of which the 3rd Defendant was purportedly declared to be Elected as the PARAMOUNT CHIEF of BIRIWA CHIEFDOM was conducted in contravention of Section 72(5) and Section 33 of the Constitution of Sierra Leone, and is therefore INVALID, NULL AND VOID"

I shall deal first with the contention that the conduct of the said election by the first and second Defendants was a violation of Section 33 of the Constitution. Having held that the said election was not a public election within the meaning of that Section it follows that it should not have been conducted and supervised in accordance with the provisions of the said section which stipulates inter alia that the

Electoral. Commission was to be responsible for the conduct and supervision of the registration of voters and vested it with powers for that purpose to make regulations not only for the registration of voters but also for the conduct of elections mentioned therein I take judicial notice of the fact that the Electoral Commission has never made any regulations, by statutory instrument or otherwise for the registration of voters or the conduct of Paramount chieftaincy elections. From the affidavit evidence before this Court it is common ground that the person responsible for the revision of the list of Chiefdom Councilors who are the electors in such election is the Provincial Secretary.

For all the above reasons I am unable to hold that the conduct of the said election by the first and second Defendants was in contravention of section 33 of the Constitution. The declaration sought could therefore not be granted by this Court in its original jurisdiction.

Though it is apparently not the case, I am obliged to consider whether the allegation that conduct of the said election by the first and second defendant was indeed in contravention of Section 72(5). This is so because if it could be established that there was a violation of any provision of the Constitution involved in the process then the Plaintiffs could properly invoke the provisions of Section 127(1) to have this Court declare the said election is invalid, null and void.

I shall once more set out the exact words of Section 72(5) of the Constitution for emphasis and clarity. The Section merely provides that:

"Subject to the provisions of this Constitution and in furtherance of this Section, Parliament shall make laws for the qualification, election, powers, functions removal and other matters connected with Chieftaincy".

With the greatest respect to Counsel for the Plaintiffs, I fail to see how the first and second Defendants could be said to have acted in any way in contravention of the above provision. The present position of which this Court is obliged to take judicial notice is that since the enactment of the Constitution no law has been made by Parliament as stipulated by Section 72(5). Even if such law had been enacted by Parliament and the conduct of the Defendants complained of in the instant case had been a contravention of the provisions of such law it would not have been tenable to argue that they would thereby have violated the provisions of Section 72(5) of the Constitution so as to invoke the original jurisdiction of this Court to deal with the said contravention…

[p.95]

For the above reason, the declaration sought as the second relief could not be made by this Court. Since the declaration sought as the third relief is a consequential one dependent on the second declaration which this court has already declined to make, it follows that it could not properly be made and the invitation to make it is hereby declined.

I now turn to the two declarations sought as the fourth relief in the Originating Notice of Motion which read as follows:

"(i) A Declaration that by Native Law and Custom and by tradition, any person who does not belong to a Ruling House is not eligible to contest for and be elected as Paramount Chief of any Chiefdom in Sierra Leone.

(ii) A Declaration that DR. ISSA M. SHERIFF not being a member of any of the Four(4) Established Ruling Houses of BIRIWA Chiefdom, Bombali District, Northern Province of Sierra Leone is not eligible to contest for the Office of Paramount Chief of the said BIRIWA Chiefdom."

Counsel for the Plaintiffs has not been able to point to any provision of the Constitution which would serve as the basis for the making of these declarations by this Court in its original jurisdiction. Indeed, this is not surprising because it is not the Constitution that governs the question of eligibility to contest for and be elected as a Paramount Chief of any Chiefdom in Sierra Leone. It is a matter that is governed partly by customary law and partly by statute, the relevant statute being the Provinces Act Cap 60 as amended. This, until such time as Parliament acts in accordance with its mandate contained in Section 72(5) of the Constitution by enacting a new law to govern the question of eligibility. There is nothing in Cap 60 which makes it incumbent-on this Court to ensure compliance with its provisions by invoking its original jurisdiction. I hold that the said declarations sought as part of the fourth relief in the Originating Notice of Motion could not be made by this Court in its original jurisdiction.

[p.96]

Finally, the fifth relief is for an Order that an election to the office of Paramount Chief of Biriwa Chiefdom shall be conducted and supervised by the 5th defendant in accordance with Section 33 of the Constitution on a date to be determined by the defendant herein.

Before proceeding to examine the question whether or not this Order ought to be made as a matter of law I wish to examine the state and effect of the available affidavit evidence. This discloses that the 5th Defendant was at some stage invited by the Permanent Secretary of the Ministry of Local Government and Community Development, according to the express words contained in Exh "M" attached to the affidavit in support of the Originating Notice of Motion sworn to by the first Plaintiff, to "put in place modalities for the said elections". This request was declined for reasons stated in the said Exh "M" signed by the chairperson, Chief Electoral Commissioner.

I need not enquire into the validity of the reasons advanced by the Electoral Commissioner because, based upon the conclusion I reached above after a proper construction of Section 33 of the Constitution, I am of the view that the Electoral Commission was under no constitutional duty to be responsible for the conduct and supervision of the said election. There is no doubt that based on the available evidence the Commission has a role to play in the process of electing Paramount Chiefs. I am not sure what is the legal basis of this role but I am satisfied it does not derive from the provisions of Section 33 of the Constitution.

This situation could be contrasted with that relating to the presidential election. Apart from Section 33 which makes the Electoral Commission expressly responsible for the conduct and supervision of such an election there is Section 45 which not only designates the Chief Electoral Commissioner the Returning

Officer for the election of a President but the Section also expressly vests original jurisdiction in this Court to hear and determine any question which may arise relating to the conduct of the said election.

[p.97]

In the instant case, I am of the view that this Court cannot make the said Order sought in its original jurisdiction for the same reasons that it cannot make the declarations sought that the election of the third Defendant is void or that the office of Paramount Chief of Biriwa Chiefdom is vacant or that the third Defendant was not eligible to contest the said election. In short, this is not the appropriate forum to have these matters determined. I hereby decline to make the Order sought.

In view of this Court's lack of original jurisdiction to make the several declarations and Order sought in the Originating Notice of Motion for the reasons stated above, I hereby make the following Orders:

That the Originating Notice of Motion herein dated 14th September 2006 is hereby struck out;

Each party is to bear its own costs of this action.

SGD.

JUSTICE DR. ADE RENNER-THOMAS, CHIEF JUSTICE

SGD.

JUSTICE SIR JOHN MURIA, J.S.C.

SGD.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

SGD.

HON. MR. JUSTICE M.E.T. THOMPSON, J.S.C.

SGD.

HON. MS. JUSTICE U.H. TEJAN-JALLOH, J.A.

CASES REFERRED TO

1. Marquis of Camden v IRC [1914] 1KB 641 of 647

2. CA per Cozens-Harding M.R

3. dicta of Lord Reid in Mansell 1 v Olins [1974] 1 All E.R 16 at 18, [1974] 3 WLR 835 at 837, HL,

4. Donalson M.R in Nancollas v Insurance Officer [1985].

STATUTES REFERRED TO

1. Sections 124(1) and 127(1) of the Constitution, Act. No.6 of 1991

2. Section 5 of the Provinces Act, Cap 60 of the Laws of Sierra Leone, 1960 as amended.

ERIC JAMES v. SEABOARD WEST AFRICA LIMITED

[CIV.APP. 1/2001] [p.104-138]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23 NOVEMBER 2006

CORAM: JUSTICE DR. ADE RENNER-THOMAS, CJ

JUSTICE SIR JOHN MURIA, JSC

MR. JUSTICE E.G. THOMPSON-DAVIS, JSC

MS. JUSTICE U.K. TEJAN-JALLOH, JA

MR. JUSTICE A.N.B. STRONGE, JA

BETWEEN

ERIC JAMES

(CARRYING ON BUSINESS AS

JAMES INTERNATIONAL ENTERPRISES) — APPELLANT

AND

SEABOARD WEST AFRICA LIMITED — RESPONDENT

A.F. SERRY-KAMAL Esq. for the Appellant

A. Tejan-Cole Esq. with him M.B. Michael Esq. for the Respondent

DELIVERED THE 11TH DAY OF OCTOBER 2006

JUDGMENT

RENNER-THOMAS C.J.

This is an appeal by Eric James (carrying business as James International Enterprises) (hereafter referred to as the Plaintiff/Appellant) against a decision of the Court of Appeal for Sierra Leone dated 12th

January 2001 setting aside a Judgment of the High Court given in favour of the Plaintiff/Appellant on the 2nd day of August 1986.

[p.106]

In his statement of claim the Plaintiff/Appellant pleaded inter alia as follows:—

a. By an agreement dated the 27th day of June 1985 between the defendant company of the one part and the plaintiff of the other registered as number 126/85 in volume 38 at page 105 in the Book of Miscellaneous Instruments kept in the office of the Registrar General for Sierra Leone the defendant appointed the plaintiff as Distributor of its "Life Flour" in Sierra Leone on the following terms:

"(1) Seaboard appoints James sole Distributor of "Life Flour" in Sierra Leone and hereby undertakes not to sell "Life Flour" to any other person at anytime during the currency of the agreement subject to the terms and conditions hereafter set forth ".

"(2) Seaboard shall sell an initial number of 100,000 bags of 50 pounds each of "Life Flour" to the Distributor during the currency of this agreement and the Distributor agrees to buy the first 100,000 bags of such flour milled by Seaboard after [the] date hereof".

"(3) Seaboard shall sell "Life Flour" at the government approved price to the Distributor and the Distributor shall pay 3 U.S. dollars as the price per bag based on the current official exchange rate to a bank account as designated by Seaboard the remainder of the price shall be paid in Leones as directed by Seaboard".

"(4) The distributor shall take delivery and collect daily from Seaboard's premises Cline Town the bags of flour in such quantities as Seaboard shall from time to time mill".

"(5) The distributor shall pay to Seaboard the price herein before mentioned in the manner hereinbefore described on or before it collects and takes delivery of the bags of flour from Seaboard".

[p.107]

"(6) Upon the request of the distributor made at any time before the distributor shall have taken delivery and paid for ninety thousand bags of "Life Flour" Seaboard agrees to sell to the distributor a further one hundred thousand bags of flour on the same terms and conditions as the original one hundred thousand bags of flour after the distributor has taken delivery and paid for one hundred and ninety thousand bags since the inception of this contract, Seaboard will discuss with the distributor if the distributor so desires the sale of and additional quantity of flour under the terms and conditions as se herein ".

"(7) Any variation of the terms of this agreement shall be valid provided such variations is made in writing and mutually agreed to by the parties".

"(8) If any dispute or difference shall arise between Seaboard and the distributor with regard to this agreement then in every such case the dispute shall be referred to an Arbitrator in the case of the

parties mutually agreeing on one otherwise three Arbitrators are to be appointed one by each party and the third who shall be chairman appointed by the two appointees of the parties the award of the Arbitrator or Arbitrators shall be binding on both parties ".

"(9) This agreement shall be governed by the laws of Sierra Leone ".

"(10) Either party shall have the right to terminate this exclusive arrangement upon any default by the other party not cured within ten days or by written notice ".

b. That sometime in 1986 the said agreement was varied to allow the parties to agree to the price of flour to be paid in leones or dollars.

[p.107]

c. That the Defendant, the Respondent in this appeal, in breach of the agreement proceeded to recruit other distributors. The Plaintiff/Appellant elected to keep the agreement alive and agreed to accept in lieu a commission paid by the Respondent for all flour produced and sold through various distributors.

d. That subsequently on or about September 1992 the Respondent stopped supplying flour to the Plaintiff/Appellant and refused to pay the Plaintiff/Appellant any further commission.

In his prayer the Plaintiff/Appellant claimed:—

I. Arrears of commission already earned before the breach of the revised contract;

II. Loss of commission or profit from September 1992 until payment;

III. That an account be taken of all bags of flour sold by the Defendant since the revision of the contract;

IV. Specific performance of the revised agreement;

V. Any further of other relief; and

VI. Costs.

In the defence filed on behalf of the Respondent it was contended inter alia that:—

a) The Plaintiff/Appellant in fact breached the agreement by failing to pay U$3.00 per bag of the flour as required by clause 3 of the agreement and by failing, to pay in advance for flour supplied to the Plaintiff/Appellant by the Respondent as required by clause 5 of the agreement;

b) That there was never any variation of the agreement as alleged or at all;

c) "As regards paragraph 4 of the statement of claim, the defendant denies that the said Mr. Leslie Thompson acted in breach of the agreement as [p.108] alleged and will contend that the said Leslie Thompson was led to continue to pay commissions to the Plaintiff because he was led to believe that there was a variation of the original contract in the terms indicated to him by the plaintiff and did so

only out of abundance of caution, but when he discovered that no variation (though suggested) was accepted by the defendant, he stopped paying commissions ";

d) "The primary consideration for concluding the said contract was to afford foreign exchange to the defendant and by failing to do so, the very basis of the said contract was destroyed by the plaintiff";

That Plaintiff/Appellant joined issue with the Respondent on the several contentions raised in the defence.

On the 24th day of March 1995 the Respondent was granted leave to amend the defence filed by adding new paragraphs 10 and 11 which read as follows:—

"10. The Defendant will aver that as a result of the sale of an initial

number of 100,000 bags of 50 pounds each life flour to the Plaintiff as provided for in Clause 2 of the agreement and the sale of a further 100,000 bags of flour as provided for by Clause 6, the Defendant had discharged his obligations under the said Agreement.

11. Further and in the alternative that as a result of several breaches of the agreement on the part of the Plaintiff, the Defendant was exonerated from further performing any of his obligations under the said Agreement by reason of the said breaches.

[p.109]

PARTICULARS OF BREACHES OF THE AGREEMENT

a. The Plaintiff failed to pay the U$3 (Three United States Dollars) of the price per bag as required by clause 3 of the Agreement.

b. The Plaintiff failed to pay to the Defendant on or before it collected and took delivery of the bags of flour for the Defendant as required by Clause 5 of the Agreement. Further that the Plaintiff on several occasions paid to the Defendants cheques which were not honoured by the Plaintiff's Bankers.

c. That the Plaintiff failed to take delivery and/or to collect the bags of flour from the Defendant".

It was on the basis of the above pleadings that the matter proceeded to trial.

During the course of the trial the Plaintiff/Appellant gave evidence as PW4 he having been interposed during the cross-examination of PW3, Frederick Chrispin Jones. During the cross-examination of the Plaintiff/Appellant by Counsel for the Respondent the learned trial judge recorded the following responses:—

"As Eric James carrying on business as James International Enterprises I had no staff.

So Cole was never employed by Eric James carrying on business as James International Enterprises but he was working for J.I. enterprises Ltd.

I now say that in fact there were three entities i.e.

(1) ERIC JAMES CARRYING ON BUSINESS AS JAMES INT. ENT.

(2) JAMES INT. ENT.

(3) JAMES INT. ENT (LTD).

I was involved in all three of them.

[p.110]

James Int. Ent. was a business name.

It has now been incorporated into James Int. Ent. Ltd.

In fact, there are now only two of these entities because James Int. Ent. has now ceased to exist. It ceased in 1985. It was registered in 1974. I do not know whether the registration has been cancelled.

It was a business name used by several business including James Int. Ent. Ltd.

Eric James carrying on business as James Int. Ent. was registered in

Germany in 1970.

It was never registered in Sierra Leone ".

These answers were in fact given on the 31st January 1995. Thereafter, the case for the Plaintiff was closed. The case for the Defendant was opened on 5th May 1990 and closed on 12th January 1996. One of the witness called by the Defendant was Esther Massallay who gave evidence as DW4 on the 15th November 1995 and had this to say:—

I am a clerk at the Administrator and Registrar-General's office. Some of my duties are to keep record of registered documents. I am also custodian of documents relating to business registration.

I was served with a subpoena dated 6th day of November, 1995. I was asked to produce the record of business registration of Eric James carrying on business as JAMES INTERNATIONAL ENTERPRISES, [emphasis mine]. I do not have the record that I was requested to produce, I searched for it but I found no record. "

[p.111]

Counsel for the Defendant, the Respondent in this appeal, commenced his address on 31st January 1996. During the course of this address, Counsel for the Defendant had this to say:—

"I submit that there was no entity known as Eric James carrying on business as James International Enterprises in Sierra Leone. Easter Massallay then also said that she never found any business known as Eric James carrying on business as James International Enterprises.

I would ask the court to draw the inference from the evidence that Eric James purported to carry on business under the business name of James International Enterprises and in doing so he acted illegally and in breach of the business name registration Act. "

On 11th March 1996, to be precise, a Motion was filed on behalf of the Defendant seeking leave to amend the amended defence filed on 24th March 1995 by adding the following new paragraph 12:—

"That the contract which is the subject herein cannot in law be enforced"

On 21st March 1996 the learned trial judge gave a Ruling refusing the application to amend and eventually, as stated above, gave judgment for the Plaintiff/Appellant.

As part of his judgment the learned trial judge held that the words "carrying on business of James International Enterprises" added to the name Eric James of the Plaintiff/Appellant did not constitute a business name which ought to be registered under the Business Names Registration Act, Cap 257.

[p.112]

As a result, in the amended Notice of Appeal to the Court of Appeal the Defendant contended as follows:—

"That the learned trial judge failed to consider sufficiently or at all the submissions that James International Enterprises Limited and Eric James (Carrying on Business as James International Enterprises) were separate and distinct entities in law.

The learned trial judge was wrong in law in:—

(a) holding that Counsel for the plaintiff ought not to have addressed them on the non-registration of the plaintiffs/respondent's business.

(b) His interpretation of the Business Names Registration Act Cap. 257 of the Laws of Sierra Leone 1960.

(c) In refusing the Plaintiff/Appellant's (defendant's application to amend their defence by Notice of Motion dated 11th March, 1996.

(d) Holding that James International Enterprises is not a business name and consequently wrong in failing to consider the effects of non registration thereof under the Business Names Act Cap. 257 Laws of Sierra Leone 1960.

In dealing with these grounds of appeal Alhadi J.A. delivering the judgment of the Court of Appeal, had this to say:—

"It is not in dispute that the plaintiff/respondent were [sic] carrying on business in this country as a sole proprietor under the name of the title of the action herein. There is evidence the business was not registered as [p.113] required in the statute. The agreement, exhibit "A" was entered into by the plaintiff/respondent by that name ".

He continued by asking:—

"What then is the effect of non-registration? It cannot be doubted that a party who is guilty of a breach of a statutory provision which is mandatory cannot recover any benefit arising from transaction entered into in that business name. For such proprietor lacks the legal status or capacity to institute any such proceedings. For he suffers the full impact of the maxim ex turpi causa non oritur and all the remedies in law are denied to him.

The position will be otherwise were an individual carrying on business in a name or style other than his own when he could be sued in his own name followed by the words "trading as A.B. or in his business name followed by the words ("a trading name") see Mason & Sons v. Mogridge (1892) 5TLR 805.

In this case the Plaintiff/Respondent was under a legal obligation to register the business under Cap 257 in the manner provided for in Sections 3, 4, 5 and 6. Non-compliance is punishable on summary conviction to [sic] a fine. Since a violation of these statutory provision is attendant with criminal sanctions any transactions conducted by it in that name is tainted with illegality (emphasis mine) and therefore unenforceable since the court will not lend its aid to it. "

[p.114]

The learned Justice of Appeal then cited the case of Nabieu Amadu v Aiah Sidiki (1972-73) ALR (SL) 421 in which the Privy Council held that possession of diamond by the Plaintiff/Appellants in contravention of Section 67 of the Minerals Act, Cap 196 of the Laws of Sierra Leone 1960 was an illegality which deprived the Plaintiff/Appellant of a claim for either the return of the diamond or for the payment of the proceeds of its sale without relying on the illegal possession. According to the Board "in these circumstances the fact that the illegality was not pleaded not argued at this trial is of no consequence". Alhadi J.A. also cited the case of Strongman (1945) Limited v. Incock (1955)2 QB in which Denning M.R. expressed the view that the plaintiff could not sue on a contract for work done which was done in contravention of the Defence Regulations 56A as it was a work carried out without proper license which makes it a criminal offence.

These two cases, according to Alhadi J.A., were similar to the instant case in that violation of statutory provision was made a criminal offence punishable with imprisonment or fine.

Alhadi J.A. then went on to refer to the refusal of the learned trial judge to allow the Defendant to amend its defence ''by pleading non-registration of the plaintiff/respondent pursuant to the above provision of the law".

He continued by stating that:

"The issue therein raised was of a fundamental nature as it goes to the jurisdiction of the court to adjudicate on the matter before it. For this was a non-compliance with mandatory statutory provisions which renders the proceedings void and a nullity. Also this was an opportunity for the judge to have adjudicated [p.115] on this all important issue instead of abdicating his responsibility by holding that the words "(carrying on business as James International Enterprises)" are descriptive of Eric James where

there is glaring evidence that the words represent a business name used in all the business entities set up by him ".

The learned Justice of Appeal finally had this to say about the refusal of the leave to amend by the learned trial judge:—

"In my view if the amendment had been granted, which I am of the view ought to have been the plaintiff/respondent would have availed himself of his undoubted right to lead evidence of registration of the business, an attempt which was unsuccessfully made before us to tender fresh evidence of such registration and was refused by us that the issue of non-registration was already a Ground of Appeal in these proceedings. The learned trial judge ought to have allowed amendment. His refusal in my view was wrong. The Appeal on this ground is allowed".

In the Notice of Appeal to this Court against the decision of the Court of Appeal the Plaintiff/Appellant canvassed several grounds of appeal but none against the findings of the Court of Appeal that the learned trial judge should have allowed the application of the defendant to amend his defence so as to raise the issue of non-compliance with the Business Names Registration Act, Cap 257 of the Laws of Sierra Leone 1960.

Despite this apparent concession on the part of the Plaintiff/Appellant it is pertinent to note that the Respondent did not avail itself of the opportunity afforded it during the hearing of this appeal to apply for leave to amend the defence to raise the issue of non-compliance with Cap 257.

[p.116]

Indeed, it was strongly contended by Counsel for the Respondent before this Court that non-compliance with the relevant provisions of Cap 257 not only rendered the agreement in the instant case unenforceable but rendered it illegal and therefore a nullity. Counsel for the Respondent submitted that the Court must take notice of any illegality in a contract on which the Plaintiff/Appellant is suing, if it appears on the face of the contract or from the evidence brought before it by either party; although the Respondent did not specifically plead it.

Counsel for the Respondent relied on the following cases:—

Gedge v. Royal Exchange Assurance (1900) 2 QB.214

North-Western Salt Co v. Electrolytic Alkali Co (1914) A.C. 461

Re Robinson's Settlement Grant v. Hobbs (1912) 1 Ch. 724; and

Lipton v. Powell (1921) 2 K.B. 5

He also relied on passages to be found in Chitty on Contract, 22nd [sic] Edition paragraph 845 at page 368 under the rubric ''Contract illegal or void by statute — statutory voidness distinguished from common law voidness"

Before reviewing the relevant authorities and expounding on the state of the law governing unenforceable contracts I think this is a convenient stage to set out the provisions of the Business Names Registration Act, Cap 257 of the Laws of Sierra Leone 1960. The relevant provisions are contained in Sections 3, 4, 5, 7 and 12 of the Act and are expressed as follows:—

"3. The following proprietors and firms shall be registered in the manner directed by this Act—

(a) every proprietor having a place of business in Sierra Leone and carrying on business under a business name which does not consist of his ordinary name without any addition thereto;

(b) every firms having a place of business in Sierra Leone and carrying on business under a business name which does not consist of the ordinary names of all the partners in the firm -without any addition thereto;

(c) every proprietor or firm having a place of business in Sierra Leone who or a partner in which has either before or after the coming into operation of this Act changed his name, including any proprietor or partner who, being a woman, has changed her name in consequence of marriage;

Provided that—

(i) where any addition to the ordinary name of proprietor or the ordinary names of the partners in a firm carrying on any business merely indicates that the business is carried on in succession to a proprietor or firm formerly carrying on the same business that addition shall not of itself render registration necessary;

(ii) where two or more partners have the same surname the addition of the letter "s " at the end of that surname shall not of itself render registration necessary; and

(iii) where the business is carried on by a receiver or manager appointed by any Court, registration shall not be necessary.

4. Every proprietor or firm required under this Act to be registered shall furnish to the Registrar General a statement in writing in the prescribed form signed by [p.118] the proprietor or by all the partners in the firm and containing the following particulars—

(a) the business name of the business in respect of which the proprietor or firm is required to be registered;

(b) the general nature of the business;

(c) the principal place of business;

(d) all other places at which the business is carried on;

(e) the usual residence and any other business occupation of the proprietor, or of every partner in the firm, and where the proprietor or any of the partners in the firm has either before or after

the commencement of this Act changed his name, or, being a woman, has changed her name in consequence of marriage, any name by which the proprietor or partner was formerly known;

(f) If the business is commenced after the coming into operation of this Act [sic] Ordinance, the date of commencement of the business.

5. The particulars required to be furnished under this Act shall in the Act comes

into operation be furnished within fourteen days after the commencement of the business, which this Act comes into operation, within three months from that date…….

7. If any proprietor or firm fails to comply with any of the provisions of section 4 or section 6 the proprietor or every partner in the firm, as the case may be, shall be liable on summary conviction to a fine of five pounds for every day during which the default continues, and the Court by which the offender is tried shall order a statement of the required particulars to be furnished to the Registrar General within such time as may be specified in the order.

[p.119]

12. Where any proprietor or firm required under this Act to furnish a statement of particulars or of any change in particulars makes default in so doing the rights of the proprietor of firm under or arising out of any contract made or entered into by him or it or on his or its behalf at any time while he or it is so in default, in relation to the business in respect of which the statement of particulars is required, shall not be enforceable by action or other legal proceedings either in the business name under which the business is carried on or otherwise:

Provided that—

(a} the proprietor or firm in default may apply to the High Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was due to accident or inadvertence or that on other grounds it is just and equitable to grant relief, may grant the relief applied for either generally or as respects any particular contract and on such conditions as the Court impose;

(b) if any action or proceeding shall be commenced by any other part) against the proprietor or firm in default to enforce the rights of that other party in respect of the contract, nothing herein contained shall preclude the proprietor or firm from enforcing in that action or proceeding by way of counter-claim, set-off or otherwise, such rights as he or it may have against the other party in respect of the contract. "

The above provisions of Cap 257 are very similar to, if not identical with, the provisions contained in the English Business Names Act 1916. Cases decided by the English Courts in which the latter statute has been interpreted and applied are [p.120] therefore of great assistance in interpreting the provisions of Cap 257 that I have cited above.

One such case is Hawkins and Another v. Duche (1921) K.B.D. in which Section 8 of the 1916 Act, in the same terms as Section 12 of Cap 257, was considered by McCardie J. who was in that case dealing with the circumstances under which the Court could grant relief to a defaulting proprietor or firm as stipulated in the proviso to Section 8 of the 1916 Act and S.I 2 of our Cap 257. He compared and contrasted the provisions in the English Statute of Frauds 1688 and section 4 of the English Sale of Goods Act 1893 on the one hand and Section 8 of the 1916 Act on the other and then went on to state as follows:—

"The Statute of Frauds and Section 4 of the Sale of Goods Act 1893 give no power to any Court to grant relief against non-compliance with those provisions. Here the question is as to the extent of the wide relieving power given by the Act of 1916 itself. 1 point out also that s. 4 of the Sale of Goods Act, 1893, says that the "contract" shall not be enforceable, whereas s. 8 of the Act of 1916 says that the "rights" of the defaulter under the contract shall not be enforceable. The contract itself is in no way invalidated by the Act of 1916 [emphasis mine] and subheads (b) and (c) of the first proviso are well worthy of attention. "

I am also of the opinion that a contract entered into whilst one of the party continues to be in default of the relevant provisions of Cap 257 is in no way invalidated by Section 12 of that Act, and I so hold.

The effect of non-compliance with the provisions of Section 12 of Cap. 257 is to be distinguished from that of non-compliance with the provisions of certain other [p.121] statutes such as the Minerals Act, Cap. 196 which was dealt with in Nabieu Amadu v. Aiah Sidiki (supra) or the English Money Lenders Act 1900 (see In Re Robinson's Settlement (supra); Lipton v. Powell and another (supra); of London and Harrowgate Securities Ltd. v. Pitts (1975) QBD). The distinction is that in the cases relied on by Counsel for the Respondent and cited above the statutes make non-compliance with the requirement for a license or registration illegal and provide no relief in the event of non-compliance with the relevant statutory provision.

Not only does Section 12 of Cap. 257 make it possible for a defaulting party to apply for relief against the disability imposed by the Section but by virtue of proviso (b) to Section 12 the defaulting party may maintain any rights he may have against the other party in respect of the contract "by way of counter-claim, set-off or otherwise ". In the light of such express provision I fail to see how it could be said, as the Court of Appeal held, that non-compliance with the provision of Section 12 of Cap 257 rendered the contract in the instant case illegal, void and of no effect. I disagree and hold that despite the criminal sanction imposed by Section 7 of Cap 257 the Act could not operate to invalidate a contract made in violation of the relevant provisions of the Act. (see Chitty on Contracts 28th edition, vol. 1, paragraph 1-041 under the rubric: "Unenforceable Contracts"; see also Cope v. Rowland (1836) 2 M+W 452; Food Products Inc. v. Units Shipping Co. Ltd. [1939] A.C. 277; and Yin v. Sam [1962] A.C. 304).

What then is the effect where a party to a contract is in default as provided for in Section 12 of Cap. 257? In what circumstances must the court give effect to the sanctions provided by Section 12(1) of the Act?

[p.122]

First, it must be emphasized that the default envisaged by Section 12(1) is non-compliance with the provisions of either Section 4 or Section 6 of the Act. The latter Section is clearly not relevant in the instant case. In my view, what is relevant here is Section 4. This Section imposes an obligation on any person or firm required by Section 3 of the Act to register a business name under the Act to "furnish to the Registrar-General a statement in writing in the prescribed form signed by the proprietor or by all the parties in the firm " and containing the particulars listed in Section 4 of the Act.

Clearly, these particulars are required to enable the Registrar-General register the business name. However, this registration process must be distinguished from that required under the provisions of the Business Registration Act, No. 13 of 1983. A proprietor or firm that is not required by Section 3 of Cap 257 to register a business name and as a consequence need not furnish the particulars set out in Section 4 of Cap. 257 still needs to be registered in accordance with the Business Registration Act, No. 13 of 1983. In the latter case there is no exemption.

Further, according to Section 5 of Cap 257 there is a grace period for the furnishing of the particulars required by Section 4 of the Act. For those businesses which were in existence at the time Cap 257 came into effect in November 1954 the requirement must be fulfilled within three months from that date. In the case of a business commenced after November 1954 the required particulars are to be furnished "within fourteen days after the commencement of the business", (emphasis mire).

Upon a proper construction of Section 7 and 12 of Cap 257 it is only after these periods have elapsed that the criminal liability envisaged by Section 7 and the [p.123] civil sanction envisaged by Section 12 could be suffered by the defaulter. Indeed, for the purposes of Section 12, it is possible for a proprietor to commence business and enter into a contract before the end of the grace period under Section 5 without first furnishing the particulars required under Section 4 and without attracting the sanction envisaged by Section 12.

For a party to a contract to attract the sanction envisaged by Section 12 of Cap 257 it must be shown that:—

1. There was a requirement to register a business name under Section 3 of the Act;

2. That the relevant grace period under Section 5 had elapsed; and

3. The contract must have been entered into by or behalf of the party to suffer the sanction whilst that party was in default of furnishing the particulars required by Section 4 of the Act.

In my considered opinion these are materials fact which must be pleaded in one way or the other and there must be evidence led in proof of these fact before there could be said to be default under Section 12 of the Act. Positive evidence is required here not just facts from which an inference could be drawn.

It is clear from the following cases where the English Registration of Business Names Acts 1916 and 1927 were considered that the defendant who wished to invoke sanctions similar to the one envisaged by Section 12 of Cap 257 had pleaded the fact. In Watson v. Park Royal (Caterers) Limited [1961] QBD in

considering the question of relief under Section 8 of the 1916 Act, which is more or less, identical to Section 12 of Cap. 257 Edmund Davies J. had this to say:—

[p.124]

"It has already been demonstrated by the correspondence and other documents that from the outset and long before these proceedings were begun, the defendants were taking the point that there had been no registration and were giving due notice of their intention to rely on that plea [emphasis mine] were any proceedings instituted which they in due course did. The plaintiff must therefore be held to have been amply warned and fully aware of the statutory requirement. "

In one of the correspondence referred to in the above and relied on by Edmund Davies J. the defendant's Solicitor had this to say:—

"I have caused enquiries to be made from which I am satisfied that the name of "Brays" is not registered pursuant to the provisions of the Registration of Business Names Act, 1916, and I respectfully submit that 'this fact alone provides the defendants with a complete defence to this action ".

In Hawkens and another v. Duche (supra) one of the defences to the action was that the M and B Taper to whom the goods were sold was not a partnership consisting of Mayer and Bernard but was Mayer trading alone under the style of M. and B Taper; that Mayer had neglected to register his business name as required by Section 1 of Registration of Business Names Act, 1916; and that as he was in default the plaintiffs were precluded by Section 8(1) of that Act from enforcing Mayer Taper's rights under the contract by action,

McCardie J. in dealing with the issue of how wide is the discretion given to the Court to grant relief in case of such default as alleged in that case had this to say:—

[p.125]

"... that the fair administration of justice as between party and party require a construction of the Act which gives the High Court a power to grant relief as well after as before action. It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant should manage to elicit a trivial and inadvertent breach by the plaintiff of the [1916] Act and thereby defeat the whole action which was well founded".

(See also JH Cook & another v. Alban Expanded Metal and Engineering Company Limited [1969].)

Finally, on this issue I hold that it was incumbent on the defendant to plead reliance on the fact of non-compliance with the express provisions of section 12 (1) of the Act and to have ensured that there was clear and positive evidence of such default. I find that the available evidence is not conclusive of the fact of non-registration of the business name of the plaintiff as opposed to the non-registration of the business carried on under the business name.

Secondly, I share the view of Alhadi J.A. that if the defendant had sought and obtained leave to amend as the Court of Appeal had rightly held they were entitled to this would have availed the Plaintiff/appellant of "his undoubted right to lead evidence of the registration of the [business name]."

Thirdly, although the Plaintiff/Appellants also failed to renew their application to lead fresh evidence of registration this could not be held against them as the issue of non-registration of the business name had not been satisfactorily raised by the Respondents herein.

[p.126]

The next question to be determined is whether the Respondent has acted in breach of the agreement which, according to the contention of the Plaintiff/Appellant, had been varied so as to entitle him to receipt of commission for all flour produced and sold by the Respondent. The breach complained of was the summary termination of the relationship between the parties and the refusal to make any further supplies of flour or pay any outstanding or further commission to the Plaintiff/Appellant.

The Respondent denies that there was any variation of the agreement, Exh A, as alleged by the Plaintiff/Appellant or at all. In paragraphs 4, 5, 6 and 7 of the amended defence it contends as follows:—

"4. As regards paragraph 4 of the statement of claim, the Defendant denies that the said Mr. Leslie Thompson acted in breach of the agreement as alleged and will contend that the said Leslie Thompson was led to continue to pay commission to the Plaintiff because he was led to believe that there was a variation of the original contract in the time indicated to him by the Plaintiff and did so only out of an abundance of caution, but when he discovered that no variation (though suggested) was accepted by the Defendant, he stopped paying commissions.

5. The Defendant further contends that the primary consideration for concluding the said contract was to afford foreign exchange to the Defendant and by failing to do so, the very basis of the said contract was destroyed by the Plaintiff.

[p.127]

6. As regards paragraph 5 of the statement of claim, the Defendant asked (he Plaintiff in March 1992 to vacate the office of the Defendant, since the Plaintiff has no further business with the Defendant to justify the occupation of the Defendant's premises but the Defendant never stopped supplying flour to the Plaintiff, provided the Plaintiff paid in advance for the flour before taking delivering thereof.

7. As regards paragraph 6 of the statement of claim, the Defendant contends that the Plaintiff has never acted in accordance with the agreement and that there was no variation to the said agreement. "

It is common ground that the agreement tendered by PW1 as Exh "A" was dated 27th June 1985 which presumably was the date it came into effect. The acts of the Defendant which the plaintiff claimed constituted a breach of contract occurred sometime in August 1992. What transpired in the interval is of great significance for the outcome of this appeal.

The evidence relied on by the Appellant for the contention that the agreement was varied is both oral and documentary. As to what took place in the few years after the execution of the agreement we have first the evidence of the Plaintiff himself PW4.whose testimony was interposed whilst PW3, Frederick Chrispin Jones was still giving evidence.

After testifying as to me circumstances that led to the signing of the agreement, that is, the dire need of the Defendant/Respondent for foreign currency which risked crippling its business he deposed that he made an initial payment of U$250,000.00 to the Defendant/Respondent. He then continued as follows:—

[p.128]

"It was after that we entered into this agreement Exh "A ".

This agreement was entered into on the 27th of June 1985. I signed this document myself I can see my signature at page 2. The agreement was prepared by Wright and Jusu-sheriff who acted for both of us'. The agreement was implemented. The Defendant supplied me with flour according to the agreement until sometime mid-way 1990. [emphasis mine]

In this exhibit "A" I was described as Eric James carrying on business [as] James International Enterprises. Under this title I carried on business as an entrepreneur. It was a one man business. I was the same person.

My address on Exh "A" is 28 Savage Street. That was where I was living and operating the business.

I subsequently incorporated this enterprise into a private limited liability company, [emphasis mine]

According to the available evidence this incorporation took place very early in the relationship with the Defendant. The Certificate of Incorporation, part of bundle of documents marked as Exh "T" and tendered by PW3, is dated 22nd July 1985. It is not surprising therefore that PW3 whose evidence is crucial for this aspect of this judgment testified after tendering Exh "T" under cross-examination by Counsel for the Defendant as follows:—

"I haven't got the Registration Certificate of Eric James carrying on business as James International Enterprises.

I was not the General Manager of the firm i.e. Eric James carrying on business as James International……We have a Company called [p.10] James International Enterprises Limited which is a Company registered under the Companies Act. I am the General Manager of this Company.

I am not aware of the firm named Eric James carrying on business as James International.

I am also not aware of a firm by the name Eric James carrying on business as James International Enterprises ".

The further evidence of PW4 is to the effect that sometime after the implementation of the agreement, Exh "A" and, in my view, certainly after the incorporation of the sole proprietorship the nature of the business relationship with the Defendant changed. This is how PW4 put it:—

"The payment for the flour by me was made on a day to day basis. They would supply us the flour and we would pay for it.

Both the M/D Sea Board and I consulted each other and then agreed on the selling price which changed from time to time. The price at which I sold to the public was also agreed upon by me and the M/D of the Defendant Company.

We continued this modus operandi up to the arrival of Mr. Leslie Thompson in April 1991".

After the arrival of Mr. Leslie Thompson further changes took place. Some of these changes, are evidenced in a series of correspondence between PW3 on behalf of James International Enterprises Limited and the Defendant Company. These include the following:—

1. Exh "B" — letter dated 25th February 1992 from Leslie Thompson to "Mr. Eric James Principal James International Enterprises Limited";

[p.130]

2. Exh “C” — letter dated 3rd march 1992 from Leslie Thompson to Eric James;

3. Exh "H" — letter dated 28th February 1992 from PW3 to Mr. Leslie Thompson;

4. Exh "J" — letter dated 6th March 1992 from PW3 to Leslie Thompson; and

5. Exh "M" — letter dated 11th August 1992 from Leslie Thompson to "Eric James, Chairman, James International Enterprises Limited".

In my opinion, what can be gleaned from this series of correspondence is that the business of sale of flour produced by the Defendant Company and the payment of a commission was by 1992 being conducted with James International Enterprises Limited, the company, and not with Eric James, the sole proprietor, carrying out business as James International Enterprises.

My view of this change is reinforced by the testimony of PW3 in the following words:—

"Exh "H" was written by me on behalf of my Company, James International Enterprises Limited. So were [exhibits] J, L, O, R, S. All the flour that was bought from Seaboard was by James International Enterprises Limited. What was paid by Seaboard [in respect of] the flour was paid to James International Company Limited, the Company ". [Emphasis mine]

What then is the inference to be drawn from the above evidence as to the change in the relationship between the parties to the original agreement? What is the legal effect?

[p.131]

Counsel for the Appellant contends that it was a mere variation of the original agreement as a result of which the Company, James International Enterprises Limited, was merely acting as the agent of Eric James, the sole proprietor. On the other hand, Counsel for the Respondent contends that the original agreement had been discharged by performance (though such performance had not been quite satisfactory on the part of the Plaintiff/Appellant) and had not been varied.

Before I deal with the legal effect of the incorporation of the sole proprietorship in July 1985 on the business carried by Eric James, prior to that date I wish in passing to say a few words about the legal effect of the changes in the nature of the business relationship of the Respondent whether with the Company on its own behalf or with the Company as agent of Eric James as contended by and/or on behalf of the Appellant.

Did the changes tantamount to a variation of the agreement on Exh "A" as contended by the Plaintiff/Appellant? In order to answer this question in the context of the instant case it must be pointed out that there is a distinction between variation and novation.

In the case of variation, the parties to the contract agree to modify or alter its terms. The agreement which varies the terms of an existing agreement must be supported by consideration. In many cases consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other. The main feature of a variation is that the original contract continues to exist but in an altered form.

[p.132]

The distinction between a variation and a novation is thus explained by the editors of Chitty on Contracts, 28th edition, Volume 1 at paragraph 23-031 under the rubric: "Novation":

[Novation is a generic term which signifies] "that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties: the consideration mutually being the discharge of the old contract. In particular, r[sic] it denotes the recission of one contract and the substitution of another in which the same acts are to be performed by different parties ",

Novation may thus be used to describe a species of transfer of rights and obligations where two contracting parties agree that a third, who also agrees, shall stand in relation of either of them to the other. There is a new contract for which the consent of all the parties is required. According to Chitty (supra) at paragraph 20-085/6:

"Most of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as the debtor in the place of the old company or firm. The acceptance may be inferred from acts and conduct, but ordinarily it is not to be inferred from conduct without some distinct request……

[p.133]

It should, however, be noted that the effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by a new one ".

In the instant case, from the totality of the evidence, one can safely conclude that by the conduct of the parties they did effect a complete extinction of the first and original agreement evidenced in Exh "A", and did not merely effect an alteration which left that original agreement subsisting. The changes went to the very root of the contract. As a result, I hold that there was not a mere variation but a novation that ensued soon after the execution of the original agreement.

The next and crucial question is whether there was a valid consideration for this new agreement and whether the Plaintiff/Appellant was a party thereto.

The Court of Appeal took the view that there was no consideration for this new agreement nor was it made under seal. In that Court's view the basis of this new agreement was contained in Exh "B" dated February 1992. With respect to the learned Justices, this does not correctly reflect the state of the evidence. The new agreement arose partly by conduct when the Respondent agreed to supply its products to the new Company on terms different from that contained in Exh "A" i.e. the payment of US3.00 per bag before delivery. Under the new agreement there was the sale of flour in leones leaving a margin for the distributor on the one hand and on the other hand the purchase of produce by the Company with money advanced by the Respondent to generate foreign currency for the Respondent as evidenced in Exh "C". This arrangement was of mutual benefit to both parties and that constituted valuable consideration. (See Currie v Musa (1875) LR 10 Ex 153) (Williams v Roffey Bros & Nicholls (Contractors) Ltd [p.134] [1991] 1 Q.B, 1 at 23) (Guinness Mahon & Co Ltd v Kensington & Chelsea Royal B.C. [1998] 2 All E.R. 272)

The second question to be answered is this: who were the parties to the new agreement? The contention of the Plaintiff/Appellant is that he continued to be the contracting party throughout the relationship with the Respondent and that James International Enterprises Limited was merely his agent. In my considered opinion, implicit in that contention is an admission that performance of the obligation due to the Respondent was by James International Enterprises Limited but the benefit of the agreement was that of the Plaintiff/Appellant.

Such a relationship between "vicarious performance" and "agency" is considered in paragraph 20-082 of Chitty (supra) in the following passage:—

"…… in the case of vicarious performance the original contracting party remains liable on the contract. There is nothing to prevent a person contracting on such terms that he is entitled either to perform the contract himself, or to secure performance by making a new contract with a third party as agent of the other contracting party".

But in the instant case was James International Enterprises Limited merely an agent of the Plaintiff/ Appellant or was it in fact the real contracting party?

Since as far back as 1897 when the House of Lords pronounced its decision in the all too familiar case of Solomon v. A. Solomon & Co Limited [1897] AC. 22 (H.L) it has been generally accepted as trite law that once a company is legally incorporated it must be treated like any other independent person with its rights [p.135] and liabilities separate to itself. According to Lord Herschell in Solomon's case "the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what these rights are ".

Like Mr. Eric James, Mr. Solomon had converted his one man business into a limited liability company. When the company failed it was sought to make Mr. Solomon liable for some of its debt by arguing that the company was Mr. Solomon in another guise, that he had used the company as an alias and had employed the company as its agent. In dealing with the legal effect of incorporation of an existing business in the Solomon case Lord Macnaghten stated in this oft-quoted passage that:—

"The company is at law a different person altogether from the subscriber to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them ".

In the same case, on the issue of agency, Lord Halsbury LC, at page had this to say:—

"I observe that the learned Judge (Vaughan Williams J) held that the business was Mr. Solomon's business; and no one else's; and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that the very learned judge becomes involved by the very argument in a very singular contradiction. Either the limited company was a legal entity or it was not.

[p.136]

If it was, the business belonged to it and not to Mr. Solomon; If it was not there was no person and nothing to be an agent of at all; and either that there is a company and there is not".

I adopt the above passages for the purposes of the instant case and hold that based on the totality of the evidence, particularly the testimony of PW3 cited earlier, Mr. Eric James, the sole proprietor is not and could not have been a party to the new agreement for the simple reason that the sole proprietorship had ceased to exist since July 1985 and had been superceded by the new Company. A fortiori, the Company could not therefore have been acting as agent of the Plaintiff/Appellant as contended on his behalf.

In view of the above, I hold that the Respondents could not be liable in the circumstances for the alleged breaches as contained in the statement of claim and as set out above. As the action has been brought in the name of the wrong plaintiff 1 do not feel compelled to go on any further in this judgment to consider whether there was in fact any breach of contract for which the Respondent may be liable and whether it is in fact under any obligation to render an account as prayed for by the Plaintiff/Appellant.

Before I conclude I must state for the purpose of completeness of this judgment that I have adverted my mind to the provisions of Order XII, particularly Rules 3 and 11 of the High Court Rules to see whether it could be of any assistance to the Plaintiff/Appellant even at this late stage. The Rules states as follows;

"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may, if satisfied that it has been so commenced [p.1037] through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just"

Taking into account the circumstances of the instant case and upon a proper construction of the above provision I have come to the conclusion that this provision could not be of any assistance to the Plaintiff/Appellant for the following reasons:—

First, Unlike Rule 11 of Order XI1 which enjoins the court to ensure suo moto the joinder or substitution of any non-party whose presence is necessary before the court for the purpose of adjudicating on the matters in dispute between the parties before it Rule 3 of that Order envisages an application by the party who wishes to substitute or add a new plaintiff. The court cannot do it suo moto as under Order XII Rule 1 because under Rule 3 the applicant, inter alia, needs to satisfy the court that the mistake was bona fide. In the instant case there was no such application at the trial nor before the Court of Appeal nor before this Court and this despite the fact that the need for such an application should have been obvious to Counsel for the Plaintiff/Appellant after the answers given under cross-examination by PW3, Mr. Jones Besides, throughout the trial the issue of the entitlement of the Plaintiff/Appellant to sue had been made an issue in one form or another. (See Performing Rights Society Limited v. London Theatre of Varieties Limited [1924] A.C. 1)

Secondly, I doubt whether an application to this Court to substitute or add the Company as plaintiff would have succeeded as the authorities all seem to establish that the court would be reluctant to allow a new plaintiff to be substituted or added where the action if commenced at the date of the order to substitute or add would have been statute-barred under the relevant provision of the enactment governing limitation of the particular type of action before the [p.138] Court (See Attorney-General v. Pontypridd Waterworks Company [1908] 1 Ch 388; Mabro v. Eagle Star [1932] 1KB 485).

For the above reasons the Appeal cannot succeed and is therefore dismissed. For entirely different reasons I would uphold the orders made by the Court of Appeal in setting aside the Judgment of the High Court. I order that each party bears its own costs of this Appeal.

SGD.

JUSTICE DR. ADE RENER-THOMAS, CHIEF JUSTICE

SGD.

MR. JUSTICE E.G. THOMPSON-DAVIS, J.S.C.

SGD.

MS. JUSTICE U.H. TEJAN-JALLOH, J.A.

SGD.

MR. JUSTICE A.N.B. STRONGE, J.A.

CASES REFERRED TO

1. Nabieu Amadu v Aiah Sidiki (1972-73) ALR (SL) 421

2. Strongman (1945) Limited v. Incock (1955)2 QB

3. Gedge v. Royal Exchange Assurance (1900) 2 QB.214

4. North-Western Salt Co v. Electrolytic Alkali Co (1914) A.C. 461

5. Re Robinson's Settlement Grant v. Hobbs (1912) 1 Ch. 724

6. Lipton v. Powell (1921) 2 K.B. 5

7. Hawkins and Another v. Duche (1921) K.B.D.

8. Lipton v. Powell and another (supra)

9. Harrowgate Securities Ltd. v. Pitts (1975) QBD).

10. Cope v. Rowland (1836) 2 M+W 452;

11. Food Products Inc. v. Units Shipping Co. Ltd. [1939] A.C. 277;

12. Yin v. Sam [1962] A.C. 304).

13. Watson v. Park Royal (Caterers) Limited [1961] QBD

14. JH Cook & Another v. Alban Expanded Metal and Engineering Company Limited [1969].

15. Currie v Musa (1875) LR 10 Ex 153

16. Williams v Roffey Bros & Nicholls (Contractors) Ltd [p.134] [1991] 1 Q.B, 1 at 23

17. Guinness Mahon & Co Ltd v Kensington & Chelsea Royal B.C. [1998] 2 All E.R. 272

18. Solomon v. A. Solomon & Co Limited [1897] AC. 22 (H.L)

19. Performing Rights Society Limited v. London Theatre of Varieties Limited [1924] A.C. 1

20. Attorney-General v. Pontypridd Waterworks Company [1908] 1 Ch 388;

21. Mabro v. Eagle Star [1932] 1KB 485

STATUTES REFERRED TO

1. Business Names Registration Act Cap. 257 of the Laws of Sierra Leone 1960.

2. Section 4 of the Sale of Goods Act 1893

EVELYN AYO PRATT v. JACQUELINE CAREW & OTHERS

[SC. CIV.APP.5/2005] [p.3-8]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 25 MAY 2006

CORAM: MR. JUSTICE S.C.E. WARNE, JSC

MR. JUSTICE E.C. THOMPSON-DAVIS, JSC

MRS.JUSTICE V.A.D.WRIGHT, JSC

BETWEEN:

EVELYN AYO PRATT (ADMINISTRATRIX OF

THE ESTATE OF BETSY ROBERTS PARKINSON

(DECEASED) — APPLICANT

AND

JACQUELINE CAREW & OTHERS — RESPONDENTS

AND

ISHEKA DEEN SESAY — INTERVENER

A.F. SERRY KAMAL FOR APPELLANT

BERTNAN MACAULAY JR. ESQ., FOR THE INTERVENER

DELIVERED ON THURSDAY 25 MAY 2006

RULING

WARNE JSC

Counsel for the Appellant Mr. Serry Kamal filed a Notice of Motion dated 30th March 2005 praying for certain orders to wit:

(1) An interim stay of execution of judgment of the High Court dated the 14th day of February 1995 and all subsequent proceedings thereto pending the hearing and determination of this application.

(2) An order granting a stay of execution of the judgment of the Court Dated 14th day of February 1995 and all subsequent proceedings thereto pending the hearing and determination of the Appellants appeal to the Supreme Court of Sierra Leone.

[p.4]

(3) Such further or either order as the court shall deem fit. The application is supported by an affidavit sworn to by one Elizabeth Parkinson on the 30th day of March 2006 together with exhibits annexed and filed herein.

At the hearing of the Notice of Motion on the 9th day of May, 2006 Mr. Serry Kamal sought leave to amend the aforementioned Notice of Motion of 30th March 2006. The amendment is underlined in red that is to say:

(1) An order granting an interim stay of execution of the judgment of the High Court dated the 14th day of February 1995 and the Order of the Court of Appeal dated the 14th day of November 2004 and all subsequent proceedings thereto be stayed pending the hearing and determination of this application.

(2) An order that the judgment of the High Court dated the 14th day of February, 1995 and the order of the Court of Appeal dated 24th day of November, 2004 and all subsequent proceedings thereto be stayed pending the hearing and determination of the appeal. This amended Notice of Motion is dated 11th day of April 2006. Leave was accordingly granted by the Court for the hearing of the amended Notice of Motion theirs being no objection by Counsel for the Intervener.

Mr. Serry-Kamal, Counsel for the applicant submitted that the motion is supported by the affidavit of Elizabeth Parkinson sworn to on the 30th day of [p.5] March, 2006 with particular reference to paragraphs 6 and 7. Counsel further submitted that if the application is not granted, the appeal will be rendered nugatory. Counsel further relies on paragraphs 4, 6, 7, 8 of the said affidavit and said they afforded special circumstances why stay should be granted. The application is made pursuant to Rule 60 of the Supreme Court Rules No. 1 of 1982.

Mr. Berthan Mcaulay Jr. Counsel for the Intervener, is opposing the application for the orders prayed for. He has referred to the affidavit sworn to by himself on the 25th day of April. Counsel has submitted that the affidavit of Elizabeth Parkinson in support of the application is made in her name but not on behalf of the appellant.

He submits that the applicant is Evelyn Ayo Pratt, Administratrix of the estate of Betsy Rogers Parkinson, and it is clear she comes to the court in a representative capacity, as Administratrix of the estate of Betsy Rogers Parkinson. Counsel further submitted that the affidavit in support of the application is not

sworn to by the Appellant Evelyn Ayo Pratt. Counsel also submitted that the averment in paragraph 4 of the affidavit of Elizabeth Parkinson is not supportive of the application. Counsel also referred to paragraph 7 of the said affidavit and submitted that being occupants of the property in no way made them parties to the appeal.

[p.6]

Counsel went on to submit that the appeal to this court is by Betsy Rogers Parkinson by her Administratrix — The appeal. Counsel submitted is made in the name of Betsy Rogers Parkinson who has no locus standi in this court.

Counsel finally submitted that there are no special circumstances disclosed to warrant this court to grant the application.

Mr. Serry Karnal replied.

The application of Serry Kamal is seriously flawed in many respects. The purported Notice of Motion dated 11th April 2006 is not a Notice of Motion but a Notice. The Court granted leave that it can be entertained in the proceedings; however, the order sought does not bear any relationship to the Exhibits EP1 and EP2 respectively referred to in the affidavit of Elizabeth Parkinson sworn to on the 30th day of March 2006.

There is no supplemental affidavit in support of the Notice which contained the amendment sought, nor is there any notice on the purported Notice dated 11th day of April, 2006 that the affidavit of Elizabeth Parkinson sworn to on 3rd March 2006 was intended to be used at the hearing of the amended Notice. In order to exacerbate the short comings in the application to the court by Mr. Serry Kamal the title of the interlocutory application is not the same as that on the order of the Court of Appeal dated 24th day of November 2004 sought to be stayed. In the interest of clarity the Order sought to be stayed is Intituled.

[p.7]

IN THE COURT OF APPEAL OF SIERRA LEONE

(CERTIFICATE OF THE ORDER OF THE COURT RULE 35(1)

IN THE COURT OF APPEAL[sic] OF SIERRA LEONE

(PROBATE JURISDICTION)

IN THE MATTER OF THE ADMINISTRTION OF THE

ESTATE OF FLORENCE ROBERTS

(DECEASED) INTESTATE

AND

IN THE MATTER OF THE ADMINISTRATION OF

ESTATES ACT CAP.45

AND IN THE MATTER OF AN APPLICATION UNDER

ORDER XLV OF THE HIGH COURT RULES BETWEEN:

BETSY ROGERS PARKINSON

ELAINE PRATT

CYNTHIA DAVIES (MAUDE ROBINSON)

LARENCE ROBINSON — APPELLANTS

DESMOND ROBINSON

AND

JACQUILINE CAREW

GEORGE ADEKUNLE ROBINSON — RESPONDENTS

AND

ISHEKA DEEN SESAY — INTERVENER

[p.8]

The TITLE on the Interlocutory application is: CIV.APP. 5/2005

BETWEEN:

EVELYN AYO PRATT (ADMINISTRATRIX OF THE ESTATE

OF BETSYROGERS PARKINSON (DECEASED) — APPLCIANT

AND

JACQUILINE CAREW & ORS. — RESPODNENTS

AND

ISHEKA DEEN SESAY — INTERVENER

There has been no application for a substitution of parties pursuant to Rule 37 Rules of the Supreme Court No.1 of 1982 neither does the affidavit of Elizabeth Parkinson sworn to on 30th day of March 2006 aver that she had authority to swear to the affidavit on behalf of the several persons named therein nor has she exhibited the death certificate of the parties who had died.

To compound the defect in the application, there is no Letters of Administration exhibited that Elizabeth Parkinson is the Administratrix of the estate of Betsy Rogers Parkinson.

In my opinion, there is no merit in the application and it must needs dismissed and I dismiss it with costs assessed at Le 350,000 to be paid by the applicant to the intervener/Respondent.

SGD.

NATHALIE INA KOTO ELEADY-COLE v. MAGNUS KOSO-THOMAS & 2 ORS.

[CIV APP.6/93] [p.24-35]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 6 SEPTEMBER 2006

CORAM: DR. ADE RENNER-THOMAS, C.J.

JUSTICE SIR J. MURIA, J.S.C.

JUSTICE S.C. WARNE, J.S.C

MRS JUSTICE V.A. WRIGHT, J.S.C.

JUSTICE U.H. TEJAN-JALLOH, J.A.

NATHALIE INA KOTO ELEADY-COLE — APPELLANT

AND

MAGNUS KOSO-THOMAS

(EXECUTOR OF THE ESTATE OF

REGINALD HOWARTH ELEADY-COLE)

AND

JEANNE PIERRE ELEADY-COLE — RESPONDENTS

DATED THE 7TH DAY OF SEPTEMBER 2006

Y.H. Williams Esq. M.M. Tarawally Esq. & Ms. Kamara for the Appellant

J.B. Jenkins Johnston Esq. for the Respondent

WRIGHT, J.S.C.

This is an appeal from the judgment of the Sierra Leone Court of Appeal delivered on the 20th day of May 1993.

[p.25]

The grounds of appeal are as follows:—

1. "That the learned Justices of Appeal erred in law when they held that the allegations of cruelty by the appellant were not grave and weighty to amount to legal cruelty and that the absence of independent evidence adversely affected the appellant's case with regard to her allegations of cruelty;

2. That the learned justices of Appeal erred in law in substituting a decree of dissolution of the marriage in place of a decree of judicial separation;

3. That there is no legal ground for the granting of a "decree of Divorce by the learned Justices of Appeal;

4. That as the law stands, a decree of Divorce cannot be granted unless prayed for the learned Justices of Appeal had rejected the prayer of the respondent for dissolution of the marriage and the appellant had not prayed for dissolution of the marriage;

5. That it is not a legal ground for the granting of a decree of Divorce that the court thinks it would be better that the relief to be granted for a dissolution and judicial separation;

6. That the irretrievable breakdown of the marriage is not a legal ground for the granting of a decree of Divorce in this jurisdiction;

7. That the concept of public policy as a ground for the dissolution of a marriage is not recognized by the Matrimonial Laws in this Jurisdiction;

8. That the learned Justices of Appeal having correctly stated the Law relevant to the exercise by the Court of its discretion in favour of the respondent inspite of his own adultery with the woman named [p.26] and decided not to exercise its discretion then proceeded to consider matters in the discretion statement filed by the respondent in arriving at its decision to grant a decree of divorce;

9. That the learned Justices of Appeal erred in Law in allowing the Appellant 12% share of the current price of the property in question as her beneficial interest when there was no sufficient or any basis, for such a computation;

10. That having regard to the evidence and the law applicable the Judgment is unsatisfactory";

BACKGROUND

The appellant and the respondent in the court below hereafter called:

"the deceased" were married in England on the 7th day of January 1961. After the marriage the parties lived at divers addresses. There were no children of the marriage. The appellant petitioned the High Court on the 30th June 1992 for a dissolution of marriage and that she be granted a half share in the land and premises known as 14 Spur Loop, Wilberforce. On the 10th September 1982 an order was granted to the appellant amending her prayer in the petition for a dissolution of marriage to read "that she may be judicially separated from the respondent".

On the 21st February 1990 the High court granted a judicial separation between the parties and that the property at 14 Spur Loop, Wilberforce in Freetown of the Republic in Sierra Leone was the joint property of the parties. The Justice of Appeal granted a dissolution of marriage between the parties and awarded the appellant [p.27] 12% share in the property at W14 Spur Loop Wilberforce for which the appellant has appealed to the Supreme Court.

Counsel for the appellant was given leave to argue ground 9 because he conceded that because of the death of respondent Reginald Howarth Eleady-Cole (hereinafter called the "deceased") the cause of action, the basis for grounds 1-8 of this appeal abated.

Learned Counsel for the appellant stated that the learned trial judge was right in deciding that the appellant was entitled to a 50% share in the property at W14 Spur Loop Wilberforce citing Rimmer vs Rimmer (1952) 2 AER 863. He said that the issue in dispute in this appeal was the quantum to which the appellant was entitled.

Counsel for the respondent submitted that the Court of Appeal was right in awarding 12% of the value of 14 Spur Loop on the evidence before the court. He stated that the appellant did not make any contribution towards the building of the house and that there was not enough evidence to support a resulting trust. (See Gissing v Gissing (1970) 2AER 781.

It was ordered by this Court on the 6th April 2006 that Magnus Koso-Thomas one of the Executors of the estate of the deceased be substituted as respondent in this appeal in place of the deceased who died on the 9th October 1997.

Before arguments were closed the Court referred to the affidavit of Yada Hashim Williams sworn to on the 3rd March 2006 which was supported by a [p.28] Motion dated 3rd March 2006 in which the deceased purported to convey the property to Jean-Pierre Eleady-Cole and the Court declined to make orders in this motion because firstly, Jean Pierre was not a party to the proceedings and secondly because it was agreed by both sides that the appellant had a share in the property but the extent of that beneficial interest was not certain.

I now turn to ground 9 in these grounds of appeal referred to earlier. The evidence is clear that the land on which the house in dispute was built was State land leased by the deceased by the Government of Sierra Leone and was in the deceased's name. The architectural plan was drawn in the name of both the appellant and deceased to which the deceased had no objection. Both parties to the marriage opened a joint account into which both parties paid in money for the purpose of constructing a house on the said land which was to be matrimonial home.

From the above evidence it is clear that it was the intention of both parties right from the beginning that they were to have a joint interest in the matrimonial home.

However, the parties never lived in the house as it was later rented to pay a loan given to the deceased by Barclays Bank under a gentleman's agreement though no formal document was drawn out the appellant had produced her title deeds in respect of other properties in which she had interest as collateral to secure the loan from the bank. It is not possible to ascertain precisely the amount paid to the savings account by each party because there is no evidence as to the respective quantum paid in by both parties.

[p.29]

The appellant paid for the cleaning of the site and bought some fittings for the house. There was unchallenged evidence that the Le 1,000.00 which was paid to the appellant as compensation for her damaged car was received by the deceased and used for decorating the deceased surgery. The deceased admitted receiving the sum of Le700.00 from the appellant while the building was under construction which he gave to the contractor. The contractor deposed that the appellant was often at the site.

There is substantial evidence of the common intention. I now quote from the evidence of the appellant at page 142 of the for the record of appeal:

"When the land was about to be purchased my husband and I had a joint account at Siaka Stevens Street, Freetown. The purpose of the account was to save up for the building of the house at Spur Loop Wilberforce. Our intention was that the house was to be out[sic] matrimonial home I never lived in the house because we leased it to the manager of Barclays Bank. I surrendered my title deed for the land at Aberdeen Road land at Mudge Farm Aberdeen Road, Freetown land at Tengbeh Town, my share of land at Hamy's Farm Congo Cross, my own share of property at Howe Street Freetown and my share of 19A Garrisson Street Freetown as collaterals to the bank. I have with me the joint saving pass books in the name of Dr. and Mrs. Eleady-Cole. I made a list of all the properties I was surrendering to the bank and the bank accepted it. My husband signed the Mortgage Deed".

[p.30]

The appellant also said at page 143:

"My husband applied for a building permit and obtained it in the name of Dr. and Mrs. R. Eleady-Cole. I now produce and tender it marked Exh. E. the permit is in respect of a dwelling house off Wilberforce Spur Loop. It was this house I told the Court I contributed to financially. Quite apart from the financial

contribution I made I bought some fittings. I also paid for the hiring of two loader for clearing the site. I bought the fittings in London and sent them by ship. I have never received any share of the rents paid in respect of the house".

In page 157 the deceased is recorded as saying:

"When the house was under construction my wife had her own share of the rents from the jointly owned property. Her share was Le700.00. She gave me Le700.00 which I gave the builder. "

Both Counsel for the appellant and the 1st respondent agreed that the appellant was entitled to a share in the property in dispute.

From the above what is not clear is whether they were to have equal shares or some other proportion.

What is the test in determining the proportion to which the appellant is entitled? Romer, L.J. in Rimmer v Rimmer (1952) AER said:

"cases between husband and wife ought not to be governed by the same strict consideration, both at law and in equity as are commonly applied to the ascertainment of the respective rights as strangers [p.31] when each of them contribute to the purchase price of property and the old fashion doctrine that equity leans towards equality is peculiarly applicable to dispute of the character of the present one, where the fact, as a whole, permit its application".

In Jansen v Jansen (1965) 363 AER Lord Denning said:

"agreements such as these, as I say are outside the realin[sic] of contract altogether. The common law does not regulate the firm of agreement between spouses. Their promises are not sealed with seals and sealing war. The consideration that really obtains for them is that natural love and affection which counts for so little in those cold court".

To my mind the test to be applied in such cases is the intention of both parties to the marriage. Was there an agreement between the parties express or implied as to how the property was to be held? Could the conduct of the parties reveal their intention and was there a constructive or resulting trust on the property.

In the case of Pettitt v Pettitt (1969) 2 AER 411 a freehold of a cottage had been purchased entirely out of moneys provided by the wife and the property stood in her name. The husband undertook internal decoration work and built a wardrobe in it. He also laid a lawn and constructed a wall and side wall in the garden. It was held that the husband was not entitled to an interest in his wife's property merely because he had done in his own leisure time jobs which husbands normally did.

[p.32]

Lord Diplock said in this case:

"How does the court ascertain the "Common Intention" of spouses as to their respective proprietary interests in a family asset when at the time it was acquired or improved as a result of contributing in money or moneys worth by each of them they failed to formulate it themselves? It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the court should give effect to it".

"In numerous judgments of the court of Appeal during the last 20 years this branch of the law of property has undergone considerable developments. The cases start with Re Rogers question and end with Gissing v Gissing 1 AER 1043" and I may add that we now have Miller vs Miller and McFarlane vs McFarlane which was decided in the House of Lords on the 24th May 2006.

In Jones vs. Maynard (1951) 1 AER 802 it was decided that where there is a joint purse between husband and wife whatever comes out of that joint purse or pool is the joint property of both parties.

Vaisey J. in that case said;

"Plato said that equality was a sort of justice, that is to say, if in such a matter as this one I cannot find any other bass[sic], equality is the proper basis. I think that it is principle which applies here. When moneys were taken out of the joint account for the purpose of making an investment the intention which I attribute to the parties is equality and not some preparation to be ascertained by an inquiry as to the [p.33] amount which were respectively contributed by the husband and the wife common purse ".

The conduct of the parties may give rise to some other inference as to their common intention (see Ulrich v Ulrich and Felton, 1968 (AER 67.

This case can be distinguished from Gissing v Gissing (Supra) in which the purchase price and mortgage payments were paid by the appellant. The respondent provided furniture and equipment for the house and for improving the lawn. At no time was there any express agreement as to how the beneficial interest in the matrimonial home should now be held. It was held that on the fact it was not possible to draw any interference that the respondent should have any beneficial interest in the matrimonial home.

At page 782 Lord Reid said:

"if there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house could not be bought. I agree that depends on the law of trust rather than on contract so the question is under what circumstances does the husband become trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him and implied constructive or resulting trust".

[p.34]

At page 784 Viscount Dilhorne concurred and said:

"/ agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by person in whom the legal estate is not vested and whether made by a stranger, or spouse or a former spouse must depend for its success on establishing that it is held in a trust to give effect to the beneficial interest of the claimant as cest que trust. Where there was a common intention at a time of acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouses in whose name the legal estate was vested to fail to give effect to that intention and the other spouses will be held entitle to a share in the beneficial interest".

As I have said above it is clear from the evidence in the cases cited that there was a common intention that the property was to be held jointly by the appellant and the deceased.

According to the circumstances of this case and the evidence I hold that the legal estate of the property the subject of this action is held in trust for the appellant whether constructive or resulting trust.

To give effect to the common intention of the parties I hereby declare that though the legal estate was at all material times vested in the deceased it was held in trust constructive, resulting or otherwise, as to the beneficial interest in equal shares for himself and the appellant.

The appeal therefore succeeds.

[p.35]

SGD.

V.A. WRIGHT, J.S.C.

SGD.

DR. ADE RENNER-THOMAS C.J.

I agree

SGD.

JUSTICE SIR J. MURIA J.S.C.

I agree

SGD.

JUSTICE S.C. WARNE, J.S.C.

I agree

JUSTICE U. TEJAN-JALLOH J.A.

CASES REFERRED TO

1. Jansen v Jansen (1965) 363 AER

2. Pettitt v Pettitt (1969) 2 AER 411

3. Gissing v Gissing 1 AER 1043

4. Jones vs. Maynard (1951) 1 AER 802

5. Ulrich v Ulrich and Felton, 1968 AER 67

NGANDI T.A. SOKOYAMA & THREE OTHERS v. THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE & 2 ORS.

[SC. NO. 1/2005] [p.9-23]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 6 SEPTEMBER 2006

CORAM: JUSTICE DR.ADE RENNER-THOMA, C.J.

JUSTICE SIR JOHN MURIA, J.S.C.

JUSTICE S.C.E.WARNE, J.S.C

MRS. JUSTICE V.A.D WRIGHT, J.S.C

MR. JUSTICE A.N.B. STRONGE, J.A.

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE SECTIONS 124, 171(5)

AND

IN THE MATTER OF PROVINCES ACT CAP. 60 OF THE LAWS OF SIERRA LEONE AS AMENDED BY THE PROVINCES AMMENDMENTS ACTS NO. 4 AND 49 OF 1961

BETWEEN:

NGANDI T.A. SOKOYAMA & THREE OTHERS — PLAINTIFFS

AND

THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE — DEFENDANT

A.F. SERRY KAMAL ESQ., FOR PLAINTIFFS

L.M.FARMAH ESQ., WITH E.E. ROBERTS ESQ., D. JANU ESQ., FOR DEFENDANT

DATED THE 6TH DAY OF SEPTEMBER 2006

JUDGMENT

WARNE, J.S.C.:

NGANDI T.A. SOKOYAMA & THREE OTHERS v. THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE

[SC. No. 1/2005]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 6 SEPTEMBER 2006

CORAM: JUSTICE DR.ADE RENNER-THOMA, C.J.

JUSTICE SIR JOHN MURIA, J.S.C.

JUSTICE S.C.E.WARNE, J.S.C.

MRS. JUSTICE V.A.D WRIGHT, J.S.C.

MR. JUSTICE A.N.B. STRONGE, J.A.

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE SECTIONS 124, 171(5)

AND

IN THE MATTER OF PROVINCES ACT CAP. 60 OF THE LAWS OF SIERRA LEONE AS AMENDED BY THE PROVINCES AMMENDMENTS ACTS No.4 AND 49 OF 1961

BETWEEN:

NGANDI T.A. SOKOYAMA & THREE OTHERS — PLAINTIFFS

AND

THE ATTORNEY-GENERAL AND MINISTER OF JUSTICE — DEFENDANT

A.F.Serry-kamal Esq, for Plaintiffs

L.M. Farmah Esq., with E.E. Roberts Esq., and O. Kanu Esq, for Defendants

JUDGMENT

WARNE J.S.C.:

This is a claim by way of Originating Notice of Motion seeking the following reliefs:

1. An Order that Section 5(4) of the Provinces Act Cap 60 of the Laws of Sierra Leone is inconsistent with Section 133(1) of Sierra Leone Constitution Act No. 6 of 1991 and therefore null and void.

2. That the letter dated 7th June 2005 from the Attorney-General and Minister of Justice refusing the Plaintiffs right to sue in the High Court to question the validity of the election of the Paramount Chief of Sandor Chiefdom is ultra vires the Constitution of Sierra Leone and therefore null and void.

[p.10]

(3) That in the light of the State Proceedings Act 2000 the provision in Section 5(4) of the Provinces Act 1960 Cap 60 of the Laws of Sierra Leone as amended is ultra vires the Constitution of Sierra Leone and therefore null and void.

Background

There was an election at the Sandor Chiefdom in the Kono District in the Eastern Province of the Republic of Sierra Leone. This election was to fill the vacancy created by the death of Paramount Chief Nyghaquee Fasuluku Sonsiama. Several Candidates vied for vacancy. Only one candidate was declared eligible to contest the election. He was duly elected. The Plaintiffs in this case were the other candidates. They were disqualified from contesting the election as being ineligible. Being disqualified, and the election having being held, and the sole candidate declared the winner, they sought the consent of the Attorney-General and Minister of Justice to commence proceedings in the High Court to challenge the validity of the said election. The Attorney-General refused to give his consent. The Plaintiffs have therefore invoked the jurisdiction of this court pursuant to Sections 124, 171 (5) of the Constitution of Sierra Leone Act No. 6 of 1991 (hereinafter called the Constitution) and the Provinces Act Cap 60 of the Laws of Sierra Leone as amended by the Provinces Amendment Act No.4 of 1991 (hereinafter called the Provinces Amendment Act.)

Mr. Serry-Kamal Counsel for the Plaintiffs filed an affidavit sworn to by Tamba M. Mondeh Tengbessa one of the Plaintiffs on the 14th day of June 2005. This affidavit is in support of the Originating Notice of Motion. During the hearing, Counsel filed another affidavit sworn to again by Tamba M. Mondeh Tengbassa on his and on behalf of the other Plaintiffs herein on the 17th day of May 2006.

[p.11]

Mr. Serry-Kamal, in support of the various documents filed made the following submissions: that the grounds on which the Plaintiffs rely are those in Exhibits TMMT4 and TMMT5. He referred to the provisions in the Provinces Amendment Act No.4 and No.49 of 1961. Those Sections (1) (2), 4(2) and 7(1) of the State Proceedings Act No. 14 of 2000 are inconsistent with the provisions of Section 133(1) of the Constitution.

That the case for the Plaintiffs is that set out in their cases dated 21st June 2005. That the only requirement that must be fulfilled to seek any of the reliefs as set out in Section 5(4) of the Provisions Act Cap.60 as amended are contained in Section 6. The application must be in writing addressed to the Permanent Secretary, Ministry of Internal Affairs and made within 30 days of the irregularity complained of, he added. Counsel went on to address the Court on the series of events prior to the refusal contained in Exhibit TMMT5 which are Election was held on the 13th May 2005, application the Attorney-General and Minister of Justice made on the 19th May 2005 and copies addressed to the Permanent Secretary, Ministry of Local Government and the Ministry of Internal Affairs. Counsel submits that the refusal of the Attorney-General is contrary to Section 133(1) and Section 171(15) of the Constitution. That having provided the requirements, Section 5(4) of the Provinces Act Cap.60 as amended is ultra vires the Constitution and consequently any Law which is inconsistent with the Constitution is null and void.

That Section 5 Subsections (4) to (7) are inconsistent with Section 133(1) of the Constitution and as such, null and void:

That Section 133(1) of the Constitution gives unlimited access to the Court and refers also to Section 171(15) of the Constitution. In support thereof Counsel refers to the State Proceedings Act No. 14 of 2000 and more particularly to Section [p.12] 2 and the case of A.P.C. vs. Nasmos SC No.4 of 1966 of 29th October 1999 (unreported).

That the Petition of Rights Act No.23 of the Laws of Sierra Leone is ultra vires the Constitution as a result of the foregoing submissions.

That the dicta of Wright JSC. In the Nasmos case states that Sections 3, 4 and 5 of the Petition of Rights Act Cap 23 are inconsistent with the Constitution. That the scheme in the Provinces Amendment Act is similar to the provisions in Sections 2, 3, 4 and 5 of Act No.23 of the Laws of Sierra Leone. In section 4 of Act No.23, there is the requirement of the Attorney-General's Fiat with this difference, that by the provision in Section 5(7), the jurisdiction of the court is ousted. In fact, Counsel has urged on the Court that Sections 5(3) 4(5) and (7) of Act No. 23 appear to oust the jurisdiction of the Court and this is in contravention of Section 171(15) of the Constitution. Counsel submits that he is challenging the validity of the election and this is a claim against the Government and a claim means a right to sue. The above submissions were made in support of ground (1) of the claim. Counsel submits that he was adopting his submissions on ground (1) for the reliefs sought on grounds (2) and (3).

In order to buttress his case further, Counsel submits that if his submission, on ground (1) are not tenable, then exhibit TMMT5 dated 7th June 2005 is inconsistent with Section 133(1) of the Constitution. He submits that the refusal contained in the letter is a violation of section 133(1) of the Constitution.

In a further argument on ground (3) Counsel submits that in the light of the provisions of Sections 5(4) (6) and (7) of the Provinces Act as amended, the refusal of the Attorney-General to grant his consent is ultra vires the Constitution. Finally [p.14] Counsel sought leave to be granted that a declaration be made in ground (1) that section 5(4) of the Provinces Act as amended instead of an order.

The Court granted the leave accordingly.

Mr. L.M. Farmah Counsel on behalf of the defendant submits that he had filed Defendant's case on the 5th March 2006 and wishes to adopt his argument in his case. That would have sufficed, in view of the fact that he had mentioned the authorities he relied on. However, he went on to make some interesting submissions. That the Provisions Act Cap 60, more particularly Section 5(4) is not in conflict with section 133(1) of the Constitution. The reason being that the Statute and Section 133(1) deal with two subject matters and each provide a different regime, he added. Counsel further submits that section 133(1) deals with a claim against the Government. He submits that the claim against Government in Section 133 is for damages and compensation and not for actions of elections particularly Paramount Chiefs elections. That in order to enforce a claim under Section 133 (1) one should invoke the provisions which are contained in the State Proceedings Act Sections 5 and 6.

Counsel submits that any irregularities that may arise out of a Paramount Chief election the manner in which an action can be instituted is by the Provinces Act and the Provinces Act is an existing legislation.

Counsel further submits that Section 72 of the Constitution has nothing to do with Section 133(1) of the same Constitution and Section 72(3) upholds and preserves the Provinces Act Cap.60. Counsel submits that the repeal of Petition of Rights Act Cap 32 does not affect the existence of the consent requirement under section 5(4) of the Provinces Act Cap 60. Counsel finally submits that Chieftaincy election under the Constitution together with the Provinces Act provides the process by [p.15] which claims can be instituted and this is quite different from claims under Section 13(1). The latter of which is in Part 11 of the State Proceedings Act.

In the instant case the Plaintiffs claim that they have been restrained from instituting proceedings in the High Court to test the validity of the election of the Paramount Chief held on 13th May 2005. The law which gives the Attorney-General power to restrain them from instituting proceedings appears to be inconsistent with that provided by Section 133(1) of the Constitution, consequently the amended Section 5 of the Provinces Act may be inconsistent with the provisions of Section 133(1) of the Constitution and therefore null and void.

Section 133(1) of the Constitution provides:—

“Where a person has a claim against the Government, the claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right".

The Plaintiffs are persons within Section 133(1) who claim that their rights have been contravened. Mr. Farmah has argued strenuously that claim against Government in section 133(1) is one for damages or compensation for wrong against the individual. There is no qualification in section 133(1) as to the claim, which may be enforced as of right, Counsel urged on the Court to make a distinction which ought to be made or enforced as of right in relation to damages or compensation against the Government for wrongs against a person and a claim against Government vis a vis an election more particularly a Paramount Chieftaincy election.

[p.16]

As I have said, there is no qualification in Section 133(1) as to what right, which has been, contravened that may be enforced without the grant of a fiat or the process known as Petition of Right, with respect to Counsel for the defendant.

That Section 72 of the Constitution which deals with the institution of Chieftaincy has no relation to Section 133(1) of the Constitution. Counsel urged on the court that Section 72 creates a separate regime. The submission again is contrary to the Constitution being one and an indivisible document. This is the basic law. No doubt the drafters of the Constitution were wise to ensure that the institution of Chieftaincy is preserved but to my mind they had no intention to isolate it from the rest of the Constitution or to put it above the supremacy of the Constitution, (vide Section 72(5) :—)

5. "Subject to the provisions of this Constitution and in furtherance of this section, Parliament shall make laws for the qualifications, election, powers, functions, removal and other matters, connected with Chieftaincy".

This is clearly indicative of the intention of the drafters of the Constitution that Section 72 shall be part of the Constitution and subordinate thereto.

Let me now address the submission of Mr. Farmah that this claim is not sustainable against the Government. It is necessary to ascertain the definition of Government. In the Interpretation Act, No.8 of 1971, section 4(1) "Government means the Government of Sierra Leone (which shall be deemed to be person) and includes, where appropriate, any authority by which the executive power of the State is duly exercised in a particular case". Having said this, I hold that the Plaintiffs have a right to institute proceedings against the Government; the Government being a person.

[p.17]

Does Section 72 of the Constitution create a separate regime irrespective of Section 133(1) of the same Constitution? I do not think so: I am fortified in my view by the provision in section 170(1) of the Constitution which state, the Laws of Sierra Leone. Shall comprise:—

(a) This Constitution

(b) The Laws made by or under the authority of Parliament as established by this Constitution.

(c) any orders, regulations and other statutory instruments made by any Person or authority pursuant to a power conferred in that behalf by this Constitution or any other Law.

(d) the existing law; and

(e) the common law

2. The Common Law of Sierra Leone shall comprise the rules of law generally Known as the common law, the rules of law, generally known as the doctrines of equity, and rules of customary law including those determined by the Superior Court of Judicature.

3. For the purpose of this Section the expression "Customary Law" means the Rules of law which by custom are applicable to particular communities in Sierra Leone."

I hold that Sections (2) and (3) are particularly applicable in the instant case since "Customary Law" is germane to the issue. I concede that we are [p.18] not here dealing with the merits regarding the validity of the election in the Sandor Chiefdom, yet we are bound to acknowledge that Section 72 of the Constitution is part of the Constitution and should be considered as such.

The documents that precipated these proceedings are contained in the affidavit of Tamba M. Mondeh Tengbessa sworn to on the 17th day of May 2006 on his and on behalf of the other Plaintiffs. The exhibit TMMT4 which is a letter dated 19th May 2005 written by the Solicitor of the Plaintiffs to the Attorney-General and Minister of Justice seeking his consent to institute proceedings in the High Court to challenge the validity of the election of Sheku Amadu Fasuluku as Paramount Chief of Sandor and our disbarment from contesting the said election"; and exhibit TMMT5 which is a reply by the Attorney-General dated 7th June 2005 refusing his consent to institute such proceedings. Both exhibits are part of this Judgment. They are exhibit TMMT4 and exhibit TMMT5. I have included these two exhibits in this Judgment in the following pages.

[p.19]

M.J. Tucker (Miss)

A.B. Kalokoh

S.M. Sesay

Our Ref:—

Your Ref:—

19th May 2005.

THE ATORNEY GENRAL AND MINITER OF JUSTICE

GUMA BUILDING

LAMINA SANKOH STREET

FREETOWN.

Dear Sir,

RE: CHIEFTAINCY ELECTIONS IN THE SANDOR CHIEFDOM KONO DISTRICT

We represent Mr. Gandi Tamba Amadu Sukuyama and others aspirants who were disbarred from contesting elections held at Kayima Sandor Chiefdom on the 13th May 2005.

On behalf of our clients we intend to command CIVIL Proceedings in the High Court to challenge the validity of the election of Sheku Amadu Tejan Fasuluku as Paramount Chief of the Sandor Chiefdom and our disbarment from contesting the same elections.

Pursuant to Section 6(4) of Provinces Act Cap.60 as amended by Act No.4 and 49 or 1961 we write to seek your consent to commence those proceedings.

Yours faithfully

A.F. Serry-Kamal

For Serry-Kamal & Co.

8 Walpole Street

Freetown

Sierra Leone

Tel: 226263

Fax: 226652 Email

[p.20]

The letter was copied to all interested parties

----------M.T. States

Republic of Sierra Leone

Tel: — 229303/223497 Attorney-General & Minister of Justice

Fax: — 229366 Attorney-General's Chambers

7th June 2005 Ministry of Justice

Guma Building

Lamina Sankoh Street

Freetown, Sierra Leone.

Dear Sir,

RE: CHIEFTAINCY ELECTION IN THE SANDOR CHIEFDOM KONO DISTRICT

I refer to your letter dated 9th May 2005 seeking my consent to enable you Commence proceedings in Court in response of the above mentioned Paramount Chief Election conducted in Sandor Chiefdom Kono District.

Having considered the facts and circumstances leading to the elections and Recognition of Paramount Chief Sheku Ahmed Tajan[sic] Fasuluku of Sandor Chiefdom, I am unable to grant to you and your client my consent required by Section 5 Subsection 4 of the Provinces Act Cap 60 of the Laws of Sierra Leone 1960 as amended.

Yours faithfully,

F.M. Carew Attorney-General & Minister of Justice.

This letter was copied to the Secretary to the President and the Minister of Local Government and Community Development.

For ease of reference the Provinces Amendment Act No.49 1961 is part of this Judgment in the following Pages.

[p.21]

A.410 No.49 Protectorate Amendment (No.2) 1961

"(3) No proceedings shall be brought in any Court to retain or suspend or in any way to interrupt the election of a Paramount Chief

(4) No proceedings shall be brought in any court without the consent in writing of the Attorney-General

(a) to assert the validity of the election of any person as a Paramount Chief or to declare any person to be the duly elected Paramount Chief of any Chiefdom;

(b) or to question in any way the validity of the election or, or to unseal or replace, any Paramount Chief or to retain him in any way in the exercise of any of the rights, duties, privileges or functions conferred upon, or enjoyed by him by virtue of his office; or to

(c) assert or question in any way the validity of any installation deposition or recognition of a Paramount Chief

(5) For the purpose of this section the expression "proceedings" means any action or proceedings whatsoever and shall include without prejudice to the general of this definition any proceedings for the issue of prerogative writs or orders.

(6) Application for the consent of the Attorney-General required by Subsection (4) shall be made in writing and notice of such application shall be served upon the Permanent Secretary of the Ministry responsible for Internal Affairs and the Attorney-General shall not give his consent unless the person seeking to bring proceedings has made his application within thirty days after the irregularity or breach of which the complains first occurred.

(7) The decision of the Attorney-General in granting or refusing such Consent shall be final and shall not be enquired into in any Court.

J.W.E. DAVIES

for Clerk of the House of Representative

[p.22]

Mr. Serry-Kamal has applied to the Court for a hearing pursuant to provisions of Section 124 of the Constitution which states:

"The Supreme Court shall save as otherwise provided in Section 122 of this constitution, have original jurisdiction to the exclusion of all other courts

(a) in all matters relating to the enforcement or interpretation of any provision of this Constitution ".

In spite of the several submissions of Mr. Serry-Kamal I believe that what the Court is required to consider, is whether pursuant to Section 124(1) (a) of the constitution, in Section 5(4) of the provinces Act 1960 is in consistent with section 133(1) of the Constitution and therefore null and void? The Court can make such Declaration pursuant to Section 171(15) of the Constitution, which provides that—

"This constitution shall supreme Law of Sierra Leone and any other Law found to be consistent with the provision of this Constitution shall to the inconsistency, be void and of no effect".

In the interest of clarity, the Section complained of is Section 5(4) of the Province Act, 1960 which provides that "No proceedings shall be brought in any Court without the consent in writing of the Attorney-General". Section 133(1) of the Constitution is clear and unambiguous. At the expense of the repetition it states:—

"Where a person has a claim against the Government that Claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the process known as petition of Right".

I therefore hold that Section 5(4) of the Provinces Act, 1960 is inconsistent with the Provisions of Section 133(1) of the Constitution and rendered void and of no effect to that extent pursuant to section 171(15) of the Constitution herein before mentioned.

In my view, the Plaintiffs had the right pursuant to Section 133(1) of the Constitution to enforce such right against the Government.

There was no need to seek the consent of the Attorney-General to institute proceedings against the Government. I have already found that the [p.23] Government is a person according to law (vide Section 4 of the Interpretation Act, No. 8 of 1 971).

I therefore declare that Section 5(4) of the Provinces Act, Cap. 60 of the Laws of Sierra Leone 1960 as amended is inconsistent with Section 133(1) of the Constitution Act No. 6 of 1991 and therefore null and void

There is no doubt that the election for the Paramount Chieftaincy of Sandor Chiefdom was conducted by Mr. Samura, the Provincial Secretary of the Northern Province of the Republic of Sierra Leone. He was a representative and acting as an agent of the government. (Vide Section 4 of the Interpretation Act, No. 8 of 1971)

Assuming that the action contemplated by the plaintiffs was against the said Provincial Secretary who conducted the election as an agent of the Government the contemplated action would have tantamounted to a claim against the Government. Such a claim, pursuance to Section 133(1) of the Constitution Act No. 6 of 1991, may be enforced as or right without the need for a fiat or consent.

Consequently it was unnecessary for the plaintiffs to seek the consent of the Attorney-General: as such, it will be inappropriate for me to make a pronouncement on the second declaration sought.

Finally, I refuse to make any pronouncement regarding the third declaration sought because the issue of consent is irrelevant to the question of compliance with the State Proceedings Act, No. 14 of 2000.

No orders as to costs

SGD.

I agree.

SGD.

I agree.

SGD.

I agree.

SGD.

CASE REFERRED TO

1. A.P.C. vs. Nasmos SC No.4 of 1966 (unreported)

STATUTES REFERRED TO

1. State Proceedings Act 2000

2. Section 5(4) of the Provinces Act 1960 Cap 60

3. Sections 124, 171 (5) of the Constitution of Sierra Leone Act No. 6 of 1991

4. Provinces Amendment Act No.4 and No.49 of 1961

5. Sections (1) (2), 4(2) and 7(1) of the State Proceedings Act No. 14 of 2000

OMRIE GOLLEY AND 2 OTHERS v. THE STATE & ANOR.

[SC.MISC.APP.1/2006] [p.1-2]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 6 APRIL 2006

CORAM: MR. JUSTICE S.C.E. WARNE, JSC

MR.JUSTICE E.C. THOMPSON-DAVIS, JSC

MRS.JUSTICE V.A.D.WRIGHT, JSC

MR. JUSTICE A.N.B. STRONGE, JA

MS. JUSTICE U.K. TEJAN-JALLOH, JA

BETWEEN:

OMRIE GOLLEY AND 2 OTHERS — PLAINTIFFS

AND

THE STATE

THE HON.MR. JUSTICE S.A. ADEMOSU — DEFENDANTS

C.F. Marqai Esq., with R. Kowa Esq., for Plaintiff

E.E. Roberts Esq., with L.M. Farmah Esq.,

O. Kanu Esq, A. Sesay Esq., State Counsel for the Defendants.

DELIVERED THIS 10TH DAY OF APRIL 2006

RULING

WARNE, JSC.

Mr. Margai for the Plaintiffs submitted that the 4th question for interpretation by this Court, whether the continuous presence by the trial Judge Mr. S.A. Ademosu is not a violation of Section 136(2) (3) (6)

and Section 137(2)(3) of the Constitution of Sierra Leone Act No.6 of 1991, can be judiciously heard by the panel as constituted with the exception of Justice Umu Hawa Tejan Jalloh the other four Justice Sydney Warne, Justice E.C. Thompson-Davis. Justice Virginia Wright and Justice A.N.B. Stronge being retirees. He submitted further that 4th issue is of such fundamental importance that it ought to be addressed.

I have fully considered the submission made by Learned Counsel for the plaintiffs and carefully examined section 136 sub-section 5(2)(3) and (6) and section 137 sub-sections" [p.2] (2) and (3) of the Constitution of Sierra Leone, Act No.6 of 1991, raised by Counsel, and I find no merit in the submission.

In my view, the whole submission is impugning the integrity of the court as duly constituted.

I therefore order that the proceeding shall commence.

SGD

SYDNEY WARNE J.S.C

SAMUEL HINGA NORMAN v. THE SIERRA LEONE PEOPLE'S PARTY (SLPP) & 3 ORS.

[S.C. NO. 3/2005] [p.36-77]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 122, 124(1), 127 and 171(15) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO.6 OF 1991, TOGETHER AND RULES 89 TO 98 INCLUSIVE OF THE SUPREME COURT RULES, STATUTORY INSTRUMENT NO.1 OF 1982 AND ORDER 21, RULES OF THE SIERRA LEONE HIGH COURT RULES (1960)

IN THE MATTER OF SECTIONS 34, 35(1), (2), (4), & (8), 54(1) TO (4) INCLUSIVE; 64 (1); 76 (1) (h); AND 108 (8) AND (9) OF THE SAID CONSTITUTION OF SIERRA LEONE AND THE THIRD SCHEDULE THERETO.

IN THE MATTER OF SECTIONS 6, 14(1), 24/27 AND 29 OF THE POLITICAL PARTIES ACT, NO.3 OF 2002, AND SECTION 13 OF THE STATE PROCEEDINGS ACT NO.14 0F 2000

IN THE MATTER OF CLAUSES IV(A)(1); IV(A)(3)(I); V(1)(C);AND VI(b) & (f), OF THE CONSTITUTION OF THE SIERRA LEONE PEOPLE'S PARTY (SLPP), DATED JULY 1995, AND ALSO OF THE PARTY CONFERENCE OF THE SAID SLPP HELD ON 3RD AND 4TH SEPTEMBER AT MAKENI.

BETWEEN

SAMUEL HINGA NORMAN PLAINTIFF/RESPONDENT

AND

THE SIERRA LEONE PEOPLE'S PARTY (SLPP) 1ST DEFENDANT/APPLICANT

ALHAJI U.N.S. JAH

NATIONAL CHAIRMAN, SLPP 2ND DEFENDANT/APPLICANT

[p.37]

JACOB J. SAF.FA

National Secretary-General, SLPP — 3RD DEFENDANT/APPLICANT

(All foregoing being of 15 Wallace Johnson Street, Freetown)

ATTORNEY-GENERAL AND MINISTER OF JUSTICE — 4TH DEFENDANT

Hearing: 7 and 16 December 2005, and 25 April 2006

Judgment: 7 September 2006

Advocates:

Dr. Bu-Buakei Jabbi for the Plaintiff

E. Halloway, D.B. Quee and A. Brewah for 1st, 2nd and 3rd Defendants

L.M. Farmah, E. Roberts, Osman Kanu and A. Sesay for 4th Defendant

Delivered this 7th day of September 2006

JUDGMENT

MURIA JSC:

So far as we know, Samuel Hinge Norman (the plaintiff in the present case) is the same person and plaintiff in the previous action, Samuel Hinge[sic] Norman v Dr. Sama S. Banya (National Chairman, SLPP), Dr. Prince Harding (National Secretary-General, SLPP) and The Sierra Leone People's Party, (SLPP) S.C. No.2/2005 ("SC.2/05"). The first defendant in the present proceedings is the same political party, Sierra Leone People's Party ("SLPP") and third defendant in SC.2/05. The present second and third defendants are the National Chairman and National Secretary-General respectively, of the SLPP and they replaced Dr. Sama S. Banya and Dr. Prince A.

[p.38]

Harding who were, respectively, the first and .second defendants in SC.2/05. The parties in both cases are the same, save for the addition of the Attorney-General and Minister of Justice in the present proceedings.

The factual background

To appreciate the circumstances of the present case, S.C. No. 3/2005 (SC.3/05), it would be useful to ascertain the background leading to the present proceedings. It is important to note that the primary facts giving rise to the present case are the same as those in SC. 2/05.

In July 2005 the National Executive Council ("NEC") of the SLPP held a meeting in Freetown and decided that a Party Conference of the SLPP be held at Makeni in the Northern Province of Sierra Leone on 19th and 20th of August 2005. The SLPP is one of the political parties in Sierra Leone registered under the provisions of the national Constitution ("the National Constitution") and the Political Parties Act 2002, No.3 of 2002 — ('''the Political Parties Act"). One of the purposes of the Party Conference was to elect the Party's Presidential Nominee for the 2007 elections, who under clause V (2) (C) of the 1995 Constitution of the SLPP ("the SLPP Constitution"), automatically becomes the Party Leader after such election.

The plaintiff was of the view that it was too early to choose a Presidential Nominee for the Party anytime in 2005 for the Presidential Elections in 2007. Being unhappy with the Party's National Executive Council's decision to proceed with the election of the Presidential Nominee of the SLPP at the Party Conference scheduled to be held on 19th-20th August 2005, the plaintiff commenced the proceedings in SC.2/05 seeking a number of declarations and a permanent injunction against the 1st, 2nd and 3rd defendants who are the same three defendants (in their official capacities) in the present action. The defendants by their Counsel gave an undertaking that the Party would not proceed with the proposed Party Conference and election of the Party's Presidential Nominee until the matter had been determined. The plaintiff by his Counsel gave a cross-undertaking as to damages.

[p.38]

The plaintiff’s action in SC.2/05 was heard on 17th August 2005 and determined by this court on 31st August 2005, striking out the plaintiff’s action for want of locus standi. Thereafter the SLPP proceeded with the Party Conference at Makeni on 3rd and 4th September 2005, at which occasion the incumbent Vice President, Solomon Ekuma Berewa was elected Leader and Presidential Nominee for the SLPP for the 2007 Presidential Elections defeating three other rivals, namely Joseph Bandabla Dauda, Charles Francis Margai and Julius Maada Bio.

As an aspirant to be Presidential Nominee for SLPP, the plaintiff is again renewing his same challenges to the actions taken by the Party. He commences these proceedings again as a private individual citizen and "in the general interest of maintaining and upholding the National Constitution" and keenly concerned that his Party (the SLPP) maintains its pristine democratic credentials and tradition consistent with the National Constitution and the rule of law generally, the same footing upon which he commenced his action in SC.2/05.

By an Originating Notice of Motion dated 27 October 2005, the plaintiff claims a number of declarations. I set out these declarations so as to appreciate the resemblance of the present action to that of SC.2/05. The declarations and orders sought are:

1. A DECLARATION to the effect that the nomination, election, selection, choice, or adoption, as the case, may be, by the 1st Defendant herein, on 4th September 2005, at its Party Conference held at Makeni on 3rd and 4th September, 2005, of Solomon Ekuma Berewa as the Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst, at the self-same material, the said Solomon Ekuma Berewa was the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, was and is inconsistent and incompatible with and in contravention and violation of subsections 35(4) and 76(1)(h) of the said National Constitution of Sierra Leone, and was and is accordingly [p.40] unconstitutional, illegal, undemocratic, invalid or null and void, and so of no lawful effect whatsoever.

2. A DECLARATION to the effect that the acceptance, assumption, holding and incumbency of the position or post of Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP) by Solomon Ekuma Berewa, with effect from 4th September 2005 and up until now, whilst the said Solomon Ekuma Berewa was and has been throughout the self-same material time the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, was and is inconsistent and incompatible with and in contravention and violation of subsection 35(4) and 76(l)(h) of the said National Constitution of Sierra Leone, and was and is accordingly unconstitutional, illegal, undemocratic, invalid or null and void, and so of no lawful effect whatsoever.

3. A DECLARATION to the effect that the nomination, election, selection, choice, or adoption, as the case may be, by the 1st Defendant herein as aforesaid, of Solomon Ekuma Berewa as the Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst, at the self-same material time, the said Solomon Ekuma Berewa was the Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, and that the acceptance, assumption, holding and incumbency of the said post or position of Leader (Presidential Nominee) for the SLPP by the said Solomon Ekuma Berewa whilst he was and still is effectively Vice-President of Sierra Leone as aforesaid, being both separately and jointly inconsistent and incompatible with and in contravention and violation of subsections 35(4) and 76(1)(h) of the said National Constitution as aforesaid, are both separately and jointly tantamount to a suspension, alteration or repeal by implication, presumptive conduct or otherwise of the said provisions in subsections 35(4) and 76(1)(h) thereof "other than on the authority of Parliament" in terms of subsections 108(8) and (9) of the said National Constitution.

[p.41]

4. A DECLARATION to the effect that, by offering or allowing himself to be nominated, elected, chosen, or adopted into, and/or by having ostensibly accepted, assumed, held or occupied and continued to hold or occupy up until now since 4th September 2005, or at all, as the case may be, the position or post of Leader (Presidential Nominee) for the Sierra Leone People's Party (SLPP), whilst he was and still is effectively Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, such item(s) of conduct being inconsistent and incompatible with and in contravention of the provisions in subsections 35(4) and 76(1)(h) of the said National Constitution, and by virtue thereof, Solomon Ekuma Berewa, in his capacity as Vice-President of Sierra Leone as aforesaid, has committed and is still committing a violation of the Constitution of Sierra Leone by thereby failing or refusing or

neglecting to "support, uphold and maintain the Constitution of Sierra Leone as by law established" to wit, by thereby failing or refusing or neglecting, in respect of the said provisions, to comply with the oath of Vice-President as set out in the Third Schedule to the said National Constitution, which said oath he did "take and subscribe" before entering upon the duties of the said office under the provisions of subsections 54(4) of the said National Constitution.

5. A DECLARATION to the effect that the position or post of Leader (Presidential Nominee) of the Sierra Leone People's Party (SLPP) for the purposes of the 2007 national Presidential elections has, in law, stood vacant with effect from 4th September 2005 and that, in law, it still remains vacant as at the time of making this declaratory order by reason of the constitutional violations and contraventions which are the subject of the foregoing declarations herein.

6. A PERMANENT OR FINAL INJUNCTION restraining the 1st Defendant herein in all its emanations and manifestations as organs, institutions, officers, members, sessions, meetings or operations thereof, the 2nd and 3rd Defendants herein, in their respective official capacities, and the servants, agents, operatives, [p.43] privies and successors-in-office of the 1st, 2nd and 3rd Defendants, as may variously be applicable, from nominating, electing, selecting, choosing, or adopting any or the incumbent Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, at all events during any time when subsections 35(4) and 76(1)(h) of the said National Constitution and the relevant provisions of the Constitution of the Sierra Leone People's Party (SLPP) dated July 1995, are still in force in their, present form and text, as Leader (Presidential Nominee) for the said SLPP whilst the said incumbent was or still is effectively Vice-President of Sierra Leone as aforesaid.

7. AN ORDER OF MANDAMUS commanding the 4th Defendant herein, in his/her official capacity, duties and functions as the Honourable Attorney-General and Minister of Justice, to ensure that any or the incumbent Vice-President of Sierra Leone under the provisions of the Constitution of Sierra Leone 1991, at all events during any time when subsections 35(4) and 76(1)(h) of the said National Constitution and the provisions of the Constitution of the Sierra Leone People's Party (SLPP) dated July 1995 are still in force in their present form and text, is properly and best advised not to (and in fact, does not) offer or allow himself /herself to be nominated, elected, selected, chosen, or adopted into, nor to accept, assume, hold or occupy, as the case may be, the position or post of Leader (Presidential Nominee) for the said SLPP whilst the said incumbent was or still is effectively Vice-President of Sierra Leone as aforesaid.

The plaintiff further seeks any other or further relief as the Court may deem just, together with costs of the action.

Questions for determination

At the hearing on 7th December 2005, the Court in the exercise of its powers under Rule 98 of the Supreme Court Rules as read with 0.52 r 3 of the High Court Rules and 0.34 r2 of the English Supreme Court Rules as contained in the 1960 Annual Practice, ordered [p.43] two questions of law, arising out of the action (SC No.3/05) to be first determined. The two questions are:

(a) Whether in the circumstances of the instant case this court can properly invoke the provisions of section 122(2) of the Constitution, Act No. 6 of 1991, to depart from its decision in the matter entitled S.C.No.2/2005; as to hold that the plaintiff has capacity to bring the action herein and is not deprived of such capacity because of lack of locus standi and/or his failure to exhaust other remedies available to him? and

(b) Whether in the event that the court were to hold that this is not a proper case to invoke the provision of section 122(2) of the Constitution, Act No.6 of 1991, to depart from its previous decision as aforesaid, this court is not bound to apply its decision in SC.2/2005 and ought not to strike out the Originating Notice of Motion herein because of lack of capacity of the plaintiff to maintain the action herein for the same reasons as contained in its decision in SC 2/2005, thus depriving this court of jurisdiction to hear and determine the matter on its merit.

In order to facilitate the proper consideration of the questions posed for the court's determination, the court ordered further written submissions in addition to the case for the parties, with supporting case and statute laws on the matter. Counsel for the plaintiff prepared and filed the plaintiff's further written submissions on 24th January 2006.

Before I deal with the arguments as contained in the statement of the plaintiffs case and in Counsel's further written submissions, and the arguments relied on by the defendants, it is pertinent to point our[sic] that this court is the final arbiter of any question of law in Sierra Leone, as mandated by the Constitution. Thus the court has the onerous task of setting the path to follow on important legal issues such as [p.44] those with which we are concerned in this case. In this regard, I re-echo what I said in SC No.2/2005 that:

".... the courts in Sierra Leone, in particular the Supreme Court, will have to decide the path to follow on the standing of a party who seeks to invoke the review jurisdiction of the court in constitutional, as well as administrative law disputes. The court must do so based on legal grounds."

In the final analysis, the position which this court takes in the present case, will result in what I have indicated above, that is, to set a path to follow on the question of locus standi of the party who seeks to invoke the jurisdiction of the court in constitutional law disputes, and how this court should exercise its power under section 122(2) of the Constitution of Sierra Leone. Having said that, I now turn to the submissions of Counsel for the parties.

Submissions by Counsel

From the outset, Dr Jabbi contended that the Supreme Court has the mandate to depart from its previous decisions where it is right to do so. There can be no question that this court possesses the power to depart from its previous decision.

The authority to do so is section 122(2) of the Constitution which provides:

"(2) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears right so to do and all other courts shall be bound to follow the decision of the Supreme Court on question of law." (Emphasis added)

A similar position also exists in the English House of Lords. As Dr. Jabbi of Counsel for plaintiff puts its, there is a close" textual affinity" in the statements of [p.45] the jurisdiction of the Supreme Court in Section 122 of the Sierra Leone Constitution and that of the House of Lords in the Practice Statement (Judicial Precedent) [1966] 3 All ER 77 HL (UK). As with section 122(2) of the Constitution of Sierra Leone, I also set out the House of Lords Practice Statement:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individual can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordship nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House. "

I will return to this Practice Statement and section 122(2) of the Constitution later in this judgment. For the moment, I need only say that having discovered the baseline for the authority to depart from the court's previous decision, the onus is [p.46] on the plaintiff to establish the justification for such departure as was done in Miliangos v George Frank (Textiles) Limited [1975] 3 All ER 801.

In his submissions, both written and oral, Dr. Jabbi of Counsel for the plaintiff argued that the majority decision of the court on the issue of locus standi was grievously wrong and as such it was a grave denial and miscarriage of justice. Thus to "nip" in the bud any suspicion of an inherent trend lurking towards any form of attempted constituticide," Counsel submitted that the court should depart from its decision in SC.2/05 soonest possible. In support of his quest for the court to change its mind on the issue of locus standi, Counsel relied on his 51 page statement of the plaintiff's case and the detailed 31 page further written submission, as well as his oral submission in Court.

As I understand it, Dr. Jabbi's main contention is that the court failed to decide on the issue of locus standi and that all that were said on the issue in SC.2/05 were obiter dicta. Counsel quoted the following passage in the judgment of the learned Chief Justice in support of his contention:

"For reasons which will soon become obvious, I do not believe it is necessary in the circumstances of the instant case for me to dispose of the issue of standing on that basis and I do not desire to do (SIC). I

therefore make no pronouncement on whether on[sic] not this court should adopt the liberal approach in the inquiry for standing as advocated by Dr. Jabbi. "

That passage and the remarks by the other members of the court, on the issue of locus standi were effectively "reduced to mere dicta" argued Counsel.

Not content with the above line of contention, Counsel presented his alternative stance. He suggested that-even if the views expressed by the members of the court were not mere dicta, there were serious reservations about the court's decision on the plaintiffs standing. It appears from the submissions that [p.47] according to Counsel for the plaintiff, four justices misapprehended the issue of locus standi and only one espoused the correct concept of the locus standi.

Counsel, in this regard, relied on the following passage in the judgment of His Lordship, Tolla-Thompson JSC:

"In this regard, I am inclined to adopt a liberal approach to this question. The plaintiff is a Sierra Leonean and a fully paid-up member of SLPP. He is an aspirant for the Presidential Election in 2007. In my humble view, I think this is enough to vest the plaintiff with standing and I so hold. "

In an attempt to further buttress his client's case, Dr. Jabbi went on to contend and sought to demonstrate that the views expressed by Tolla-Thompson JSC and those of my own were "diametrically" opposed to each other. Counsel quoted the following passage from my own judgment to support his contention:

In the present case, if this Court were to accept the liberal approach to the test of standing urged upon it by Dr Bu-Buakei Jabbi, the plaintiff must show, not only that he has a sufficient interest in the matter that he brings to the court, but that this liberal test of "sufficient interest" is the appropriate test to be adopted in Sierra Leone. No case decided by our courts here had been cited by Counsel on this issue. However when looking at the cases on the test of standing from other jurisdictions, it is clear that the position is not uniform. Thus, the courts in Sierra Leone, in particular the Supreme Court, will have to decide the path to follow on the standing of a party who seeks to invoke the judicial review jurisdiction of the Court. The Court must do so based on legal grounds. My searches in the National Constitution, Statutes and Rules of Courts have not shown any express legislative formula in this jurisdiction for the liberal approach to standing as urged by Counsel.

[p.48]

Apart from the clear test to invoke the Courts jurisdiction under section 28 of the National Constitution, the general feeling as to the approach to be taken by the Courts in Sierra Leone is one where the applicant for a judicial review in the nature here claimed, the applicant must show that he has an interest in the subject matter before the court. That interest must be one that is personal to him, and one which has been adversely affected by the action complained of. A general interest which the applicant possesses in common with all members of the public or in common with other members of a section of the community cannot confer standing on him.

As to the other two members of the court, Wright JSC and Kamanda JA, Counsel contended that they simply agreed to the learned Chief Justice's decision on the issue of locus standi. Counsel then contended that in the light of the lack of unanimity of views held by the members of the court in SC.2/05 on the issue of locus standi, this is also justification for the Court to depart from its previous decision.

On the other hand, Mr. Eke Halloway of Counsel for the first, second and third defendants submitted that as in SC.2/05, the plaintiff lacks capacity or standing to maintain the action in SC.3/05 for the same reasons as contained in the decision of the court in SC.2/05 which was not given per incuriam.

In addition, Mr. Halloway pointed to the fact that following the court's decision in SC2/05 the defendants proceeded to hold their Party Conference and regulate the affairs of their Party including holding elections of all the offices of the Party.

For those reasons, Counsel for the first three defendants submitted, it would not be right for the court to depart from its earlier decision made in SC.2/05, relying on the House of Lords Practice Statement (Judicial Precedent).

[p.49]

Issues

In the light of the submissions by Counsel for the parties, it seems obvious that three issues emerged for the court to determine: the first is whether the decision of the court in SC.2/05 was wrong, thereby justifying departure from it; secondly, whether SC.2/05 can be distinguished from the present case; thirdly, whether the court will follow its earlier decision i.e. whether the court should refuse to depart from its decision in SC.2/05.

Whether the decision in SC.2/05 was wrong.

The onus is on the plaintiff to persuade the Court that its decision in SC.2/05 was wrong, justifying a departure from it. There are numerous cases to support the proposition of law that where a previous decision of the court is shown to be erroneous, the court is permitted to depart from it. See Distributors (Baroda) Pvt and Limited v Union of India (1988) (1985) AIR 1585; R v Shivpuri [1986] 2 All AER 334; Federal Civil Service Commission v Laoye (1990) LRC (Const.) 443 SC (Nigeria); O'Brien v Mirror Group Newspapers Limited [2000] 1ESC 70 (25 October 2000); Pendakwa Raya v Tan Tatt Eek & Anor. (2005) MYFC 2 (3 February 2005).

The action SC.2/05 came before this Court in August 2005 and the question before the court was whether the plaintiff (the same plaintiff in the present action) had the locus standi to invoke the jurisdiction of the court. The main judgment was delivered by His Lordship, the Chief Justice who having exhaustively considered the arguments from both parties, concluded at pp 30-31 of His Lordship's judgment:

"In the circumstances of this case and based on the available affidavit evidence, to grant the plaintiff locus standi to maintain an action to ensure [p.50] the SLPP, a political party registered under the

Political Party Act, does not contravene any provision of the National Constitution, particularly section 35 thereof, would be, in my opinion to pre-empt the Commission and, as it were to allow the plaintiff to usurp the powers of the Commission particularly when there is no allegation before us that the Commission has failed to carry out its statutory duties and the Commission has not even been made a party to this action. (See the Nigerian Cases of Nwanko v Nwanko supra; Ajakaiye v Military Governor(1994) SCNJ 102 at 119; and Amaghizenween v Eguanwense (1993) 11 SCNJ27).

For all the above reasons, I hold that the plaintiff lacks locus standi to maintain the claim for declarations sought as part of the third and fourth reliefs in the Originating Notice of Motion. The claim for this relief should be struck out".

Turning to the fifth relief sought namely that of a permanent injunction, and His Lordship continued:

"As I said earlier, in my opinion, this is a consequential relief which of necessity must flow from one of the several declarations sought. Ex facie, it is difficult to tell with which of the declarations sought this relief has a nexus. If it is to be attached to the declaration sought in the second relief in the Originating Notice of Motion then it must be struck out in view of my earlier pronouncement that the Plaintiff could not invoke the original jurisdiction of this Court to maintain an action for the second relief. The claim for an injunction ought also to be struck out for the same reason. Similarly, since I have held that despite the fact that this Court's original jurisdiction is properly invoked in respect of the third and fourth reliefs sought in the Originating Notice of Motion the Plaintiff nevertheless lacks locus standi to maintain the claim for said third and fourth reliefs and as [p.51] a result the Claim for the said reliefs ought to be struck out, for the same reason, the claim for an injunction as a relief consequential to the declarations sought under the third and fourth reliefs in the Originating Notice of Motion ought to be struck out. "

His Lordship, the learned Chief Justice, then pronounced the orders of the court as follows:—

"(1) The claims for the 1st and 2nd reliefs in the Originating Notice of Motion are hereby struck out as they could not be granted in this Court's original jurisdiction.

(2) The claim for the 3rd and 4th reliefs in the Originating Notice of Motion are hereby struck out for want of locus standi on the part of the Plaintiff.

(3)In view of Orders 1and 2 above the fifth relief in the Originating Notice of Motion that for a permanent injunction is struck out accordingly.

(4) The Defendants are here discharged from the Undertaking they gave to this Court on the 16th August 2005.

(5) The Cross-Undertaking as to damages given by the Plaintiff on the 16th August 2005 is to remain on the file until further Order.

(6) Each party to bear its own costs of the proceedings so far.

(7) Liberty to apply.

The above orders of the court were unanimously agreed to by all the members of the court. There were no dissenting judgments made by any of the members of the court. The Court held that as the plaintiff who has brought the action admittedly in his private capacity was asserting a public right, he lacked the locus standi to do so.

[p.52]

Secondly, in the circumstances of the case, the proper person or body with the standing to seek the remedies which the plaintiff sought in SC.2/05 would be the Political Parties Registration Commission, against whom remedies are open to an aggrieved person, should it failed or refused to perform its public functions.

It is incorrect for Counsel for the plaintiff to assert that the court was not unanimous in its decision that the plaintiff had no locus standi in SC.2/05. Clearly the tenor of Counsel's written and oral arguments on the issue of the plaintiffs locus standi in the matter, has been in part, swayed by the fact that there are three varying views on the approach to locus standi expressed by his Lordship, the Chief Justice, His Lordship Justice Tolla Thompson JSC and myself. Consequently, it led counsel to contend that the issue of locus standi was obiter in SC.2/05. Quite the contrary, the central question unanimously agreed to by all the members of the court was that the plaintiff had no locus standi to maintain his claims' for the alleged breaches of the provisions of the SLPP Constitution, Political Parties Act and National Constitution (ss.35 (2) and (4); 42(1); 43(a) and (b); 46(1), 49(4); 76(i) (h) and 171(15)).

It is difficult to follow the rationale of Counsel's contention that the issue of locus standi did not form the basis of the ratio decidendi of the court's decision in SC.2/05 when, central to the plaintiffs case, in the first place, was to establish his legal capacity or standing to invoke the jurisdiction of the court, and the court having heard the parties, unanimously ordered the plaintiffs claims to be struck out for want of locus standi. But, I am not surprised at all at counsel's approach to the issue, since he dissectively chose to use obiter remarks made by their Lordships in their reasoning as to the approach on the question of locus standi in the case.

Consequently, Counsel lost focus on the distinction between whether or not the issue of locus standi should be given liberal approach by the courts in Sierra Leone and whether the plaintiff has locus standi in the case before the court. The former is general, while the latter is specific. The varying views of the members of the court relate to the approach to the question of locus standi. In so far as the standing of the [p.53] plaintiff in the case (SC.2/05) was concerned, there can be no room for doubt that the court was unanimously firm that he had no standing to invoke the jurisdiction of the court. That is the firm decision of the court and unless it is justified and "appears right to do so", departure from it ought not to be done readily. See Pendakwa Raya v Jan Tatt Eek & Anor. (above); SCR No. 2 of 1982, Re Opai Kunangel Amin [1991] PNGLR 1.

One such justification for a departure, is that the plaintiff must show that the decision in SC.2/05 was wrong; (See the cases already cited earlier in this judgment; See also R v Kansal [2001] UKHL 62 (29 November 200l) or that the decision in SC.2/05 is calculated to produce injustice (Hinks v R [2000] UKHL 53 (26 October 2000); [2000] 3 WLR 1590.

Apart from the assertion that the decision of the court in SC.2/05 was "seriously wrong", Counsel for the plaintiff offers very little to convince this court that its decision was wrong and that it ought to be departed from. The voluminous written submission of Counsel merely took the court through the history and the various other circumstances in other comparable jurisdictions as to the nature and variety of possible factors enabling the courts to exercise their powers to review and reconsider their decisions such as through the exercise of the court's power of self-review, as in Eperokun v University of Lagos (1986) NWLR 162, Oduye v Nigeria Airways Limited (1987) 2 NWLR 126 and R v Shivpuri (above); instant self-review where it is done at the instance of a person affected, as in In re Transferred Civil Servants (Ireland) Compensation (1929) AC 242 PC (Ireland); Exp. Pinochet Ugarte (No. 2) [1999] 1 LRC and Pepcor Retirement Fund v Financial Services Board and Registrar of Pension Funds (30 May 2003) Supreme Court of South Africa, Case No. 198/2002; voiding self-review or setting aside own void decision, as in Coker v Coker (1950-56) ALR SL 130, Seif v Forfie (1958) 3 WALR 274 PC (Ghana) and. Mosi v Bagying (1963) 1 GLR.3 . The Court is, indebted to Counsel for the plaintiff for his painstaking research in those areas on the court's power to review and reconsider their decisions. On the other hand, there is nothing contained [p.53] in the submissions and the cases cited by Counsel under those areas which points to the claim by the plaintiff that this court's decision in SC.2/05 was seriously wrong. That is the first hurdle which the plaintiff must overcome before he can assert that it is right for this court to depart from its earlier decision.

There is an aspect of the present case which counsel for the plaintiff sought to rely on to persuade the court to accord the plaintiff locus standi, thereby effectively reconsidering and departing from its previous decision in SC.2/05. Counsel now suggests that the issues now raised in the present action SC.3/05 are different from those raised and determined in SC.2/05. These include alleged violations of section 35(4), 76(1)(h), 108(8) & (9), 54(4) of the National Constitution, alleged vacancy in the Office of Leader (Presidential Nominee) of the SLPP, an injunction against the 1st, 2nd and 3rd defendants from electing any incumbent Vice-President as Leader (Presidential Nominee) of SLPP, and mandamus against the 4th defendant to command him to give proper advice to the Government so as to avoid contravening section 35(4) and 76(l)(h) of the Constitution. Obviously Counsel relies on these "new" issues also to support his counter-argument on the question of estoppel per rem judicatum raided by counsel for the defendants.

In my judgment, for our present purpose, the issue of estoppel per rem judicatum, is of no moment here. It does not arise and I need not consider it. I am content to decide this case on the issue of locus standi and whether this court should depart from its earlier decision on this aspect of the case.

On the contention that the new issues ought to enable this court to change its mind on the locus standi of the plaintiff, I need firstly to say that apart from the allegation of breach of section 108(8) and (9) of the National Constitution and the claim for an order of mandamus, the other provisions referred to by counsel had already been considered in SC.2/05. They are not new issues. In reality what Counsel is how saying is that, these alleged breaches of the same provisions of the National Constitution have now been made again as a result of the SLPP Conference at [p.55] Makeni on 3rd and 4th September. 2005, suggesting that the circumstances had changed from those existing up to 31st August 2005, the date of the SC.2/05 decision. In this case, and on the facts as presented to the court, I am of the firm view that

the circumstances, particularly, the factual circumstances giving rise to SC.2/05 and SC.3/05 have not changed. The facts, the issues and the parties are basically the same. The addition of the 4th defendant in SC.3/05 makes no difference as to the factual basis of these two cases which in reality are one and the same case rebound and clothed with a different colour. On that view of the facts of the two cases, it would be difficult for the plaintiff to satisfy this court that it should change its mind and depart from its previous decision on the status of the plaintiff.

However, even if, for argument's sake, new issues, namely, the alleged breach of section 108 and that of mandamus, the locus standi of the plaintiff does not depend on those 'new' allegations, rather .his locus standi is determined by the factual circumstances of the case upon which he stands. A mere change of issues along the way does not confer standing on the plaintiff. The case of Senator Abraham Adesanya v The President of Federal Republic of Nigeria & Others [1981] 2 NCLR 358, at p. 390, supports this proposition where the court said:

"The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the court, not on the issues he wishes to have adjudicated".

See also the Constitutional Law of South Africa at chap. 8.2 where it is stated:

"The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication. The word 'standing' has been referred to as 'a metaphor used to designate a proper party to a court action'. An inquiry into standing should thus focus on the party who brings the matter before the court, not on the issues to be adjudicated"

[p.56]

In the present case before us, there is no evidence whatsoever that the factual background of the plaintiff has changed from that which pertained on 31st August 2005. His status, and therefore, his standing, in my judgment, remains the same as it was in SC.2/05 as in the present SC.3/05.

Then, there is one further aspect of the case that undoubtedly affects the plaintiffs standing in this matter. It will be observed that following the decision of this court on 31st August 2005, the first three-defendants proceeded to hold the postponed Party Conference at Makeni on 3rd-4th September 2005. On 1st September 2005, the plaintiff issued a statement in writing (Exhibit 8 to the affidavit in support of the case) addressed to the people of Sierra Leone. In that statement, the plaintiff decided not to participate in the SLPP political affairs and activities during the Conference or ever. He requested all his relatives, friends, well-wishers, sympathizers and supporters, in and outside of Sierra Leone, not to attend the Party Conference with any intention of pursuing his political interest.

That is a clear demonstration that the plaintiff is severing his very interest which he purports to represent in this action, inter alia, as "a conscientious and active member of the SLPP who is keenly concerned that the Party maintains and enhances its pristine democratic credentials; and a person aspired to be elected Leader and a 2007 Presidential Nominee" Therefore, the only capacity in which he is pursuing these proceedings is, in his own words, "as a public-spirited, law-abiding and constitution-

compliant citizen of Sierra Leone ... in the general interest of maintaining and upholding the National Constitution". That was the capacity in which he came before the Court in SC.2/05, when the Court found him to be lacking locus standi in such circumstances. The finding of the Court in the present proceedings remains the same.

[p.57]

There can be no suggestion here that the plaintiff can bring an action under the National Constitution in the general interest of the public, as he purported to do, unlike the position in South Africa. Under section 38 of the Constitution of South Africa, those who can bring actions under that provision for breaches of fundamental rights are specified. They include:

a. anyone acting in their own interest;

b. anyone acting on behalf of another person who cannot act in their own

name;

c. anyone acting as a member of, or in the interest of, a group or class of persons;

d. anyone acting in the public interest; and

e. an association acting in the interest of its members.

Notably, there is a provision under the Constitution of South Africa entitling a person to bring an action in the public interest or in the interest of others for alleged breaches of fundamental rights. In the present case, the plaintiff cannot bring himself within such constitutional entitlement because there is no constitutional sanction for public interest litigation by a public spirited litigant under the Constitution of Sierra Leone for alleged breaches of fundamental rights.

The two" Gate-ways"

Dr. Jabbi of Counsel for the plaintiff has helpfully referred to two jurisdictions -Sierra Leone and Solomon Islands, in his submission on this aspect of the plaintiff's case. The 'two gate-ways' (to use the expression in Ulufa 'alu v Attorney General & Others [2002] 4 LRC 1, and referred to by Counsel for the plaintiff), to invoke the jurisdiction of the court to enforce the provisions of a constitution is common to many of the common law jurisdictions with written Constitution. The case of Ulufa 'alu v Attorney General had gone to the Court of Appeal of Solomon Islands which confirmed the High Court judgment: Ulufa 'alu v Attorney General [2004] [p.57] SBCA 1; (2nd August 2004) CA CAC 015 OF 2001. The two gateways under the National Constitution of Sierra Leone are sections 28(1) and 127(1). I set out these two provisions. 28(1) provides:

"Subject to the provisions of subsection (4), if any person alleges that any of the provisions of sections 16 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him by any person (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the .detained person), then without prejudice to any other action with respect to the same matter

which is lawfully available, that person, (or that other person), may apply by motion to the Supreme Court for redress. " [underlining added]

and Section 127(1) says:

"A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect. "

The equivalent provisions under the Constitution of Solomon Islands are sections 18(1) and 83(1) respectively, which Counsel for the plaintiff referred to.

A person's standing under the section 28(1) "gateway" presents no qualm at all. He has to show that the alleged breach was "in relation to him", as in the case of section 18(1) of the Constitution of Solomon Islands. See Ulufa 'alu v Attorney General (above); Dow v Attorney General [1992] LRC (Cons.t) 623 (Botswana). We are not concerned with this "gate-way" in the present case.

If I may add, sections 38 (Enforcement of Rights under the Bill of Right-provisions) " and 172 (Powers of Courts in Constitutional Matters) also provide the two "gateways" under the Constitution of South Africa. Apart from section 38 (set out above), [p.59] subsection (2)(d) of section 172 provides that any person or Organ of State with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity made by a court.

Dr. Jabbi likened the second "gate-way" under -section 83(1) of the Constitution of Solomon Islands to that of Section 127(1) of the Constitution of Sierra Leone, and urges this court to give section 127(1) unrestricted construction so as to confer locus standi on any person, including the plaintiff, who alleges breaches of the provisions of the Constitution, to challenge such breaches before the court. Implicit in that submission is the contention that there is no need for such a person to show that he has an interest which is being affected or likely to be affected by the alleged breach or that he need not show that he is a proper party, before he could invoke the jurisdiction of the Court. It is appreciated that the width of section 127(1) is couched in the words "a person who alleges" which words are seemingly wide in their purport. However, to accept Counsel's contention without more would be grossly flawed for a number of reasons. First, the case law authorities show that such words do not necessarily confer limitless boundaries in their application. If it were so, the courts would be flooded with frivolous and vexatious litigations, even by "mere busy-bodies", a situation which the courts must guard against. See R v Inland Revenue Commissioners; exparte National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 (the Federation of Self-Employees Case). Secondly, it does not accord with the construction given to similar provisions in other common law jurisdictions with written constitutions where a citizen, although has the right to challenge the constitutionality of a statute or things done under it, must show that he has sufficient interest to bring the challenge in the Court. See SCR 4 of 1980; Re Petition of Michael Somare [1981] PNGLR 265; Anderson v The Commonwealth (1932) 47 C.L.R. 50; Trethowan v Peden (1930) 3 S.R. (NSW) 18; Harris v Adeang [1998] NRSC 1 (Supreme Court of Nauru); Dow v Attorney General of Botswana (above). Thirdly, although section 127 (1) gives no express guidance as to the ambit"'

of the words "a person who alleges" used in that provision, the language of the section does not inhibit the power of this court, as the ultimate court of final appeal, [p.60] to insist on the requirement that a person who wishes to bring a constitutional challenge before the court must be a "proper party," since the standing to bring a matter before the court is the first procedural criteria that a person must accomplish before he can be heard on any issue he may wish to raise, however so pressing such issue may be.

The position, both in SC.2/05 and the present case, is that the plaintiff is alleging that a political party and its officers have contravened the provisions of the SLPP Constitution as well as those of the National Constitution. The law provides the statutory machinery under section 27 of the Political Parties Act which grants the Political Parties Registration Commission the right (and so, the standing) to invoke the original jurisdiction of the Supreme Court. There has been no evidence, whether before or after 31st August 2005, that the Commission had exercised its power under that section, nor is there any evidence to show that it had refused or neglected or failed to exercise its power under the Act. It would, therefore, be difficult to accord the plaintiff standing in those circumstances. He would not be the proper party to invoke the jurisdiction of the Court under section 127(1) of the National Constitution in this case.

The Supreme Court being clothed with the power to guard, interpret and apply the National Constitution of Sierra Leone, is entitled to provide guidance as to the operation of the provisions, such as section 127(1) of the National Constitution. In doing so, the court can only exercise its power over a person who is a proper party before it. The court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties: Brydges v Brydges and Wood [1909] P. 187 CA. After all, if the court were to declare that the actions complained of were unconstitutional, it would only be doing so in the exercise of its duty which it owes to the person whose rights have been established, whether such person comes before the Court through section 28(1) gate-way or section 127(1) gate-way.

[p.61]

In the circumstances, the court was correct in coming to the decision that the plaintiff had no locus standi to maintain his claims in SC.2/05. The plaintiff has not shown otherwise, in the present case, to warrant a departure from it.

Whether SC.2/05 can be distinguished from SC3/05.

I have already stated that the factual background giving rise to SC.2/05 and SC.3/05 are the same, save perhaps, for the reframing or the repetition of the issues already dealt with in SC.2/05 and adding "new" ones, after the events of 3rd and 4th September 2005. The re-raising of those issues and adding the so-called 'new' ones do not and cannot accord the plaintiff locus standi since the factual foundation of the standing of the plaintiff to sue remains unchanged. In those circumstances there is no distinction between the factual basis of SC.2/05 and SC.3/05 sufficient to persuade the court to alter its position on the standing of the plaintiff. Counsel for the plaintiff referred to R v Shivpuri (above), where the learned law lords were able to distinguish the case of Anderton v Ryan [1985] 2 All ER 355, and applying the

1966 Practice Statement, departed from Anderton v Ryan. The House of Lords was there able to distinguish the two cases since they were founded on different facts giving rise to different legal issues in the cases. The case of R v Shivpuri concerns the appellant being charged and convicted of two counts of attempting to commit offences relating to drugs whereas in Anderton v Ryan the appellant was charged with attempting to handle stolen goods. The goods were not stolen, so the appellant was acquitted. One of the distinguishing factors between the two cases was that in Anderton v Ryan as Lord Bridge stated,

"The concern of the court was to avoid convictions in situations which most people as a matter of common sense, would not regard as involving criminality ".

That, regretted Lord Bridge, was not in line with the new law, Criminal Attempts Act 1981. There was a change in the situations of the two cases which warranted a departure from Anderton. That is not the position in our present case where the [p.62] plaintiff, as in SC.2/05, is still the same plaintiff and an aspirant to be Presidential Nominee for SLPP, who is again renewing his same challenges to the actions taken by the Party, commencing these proceedings again as a private individual citizen, and a public-spirited law-abiding citizen with the general interest of maintaining and upholding the National Constitution.

For my part I cannot find any justification for, nor do I accept any suggestion that material basis for the standing of the plaintiff has changed in SC.3/05 so as to accord him a change of status in the present proceedings. The findings of this court in SC.2/05 were based on those same material facts which remain unchanged in the present proceedings. See Goodharth, "Determining the Ratio Decidendi of a Case," Essays in jurisprudence and the common Law (1931) 1.

Application of the doctrine of exhaustion

In his submission both written and oral, Counsel for plaintiff contended that the doctrine of exhaustion had no relevance in SC.2/05 and by resorting to it, the court was distorting the law by "mere judicial fiat." With respect to Counsel, in applying the principles of the doctrine of exhaustion in SC.2/05, there was not a stint of judicial Fiat exerted by this court. The difficulty which Counsel faces is that, he is dissectively labouring on this issue of exhaustion as though it was an isolated aspect of the case. If it can be put in blunt terms: the doctrine of exhaustion is applicable, not only in administrative actions but also in constitutional matters. It is a relevant factor for the exercise of the court's discretion whether in administrative law or constitutional law actions on the question of whether to grant or refuse locus standi. In Re Petition of Michael Somare 's case (cited earlier), although the petitioner was granted locus standi, the Supreme Court of Papua New Guinea had not lost sight of the qualification to the general view of standing, namely, that a court should have a discretion to refuse standing where the applicant has not exhausted other methods of achieving the same thing.

At p.30 of His Lordship the Chief Justice's Judgment in SC.2/05 clearly point out:

[p.63]

"It has not been alleged by the Plaintiff that the Commission has neglected or refused to carry out its functions under sections 6 and/or 27 of the Political Parties Act. The situation there is different from what obtained in the Nigerian case of Fawehinmi case cited earlier in this judgment. In that case it was shown by affidavit evidence that the appellant had requested the. Director of Public Prosecutions to exercise the discretion granted to him by statute and it was only after the Respondent replied that he had not come to a decision whether or not to prosecute that the appellant took out the proceedings for leave to apply for mandamus. I say this because, in this country also, where a public officer or public body fails or refuses to carry out its functions or to exercise powers vested in it by statute the law provides ample remedies open to a person affected thereby ".

In my own judgment at page 16, I said:

"The provisions of the Political Parties Act mentioned above, in my view, provide an aggrieved person such as the plaintiff, with the statutory machinery to deal with his complaints against the defendants over the organization, operation, functioning or conduct of the SLPP. The plaintiff has not done that in this case. Further, there was no suggestion that the available alternative administrative remedy under the provision of the Political Parties Act was inadequate nor was it dispositive. It may well-be viewed as an abuse of process to allow the plaintiff to first exhaust judicial remedies and then revert to explore the alternative administrative remedy. This is a factor also relevant to the exercise of the Court's discretion ".

His Lordship Tolla-Thompson JSC had this to say:

''Has he exhausted all his remedies before coming to us?

[p.64]

I opine not. The infraction of the SLPP constitution is intertwined with the Political Parties Act and the National Constitution and therefore Section 6(2) (d) and Section 27(1) of the Political Parties 2002 come into play.

……

"There is no evidence that the plaintiff ever approached the commission either orally, writing or otherwise in accordance with this section. If he had done, it would have been a different matter. "

……

In whatever circumstance, I do not think that the plaintiff should have bypassed the commission and come straight. He should have exhausted his remedy if only for the record. If the Commission failed to act there should be evidence to that effect. "

The sum total of the opinions just cited makes it quite plain that the principles of the doctrine of exhaustion are genuine factors which the court is entitled to take into consideration on the question of whether or not a person should be allowed to invoke the jurisdiction of the court, be it in constitutional

or administrative action. No error can be gleaned from the application of the doctrine of exhaustion by the court in SC2/05 and this court is not prepared to depart from what it said in that case.

Whether the court should depart from its previous decision.

In so far as I can gather from the authorities on the point, the decisions taken by the courts to depart or follow previous decisions were influenced by both law and judicial policy, and so, in my view, they should be. This will enable the courts, more particularly the Supreme Court to ensure certainty and consistency in the establishment and applications of authoritative declarations of the state of the law on an issue. Prior to the 1966 Practice Statement, the English Courts had been taking a somewhat very restrictive approach to disturbing previous decisions of the [p.65] courts as can be seen in some of the old cases. In Tommey v White (1850) 3 HL Cas. 49, at p.69, Lord Truro L.C. said:

"It appears that judgment — a complete and final judgment — has been pronounced by your Lordship's House in this case. That judgment can only be vacated by a special Act of Parliament to enable the parties, if injustice can be proved to have been done, to be again heard. "

Again, some years later in Thellusson v Rendlesham (1859) 7 HL Cas. 429, at p.529 Lord St. Leonards had this to say:

"I protested against what I thought might be hereafter quoted as a dangerous precedent, of calling in question a deliberate decision of the House of Lords. "

Much the same was held in London Tramways v London County Council [1898] A.C 375 where the House of Lords determined that despite instances of individual hardship that might result in it being bound to follow its own decisions, it was thought that it was better that the door to specific legal issues be closed once and for all by the highest court. On the other hand, the High Court of Australia has, as early as 1914, in The King -v- The Commonwealth Court of Conciliation and Arbitration and the President Thereof and the Australian Tramway Employees Association. [1914] 18 CLR 54, not adopted such rigid rule. Griffith CJ at p.58, laid down the rule as:

"In my opinion, it is impossible to maintain an abstract proposition that Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when, the previous decision is [p.66] manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was res integra. Otherwise there would be grave danger of want of continuity in the interpretation of law".

Since 1966 the English Courts have taken a less strict approach on the application of stare decisis. However, to show the firm adherence to judicial precedents by the English Courts, it is not until 1986 in R v Shivpuri (above) that the 1966 Practice Statement had been applied to a decision that was only a year old, that is, the Anderton v Ryan case. I venture to suggest that in the .case of the courts in the

United Kingdom and other countries that have firmly established and developed their laws for hundreds of years, the effect of their highest courts departing from their previous decisions may further enhance and strengthen the development of their laws. The same may not be the case in jurisdictions such as Sierra Leone and other .developing jurisdictions that are still at their embryonic stage of developing their laws and legal system. It is in this sense that I would urge this court and in my view it should adopt the approach taken by the courts in other developing common law jurisdictions when it comes to applying the provisions of section 122(2) of National Constitution.

Provisions such as section 122(2) are not automatic doors into the field of legal adventure, rather they are visionary guides to the courts of final resort to declare and steer the development of the law with certainty, and comity.

When one turns to cases in other developing common law jurisdictions, the views which I have expressed here find support. In the Papua New Guinea case of Re [p.67] Opai Kunangel Amin; SCR No.2 of 1982 [1991] PNGLR1, Kapi DCJ (as he then was) had this to say on the question of judicial precedent:

Counsel for the Public Prosecutor in his submission questioned the-correctness of the decision Re Joseph Auna. The case was decided by a five-Member Bench in December 1980. With the exception of one Member of that Court, this Bench is made-up of different judges. As a matter of practice, care should be taken when questioning the decisions of the Supreme Court in such a short time with different judges. If this is encouraged then the parties may be led to challenge the decisions of the Supreme Court before a bench composed of different judges in a short period of time. This could lead to a degree of some uncertainty of the principles of law pronounced by the Supreme Court. This is not desirable. However, where the principles of law pronounced by the Supreme Court are clearly wrong, they should be challenged as the opportunity arises, as the Supreme Court is not bound by its own decisions.

Like the Supreme Court of PNG, the Federal Court of Malaysia shares the caution against departing from an earlier recent decision of the court in Tunde Apatira & Ors. V Public Prosecutor (2001) 1 MLJ 259. In that case the Federal Court of Malaysia was asked to depart from its earlier decision in Mohammed bin Hassan v PP [1998] 2 MLJ 273. The court has this to say also:

"With respect, we are unable to accept the learned deputy's invitation to depart from Muhammed bin Hassan for three reasons. In the first place, Muhammed bin Hassan is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law.

[p.68]

They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition

of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as R v Shivpuri [1986] 2 All ER 334.

The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in Muhammed bin Hassan has been affirmed by our courts (see, PP v Ong Cheng Heong [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example Haryadi Dadeh v PP [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from Muhammed bin Hassan, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the court.

Lastly — and this is the most important reason — we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s 37(da) of the Act. The logic and reasoning for interpreting that subsection in the way in which it was done in Muhammed bin Hassan appear sufficiently from the judgment in case. It requires-no repetition.

[p.69]

For the foregoing reasons, we reject the argument of the respondent to the effect that Muhammed bin Hassan was wrongly decided and ought no longer to be applied. "

In another Malaysian case of Dalip Bhagwan Singh v Public Prosecutor (1998) MLJ1, the Federal Court of Malaysia said:

"In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

……

The rule of judicial precedent in relation to the House of Lords was stated in London Tramways v London County (1898) AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.

……

In Malaysia, the Federal Court and its forerunner, i.e. the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own [p.70] previous decision has been exercised sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions. "

I bear in mind, of course, that such judicial declarations by the courts of final appeal on the doctrine of precedent, do bear great weight on the state of the laws in a particular jurisdiction. This court will do the same because it has been given the power to do so under section 122(2) of the National Constitution, a provision that has "constitutionalised the doctrine of precedent" as so described by Odoki CJ in the Uganda case of Ssemogerere v A.G. [2005] 1 LRC 50, referring to art. 132(4) of the Constitution of Uganda, and which is in similar terms to our section 122(2) of the National Constitution.

It is also worth noting the remarks made by the Privy Council in the Attorney-General of Ontario v. The Canada Temperance Federation [1946] 50 C.W.N. 535 where it was said:

[p.71]

"Their Lordships do not doubt that in tendering humble advice to His Majesty, they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance on more than one occasion the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Governments and subjects." (Emphasis added).

Being mindful of our own local context and the need to develop our law firmly, this Court will not lose sight of the wisdom imparted by the eminent judicial minds in the various cases on the doctrine of precedent. I need only refer to a couple of these cases before concluding this judgment. In Miliangos v George Frank Textiles) Limited (above) the House of Lords departed from its earlier decision in re United Railways of the Havana and Regla Warehouses Limited [I960] 2 All ER 332 (the Havana Railway case). Lord Wilberforce, referring to the 1966 Practice Statement said:

"Under it, the House affirmed its power to depart from a previous decision when it appears right to do so recognizing that too rigid adherence to precedent might…… ad to injustice in a particular case and unduly restrict the proper development of the law. My Lords, on the assumption that to depart from the Havana Railways case would not involve undue practical difficulties, that a new and more satisfactory rule is capable of being stated, I am of opinion that the present case falls within the terms of the declaration. To change the rule would, for the reasons already explained, avoid injustice in the present

case. To change it [p.72] would enable the law to keep in step with commercial needs and with, the majority of other countries facing similar problems".

In the Irish case of O 'Brien v Mirror Group Newspaper Limited [2000] IESC 70 (25 October 2000), the court was there asked to depart from its earlier decision in De Rossa v Independent Newspapers PIC, (30th July 1979) Supreme Court, (Unreported). Keane CJ, declining the invitation to depart from De Rossa, said at pp 21-22 of his judgment:

"We are being asked to hold that not merely is the carefully considered and reasoned view of Hamilton CJ wrong: we are being asked to hold that it is so 'clearly wrong' that there are now "compelling reasons" why it should be overruled and that, indeed, justice requires that it be overruled.

The court, moreover, was invited to overrule the decision less than a year after it was pronounced. There is, of course, no guarantee whatever that, were it to be so overruled, within a relatively short period of time the court might not be persuaded that this decision in turn was 'clearly wrong' and must itself be overruled. The stage would have been reached at which the doctrine of stare decisis in this court would have been seriously weakened and the certainty, stability and predictability of law on which it is grounded significantly eroded. "

I find the guidance contained in the judgment of Henchy J. in Mogul of Ireland v Tipperary (NR) County Council [1976] IR 260 at p. 272 (which Keane CJ referred to in O Brien v Mirror Group Newspapers) very instructive. Declining the invitation to overrule the case of Smith v Cavan and Monaghan County Council [1949] IR 322, Henchy J said at p.272:

[p.73]

"A decision of the full Supreme Court... given in a fully argued case and on a consideration of all the relevant materials, should not normally be overruled merely because a later Court inclines to a different conclusion. Of course, if possible, error should not be reinforced by repetition or affirmation and the desirability of achieving certainty, stability, and predictability should yield to the demands of justice. However, a balance has to be struck between rigidity and vacillation, and to achieve that balance the later Court must, at the least, be clearly of opinion that the earlier decision was erroneous. "

The case of Mogul of Ireland also supports the proposition that even if the later court is of the opinion that earlier decision was wrong, it may decide that in the interests of justice not to overrule it if it has become inveterate and if in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand. In such cases the maxim communis error facit jus applies.

One of the obvious features of the present case is that it is based on the same factual circumstances as those in SC.2/05. This Court had fully considered the various constitutional provisions, including section 127(1), as well as the provisions of the Political Parties Act, in SC.2/05, in the light of those same factual background with which we are also concerned here. In such a situation I respectfully adopt the words of

Henchy J. in Mogul of Ireland where, referring to the case of Smith v Cavan and Monaghan County Councils [1949] IR 322 which the Court was asked to overrule, he said:

"There are no new factors, no shift in the underlying considerations, no suggestion that the decision has produced untoward results not within the range of [the] court's foresight. In short, all that has been suggested to justify a rejection of that decision is that it was wrong. Before such a volte-face could be [p.74 justified it would first have to be shown that it was clearly wrong. Otherwise the decision to overrule it might itself become liable to be overruled. In my opinion, counsel for the applicants have, at most, established no more than that the interpretation for which they contend might possibly be preferred to that which commended itself to the court in Smith's case. That is not enough. They should show that the decision in Smith's case was clearly wrong and that justice requires that it should be overruled. They have not done so. I would therefore decline the invitation to overrule the decision in Smith's case. "

I have taken the liberty to quote extensively from these various case authorities in order to show the guiding thoughts and principles to be applied when an issue has been taken as to whether or not the court should depart from its previous decisions on a particular point. Unlike in the present case before us in SC3/05, all the authorities that I have been able to access involved different parties and different factual circumstances, although the issues for determination might be similar. Even where the cases involved were only a short period apart, the parties and material particulars were different save for the case of Ex parte Pinochet Ugarte (No.2) (above) where the period between the first Pinochet case and second one was only about three weeks. However, the basis for the quick-review of the court's earlier decision in that case was due to the fact that the court was not properly constituted. One of the members of the majority Law Lords in the Panel was a director and Chairperson of Amnesty International Charity Limited, an organisation connected to Amnesty International who was the Intervener in the proceedings before the House of Lords in the earlier hearing. The reasons for the setting aside the earlier order was due to the fault on the part of the court subjecting the petitioner to an unfair procedure. The circumstances in that case are different to those in the present case.

In the present case, I am not persuaded that the decision of the Court in SC2/05 was wrong. The interpretation and application of section 127(1) of the National Constitution in so far as it applies to the plaintiff in the circumstances of SC2/05 was [p.75] correct in law. Those circumstances have not changed and continue to apply to the plaintiff in the present case.

Nor do I think that SC.2/05 can be distinguished from SC.3/05 in the manner advanced by Dr. Jabbi of Counsel for the plaintiff. The distinction sought to be made and relied upon here stems from the fact that following the court's decision in SC.2/05, the SLPP proceeded to hold the Party's Conference and conducted other affairs of the Party. In my view, to confer locus standi on the plaintiff based on that distinction is not only artificial, but it will lead to endless arguments as to the standing of the plaintiff based on the distinction between the events before and after 3rd and 4th September 2005. Such an exercise may well be futile and ought not to be encouraged.

Simply because the members of the court in SC.2/05 were at variance in their reasoning on question of whether or not the approach to locus standi should be liberal, the fact remains that the court was nevertheless unanimous in the result of the case that the plaintiff had no locus standi to maintain his action in SC.2/05. The issue of the locus standi of the plaintiff was fully considered by this court in SC.2/05 and now, in this case SC.3/05 and decided upon it. As Henchy J said in Mogul of Ireland, the question was fully argued and answered; there are no new factors, no shift in the underlying considerations and no suggestion that the decision has produced untoward results. In fact the parties in this case (at least the defendants), have acted and conducted the affairs of their political Party acting on the correctness of the decision of the Court in SC.2/05. All that has been suggested to justify a departure from the decision in SC.2/05 is that it was wrong. That is not enough. Before such a volte-face could be justified, the plaintiff must first have to show that the decision of the Court in SC.2/05 was clearly wrong. In my opinion, he has not done so. I would therefore decline the invitation to depart from the decision in SC.2/05.

Conclusion and Order

In view of the number of issues raised and the voluminous painstaking research put into the case by Counsel for the plaintiff, I felt obliged to give due consideration to those [p.76] issues and the arguments (both written and oral) before coming to the conclusions, based on law, as I have done in this case. Thus, having done so, I answer the questions posed as follows:—

Question 1 In the circumstances of this case, the Supreme Court cannot and ought not to invoke section 122(2) of the National Constitution so as to depart from its earlier decision in SC.2/05. Therefore, I hold that the plaintiff lacks the capacity to maintain this action because he lacks locus standi.

Question 2 Having thus held that this is not a proper case to invoke section 122(2), this court declines to depart from its previous decision in SC.2/05 and is therefore bound to apply it in the present case. Consequently, the Originating Notice of Motion herein (S.C. No. 3/05) ought to be struck out because of lack of capacity of the plaintiff to maintain the action herein for the same reasons as contained in its decision in S.C. No. 2/2005.

The Originating Notice of Motion herein, S.C. No.3/2005, is hereby struck out for the reasons set out in this judgment.

It only remains for me to thank Counsel for the plaintiff for his usual acumen in the manner in which he presented the plaintiffs case, not only in this case but also in SC.2/05. The court is most grateful and is greatly assisted by the painstaking research and submissions (written and oral) presented to the court.

[p.77]

SGD.

JUSTICE SIR JOHN MURIA, J.S.C.

SGD.

JUSTICE DR. ADE RENNER-THOMAS, C.J.

SGD.

JUSTICE S.C. WARNE, J.S.C.

SGD.

JUSTICE V.A.D. WRIGHT, J.S.C.

SGD.

JUSTICE M.E. TOLLA-THOMPSON, J.S.C

CASES REFERRED TO

1. Miliangos v George Frank (Textiles) Limited [1975] 3 All ER 801

2. Distributors (Baroda) Pvt and Limited v Union of India (1988) (1985) AIR 1585;

3. R v Shivpuri [1986] 2 All AER 334;

4. Federal Civil Service Commission v Laoye (1990) LRC (Const.) 443 SC (Nigeria);

5. O'Brien v Mirror Group Newspapers Limited [2000] 1ESC 70 (25 October 2000);

6. Pendakwa Raya v Tan Tatt Eek & Anor. (2005) MYFC 2 (3 February 2005).

7. The Nigerian Cases of Nwanko v Nwanko supra;

8. Ajakaiye v Military Governor(1994) SCNJ 102 at 119;

9. Amaghizenween v Eguanwense (1993) 11 SCNJ27).

10. Pendakwa Raya v Jan Tatt Eek & Anor

11. SCR No. 2 of 1982, Re Opai Kunangel Amin [1991] PNGLR 1.

12. R v Kansal [2001] UKHL 62 (29 November 200l)

13. Hinks v R [2000] UKHL 53 (26 October 2000); [2000] 3 WLR 1590.

14. Eperokun v University of Lagos (1986) NWLR 162,

15. Oduye v Nigeria Airways Limited (1987) 2 NWLR 126 and R v Shivpuri

16. Coker v Coker (1950-56) ALR SL 130,

17. Seif v Forfie (1958) 3 WALR 274 PC (Ghana)

18. Mosi v Bagying (1963) 1 GLR.3

19. Senator Abraham Adesanya v The President of Federal Republic of Nigeria & Others [1981] 2 NCLR 358, at p. 390

20. Ulufa Alu v Attorney General & Others [2002] 4 LRC 1

21. R v Inland Revenue Commissioners;

22. exparte National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 (the Federation of Self-Employees Case)

23. SCR 4 of 1980;

24. Re Petition of Michael Somare [1981] PNGLR 265

25. Anderson v The Commonwealth (1932) 47 C.L.R. 50

26. Trethowan v Peden (1930) 3 S.R. (NSW) 18;

27. Harris v Adeang [1998] NRSC 1 (Supreme Court of Nauru);

28. Dow v Attorney General of Botswana

29. Brydges v Brydges and Wood [1909] P. 187 CA.

30. Anderton v Ryan [1985] 2 All ER 355

31. Tommey v White (1850) 3 HL Cas. 49, at p.69,

32. Thellusson v Rendlesham (1859) 7 HL Cas. 429, at p.529

33. London Tramways v London County Council [1898] A.C 375

34. Re Opai Kunangel Amin

35. SCR No.2 of 1982 [1991] PNGLR1, Kapi DCJ

36. Tunde Apatira & Ors. V Public Prosecutor (2001) 1 MLJ 259

37. Mohammed bin Hassan v PP [1998] 2 MLJ 273.

38. R v Shivpuri [1986] 2 All ER 334.

39. PP v Ong Cheng Heong [1998] 6 MLJ 678

40. Haryadi Dadeh v PP [2000] 4 MLJ 71

41. Dalip Bhagwan Singh v Public Prosecutor (1998)

42. Ssemogerere v A.G. [2005] 1 LRC 50

43. Attorney-General of Ontario v. The Canada Temperance Federation [1946] 50 C.W.N. 535

44. Re United Railways of the Havana and Regla Warehouses Limited [I960] 2 All ER 332 (the Havana Railway case)

45. O 'Brien v Mirror Group Newspaper Limited [2000] IESC 70 (25 October 2000)

46. De Rossa v Independent Newspapers PIC, (30th July 1979)

47. Mogul of Ireland v Tipperary (NR) County Council [1976] IR 260 at p. 272

48. Smith v Cavan and Monaghan County Council [1949] IR 322,

STATUTES REFERRED TO

1. Section 122(2) of the Constitution, Act No. 6 of 1991

2. Criminal Attempts Act 1981

2007

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TITLE OF CASE

ALHAJI ABDULAI BANGURA v. THE COURT OF APPEAL OF SIERRA LEONE, TOUFIC HUBALLAH SIERRA LEONE NATIONAL PETROLEUM COMPANY LTD UMARU SAWANEH MOHAMED KAMARA & THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE

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ALPHABETICAL LISTING

ALHAJI ABDULAI BANGURA APPLICANT & 2 ORS. v. THE ATTORNEY GENERAL & MINISTER OF JUSTICE

[S.C. MISC. APP. NO. 3/2006] [p.195-205]

(SUPERVISORY JURISDICTION)

IN THE MATTER OF SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE 1991

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY AN ORDER OF CERTIORARI TO QUASH THE ORDER OF THE COURT OF APPEAL DATED THE 13 THE DAY OF JULY 2006 IN THE MATTER CIVIL APPEAL NO. 60/2005 BETWEEN ALHAJI ABDULAI BANGURA (APPELLANT) AND TOUFIC HUBALLAH, SIERRA LEONE NATIONAL PETROLEUM COMPANY LIMITED, UMARU SAWANEH MOHAMED KAMARA (RESPONDENTS) FOR THE SAME TO BE QUASHED.

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 26 NOVEMBER 2007

CORAM: MR. JUSTICE G. SEMEGA-JANNEH, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE M.E. TOLLA-THOMPSON, J.S.C.

MR. JUSTICE S.A: ADEMOSU, J.A.

MR. JUSTICE JON KAMANDA, J.A.

BEETWEN:

ALHAJI ABDULAI BANGURA APPLICANT

AND

THE COURT OF APPEAL OF SIERRA LEONE

PRESIDED OVER BY HONOURABLE MISS JUSTICE U.H. TEJAN JALLOH JUSTICE OF APPEAL, HONOURABLE MR. JUSTICE P.O. HAMILTON JUSTICE OF APPEAL AND HONOURABLE MS. JUSTICE S. KOROMA JUSTICE OF APPEAL

AND

TOUFIC HUBALLAH

SIERRA LEONE NATIONAL PETROLEUM COMPANY LIMITED

UMARU SAWANEH

MOHAMED KAMARA

AND

THE ATTORNEY GENERAL & MINISTER OF JUSTICE — RESPONDENTS

[p.197]

COUNSEL:

A.F. SERRY-KAMAL ESQ FOR THE APPLICANT

O. KANU ESQ. FOR THE 1ST RESPONDENT

E. PAPS-GARNON ESQ. FOR THE 2ND RESPONDENT

C.C. V. TAYLOR ESQ. FOR THE 3RD RESPONDENT

EMEGA-JANNEH J.S.C.

This is an application for an order of certiorari to remove to this court the order of the Court of Appeal dated the 13th day of July 2006 in the matter civil appeal numbered 60/2005 between Alhaji Abdulai Bangura (Appellant) and Toufic Huballah, Sierra Leone National Petroleum company Limited, Umaru Sawaneh Mohamed Kamara (Respondents) for the same to be quashed. The application is made pursuant to leave of this court given on the 8th day of September 2006.

FACTS

In civil suit numbered CC151/1996 in the High Court, Toufic Huballah, obtained judgement on the 8th day of June 2005 against the Sierra Leone National Petroleum Company Limited; Umaru Bah Sawaneh; Mohamed Kamara (the 2nd 3rd and 4th Respondents herein) and Alhaji Abdulai Bangura (the Applicant herein) Subsequently an application was made on behalf of Mr. Bangura to the High Court [p.198] Judge, the Honourable Mr. Justice A.S. Raschid, to set aside his judgement of the 8th day of June 2005 in default of appearance. A preliminary objection to the application was raised on behalf of the Sierra Leone National Petroleum Company Limited. The Judge upheld the objection by his order given on the 12th October 2005. Mr. Bangura was dissatisfied with the judge's order and as a consequence a Notice of Appeal dated the 25th day of October 2005 was filed on the same date, the 25th day of October 2005. On or about the 4th day of July, 2006, Mr. Serry-Kamal, of counsel, for Mr. Bangura, received a summons to settle the records for the appeal filed on behalf of Mr. Bangura. While the appeal processes

were going on, the Court of Appeal on an application made on behalf of Mr. Huballah, struck out the appeal numbered 60/2005 which was the appeal filed on behalf of Mr. Bangura to set aside the judgement of the High Court given on the 8th day of June 2005. The Court of Appeal that struck out the appeal was comprised of Honourable Ms. Justice U.H. Tejan-Jalloh — Presiding; Honourable Mr. Justice P.O. Hamilton (Justice of Appeal) and Honourable Ms. Justice S. Koroma (Justice of Appeal)

GROUNDS

Mr. Bangura was dissatisfied with the striking out order of the Court of Appeal, thus resulting in this application invoking the supervisory powers of this court, and which said application is premised on the following grounds

1 The Court of Appeal exceeded the limits of its powers by striking out the said appeal

2. The Court of Appeal by striking out the said appeal acted ultra vires

3. The Court of Appeal had no power to strike out a duly constituted appeal on which another panel of the same court had granted a stay of execution and a summons had been issued to settle records

4. The Court of Appeal has no power to hear an interlocutory application to set aside a duly constituted appeal.

[p.199]

ARGUMENTS OF COUNSEL

Mr. Serry-Kamal, counsel for the Applicant, in argument, states that the appeal numbered 60/2005 which was struck out by the Court of Appeal was duly constituted and filed within time. He states that the striking out order of the Court of Appeal exhibited as "AFSK 18" to his affidavit in support of the application sworn to on the 4th August, 2006, was made on the 12th day of October 2005. Whereas the appeal against the striking out order exhibited to his said affidavit as "AFSK 19" was filed on the 25th October 2005 — less than one month after the striking out order appealed against. He points out that the period allowed for appealing is three months plus one month extension of time. Mr. Serry-Kamal contends that the procedure employed in the application to have the appeal struck out is not prescribed by or known to the Court of Appeal Rules, 1985. He further contends that the application made for the striking out of the appeal is in the nature of a preliminary objection to the hearing of the appeal when properly set down for hearing, and the procedure to be employed for such an objection is specifically set out in rule 19 of the Court of Appeal Rules. Mr. Serry-Kamal buttresses his argument by submitting that the Court of Appeal isa creature of statute and can only exercise the powers accorded it by the creating legislation, the Courts Act and the rules that govern the Court. He concludes by submitting that the Court of Appeal acted completely outside its powers.

Mr. Pabs-Garnon, counsel for the 2nd Respondent, draws the court's attention to the striking out order of the 12 October 2005 appealed against and also the final judgement of the High Court given or the 8th day of June 2005 and exhibited to the said affidavit in support as "AFSK 13", He posits that there is no

appeal against the judgement of the 8th June 2005. He argues that the appeal filed on the 25th October 2005 is a purported appeal against an interlocutory order and refers the court to section 56 of the Courts Act which deals with appeals against interlocutory orders and final judgments. He further draws the court's attention to rule 10 (1) of the Court of Appeal Rules and argues that the appeal filed on the 25th October 2005 is incompetent because no leave to file same was sought and obtained. Finally, he argues that there was no appeal properly before the Court of Appeal and submits that the only appeal that could have been brought before the Court of Appeal was against the judgement of the 8th day of June 2005.

[p.200]

Mr. C.C. Taylor, counsel for the 3rd Respondent, adopted the arguments of Mr. Pabs. Garnon. However, he further argues that since the relief being sought in this application is the restoration of the struck out appeal, this honourable court, if it were to restore the appeal by the quashing of the striking out order, would be acting in vain as the said appeal was incompetent, and the court does not act in vain. He also argues that the Court of Appeal suo-moto could have raised objection to the hearing of the struck out appeal.

Mr. O Kanu, counsel for the 1st Respondent, adopts the arguments of Mr. PabsGarnon and that of Mr. C.C.V. Taylor. He further argues that the Court of Appeal did not act in excess of jurisdiction in striking out the appeal.

THE ISSUES

I have formulated the following issues:

Did the Court of Appeal have the authority or jurisdiction to strike out Mr. Bangura's appeal filed on the 25th October 2005 against the order of the 12th October 2005? If not, what are the consequences.

THE REASONING

There is no dispute as to the material facts and the dates of the relevant order and judgement. This being so it is indisputable that the appeal against the striking out order was within the stipulated appeal period of three months, that is, if the appeal was in fact an appeal against a final order or judgement. What is not in doubt is that the appeal was filed and was being processed like any ordinary appeal, such as, the parties being summoned to settle the record.

Counsel for the respective Respondents concentrate in arguing that the appeal struck out was an interlocutory appeal and, therefore, leave was required for it to be filed, failed of neglected to focus their attention on the Notice of Motion and the supporting affidavit exhibited to the said affidavit of Serry-Kamal as "AFSK 28" [p.201] praying for the striking out of civil appeal numbered 60/2005. The orders prayed for in the Notice of Motion are reproduced hereunder for ease of reference and clarity.

"1. That the appeal Civ. App 60/2005 be struck out for irregularity upon the following grounds

a) That the above ... mentioned appeal was filed after the expiration of three months as prescribed by rule 11 of the Rules of the Court of Appeal

b) That the Appellant did not apply for enlargement of time as prescribed by rule 11 (6) of the Court of Appeal Rules

2) That the costs of and occasioned by this application be costs in the cause

3) Any further or other relict" (emphasis provided)

For the same purpose as in the reproduction herein of the orders prayed for in the Notice of Motion, I hereunder reproduce the numbered paragraphs of the affidavit in support of the Notice of Motion sworned to by Ms. Mariama Dumbuya, of counsel, namely:

"1. That I am a partner in the firm of Renner-Thomas and Co solicitors and I am duly authorized to make this affidavit on behalf the above 1st Respondent (2nd Respondent herein)

2. That judgment was delivered in the High Court in matter CC 151/96 1996 H No 3 on the 8th of June 2005. Copy of the said judgment is hereby produced shown to me and marked "MD 1"

3. That even though the Appellant herein the 4th Defendant in the High Court entered a conditional appearance on the 9th day of August 2005 [p.202] 2 (two) months after the said judgment was delivered he failed and/or neglected to appeal against the said judgment within the time prescribed by the Rules of the Court of Apoe.al. Copies of the Memorandum and Notice of Conditional Appearance are hereby produced shown to me and marked "MD2" and "MD3" respectively.

4. That even after the expiration of 3 months the Appellant herein did not apply to the court for an enlargement of time within which to appeal against the said judgment.

5. Notwithstanding the above the Appellant on the 25th day of October 2005 filed in the Court of Appeal a Notice of Appeal without seeking an enlargement of time. A copy of the said Notice of Appeal stamped by the Appeal Court on the 25th day of October 2005 is hereby produced and shown to me and marked "MD 4".

6. That I make this affidavit in support of the application herein to strike out the appeal of the appellants as it is irregular and does not conform to the rules of the Court of Appeal"

(bracketed words and emphasis provided)

It can be clearly seen from the cited Notice of Motion and the facts attested to in the supporting affidavit that the application to strike out to the Court of Appeal was not referable to the order of the Court of Appeal made on the 12th October 2005. The application on the face of the Notice of Motion was for the appeal numbered 60/2005 to be struck out for irregularity. The irregularities complained of are:

a. filing same outside the three months prescribed by the Court of Appeal Rules

b. filing same outside the stipulated period without first seeking an enlargement of time.

[p.203]

Quite clearly the above alleged irregularities cannot and do no apply to the appeal filed on the 25th October 2005 numbered 60/2005 against the striking out order of the12th October 2005 which shows only a period of 13 days from the date of the said order to the date of the filing of the appeal against the said order. Paragraphs 2, 3, and 4 of the affidavit in support makes manifest .the misapprehension in the application that civil appeal numbered 60/2005 filed on the 25th October 2005 was against the judgment of the 8th day of June 2005. It is telling that the 25th October 2005 is just over three months from the date of the judgment of the 8th June 2005. The 25th October 2005 is over three months in relation to the judgment of the 8th June 2005 and not to the order of the 12th October 2005 against which the appeal was directed. There was never any appeal against the judgment of the 8th June 2005. However, paragraph 5, coming on the heels of paragraphs 2, 3, and 4 of the affidavit, makes it clear that Mr. Huballah and his counsel wrongly believed that the appeal filed on the 25th October 2005 was against the judgment of the 8th June 2005.

In the circumstances, it is my firm view, that as a matter of fact, there was no application before the Court of Appeal to strike out the appeal numbered 60/2005. The counsel for Mr. Huballah, based on the facts on the face of the Notice of Motion and the affidavit in support, in effect, were asking the Court of Appeal to strike out a non existent appeal. Furthermore, the facts deposed to cannot and do not justify the striking out of the appeal numbered 60/2005.

I am in agreement with the contention of Mr. Serry-Kamal that the application was in the nature of a preliminary objection to the hearing of an appeal and aught to have been made pursuant to rule 19 of the Court of Appeal Rules. Rule 19 set down certain condition precedent to the hearing of a preliminary objection, that is, the serving of the notice of preliminary objection three clear days before the hearing of the appeal. In the instant case this was not done. Counsel for the Respondents argue that the Court of Appeal could have acted suo-moto on the basis of rule 19. There is no evidence that the Court of Appeal so acted, and if it were so disposed to act the court, in my view, could not have raised and served a notice of preliminary objection. At best, the court could only have struck out the appeal at the hearing.

[p.204]

In the premises, I am of the firm view that the Court of Appeal had no authority or jurisdiction to strike out the appeal numbered 60/2005, and I so hold.

CONCLUSION

Counsel for the respective Respondents in their arguments seem to be urging this court not to grant the application, as to do so would have the effect of restoring the appeal numbered 60/2005, which in their thinking, is incompetent and thereby having the unsalutary effect of this court's act being in vain. But are counsel not asking for the impossible? Jurisdiction is fundamental to the judicial process; a defect or lack of it renders the entire proceedings a nullity, and orders or decisions, flowing from such

proceedings, cannot legally stand for want of jurisdictional underpinning. This is so no matter how well the proceedings are conducted. That is why it is sometimes said that there is no need to move a court to set aside a decision/order made without jurisdiction but it is generally done out of abundance of caution and what is colloquially called "playing it safe". Counsel fell into error in misapprehending the facts supporting the application to strike out the appeal numbered 60/2005 filed on the 25th October 2005 against the order made on the 12th October 2005 by the High Court by stating or presenting facts that relate to and are relevant only vis-à-vis the judgment by the High Court made on the 8th June 2005. With all due respects, the Court of Appeal also fell into the same error as the court's decision was based on the erroneous presentation of the facts in the said Notice of Motion to strike out the said appeal and the affidavit in support. If this court were to accede to the prayer of counsel for the respective Respondents not to quash the order of the Court of Appeal dated the 13th July 2006, this court would fall into error. Clearly this court has no authority or power to confer jurisdiction on the Court of Appeal (or any court for that matter) where there is none. See State Vs Onagornwa (1992) 2NWLR at Page 49, para D-F. per UWAIS J.S.C. (as he then was). Accordingly, the order of the Court of Appeal in civil appeal numbered 60/2005 dated the 13th day of July 2006, photo-copy of which is exhibited to the said affidavit of Mr. Serry-Kamal as "AFSK 29", is hereby set aside with costs for the Applicant.

[p.205]

SGD

Hon. Justice Emega-Janneh - JSC.

I agree

SGD.

Hon. Mrs. Justice V.A.D. Wright - JSC.

CASE REFERRED TO

State vs Onagornwa (1992) 2NWLR at Page 49

STATUTE REFERRED TO

Rule 11 (6) of the Court of Appeal Rules

BANK OF SIERRA LEONE v. AHMAD T. ALGHALI

[S.C. CIV. APP. NO. 2/2005] [p.147-179]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 9 NOVEMBER 2007

CORAM: MR. JUSTICE G. SEMEGA- JANNEH, J.S.C

MRS. JUSTICE V.A.D.WRIGHT, J.S.C.

Mr. JUSTICE ME. T.THOMPSON, J.S.C.

MR. JUSTICE A.N.B. STRONGE, J.A.

MS. JUSTICE S.KOROMA, J.A.

BETWEEN:

BANK OF SIERRA LEONE	—	APPELLANT
AND		
AHMAD T. ALGHALI	—	RESPONDENT
COUNSEL: E. P ABS-GARNON ESQ	—	FOR APPELLANT
J.B. JENKINS-JOHNSTON ESQ	—	FOR RESPONDENT

SEMEGA-JANNETH J.S.C

Ahmad T. Alghali (Respondent herein} was employed by the Bank of Sierra Leone (Appellant herein and hereinafter referred to as "the Bank") as a junior banking official and was given, a letter of appointment dated the 26th March 1993. He rose through the ranks and was Section Head, Currency Management, at the time his employment was dispensed with by a letter dated the 18th April 2000.

Preceding the termination of Mr. Alghali's employment, the Bank mounted an 'investigation into an alleged twice encashment of a Union Trust Bank Cheque in [p.148] the sum of Le.80,000,000.00 (Eighty Million Leones) which allegedly resulted in the Bank's loss of Le.80,000,000.00 (Eighty Million Leones). The Bank suspected some of its officials including Mr. Alghali of being involved in the transactions leading to the loss to the Bank of the.80,000,000.00 (Eighty Million Leones).

On the 17th April 2000, the Bank by its Director of the Human Resources Department, Mrs. A.A.M. Mahdi, wrote to the suspected Bank officials, including Mr. Alghali requesting each one of them to state why disciplinary action should not be taken against them for their involvement in the exercise in accordance with the Bank's Staff Rules and Regulations and demanded a reaction not later than 2.00p.m. that day, Monday the 17th April 2000. Mr. Alghali, like the other suspected officials, complied and replied that same day.

The following day, 18th April 2000, Mrs. Mahdi wrote a Memorandum (exhibit "M1") to Mr. Alghali as follows:—

"REPAYMENT OF CHEQUE NO.319606 FOR LE.80,000,000.00 ON THE 11TH AUGUST 1999

Further to our enquiry into the above transaction that took place on the 19th August 1999, we have been able to obtain the input of several staff members which we are enclosing for your reaction.

Kindly ensure that you submit your written reaction to us not later than 12.00 noon today, 18th April 2000"

Mr. Alghali again complied and, replied on the same day, 18th April, 2000 by memorandum (Exhibit "N") "thus:

"REPAYMENT OF CHEQUE NO.319606 FOR LE.80,000,000.00 ON 11TH AUGUST 1999.

[p.149]

I refer to your memorandum CF:583 dated 18th April, 2000 submitting input from several staff members for my reactions and wish to state the following.

With reference to the response from Mr. A.L. Gegbai, I could not recall walking over to him with the cheque, as it is not usual for cheque of this nature to come directly to me when payment is required.

I cannot agree with Mr. J.C.H. Abu that the cheque was presented to Currency Office by the bank's representative already referenced and authorized since the bank's representative is usually asked by the Currency Office to present the cheque to Banking Office for referencing and to go and wait at the Receiving Bay to receive payment. After referencing and authorization the cheque is presented by Banking Office to the Vault Operator at the Currency Office or down the vault. There is also nothing in the snap books, bin cards or the Treasury book to show that the denominations stated by Mr. Abuwere paid from the vault or cosigned by the panel A key holder.

The Input of Mr. Roxy Edwards is very much nearer to what transpired at Banking Office on the above date.

Sgd: A.T. ALGHALI"

Mrs. Mahdi on the same day, the 18th April 2000 wrote to Mr. Alghali terminating his employment with the Bank. The letter (exhibit "E") reads

"Dear Sir

TERMINATION OF SERVICE

[p.150]

You are hereby informed that in accordance with Rule 10.1 of the Staff Rules and Regulations, Management has reached a decision that your services with the Bank be terminated with effect from 1st August 2000. Accordingly you will be paid 3 (three) months salary in lieu of notice. You need not report for duty with effect from tomorrow, 19th April 2000.

Enclosed is a copy of the breakdown of your, final benefits and our Cheque No.331657 being final settlement of your benefits as at 31st July 2000

You are to hand over all Banks' properties in your possession including the Bank's Identity Card.

Your former Head of Department is informed accordingly.

Yours faithfully

For BANK OF SIERRA LEONE

SGD:

A.A.M. MAHDI (MRS)

Director, Human Resources

Encls."

Mr. Alghali subsequently wrote to the Governor of the Bank appealing for the review of the decision terminating his services and stating grounds why this should be done. There was no reply to his letter.

After short exchanges of letters between the Solicitor of Mr. Alghali and that of the Bank, Mr. Alghali caused a Writ endorsed with, a Statement of Claim to issue claiming the following reliefs.:

"(1) A Declaration that according to the records of the Defendant Bank [p.151] the Plaintiff became due to retire from the services of the Bank on 7th July 2000 and entitled to a Pension, he having reached the retirement .age of 55 years.

(2) A Declaration that the purported termination of the Plaintiffs services with effect from 1st August 2000 (after his effective retirement date) was unlawful; null and void and of no effect.

(3) A Declaration that the Defendant Bank's right to grant an extension of tenure of office to staff beyond the age of 55 Years WAS NOT properly exercised in this case where,

(a) the recipient of such extension was never so informed;

(b) the recipient of such extension had not requested such extension;

(c) Such extension was of no beneficial interest to the defendant bank.

(d) Such extension was not made "bona fide".

(4) An Order that .the Plaintiff be granted all his entitlement under the Bank's Pension Scheme, of which he has· been deprived of by the purported Termination of his services after the date of his retirement.

(5) Aggravated Damages for Breach of Contract

(6) The Costs of the Action"

[p.152]

The Bank counterclaimed, giving PARTICULARS OF SPECIAL DAMAGE being loss of Le.80,000,000.00 wrongly paid out as a result of negligence and/or willful default of Mr. Alghali for:

"1. Damages

2. Interest on such damages at such rate and of such period as the Court shall think just.

3. Further or other Relief.

4. Costs."

The matter went on trial in the High Court before the learned trial judge L.A.E Marcus-Jones J, who, on the 3rd October 2002, gave judgment dismissing both claim and counterclaim.

On the 19th March 2003, Mr. Alghali being dissatisfied with the judgment of L.A.E. Marcus-Jones J, appealed to the Court of Appeal, on the following GROUNDS OF APPEAL (without the particulars) as follows:

1. That the Learned Trial Judge totally failed, and/or neglected, and/or omitted to properly or adequately consider the case for the Plaintiff notwithstanding the evidence led, before her, the submission, of Counsel and the several authorities cited, leading her to the erroneous conclusion that, "....On the evidence I cannot grant relief claimed by Plaintiff....."

2. That the Learned Trial Judge failed to properly evaluate the evidence led before her including the exhibits tendered, but rather merely repeated the contents of the pleadings, the evidence and some submissions of Counsel in almost the whole of her said Judgment excepting the last page thereof.

3. That the Learned Trial Judge did not consider AT ALL whether or not the Plaintiff was entitled to or qualified to receive a pension from the [p.153] Defendants after twenty-seven (27) years service according to the Defendant's own records, which was a major and substantial part of the Plaintiffs case.

[p.154]

The Bank being dissatisfied with the decision of the Court of Appeal Appealed to this Court by a Notice of Appeal dated and filed on the 12th January 2005 :—

The Grounds, without the Particulars, are as follows:—

1. That the Court of Appeal failed to consider and give due weight to the available written and oral evidence particularly that of the Plaintiff PW1 when it held that there was no evidence to support the contention that the Appellant had not been guilty of any misconduct.

2. That the Court of Appeal erred in law when it held that specific charges must be drawn up against the, Respondent and proven before disciplinary measures are taken.

3. The Court of Appeal erred in law when it held that, having, regard to the circumstances of the case the Appellant had not complied with the terms of the Staff Rules and Regulations and that the termination of the Respondent was thus illegal.

At this juncture it is convenient to state that about 14 days prior to the Letter of Termination to Mr. Alghali, he received a memorandum ("Exhibit "D") dated the 4th April 2000 from the Bank concerning his impending retirement.

I reproduce the memorandum hereunder for its import and effect. The Memorandum is in the following terms:—

[p.155]

RETIREMENT

According to our records you are due to retire from the services of the Bank on 7th July 2000. Our records also indicate that prior to your retirement date you would have earned a total of 15 (fifteen) proportionate leave days for the year 2000. You are therefore to proceed on leave prior to retirement on 16th June, 2000 to ensure that you utilize your total leave days.

Action will be taken to pay all benefits due you. We will in due course schedule an appointment for you to pay a courtesy call on the Governor before you finally proceed on retirement.

In view of the above you are requested to return to the Director, Human Resources your Bank of Sierra Leone identity card and any of the Bank's properties you may have in your possession on or before 6th July 2000 which is your last working day.

It is my pleasure to extend to you on behalf of the board of directors and Management profound appreciation for your services to the Bank and to wish you the best in all your future endeavours.

We have no doubt that the link forged over the years will remain strong.

Sgd: E.V. Smith (Mrs.)

pp. Director Human Resources"

The Retirement Memorandum has been given different and opposing meanings by counsel on both sides. I shall deal with the memorandum later on in the judgment to show what, in my view, is true import and meaning.

In the Appellants' statement of case, it is stated that:

"The principal issue which calls for determination by the Supreme Court [p.156] is whether the Court of Appeal having correctly referred to the relevant case of Gitten-Stronge v. S.L. Brewery Limited (17th December 1980) S.C. CIV.APP. 7/1979 did correctly apply the principles stated there in the instant matter.....

.....
.....

The principles set out in the said case are as follows:

1) If an Employer gives notice for the prescribed period under the Contract of Employment or pays the equivalent salary in lieu of such notice the termination is lawful and the employee had no remedy in law.

2) The motive of the employer in terminating the employee is irrelevant so long as he complies with the terms of the Contract of Employment."

The Appellant's counsel argues that the Court of Appeal did not properly apply to the facts disclosed by the evidence the principles laid down in the judgment delivered by Livesey-Luke CJ in Gittens-Stronge v Sierra Leone Brewery (17th December 1980) S.C. CIV. App. No.7/1979 (Unreported). The Appellant's counsel further argues that as a result the Court of Appeal failed to properly adjudicate upon the matter. He contends that the Bank was not obliged to give Mr. Alghali any reason for terminating his employment. He further contends that the termination of Mr. Alghali was lawful in that it was effected in accordance with the contract of employment by the payment of the benefits Mr. Alghali was entitled to, and payment in lieu of, notice. He argues that the Court of Appeal misdirected itself when it held the termination unlawful after holding that the correct benefits were paid upon termination and that the correct payment In lieu of notice had also been paid. In effect, he argues the termination was in accordance with the terms and conditions of the contract of employment and therefore not wrongful. Counsel for the Respondent did not [p.157] formulate any issue for determination but proceeded to argue the Grounds of Appeal. He essentially repeats his arguments in the Court of Appeal and submits that the Termination Letter was invalid as it came after the retirement letter, which in his thinking, was a Notice of Termination, validly given and withdrawn, and also because the Termination Letter purported to take effect on a date more than three (3) weeks after Mr. Alghali retirement date of 7th July 2000 according to the Retirement letter He further argues that the Bank could not by the Termination Letter give Mr. Alghali a "valid" three months notice as he had only 2 months and 18 days left in the Bank's employment as per the Retirement Letter acted in breach of the contract of employment.

Counsel for the Respondent apparently reserved his arguments on the issue formulated in the Appellant's statement of case for his closing and he responds by quoting copiously verbatim the judgment of Muria J.A. at pages 6-8, 9-12, 13-15 of the judgment and reflected respectively at pages 146-148, 149-152, 153-155 of the record of appeal to demonstrate that 'the Court of Appeal did not fail as contended by the Appellant's counsel to properly adjudicate upon the appeal before it and submits that the Court of Appeal dealt with "the appeal fully, exhaustedly reached the right conclusion in dismissing the appeal."

An issue formulated in an appeal must derive from and bear relationship to one or more of the Grounds of Appeal; it cannot stand in splendid isolation from the Grounds of Appeal. The Appellant has formulated an issue which I find relates to the Grounds of Appeal. The Respondent has not formulated

an issue and he is presumed to accept the issue formulated by the Appellant. I have formulated an issue which embraces the issue formulated by the Appellant and is as follows:—

ISSUE

Was Mr. Alghali's employment terminated in accordance with the terms of his contract of employment and

[p.158]

(a) if so what are the consequences and

(b) if not what are the effects

In considering the above issue one has to determine the purport anq effect, among others, of:—

(1) The Retirement Letter and

(2) The Termination Letter against the backdrop of the Staff Handbook (Exhibit "T") and the Staff Rules and Regulations (Exhibit "U") and the general law.

Mr. Alghali and the Bank, agree that the employment relationship was guided by the Staff Handbook and the Staff, Rules and Regulations. This is disclosed in the pleadings where in paragraph 1 of the Statement of Claim it is stated:

The Plaintiff will further aver that at the time of his employment his conditions of employment were as stated in the Staff Handbook of April 1971 and in the Staff Rules and regulations of January 2000 at the time the cause of Action herein arose,"

And in the Defence wherein paragraph (1) it states:—

"The Defendant admits the averments contained in paragraphs 1 and 2 of the Statement of Claim."

It can be seen from the quoted pleadings that Mr. Alghali and the Bank Were of one mind that the terms and conditions of employment of Mr. Afghan were as contained in the Staff Book and the Staff Rules and Regulations and therefore the contractual relationship was governed by them.

[p.159]

Both the Staff Handbook and the Staff Rules and Regulations laid down a disciplinary procedure by which a Staffs services can be ended by reason, inter alia, of breach of the Bank's Regulations. The disciplinary procedure and measures are set out in Chapter 6 — Regulations 44 and 45 in pages 14 and.15 of the Staff Handbook and in respect of the Staff Rules and Regulations in Regulations 9 and 10 — 10.3 of pages 13, 14 and 15.

In my view the disciplinary procedure and measures set out respectively in the Staff Handbook and Staff Rules and Regulations, are not mutually exclusive but are complimentary and supplementary of one and another

It is pertinent to note at this juncture that termination or separation of service in normal and ordinary circumstances are also provided for in both the Staff Handbook and the Staff Rules and Regulations.

In the Staff Handbook headed TERMINATION OF SERVICE in Chapter 2 at page 3 provides:

"10.1 — For the purpose of termination of or resignation by a permanent member of the staff, the period of notice or payment in lieu thereof by either side will be:

a) three months for officers above the Rank of Banking Officer Grade A equivalent, and

b) One month for officers of the rank of Banking Officer Grade A and below or equivalent.

Provided that:

[p.160]

i. This condition will not apply in case (SIC) or dismissal in terms of regulation 4.3:

ii In the case of Resignation the period of Notice or pay in lieu thereof maybe reduced or waived at the discretion of the Governor."

The Staff Rules and Regulations similarly under Regulation 11 under the overall heading SEPARATION FROM SERVICE provides:

"The service of staff with the Bank is severed by any of the following:

a) Resignation

b) Termination

c) Retirement

d) Death."

And in what Interests us here, Regulation 11 further provides:

(b) Termination by Notice

i) The bank reserved the right as employer to terminate the service of an employee at any time and need not assign any reason for such termination.

ii) The bank shall give staff notice of termination or payment in lieu of such notice in accordance with their rank as follows:—

· Probationary employees — fourteen calendar days.

Employees below the rank of Section head- one calendar month

· Section Head and above — three calendar months

[p.161]

(iii) Staff terminated who have served a maximum of 5 years shall be entitled to all earned benefits up to the time of termination."

In the instant case the Bank opted to employ the disciplinary procedure and measures provided in the Bank's Regulations and imposed termination on Mr. Alghali as a disciplinary measure and paid him three months salary in lieu of Notice and other terminal benefits excluding his pension rights.

It is on this basis and because of these payments that counsel for the Appellant argues that since the payments accord with the provisions provided the termination was not wrongful and, therefore, there was no breach of the employment contract.

In support of his argument learned counsel for the Appellant relies on the GITTENS-STRONGE case (supra) and formulates in the Applicant's case what he regards to be the principles laid down in the case there said principles are stated above.

It is with due respect to 'counsel for the Appellant that I say I find the argument fallacious in so far as the argument represented an incomplete picture and effect of that portion of the judgment from which the formulated principles are derived must say that I am in complete agreement with the learned judge of the Court of

Appeal, Muria J.A, when, in his well written and well reasoned judgment at page 12 and reflected at page 152 of the record of appeal, he said:—

"the case of GITTEN-STRONGE vs Sierra Leone Brewery Limited (above) cited by Counsel for the Respondent does not support the proposition he contended for and it would be incomplete description of the ratio in that case to say that termination of employment is lawful as long as the required notice on payment in lieu thereof has been made. As well as the requirement of proper notice of termination, [p.162] the common law recognizes that the employer must also act in accordance with the terms of the contract of employment. Only when the employer acts in accordance with the terms of the contract of employment will he be protected. The requirement of giving notice is only. one of them.

It Is helpful for a better appreciation of the argument and discourse that the passage in issue in the judgment at page 26 by Livesey-Luke CJ be reproduced in full hereunder:—

"… the defence of the company was that they acted in accordance with the Service Agreement by paying two months salary in lieu of notice into the account of the appellant. If they had made the payment at the time due, that plea would have succeeded and the appellant's claim would have failed. This is the strict common law position. According to the common law if an employer gives notice for the prescribed period under contract of employment or pays the equivalent salary in lieu of such notice, the

termination is lawful and employee has no remedy in law. Similarly in case where no period of notice is prescribed in the contract, if the employer gives what the court considers to be reasonable notice in the circumstances or pays salary in lieu thereof, the termination is lawful and the employee has no remedy in law. It does not matter how unfair or nigh handed the termination was, or for how long the employee had served the employer. If the employer acts in accordance with the terms of the contract of employment he is protected ....."

(Emphasis added)

[p.163]

Learned counsel for the Appellant seems to limit his view of the cited passage in the GITTEN-STRONGE CASE in the ordinary and normal common law master and servant relationship where the usual three elements are present, namely

1) Appointment

2) Salary

3) Notice period to terminate or

4) Non-notice to terminate in which case, the common law would imply reasonable notice.

In such an employment scenario the employer is protected if he gives notice to the employer which the employee would have to work through or, in the alternative, pays salary for the requisite notice period in lieu of notice or in a situation where no period of notice is stipulated, the employer gives the employee reasonable notice which again the employee would have to serve out but the employer may choose to pay salary in lieu for the period the law considers reasonable notice depending on the circumstances of each case. The situation is different in more complex situations such as, where other terms are included in the contract of employment, An instance is where there are laid out procedures to be followed before an employee can be terminated for committing certain disciplinary offences. In such a case the employer is not protected if he purports to act on the basis of the laid out procedure but in fact refuses or fails to correctly follow the procedure or steps laid out. The result is that the employer would be in breach of the employment contract and thereby liable in damages. It is telling to note that judgment was given to the Appellant/Employee in the GITTEN-STRONGE CASE supra because the court found that the Respondent (Employer) failed to act in accordance with its own provision for notice by not crediting the account of the employee with two months salary in lieu of notice contemporaneously with his termination.

Let me now return to the instant case to examine whether the Bank acted in accordance with its own Regulations.

[p.164]

In the Termination Letter the Bank purported to act under Regulation 10.1 of the Staff Rules and Regulations. The Regulation stipulates the offences and penalties and provides:

"10.1 DISCIPLINARY MEASURES

Staff who commit a breach of any of the regulations of the Bank or who displays negligence inefficiency or indolence or who knowingly do anything detrimental to the interests of the Bank or in conflict with its instruments or commit a breach of discipline or is guilty of any other act of misconduct or who are convicted of a criminal offence, shall be liable to any of the following penalties:

i) Reprimand in Writing

ii) Fines/Recoveries

iii) Suspension

iv) Interdiction

v) Termination

vi) Dismissal"

And Regulation 10.2(v) which is one of the penalties available to the Bank if an employee is found guilty states:

"TERMINATION

In the case of termination, the Bank shall give staff notice or payment in lieu of such notice and the employee shall be entitled to gratuity (where he/she is qualified) and other emoluments up to the time of termination"

Regulation 10.1 of the Staff Rules and Regulations stipulates the breaches or causes that can trigger a disciplinary process and specifies the penalties at the option of the employer presumably, depending on the gravity and circumstances of the breach or offending act and Regulation 10.2 of the Staff Rules and Regulation defines or gives [p.164] the effect of termination. However Regulation 10.1 and 10.2(v) of the Staff Rules and Regulations are not the end of the matter.

The Bank would have firstly to identify the disciplinary offence, go through the disciplinary procedure or steps, and if at the end of the process the employee is found guilty (or at fault) then the Bank shall be in the position to decide on and impose the appropriate penalty in Regulation 10.1 of the Staff Rules and Regulations. In the embarkation of such course, Regulation 9 of the Staff Rules and Regulation and Regulation 44.2 in chapter 6 of the Staff Handbook are relevant.

Regulation 9 of the Staff Rules and Regulation is captioned: STAFF'S RIGHT TO DEFEND and provides:

"Staff who are alleged to have breached any of the Regulations of the Bank shall be informed of the specifics of the allegation by a superior Officer, or by the Governor in the case of Head of Department/Unit.

The concerned staff shall be given an opportunity to justify why disciplinary action should not be taken against him/her"

(Emphasis added)

And sub-Regulation 44.2 of the Staff Handbook states as follows:—

"No employee shall be subject to penalties (b), (c) and (d) in sub Regulation 1 of the Regulation except by an Order in writing Signed by the Governor in the case of Heads of Department or Secretary in the case of other employees. No such order shall be passed without the charge being formulated in writing and given to the said employee so that he shall have reasonable opportunity to answer them in writing or in person and in the latter case his defence shall be taken down in writing and read to him. In every case when all or any of the requirements of this sub-Regulation are waived, the reason for so doing shall be recorded in writing"

[p.166]

(Emphasis mine)

One can see that both the Regulation and sub-Regulation cited above required that the employee be given the specifics of the allegation or a charged framed. In my view "given specifics" or "charge framed" are not different in nature or function. The purpose of both is to give the concerned employee a reasonably clear picture of the offence he is alleged to have committed so that he can properly answer the charge.

The charge or specifics of the offence must be clear and unambiguous and be specifically referable to a particular Regulation or Regulations so that the person concerned has a fairly good idea of what he is faced with. It is only then that he would be in the position to properly defend himself for it stands to reason that one can't properly defend oneself if one is not sure of what one faces. The formulation of a charge or complaint in relation to a disciplinary offence is not required to have the same or similar kind of formality or specificity or particularization or employ similarly legal or precise wording as in a criminal charge. But what is expected as in the instant case is a formulation and, particularization that relates to and clearly identifies disciplinary offence in question and state the substance of the complaint or commission of the offence so as to give the employee a fair idea' of what he is accused of so as to enable him better defend himself in line with the principle of fair hearing.

The Memorandum, Exhibit "J", dated the 17th April 2000 that Mrs. Mahdi wrote on behalf of the Bank to Mr. Alghali requesting him to state why disciplinary action should not be taken against him shows clearly that investigation was still being carried on and that Mr. Alghali was being asked to assist further In the Investigation. I hereunder reproduce the Memorandum (Exhibit "J"):

PAYMENT OF CHEQUE No.319606 FOR LE.80,000,000 IN THE 11TH AUGUST 1999

[p.167]

You would recall that on 11th August 1999 the above cheque No.319606 for the sum of Le.80,000,000.00 drawn by the Union Trust Bank Limited was paid over the counter in the Banking Office.

The explanation put forward that you cannot now remember who gave you the cheque was paid, is found to be unsatisfactory and it has hindered further progress in the investigation into the loss the Bank has suffered.

Consequently, you are being given another opportunity to reflect more seriously on the matter and let us have any further Information you may think may throw Light on how , you received this cheque.

In view of your said involvement in the said exercise which has caused loss to the Bank, you are hereby requested to state why disciplinary action should not be taken against you in accordance with the Bank's Staff Rules and Regulations.

Please ensure that we receive your reaction not later than 2.00 p.m. today, Monday 17th April, 2000.

(Emphasis provided)

Mt Alghali replied by Memorandum (Exhibit "K") dated the 17th April 2000. In these terms:—

"PAYMENT OF CHEQUE NO. 319606 FOR LE. 80.000.000.00 ON 11th AUGUST 1999

With reference to your memorandum CF:583 dated 17th April 200b in respect of the above subject, I wish to state that it is not usual for a cheque of this nature to come directly to me when payment is required. What I could recalled is that the lady who [p.168] came and collected the payment was asked to wait in my office while the cheque was being processed.

This processing involved the paying cashier stamping the cheque with his receiving stamp and passing it to the verifying office who reference it. The cheque was then presented to the Division Head, Banking Operations who authorized the payment.

I was called by the supervising cashier to open Vault IV in order for him to supply the money for effecting the payment. Since the request by the Union Trust Bank was specifically for new notes, the supervising cashier discovered that though he had sufficient new notes to accommodate the cheque he could not supply the money. according to the specific request of the Bank and therefore asked the cashier to requisition the money based on the available new notes in Vault IV which could cover the cheque. This necessitated the making of the second analysis on the cheque by the cashier. The money was supplied from Vault IV to the cashier who effected the payment to the lady".

In my view, one can discern or deduce from the two Memoranda, Exhibit "J" and Exhibit "K" and the subsequent memorandum, Exhibit "M1", that investigations were still going on and no charge or an

allegation of a breach of the Bank's Regulation was being proffered at this stage; Mr. Alghali was merely being required to help the investigation as a witness. The memorandum is too general and vague and fails to make any specific allegation of breach or commission of a disciplinary offence. In my considered opinion nothing in the memorandum — Exhibit "M1" — amounts to a charge or specifics of an allegation of a breach of the Bank's Regulations as contemplated in the Staff Handbook and the Staff Rules and Regulations, and I so hold. It is not surprising that there was no charge or specifics of any allegation given to Mr. Alghali since in his case being a Section Head it was the Governor who could have informed him of the charge specifics of the allegation in compliance with Regulation 9 of the Staff Rules and Regulations. The Governor did not do so. Thus the Bank again failed to comply with its own Rules and Regulations. See Gitten-Stronge's case, supra, for consequences in [p.169] respect of failure to comply with procedure in a disciplinary process in the context of a contract of employment. The result is that the Bank is in breach of the Contract of Employment. Thus, I agree with and hold that Muria J.A. is correct when in the judgment of the Court of Appeal he states:—

"…….In present case, no specific charge of misconduct or breach of title regulations had been put to the Appellant so that he could answer it. One would have expected that in order to comply with Regulations 9. 10.1 and 10.2, the Respondent, following its investigation and gathering of information from its staff members, would have drawn up specific charge or charges against the Appellant and accord him the opportunity to respond to the charge or charges A decision would have to be taken on the charge(s) whether they were established and that the Appellant had committed the breach(s) alleged."

The Staff Handbook and the Staff Rules and Regulations also required the Bank to give Mr. Alghali an opportunity to justify why disciplinary action should not be taken against him. Since a charge or the specifics of an allegation of a breach of the Bank's, Regulation was not given to Mr. Alghali in my view, he was not in the position to know what disciplinary offence he allegedly committed. The situation was such that it cannot, in my view, be properly said that Mr. Alghali was given the opportunity to defend himself in accordance with the Bank's Regulations.

Let me assume for a moment that the memorandum, Exhibit "J", was intended to give opportunity to Mr. Alghali to defend himself. Can it be rightly .said that the mere invitation to state why disciplinary action should not be taken against him was to constitute an opportunity to defend. I think not. Proper opportunity to defend entails more. Proper opportunity is inextricably linked to fair hearing which implies that the Person knows:—

1) the case which is made against him

2) what evidence has been given and

[p.170]

3) What statements have been made affecting him.

And must be given

4) a fair opportunity to correct or contradict them

5) adequate time to prepare his defence.

These are in line with what Lord Denning stated in the Privy Council case of Kanda v. Government of Malaya (1962) A. V. 332 at 337 and adopted by the Supreme Court of Nigeria in Garba v University of Maidugurl (1986) 1 N.W.L.R. (PT 18) 550,at 618 as follows:

"If the right to be heard is to be a real right which is worth anything it must carry with it the right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

See ADEDEJI & POLICE SERVICE COMMISSION (1988) NMLR 102 at 107 per Ademola CJN.

In my considered view, Mr. Alghali was not given the opportunity to defend himself; he was not given adequate time to prepare his defence and he was not given a fair hearing. In the memorandum, Exhibit "J", Mr. Alghali was given a deadline to reply not later than 2.00p.m. The same day and in the Memorandum, Exhibit "M1" the deadline was 12.00 noon the same day. There is no evidence as to the time in the morning the Memoranda were respectively given to Mr. Alghali. One thing that is certain is that in both cases he was not given, in my view, adequate time to respond. In the circumstances, even if it could be said Mr. Alghali was given a hearing, it could not, in my considered view, be a fair hearing in accordance with the relevant Regulations in the Staff Handbook and the Staff Rules and Regulations In the result, the Bank breached the contract of employment, and so hold.

[p.171]

It must be noted that in the context of contract of employment the application of the principle of fair hearing is nota right except where it is provided for in the contract as in the Instant case. The principle is not only applicable to criminal trials but also to civil trials and other hearings where the parties concerned have a right to be heard. In the instant case, Mr. Alghali has a contractual right to a fair hearing.

A big issue is made of the Bank's refusal or failure to inform Mr. Alghali of the reason for the termination of his employment. The Bank seeks cover for its refusal or failure under Regulation 11(b) (i) where it reserves the right to terminate the service of an employee without assigning any reason for such termination. In my considered opinion the Bank cannot find cover under this Regulation. Where the termination of the employee is inflicted as a penalty resulting from a disciplinary process under Regulation 10, the refusal to give a reason after completion of the disciplinary process and the imposition of a penalty without assigning a reason is a fundamental contradiction with the disciplinary process and in conflict with the principle of fair hearing and underlines the integrity of the appellate process in Regulation 10.3. Again how can an employee have a fair appeal or hearing if he is denied knowledge of the very reasons he needs for his appeal? The refusal or failure to inform Mr. Alghali of the reasons for the termination of his employment is a further denial of his right to defend himself and a

breach of the employment contract, and I so hold. In my view if the Bank terminates normal and ordinary circumstances and not after resorting to the disciplinary process, terminates as a consequence of that process the Bank may then rely on Regulation 11 (b)(i) and not otherwise.

Let me at this stage deal with the Retirement Memorandum on which the Respondent in a large part based his claim for pension, in that, counsel for the Respondent argues, being a notice to terminate, it could not be unilaterally withdrawn or overridden by the Termination. Letter, which in effect, was null and void.

[p.172]

In my opinion the Retirement Memorandum is neither the same as a notice to terminate nor analogous to a notice to terminate. A notice to terminate is an option exercisable by either the employer or the employee to bring the employment to an end. Once a notice issues the termination process commences and ends at the effluxion of the period given. Without the notice the employment continues unless ended by other means. Retirement, however, occurs when the employee reaches his 55th birthday except in the Case of voluntary retirement where the employee serves a stipulated number of years or, at or after a stipulated birthday, requests for an early retirement from his employee.

It seems to me, therefore, that the idea that the Retirement Memorandum constitutes notice which cannot unilaterally be withdrawn or overridden does not arise at all except perhaps if one were to argue that since the Bank reserves the right to extend Mr. Alghali tenure, the Retirement Memorandum constituted an implied notice that the Bank would not exercise its option to extend the tenure and that Mr. Alghali would be retired oh the 6th July 2000 — a day before his 55th birthday. In the Pension Scheme TRUST DEED AND RULES — Exhibit "DD2' a Pension date" means in relation to any member the day preceding the fifty-fifth anniversary of his birth." The argument was not urged upon the Court and I do not see the need to determine the issue here.

There is dispute as to when the termination of Mr. Alghali's employment took effect Counsel for the Appellant argues that the Termination Letter makes the termination date 1st August 2000 but that in law the effective termination date is 19th April 2000 — the day 1 following the date of the Termination Letter. The Respondent's counsel on the other hand argues that the termination purports to extend the employment beyond the retirement date of the 7th July 2000 to the 1st August 2000 but that the letter itself was null and void and of no effect.

My understanding of the Termination Letter is that the Bank Intended to give and did give Mr. Alghali three (3) months notice to terminate his employment effective 1st August 2000 and then paid him three months salary in lieu of that notice. Some support for this [p.173] can be found, not only in the arguments of counsel before this Court (and also the Court of Appeal), in paragraph (4) of the Defence which states.

"(4) As regards to paragraph 5 thereof the Defendant will contend that it did not expressly invoke. Rule 11(c)(ii) of the said Rules and Regulation but the alledge extension of the plaintiffs' services as provided

for in the said Rule arose by necessary implication when the Plaintiffs services were duly terminated with three months notice as required by the said Rules"

In answer to the dispute as to the effective date of the termination of Mr. Alghali's employment, I cannot do better than quote the learned authors of CHITTY ON CONTRACTS — SPECIFIC CONTRACTS, 27TH EDITION, para 37-114 page 787 at 788 where it is stated.

".....The question also arises of the time at which the termination of the contract takes effect. The view of such payments as liquidated for breach seems to require the view that termination is immediate upon the ending of actual employment. The view of such arrangements as involving a waiver of the right to the services to the employee may result in an extension of the date of termination to the date at which notice in lieu of which payment is made would have expired. The former of the two views seems to be currently preferred except in the special case where there are two distinct operations of (living notice and making "payment in lieu of that notice" (Emphasis provided)

In the context of the instant case, I am of the considered opinion that the exception underlined is applicable, and I so hold.

Let me for a moment accept the argument of Counsel for the Appellant that the, termination took effect on the 19th April 2000. This conform with the first view expressed in the quoted passage above which makes the payments made to Mr. [p.174] Alghali in lieu of notice liquidated damages of all the remuneration and entitlements he would have enjoyed during the period of notice. In Mr. Alghali's case, his remuneration and entitlements during the period of notice except his pension rights were paid. In my view his pension rights, which are contractual and binding on the Bank, matured on the 6th July 2000 during the period of notice and therefore he is entitled to his pension payments in accordance with the Pension Scheme, and I so hold.

The discourse relating to the Termination Letter/the issue of the notice to terminate and the decisions or holdings made by me assumes that the notice to terminate was legally effective and not null and void. But is the notice to terminate in the circumstances valid and legally effective? I am of the firm view that it is not. Mr. Alghali was a Section Head at the time that the termination letter was delivered, and as at that time, he was clearly, entitled to three calendar months notice if his services were to be lawfully terminated by notice as evidenced in Regulation 11(b)(ii) of the Staff Rules and Regulations reproduced earlier herein. Mr. Alghali was entitled to retirement on reaching the age of 55 years by virtue of Regulation 11(c){ii) which states:

"All staff will be retired by the Bank on attaining the age of 55.

However, the Bank reserves the right to grant an extension of tenure of office to staff beyond the age of 55, but such extension not to exceed the age of 60 years."

(Emphasis provided)

Mr. Alghali, after serving 27 years, was due for retirement on the 7th July 2000, on attaining the age of 55 years. In fact, he was given a letter (Exhibit 'D') advising him of Impending retirement. Shortly after, on the 18th April 2000, Mr. Alghali's service, were terminated by letter (Exhibit E) with effect from 1st August 2000 and he was then paid three months salary in lieu of notice. The termination date and the period of notice for which payment was made in lieu exceeded the retirement date for Mr. Alghali. In my judgment, the said period of notice which was beyond the said retirement date was intended to comply with the requisite three calendar months [p.175] notice, that is to say, the months of May, June and July 2000. A calendar month means any month in the usual 12 months calendar.

To justify giving a notice that goes beyond the retirement age/date of Mr. Alghali, counsel for the Bank comes up with the ingenious and clever argument that inherent in the termination letter was an implied extension of the tenure of office of Mr. Alghali. This argument, in my view, is not tenable. The Termination Letter was dealing specifically with termination of service and not extension of tenure of office: the two, in my view, are mutually exclusive. This fact is reflected by both the heading of the termination letter and its content. Furthermore, significant matters as the extension" of tenure of office I conclude, must be specifically raised and dealt with, and not made by implication. However, in my judgment, the staff concerned must be aware of the issue and. wants an extension of tenure of office to which the Bank may accede to.

In Regulation 11(c) (ii) "the Bank reserves the right to grant extension of tenure of office". In my view, what the Bank retains (or reserves) to itself is the discretion to accede to a request or wish by a staff for an extension of tenure of office. The Shorter Oxford English Dictionary, 5th edition, volume 2, defines the verb grant as follows:

1. Consent to a request; agree to do

2. Agree to; promise, undertake; consent to do

3. Accede to; consent to fulfill (a request etc.)

4. Concede as an indulgence; bestow as a favour; allows (a person) to have

5. Give or confer (a possession, a right, etc.) formally; transfer (property) legally

6. Yield, give up

7. Admit, acknowledge. Now usually concede (a proposition) as a basis for argument.

I have quoted the full and varied definition of the verb so as to provide a broad set of [p.177] choices for the application of a meaning in the context the verb is used in the said Regulation. In my view, the definitions mentioned in numbers 1 — 4 are appropriate choices, particularly numbers 1 and 3. If the Bank had intended to arrogate to itself the power to unilaterally extend a staff tenure of office without regard to the staff wishes, the verb "grant" would not have a place in the said Regulation. The Bank could have simply stated "it reserves the right to extend a staff tenure of office beyond the age of 55". The selected definitions, in my view, are consistent with and in support of my understanding of the cited

phrase in the ;regulation. In the circumstances, I am of the firm view that the notice contained in the Termination Letter is in breach of Regulation 11(b)(ii) and was invalid because it did not fall within .the period of the Mr. Alghali's employment before his services would have come to an end pursuant to Regulation 11(c)(ii) of the Staff Rules and Regulations.

I will deal briefly with the issue of negligence: I firstly take note that allegations of negligence were never made against Mr. Alghali before this matter came to Court. However in defence to Mr. Alghali's claim in the High Court, in paragraph 6 of lieu Statement of Defence, the Bank alleged misconduct against him thus:

"(6) Further and/or in the alternative and before the alleged breach the plaintiff misconducted himself in the service of the Defendant by performing his duties in such a grossly negligent and inefficient manner that led to the Defendant losing a considerable amount of money.

PARTICULARS OF NEGLIGENCE

(1) Causing a cheque for Le.80,000,000.00 drawn on the Defendant Bank to be paid contrary to laid down procedure and practice resulting in the loss of the said amount to the Defendant.

(2) Facilitating the conversion of the proceeds of the said cheque by a person or persons unknown.

(3) The Defendant will further rely on the doctrine of "res ipsa Loquitur".

The Particulars of Negligence seem to imply fraud and the evidence adduced also seem to imply fraud and/or conspiracy to defraud but that is not to say there is evidence to warrant a finding of fraud and/or conspiracy to defraud. Yet the allegation is that of negligence. In his opening address in the High Court Page 27 Line 16-20 of the record Counsel (as he then was) for the Appellant said:

" ... that by way of counter claims the Deponent will be seeking damages from the plaintiff for his gross negligence and for facilitating what we will contend tantamount on (sic) a fraud on the Bank which caused the Bank to Jose 80 million Leones."

In my view, the same facts cannot be seen to support both fraud and negligence by the same person at the same time. The two are at the opposite ends of a pole and are diametrically opposed. The acts and/or failures to act alleged to have been in furtherance of a conspiracy to defraud and/or fraud, in my view, cannot in the same breath be characterized as negligence vis-a-vis the same person.

In the circumstances, hold that paragraph 6 of the Defence and, in particular, the Particulars of Negligence are not indicative of gross negligence, and that the evidence adduced does not prove gross negligence or negligence against Mr. Alghali. As regards whether Mr. Alghali has been involved in fraud or conspiracy to defraud the Statement of Defence relied on negligence and for this reason. I refrain from determining the issue.

I have already held that the contract of employment has been breached in more than one point. Mr. Alghali has been paid all his remuneration and benefits up to the 1st [p.178] August 2000. The question of damages is no longer an issue, except his pension rights. which, for him is the one outstanding issue.

Let me now deal with the issue of Mr. Alghali's pension rights. In my view Mr. Afghali is entitled to pension. The Bank's Pension Scheme was set up for the benefit of its staff and every staff was obliged to become a member on confirmation and upon attaining the age of twenty years. See Regulation 12.1 of the Staff Handbook which states:

12."A member of the staff will join the pension scheme which is non contributory, on confirmation and on attaining the age of twenty years"

Mr. Alghali was a confirmed staff and had attained the age of twenty years while in the employment of the Bank. The rights of staff under the Bank's Pension Scheme are contractual and the Bank is bound by tho.se terms. This is so because the entitlement to the pension rights is grounded in the Staff Handbook and the Staff Rules and Regulations which, as I have already shown, govern the employment relationship between the Bank and Mr. Alghali. In claim for damages for wrongful dismissal, the employee, apart of loss of earnings, may be entitled to other benefits including pension rights if the employer is contractually bound as in this case. See Aklam v Sentinel Insurance Co. Limited (1959)2 Lloyds Rep. 683; Bold v Borough, Nicholson and Hall Limited [1963] 3 All. E.R.849. The loss of Mr. Alghali's pension rights was a foreseeable .result of and flows naturally from the breach of contract. See Hadley v Baxendale (1854) 9 Exch. 341 per Baron ALDERSON at p. 465 (All E.R. 1843-1860). In my view, Mr. Alghali's rights to pension matured on the 6th July 2000, the day preceding his 55th birthday, and is entitled to pension payments from the 7th July 2000. Support for this is found in rule 7 sub-rule (1) of the TRUST DEED AND RULES of the Bank of Sierra Leone Pension Scheme which provides:

"7 (i) A member who having completed ten year's pensionable service [p.179] ceases to be in service at pension date shall be entitled to a pension commencing on the day following such cessation and continuing subject as hereinafter provided during the remainder of his life".

Mr. Alghali has been paid his salary and emoluments up to the 1st August 2000. In the circumstances he can only be paid pension from the 1st August 2000 and in a manner that accords with the Pension Scheme Rules and I so hold.

In the premises I affirm the judgment of the Court of Appeal, and, accordingly, dismiss the appeal with costs.

SGD.

JUSTICE G. SEMEGA-JANNEH, JSC

[p.180]

V.A. WRIGHT. JSC:

The Respondent brought an action against the Appellant that the purported termination of the Respondent's services with effect from 1st August 2000 as stated in the letter of termination was unlawful, null and void since the Appellants right to grant an extension of tenure of office to the staff beyond the age of 55 years was not properly exercised.

The Respondent had been employed by the Appellant for 27 years and at the time of his termination of employment he was section Head, Currency Management. On the 4th April 2000 the Appellant wrote to him informing him of his retirement due on the 7th July 2000. The Respondent claimed that although he was given his entitlements he was not given his pension which was due him on his retirement.

[p.181]

The grounds of Appeal are:

(1) That the Court of Appeal failed to consider and give due weight to the available written and oral evidence particularly that of the Plaintiff P.W.1 when it held that there was no evidence to support the contention that the Appellant had not been guilty of any misconduct.

(2) That the Court of Appeal erred in law when it held that specific charges must be drawn up against the Respondent and proven before disciplinary measures are taken .

(3) The Court of Appeal erred in law when it held that having regard to the circumstances of the case the Appellant had not complied with the terms of the Staff Rules and Regulations and that the termination of the Respondent was thus illegal.

(a) That the judgment of the Court of Appeal be reversed.

(b) Any further or other relief as to the Supreme Court may seem fit.

By a Writ of Summons dated the 9th day of August 2000 issued by the Respondent against the Appellant claiming inter alia a declaration that the termination of employment by the Appellant was null and void and that he should be granted entitlements owed to him under the Banks Pension Trust Scheme.

The Respondent gave evidence that he had worked for the Bank since 1973 and that he was supposed to proceed to retirement after serving the Bank [p.182] for 27 years. A Defence and Counterclaim to the action was filed on behalf of the Appellant alleging negligence on the part of the Respondent thus causing the Appellant loss to the value of Le80,000,000.00 and contending that termination of the Respondent was lawful, thereby claiming the same amount by way of counterclaim.

The matter was heard and on the 3rd October 2002 by the Learned High Court Judge who gave judgment as follows; "That on the evidence I cannot grant reliefs claimed by the plaintiff. I also find evidence insufficient evidence to allow the counterclaim of the Defendant excepting this. I give judgment for the defendants. Each party will pay it costs".

Learned Counsel for the Respondents appealed to the Court of Appeal and the grounds of Appeal were as follows:

(1) That the Learned Trial Judge totally failed, and/or neglected, and/or omitted to properly or adequately consider the case for the Plaintiff Notwithstanding the evidence led before her, the submissions of Counsel and the several authorities cited, leading her to the erroneous conclusion that "....On the evidence I cannot grant relief claimed by Plaintiff"

(2) That the Learned Trial Judge failed to properly evaluate the evidence led before her including the exhibits tendered, but rather merely repeated the [p.183] contents of the pleadings, the evidence and some submissions of Counsel in almost the whole of her said judgment excepting the last page thereof.

(3) That the Learned Trial Judge did not consider AT ALL whether or not the Plaintiff was entitled to or qualified to receive a pension from the Defendants after twenty-seven (27) years service according to the Defendant's own records, which was a major and substantial part of the Plaintiff's case.

(4) That the judgment was against the weight of the evidence.

Judgment was delivered on the 19th day of November upholding the Appeal of the Appellant.

By Notice of Appeal dated the 12th day of January 2005 the Appellant appealed to the Supreme Court.

At the hearing Counsel for the Appellant relied on the dicta of Livesey Luke J. in 7/79 C.A. Gittens-Stronge Vs. Sierra Leone Brewery unreported, said "that if the Employer gives notice for the prescribed period under the contract of Employment or pays the equivalent salary in lieu of such notice the termination is lawful and the employee will have no remedy in law".

He said that the Appellant made payment due to the Respondent in accordance ith section 11(b) of Staff Rules and Regulations, and that the investigation was carried out on the payment of the (Le80,000,000.00) eighty million cheque from Union Trust Bank. The junior officials in the Bank thought this was irregular as [p.184] payments to Bank were not usually made over the counter. This same cheque was paid again not knowing that another payment had been made. After the investigation and based on these facts the respondent was terminated. The motive of the employer in terminating the employee is irrelevant so long as he complies with the terms of the contract of Employment. The employer need not give reasons for his termination as in section 11 in the Staff Rules Regulation. He said that since the Respondent was terminated in April, when he was not yet 55 years he was not entitled to pension.

Counsel for the Respondent on the other hand contended that although the Appellant reserves the right of the Appellant to grant an extension of tenure of office to Staff beyond the age of 55 years, it was neither proper nor lawful for the Appellant to grant such an extension of tenure to the Respondent. When the Appellant informed the Respondent in writing to proceed on retirement on the 7th July 2000 he Appellant never informed the Respondent that he had been granted an extension of tenure.

Learned Counsel for the Respondent strenuously argued that the same query was not addressed only to the Respondent but also to others. He contended that he should have been queried separately and be given the right to defend his action in accordance with Rule 9 of the Staff Rules and Regulations which was not done.

[p.185]

An employer gives notice for the prescribed period or pays the equivalent salary in lieu of such notice the termination is lawful and the employee has no remedy in law. The plaintiff cannot raise the question of notice, proper or otherwise.

In this matter, the Appellant included a cheque representing the salary and other entitlements of the Respondent for three months in Exhibit D which the Respondent accepted and did not return.

The letter of termination stated as follows:

"You are hereby informed that in accordance with rule 10.1. of the Staff Rules and Regulations management has reached a decision that your service with the Bank be terminated with effect 1st August 2000. Accordingly you will be paid three months salary in lieu of notice. You need not report for duty with effect from tomorrow 19th April 2000. Enclosed is a copy of the breakdown of your final benefits and one cheque No.331657 being final entitlement of your benefits as on 31st July 2000."

Learned Counsel for the Respondent contended that since the Respondent had served 27 years in the employment of the Appellant and having reached the age of 55 years while still in the employment of the Bank he was entitled to receive a pension from the Bank. Therefore he had been willfully deprived of his said pension by the unlawful termination of his services after the date of retirement.

[p.186]

Counsel for the Appellant however stated that the Respondent was not in the employment of the Appellant on the date of his retirement and was therefore not entitled any pension. The termination was lawful and in accordance with Rule 11 of the Staff and Regulations and no notice need to be given for the termination.

I shall refer to the Staff Rules and Regulations Rule 10(1) which was referred to in the Letter of Termination.

Rules 10(1) states:

Staff shall have a right of appeal against any disciplinary measures meted out to them. Such appeal which must be in writing, and shall be addressed to the Board of Directors and copied the Governor in the case of Head of Directors and copied the Governor in the case of Head of Departments and Division Heads. In the case of all other employees which appeals shall be addressed to the Governor through the Director, Human Resources such an appeal shall be made within one month.

This brings to mind Rule 11 headed separation from service. The service of Staff with the Bank is severed by any of the following:

(a) Registration

(b) Termination

(c) Retirement

(d) Death

(b) Termination of Notice

(1) The Bank reserves the right as employer to terminate the service of an [p.187] employer to at any time and need not assign any reason for such termination.

(11) The Bank shall give staff notice of termination in lieu of such notice in accordance with their rank as follows:

- Probating employees. Fourteen calendar days.
- Employees below the rank of section head one calendar month
- Section Head and above three calendar months.

(111) Staff Terminated who have served a maximum of 5 years shall be Entitled to all earned benefits up to the time of termination.

Later on in my judgment I shall deal with the question of when the letter of termination should took effect.

In SC.Civ.App.7/97 Gittens Strange V. Sierra Leone Brewery Limited unreported, livesey Luke C.J. when dealing with a similar case said "whether such cessation is called "termination" or "dismissal" is of no importance in this context. If the "termination" is unlawful if it gives rise to an action for wrongful dismissal" similarly if the dismissal is unlawful it gives rise to an action for wrongful dismissal".

Before the written letter by the Appellant informing the Respondent of his retirement the Appellant and other employees were queried to explain in writing about their involvement in the matter following the report of the shortage of Le80,000,000 from the banking vault.

[p.188]

There are three different dates in the termination letters. Exhibit E, 1st August 2000 which was actually stated as the termination date; 19th April 2000, on which date the Respondent was told not to return to work and 31st July 2000 up to when final settlement of benefits were calculated. The Appellant informed the Respondent of his termination and made payment of full settlement of his benefits and at the same time unnecessarily gave notice of three months. It is apparent that Exhibit E was badly written.

I have no doubt in my mind that inspite of the badly drafted letter of termination the" date the Appellant stopped work on the orders of the Respondent was 19th April 2000, and the fact that in the letter of termination was enclosed a cheque representing the calculated salary of three months and other benefits due the Plaintiff, the termination was lawful. Livesey Luke C.J. in his judgment in Gittins-Stronge v. Sierra Leone Brewery Limited (Supra) had this to say.

'if according to the terms of the employment, termination must be written notice or salary in lieu of notice such notice or such payment of salary must, in my opinion, be contemporaneous with the act of termination."

Let me here state that I found that the letter of the 4th April 2000 from the Director of Human Resources of the ……relating to the Appellants imminent 'employment was a reminder that the Appellant was due to retire on the 7th July 2000.

[p.189]

Rule 11 (C) (11) of Exhibit U the Staff Rules and Regulations states that Although the staff will be retired by the Bank on attaining the age of 55 years the Bank reserves the right to grant an extension not exceeding the age of 60 years. Therefore if the Appellant did not exercise such right in favour of the Respondent I do not see how he could have complained about it. See dicta of Livesey-Luke in the case of Vincent Vs. S.P. (Sierra Leone Limited SC.CIV.APP.2/81 delivered on the 3rd day of April 1984.

I find that Exhibit "D" which is the memorandum dated 4th April 2000 from the Director of Human Resources to the Appellant relating to the Appellants imminent retirement does not have the same legal effect as Exhibit E and this could be easily distinguished from a notice of termination as highlighted in the judgment of Beccles-Davies JSC in the case SC.CIV.APP. 5/80

Freetown Cold Storage Limited Vs. Ignatius Guildford Reffell unreported Judgment delivered on 14th July 1982 and dealt with in the case of Harris & Russell Limited Vs. Slingsby (1973) ALL E.R. 31, Decro-Wall International S.A. Vs Practioners in Marketing (1971) 1 WLR 3611 and Riordan Vs. The War Office (1959) 3 ALL E.R. 522.

I shall now deal with Exhibit J which is a letter of query for the payment of cheque No.31960 for Le80,000,000 on the 11th August 1999. However on the same date similar letters of query had been served on other members of staff including the Respondent who had been involved in the payment of the cheque. The replies from other members of staff implicated the Plaintiff. The [p.190] Respondent was asked to show why disciplinary action should not be taken against him in accordance with the Staff Rules and Regulation to which he complied. He was also asked to reply to the comments of the other members of staff to which he replied.

D.W.1 Grahe Oladi Hassan Division Head of procurement Department and Stores General Services Department said that after April 1999 she had cause to carry out investigation because of discrepancy in the Book. There was an outstanding amount of Le80,000,000 against the Bank. She said that they discovered the cheque for Le80,000,000 was paid twice; and she interviewed P.W.1, Ahmed Tafsir Alghali P.W.2 Bintu Sesay, Mr. Roxy Edwards and Mr. Gebai Supervising Cashier they went on to say that payment on cheques for large sums is effected at the receiving Bay and not Banking Hall. She said that the Plaintiff should be aware of this and she concluded that because of the breach of this procedure cheque Exhibit Y was paid twice; and the Bank was not able to receive the Le80,000,000.

In cross examination by Counsel for the Respondent she said that there was record that cashier No.4 paid out Le80,000,000 on cheque No. 319606 on the day, it was drawn on Union Trust Bank. The second time the cheque was paid was at the Banking Hall. The first time it was paid was at the Receiving Bay. Looking at the foot of the cheque nothing tells her it was paid at the Receiving Bay.

[p.191]

From the answers given by the Appellant some of which were envisaged e.g . in Exhibit N (page 154) in answer to Gegbais allegation that he handed over the cheque, he said he could not recall.

The other issue was whether the Rules and Regulations, pursuant to which action was taken to have the, Plaintiffs service terminated. The implementing Rule 10(1), rule 9 has to be taken into consideration. Great play was made on the phrase "specifics" of the allegation" both by the Learned Sir John Muria JA as he then was and by Counsel for the Respondent in his address. I hold the view that the Appellant discharged that obligation by bringing to the Respondent's notice the details of any breach of the regulation, or any "display of negligence in general or anything detrimental to the interests of the Bank".

The other limb of rule 9 is that staff should be given an opportunity to make a defence to justify why disciplinary action should not be taken against him or her.

I disagree with the learned Judge in his view that a charge has to be laid against the member of staff. I hold that the allegation of negligence was clearly made and the respondent was given ample opportunity as where other staff members under investigation to defend themselves and to justify why disciplinary action should not be able taken against them Exhibits J.K, M2, M4, M6 and N were all about the investigation carried out by the Defendant. Obviously the respondents replies to queries were not acceptable and the Appellant chose the penalty of [p.192] termination as an option against the Respondent There is no evidence that inspite of the fact that the matter was speedily resolved that the Respondent was not given every opportunity to make a defence against the allegation levied by the Defendant.

It is not necessary for charges to be laid out as is done in criminal cases so long as the misconduct was adequately brought to the notice of the employee and he was given the opportunity to respond to the allegation contained therein.

From the above it is clear that the Appellant was given ample opportunity to exonerate himself contrary to what was contended by Counsel for the Respondent; and I disagree with the finding of the Court of Appeal on this point.

I find also that there is abundant evidence of negligence on the part of the Respondent He had been negligent in his duty.

One of the main questions to be determined was whether after the Letter of Termination had been issued the Respondent was still in the employment of the Appellant as contained in the Staff Rules and Regulations (Exh. U).

I will first of all deal with when the letter of termination took effect. Let me again say that this letter was badly written Exhibit "E" states you need not report for duty with effect from tomorrow 19th April 2000.

On a strict interpretation of Rule 10 (1). Rule 10 (2) (V) and Rule 11(b) (iii) Exhibit "U" (Staff Rules and Regulations) I opine that the effective date of [p.193] termination of the employment was the 18th April 2000, because after paying the respondents three months salary and their benefits in lieu of notice there was no need to give any notice. Even Learned Counsel for the Respondent in his case filed on page 9 in the penultimate paragraph said "The Appellant indeed has served the Bank for more than 10 years if he had not been terminated he would have reached the age of 55 years on 7th July 2000.

I shall here state that I find that Exhibit "E" as contended by the Counsel for the Respondent did not make the action taken by the Appellant there on in valid. The Appellant paid the Respondent three months salary in lieu of notice.

See Gittens Stronge Vs. Sierra Leone Brewery Limited (supra) in which Luke JSC said:

"According to Common Law if an employer gives notice for the prescribed period or pays the equivalent salary in lieu of such notice the termination is-lawful and the employee has no remedy in law ……If the employer acts in accordance with the terms of the contract of Employment he is protected", See Volta also Aluminum Co. Limited Vs. Tetteh Akuffo Baddoo volume 2 2003-2004 Supreme Court Ghana Law Report page 1163 and Bannerman Mason v. Ghana Employer's Association 1996-1997 SC.GLR (Ghana Reports).

In the Judgment of S.U. Anu.JSC. In Gidfrey Vs. Isievwore (2002) of S.C.N.J. (Supreme Court Nigerian Judgments page 33 he said:

[p.194]

Pensionable employment does not mean for life or until normal retirement age as stated 'in Chitty on Common Law Sense Volume 2. 24th Edition page 101. To become "eligible" to something may mean "legally qualified" to it as pointed out by Lord Chelmsford in Baker Vs. Lee (1880) 8 H.L. Cas. 495 at page 522.

Reference has been made to the Staff Handbook 1971 where it is provided in Clause 12 as follows:

PENSIONS

1. Will join Pension scheme which is not on confirmation and on attaining the

2. Members of the staff will become eligible for pension after continuous service of ten years or on voluntary retirement at or after the age of fifty years.

According to the records the date on which the Appellant legally qualified for pension was on the 7th july 2000, but he was terminated before that date.

The Appellant was not bound to keep the Respondent in employment after the age of 55 years and I disagree with the Learned Justices of Appeal that the termination was unlawful,

As already opined I cannot say that the Respondent was in the service of the Appellant on the date of retirement and I hold that the Re9Pondent was lawfully terminated on the 18th April 2000. That being the case he cannot be entitled to pension and I so hold. The Appeal therefore succeeds. Each party

To bear its own costs.

SGD.

HON. MRS.JUSTICE V.A. WRIGHT JSC.

SGD.

HON. MR. JUSTICE M.E.T.THOMPSON

I agree.

SGD.

HON. MRS. JUSTICE S. KOROMA, J.A.

I agree.

HON. MR. JUSTICE A.N.B. STRONGE

CASES REFERRED TO

1. Gittens-Stronge v Sierra Leone Brewery (17th December 1980) S.C. CIV. App. No.7/1979 (Unreported)

2. Garba v University of Maidugurl (1986) 1 N.W.L.R. (PT 18) 550

3. Adedeji & Police Service Commission (1988) NMLR 102 at 107

4. Aklam v Sentinel Insurance Co. Limited (1959)2 Lloyds Rep. 683

5. Bold v Borough, Nicholson and Hall Limited [1963] 3 All. E.R.849

7. Hadley v Baxendale (1854) 9 Exch. 341; (All E.R. 1843-1860)

8. Vincent Vs. S.P. (Sierra Leone Limited SC.CIV.APP.2/81 delivered on the 3rd day of April 1984(Unreported).

9. Freetown Cold Storage Limited Vs. Ignatius Guildford Reffell (Unreported)

10. Harris & Russell Limited Vs. Slingsby (1973) ALL E.R. 31

11. Decro-Wall International S.A. Vs Practioners in Marketing (1971) 1 WLR 3611

12. Riordan Vs. The War Office (1959) 3 ALL E.R. 522

13. Volta also Aluminum Co. Limited Vs. Tetteh Akuffo Baddoo [2003-2004] 2 SCGLR page 1163

14. Bannerman Mason v. Ghana Employer's Association [1996-1997] SC.GLR

15. Gidfrey Vs. Isievwore (2002) of S.C.N.J

CHARLES FRANCIS MARGAI v. SOLOMON EKUMA BEREWA & ANOR. (CONSOLIDATED)

[SC 2/2007] [p.88-102]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 3 AUGUST 2007

CORAM: JUSTICE DR. ADE RENNER-THOMAS C.J.

MS. JUSTICE U.H. TEJAN-JALLOH J.S.C.

MR. JUSTICE G. SEMEGA-JANNEH J.S.C.

IN THE SUPREME COURT OF SIERRA LEONE

(ORIGINAL JURISDICTION)

IN THE MATTER OF AN OBJECTION AGAINST THE NOMINATION OF MR. SLOMON EKEUMA BEREW A — PRESIDENTIAL CANDIDATE FOR THE SIERRA LEONE PEOPLES PARTY (SLPP) TO CONTEST THE PRESIDENTIAL ELECTION SCHEDULED FOR 11TH AUGUST, 2007 PURSUANT TO SECTION 32 OF THE ELECTORAL LAWS ACT, NO.2 OF 2002 (AS AMENDED) AND SECTIONS 45 AND 124(1)(A) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO.6 OF 1991

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO THE SUPREME COURT PRACTICE DIRECTIONS, NO.2 OF 2007 AS CONTAINED IN GOVERNMENT NOTICE NO. 98 OF 2007 DATED 5TH JULY 2007

_____

AND IN THE MATTER BETWEEN:

ABUBAKARR CONTEH

2 FOULAH STREET

FREETOWN — PLAINTIFF

VS.

SOLOMON EKUMA BEREWA

VICE PRESIDENT'S LODGE

SPUR ROAD

FREETOWN — 1ST DEFENDANT

AND

THE CHIEF ELECTORAL COMMISSIONER

15 INDUSTRIAL ESTATE

WELLINGTON

FREETOWN — 2ND DEFENDANT

AND

IN THE MATTER OF AN OBJECTION AGAINST THE NOMINATION OF MR SOLOMON EKEUMA BEREWA — PRESIDENTIAL CANDIDATE FOR THE SIERRA LEONE PEOPLES PARTY (SLPP) TO CONTEST THE PRESIDENTIAL ELECTION SCHEDULE FOR 11TH AUGUST, 2007 PURSUANT TO SECTION 32 OF THE ELECTORAL LAWS ACT, NO.2 OF 2002 (AS AMENDED) AND SECTIONS 45 AND 124(1)(A) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO.6 OF 1991

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO THE SUPREME COURT PRACTICE DIRECTIONS, NO.2 OF 2007 AS CONTAINED IN GOVERNMENT NOTICE NO. 98 OF 2007 DATED 5TH JULY 2007

BETWEEN:

CHARLES FRANCIS MARGAI

20 OLD RAILWAY LINE SIGNAL HILL

FREETOWN — PLAINTIFF

AND

SOLOMON EKUMA BEREWA

VICE PRESIDENT'S LODGE

SPUR ROAD

FREETOWN — 1ST DEFENDANT

AND

THE CHIEF ELECTORAL COMMISSIONER

NATIONAL ELECTORAL COMMISSION

15 INDUSTRIAL ESTATES

WELLINGTON FREETOWN — 2ND DEFENDANT

(MATTERS CONSOLIDATED BY ORDER OF THE SUPREME COURT DATED THE 26TH JULY 2007)

J. KOROMA ESQ for the Plaintiff in SC1/2007;

M.P. FOFANAH ESQ and R.B. KOWA for the Plaintiff in SC2/2007;

E.A. HALLOWAY ESQ, D.B. QUEE ESQ, E.E.C. SHEARS-MOSES ESQ,

A. BREWAH ESQ and E. NGAKUI ESQ for the 1st Defendant in both matters;

[p.90]

F.M. CAREW ESQ, Attorney-General, L.M. FARMAH ESQ, O. KANU ESQ and

A. SESAY ESQ, for the 2nd Defendant in both matters

RENNER-THOMAS C.J.

The proceedings herein which Were consolidated by an Order of this Court made on the 26th day of July 2007 arose out of the nomination of the 1st Defendant herein, Solomon Ekuma Berewa, (hereinafter referred to as "the 1st Defendant"), the incumbent Vice President of the Republic of Sierra Leone, as the candidate of the Sierra Leone People's Party (SLPP) for the Presidential Elections due to be held on the 11th August 2007.

Subsection 1 of section 32 of the Electoral Laws Act, No.2 of 2002 (hereinafter referred to as the Electoral Laws Act 2002) directs the Chairman of the Electoral Commission who is the Returning Officer for the Presidential Election to publish by Government Notice details of the nominations for the said election immediately after the time prescribed by section 30 of the Electoral Laws Act 2002 for delivery of the nomination papers.

Subsections 2, 3 and 4 of section 32 of the 2002 Act expressly provide as follows:

"(2) The Government Notice referred to in subsection (1) shall direct that any citizen of Sierra Leone may lodge an objection, if any, against the nomination of a presidential candidate but that such objection shall be lodged with the Supreme Court within seven days of the publication of the Government Notice.

(3) An objection against the nomination of any presidential candidate shall be heard by the Supreme Court made up of three Justices whose decision shall be given within thirty days of the lodging of the objection.

(4) Where the Supreme Court uphold an objection against any nomination, it shall declare the presidential candidate concerned to be disqualified from contesting the presidential election."

Relying on the aforesaid provisions and pursuant to Supreme Court Practice Directions No.2 of 2007, Public Notice No. 98 of 2007, (hereinafter referred to as "Practice Directions No.2 of 2007") Abubakarr Conteh of 2 Foulah Street Freetown, the Plaintiff in SC 1/2007 (hereinafter referred to as "the 1st Plaintiff') who describes himself as a concerned citizen of the Republic of Sierra Leone took out an Originating Notice of Motion on the 16th day of July 2007 by which he sought, inter alia, a declaration that the 1st Defendant is ineligible to contest the presidential election scheduled for the 11th August 2007.

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The grounds relied on by the 1st Plaintiff are that:

"(a) the nomination of the 1st Respondent is inconsistent with section 14(1) of the Political Parties Act No. 3 of 2002 as amended, section 35(4), 41 (d) and 76(1) (h) of the Constitution, Act No. 6 of 1991, and section 29(2) (d) and 30(3) of the Electoral Laws Act No. 2 of 2002 as amended including paragraph 13 of the form contained in the Fourth Scheduled to said section 30(3) ".

[and]

(b) the nomination of the 1st Respondent is also inconsistent with section 76(1)(b) and section 115(2)&(4) of the Constitution, Act No. 6 of 1991".

On the same day, 16th July 2007, Charles Francis Margai of 20 Old Railway Line, Signal Hill, Freetown (hereinafter referred to as "the 2nd Plaintiff') who described himself as a Sierra Leonean and a registered voter also filed an Originating Notice of Motion seeking a declaration that:

"the 1st Defendant/Respondent herein is disqualified from contesting the Presidential Elections scheduled for 11th August, 2007 on the grounds that his nomination is inconsistent with section 14(1) o/the Political parties Act No. 3 of 2002 as amended, sections 35(4), 41 (d), 76(1) (b) & (h), 115(2) & (4) and 171(1) of the Constitution of Sierra Leone, Act No. 6 of 1991, and section 29(2)(d) of the Electoral laws Act, No.2 of 2002 as amended".

As required by Practice Direction No. 2 of 2007 the Originating Notice of Motions of both the 1st and 2nd Plaintiffs were accompanied by a Statement of their respective Case. Unfortunately, instead of advancing legal arguments in support of the several contentions on the face of their Motion cited above both Statements merely repeated the said contentions by adopting

"in its entirely the Application filed, the reasons preferred and the authorities cited therein, all of which are self-explanatory."

On the 20th day of July 2007 the 1st Defendant filed a Statement of his Case in both matters. Briefly put, the 1st Defendant submitted that he was qualified in every respect to contest the said presidential election as he had satisfied all the requirements in sections 41 and 75 of the Constitution, Act No. 6 of 1991 (hereinafter referred to as "the Constitution") and that it was not section 76(1)(h) of the Constitution or any of the other provisions which the plaintiffs [p.92] alleged he was in contravention of which determined whether or not a candidate for the presidential election was disqualified from contesting.

The Chief Electoral Commissioner was joined as 2nd Defendant in these proceedings and on her behalf L.M. Farmah Esq., Principal State Counsel, entered an Appearance to the two Originating Notices of Motion. On the 23rd day of July 2007 Counsel for the 2nd Defendant purported to file a Statement of Case on her behalf which consisted mostly of an account of the statutory role of the 2nd Defendant in the nomination process.

This is not surprising as neither Plaintiff made out a case against the 2nd Defendant and I doubt whether she should even have been joined as a Defendant at all especially taking into account paragraph 3 of Practice Direction No.2 of 2007 which provides that immediately after commencement of any proceedings relating to an objection to the nomination of a presidential candidate the originating process should be served on the Chairman of the Electoral Commission.

The redundancy of the 2nd Defendant in these proceedings is even more obvious when, pursuant to an Order of the Court made on the 25th day of July 2007; the parties in both actions filed an agreed memorandum of issues to be tried in these proceedings. According to the said memorandum the sole issue to be tried by this Court was:

"whether or not the 1st Defendant/Respondent as Vice President of the Republic of Sierra Leone is qualified to be nominated as the Presidential Candidate for the Sierra Leone People's party (SLPP) having regard to sections 35(4), 76(1) (h), 76(1)(b), 41 (d), 115(2) and (4) and 171 (1) of the Constitution of Sierra Leone, Act No. 6 of 1991, section 14(1) of the Political Parties Act No.3 of 2002 as amended and section 29(2) (d) and 30(3) of the Electoral Laws Act, No.2 of 2002 as amended as well as sections 41, 42(1), 43(a), 46(1) and 75 of the Constitution of Sierra Leone aforesaid".

As a result, when the matter came up for hearing on the 27 day of July 2007 this Court directed that it no longer wished to hear from Counsel for the 2nd Defendant and released him from further participation in the proceedings. Indeed, it is my considered opinion that neither Plaintiff has made out a case against the 2nd Defendant.

In the circumstances, the purported claim against the 2nd Defendant in both matters is hereby dismissed. I shall address the question of costs at the end of this Ruling.

I now revert to the respective Cases put forward by the Plaintiff in both matters. Counsel for the Plaintiff in SC1/2007 attempted, but later abandoned the attempt, to clarify or add to the Statement of Case filed with the Originating Notice of Motion and at the hearing was confined to the several contentions contained therein. In contrast, Mr. Fofanah, Counsel p.93] for the Plaintiff in SC2/2007 was given leave by this Court to rely on a document filed on the 24th July 2007 headed "Matters of Clarification on the Agreed Triable Issue in the joint Memorandum signed by the parties thereto". For clarity, I reproduce the content of this document in extenso. It states:

"That pursuant to the originating notice of motion filed herein dated 16th July 2007, together with its supporting Affidavit and Case Statement, the Plaintiff/Applicant seeks· a declaration that the 1st Defendant/Respondent, as "the Vice president of the Republic of Sierra Leone", disqualified from contesting the Presidential Elections scheduled for 11th August, 2007 on the grounds that his nomination is, firstly, inconsistent with section 14(1) of the Political Parties Act No. 3 of 2002 as amended, sections 35(4), 41 (d), 76(1)(h) of the Constitution of Sierra Leone, Act No. 6 of 1991 and sections 29(2)(d) and 30(3) of the Electoral Laws Act, No.2 of 2002 as amended (emphasis added).

And secondly, that pursuant to the said originating notice of motion and its supporting documents, the Plaintiff/Applicant similarly seeks a declaration that the 1st Defendant/Respondent, as a "Public Officer" under section 115(2) & (4) and 171 (1) of the Constitution of Sierra Leone aforesaid, is disqualified from contesting the Presidential Elections scheduled for 11th August 2007 on the grounds that his said nomination is in consistent with section 76(1)(b) of said constitution."

This was how the matter stood when it came up for hearing on the 27th July 2007.

What in fact was the issue or were the issues to be determined in these proceedings? I resist using the expression "to be tried" because clearly this wag not a trial.

I start by dealing with what was not in issue. In my considered opinion, it was not being disputed that the 1st Defendant had satisfied the requirements of sections 41 and 42(1) of the Constitution, which incidentally are identical, if not ipsissima verba, with those of section 29(1) and (2) of the Electoral Laws Act, No.2 of 2002 and by extension paragraphs (c) and (d) of section 75 of the Constitution.

I shall therefore only reproduce here sections 41, 42(1) and 75 of the Constitution. First, section 41 states that:

"No person shall be qualified for election as President unless he—

[p.94]

(a) is a citizen of Sierra Leone;

(b) is a member of a political party;

(c) has attained the age of forty years; and

(d) is otherwise qualified to be elected as a Member of Parliament".

This is followed by section 42(1) which provides that

"A presidential candidate shall be nominated by a political party."

Thirdly, section 75 provides, inter alia, that

"Subject to the provisions of section 76 any person who—

(a) Is a citizen of Sierra Leone (otherwise than by naturalization); and

(b) Has attained the age of twenty-one years; and

(c) Is an elector whose name is on a register of electors under the Franchise and Electoral Registration Act, 1961, or under any Act of Parliament amending or replacing that Act; and

(d) is able to speak and to read the English Language with a degree of proficiency sufficient to enable him to take an active part in the proceedings of Parliament, shall be qualified for election as such a Member of Parliament:"

The uncontroverted evidence before this Court is that the 1st Defendant

- is a citizen of Sierra Leone otherwise than by registration;

- is a member of a political party, the SLPP

- is not less than forty years of age;

- is otherwise qualified to be elected as a Member of Parliament in that, in accordance with section 75(c) and (d) of the Constitution,

- he is an elector whose name is on a register of electors under the Electoral Laws Act, No.2 of 2002; and

[p.95]

- is able to speak and to read the English Language with a degree of proficiency sufficient to enable him to take an active part in the proceedings of Parliament; and that an accordance with 42(1) of the Constitution:

- he was nominated by a political party, the SLPP."

In view of the above, it would appear safe to conclude that the 1st Defendant has complied with all the Constitutional requirements for nomination as a candidate for the presidential election due to be held on August 11th 2007 and that the objections to his nomination should not, without more, be upheld.

Indeed, from the perspective of both Plaintiffs the matter does not end there. They contend, and in my view, that is the issue to be determined, that the 1st Defendant is disqualified because his nomination is

inconsistent with various other provisions of the Constitution, of the Electoral laws Act 2002 and of the Political Parties Act, No 3 of 2002. I shall therefore proceed to address the several contentions seriatim.

First, both the 1st Plaintiff and the 2nd Plaintiff contend that the nomination of the 1st Defendant is inconsistent with the provision of section 35(4) of the Constitution which states that:

"35(4) No political party shall have as a leader a person who is not qualified to be elected as a Member of Parliament".

Counsel for the Plaintiff in SC 1/2007 argued that this provision should be read together with section 76 of the Constitution which lists various factors which could disqualify a person from being elected as a Member of Parliament. He seems to have equated being a presidential candidate of a political party with being a leader of that party. I cannot agree with this contention. In view of the requirements listed above for qualification as a presidential candidate there is no basis for contending that being a leader of a political party, the SLPP in the instant proceedings, and not being qualified to be elected as a Member of Parliament, without more, should disqualify the 1st Defendant from being nominated as a presidential candidate of the said SLPP and I so hold.

The arguments of Counsel for the Plaintiff in SC 2/2007 on this ground of disqualification of the 1st Defendant as a presidential candidate was more or less along the same lines as those canvassed by Counsel for the 1st Plaintiff. I shall therefore not bother to repeat them but for the same reasons stated above they are hereby rejected.

I next turn to the provision of 14(1) of the Political Parties Act, No.3 of 2002, which states that:

[p.96]

"A political party shall not have as a founding member or as a leader of the party or a member of its executive body, whether national or otherwise, a person who is not qualified to be elected as a Member of Parliament under the Constitution".

Again in my opinion the contention canvassed by Counsel on behalf of both Plaintiffs that the 1st Defendant's nomination as a presidential candidate of the SLPP is inconsistent with the above provision hinges on the fact that, in their respective submissions, the 1st Defendant is, disqualified from being elected as a Member of Parliament by certain provisions in section 76 (1) of the Constitution.

Again, this contention is untenable for the simple reason that even if one were to hold that the 1st Defendant was disqualified to be elected as a Member of Parliament under any provision of section 76 of the Constitution the fact that he is a founding member of the SLPP or a member of the executive body whether national or otherwise is irrelevant when one comes to consider the requirements for nomination as a presidential candidate under sections 41, 42(1) and 75 of the Constitution, or sections 29(1) and (2) of the Electoral laws Act 2002 as set out above.

For the above reason I hold that this ground of objection to the nomination of the 1st Defendant as a candidate for the forthcoming presidential election also fails and is hereby rejected.

I shall next deal with sections 43(a) and 46(1) of the Constitution together. Section 43(a) provides for the circumstances that would dictate the holding of presidential elections and simply states that:

"A Presidential election shall take place—

(a) Where the office of President is to become vacant by effluxion of time and the President continues in office after the beginning of the period of four months ending with the date when his term of office would expire by effluxion of time, during the first three months of that period.

Section 46(1) of the Constitution provides that:

"no person shall hold office as President for more than two terms of five years each whether or not the terms are consecutive."

In my opinion it is pretty obvious on a reading of section 43(a) of the Constitution that the contention that the 1st Defendant's nomination for the forthcoming presidential election is [p.97] Inconsistent with this provision lacks any merit. I have no hesitation in holding that it has no relevance to the question of whether or not the 1st Defendant is disqualified from being nominated as a presidential candidate of the SLPP in the forthcoming 2007 presidential election and so hold.

Section 46(1) of the Constitution play well be relevant when one comes to consider the implication and legal effect of section 76(1)(h) of the Constitution but by itself it does not affect the issue of whether or not the 1st Defendant is disqualified from being nominated as a presidential candidate of the SLPP for the 2007 presidential elections. This is so because all the available evidence in the instant proceedings point to the fact, and one can safely take judicial notice of that fact, that the 1st Defendant has never before held office as President. There is no way therefore that his nomination could be said to be inconsistent with the provision of section 46(1) of the Constitution and I so hold.

Probably the most attractive argument canvassed by Counsel for both the 1st Plaintiff and the 2nd Plaintiff is that which revolves around the legal effect of section 76 of the Constitution to which I shall now turn my attention. Let me hasten to state that for present purposes even more important than the legal meaning of the several provisions of section 76 of the Constitution relied on by Counsel for the Plaintiffs is the question whether the provisions governing the requirements for nomination as a presidential candidate to be found in section 41 and 42 of the Constitution cited above are all to be read subject to the provisions of section 76 of the Constitution.

During the course of the oral arguments both sides made great play of the appropriate rule or capon of interpretation to be utilized in construing the meaning of the provisions of sections 76(1)(b) and 76(1)(h) of the Constitution. It is my considered view that it would be futile to engage in such an exercise if at the end of the analysis which follows one were to come to the conclusion that these provisions of section 76 dealing with disqualification for elections as a Member or Parliament were in fact inapplicable to the issue of a candidate's eligibility for nomination for a presidential election.

My First observation is that looking at the Constitution as a whole as I am obliged to do in these circumstances there is nothing therein that expressly states that the disqualifications listed in section 76 of the Constitution are to be applied to a candidacy for a presidential election.

Could it then be said to be implied? There is no doubt that it could be argued that section 76 is so applicable by implication. The basis for such argument is the introductory and qualifying words to be found in section 75 of the Constitution, to wit, "subject to the provisions of section 76" before the listing of the four qualifications for election as a Member of Parliament two of which contained in paragraphs (c) and (d) of section 75 of the Constitution clearly apply in considering the issue of qualification for presidential election. This is by virtue of paragraph (d) of section 41 of the Constitution which requires a [p.98] elected as a Member of Parliament thus making it necessary to import the provision of those two paragraphs of section 75 into section 41 of the Constitution.

Indeed, it is contended by Counsel for both Plaintiffs that because section 75 is to be read subject to section 76 of the Constitution the importation so to speak of the provisions of paragraphs (c) and (d) of section 75 into section 41 of the Constitution to complete the requirements for candidacy of a presidential election means that the whole of section 41 should be read subject to section 76 of the Constitution.

It is clear that if this was the intention of Parliament the drafts man failed to express that intention clearly. Could it be said that the draftsman left such an important qualification to be implied? Or could it be said that there was an omission on the part of Parliament to deal at all with the question of disqualifications for a candidacy for presidential elections?

There is no easy answer to these questions based on a mere reading of the Constitution as enacted. However, based on the post-enacting history of section 410f the Constitution, I am inclined to the view that, in fact, it was not the intention of Parliament to make section 41 subject to section 76 of the Constitution but rather there might have well been an omission to address the issue of possible disqualifications of a candidacy for a presidential election.

I am fortified in this view when I come to consider the provisions of section 29 of the Electoral Laws Act 2002 which, as I have said earlier, are virtually identical, if not ipsissima verba the provisions of sections 41 and 42(1) of the Constitution.

According to Benion, Statutory Interpretation, (3rd ed, 1997 at page 541),

"Where a later Act is in pari materia with an earlier Act, provisions in the later Act may be used to aid construction of the earlier Act..... The principle underlying the treatment of Acts which are in pari materia is based on the idea that there is continuity in legislative approach in such Acts, and common terminology. A later Act may thus throw light on some aspect of an earlier Act. "

What light then does the Electoral Laws Act 2002 throw on the question of whether section 41 of the Constitution should be read subject to section 76 of the Constitution? First, section 29 of the Electoral Laws Act 2002 which is a later statute makes no direct reference to section 76 of the Constitution. The

reason for this becomes obvious when we come to consider the provision of the next section of the Electoral Laws Act 2002 for it is in subsection (3) of section 30 of that Act that Parliament chose to deal directly and not by implication with the question of disqualifications for election as a President.

[p.99]

However, for some strange reason, instead of dealing with these disqualifying provisions in the main body of the Electoral Laws Act 2002 as in the case of section 76 of the Constitution dealing with disqualification for election as a Member of Parliament, the draftsman chose to set out the disqualifying provisions in the Fourth Schedule to the Electoral Laws Act 2002 and as part of a statutory declaration to be made by a presidential candidate and that should be filed together with his nomination papers under section 30(3) of the Act.

The question then arises as .to the legal effect of those matters dealt with in the Fourth Schedule of the Electoral Offences Act 2002. There is no doubt that a Schedule to an Act is to be constituted, by virtue of the functional construction rule,-as .an adjunct to the main body of the Act but nevertheless fully a part of it. According to Benion (supra at page 3) whether material is put in a section or a Schedule is usually a matter of convenience. In A-G v. Lamlough (1878) 3 Ex. D 214 at 229) Brett LJ had this to say:

"A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much part of the statute, and is as much an enactment, as any other part."

Normally, the Schedule is used to set out some provisions which are too long or detailed to be put in the body of the Act. Another common use of the Schedule is to set out in it some document which is referred to in the body of the Act. In the instant case, the document happens to be a statutory declaration which according to the inducing words in subsection 3 of section 30 of the Electoral Laws Act 2002 Act must accompany the nomination papers of presidential candidate.

Having thus established that the statutory declaration in the Fourth Schedule of the Electoral Laws Act 2002 is very much a part of that statute one must examine it more closely to ascertain what is the legal effect of its contents. The first observation I wish to make is that some of the statements to be made by the presidential candidate in the Statutory Declaration are simply matters of fact such as whether he has made arrangements satisfactory to the appropriate authority for the payment of his taxes; others are matters of mixed fact and law such as whether he has been convicted for an offence involving fraud and dishonesty; and yet others are matters of strict law such as whether he is otherwise disqualified from standing for the election by any law in force in Sierra Leone which could only be conclusively dealt with in the circumstances by this Court.

What is most significant however for present purposes is that virtually all the disqualifications for membership of Parliament found in section 76 of the Constitution are dealt with in the statutory declaration. Thus, the disqualifications in paragraphs (b), (c), (d), (e), (f) and (g) of section 76(1) of the Constitution are reproduced in paragraphs 11, 5, 6, 8, 12 and 7 respectively of the statutory declaration in the Fourth Schedule of the Electoral Laws Act 2002. Even the disqualifications listed in sections 76(2) and (3) of the Constitution are listed in paragraphs 6 and 10 of the statutory declaration. However, of

the two [p.100] disqualifications relied on by the Plaintiffs in these proceedings only that contained in section 7 6(1) (b) of the Constitution is reproduced as paragraph 11 of the statutory declaration. That contained in section 76(1) (h) 6fthe Constitution relating to the ineligibility of the President, Vice President, Ministers and Deputy Ministers for election as Members of Parliament is significantly omitted.

Having thus ascertained the legal effect and content of the Fourth Schedule of the Electoral Laws Act 2002 it is my considered view that for several reasons one can safely conclude that it could not be properly be contended that the provisions of section 76(1)(h) should apply to candidacy for a presidential election. First, as the Electoral Laws Act 2002 is a later statute than the 1991 Constitution Parliament is deemed to be aware of the provisions of the Constitution when it enacted the later Act. Secondly, the fact that the latter enactment deals expressly and specifically with the issue of disqualifications for presidential elections it is to be preferred to those provisions of section 76 of the Constitution which as I have held earlier could only be said to qualify section 41 of the Constitution only by implication. Thirdly, the omission of the disqualification in Section 76(1) (h) from the list of disqualifications in the Fourth Schedule of the Electoral Laws Act 2002 which is otherwise in pari materia with those dealt with in section 76 of the Constitution necessarily means that the principle of interpretation expressio unius est exclusio alterius could properly be applied in the circumstances. I therefore hold that it could not have been the intention of Parliament that the disqualification contained in section 76(1) (h) of the Constitution should apply to a candidacy for presidential election and the objection on that ground to the 1st Defendant's nomination for the forthcoming presidential election is hereby rejected.

Unlike the ground of disqualification in section 76(1) (h) of the Constitution that contained in section 76(1)(b) of the Constitution is incorporated in the Fourth Schedule of the Electoral Laws Act 2002 as paragraph 11. In the said paragraph 11 the candidate is required to declare that he is not:

"a member of any commission established by the Constitution, or, member of the Armed Forces of the Republic, or a public officer, or an employee of a corporate body established by an Act of Parliament or out of funds appropriated by Parliament. I have not been in any of the foregoing capacities during past twelve months."

As stated earlier, this wording of paragraph 11 of the statutory declaration is ipsissima verba that of section 76(1) (b) of the Constitution. It is the contention of Counsel for both Plaintiffs that the 1st Defendant is a public officer within the meaning of sections 115(2) and (4) and 171(1) of the Constitution because the emoluments attached to his office of Vice President are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament.

[p.101]

Although the arguments canvassed by Counsel on behalf of both Plaintiffs were referable only to section 7 6(1)(b) of the Constitution if this Court were to hold that such arguments were tenable then that would suffice to disqualify the 1st Defendant from contesting the forth coming presidential election

because his declaration in paragraph 11 of the statutory declaration would have been wrong as a matter of law.

The issue that remains to be determined therefore is whether the Vice-President is a public officer. If he is held to be so, failure to resign from such office twelve months prior to presenting himself as a candidate for the forthcoming presidential election would invalidate his candidature.

Section 171(1) of the Constitution is the section that deals with interpretation of words and phrases used in different parts of the Constitution. Apart from the definition of "public office" referred to above the section also defines a "public officer" as meaning a person holding or acting in a public office. A related term also defined in the said section is "public service". According to the section 'public service' means,

"subject to the provisions of subsections (3) and (4) service of the government of Sierra Leone in a civil capacity and includes such service in respect of the Government prior to the twenty-seventh day of April 1961."

It is my considered view that the three terms "public officer" "public office" and "public service" have the same connotation and are inextricably linked. Thus, based on this premise, one can properly state that a public officer is a person who holds a public office in the public service of the Government of Sierra Leone.

In light of the above, I am also of the view that one cannot properly answer the question whether the 1st Defendant is a public officer without adverting one's mind to section 171(4) of the Constitution which expressly states that:

"In this Constitution "public service" does not include service in the office of President, Vice-President, Speaker, Minister, Deputy Minister, Attorney-General and Minister of Justice, Deputy Speaker, Member of Parliament....."

Applying the above express and unambiguous provision to the facts in the instant proceedings the only conclusion I can reach is that the 1st Defendant as incumbent Vice President of the Republic of Sierra Leone is not a public officer within the meaning of section 171 of Constitution and as referred to in paragraph 11 of the statutory declaration in the Fourth Schedule of the Electoral Laws Act 2002. I therefore hold that the disqualification contained in paragraph 11 of the statutory declaration in the Fourth Schedule of the Electoral Laws Act 2002 does not apply to the 1st Defendant in both matters. This ground of objection therefore fails.

[p.102]

In the circumstances, since all the grounds of objection have been rejected in this Ruling I cannot make the several declarations prayed for in the Originating Notice of Motion filed by both Plaintiffs and I therefore make the following Orders:—

1. The Originating Notice of Motion in SC1/2007 is hereby dismissed.

2. The Originating Notice of Motion in SC2/2007 is hereby dismissed.

Counsel will hereafter address this Court on the question of costs.

SGD.

I agree.

JUSTICE U.H. TEJAN-JALLOH J.S.C.

I agree.

JUSTICE G. SEMEGA-JANNEH J.S.C.

[p.103-105]

U.H TEJAN-JALLOH

On the 7th day of July, 2007, Solomon E. Berewa Esq., the 1st Defendant /Respondent presented his nomination paper for Presidential candidate for the forth coming election to the Chairman of the Electoral Commission, who is the Returning Officer. The nomination form is pursuant to section 30 and the Third Schedule to the Electoral Laws Act 2002 — Act No.2 of 2002. This was accompanied with two statutory declarations' by virtue of sub-section 3 and the Forth schedule to the aforementioned Act.

Charles Francis Margai Esq. and Mr. Abu Bakarr Conteh objected to the provisional nomination by Originating Notice of Motion dated 16th day of July, 2007 and on this Court issued practice directions which is published as Government Notice No.98 of 2007 dated 5th July, 2007. The Chief Electoral Commissioner was made 2nd Defendant/Respondent and was represented by the learned Attorney General and Minister of Justice. He later sought the consolidation of the two Motions — to which the Court gave its consent on the 26th July 2007. On the 24th day of July 2007, the three counsel for the Plaintiffs/Applicants and those of the 1st and 2nd Defendant/Respondent respectively signed a memorandum on agreed issues to be tried by the Court. It reads as follows;

"Whether or not the Defendant or Respondent as Vice President of the Republic of Sierra Leone is qualified to be nominated as the Presidential candidate for the Sierra Leone Peoples' Party (SLPP) having regard to sections 35 (4), 76 (1) (h), 76 (1) (b), 41 (d), 115 (2) and (4) and 17 (1) of the Constitution of Sierra Leone Act No.6 of 1991 Section 14 (1) of the Public Political Parties Act No. 3 of 2002 as amended and section 29 (2) (d) and 30 [p.106] (3) of the Electoral Laws Act No. 20/2002 as amended as well as section 41, 42 (1), 43 (a), 46 (1) and 75 of the Constitution of Sierra Leone aforesaid".

We accordingly gave our consent and heard arguments on the 27th July, 2007 and Counsel for Plaintiffs/Applicants presented additional case statement of the same date i.e. 27th July 2007.

The agreed issues involve the interplay of certain provision of the Constitution of Sierra Leone, 1991 — Act No.6 of 1991, the Political Parties Act 2002 the Electoral Laws Act 2002 Act No.3 of 2002 Act 2002. For the first Act, reliance is placed on section 35 (4), 76 (1) (h), 76 (1) (b); 41 (d), 115 (2) and (4), 171, 41,

42(1) 43(a), 46 (1) and 75; for the Second Act, section 41(1) and the Third Act, section 29 (2) (d) and 30 (3), Before I proceed to discuss the relationship of these provisions to the objection that the 1st Defendant/Respondent as Vice President is not qualified to be nominated for the candidature of President, I remind myself that our national constitution is our basic document and must be given purposive interpretation. It is not intended to be interpreted as an Act of Parliament or enactment and not all the canons of interpretation apply.

A second point, which ought to be made is that Parliament in enacting the constitution has tried as humanely possible to separate the three arms of government. Thus the provisions of the executive are to be found in chapter 5, those of the Legislature in chapter 6 and the Judiciary in chapter 7 of the Constitution. Its intention is to provide a separation of powers between those three arms, emphasizing the case of Hinds v The Queen (1977) AC 195 (Privy Council).

In the instant case, what we have to consider and determine is whether the 1st Defendant/Respondent Solomon E. Berewa as Vice President is precluded by the Constitution and/or by any enactment in force from being nominated as Presidential candidate in a Presidential election as contended by the Plaintiffs/Applicants. I think there is agreement that the nomination of 1st Defendant/Respondent is that of President nothing else; and what should primarily be borne in mind are the attributes, qualifications or disqualifications of that position.

[p.107]

Section 35 (4) provides that a political party cannot have a person who is the leader if he is not qualified to be elected as a Member of Parliament. With respect, this sub-section in it ordinary, natural and grammatical sense deals with an election of a Member of Parliament and has no relevance to that of a President. This section is a requirement which must be complied with by Political Parties and not as I understand it by someone seeking nomination as President.

The next section of the Constitution canvassed by the Plaintiffs/Applicants is 76 (1) (h) and 76 (1) (b) I propose to deal with section 76(1)(b) first which ought to be considered with section 115 (2) and section 171 (1) of the Constitution. The combined effect is that the 1st Defendant/Respondent is a Public Officer, his salary and allowances paid from the consolidated fund. It is conceded that the 1st Defendant/Respondent receives his remuneration from the consolidated fund and therefore qualifies as a Public Officer under section 76 (1) (b), but the consequence of such a situation is that a Vice President who is seeking election as a Member of Parliament would be disqualified for election as a Member of Parliament. This is not so when an incumbent seeks or is seeking for election of the office of President. And therefore the sub-section do no apply.

Regarding the contention under section 76(1)(h) of the Constitution, it mentions the office of Vice President, a position for the time being held by the 1st Defendant/Respondent. It is clear from the marginal notes and on normal, ordinary and literal construction of the section that the disqualification is meant and means election for membership of Parliament and not in the case before us of that of the office of president. It appears to me that there is a misconception on the part of the Plaintiffs/Applicants in their attempts to incorporate these sections meant for election for membership of Parliament, when

their complaint is an objection to nomination of the office of President. Perhaps, such an exercise should have been justified if there is no express provision in the Constitution or any enactment dealing with qualifications for the office of President.

[p.108]

I now proceed to section 14 (1) of the Political Parties Act — Act No.3 of 2002 as amended by section 29 (2) (d) and 30 (3) of the Electoral Laws Act, No.2 of 2002.

These are set out in extenso:—

"Section 14 (1) reads — A Political Party shall not have as a founding member of its executive body, whether national or otherwise, a person who is not qualified to be elected as a Member of Parliament under the Constitution ".

"Section 29 (2) (d) — read: A person is not qualified to be nominated as a candidate in a Presidential election unless he is — (a) otherwise qualified to be elected as a Member of Parliament".

And

"Section 30 (3) — the nomination papers of Presidential candidate shall be delivered by the candidate to the Returning Officer on such day and at such time and place as may be prescribed by the Returning Officer by order published by Government Notice and shall be accompanied with two statutory declarations in the form prescribed in the fourth schedule made separately by the Presidential candidate designated by law for the office of Vice President",

On examination of these three sub-sections, I feel that there is prohibition that a Political Party shall not have as a foundling member a leader of a Political Party, who is not qualified to be elected as a Member of Parliament under the Constitution. In my view this is an internal matter for the Political Party concerned and there is no evidence before us that there is any breach of the provision. Instead, I take judicial notice of the fact that the authorized authority, the Political Parties Commission, has registered the Party of the 1st Defendant/Respondent. In addition the disqualification is not in respect of the office of the President, but that of a Member of Parliament.

As regards, section 29 (2) of the Electoral Laws Act, it is the same as section 41 (d) of the National Constitution, which I will deal with later. The difference is that the Electoral Laws Act talks about nominating of a candidate in Presidential election and the National Constitution refers to electing of President. I take nomination as a step before election and they both relate to Presidential election.

[p.109]

Sub-section 30 (3) of the Electoral Laws Act — Act No.2 of 2002 is also cited to support the objection of the Plaintiffs/Applicants and I have examined it and I find it harmless and irrelevant to the issue before us. It is a requirement that must accompany the form prescribed under section 30(1) of the Act. Its rightful place is with section 41 of the Constitution which deals with the qualification of the· President.

I have earlier in this ruling mentioned the purposive approach and the literal approach, assigning the former to the interpretation of a written Constitution as ours. The latter rule of interpretation is that the intention of Parliament must be found in the ordinary and natural meaning of the words used. If those words interpreted literally, are capable of alterative meanings, the literal rule clearly cannot be applied. I find on analysis of the section discussed above the words used are capable of only one literal meaning, thus this meaning must be applied even if it appears unlikely.

Furthermore, it must be remembered that no two Constitutions are the same, hence their interpretations must to that extent also differ and in interpreting the provisions of our national Constitution, I have and I must not put any gloss or interpretation from any other Constitution or Statute. I remind myself also that similar provision in other Constitutions or Statutes are only of persuasive effect arid in no way binding on our courts. In this respect, I refer to sub-section 122 of the Constitution, which among other things provides that the Supreme Court may, while treating its own previous decisions as normally binding, depart from previous decisions, when it appears right so to do. I caution Counsel that technical objection on Constitutional matter must be available as much as possible and it is discouraged by the Court. This brings me to the other section of the National Constitution relied upon by the Plaintiffs/Applicants — namely sections 41, 42(1), 43 (a), 46 (1) and 75. It is beyond any shadow of doubt that when the 1st Defendant/Respondent presented his nomination form on the 7th July 2007, he satisfied himself that he had fulfilled the tests for qualifications for the office, as President, under sections 41, 42 (1) and 43 (a).

[p.110]

This is evidenced in writing by the form prescribed in the Third Schedule to the Electoral Laws Act and the two statutory declarations in the form prescribed in the Fourth Schedule to the same Act see section 30 of the Act. It is also in compliance with section 42 (1) of the National Constitution as he was nominated by his political party. Furthermore, the National Electoral Commission by power vested on it had declared a date for nomination and invitation for President in compliance with sections 43 and 49 of the Constitutions as well as section 28 of the Electoral Laws Act 2002 — Act No.2 of 2002. These sections pertain to a Presidential election and are to my mind clear, plain and unambiguous. They are in express terms and must prevail over any ingenious attempt to override them by analogous Constitutional or Statutory Provisions dealing with another office or establishment in the Constitution. They are sections dealing with election of President simpliciter unlike sections 35(4), 76(1)(h), 76(1)(b) of the Constitution which are applicable to the election of Membership of Parliament.

Reference is also made to section 46 (1) and 75 of the Constitution. I don't find any useful help or use of the sub-section 46(1) as it has no relevance to the election of a President. It isa caveat that no President must hold office for more than two terms of five years each whether or not the terms are consecutive. The fact that an incumbent sought such an office without an objection is not a precedent to be followed or released for a sitting Vice president, who is seeking office as President. Such reference should be deprecated I will ignore it

Last but not least is the reference to section 75 of the Constitution, which deals with qualification for membership of Parliament. It application is that it is subject to section 76 which deals with disqualification of Members of Parliament. My earlier argument on section 76 (1) (h) and section 76 (1) (b) apply and is not relevant to the issue before us.

[p.111]

In the circumstance and for the above reasons, I. find that 1st Defendant/Respondent's nomination is valid and I so hold.

Both Motions are accordingly dismissed with Costs

SGD.

JUSTICE U.H. TEJAN-JALLOH, JSC

[p.112-114]

SEMEGA-JANNEH JSC

Again, this court has to deal with a matter of great constitutional significance, and for this reasons members of the panel feel obliged to contribute some insights in individual Ruling. I have had the privilege of reading in draft the lead Judgment by my learned brother, Or Ade Renner-Thomas, Chief Justice. With characteristic insight and erudition he dealt with the issues of these suits. I am in agreement with him in almost all his conclusions especially the final and deciding conclusion. In particular, I need to empress my agreement with his treatment of the statutory declarations made pursuant to subsection (3) of section 30 of the Electoral laws Act, 2002, submitted to the Returning Office by the 2nd Defendant — Solomon Ekuma Berewa — in relation to section 76 of the Constitution 1991. However, I am of the [p.115] considered view that since the Constitution, 1991, contains the qualifications in respect of Members of Parliament (see sections 75 and 76) and that of the Speaker (see section 79 subsections (1) and (3), not to mention lesser offices, it is preferred that the disqualifications for the Office of the President be given the status of being included in the Constitution, 1991.

Let me now proceed with my Ruling.

Suit numbered 1/2007 and suit numbered 2/2007 were both filed on the 16th July 2007. On the 26th July, the two actions, on the application of the Electoral Commissioner, 2nd Defendant in both actions, were consolidated by this court and suit 1/2007 made the lead action.

When the consolidated suits came up for hearing on the 27th July 2007, this court deemed it unnecessary to further hear from the Electoral Commission and relieved her from further participation.

For convenience and the purposes of the consolidated actions, the court, on the 27th July 2007, decided that the Plaintiff in suit 1/2007 is to be referred to as the "1st Plaintiff" and the Plaintiff in suit 2/2007 as the "2nd Plaintiff" and the 1st Defendant and the 2nd Defendant being so designated in suits 1/2007 and 2/2007 respectively to retain the same respectively in the consolidated actions.

Pursuant to the court's Order of the 24th July 2007, the Parties filed a Memorandum on Agreed Issues on the 24th July 2007. The Memorandum deals with a one issue and is, for ease of reference, reproduced as follows:

".....Whether or not the 1st Defendant! Respondent as Vice President of the Republic of Sierra Leone is qualified to be nominated as the presidential candidate for the Sierra Leone [p.116] People's Party (SLPP) having regard to sections 35(4), 76(1) (b), 41(d), 115(2), and (4) and 171(1) of the Constitution of Sierra Leone, Act No. 6, of, 1991, section 14(1) of the Political Parties Act No. 3, of 2002, as amended and section 29(2) (d) and 30(3) of the Electoral Laws Act, No. 2 of 2002 as amended as well as section 41, 42(1), 43(a), 46(1) and 75 of the Constitution of Sierra Leone, aforesaid",

The respective cases of the Defendants and the arguments of their respective counsel are very similar, if not the same, and, as for the objective of the respective suits, they can be said to be identical. I will deal with this matters raised without reference to any particular counsel except instances I deem appropriate.

The suits are brought in response to the Government Notice given pursuant to subsection (2) of section 32 of the Electoral Laws Acts, 2002, which provides:

"(2) The Government Notice referred to in subsection (1) shall direct that any citizen of Sierra Leone may lodge an objection, if any against the nomination of the Presidential candidate but that objection shall be lodge with the Supreme Court within seven days of the publication of the Government Notice",

The suits being based on an objection, it is appropriate that the Originating Notice of Motion should contain on its face or body the distinct ground or grounds of the wording in subsection (4) of section 32 which states:

"(4) Where the Supreme Court upholds on objection against any nomination, it shall declare the Presidential candidate concerned to be disqualified from contesting the presidential election".

[p.117]

The Originating Notice of Motion in suit 1/2007 contains several declaratory reliefs that could have been appropriately framed as the grounds of the objection followed by a clear and concise statement of the obvious relief being sought. The Originating Notice of Motion in suit 2/2007 is well framed even though it might have been better to have the ground of objection in a separate paragraph from the relief being sought.

Let me now proceed to deal with the contention of counsel that the nomination of the 1st Defendant — Solomon Ekuma Berewa — as a Presidential candidate is inconsistent with the various statutory provisions set out in the Memorandum.

Section 14(1) of the Political Parties Act, 2002, provides that:

"14(1) A political party should not have as a founding member or a leader of the party or a member of its executive body, whether national or otherwise, a person who is not qualified to be elected as a Member of Parliament under the Constitution".

Clearly, the subsection deals with the qualification of a founding member, a leader and a member of the executive of a political party. There is absolutely nothing in it germane or relevant or related to the issue in the Memorandum and, more significantly, to section 32, particularly, subsection 2 of the Electoral Laws Act, 2002 from which the consolidated suits derived. Subsection (4) of section 35 of the Constitution 1991 states:

"(4) No political party shall have as a leader a person who is not qualified to be elected as a Member of Parliament".

The subsection deals executively with the qualification of a leader of a political party.

This subsection in effect is re-enacted in subsection (1) of section 14 of the Political Parties Act, 2002. What I have said in respect of subsection (1) of section 14 is equally correct and applicable to subsection (4) of section 35 of the Constitution 1991.

[p.118]

Both subsections prohibit a political party having a party leader who is not qualified to be a Member of Parliament. The subsections and the argument of counsel are irrelevant to the issue and ordinarily ought not to be entertained. However by the time I conclude this Ruling I expect some light to be shed on these subsections and to engender a better understanding of the meaning of the phrase "a person who is not qualified to be elected as a Member of Parliament".

In my considered view, to resolve the issue whether the 1st Defendant — Solomon Ekuma Berewa - is qualified to be nominated as the Presidential candidate of the Sierra Leone People's Party (SLPP), the requisite qualifications for the Office of President have to be identified and determined. In the Constitution 1991, section 41 provides the qualifications for Office of President for the Republic of Sierra Leone as follows:

"41 No person shall be qualified for election as President unless be—

(a) is a citizen of Sierra Leone;

(b) is a member of a political party;

(c) has attained the age of forty years; and

(d) is otherwise qualified to be elected as a Member of Parliament.

(emphasis added)

Section 41 (b) requires that the qualifications for Membership of Parliament be looked at. The qualifications are found in section 75 of the Constitution, 1991, and it provides:

"75. Subject to the provisions of section 76, any person who—

(a) is a citizen of Sierra Leone (otherwise than by naturalization); and

(b) has attained the age of twenty-one years; and

(c) is an elector whose name is on a register of electors under the Franchise And Electoral Registration Act; and

[p.119]

(d) is able to speak and to read the English language with a degree of proficiency sufficient to enable him to take an active part in the proceedings of Parliament.

shall be qualified for election as such a Member of Parliament.

Provided that a person who becomes a citizen of Sierra Leone by registration by law shall not be qualified for election as such a Member of Parliament or any local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the Civil or Regular Armed Services of Sierra Leone for a continuous period of twenty-five years"

A comparison of section 41 and section 75 shows that there are some qualifications in section 75 that are not in section 41 and some that are common in both sections but with minor differences either by the presence of qualifying words or in the figures. By virtue of section 41 (d) one is obliged to include in the qualifications of section 41 the qualifications in section 75 that are not present in section 41 and rationalise the said minor differences. The result is section 75(c), (d) and the Proviso are or become part of the qualifications for the Office of President. Section 41 (a) in effect is qualified by the phrase "otherwise than by naturalization" and section 75(b) the age of (21) twenty-one years, being lesser, is subsumed in the greater figure of forty years required in section 41 (c).

In the result the requisite qualifications for the Office of the President of the Republic of Sierra Leone are that the person

1. is a citizen of Sierra Leone (otherwise than by naturalization);

2. is a member of a political party

3. has attained the age of forty years

[p.120]

4. is an elector who name is on a register of elections under the Franchise and Electoral Registration Act, 1961, or under any Act of Parliament amending or replacing that Act; and

5. is able to speak and to read the English language with a degree of proficiency sufficient to enable him to take an active part in the proceedings of Parliament

Provided that a person who becomes a citizen of Sierra Leone by registration by law shall not be qualified for election as President unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the civil or regular Armed services of Sierra Leone for a continuous period of twenty-five years.

The word "otherwise" in section 41 (d) is referable to the preceding clauses, that is, sections 41 (a) (b) and (c) and, in my view, it means" other than" the said preceding clauses. Subsection (2) of Section 29 of the Electoral laws Act 2002, is a re-enactment, in all material particulars, of section 41 of the Constitution. Subsection (2) (d) of section 29 contains the phrase "otherwise qualified to be elected as a Member of Parliament" which is also contained in section 41 (d) of the Constitution. It is telling to note that the word "otherwise as contained in the phrase only appears in section 41 (d) of the Constitution, 1991, and subsection 29 (2) (d) of the Electoral Laws Act, 2002, and in virtually all other cases where possession of the qualifications for Membership of Parliament is required, whether phrased in positive or negative terms, there is a noticeable of the word "otherwise". In my view, there is a reason for this, and the reason, clearly, is the contextual absence of the preceding clauses or requirements contained in both section 41 (a) (b) and (c) of the Constitution, 1991, and subsection 29 (2) (a) and (c) of the Electoral laws Act, 2002. The Oxford Advanced Learner's Dictionary Of Current English defines "Otherwise" and the Shorter Oxford English Dictionary defines "Otherwise", among others, - "(1) in my view the definitions given are not inconsistent with the interpretation above, and are supportive.

A serous flash point of dispute are subsections 76 (1) (b) which provides:

[p.121]

"76 (1) No person shall be qualified for election as a Member of Parliament

(b) if he is a member of any Commission established under the Constitution or a member of the Armed forces of the Republic, or a public officer, or an employee of a public corporation established by an Act of Parliament, or has been such a member, officer or employee within twelve months prior to the date on which he seeks to be elected to Parliament;

(emphasis added)

(h) if he is for the time being the President, the Vice President, a Minister or a Deputy Minister or a Deputy Minister under the provisions of this Constitution"

The inclusion of section 115 (2) and (4) and 171 (1) of the Constitution, 1991, in the Plaintiffs' case is clearly for the purpose of establishing that the office of the Vice President is a public office and that the 1st Defendant — Solomon Ekuma Berewa — is a public officer. Subsection (4) shows the officer whose salaries are charged to the Consolidated Fund by virtue of subsection 2 and the list includes the President, Vice President, Justices and Judges of the Superior Courts among others. In section 171 (1) "public office" is defined as including an office the emoluments attaching to which are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament and "public officer" is defined as a person holding or acting in a public office.

I am of the firm view that the persons, for the time being, holding the offices mentioned in section 76 (1) (b) are not included in section 76 (1) (h) for the simple reason that it is unnecessary to include them twice over for the same purpose. More significantly section 171 (3) which states:

"(3) In this Constitution unless otherwise empressly provided "the public service" includes service in the office of Chief Justice, a Justice of the Supreme Court, Justice of Appeal, Judge of the High [p.122] Court or of the former Supreme Court or in the office of a Judge of any other court established by Parliament being an office the emoluments attaching to which are paid out of the Consolidated Fund or any other public fund of Sierra Leone, and service in the office of a member of the Sierra Leone Police Force.

(emphasis added)

Includes certain categories of officers not named in section 76 (1) (b). And section 171 (4) which states:

"(4) in this Constitution "the public service" does not include service in the office of President, Vice President, Speaker, Minister, Deputy Minister, Attorney-General an Minister of Justice, Deputy Speaker, Member of Parliament, or of any member of any Commission established by this Constitution, or any member of any Council, board, panel, Committee or other similar body (whether incorporated or not) established by or under any law, or in the office of the Paramount Chief, Chiefdom, Councilor or member of a Local Court"

(emphasis added)

Includes offices named in section 76 (1) (h). All offices not included in "the public service" are broadly political appointments, short term appointments and of bodies not being part of the general administration of Government. In my view, the proper persons to be included in "public office" in section 76(1)(b) are those named in section 171 (3) and not those named in section 171 (4). The President, the Vice President, a Minister or Deputy Minister — political appointees — need not be disqualified from membership of Parliament for twelve months after leaving office but only during their respective tenure in office. In my Judgment, this was the clear intention of the Legislature and, in any [p.123] event, whether the Vice President is included in the phrase "public office" in section 76 (1) (b) or not, it has no impact or effect on the nomination of the 1st Defendant Solomon Ekuma Berewa's — nomination for the forth coming Presidential election scheduled for the 11th August, 2007, and I so told.

It is clear even from a cursory reading of sections 75 and 76 of the Constitution, 1991, that section 76 consists of disqualifications for Membership of Parliament in contrast to section 75 which contains the qualifications for Membership of Parliament. The side notes to section 75 and 76 makes it even clearer. In addition to that, the word "disqualification" is used in the Proviso" in subsection (2) and the word "disqualified" is used in subsections (4) and (5) of section 76. All these are clear indications that section 76 does not form or become part of the qualifications for Membership of Parliament. "Disqualification" is distinct from qualification; there cannot be a disqualification where there is no qualification;

Counsel for the respective plaintiffs by reason of section 75 of the Constitution, 1991, being subject to the provisions of section 76, in their arguments, import the provisions of section 75, thereby, erroneously making them qualifications for Membership of Parliament. Therein lies the mischief!! In my view the phrase "subject to the provisions of section 76" found in section 75 does not have the effect of importing the provisions of section 76 into section 75; the phrase simply means that a person shall be disqualified from standing for Parliamentary elections not withstanding that he possesses the qualifications to stand for such elections. Perhaps section 79 (1) which deals with the election of a Speaker can be illustrative of the point. For clarity and ease of reference, the section is reproduced hereunder:

"79 (1) the Speaker of Parliament shall be elected by Members of Parliament from among person who are Members of Parliament or are qualified to be elected as such and who are qualified to be appointed Judges of the Superior Courts of Judicature or have held such office.

[p.124]

Provided that a person shall be eligible for election as Speaker of Parliament not withstanding that such person is a public officer or a Judge of the court, a Justice of the Court of Appeal or a Justice of the Supreme Court and such person, if elected, shall retire from the public service on the day of his election with full benefits"

The public officer or Judge or Justice of the Superior Courts who is elected Speaker is elected only by reason of the fact that he possesses the qualifications for Membership of Parliament as contained in section 75 of the constitution, 1991, as the disqualification (s) is accordingly removed. A public officer or Justice of the Superior Courts who lacks the qualifications contained in section 75 cannot be elected speaker even where the disqualification is removed because he or she would not be "qualified to be elected as such" Member of Parliament. Non Sierra Leonean's public officers or Judges or Justices on technical assistance are perhaps, perfect examples.

The requirement that the public office or Judge or Justice of the Superior Courts who is elected Speaker shall resign goes, not to the removal of a disqualification but to the separation powers. It is the same reason — separation of powers — that section 76 (1) (h) disqualifies the President, the Vice President, a Minister or Deputy Minister (Members of the Executive) from standing for parliamentary elections whilst in office.

It seems to me there are no provisions for disqualifications in respect of the Office of the President (Vice President) unlike Membership of Parliament; and appropriate provisions of section 76 of the Constitution, 1991, have not been made applicable to section 41. This I regard as a wide lacuna in the Constitution, 1991, and needs to be plugged or remedied.

In the premises I hold and declare that the 1st Defendant — Solomon Ekuma Berewa — is not disqualified from contesting the forth coming Presidential election scheduled for the 11th August, 2007.

[p.125]

Accordingly, I hereby dismiss both suits with costs.

SGD.

HON. JUSTICE GIBRIL B. SEMEGA-JANNEH

CASE REFERRED TO

A-G v. Lamlough (1878) 3 Ex. D 214 at 229

STATUTES REFERRED TO

1. The Electoral Laws Act, No. 2 of 2002

2. The Constitution, Act No. 6 of 1991

3. The Political Parties Act No. 3 of 2002

NATIONAL INSURANCE COMPANY LTD v. MOHSON TARRAF

[SC. CIVIL APP NO 1/2004] [p.126-146]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 26 OCTOBER 2007

CORAM: JUSTICE U.H. TEJAN JALLOH J.S.C.

JUSTICE G. SEMEGA-JANNEH J.S.C.

JUSTICEV.A.D. WRIGHT J.S.C.

JUSTICE P.O. HAMILTON J.A.

JUSTICE S. KOROMA J.A.

BETWEEN:

NATIONAL INSURANCE COMPANY LTD APPELLANT

AND

MOHSON TARRAF RESPONDENT

COUNSEL: A.F. SERRY-KAMAL ESQ AND E.E.C SHEAR-MOSES.ESQ AND MS. V.M. SOLOMON FOR APPELLANT

PATRICK LAMBERT ESQ FOR RESPONDENT

SEMEGA-JANNEH J.S.C.

The background to the case is as follows: On the 11th October 1996, Mohson Tarraf took out an insurance through an Insurance broker, Roland J. Hamilton. The same date Mr. Tarraf filled the proposal forms (Exhibits "G1" and "G2") of the National Insurance Company Limited, (the N.I.C.) paid the premium and was issued with a receipt (Exhibit "A") by Mr. Hamilton in these terms

[p.127]

"RECEIPT

I Raland J. Hamilton RJH Insurance Broker, 139 Circular Road, Freetown receive the sum of USD 460.00 (Four Hundred And Sixty Dollars Being overseas Insurance (Fire And Burglary) Premium for the period 11th October 1996 to 11th October 1997 that was duty signed".

The insurance was for stock in trade against burglary and fire. Nothing happened until on the 2nd December when Mr. Mohson was handed the Cover Note (Exhibit "B") by Mr. Hamilton. Mr. Tarraf retained the Cover Note. Again nothing happened until the night of the 26th May 1996 at about 2 a.m. when Mr. Tarraf received a phone call that his store, Ashobi store, has been burgled. He visited the store on the 27th May 2'007 and found it completely empty. On the 6th October 1997, Mr. Tarraf reported the matter to the police and was subsequently issued with a report (Exhibits "C"). He tried contacting Mr. Hamilton and then the N.I.C without success. He eventually made a claim on the N.I.C. through his solicitors who wrote three letters (Exhibits D1, D2 and D3) to the N.I.C and a reply (Exhibit "E") was received. The reply was not satisfactory to Mr. Tarraf and, as a result, a writ was caused to issue in which Mr. Tarraf claims:

1. The sum of US$ 40,000/00

2. Interest on the said sum of US$ 40,000/00 at such rate as the court thinks fit from the 21st day of May 1997 to the date of Judgment

3. Further or other relief

4. Cost

The insured value of the goods in the burglary proposal form (Exhibit G1) is US$ 40,000/00.

[p.128]

In the High Court, the matter was heard by AB. Strange J (as he then was) and he, after considering the evidence, held in his Judgment that Mr. Tarraf was bound by the terms of the Cover Note. He further held that N.I.C led no evidence to show that when the peril occurred there was a civil war which directly or indirectly caused the loss and, for this reason, he further held that the N.I.C could not avail

themselves of the Exclusion Clause in the Cover Note. He also held that the award should be limited to US $ 20,000/00. In the result, he gave Judgment to Mr. Tarraf as follows:

A. Loss suffered: US$ 20,000/00 or its equivalent in Leones at the rate of exchange effective on the date of judgment.

B. Rate of Interest at 12% (Twelve Percent) as from 26th November 1997 to date of Judgment

C. Defendants (N. I. C) to pay the costs of the action, such costs to be taxed.

(bracketed initials provided)

Against this Judgment the N.I.G filed a Notice of Appeal to the Court of Appeal on grounds as follows:

1. That the learned trial Judge erred in finding that though the cover note was a contract between the plaintiff (Mr. Tarraf) and Defendant the exclusion clause was not part of the contract and so the Defendant cannot rely on the said exclusion clause (bracketed words added)

2. The learned trial Judge failed to consider the "War and Civil War Exclusion Clause" in the circumstance of 26th May 1997

3. The Learned trial Judge failed to consider adequately or at all the defendant's documentary evidence tendered in court and evidence [p.128] on behalf of the defendant but preferred to rely on the oral evidence of the plaintiff.

4. The learned trial judge erred in ordering the exchange rate to be as at the date of Judgment.

5. The trial Judge had no basis for ordering 12% percent in foreign currency"

The Court of Appeal, after hearing exhaustive arguments of counsel for the N.I.C and Mr. Tarraf, gave judgment, delivered by S.C.E. Warne, JSC (as he then was). in favour of Mr. Tarraf, varying the award of US $ 20,000/00 to US $ 40,000/00 and ordering that: .

1. The Appellant (the N.I.C) shall pay the Respondent (Mr. Tarraf) the sum of USD 40,000/00 being insurance claim. (bracketed words added)

2. The Appellants shall pay the Respondent interest at the rate of 12% per annum, from the date of the Judgment delivered on the 7th day of April 2000.

3. The Appellants shall pay the costs occasioned by this appeal and the costs below to the Respondent.

Clearly the N.I.C (the Appellant herein) was dissatisfied with the Judgment and filed a Notice of Appeal on grounds (without the particulars) as follows

1. The learned Justices erred in holding that the proposal forms were the contract of insurance but failed to state the terms and conditions shown

2. The learned Justices erred in law and in fact by ignoring the cover note as a contract between the appellants and the respondent.

[p.130]

3. The learned Justices were mistaken in holding that there was no evidence of any of the event in the exclusion clause and went on to say there was no evidence of war or a civil war when the matter concerned usurped power.

4. The learned Justices failed to consider whether the Appellants were agents for an overseas insurer and went on to hold that the receipt was not with anything when in fact it was the basis of the contract and contains all the necessary elements.

5. The learned Justices erred in ignoring the terms and conditions in the Cover Note as those of the contract of insurance between the Appellants and Respondent.

6. The learned Justices erred in law in varying the award from US $ 40,000/00 to US $ 20,000/00 when there was no notice for variation of Appeal before them.

7. The learned Justices failed to state on what evidence they decided on the figure of US $40,000/00.

8. The learned Justice erred in Law in arbitrarily awarding interest at 12% without any evidence of the rate of interest applicable in the case of foreign currency having held that the interest being claimed was on foreign currency.

The facts of the case are not in dispute and the decision of the trial Judge did not turn on his belief or disbelief of the witnesses. If the case turns on the veracity of the witnesses the appellate court should not lightly reject the trial court's assessment of the evidence. The appellate court should always bear in mind the advantage of the trial court in hearing and seeing the witnesses and watching their demeanour. See Powell Vs Stratham Manor Nursing Home (1935) AC 243 at 249-251. The appellate court should therefore only set aside the Judgment if the Appellant satisfies the court that the decision is wrong and should have gone the [p.131] other away. But where the case turns not on belief in the witnesses but on the inferences to be drawn from the fact and/or documents then the appellate court is in as good a position as the trial court. Thus the Court of Appeal was in order when after quoting LINDLEY MR. in Coghlam Vs Curberland (1898)1 ON 204, it proceeded to review the materials before it and drawing its own inferences. Like the Court of Appeal, I will proceed on the basis of the principles restated above.

On the basis of the Grounds of Appeal, I draw up for consideration the following issues.

1.Was there a contract of insurance between Mr. Tarraf and the N.I.C? If so what was the nature of the insurance

2. What is the status and effect of the Cover Note?

3. Is Mr. Tarraf entitle to judgment and if so, on what terms;

Counsel for N.I.C. E.E.C. Shear-Moses Esq., in oral argument contends that the contract is one of overseas insurance between Mr. Tarraf and a disclosed principal, Harris and Dixon Insurance Brokers, and the N.I.C being mere agents. I find the contention bemusing and untenable. The contention cannot find support in the Defence filed in the trial court. The relevant paragraphs 3 and 4 of the Defence state:

"3 In answer to paragraph 3 of the statement of claim the Defendants through their reinsurers issued Cover Note No. TR 963063 G to cover fire and burglary/ theft and the latter covered loss of US$ 20,000/00 and not US$ 40,000/00 as alleged. Further the said Cover Note is subject to certain terms and conditions, limitations, exclusions and warranties"

"4 the Defendants deny the allegations contained in paragraph 5 of the Statement of Claim and will state further that it is not responsible for payment of the sum of US $ 40, 000/00 or at alias the Cover Note [p.132] issued to the Plaintiff indemnifies the Defendants from any liabilities under the War and Civil War Exclusion Clause (MMA 464). Further the Plaintiff is fully aware of the indemnity on the part of the Defendants 11.

It seems to me, notwithstanding the poor preparation of the Defense, that the N.I.C was averring an insurance between themselves and Mr. Tarraf, and a reinsurance cover of their risk in the unlying Insurance. This is so because they aver to have issued the Cover Note through their insurers and that the Cover Note will indemnify them of any liabilities under the War and Civil War Exclusion Clause. If they were agents for Harris and Dixon (disclosed principals) how could they be indemnified under the Cover Note? Surely they expect indemnification because they were reinsured. It is noteworthy that ground 2 of the Grounds of Appeal refers to the Cover Note as a contract between the N.I.C and Mr. Tarraf.

In my view, overseas insurance, reinsurance and local insurance are different. With overseas insurance the contract is with an insurer overseas, usually transacted through a local insurer or broker who as agent places the risk with the overseas insurer. Reinsurance involves the insurer taking out insurance to cover the risk or part thereof that it/he/she, as the case maybe, has undertaken to cover in another insurance. E.R. IVAMY, in his authorative book: Personal Accident, life and Other Insurance, at page 305, discussing reinsurance, has this to say:

"The business of insurance is not restricted to the making of contract of insurance between the insurer and the outside would.

Both of the contracting parties may be insurers by profession, the object of the contract being to indemnify the insurers taking the place of the assured in an ordinary contract against loss which they themselves sustain in their capacity as insurers under another contract of insurance.

Where there is the case, the contract is termed a contract of reinsurance".

[p.133]

I will add that a contract of re-insurance can be made within the same country or town and does not have to involve a foreign based insurer/re-insurer.

The learned writer of Chitty on Contract: specific contracts 27th edition, para 39-081, at page 937, dealing with the general characteristics of reinsurance has this to say:

"An insurer may take out insurance in respect of the risk covered by the original insurance. Such a. contract of reinsurance is quite separate from the underlying contract of insurance, so that there is no privities of contract between the insured and the reinsurer, though the contract of reinsurance will often provide (by the use of general words such as "all terms, clauses and conditions as original") for the terms and conditions of the underlying insurance to be incorporated into the reinsurance".

The local insurance is the same as the ordinary insurance which is a contract between the insurer and the insured and the transaction is carried out within the same country.

I have gone to this length in dealing or treating the above different insurances because I have formed the view that the. N.J.C is either confused as to the purposes and functions of the said insurances or that they feel constrained by the manner the transaction with Mr. Tarraf was conducted.

FORMATION

Mr. Tarraf filled the proposal forms and duly paid the premium to the insurance brokers. It has not been specifically stated in the evidence of the status of the insurance brokers and as to whether they were agents of Mr. Tarraf or the N.I.C even though, ordinarily; the brokers are the agents of the insured. In Chitty on contract: specific contracts, supra, paragraph 39-037, at page 908, the learned authors in describing the status and role of the brokers, has this to say:

[p.134]

"BROKER. Persons seeking insurance frequently engage brokers, whose services are usually remunerated on commission basis by the insurer but who nonetheless are agents of the assured, though they may act for the insurer as well, in which case conflicts of interest may well arise. The broker must act with reasonable care and skill, and if for example, he fails to arrange a contract of insurance as instructed, it is no defence that the insurer could have escaped liability if the contract had been made, if as a matter of business the insurer would not have refused payment".

And in Halsbury's Laws of England, third edition, paragraph 382, at page 201, the learned authors have this to say as regards insurance brokers and insurance agent:

"If a person, wishing to obtain insurance of a non-marine character employs an insurance broker as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the person for the acts and omissions of the broker. If negotiations for such insurance are conducted on behalf of the insurers by an insurance agent, the responsibility of the insurers for the act and omissions of the agent is similarly governed by the general law of agency"

Mr. Tarraf, in his evidence in chief at page 41 of the record, states that when he had the transaction with Rowland J. Hamilton, whom he knew as an insurance broker, he "asked him to arrange for the insurance of the goods" in his store. It appears from the evidence that the brokers were agents of Mr.

Tarraf in respect of the insurance. (See page 43 of the record — evidence of Mr. Tarraf in cross examination). This may not affect the outcome. It is not in dispute that the insurance premium was paid and the proposal forms filled by Mr. Tarraf and received by the N.I.C.

[p.135]

After receipt of the proposal forms and the premium, the insurers ordinarily should have provided a preliminary protection by way of a cover note but this was not done. It was only on or about the 2nd December 1996 that Mr. Tarraf was issued with the Cover Note – Exhibit "B" and it was for a fixed period covering 12 months from the 11th October 1996; the exact period that Mr. Tarraf required an insurance cover for.

It is the contention of counselor for Mr. Tarraf that the Cover Note does not affect Mr. Tarraf's insurance with the N.I.C. as the Cover Note is effected by the N.I.C with Harris and Dixon Insurance Brokers for their benefit in providing cover for their risk in the underlying insurance between Mr. Tarraf and the N.I.C. I am in agreement with counsel in so far as the Cover Note is a cover for the risks undertaken by the N.I.C. in the underlying insurance. I will deal with issue of the Cover Note shortly in the Judgment.

The contract of insurance came into effect when the proposal forms were filled and the premium paid and the forms were handed over to and accepted, without demur or qualification, by Mr. Tarraf. The proposal forms, even though being the forms of the N.I.C. constitute an offer from Mr. Tarraf. In the result there was offer, Consideration and acceptance.

THE COVER NOTE

"Once the contract is complete the insurer is bound to issue and the proposer to accept a policy in accordance with the stipulations of the proposal". See Halsbury, supra, para 389, page 206. A proposal form usually incorporates the usual terms and conditions of the insurer. The same applies to a cover note: it normally incorporates the terms and conditions of the insurer's standard form of policy either by direct reference or by reference to the signed proposal which usually incorporates the standard forms. "As in contract generally, one person may be taken to have contracted on terms of which he was only constructively aware, and generally the insurer's proposal form, which the assured uses to give the insurer particulars of the risk, contains express reference to the [p.136] insurer's terms and conditions". See Chitty on Contract; specific contracts supra, para 39-039, at page 910. In the instant case, the N.I.C. issued the Cover Note to Mr. Tarraf in place of a policy. Normally, a cover note gives interim protection or insurance pending the issuance of a policy; it is usually for a short duration, and is a contract in its own right, independent of the policy. In respect of the Cover Note, however, the period is not interim at all but covers the entire period that Mr. Tarraf wanted the insurance to cover as reflected in the receipt Exhibit A, also at page 47 of the record and paragraph 3 of the statement of claim, at page 2. In the peculiar circumstances of the instant case, counsel for Mr. Tarraf aptly described the insurance cover as "cover note/insurance policy".

The counsel for Mr. Tarraf contends that the Cover Note — Exhibit 'B' — is in fact reinsurance cover issued by Harris & Dixon Insurance Brokers Limited to the N.I.C and that the same is admitted by the

N.I.C in the statement of Defence. I agree with Counsel. However, it is not in dispute that Mr. Tarraf received the Cover Note on or about the 2nd December 1996 (see page 3 of the record,) and continued to have it in his possession and that he never complained about or protested against it (see page 43 the evidence of Mr. Tarraf under cross- examination). It seems very clear to me that Mr. Tarraf adopted and accepted the Cover Note as the insurance cover note/insurance policy as representing the contract of insurance which reflect the terms and conditions. I am further confirmed in this view by the letters (Exhibits 'D1', 'D2' and 'D3') that emanated from Mr. Tarraf's solicitor, particularly Exhibit D2 — the letter dated the 26th November 1997 and predicated with the phrase "Without prejudice". The letters were tendered in evidence by Mr. Tarraf.

The number given to the cover note referred to in the letters is the, same and the correct number of the Cover Note tendered in evidence and pleaded in the Statement of Defence. The number given to the Cover Note in paragraph 3 of the Statement of Claim, deleted by amendment, is not the actual number; the actual number is: (C/N No.) TR963063 G shown clearly at the top of the front page and the second page of the Cover Note — Exhibit "B". The number deleted is found in the second page and it incorporates the actual number; and given its placing, it [p.137] obviously serves another purpose. In any event, I am in agreement with the trial judge in that, I am of the view, its deletion is of no consequence in the trial. Even with the deletion of the number by way of an amendment, what cover note is being referred to in paragraph 3 of the statement of Defence in the context of the pleadings and evidence if not the Cover Note — Exhibit 'B' — tendered in evidence? The answer, in my view, is non other than Exhibit 'B'.

The period of cover in the Cover Note coincides with the period of cover required by Mr. Tarraf. It contains several terms and conditions relevant to the type of insurance in issue and the sum insured. The Cover Note was received and retained without protest or complaint. Even if it can be argued that Mr. Tarraf did not adopt or accept the Cover Note I am of the firm view that he ought to be deemed, in the circumstances, to have accepted the Cover Note. I have already held that the Cover Note was issued to the N.I.C. as a protection cover of the risk which represents the insurable interest of the N.I.C. in the underlying or original insurance. In the circumstances of this case, I have no hesitation in holding that the terms and conditions of the Cover Note — Exhibit "B"— ought to be implied into the contract of insurance/oral policy "since, excepting marine insurance, an oral contract of insurance, though rare, is perfectly valid and may indeed also be described as a policy" See Chitty on Contract: specific contracts, para 39-001, at page 886; Re Norwich Equitable Fire (1887) 57 L.T. 341; Forsikringsaktieselsrabet National V Attorney General (1925) A.C. 639; and treat the Cover Note — Exhibit 'B' — as a policy. See Halsbury's Laws of England, supra, para: 395, at page 209; Re Norwich Equitable ire Assurance Society, Royal Insurance Co's Claim (1929) 1 Ch.262 at P. 269 per ROMER J; Forsikringsakt National (of Copenhagen) VA-G., (1925) A.C. 639, H.L., at p. 642 per Lord CAVE, C. And I, therefore, hold that the Cover Note forms a part of the contract of insurance between Mr. Tarraf and the N.I.C.

Since the Cover Note –Exhibit 'B' — is the operative policy, it is in order to consider the contention of counsel that it introduces new terms in the contract of insurance [p.138] that are not contained in the proposal form Exhibit "G1" — or by varying the terms of the proposal form.

The proposal form — Exhibit 'G' — does not seem to contain much terms, if at all. It ought to have contained the usual terms and conditions in the standard form of the N.I.C and this could have been done by "incorporation by reference" in the proposal form but this clearly was not done. What was done was to make the proposals and declaration contained in the proposal form the basis of the contract and, this is clear in the statement in the proposal form, I quote:

"I/We hereby declare that the above statements are true and complete and that I/We have not concealed anything material to be known to the company and I/We hereby agree that this Proposal and Declaration shall be the basis of the contract between me/us and National Insurance Company Limited."

The proposal form is dated 11th October 1996 and signed by the proposer, Mr. Tarraf. One may not be certain whether the terms and conditions contained in the Cover Note — Exhibit "B" — are the usual terms and conditions contained in the standard form of policy of the N.I.C. or not. But I am clear in my mind that the major terms and conditions in the Cover Note are glaringly absent in the proposal form, exhibit "G1", particularly the one in respect of 1st loss, in the sum of US$20,000-00, which is half the amount of the insured sum.

With the introduction of new terms into the contract, Mr. Tarraf clearly had the option to send it back (See Chitty on Contracts; general principles, Volume 1, 28th edition, para: 2-032, at p.104, under the rubric: ONE PARTY'S "USUAL CONDITIONS") unless he had committed to himself to taking it; if he did nothing, his tacit acquiescence by itself could probably not be construed as an approval. However, any positive step taken by which the insured recognizes, or seeks to enforce the policy, will amount to an affirmation or approval of it. See Baker V Yorkshire Fire and Life Assurance Co., (1892) 1 QB 144 at p. 145, per Lord COLFRIDGE, CJ; Newcastle Fire Insurance Co. V Macmorran & Co (1815), 3 [p.139] DOW 255, HL. The law or the issue is clearly stated in Halsbury's Laws of England, supra, para 390, at page 207, thus—

"In general, the policy amounts to a final indication by the insurers of the sense in which, if it operates at all as an acceptance the proposal is being accepted. If the proposer does not like it, he may send it back unless he has committed himself to taking it, if he does nothing, his tacit acquiescence by itself will probably not be construed as an approval; but any positive action by which he recognizes, or seeks to enforce, the policy will amount to an affirmation of it and once he has made such an affirmation, he cannot thereafter seek to set it aside". (Emphasis added)

The suggestions in Re Bradley and Essex and Suffolk Accident Indemnity Society, (1912) 1 KB 415 CA at p.430 per FARWELL, L.J. that the assured or insured can affirm the policy without being bound by the new terms seems, in my view, inconsistent with the authorities, namely, Macdonald V Law Union .Insurance Co. (1874), L.R. 9 QB 328; British Equitable Assurance Co. Ltd V Bailey, (1906) A-C 35 H.L; Dawsons Ltd V Bonnin (1922) 2 A.C. 413, H.L. I am incomplete agreement with the view expressed by MOULTON, L.J., in the same Re Bradley case, (1911-13) ALL ER (Reprint), at page 450 when he said ".....this is not a case in which the insured is disclaiming the policy as not being in accordance with that which he intended to enter into. He is himself claiming under the policy, and he cannot be allowed to claim under the policy and yet contend that he is not bound by its terms". This statement, in

my view, accords more with the authorities and the law as expressed in the statement emphasized in the quotation above from Halsbury's Laws of England, supra. One should note that the issue in the Re Bradley's case, supra, did not turn on the said suggestions or statements.

Counsel for Mr. Tarraf places reliance on the case of Olley V. Marlborough Court Limited (1949) 1 KB 532. In my considered view the ratio decidendi of the Olley's case, a case of contract simpliciter, is distinguishable from and is in fact different from an insurance case such as the instant one. In the Re Bradley's case, the term [p.140] of the agreement was placed in the hotel room and the customer only knew of the term after he entered his room which was after the contract was made. In an insurance contract there is a relationship between the proposal form and the policy, and the assured had the option of rejecting the policy well before same usually well before the event insured against occurs. Mr. Tarraf clearly had the option of rejecting or affirming the Cover Note/Policy well before the event insured against. In short, the natures of the two contracts are significantly different.

Had Mr. Tarraf taken any positive action resulting in affirmation of the Cover Note/Policy? Yes; in my view he had. The letters — Exhibits "D1", "D2" and "D3" — constitute such action. A more significant action is this very suit. Clearly, the suit is based on the Cover Note/Policy as earlier discussed. See the Statement or Claim in its entirety with particular attention to paragraphs 3 and 4. In my judgment, Mr. Tarraf is bound by the terms and conditions of the Cover Note/Policy and is so hold.

WAR AND CIVIL WAR EXCLUSION CLAUSE

The War and Civil War Exclusion Clause provides as follows:

"Notwithstanding any thing to· the contrary contained herein this Policy does not cover loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority".

The trial court was said by counsel, Mr. E.E.C. Shears-Moses, for N.I.C. in the court below to have held that the Exclusion Clause was not part of the contract (See page 94 of the record). The trial court never said such a thing. At page 67 of the record the learned judge, in respect of the Exclusion Clause, said "on the face of it, this is the peril against which this plaintiff effected the insurance. When the assured has proved a prima facie case of loss within the contract of [p.141] insurance, the insurers are entitled to show that the loss falls within the exception — Hurst V Evans (1917) 1KB 352. The burden of proving, that the loss was caused by an excepted peril lies upon, the insurers". He proceeded to review the case of: Total Broadhurst Lee Co V London and Lancashire Fire Insurance Co. (1908), The Times, May 21 and quoted Justice BINCHAM in his summing up to the Jury when he said inter alia “.....And, finally, you must remember that this is what is called an exception in the policy and it is for the insurers to satisfy you that the exception has which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do, they may have not discharged the burden which is upon them". Then the trial judge expressed his own views thus: “The Insurers must produce affirmative evidence of facts supporting their contention, and such evidence, must be sufficient. If they fail to

produce such evidence they have not discharged the onus of proof, and the assured, accordingly succeeds in his claim". The trial judge then reproduced the War and Civil War Exclusion Clause in the Policy/Cover Note and in reference to the CONTRA PROFERENTEM principle cited the case of Cornish Accident Insurance Co, (1889)23 QB D 453 per Lord Justice LINDLEY, at page 456, that—

".....in a case of real doubt, the policy ought to be construed most Strongly against the insurers; they frame the policy and insert the exceptions. But the principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty".

The trial Judge then went on to say "the defendants (the N.I.C.) rely on the above clause (meaning the Exclusion Clause) for exemption from liability; particularly civil war. The defendants led no evidence to show that when the peril occurred there was a civil war which directly or indirectly caused it" (Bracketed words and emphasis added) and he then went to state "I hold that the defendants cannot avail themselves of the exclusion clause ....."

[p.142]

Given the background leading to this statement which is the subject of the query mentioned earlier, I cannot imagine by any stretch of the language (or imagination) how this could be interpreted and understood to mean that the said Exclusion Clause is not part of the contract. The trial Judge's statement of the law, in my View, is correct and I so hold. I will, however, go further. In the oral argument counsel for the N.I.C. argues that there was a military coup on the 25th May 1997 and that this was a notorious fact. Counsel further argues. That the Police Report (Exhibit "C") confirms his statements. He also relies on the letter of Mr. Tarraf to the reinsurers, Harris & Dixon Insurance Brokers Limited, in which he stated that the goods in his shop were looted. A party to a suit may rely on the evidence adduced by his opponent or otherwise in support of his case but it is his primary responsibility to adduce evidence in support of his case. The evidence referred to in both the Police Report and the letters are insufficient evidence. Even Mr. Tarraf was not present when the shop was allegedly looted. It is true that both the Police Report and the letter were tendered by Mr. Tarraf. One expected counsel to have cross-examined Mr. Tarraf on the issues raised, including his sources, and asked direct questions with a view of eliciting evidence that would show a causal connection, a nexus, between the alleged looting and the coup of the 25th May 1997. For the same purpose, one would have expected evidence from witnesses showing the general state of affairs, particularly, in the area of Mr. Tarraf's shop, and how it impacted on people, homes and business premises. Primarily, the evidence ought to have been directed to show that the loss resulted .directly or indirectly from the events alleged — usurped or civil war etc. — that the N.I.C. was relying upon. In Spinneys (1948) Ltd, Spinneys Centres S.A.L. and Michel Doumet, Joseph Doumet and Distributors and Agencies S.A.L. V Royal Insurance Co. Ltd (1980) 1 Lloyds Law Reports 407 extensive evidence of the situation in Lebanon was given, including the interrelationship of events and the relevant actors and players. A vivid picture was painted and evidences were given to show causal connections. In reading the evidences of the state of affairs in Lebanon during the relevant period stated in a narrative by Mr. Justice MUSTILL but based on the evidence adduced by witnesses, I had the impression of reading a detailed [p.143] historical paper. In

the instant case, there is lack of sufficiency of the evidence and, in particular, lack cogent evidence showing the nexus between the alleged state of affairs and the loss, directly or indirectly. In the circumstances, I am of the firm view that the N.I.C has not proved any of the exceptions in the Exclusion Clause, and, in the circumstances, I have no option but to hold, quoting the trial Judge, that the N.I.C. "cannot avail themselves of the exclusion clause" and so hold.

VARIATION OF THE AWARD BY THE COURT OF APPEAL

There was no cross appeal by Mr. Tarraf and he did not seek variation of the award of US $ 20,000-00 by the High Court, by filing a notice of contention that the judgment be varied pursuant to Rule 18 (1) of the Court of Appeal Rules. Notice of Motion for enlargement of time was filed but it was never heard by the court, below. In my view rule 18 (1) which is reproduce hereunder:—

"18 (1) It shall not be necessary for the respondent to give notice of motion by way of cross-appeal; but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he shall within one month after service upon him of the notice of appeal, cause written notice of such intention to be given to every party who may be affected by such grounds on which he intends to rely and within the same period shall file with the Registrar four copies of such notice, one of which shall be included in the record and the other three copies provided for the use of the Court"

is mandatory and rule 18 (2) reproduced below:

"18 (2) Omission to give such notice shall not diminish any of the powers of the Court but may in the discretion of the Court be a ground for postponement or adjournment of the appeal upon such terms as to costs or otJ1erw;se as may be just"

[p.144]

merely allows the court in its discretion to postpone or adjourn the appeal to allow for the filing of the Notice of Contention to vary. Since the Court of Appeal did not act to vary the award on the basis of a cross-appeal or rule 18 (1), one may ask on what basis did it act? Rules 31 and 32, in my view, are not applicable in the circumstances. The Court of Appeal could have acted under rule 9(6) which states.

"9(6) notwithstanding the foregoing provisions of this rule, the Court; in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant unless the parties have had sufficient opportunity of contesting the case on that ground.

But in such a case the Court of Appeal is obliged to afford the parties sufficient opportunity of contesting the case on that specific ground. From the record this was clearly not done and the court in the judgment failed or neglected to explain the legal ground for its intervention in varying the award. It is my firm view that in the circumstances the Court of Appeal was wrong in varying the award, and I so hold.

1st Loss — A LIMITATION CLAUSE

Since I hold that the Cover Note is the operative document, I have to look at the 1st loss limitation. The 1st loss is the same as the excess in motor vehicle insurance; The insurer can only be liable for the sum in excess of the US$20,000-00 being the 1st loss. In the result the N.I.C.is liable only for the US$20,000-00 over the 1st figure of US $ 20,000-00, and I so hold See Halsbury's Laws of England, supra, para: 531 page 268

PROOF OF LOSS

Counsel for N.I.C. raised the issue of the proof of loss before the Court but on the objection of counsel for Mr. Tarraf that it was not appealed against both in the court [p.145] below and this court, counsel for the N.I.C. sought to amend but withdrew the application in the face of Strenuous objection and in the belief that the issue was raised in ground 7 of the Grounds of Appeal. I agree with the counsel for the N.I.C. on this. Ground 7 is a follow up to ground 6 which deals specifically with the varying of award and, it is in that light that ground 6, should be seen. Counsel's complaint in ground 6 is in the context of and in view of Justice WARNE's decision that Mr. Tarraf was not bound by the Cover Note (See page 128, 131 and 136 of the record) and it was therefore irrelevant to the issues. In answer to ground 1, ,in the given circumstances, it would appear that the evidence on which the learned Justice decided on the figure of US$40,000-00 is the proposal form — Exhibit "G" where it is stated the insured sum is US$40,00-00.

I am in agreement with counsel for Mr. Tarraf that the appeal was not fought before the court below and this court on the basis of lack of proof of loss but on the Exclusion Clause, among others. However, I would like to draw attention to counsel for the N.I.C's reference, in oral argument, to the absence of stock books and other records. In this regards, I would like to draw attention to the proposal forms and to note that questions on stock and sale books are included therein. I take it there is good reason for these questions. If these important books are kept in the premises insured, is it not likely that these could be lost in the event of fire, and thus deprive insurers of valuable evidence? Perhaps, there should be a requirement by insurers for these books and similar documents of potential evidential value to be kept in different and secure places. Another striking fact is, that Mr. Tarraf was never questioned in respect of these, confirming in my mind,' that the N.I.C., in the trial, exclusively, but unwisely, focused on the Exclusion Clause which, to their utter surprise, I presumed, mutated into a mirage!

INTEREST ON FOREIGN CURRENCY AWARD

In the written address kindly provided by counsel for Mr. Tarraf, the point raised in ground 8 of the Grounds of Appeal was conceded. Counsel now urges the court either to remit the case to the High Court to hear evidence on the interest rate on [p.146] the relevant currency or, alternatively, for the court to strike out that part of the judgment dealing with the rate of interest on the foreign currency, in which case, Mr. Tarraf would only be entitled to the statutory interest pursuant to the Judges Act of 1883, a statute of general application, applicable pursuant to section 170(1) of the Constitution, 1991, and section 74 of the Court Act, 1965.

In the premises, I set aside the judgment of the Court of Appeal in its entirety and:

(1) Affirm the judgment of the trial court in respect of paragraph A and give judgment to Mr. Tarraf in the sum of US$20,000-00 payable in Leones at a rate of exchange effective as at 7th April 2000 — the date of the judgment given by the trial court.

(2) The matter has been in the court for too long. This court will not remit the case to the High Court for it to hear evidence on the interest rate on the relevant foreign currency. Paragraph B of the relief granted by the trial court is hereby set aside and the court makes no order as to the interest payable on the foreign currency.

(3) Due to the unhelpful manner in which the parties conducted their respective cases in the High Court and the court below, parties shall bear their respective costs in the said courts and also in this court. If costs have been paid same to be refunded.

SGD.

Hon. Justice Semega-Janneh - J.S.C.

CASES REFERRED TO

1. Powell Vs Stratham Manor Nursing Home (1935) AC 243 at 249

2. Baker V Yorkshire Fire and Life Assurance Co., (1892) 1 QB 144

3. Newcastle Fire Insurance Co. V Macmorran & Co (1815), 3 DOW 255, HL

4. Re Bradley and Essex and Suffolk Accident Indemnity Society, (1912) 1 KB 415 CA

5. Macdonald V Law Union .Insurance Co. (1874), L.R. 9 QB 328

6. British Equitable Assurance Co. Ltd V Bailey, (1906) A-C 35 H.L

7. Dawsons Ltd V Bonnin (1922) 2 A.C. 413, H.L.

8. Olley V. Marlborough Court Limited (1949) 1 KB 532

9. Cornish Accident Insurance Co, (1889)23 QB D 453

10. Michel Doumet, Joseph Doumet and Distributors and Agencies S.A.L. V Royal Insurance Co. Ltd (1980) 1 Lloyds Law Reports 407

STATUTE REFERRED TO

1. The Court of Appeal Rules

OMRIE GOLLEY & 2 OTHERS v. THE STATE & JUSTICE S.A. ADEMOSU

[SC. MISC. APP. 1/2006] [p.1-3]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 17 JANUARY 2007

CORAM: MR. JUSTICE S.C.E. WARNE J.S.C, MS. JUSTICE U.H TEJAN-JALLOH J.S.C, MR. JUSTICE E.C. THOMPSON-DAVIES J.S.C, MRS. JUSTICE V.A.D WRIGHT J.S.C, MR. JUSTICE V.A.D. WRIGHT J.S.C & MR. JUSTICE A.N.B. STRONGE J.A

OMRIE GOLLEY & 2 OTHERS — APPLICANTS

VS

THE STATE & JUSTICE S.A. ADEMOSU — RESPONDENTS

C.F. Murgai Esq. with him R. Kowa Esq. for Applicants

E. Roberts Esq. with him O. Kanu Esq. and A. Sesay Esq.

RULING

WARNE JSC

This Notice of Motion has been before this Court for some considerable time. The important issue before this Court is for the interpretation of section 137 (2)(a) of the Constitution of Sierra Leone, Act No. 6 of 1991 in so far as it relates to the Honourable Mr. Justice S.A. Ademosu who is the trial Judge in the case of The State vs. Omrie Golley and two others in the High Court: Mr. C.F. Margai, Counsel for the Applicants has submitted that since the present Coram consists of Warne, Thompson-Davis, Wright JJSC and Strange JA are affected by 0 4 (b) in the declaration sought, the interest of justice will be served by the four Justices herein before mentioned rescuing themselves from these proceedings. 0 4 (b) states "Where a Justice of Appeal retires after attaining the compulsory retiring age of sixty five (65) years as provided by section 137 (2) (b) of the Constitution but is retained as a Judge [p.2] relying on section 136 (2) of the said Constitution, was it the intention of the Legislature that the latter appointment should be indefinite"?

On the 6th April 2006, the Court ruled that the submission had no merit and that the proceedings should commence.

When proceedings commenced on the 2nd May 2006, Mr. Margai informed the court that he had another Notice of Motion dated 23rd April, 2006 seeking an order that the present members of the panel save Justice TeJan-Jalloh recuse themselves from hearing the motion with regard to the interpretation of the fourth Order concerning Mr. Justice Ademosu sitting as judge notwithstanding his retirement in 1998.....

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No doubt this submission affects the four justices named above. The Court, even though not seiged of this motion, adjourned the matter sine die to give the learned Chief justice an opportunity to appoint a panel consistent with the request of Mr. Margai. The Chief Justice wrote a letter to Mr. Margai that he will fix the date for the hearing when a panel can be constituted.

Be that as it may, the present Coram decided to resume hearing. They said Constitution is quite clear vis-a-vis a criminal matter before our Court — vide section 23 (1) of the said Constitution Act No.6 of 1991, which provides as follows whenever any person is charged with a criminal unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law" (Emphases is mine).

Fully conscious of this provision, notices were sent out to Counsel for the Applicants and the applicants themselves and the Law Office in order to commence hearing as the Court ordered on the 6th April 2006. At the hearing of 11th January, 2007 the Court was informed that the applicants had been [p.3] brought from Prison the Court ordered that they be brought up and they appeared in the dock. Mr. Margai observed that the letter from the Chief Justice did not refer to this matter. Whether it referred to this matter or not, the Court was concerned with the compliance of the Order made on the 6th April 2006 Mr. Margai for his part maintains his position that he cannot proceed before this Court.

This position cannot be maintained ad infinitum I have no alterative but to strike out the Notice of Motion and it is struck out accordingly.

The above Ruling was going to be delivered on the 16th January 2007 but Mr. Margai observed that the applicants were not in court and in the interest of justice; he applied that they be brought to court. The Court granted the application. The matter was adjourned to Wednesday 17th January 2007.

On the 17th January 2007 the applicants were present and the Ruling was delivered striking out the Notice of Motion.

SGD.

SYDNEY WARNE JSC

SGD.

UMU TEJAN-JALLOH JSC

SGD.

E THOMPSON-DAVIS JSC

SGD.

V.A.D. WRIGHT JSC

SGD.

A.N.B. STRONGE

STATUTE REFERRED TO

The Constitution of Sierra Leone, Act No. 6 of 1991

PEOPLE'S MOVEMENT FOR DEMOCRATIC CHANGE (PMDC) THE SECRETARY-GENERAL OF PEOPLE'S MOVEMENT FOR DEMOCRATIC CHANGE (PMDC) v. SIERRA LEONE PEOPLE'S PARTY (SLPP) & ANOR.

[SC. CIV. APP. 1/2007] [p.19-87]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 22 JUNE 2007

CORAM: JUSTICE DR. ADE RENNER-THOMAS, C.J.

MS. JUSTICE U.H. TEJAN-JALLOH, J.S.C.

MR. JUSTICE G. SEMEGA-JANNEH, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE M.E.T. THOMPSON, J.S.C.

BETWEEN:

PEOPLE'S MOVEMENT FOR DEMOCRATIC CHANGE (PMDC)

THE SECRETARY-GENERAL OF PEOPLE'S MOVEMENT FOR

DEMOCRATIC CHANGE (PMDC) — APPELLANTS

VS.

SIERRA LEONE PEOPLE'S PARTY (SLPP)

THE CHAIRMAN SIERRA LEONE PEOPLE'S PARTY (SLPP) — RESPONDENT

C.F. MARGAI Esq., M.P. FOFANAH Esq., and R.B. KOWA for the Appellants

E.A. HALLOWAY Esq., D.B. QUEE Esq., E.E. SHEARS-MOSES Esq., and

ANTHONY BREWA Esq. for the Respondents

RENNER-THOMAS C.J.

These proceedings were commenced by way of a Notice of Appeal filed in the Supreme Court Registry: on the 18th day of January 2007. The Notice of Appeal was filed on behalf of the People's Movement for Democratic Change (PMDC) and the Secretary-General of the PMDC (both hereinafter referred to as "the appellants"). The Sierra Leone People's Party (SLPP) and the Chairman of the SLPP (both hereinafter [p.20] referred to as "the respondents") were named as respondents. The Notice of Appeal opens as follows: —

"TAKE NOTICE that the Appellants/Petitioners being dissatisfied with the decision more particularly stated hereunder contained in the decision of the Political Parties Registration Commission dated 21st day of July, 2006, and pursuant to section 35 sub-section 7 of the Constitution of Sierra Leone 1991, Act No.6 of 1991, doth hereby appeal to the Supreme Court upon the grounds set out in paragraph 3 hereof and will, at the hearing of the appeal, seek the relief set out in paragraph 4"

There then follows several paragraphs, the first of which dealing with the decision , complained of states that the complaint of the appellants was against a decision contained in a letter from the Political Parties Registration Commission (PPRC) dated the 21st day of July 2006 in reply to a communication from the Interim Secretary of the PMMC.

To understand the complaint of the appellants it is necessary to set out at this stage and in extenso the communication (hereinafter referred to as "the Petition") from the Interim Secretary of the first appellant herein, the PMDC, addressed to the Chairman of the PPRC on the 16th day of June 2006 as follows:

"The Chairman

Political Parties Registration Commission C/o Roxy Building

Walpole Street,

Freetown.

Dear Mr. Chairman,

Re: Petitioning under Sections 6(1)(2a) 2(e), 14(1) and 27(1) (b) of the

Politica1 Parties Act No.3 of 2002 (as amended) and Sections 35(4)

and 76(1)(h) of Act No.6 of 1991

On the behalf of the People's Movement for Democratic Change, I hereby petition the eligibility of Mr. Solomon Ekuma Berewa as Leader of the Sierra Leone People's Party whilst holding the office of Vice President of the Republic of Sierra Leone.

[p.21]

Section 6(1) of Act No.3 of 2002 (as amended) provides:—

"The object for which the Commission is established is the registration and supervision of the conduct of Political Parties in accordance with the Constitution and this Act."

Section 6(2a) provides:—

Section 6(2) — without prejudice to the generality of subsection (1), it shall be the function of the Commission—

(a) "to monitor the affairs or conduct of Political Parties so as to ensure their compliance with the Constitution, this Act and with the terms and conditions of their registration ".

(b) "to do .all such things as will contribute to the attainment of the object stated in subsection (1)".

Section 14(1) of the Political Parties Act No.3 of 2002 (as amended) provides:—

"A Political Party shall not have as a founding member or as leader of the party or a member of its executive body whether national or otherwise, a person who is not qualified to be elected as member of Parliament under the Constitution ".

Section 35(4) of the Constitution of Sierra Leone Act No.6 of 1991 provides:—

"No Political Party shall have as a Leader a person who is not qualified to be elected as Member of Parliament ".

Section 76(1) of the constitution of Sierra Leone, Act No.6 of 1991 provides:—

No person shall be qualified for election as a Member of parliament—

Section 76(1) (h) “if he is for the time being the president, the vice president, a Minister or a Deputy Minister under the provisions of this Constitution"

The Sierra Leone People's Party (SLPP) is a registered Political Party in Sierra Leone

The People’s Movement for Democratic Change (PMDC) is a registered Political Party in Sierra Leone.

[p.22]

The Leader of the Sierra Leone People's Party is Mr. Solomon Ekuma Berewa who incidentally is the Vice-President of the Republic of Sierra Leon, and was such when on the 4th day of September, 2005 he was elected leader of the said party at a convention held in Makeni.

This petition seeks to have determined whether in the light of the aforesaid pro visions of Section 14(1) of the Political Parties Act No.3 of 2002 (as amended) and sections 35(4) and 76(1) (h) of the Constitution of Sierra Leone, Act No.6 of 1991, Mr. Solomon Ekuma Berewa as Vice-President of the Republic of Sierra Leone and Leader of the Sierra Leone people's Party (SLPP) is not contravening the aforementioned provisions.

It is further submitted that if the answer to the preceding paragraph is in the affirmative, then, your petitioner requests that immediate steps be taken to invoke the provisions of section 27(1)(b) of Act No.3 of 2002 (as amended) in ,conformity with the spirit and intendment of section 6(1), (2a) and (2e) of the said Act.

Section 27(1)(b) of Act No.3 of 2002 (as amended) provides:

"without prejudice to any other penalty prescribed by this Act or any other enactment, the Commission may apply to the Supreme Court for an Order cancel the registration of any Political Party where that Party has contravened any provision of the Constitution or this Act".

Faithfully submitted,

[Sgd]ANSU B. LANSANA

INTERIM SECRETARY -GENERAL (PMDC)"

The reply of the PPRC dated 21st day July 2006 which is quoted in full in the Notice of Appeal is in the following terms:

"As an ordinary citizen Solomon Ekuma Berewa is qualified to become a Member of Parliament. But while serving as Vice President of the Republic of Sierra Leone, he cannot become a Member of Parliament at the same time.

[p.23]

This is so because of the existence of the separation of powers,' as no one individual citizen can become a member of any two or all three arms of Government simultaneously, that is,

1. The Legislature which comprises the Speaker and Member of Parliament.

2. The Executive comprising the President, Vice President and Cabinet.

3. The Judiciary comprising the Chief Justice and members of the Superior Court of Judicature.

Because of the aforementioned, the Political Parties Registration Commission is of the view that Solomon Ekuma Berewa is qualified to contest for the Office of the Presidency of the Republic of Sierra Leone ".

The Notice of Appeal also alleges the following particulars of misdirection and errors of law respectively:

"1. That Commission erred in considering Mr. Solomon Ekuma Berewa's Response dated 28th June 2006 purportedly made in response to the Appellants/Petitioners Petition dated 16th June 2006 as a response from the Respondents.

2. That the Commission, in its deliberation and hence decision, failed to appreciate that section 75 of the Constitution of Sierra Leone 1991, Act No.6 of 1991 aforesaid, should have been read subject to section 76(1) (h) of the said Constitution

3. That the Commission, in its deliberation and conclusion, misconceived the spirit and intent of section 76(1) (h) of the said Constitution".

The grounds of appeal relied on by the appellants are:

"That in the light of the provisions of sections 34, 35, 75 and 76 of the Constitution of Sierra Leone 1991, Act No.6 of 1991 in particular sections 35(4) and 76(1)(h) of the said Constitution as well as [p.24] the provisions of sections 6(1) and (2) (a-e), 14(1) and 27(a) and (b) of the Political Parties Act 2002, Act No.3 of2002 (as amended), the Political Parties Registration Commission, in its decision of 21st day of July 2006, failed to address the crucial and all-important question contained in the Appellants/Petitioners' Petition of 16th June 2006 as to "whether in the light of the aforesaid provisions of section 14(1) of the Political Parties Act No.3 of 2002 (as amended) and sections 35(4) and 76(1 ((h) of the Constitution of Sierra Leone, Act No.6 of 1991, Mr. Solomon Ekuma Berewa as Vice President of the Republic of Sierra Leone and Leader of the Sierra Leone 's People's party (SLPP) is not contravening the aforesaid provisions.

That notwithstanding the provisions of section 5(3) and (4) of the Political Parties Act 2002 aforesaid, the Commission, in proceeding to determine the said Petition in the absence of its Chairman, deprived itself of the necessary Judicial' oversight that the Chairman’s presence would have brought to bear on it decision.

That the Political Parties Registration Commission determined the Appellants/petitioner’s Petition and reached a decision on it without a Response from the Respondents.

That the aforesaid decision of the Political Parties Registration Commission is against the weight of the Petition filed by the Appellants/Petitioners."

The Reliefs sought from this Court in the Notice of Appeal are that the decision of the PPRC be set aside for the reasons aforesaid and that there be substituted one in favour of the "appellants/petitioners" together with such further or other relief to the appellants/petitioners" as the Justice of the case requires.

It will be observed from the Notice of Appeal that the instant appeal is said to be filed pursuant to Section 35 (7) of the Constitution, Act No.6 of 1991, (hereinafter referred to as "the Constitution"') which provides as follows:

"Any association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final".

[p.25]

Normally, civil appeals to the Supreme Court are instituted pursuant to section 123 (1) of the Constitution, which provides that "an appeal shall lie from a judgment, decree, or order of the Court of Appeal to the Supreme Court—

(a) as right in any civil cause or matter ..."

Procedurally, such appeals from a decision of the Court of Appeal to the Supreme Court are governed by the Supreme Court Rules 1982, Constitutional Instrument No.1 of 1982. However, those rules make no express provision for civil appeals to the Supreme Court which as in the instant case, are not from a judgment, decree or order of the Court of Appeal.

However, Rule 5(2) of the Supreme Court Rules provides as follows:

"Where no provision is expressly made by these Rules regarding the practice and procedure which shall apply to any appeal or application before the Supreme Court, the Supreme Court shall prescribe by means of practice directions such practice and procedure as in the opinion of the Supreme. Court the justice of the appeal or application may require ".

No doubt with this rule in mind, by Notice of Motion dated 25th day of January 2007, the appellants sought to have the Supreme Court prescribe, by means of practice directions, the practict9and procedure to govern the appeal they had filed. Even before the application was heard, on the 30th day of January 2007, the Supreme Court relying on rule 5 of the Supreme Court Rules did prescribe by way of Practice Direction No.1 of 2007 that the practice and procedure to apply to appeals filed in the Supreme Court pursuant to section 35(7) of the Constitution Act shall thenceforth be those contained in the Supreme Court Rules, Constitutional Instrument No.1 of 1982, obviously with necessary modifications to suit any peculiar requirements of any such appeal.

Thus, when the Motion dated 25th January 2007 came up for hearing on the 31st January 2007 this Court drew the attention of the parties to the instant appeal to the said Practice Direction No.1 of 2007 and further ordered that for the purpose of compliance with the said Supreme Court Rules the instant appeal should be deemed to have been filed on the 31st day of January 2007.

After the Order the Appellants having filed their case on the 9th day of March 2007 followed by that of the Respondents on the 4th day April of 2007 the appeal came up for hearing before this Court on the 5th day of June 2007.

[p.26]

I now revert to consider more fully the circumstances leading to the filling of the Notice of Appeal by the appellants in the instant case. To be able to understand the background to the present appeal one has got to start with a closer look at the petition from the Interim Secretary of the first appellant herein, the PMDC, addressed to the Chairman of the PPRC on the 16th day of June 2006. Since it is the appellants' dissatisfaction with the reply of the PPRC to the petition which gave rise to the instant appeal I think it is necessary to deal briefly with the legal import of the petition.

There are several connotations of the word "petition." According to the Shorter Oxford English Dictionary in legal usage a petition is defined as a formal application in writing made to a Court—

(a) For judicial action concerning the matter of a suit then pending before it;

(b) For something (which lies in the jurisdiction of the Court without an action as a writ of habeas corpus, etc; and

(c) In some forms of procedure initiating a suit or its equivalent most common legal usage is to describe the originating process in divorce, winding-up or election petition matter.

Upon a perusal of the petition addressed to the PPRC it becomes clear that it was not intended to originate any legal process. In my view, it is more consistent with a petition in the non-Legal usage of the word defined in the Shorter Oxford Dictionary as:

"a formally drawn-up request or supplication addressed to a superior, or to a person or body in authority, soliciting some favour, right or mercy, or the redress of some wrong or grievance".

Clearly, the petition in the instant case was a request addressed to a body in authority, the PPRC, to redress some wrong or grievance i.e. the non-compliance by the SLPP with certain provisions of the Constitution.

Focusing further on the petition addressed to the PPRC, in order to avoid any misconception that the outcome of these proceedings may engender, it is important for me to deal at this stage of my judgment with the issue of whether the petitioner had any legal right to address such a petition to the PPRC.

[p.27]

A perusal of the content of the petition reveals that it was calling upon the PPRC to carry out one of its many oversight responsibilities in this case of ensuring compliance by the SLPP, a registered political party, with certain relevant provisions of the Constitution and of the Political Parties Act, No.3 of 2002. This was being done it was said with a view to "triggering" the exercise by the PPRC of the power vested in it by section 27(1) of the Political Parties Act, No.3 of2002.

Though the petitioner chose not to adopt a formal legal process to compel the PPRC to , carry out its duty and exercise its power set out in the Constitution and the Political Parties Act the question of the standing of the petitioner to raise the matters contained in the petition merits due consideration by this Court. Clearly, the petitioner in the instant case could be said to have an interest in the outcome of any action taken by the PPRC in consequence of the petition. Indeed, any person or group of persons, even ones without any direct interest in its outcome, could have addressed such a petition to the PPRC.

After all, one should not be oblivious to the fact that the PPRC is a public body set up by Parliament to carry out certain statutory functions in the interest of the public in general and of registered political parties in particular. Thus, any concerned citizen or public-spirited individual could well have addressed such a petition to the PPRC. Of more serious concern for the purposes of this appeal is the answer to

the question; what, if any, remedies are open to a petitioner who is dissatisfied with the outcome of his petition.

It follows, therefore, that one must focus on the position the PPRC took viz-a-viz the petition. As stated earlier the reply of the PPRC was contained in this letter dated 21st day of July, 2006 addressed to the Interim Secretary-General of the PMDC and reproduced here for emphasis:

"The Interim Secretary-General

People's Movement for Democratic Change

9A Hannah Benka-Coker Street

Freetown

Dear Sir,

Re: Petitioning the Eligibility of Mr. Solomon Ekuma Berewa as

Leader of the Sierra Leone People's Party whilst holding the Office

of Vice President of the Republic of Sierra Leone

[p.28]

As an ordinary citizen Solomon Ekuma Berewa is qualified to become a Member of Parliament. But while serving as Vice President of the Republic of Sierra Leone, he cannot become a Member of Parliament at the same time.

This is so because of the existence of the separation of powers; as no one individual citizen can become a member of any two or all three arms of Government simultaneously that is—

1. The legislature which comprises the speaker 'and members of parliament.

2. The executive comprising the President, Vice President and Cabinet.

3. The Judiciary comprising the Chief Justice and members of the Superior Court of Judicature.

Because of the aforementioned, the Political Parties Registration Commission is of the view that Solomon Ekuma Berewa is qualified to contest the Office of the Presidency of the Republic of Sierra Leone.

Dated at Freetown this 21st Day of July, 2006

Signed: R.A. Caesar, Commissioner

Signed: M.B. Williams, Commissioner

Signed: C.A Thorpe, Commissioner

Clearly, this was not the outcome that the petitioner expected. The petition had called upon the PPRC to make a "determination" regarding the issue of the breach by the SLPP of certain provision of the Constitution and of the Political Parties Act, No.3 of 2002. This was to be followed, in the event that the PPRC was of the same opinion as the petitioner, by action being taken by the PPRC to invoke its powers vested by section 27(1) of the Political Parties Act, No.3 of 2002.

The appellants contend that the PPRC failed to make the "determination" it was invited by the petition to undertake. Whatever view one takes of the reply of the PPRC it is clear that the PPRC was not willing to go along with the petitioner that section 27(1) of the Political Parties Act, No.3 of 2002) was to be invoked.

[p.29]

It is not surprising therefore that the PMDC was dissatisfied with the reaction of the PPRC to the petition as contained in the reply from the PPRC. The question that then comes up for determination at this stage is what remedies, if any, were open to the petitioner. As a result of this dissatisfaction, did the appellants become entitled, as they contend, to bring, their grievance to this Court by way of an appeal pursuant to section 35(7) of the Constitution?

The appellants themselves did raise the issue of this Court's jurisdiction to entertain, the instant appeal in paragraph 20 of their case in the following terms:

"The jurisdiction of the Supreme Court to entertain the Appellants' Appeal filed here in is derived from section 35(7) of the National Constitution, which states as follows:

"Any association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final".

However, in the course of the oral submissions made by Counsel for the appellants the issue of whether this Court had jurisdiction pursuant to section 35(7) of the "Constitution or any other law to entertain the instant appeal was not taken any further.

As far as the respondents were concerned they did not deal with the issue to this Court's jurisdiction to entertain the instant appeal as part of their case nor did they deal with the issue as part of the oral submissions by their Counsel before this Court.

However, at the end of the oral presentation made on behalf of both the appellants and the respondents, because of the importance of the question of jurisdiction of this Court to entertain the instant appeal it was thought necessary to invite Counsel for both sides to address the Court further on the issue of the Court's jurisdiction generally and in particular on the legal capacity of the appellants to bring the appeal.

Mr. Margai, Counsel for the appellant, stood his ground and insisted that he was relying on the several contentions in the appellants' case and in the oral submissions, to this Court. On the other hand, though Counsel for the respondents, probably taking the cue from the bench; did attempt to counter the

contentions put forward on behalf of the appellants, with the greatest respect to Counsel for the respondents, this was not of much help to this Court as his answers to the questions put by the bench on this all important issue of jurisdiction were not particularly helpful.

[p.30]

At this stage, I think I need to repeat an important clarification I made about the connotation of the word "jurisdiction" in the case of Hinga Norman v. Sama Banya and Ors (S.C 2/2005 judgment delivered the 31st day of August 2005, unreported) The Hinga Norman case is one of the cases cited and relied on by the appellants in their written submission. Though I was in that case dealing with the original jurisdiction of this Court as opposed to its appellate jurisdiction which is at issue in the instant appeal the clarification is still pertinent. This is what I said:

"A distinction ought to be made between two meanings frequently attributed to the word [jurisdiction] and which sometimes tend to lead to confusion. This distinction is aptly dealt with in the following dicta by Rickford L.J. in delivering his judgment in the case of Guaranty Trust Company of New York v. Hannay & Company ((1915) 2 KB 536 at 563):—

"The word "Jurisdiction" and the expression "the court has no jurisdiction "are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute, as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will not according to the settled practice do so except in a certain way and under certain circumstances."

Barracloug v Brown ([1897] A. C. 615) and Westbury-on-Severn Rural Sanitary Authority v Meredith (30 Ch.D. 387) are two English cases that illustrate this distinction. In Barraclough's case, there was a real want of jurisdiction. The power to decide the dispute as to the particular subject-matter had been removed by statute from the High Court as a court of first instance and transferred to another tribunal. In the second case, the Court could decide the dispute and give the relief sought but, by a settled practice embodied in a rule, it would not do so except under certain circumstances, i.e., if the subject-matter was of the value of £10/00 or more.

In my humble opinion, therefore, in answering the question whether this Court has original jurisdiction to hear and determine the matters [p.31] raised in the Originating Notice of Motion, no matter in what form and by whom they are raised, I shall be addressing the issue of jurisdiction in the first, and in the words of Pickford L.J above, "the only correct sense of the expression", i.e., whether or not this Court is vested original jurisdiction to hear and determine the dispute between the Plaintiff and the Defendants as to the subject-matter before us."

In my opinion, the first question to be resolved is whether this Court has jurisdiction in the first and only correct sense referred to in the Hinga Norman case, i.e. whether it can entertain the instant appeal having regard to the subject matter of the said appeal. In other words, does the instant appeal fall

within the category of appeals envisaged by Parliament when it enacted the provision of subsection 7 of section 35 of the Constitution?

However, before setting out to answer the question I have posed I feel obliged to say a few words more about the issue of jurisdiction, as this Court has found itself in the position in the recent past where it had been obliged to strike out important constitutional matters either because it found that it had no jurisdiction to entertain the matter or because its jurisdiction has been improperly invoked.

The first point I wish to make is that absence of jurisdiction in the first sense of the word cited above is not a matter of a mere technicality or procedure. It is a fundamental issue touching on the power of the court to act. Where a court has no jurisdiction to entertain a matter any proceedings and decision given thereon is a nullity no matter how well conducted the proceedings were. Judicial power is inextricably tied up with jurisdiction and justiciabilty. A court can only exercise power to entertain a matter where it has jurisdiction.

In the Nigerian case of Uzouckwu v. HRH Ezeonu II ((1991) 6 NWLR pt 200, p 708 at 758 Nasir PCA put it thus:

"Where a court lacks jurisdiction, that is the end of the matter, and any exercise of power by the court in embarking on a trial will be futile and null. This is because jurisdiction is so radical that it forms the foundation of adjudication."

In another Nigerian case of The State v. Onagoruwa ((1993) 2 NWLR Pt 221, p33 at 48 Uwais, JSC as he then was had this to say:

"The Issue of jurisdiction is fundamental, and its being raised in [p.32] the Course of proceedings cannot be too early nor premature, nor too late. This is because, if there is want of jurisdiction the proceedings of the court will be affected by a fundamental vice and would be a nullity no matter how well conducted the proceedings might otherwise be."

Want of jurisdiction in the proper sense of the word cannot therefore be waived since acquiescence resulting from the other party failing to raise the issue cannot confer jurisdiction.(see Dr. Braithwaite v. Grassroots Democratic Movement [1998] 7 NWLR 307; and Okoro v. Nigerian Army Council [2000] 3 NWLR77.) Indeed, submitting to the jurisdiction of a court is no answer to want of jurisdiction for total want of jurisdiction cannot be cured by the consent of the parties. If the court does not possess an initial jurisdiction over the subject matter, it is not possible that the consent of the parties could confer such jurisdiction. It follows therefore that the issue of want of jurisdiction can properly be raised by the court suo motu.

I now turn to examine the subject matter of the instant appeal with a view to determining whether this Court has jurisdiction to entertain it under the provisions of subsection (7) of section 35 of the Constitution as contended by the appellants. The main grievance of the appellants as I understand it is that the PPRC failed to make the determination it was invited to make by the petitioner. Indeed, this was the gravamen of the first ground of appeal so ably argued by Mr. Fofanah on behalf of the

appellants. From the perspective of the appellants, what gave rise to this appeal was the failure and or refusal of the PPRC to make a determination that the respondents had violated the Constitution, which determination should have triggered action by the PPRC in accordance with the provisions of section 27 (1) of the Political Parties Act, No.3 of 2002 seeking an order from this Court for the cancellation of the registration of the SLPP, the first respondent herein.

To be able to answer this question it is necessary that section 35 (7) of the Constitution be construed so as to ascertain its true meaning and effect.

My first comment is that subsection 7 should not be construed in isolation from the rest of the subsection of section 35. This is so because the right granted by the subsection to an "an aggrieved association" to appeal to the Supreme Court is in relation to a decision of the PPRC made under the said section 35. To be able to take advantage of the right of appeal a prospective appellant must be able to point to a decision taken by the PPRC under one of the subsections of section 35 of the Constitution which had given rise to its grievance. The appellant's Notice of Appeal in the instant appeal is silent on this point. Rather than citing the particular decision which led to their grievance the appellants merely reproduced in the Notice of Appeal [p.33] the entire content of the PPRC's reply to the Petition as being the decision with which they are dissatisfied. This, in my view, does not help the appellants much as the PPRC did not state in its reply whether in making the several assertions contained in its reply to the petition it was acting pursuant to any subsection of section 35 of the Constitution. It is therefore left with this Court to examine the PPRC's reply to the petition to ascertain whether it does in fact constitute a decision under any provision of section 35 of the Constitution within the meaning of subsection (7) of section 35.

It is clear that the provisions of subsections (1) to (4) inclusive of section 35 of the Constitution do not involve the making of any decision by the PPRC. In my opinion, and I so hold, the only subsection of section 35 which involves the making of a decision by the PPRC is subsection 5 which relates to the refusal to have an association registered allowed to operate or to function as a political party if the PPRC was satisfied that—

"(a) membership or leadership of the party is restricted to Member of any particular tribal or ethnic group or religious faith; or

(b) The name, symbol, colour or motto of the party has exclusive or particular significance or connotation to members of any particular tribal or ethnic group or religious faith; or

(c) the party is formed for the sole purpose of securing or advancing the interest and welfare or a particular tribal or ethnic group: Community, geographical area or religious faith; or

(d) the party does not have a registered office in each of the Provincial Headquarter towns and the Western Area".

At this stage, reference ought to be made to subsection (6) of section 35 of the Constitution which' "provides that Parliament "may make laws regulating the registration, functions and operation of

political parties." It is pursuant to this subsection that Parliament did enact the Political Parties, Act No.3 of 2002, sections 16 and 17 of which substantially reproduce the provisions of subsections (5) and (7) of section 35 of the constitution relating to the power of the PPRC to refuse to register an association as a political party for almost the identical reasons as those of subsection 5 of section 35 of the Constitution and the right of an association aggrieved by a decision of the PPRC to appeal to the Supreme Court.

[p.34]

Sections 16 and 17 of the Political Parties Act, No.3 2002, provide as follows:

"16. Pursuant to subsection (5) of section 35 of the Constitution, the Commission shall refuse to register as a political party any association by whatever name called if the Commission is satisfied that—

(a) the membership or leadership of the association—

(i) is restricted to members of any particular tribal or ethnic group or religious faith; or

(ii) includes a non-citizen or a person prohibited from membership or leadership of a political party under the constitution or this Act;

(b) the name, symbol, colour or motto of the association has exclusive or particular significance or connotation to members of any particular tribal or ethnic group or religious faith; or

(c) the association is formed for the sole purpose of securing or advancing the interests and welfare of a particular tribal or ethnic group, community, geographical area or religious faith; or

(d) the association does not have a registered office in each of the provincial headquarters-towns and the Western Area; or

(e) the association concerned has contravened any provision of the Constitution or this act regarding its formation or application for registration as a political party.

"17(1) Any association aggrieved by a decision of the Commission refusing its application for registration may appeal to the Supreme Court made up of three justices whose decision shall be given within thirty days of the hearing or the appeal.

[p.35]

(2) An association may, instead of appealing directly to the Supreme Court under subsection (1), apply to the Commission to reconsider its decision not to register the association as a political party.

(3) If the Commission refuses the application 'made to it under subsection (2) or fails to register the association as a political party within seven days of that application, the association may then appeal to the Supreme Court and subsection (1) shall apply, mutatis mutandis. "

In my view, whereas subsection (7) of section 35 of the Constitution deals with the right of appeal in general terms section 17 of the Political Parties Act, No.3 of 2002 expresses the right in more precise terms.

In view of what I have said above relating to legal effect and meaning of section 35 (7) of the Constitution especially when read together with section 17 of the Political Parties Act, No.3 of 2002, it is my considered view that the appellants do not have a right of appeal to this Court because of any grievance they might have felt as a result of the PPRC's reply to the petition and I so hold.

Inextricably linked with this question of the jurisdiction of this Court to entertain this: appeal pursuant to subsection (7) of section 35 of the Constitution is the question whether the appellants themselves have the legal capacity to exercise the right of appeal granted by the said subsection.

As far as the issue of the legal capacity of the appellants to bring this appeal before this Court is concerned, again, the appellants did raise the issue in paragraphs 21 to 24 inclusive of their case. Counsel for the appellants did make several submissions in the course of his oral arguments contending that both appellants do have capacity to bring the instant appeal.

As far as the first appellant is concerned it was contended by Counsel for the appellants that the PMDC was legally qualified to bring this appeal because it was "an association registered as a political party pursuant to section 12(1) of the Political Parties Act, No.3 of 2002" As to the capacity of the second appellant, the Secretary General of the PMDC it was contended that as Secretary-General of the party he is "an interested party to the Petition, having in fact petitioned the Respondents [sic] herein for and on behalf of the first appellant."

[p.36]

The respondents did not counter or challenge these various contentions in any way whether by way of written submissions in their case and during the oral arguments by their Counsel before this Court.

Before making any pronouncement on this point I think it is necessary to say a few words on the nature and legal effect of the right of appeal granted by subsection (7) of section 35 of the Constitution.

The first thing to note is that the right of appeal we are dealing with here is in the nature of a judicial review of an administrative action. According to the editors of Gamer's Administrative Law (8th edition, at pages 150 to 151), in most cases, the conduct of an administrative body causing a sense of grievance may give rise to one of the ordinary causes of action recognized by the courts. However, in circumstances where the gravamen of the complaint cannot be brought within the terms of one of the ordinary course of action, the citizen may nevertheless have a remedy in the courts in the following situations:

"(a) where [as in the instant case] a statute expressly confers a right of appeal to a named court; or

(b) where the complainant can invoke the inherent supervisory jurisdiction of the High Court to review the conduct of persons or bodies purporting to exercise public functions, to ensure that they remain

within the confines of their legal (usually statutory) powers (intra vires), and do not stray beyond the limits of that authority (ultra vires); and also to ensure that duties owed by them to the public lire' duly performed."

Dealing further with the situation where a right of appeal is granted the editors of Garner's Administrative Law (supra, at p 152) emphasize that rights of appeal

"are creatures of statute; there are no, inherent, common law, rights of appeal. Such conferment by statutes of rights of appeal has not, however, followed any very logical or set pattern. Provision, if any, has been made as has been thought appropriate in each particular instance. Moreover, the incidence of rights to appeal to courts must not be overstated. In many situations where the actions of the administration affect an individual no right of appeal to a court will be provided at all".

Most importantly, for our present purposes, the same learned editors make clear (supra at page 158) that:

"to succeed in any of the various kinds of statutory appeals the appellant must not only be able to satisfy the appropriate court on such points substance as it is the jurisdiction of that court to consider, he must also satisfy any prescribed procedural requirements. The most important of such requirements relate, first, to time limits within which the right of appeal must be exercised, and second, to limitations on the classes of persons eligible to exercise the right of appeal..... As regards standing to sue (locus standi) the point to note is that the intending applicant must be able to satisfy the court that under the terms of the particular statute conferring the right of appeal he is entitled to be an appellant."

Ordinarily, in conferring such a right of appeal the expression used by most statutes to describe the intending appellant is "a person aggrieved" or "a party aggrieved". These expressions have themselves given rise to some difficulty in interpretation with the courts adopting differing approaches over the years, most recently construing the expression most generously. Thus, we may contrast the much quoted statement of James L.J. in Re Sidebotham, ex parte Sidebotham ((1880) 14 Ch.D 458 at 463, C.A.) that:

"It is said that any person aggrieved by an order of the court is entitled to appeal But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something",

(a statement quoted with approval by Salmon J in refusing to entertain the appeal in Buxton v. Minister of Housing and Local Government ([1961] 1 QB 278))

With that of Lord Denning in the Privy Council case of A-G of Gambia v. Njie ([1961] 2 All ER 504 at 511 PC) stating that the definition adopted by James LJ in the Sidebotham case should not be regarded as exhaustive because:

"the words ''Person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include of course a [p.38] mere busybody interfering in things which do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest."

However, the expression that Parliament has used in the case of section 35 (7) of the Constitution and which this Court has to construe in the instant appeal is "an association aggrieved" as opposed to "a person or party aggrieved." First, I shall attempt to construe the word "association". In doing so, this Court must pay heed to the context in which the word is used. In this regard, subsection 8 of section 35 of the Constitution is relevant. The subsection makes reference to two terms "association" and "political party" stating that for the purposes of section 35 of the Constitution the expression "political party means an association registered as a political party as prescribed by subsection (5)."

In my opinion, the legal effect of this definition of a political party is that before registration the group or body of persons seeking registration as prescribed by subsection (5) of section 35 of the Constitution is referred to as an association simpliciter. After registration the association becomes a registered political party and could no longer refer to itself as an association simpliciter. However, where the PPRC refuses to register the association its designation does not change and being aggrieved by the refusal to be registered it could properly refer to itself as "an association aggrieved" for the purposes of the right of appeal conferred by subsection (7) of section 35 of the Constitution.

I am reinforced in this view by the wording of subsection (1) of section 17 of the Political Parties Act, No.3 of 2002 which statute, as I have held earlier, is one enacted j pursuant to the proyisions of section 34 and subsection (6) of section 35 of the Constitution and is a fuller re-enactment of subsection (7) of section 35 of the Constitution that the appellants are relying on for legal capacity to bring the instant appeal. The wording of subsection (1) of section 17 of the political Parties Act, No 3 of 2002 puts it beyond any doubt that the right of appeal granted is limited to an association which has been aggrieved by a decision of the PPRC refusing its application for registration.

The is no doubt that the appellants may be aggrieved by the refusal of the PPRC to act in accordance with their suggestion in their petition to invoke the provisions of section 27(1)(b) of the Political Parties Act, No.3 of 2002 which provides that:

"Without prejudice to any other penalty prescribed by this Act or any other enactment, the Commission may apply to the Supreme Court [p.39] for an order to cancel the registration of any political party where that party has contravened any provision of the Constitution or this Act."

However, this does not give the first appellant a right of appeal to this Court under subsection (7), of section 35 of the Constitution if for no other reason but for the fact that the PMDC, the first appellant herein is a registered political party and not an association. This is, made crystal clear by the assertion to be found at page 2 of the petition that:

"The People’s Movement for Democratic Change (P.M.D. C.) is a registered Political Party in Sierra Leone."

As far as the second: appellant is concerned, an official of the first appellant who does not even purport to act in a representative capacity, by no stretch of imagination could he be considered as an association within the meaning of subsection (7) of section 35 of the Constitution or howsoever otherwise.

As the PMDC is a registered political party and not an association seeking to be registered I hold that it cannot therefore be on an "association aggrieved" within the meaning of section 35(5) and (35(7) of the Constitution.

To sum up, I hold that the expression "association aggrieved" as used in section 35(7) of the Constitution only confers a right of appeal upon a limited group or class of persons and not on any political party or individual who may properly be aggrieved because of the failure of the PPRC to make a determination as requested by the petitioner in the instance case and by the consequent failure or refusal of the PPRC to exercise the power vested in it by section 27(1) (b) of the Political Parties Act, No.3 of 2002.

As I said earlier, such an aggrieved individual or political party may be entitled to seek some other redress or relief from the courts but in my view such redress or relief may not be obtained by way of an appeal direct to this Court and I so hold.

For the above reasons I hold that not only does this Court lack subject-matter jurisdiction to entertain the instant appeal but I also hold that as neither the first appellant nor the second appellant could be described as "an association aggrieved" within the meaning and context of subsection (7) of section 35 of the Constitution they both lack legal capacity to bring the said appeal.

[p.40]

In the circumstances, I have held that this Court lacks jurisdiction to entertain this appeal for the reasons I need not go into the merits or demerits of the several grounds of appeal canvassed by the appellants.

I therefore order that the appeal herein is struck out. I also order that each party is to bear its own costs.

SGD.

JUSTICE DR. ADE RENNER-THOMAS, C.J.

I Agree.

MS. JUSTICE U.H. TEJAN-JALLOH, J.S.C.

I Agree.

MR. JUSTICE G. SEMEGA-JANNEH, J.S.C.

I Agree.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

I Agree.

HON. MR. JUSTICE M.E.T. THOMPSON, J.S.C.

[p.41]

TEJAN-JALLOH J.S.C

The Political Parties Act 2002 was enacted by Parliament on the 21st February 2002 and it is Act No.3 of 2002 amended by the Political Parties (Amendment) Act No.6 of 2002 which was made retrospective on the 21st February 2002. The latter is to confer power on the Commission to enlarge time. However, it is not relevant to the issue before this Court.

It happened that on the 16th day of June 2006, the Interim Secretary-General of the first Appellant I addressed a petition to the Chairman of the Political Parties Registration Commission. Its thrust is the eligibility of Solomon Ekuma Berewa as leader of the Sierra Leone Peoples Party when he holds the office of Vice President of the Republic of Sierra Leone. It cited sections 6(1), 6(2a) and 6(2e), 14 of the Political Parties Act, sections 76(1) and 76(1) (h) of the Constitution of Sierra Leone 1991 — Act No.6 of 1991 in support of the said petition and requested the Commission to determine whether Mr. Solomon Ekuma Berewa had contravened the aforementioned statutory and Constitutional provisions.

In its reply dated 21st July 2006 the Commission advised that qua ordinary citizen Mr, Berewa is qualified to become a Member of Parliament, but while serving as Vice President, he cannot become [p.42] a Member of Parliament it is clear from subsequent events that the appellants were dissatisfied with the reply and intended to test the issued in a Court of law.

It therefore on the 18st of January 2007 filed a Notice of Appeal to the Supreme Court requesting the following reliefs, namely

1. To set aside the decision of the Political Parties Registration and to substitute one in favour of the Appellant/Petitioners and

2. Such further or other relief to be granted to the Appellants/Petitioner — as the justice of case requires.

However, realizing or entertaining some doubt as to the practice and procedure governing the application of such an issue to the supreme court, the appellant/petitioners by a notice of motion dated 25th January 2007 invoked rules 5 (2) of the supreme Court Rules asking for directions from this court as to the practice and procedure of the application. We then ruled by way of practice Direction No. 1 of 2007 that the practice and procedure regarding appeals from court of appeal to the supreme court apply pursuant to section 35(7) of the national constitutional of Sierra Leone Act No. 6 Supreme of 1991 shall be those contained in constitutional instrument No. 1 of 1982 which states as follows

"Any association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final".

It is pertinent to mention that when the notice of motion dated 25th January 2007 was being heard on the 31st January 2007 the attention of the parties was drawn to the Notice of Appeal of 18th January 2007 regarding Practice, direction No.1 of 2007 and the Court ordered that the notice of appeal would be deemed to have been filed on the 31st January, 2007, and in compliance with the Supreme Court Rules.

The Appellants/Petitioners and the Respondents filed their case on the 9th day of March and 4th April, 2007 respectively.

Speaking for myself, the relief sought require the determination of certain preliminary issues. Firstly, the status of the Political Parties Registration Commission. I find from sections 6(1) and 6(2) that its function which word includes its power, primarily are the registration and supervision of the conduct of Political Parties, but it requires that it must be in accordance with the Constitution and this Act. Sections 6(2) (a) as 6(2)(d) provide monitoring the affairs or conduct of the Political Party so as to ensure their compliance with the Constitution and this Act and the mediation of any conflict or disputes by persons or Parties. Secondly, reference in the Act is made to the Constitution in sections 11, 14(1) section 16 and section 27(1)(a). Thirdly, there is an interrelationship between the Supreme Court and the Commision and this can be found in sections 17 and 27 of the Political Parties Act, 2002. Furthermore, there are other functions of the Act of the Commission, which justify its classification as a very important body. Its functions smack of constitutionality and in my opinion rank more than an administrative body. I regard an act of an administrative agency as purely administrative or executive in character, or it may be of a legislative or of a judicial nature. Courts review an administrative Act on a different number of grounds, all of which mayor may not be relevant to the facts on any particular case or within the term of a particular statute. Administrative Act depends on the governmental functions the particular exercise of which the Court is asked to review and provide some remedies certiorari are available only if the function in question is judicial or quasi-judicial. Apart from express statutory provisions review by the Court of a decision of an administrative agency is based on allegation that the agency has acted ultra-vires.

[p.43]

The Supreme Court is an appellate Court and not a reviewing Court and may only review its own decision in exceptional circumstances. In my considered view, I would regard and consider the Commission as a body with attributes greater than that of an administrative agency and for the absence of a better appropriate word will call it an administrative body with quasi-judicial powers in , terms of section 125 of the constitution Act, No.6 of 1991.

Having held that the status of the Political Parties Commission may be likened to that of a quasi-judicial body, it is pertinent at this stage to examine the Political Parties Act 2002 to ascertain whether there is provision for it to entertain the petition of the Appellants/Petitioners. The relevant provision of the Act is in section 6 which reads as follows:

"6(1) the object for which the Commission is established is the Registration and supervision of the conduct of Political Parties in accordance with the Constitution and this Act.

(2) Without prejudice to the generality of subsection (1), it shall be the function of the commission-

(a) To monitor prejudice or conduct of Political Parties so as to ensure their compliance with the constitution this Act and with the terms and conditions of their registration;

(b) To monitor the accountability of Political Parties to their membership and to the electorate of Sierra Leone;

(c) To promote political pluralism and the spirit of constitutionalism among Political Parties;

(d) When approached by persons or parties concerned to mediate any conflict or disputes between or among the leadership of any Political Party or between or among Political Parties; and

(e) to do all such things as well contribute to the attainment of the object stated in subsection (1)".

The petition of the Appelant/Petitioner is the eligibility of Mr. Berewa as leader of the Sierra Leone, Peoples Party while he is vice President of the Republic of Sierra Leone.

It certainly, in my opinion, does not fall within the ambit of section 6 of the Act and therefore the Commission was not competent to offer the advice. It ought to have disabled itself and declined the request. Indeed section 76(1) and 76(1)(h) of the Constitution of Sierra Leone, Act No.6 of 1991 were included in the petition the interpretation and enforcement of the Constitution have received judicial interpretation and is uncalled for in the case before us. The authority for such an interpretation and/or enforcement of the provision of the Constitution is squarely at the door step of the Supreme Court see sections 124 and 127 of the Constitution.

There is express relationship between the Commission and the Supreme Court and they share a common feature in that both are creatures of statute. It follows that the jurisdiction in what ever sense that nomenclature might be based, must be express and in writing.

Thus there is the express right of appeal from the Court of Appeal to this Court and in the absence of express provision the Court cannot by itself assume, confer power or jurisdiction on itself nor can [p.44] parties before it do so to it. This is even so not withstanding the provision to secure protection of the law as is provided in subsections 2 and 3 of section 23 of the Constitution. Access to the Court is a constitutional right which the executive cannot in law abrogate unless it is specifically so permitted by Parliament. On the other hand it is not the responsibility of the Court to update the laws in the country; that secred or sacrosanct responsibility is that of the executive and legislative.

This brings me to the issue as to whether having held that the Appellants/Petitioners cannot use the Political Party Commission, to vindicate whatever rights they may have in their petition, they can invoke the provisions of the Supreme Court if such rights involve the interpretation or enforcement of the constitution, then it is the responsibility of the Supreme Court. But I have already held and still hold that the interpretation or enforcement of the Constitution does not appear to exist in the present appeal.

It appears to me that the relevant constitutional provision that touches and concerns it is subsection 4 of section 35 of the Constitution of Sierra Leone which reads:

"35(4) no Political Party shall have as a leader a person who is not qualified to be elected as Member of Parliament".

Other provisions, although not mentioned in the appeal and which need consideration are sections 16, 17 and also section 27 of the Political Parties Act 2002. Taking them serially, and first section 16 deals with powers of the commission to refuse registration of Political Parties, section 17(1) deals with any association aggrieved by a decision of the Commission refusing its application, such an association may appeal to the Supreme Court. Two observations must be made. Firstly, it is the refusal of registration and secondly the right is that of the association and not a Political Party. Admittedly, this is not defined in the Political Parties Act, but subsection 8 of section 35 of the Constitution makes it abundantly clear i.e. the difference between an association and a Political Party. They are two distinct entities. The first Appellants/Petitioners are a Political Party and not envisaged in subsection 17(1) of the 2002 Act.

Section 17(2) permit an association instead of appeal to the Supreme Court may apply to the Commission to reconsider its decision not to register the association as a Political Party Again the emphasis is on an association as opposed to Political Parties and it is in respect of refusal of registration. Lastly, section 27 of the Act of 2002 deals with cancellation of the registration of any Political Party, whereas by subsection 5 of section 35 of the Constitution or section 16 of the Act of 2002 it is not allowed to operate or continue to operate or function as a Political Party.

I find no legal basis expressly or impliedly to accommodate subsection 4 of section 35 of the Constitution and that subsection 5 of section 35 of the Constitution and sections 16, 17 and 27 of the 2002 Act relate to refusal and/or cancellation of Political Parties. In the circumstance the Supreme Court cannot lawfully adjudicate on the appeal which is not properly before it.

I suspect a lacuna in the law, which cannot be filled by regulation under section 32(1) of the Political Parties Act 2002, the provision reads:

"32(1) the Commission may make such regulation as may appear to it to be necessary or expedient for giving effect of this Act".

On the other hand, Parliament may wish to extend the provision of subsection 6 of section 35 of the Constitution which reads:

"Section 35(6) subject to the provision of this Constitution and in furtherance of the provisions of this section, Parliament may make laws regulating the registration, functions and operations of political Parties".

[p.45]

Section 35 of the Constitution is not an entrenched provision and can be amended without a referendum and may be extended to confer power on the Commission and/or the Supreme Court to hear and determine such issues or matters.

The result is that this Court lacks jurisdiction to determine the appeal. The appeal is accordingly struck out and each party to bear its costs.

SGD.

HON. MS. JUSTICE U.H. TEJAN-JALLOH, JSC

[p.46-47]

SEMEGA-JANNEH J.S.C.

I have had the opportunity of reading in draft the leading Judgment by my learned brother, Ade Renner-Thomas, Chief Justice. I agree with him on the reasoning and conclusions reached on the issues of locus standi of the Appellants and jurisdiction of this Court in respect of the appeal. The appeal relates to significant constitutional issues, and I therefore consider it important and useful to give our individual perspective of the Judgment of this Court.

The Sierra Leone Peoples Party, (S.L.P.P.) at its Party Conference held on the 3rd and 4th September, 2005, at Makeni, on the 4th September, 2005, nominated Mr. Solomon Ekuma Berewa, who was and continues to be the Vice President of the Republic of Sierra Leone, the Party's candidate for the Presidential Elections under Clause VI (b) of its Constitution which reads:

“The party Conference shall nominate a candidate for the Presidential Elections.”

As a consequence, Mr. Berewa became the Leader of the SLPP by virtue of Clause V2c of the Party's Constitution which states:

"There shall be a Presidential Nominee of the Party whose nomination shall be determined at the Party Conference. He shall automatically become the Leader of the Party after such a nomination. He shall be the political head of the party’s and shall at future presidential elections be the party's Presidential candidate with discretion to choose his running mate as his Vice President, in consultation with the National Executive council. He shall up-hold the constitution of the party."

The people's Movement for Democratic Change (P.M.D.C.) by letter of its Secretary General dated Friday 16th June 2006 to the Political Parties Registration [p.48] Commission (P.P.R.G.) petitioned the eligibility of Mr Berewa as Leader of the S.L.P.P. whilst holding the Office of Vice President

The Petition in essence alleged that Mr. Berewa as Vice President of Sierra Leone and at the same time being the Leader and Presidential Nominee of the S.L.P.P. for the forthcoming Presidential Elections contravenes the provisions of the Political Parties Act No.3 of 2007 and the Constitution of Sierra Leone 1991 (Act No.6 of 1991), namely:

Section 14(1) of the Political Parties Act, 2002 (as amended) which provides:

"A Political Party shall not have as a founding member as a Leader of the Party or a member of its executive body, whether, national or otherwise, a person who is not qualified to be elected as a member of Parliament under the Constitution."

Section 35(4) of the Constitution, 1991, provides:—

"No political Party shall have as a Leader a person who is not qualified to be elected as a Member of Parliament."

And Section 76(i) (b) which provides no person shall be qualified for election as a Member of Parliament.

"If he is for the time being the President, the Vice President, a Minister or a Deputy Minister under the provisions of this Constitution"

The determination of the question, in my view, involves interpretation and construction of the relevant statute~ relative to the aforesaid provisions. The question that arises as a result is whether the P.P.R.C. has the jurisdiction (or mandate) to perform such a task. I have carefully perused the Political Parties Act 2002 and find nothing empowering the P.P.R.C. to determine the question or such other questions. This is hardly surprising since, if the contrary were the case, such provisions would be in conflict with Section 124(1) (a) of the Constitution, 1991. For clarity, the whole of Section 124 is reproduced hereunder as follows:—

[p.49]

"124(1) The Supreme Court shall, save as otherwise provided ill Section 122 of this Constitution, have original jurisdiction, to the exclusion of all other Courts—

(a) in all matters relating to the enforcement or interpretation of any provisions of this Constitution and

(b) where any question arises whether an enactment was made in excess of the power conferred upon Parliament or any other authority, or person by law or under the Constitution.

(2) Where any question relating to any matter or question as is referenced to in subsection (1) arises in any proceeding in any court, other than the Supreme Court shall stay the proceedings and refer the question of Law involved to the Supreme Court for determination; and the Court, it which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Clearly, the Constitution, 1991, by the aforesaid Section, gave the Supreme Court the jurisdiction in all matters relating to the enforcement and interpretation of the provisions of the Constitution, 1991, to the exclusion of all other courts — not to speak of bodies that have no judicial or adjudicating powers. In short, the Petition required the P.P.R.C. to perform a task that it has no power in law to perform.

A distinction must be, made between a situation where, as in the instant case, the P.P.R.C. is required to delve into complex issues of interpretation of constitutional and other statutory clauses" Juxtaposing

sections of the Constitution 1991 with sections in the Political Parties Act 2002 to arrive at and give a determination of the constitutional issue in question for all and sundry and a situation where the P.P.R.C., in performing its routine function, has to make a finding of fact or make a decision as to the fact, by which process there is an implicit or explicit expression of a view of the constitutional position.

[p.50]

It is unfortunate; that the language of the Petition is couched in such a manner that required the PPRC to give a determination of the meanings and effect of the cited sections of the Constitution 1991 and the Political Parties Act, 2002, for all. An approach to the P.P.R.C alleging a breach or a contravention of a matter contained in subsection (1)(a)(b) or (c) of Section 27 of the Political Parties Act, 2002, and requesting the PPRC to inquire into the matter and act pursuant to Section 27(1) is appropriate. After a reasonable period elapses and the PPRC takes inappropriate action or fails to act at all, it should be open to the concerned party to consider and decide on what legal step or process if any to take in order to have the P.P.R.C. take appropriate action.

The use of the word "Petitioners" in the title of this appeal, is a clear indication, in my view, that the Appelant's/Petitioners intended, the petition to be understood and taken as in a legal usage.

It is abundantly clear, in my considered view, that the P.P.R.C. is not a court or a tribunal or adjudicating body. The Political Parties Act, 2002, has not clothed the P.P.R.C. with the attributes of a Court Tribunal or adjudicating body.

If the above views are correct, is there a proper basis for the Petition?

For the purpose of dealing with the question posed, let us first examine the establishment and functions of the P.P.R.C.

The Political Parties Act, 2002, was enacted pursuant to Sections 34 and 35 of the Constitution, 1991. The Political Parties Act 2002 gave effect to the intendment of the provisions of Sections 34 and 35 of the Constitution, 1991, by establishing the P.P.R.C and bestowing it With its functions. The functions are broadly stated and are contained in Section 6 of the Political Parties Act 2002 and it provides:—

"6(1) the object for which the Commission is established is for the registraiion and supervision of the conduct of political parties in accordance with the Constitution and this Act.

[p.51]

(2) Without prejudice to the generality of subsection (1) it shall be the function of the Constitution

(a) to monitor the affairs or conduct of political parties so as to ensure their compliance with the Constitution, this Act and with the terms and conditions of their Registration;

(b) to monitor the accountability of political parties to their membership and to the electorate of Sierra Leone;

(c) to promote political pluralism and the spirit of constitutionalism among political parties;

(d) When approached by the persons or parties concerned, to mediate any conflict or disputes between or among the leadership of any political party or between or among political parties; and

(e) to do all such things as will contribute to the attainment of the object started in subsection (1)"

It can be seen from the cited functions above that it is not a function of the P.P.R.C. to determine questions posed, such as that raised by the Petition, which requires it to determine the interpretation of provisions of the Constitution, 1991, which as stated earlier, the Supreme Court has jurisdiction to the exclusion of all other courts in accordance with Section 124(1)(a) of the Constitution, 1991, re-produced above.

The P.P.R.C, on its Part, replied to the Petition by a letter stated 21st July 2006 in these words:

"As an ordinary citizen Solomon Ekuma Berewa is qualified to become a member of Parliament. But while serving as Vice President of the; Republic of Sierra Leone, he cannot become [p.52] a Member of Parliament at the same time.

This is because of the existence of the separation of powers, as no one individual citizen can become a member of any two or three arms of Government simultaneously, that is,

1. The Legislature which comprises the Speaker and Members of Parliament.

2. The Executive comprising the Vice President and Cabinet.

3. The judiciary comprising the Chief Justice and members of Superior Court of Judicature.

Because of the aforementioned the Political Parties Registration Commission of the view that Solomon Ekuma Berewa is qualified to contest for the Office of the Presidency of the Republic of Sierra Leone."

The P.M.D.C and its secretary-General (Appellants herein) being dissatisfied with the above quoted view (or "decision") of the P.P.R.C. appealed to this Court. The Sierra Leone People's Party (S.L.P.P.) and the Chairman were made Respondents in this appeal.

It seems to me this Court has to settle two questions and can only proceed to hear the appeal if both answers are in the affirmative. The questions are as follows:—

1. Has the P.M.O.C. approach to the P.P.R.C. for the determination of the question raised by the Petition any or proper basis in law?

2. Are the Appellants properly before this Court?

It has already been shown that the P.P.R.C. is not competent to determine the question in that it has no jurisdiction to interpret the provisions of the Constitution 1991; original [p.53] Jurisdiction in all matters relating to the enforcement or interpretation of any provisions of the Constitution, 1991, is the exclusive preserve of the Supreme Court by virtue of Section 124(a) of the Constitution,1991.

The written statement of the Appellants case indicates that the Petition was made pursuant to sub sections (1) and 2 of Section 6 of the Political Parties Act 2002 and at the hearing of this appeal on Tuesday the 5th June 2007, in answer to a question from this Court, the Appellants' learned Counsel answered that the basis on which the Petition was brought is Section 6 of the Political Parties Act 2002 which provides the functions of the P.P.R.C. With due respect to learned Counsel, I disagree. In my considered view there is no provision in Section 6 of the Political Parties Act, 2002, that gives the PPR.C. jurisdiction in matters relating to the interpretation of the Constitution, 1991 or provides a basis upon which the P.MD.C. could bring the Petition.

In the circumstances, I am of the view, and I so hold that the answer to the first question is: No.

In respect of the second question, the written statement of the Appellants case at page 11 of the Record, states that "the jurisdiction of the Supreme Court to entertain the Appellants Appeal filed herein is derived from Section 35(7) of the national Constitution .....". Subsection (7) of Section 35 states as follows:

"Any association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall final"

It appears clear to me that the decision referred to must relate to matters arising out of the provisions of Section 35 of the Constitution, 1991. In my considered opinion, Sections 16 and 17 of the Political Parties Act, 2002, are substantially a re-enactment of Section 35 and more specifically subsections (4)(5) and (7) of the Constitution, 1991. For clarity and ease of reference, I hereunder reproduce the section in full. Section 35 of the Constitution is as follows:—

[p.54]

"35(1) Subject to the provisions of this section, political parties may be established to participate in shaping the political will of the people, to disseminate information on political ideas, and social and economic programmes of a national character, and to sponsor candidates for Presidential, Parliamentary or Local Government elections.

(2) The internal organization of a political party shall conform to democratic principles, and its aims, objectives, purposes and programmes shall not contravene, or be inconsistent with, any provisions of this Constitution.

(3) A statement of the sources of income and the audited accounts of a political party, together with a statement of its assets and liabilities, shall be submitted annualy to the Political Parties Registration Commission, but no such account shall be audited by a member of the political party whose account is submitted.

(4) No political party shall have as a leader a person who is not qualified to be elected as a Member of Parliament.

(5) No association, by whatever name called, shall be registered or be allowed to operate or to function as a political party if the Political Parties Registration Commission is satisfied that—

(a) membership or leadership of the party is restricted to rnembers of any particular tribal or ethnic group or religious faith; or

(b) the name, symbol, colours and motto of the party has exclusive or particular significance or connotation to members of any particular tribal or ethnic group or religious faith; or

(c) the party is formed for the sale purpose of securing or advancing the interests and welfare of a particular tribal or ethnic group, [p.55] community, geographical area or religious faith; or

(d) the party does not have a registered office in each of the Provincial Headquarter towns and the Western Area.

(6) Subject to the provisions of this Constitution, and in furtherance of the provisions of this section, Parliament may make laws regulating the registration, functions and operation of political parties.

(7) Any association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final.

(8) For the purposes of this section the express—

"association" includes any body of persons, corporate or incorporate, who agree to act together for any common purpose, or an association formed for any ethnic, social, cultural occupational or religious purpose: and

"political party" means any association registered as a political party as. prescribed by subsection (5)."

And Section 16 of the Political Parties Act, 2002, states:

"16 Pursuant to subsection (5) of Section 35 of the Constitution the Commission shall refuse to register as a political party any association by whatever name if the Commission is satisfied that—

(a) the membership or leadership of the association—

(i) is restricted to members of any particular tribal or ethnic group or religious faith;

or

[p.56]

(ii) includes a non-citizen or a person prohibited from membership or leadership of a political party under the Constitution or this Act;

(b) the name, symbol, colour or motto of the association has exclusive or particular significance or connotation to members of any particular tribal or ethnic group or religious faith; or

(c) the association is formed for the sole purpose of securing or advancing the, interests and welfare of a particular tribal or ethnic group, community, geographical area or religious faith; or

(d) the association does not have a registered office in each of the provincial headquarters - towns and the Western Area; or

(e) the association concerned has contravened any provision of the Constitution or this Act regarding its formation or application for registration as a political party.

Section 17 of the Political Parties Act, 2002, which states as follow—

17.(1) Any association aggrieved by a decision of the Commission Refusing its application for registration may appeal to the Supreme Court made up of three justices whose decision shall be given within thirty days of the hearing of the appeal.

(2) An association may, instead of appealing directly to the Supreme Court under subsection(1), apply to the Commission to reconsider its decision not to register the association as a political party.

(3) If the Commission refuses the application made to it under subsection (2) or fails to register the association as a political party within seven days of that application, the association may [p.57] then appeal to the Supreme Court and subsection (1) shall apply, mutatis mutandis."

deals with appeals against any decision of the P.PR.C refusing an application by an association for registration as' a political party by reason of matters arising out of the provisions of Section 16.

I am of the firm view that a decision by the P.P.R.C. under subsection 7, of Section 35 of the Constitution, 1991, must be confined to a refusal to register an association as a political party, as in Section 16 of the Political Parties Act, 2002, and the aggrieved association may then take action under subsection 7; and de-registration. By virtue of section 17(1) of the Political Parties Act, 2002, only an association that is refused registration can appeal to the Supreme Court against the decision of the P.P.R.C. refusing to register the association. The P.M.D.C. is a political party by registration under the provisions of subsection 12(1) of the Political Parties Act, 2002 and not an association. The Secretary-General who is the 2nd Appellant is simply an individual. Since the terms "political party" and "association" are not defined in the Political Parties Act, 2002, and since sections 16 and 17 are re-enactment of Section 35 of the Constitution, 1991, resort for their respective meaning could be found in subsection (8) of Section 35 of the Constitution, 1991, which states:

"(8) For the purposes of this Section the expression—

"association" includes any body of persons, corporate or incorporate, who agree to act together for any common purpose, or an association formed for any ethnic, social cultural or Religious purpose; and "political party" means any association registered as a political party as prescribed by subsection (5)"

The combined effect, in my view, of these definitions in subsection (8) is that once an association is registered as a political party, it ceases to refer to itself or be referred to as an association Support for

this view can be found in the use and effect of the two respective expression in various sections, in particular, subsections 11 (1), 12(1) and 13 [p.58] (3), section 16 and subsections 18(1) (2) and (4) of the Political Parties Act, 2002. The result is that the Appellants. Respectively, not being an association cannot bring an appeal under section 17 of the Political Parties Act, 2002, or subsection 7 of Section 35 of the Constitution 1991.

However, in the case of cancellation of a registration, the P.P.R.C. would have to apply to the Supreme Court for an order to cancel the registration of any political party under the provisions of Section 27 of the Political Parties Act, 2002, which provides as follows:—

"27 (1) without prejudice to any other penalty prescribed by this Act or any other enactment, the Commission may apply to the Supreme Court for an Order to cancel the Registration of any Political Party where that party;

(a) is by virtue of subsection (5) of section 35 of the Constitution or section 16 not to be allowed to operate or continue to operate or function as a political party;

(b) has contravened any provision of the Constitution or this Act or;

(c) Submits any statement to the Commission, including any declaration made under section 20 or 21, which is false in any material particular.

(2) The Supreme Court shall give its decision on an application under subsection (1) within thirty days of the filing of the application by the Commission.

(3) Where the application for the order under subsection (1) is granted by the Supreme Court, the Commission shall cancel the registration of the political party and thereafter, no person shall—

(a) summon a meeting of members or officers of the political party;

[p.59]

(b) attend or make any person attend a meeting in the capacity of a member or officer of the political party;

(e) publish a notice or advertisement relating to a meeting;

(d) invite persons to support the political party;

(e) make a contribution or loan to funds held or to be held by or for the benefit of the political party or on behalf of the political party; or

(f) give a guarantee in respect of any funds referred /0 in paragraph (e).

(4) Any person who contravenes subsection (3) commits an offence and shall be liable on conviction to fine not exceeding Le.5000,000.00 or to a term of imprisonment not exceeding one year or to both such fine and imprisonment."

It seems to me that provision for an aggrieved political party in respect of a deregistration of the concerned political party by the P.P.R.C. are not provided for in the Political Parties Act 2002 for the simple reason that the P.P.R.C. itself has to apply to the Supreme Court for an order for cancellation of the registration of any political party and can only cancel a political party's registration if the Supreme Court granted an Order to that effect. It can safely be assumed the Supreme Court will grant such an Order only after exhaustive enquiry upon proper basis.

In the same vein, I do not think there is provision in either the Political Parties Act, 2002, or the Constitution, 1991, for an aggrieved party, association or political party, to appeal to the Supreme Court against a refusal (or failure) by the P.P.R.C. to apply to the Supreme Court for the cancellation of the registration of an alleged offending political party pursuant to Section 27(1) of the Political Parties Act, 2002. In the case of refusal (or failure) by the P.P.R.C to apply for cancellation of registration of a political party, any [p.60] party or association of political party should consider and decide what course of action, if any, to take to compel the P.P.R.C. to act pursuant to subsection 27(1) of the Political Parties Act, 2002.

The answer to the second question, in my view, is: No. In the premises, I conclude and hold that this Court has no jurisdiction to hear the appeal and, accordingly, the appeal is hereby struck out.

Parties to bear their respective costs of the proceedings.

SGD.

HON. MR. JUSTICE G.B. SEMEGA-JANNEH

[p.61]

V.A. WRIGHT. JSC:

The Appellants by a petition dated the 16th day of June 2006 address to the Political Parties Registration Commission pursuant to section 6(1)(21) of the Political Parties Act No.3 of 2002 as amended questioned the eligibility of the 1st Respondent to have as its Leader and Presidential Nominee Mr. Solomon [p.62] Ekuma Berewa while he was serving as the Vice President of the Republic of Sierra Leone in contravention of section 14(1) of the Political Parties Act No.3 of 2002 as amended as well as sections 35(4) and 76 (1)(h) of the constitution of Sierra Leone, Act No.6 of 1991.

On the 25th June 2006 the Leader and Presidential, Nominee Mr. Solomon Ekuma Berewa and who is still Vice President responded to the petition by letter. The 2nd Appellant sent a reply to the response of Mr. Solomon Ekuma Berewa.

The Political Parties Commission proceeded to hear the petition in the absence of the Chairman who was out of the country on medical grounds and subsequently delivered its decision on the 21st July 2006 dismissing the petition on the following terms:

"As an ordinary citizen Solomon Ekuma Berewa is qualified to become a Member of Parliament. But while serving as Vice President of the Republic of Sierra Leone, he cannot become a member of Parliament at the same time".

This is so because of the existence of the separation of powers; as no one individual citizen can become a member of any two or all three arms of Government simultaneously, that is:

1.The legislature which comprises the speaker and members of Parliament

2. The Executive comprising the President, Vice President and Cabinet.

[p.63]

3. The Judiciary comprising the Chief Justice and members of the Superior Court of Judicature.

Because of the aforementioned the Political Parties Registration Commission is of the view that Solomon Ekuma Berewa is qualified to contest for the office of the Presidency of the Republic of Sierra Leone.

The Appellant being dissatisfied with the decision appealed under section, 35(7) of the National Constitution to the Supreme Court on the 18th January 2007.

The grounds of appeal are as follows;

1. That in the light of the provision of sections 34, 35, 75, and 76 of the Constitution of Sierra Leone 2992. Act No.6 of 1991 in particular sections 35(4) and 76(1) (h) of the said constitution as well as the provisions of sections 6(1) and (2) (a-e) 14(1) and 27(a) and (b) of the Political Parties Act 2002 Act No.3 of 2002 (as amended) the Political Parties Registration Commission, in its decision of 21st day of July 2006 filed to address the crucial and all important question contained in the Appellants/Petitioner Petition of 16th June 2006 as to "whether in the light of the aforesaid provision of section 14(1) of the Political Parties Act No.3 of 2002 (as amended) and sections 35(4) and 76(1)(h) of the Constitution of Sierra Leone Act No.6 of 1991 Mr. Solomon Ekuma Berewa as vice President of the Republic of Sierra Leone and Leader of [p.64] the Sierra, Leone People's Party (SLPP) is not contravening the aforesaid provision.

2. That notwithstanding the provisions of section 5(3) and (4) of the Political Parties Act 2002 aforesaid the Commission in proceeding to determine the said petition in the absence of the Chairman deprived itself of the Judicial oversight that the Chairman's presence would have brought to bear its decision.

3. That the Political Parties Registration Commission determined the Appellants/Petitioners Petition and reached a decision on it without. A Response from the Respondents.

4. That the aforesaid decision of the Political Parties Registration Commission is against the weight of the petition field by the Appellant/Petitioners.

The reliefs sought from the Supreme Court are;

1.To set aside the decision of the Political Parties Registration Commission for the aforesaid reasons and to substitute one in favour of the Appellant/Petitioners.

2. Such further or other relief to be granted to the Appellants/Petitioners as the justice of the case requires.

On the 31st day of January 2007 the Supreme Court ruled that the instant Appeal be governed by the Rules of the Supreme Court Act No. 1 of 1982 relevant to Civil Appeals from the Court of Appeal to the Supreme Court and that [p.65] for the purposes of compliance with the provision of these rules as far as the, instant appeal is concerned the same shall be deemed to have been filed and duly served on the 31st January 2007.

At the hearing M.P. Fofanah Esq., for the Appellant argued ground 1 and stated that section 35 (7) of the Political Parties Commission Act gives jurisdiction to this court, and that the 2nd Appellant who is secretary general of the 1st Appellant is an interested party to the petition having in fact petitioned the Respondent for an on behalf of the Appellant. He stated that the Appellant had a special interest of which their case will be affected citing Civ.App.SC.2/2005 Samuel Hinga Norman V. Sam a Banya and others unreported and the Nigerian case of Morehbishe and 2 others vs. Lagos State House Assembly (2002) 3 134.

He submitted that both sections 35(4) and 76(h) of the National Constitution should be read together. The product of that joint reading or construction should be further construed together with section 14(1) of the Political Parties Act No.3 of 2002 and section 35(2) of the National Constitution. Also that section 75 should be read subject to the provisions of the section 76 of the National Constitution, including section 76(1) (h) thereof.

On ground 2 Counsel for the Appellant Charles Margai Esq., concluded that notwithstanding the provisions of section 5(3) and (4) of the Political Parties Act 2002 the Commission in proceeding to determine the said Petition in the absence of its Chairman deprived itself of the necessary "Judicial" oversight that the [p.66] Chairman's presence would have brought to bear on its decision. He submitted that the qualification for a Chairman as defined in the Act was not the same as the Acting Chairman and that the decision would have been different had it been given by the chairman.

On ground 3 Counsel for the Appellant said that the Political Parties Registration Commission determined the Appellant's Petitioners' Petition and reached a decision on it without a response from the Respondents. He submitted that the purported response from "Solomon Ekuma Berewa was contained in a letter 28th June 2006 written on the letter head of the Vice President and signed as Vice President and Leader of the SLPP.

On ground 4 he said that the decision of the Political Parties Registration Commission was; against the weight of the Petition filed by the Appellants/Petitioners. "

Counsel for the Respondents on ground 1 stated that Solomon Ekuma Berewa is qualified to be a member of Parliament in accordance with section 75 of the Constitution Act No.6 of 1991 and Leader of

the Party and does not in any way offend Section 76(1)(h). He reiterated that the limitation alleged by the Appellants on the office of President, if intended to be part of the Constitution would have expressly stated as part of section 46 alongside subsection (2) of that section which states the office which the President must "relinquish or vacate" upon his election. Also that section 76(1) (h) of the Constitution could not have been intended to operate as a general disqualification provision since [p.67] the function is contained in the conditions of qualification under section 75 of the constitution. Therefore the person referred to in section 35 is not determined by section 76(1)(h) but rather by section 75.

Counsel for the Respondent in reply said that ground 2 was without merit. On ground 3 Counsel for the Respondent said that the Respondent were not obliged to respond and that the Political Parties Commission could have given their decision without any response from the Respondent.

On ground 4 he adopted the arguments on ground 1 & 3 and that the petition was based on the erroneous interpretation given to section 76(1)(h).

Since the question of jurisdiction was never raised by Counsel for the appellants, the Chief Justice the presiding Justice posed several questions to Counsel on both sides on the question of whether this court had jurisdiction to hear this matter. Charles Margai Counsel for the Appellants stated that he relied on the Appellants case, and what was said at the hearing.

Having listened to the arguments of the case on both sides the first question posed in my mind is whether the Political Parties Commission as established by Statute the Political Parties" Registration Act No.3 of 2002 referred to in section 34(1) of the Constitution is a tribunal or a quasi tribunal. The meaning of a Tribunal was defined in Garner's Administrative Law page 375 as any statutory body which comprises most of the following characteristics.

(i) It is independent of the administration and decides cases impartially as between the parties to it. This feature serves to distinguish "The tribunal remedy" [p.68] from what that of the internal administrative review" of a decision which, may sometimes be offered by a department.

(ii) It reaches a binding decision in relation to the case heard. This serves to distinguish tribunals from inquiries.

(iii) Its decision will usually be reached by a "panel" or bench of tribunal Member is rather than a one adjudicator.

(iv) It will adopt a procure akin to rather simpler and, more flexible than, that of a Court of law.

(v) It will have a permanent existence the tribunal have been established specifically to deal with a particular type of case or with a number of closely related types of case. See Garner's Administrative Law page 375.

The powers given to the Political Parties Commission are contained in section 12, 16, 17 and 27 of the Political Parties Act No.3 of 2002 (as amended). Section 12 reads:

Subject to sections (2) and (3) on the expiration of sixty days after the Date of the publication of the Government Notice referred to in sub Section (3) of section 11, the Commission shall if satisfied that all the provisions of the Constitution and this Act with respect to registration have been complied with, register the association as a political party.

(2) Where within sixty days period referred to in subsection (1) any [p.69] Objection has been brought to the notice of the commission it shall not register the association until the objection has been disposed of sot of the satisfaction of the commission.

(3) If (a) The Commission upholds the objection referred to in subsection (2) or

(b) Enquiries made under subsection (5) of section 11 disclose that any of the particulars submitted with the application for registration is false or incorrect for the commission shall refuse to register the association and cancel the provisional certificate issued to the association under subsection (3) of section 11.

(4) The commission shall upon registering an association as a political party issued to that association a final certificate of registration which shall be evidence that the provisions of the Constitution and this Act with respect to registration have been complied with.

(5) No Political Party shall organize or hold any public meeting unless it has been issued with the final certificate of registration by the Commission under subsection (4).

Section 16 reads:

[p.70]

"Pursuant to subsection (5) of section 35 of the constitution the commission shall refuse to register 'as a political party an association by whatever name called if the commission is satisfied that:

(a) The membership or leadership of the association:

(i) is restricted to members of any particular tribal or ethnic group or religious faith or

(ii) includes a non-citizen or a person prohibited from membership or leadership of a political party under the constitution of this Act.

(b) The name, symbol, colour or motto of the association has exclusive or particular significance or connection to members of any particular tribal or ethnic group or religious faith or the association is formed for the sole purpose of securing or advancing the interest and welfare of a particular tribal or ethnic group, community, Geographical area or religious faith or

(c) the association does not have a registered office in each of the provincial headquarters towns and the western area or

(d) the association concerned has contravened any provision of the Constitution or Act regarding its formation or application for Registration as a political party".

Section 17 reads

"Any association aggrieved by a decision of the commission refusing its [p.71] Application for registration may appeal to the Supreme Court made up of three justices whose decision shall be given within thirty days of the hearing of the appeal.

Section 27 reads:

Without prejudice to any other penalty prescribed by this Act or any other Enhancement the Commission may apply to the Supreme Court for an order to cancel the registration of any Political Party where that party;

(a) is virtue of subsection (5) of section 35 of the constitution or section 16 not be allowed to operate or continue to operate or function as a Political Party.

(b) has contravened any provision of the Constitution or this Act or

(c) submits any statement to the Commission including any declaration made under section 20 or 21, which is false in any material particular.

Reading these above sections 12, 16, 17 and 27 together I am of the opinion the political Parties Commission is a quasi tribunal.

The Political Party Registration Commission can be subject to a judicial review. When a statute confers jurisdiction for "Powers" on an agency to be executable in certain defined circumstances questions of law can arise as to actual conditions [p.72] i.e. interpretation of the statute and questions of fact may also arise whether those factual preconditions exist. Jurisdictional questions must be determined.

The Supreme Court has original jurisdiction to grant reliefs under sections 122(1), section 124(1), 127(1), 127(2) and 171(16) of the Constitution of Sierra Leone Act No.2 of 1961.

Let me turn my mind as to whether this court has jurisdiction to hear this matter under section 35 (7) of the National Constitution as stated in the case for the Appellants. The Appellants contended that the Political Parties Registration Commission did not give a determination on the matter. As far as, the Political Parties Commission are concerned they never gave a decision on the points raised in the petition by the Appellants. In reality looking at the petition could the Political Parties Commission give a decision legally on all the points raised? Since I am not going into the merits of the appeal I will not make any pronouncement on this point. The Appellants are asking this court to cancel the registration of the SLPP the Respondents herein by an appeal to this court.

Challenging on jurisdictional grounds is where a statute has conferred a power not "at large" but rather to be exercisable only in certain defined circumstances. The meaning of jurisdiction has been defined in many authorities see SC.No.2/2005 Samuel Hinga Norman and Sama Banya [p.73] and others and the SLPP dated 31st August 2005 unreported. In re. Moshiehene of Kumasi Abdulrahman Abubaki 1 Ghana Law Report 1999 2000 p. 189 Acquah JSC. Said: "an Application for a review founded on want of

jurisdiction is obviously one falling within the ambit of exceptional Circumstances resulting in a miscarriage of justice. For jurisdiction is so fundamental in the adjudication of any dispute that whenever it is that an adjudicating authority had no jurisdiction in the matter it purported to determine, its proceedings and judgment can be quashed.

Section 35(7) of the Political Parties Registration Act 3 of 2002 states "any association aggrieved by the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision shall be final The act goes on to define association and political party. As I earlier said the Political Parties Registration Commission did not give a decision on all the points raised and the appeal to the Supreme Court by the Appellants never stated the precise grievance they were complaining about and section 35(5) of the Constitution does not help the Appellants in my view. It is my submission that section 35 (7) and section 17 of the Political Parties Act No.3 of 2002 be read together where a clear distinction could be found! Section 17 already referred to states that a person aggrieved by a decision of the commission refusing its application for registration may [p.74] appeal to the Supreme Court; made up of three Justices. The Appellant could not have come under this section since five Justices sat on the matter. From the legal definition of a political party section 35 subsection 8 of the Constitution of Sierra Leone defines "association" includes any body of persons corporate or incorporate, who agree to act together for any common purpose, or an association formed for any ethic, social, cultural occupational or religious purpose and "Political Party" means an association registered as a political party as prescribed by subsection 5. A Political Party is an association before registration and becomes a Political Party after registration and this ceases to bear according to the interpretation of section 35(5) of the National Constitution. On refusal this is buttressed by section 11 (1) 12(1) and 3, section 16 and 18(1) (2) and (4) of the Political Parties Act. On the failure of Commission to register the association to become a political party, then that association could be seen as "an association aggrieved for the purpose of the right to appeal by subsection 7 of section 35. The Appellants in this case cannot be an aggrieved party, since they had become a political party after registration. When this section 35(7) is raised together with section 17 of the Political parties Act it is seen clearly, that it is limited to an association which has been aggrieved by a decision of the PPRC refusing application for registration. Neither the first or second Appellant is deemed to be an association within the meaning of [p.75] section 35(7) of the Constitution and therefore could not avail themselves under this provision.

Learned Counsel for the appellants in their case and arguments stated that they had the legal capacity to bring this action, because it was an association registered as a political party pursuant to section 12 of the political parties. Act No.3 of 2002 and that the 2nd Appellant was an interested parties to the petition having petitioned the Respondents for and on behalf of the 1st Appellant. It is worthy to note that the respondents were silent on this issue throughout the proceedings.

It is obvious' that both the 1st and 2nd Appellant lacked legal capacity to sue under the provisions since they came to the Supreme Court not as association aggrieved within the meaning of section 35(7) of the constitution but as a political party.

The Appellants could not even invoke section 27(1)(b) of the Political Parties Act No. 3 of 2002 since it is the Commission who could apply to the Supreme Court for an order to cancel the registration of any political where that party has contravened any provision of the Constitution.

I also hold that section 35(7) confers a right of appeal on a class of persons, and that the Appellants could not come directly to this court by way of appeal.

[p.76]

In the circumstances I hold that this court lacks jurisdiction to entertain this appeal and therefore cannot go into the merits of this case.

The appeal is struck out.

No order as to costs.

SGD.

WRIGHT, JSC.

[p.77-78]

TOLLA THOMPSON J.S.C.

I have had the opportunity of reading the judgment of my Lord the Chief Justice and my learned brothers and sisters. I concur in their reason and conclusion. I will merely add my own view and treat the matter this way which I think is supplementary to what they had said.

This appeal is against the "decision" of the Political Party Registration commission: which I shall call for the purpose of this judgment "the commission" given on the 21st July 2006. Pursuant to a petition brought before the commission, by the appellant on the 16th June 2006.

Brief Background

The 1st appellant is a political party registered by the commission as the People's Movement for Democratic Change PMDC on the 16th June 2006 1st appellant through the 2nd appellant petitioned the commission pursuant to sections 6(1) (2a) (2e), 14(1) 27(1) of the Political Parties Act No 3 of 2002 (as amended) which I shall call for the purposes of this judgment the Act and sec.35(4) and 76(1)(11) of the Constitution 1991 Act No. 6 of 1991 which again I shall call for the purposes of this judgment the Constitution) about the eligibility of Mr. Solomon Ekuma Berewa as leader of the Sierra Leone People’s Party whilst holding the office of the Vice President of the Republic of Sierra Leone.

The respondent also is a political party, registered political party under the name and title Sierra Leone Peoples Party (SLPP). On the 14th September 2005 the respondent held a convention in Makeni in which the Vice President Mr. Solomon Ekuma Berewa was elected leader and presidential candidate of the said party.

It seems to me that it was the election of the vice President as leader of the SLPP which precipitated the appellant petition to the commission. The petition was on these lines:

The Chairman

Political Party Registration commission

C/o Roxy Buildings

Walpole Street

Freetown

Dear Mr. Chairman

Re: Petitioning under sec. 611(2a), (2e), 14(1) and 27(1) of the Political Parties Act No. 3 of

2003 (as amended) and sec 35(4) and 76 l(h) of Act No. 6 of 1991

On behalf of the People's Movement for Democratic Change I hereby petition the illegibility of Mr. Solomon Ekuma Berewa as leader of the Sierra Leone Peoples Part whilst holding the office of Vice President of the Republic of Sierra Leone.

Sect 6 (1) of the Act No. 3 of 2002 as amended provides the object for which the constitution is established is the registration and supervision of the conduct of political parties in accordance with the constitution and this Act.

Sec 6 (2) provides without prejudice to the generality of sub section (1) it shall be the function of the Constitution

[p.79]

(a) to monitor the affairs or conduct of political parties so as to ensure their compliance with the constitution, the Act and with the terms and conditions of their registration

(b) to do all such things as well contribute to the attainment of the object stated in sub section (1)

sec 14(1) of the Political Parties Act No. 3 of 2002 as amended provides:

a political party shall not have as a founding member or as a leader of the party or a member of the executive body whether national or otherwise; a person who is not qualified; to be elected as a member of parliament under the Constitution

sec 35 (4) of the Constitution of Sierra Leone Act No. 6 of 1991 provides:

"no political party shall have as a leader a person who is not qualified to be elected as a member of parliament"

76 (1) of the Constitution of Sierra Leone Act No. 6 of 1991 provides:

No person shall be qualified for election as a member of parliament.

Sec 76 (1) (h)

If he is for time being the president, vice president, a minister or a deputy minister under the provision of this Constitution.

The Sierra Leone Peoples Party (SLPP) is a registered political party in Sierra Leone.

The Peoples Movement for Democratic Change (PMDC) is a registered political party in Sierra Leone.

The leader of the Sierra Leone Peoples Party is Mr. Solomon Ekuma Berewa who incidentally is the Vice President of the Republic of Sierra Leone and was such when on the 4th September 2005 he was elected leader of the said party at a convention held in Makeni.

The petition seeks to have determined whether in the light of the aforesaid provisions of sec. 14 (1) of the Political Parties Act No. 3 0[2002 (as amended and sec. 35 (4) and 76 (1) (h) of the constitution of Sierra Leone Act No. 6 of 1991, Mr. Solomon Ekuma Berewa as vice President of the Republic of Sierra Leone and leader of the Sierra Leone Peoples Party (SLPP) is not contravening the aforementioned provisions

It is further submitted that the answer to the preceding paragraph is in the affirmative then you petitioner request that immediate steps be taken to invoke the provision of section 27 (I) (b) of Act No. 3 of 2002 as amended in conformity with the spirit and intendment of sec. 6 (1) (2) (a) and (2) (e) of the said Act.

Sec. 27 (1) (1) of Act No. 3 of 2002 as amended provides without prejudice to any other penalty prescribed by the Act o/any other enactment the commission may apply to the Supreme Court for an order to cancel the registration of any political party where that party has contravene any provision of the constitution or the Act.

Yours faithfully

Ansu B. Lansana

Interim Secretary-Ceneral (PMDC)

[p.780]

It is obvious that Appellant was bringing to the notice of the Commission the purported violation of the Constitution and the act, and was asking the Commission to invoke its powers.

Based on this petition, the Commission gave a decision which is the subject of the appeal before us. I shall hereunder reproduce the decision and I quote:

"As an ordinary citizen Solomon Ekuma Berewa is qualified to become a member of parliament but while serving as Vice President of the Republic of Sierra Leone he cannot become a member of parliament at the same time".

This is so because of the existence of the separation of powers as no one individual citizen can become a member of two or all three arms of government simultaneously that is:

1. The Legislature which comprise the Speaker and Members of Parliament

4. The Executive comprising the President, Vice President and the Cabinet

5. The Judiciary comprising the Chief Justice and Members of the Superior Court of Judicature.

Because of the aforementioned, the Political Parties Registration Commission is of the view that Solomon Ekuma Berewa is qualified to contest for the office of the Presidency of the Republic of Sierra Leone."

The Appeal

It was the above decision of the Commission that precipitated the appeal to this court by the 1st and 2nd Appellants.

Particulars of misdirection and error of law respectively

1. That the commission erred in considering Mr. Solomon Ekuma Berewa response dated 28th June 2006 purportedly made in response to the appellant/petitions dated 16th June 2006 was a response to the respondents.

2. That the commission in its deliberation and hence decision failed to appreciate that sec. 75 of the Constitution of Sierra Leone 1991 Act No. 6 1991 aforesaid should have been read subject to sec 76 (1) (h) of the said Constitution.

3. That the commission in its deliberation and conclusion misconceived the spirit and intent of sec. 76 (1) (h) of the said Constitution.

Grounds of appeal

1. That in the light of sec. 34, 35, and 76 of the Constitution of Sierra Leone 1991 Act No. 6 of 1991 in particular section 35 (4) 76(1) (h) of the said constitution as well as the provision of sec. 6(1) and (2) (a-e) 14 (1) and 27 1(a) and (b) of the Political Parties act 2002 Act. No. 3 of 2002 as amended the Political Parties Registration Commission in its decision of the 21st day of July 2006 failed to address the crucial and all important question contained in the appellant/petitioners petition of the 16th June 2006: as to whether in the light of the aforesaid provisions of sec. 14 (1) of the Political Parties Act No, 3 of 2002 (as amended) and 35 (4) and 76 (1) (h) of the Constitution, of Sierra Leone Act. No. 6 of 1991. Mr. Solomon Ekuma Berewa as vice President of the Republic of Sierra Leone and leader of the Sierra Leone Peoples Party (SLPP) is not contravening the aforementioned provision.

2. Notwithstanding of sec 5 (3) and (4) of the Political Parties Act 2002 aforesaid the commission in proceeding to determine the said petition in the absence of its [p.81] Chairman deprived itself of the necessary judicial oversight that the chairman's presence would have brought to beer on its decision

3. That the political Parties Registration Commission determined the appellant/petitioner petition and reached a decision on it without a response from the respondents.

4. That the aforesaid; decision of the Political Parties Registration Commission is against the weight of the petition filed by the appellant/petitions.

Reliefs sought from the Supreme Court are:

1. To set aside the decision of the Political Parties Registration commission for the aforesaid reason and to substitute one in favour of the appellant/petitions

2. Such further or other relief to be granted as the justice of the case requires.

I note by the petition, the appellant is calling on the Commission to interpret the Constitution, as in my view there cannot be any determination of the issue without interpretation of the Constitution which will set the Commission at collusion course with the Supreme Court — whose function it is to interpret the Constitution — Sec 124 of the Constitution.

General powers of the Supreme court to entertain an appeal is spelt out in sec. 123 (1) and (2) of the constitution and rule 6(1) of the Supreme Court Rules 1982 P.N. No. 1 of 1982.

Sec. 123 (1) states:

An appeal shall lie from the judgment decree or order of the Court of Appeal to the Supreme Court:

(a) As alright in any civil cause or matter

(b) As of right in any criminal cause or matter in respect of which a n appeal has been brought to the court of Appeal from a judgment decree or order of the High Court of Justice in the exercise of its original jurisdiction

(c) With leave of the Court of Appeal in any criminal course or matter where the Court of appeal is satisfied that the case involves a substantial question of law or it is of public importance

Also: In pursuance of rule 5 (2) of the Supreme Court Rules the Supreme Court prescribed by means of practice direction No 1 of 1007 the practice and procedure applicable to this appeal and in order to comply with the Supreme Court rules the appeal is deemed to have been filed on the 31st January 2007 instead of 18th January 2007. However the appeal herein is by Notice filed in pursuant of Sec. 35(7) of the Constitution and the appellant has asked the Supreme Court to exercise to reverse the decision of the Commission.

This appeal however the notice filed is in pursuant to sec. 35 subsection 7 of the Constitution with respect to the activities, supervision and control of political parties sec. 35 (6) of the Constitution was enacted.

Sec. 35(6) enacts thus

"subject to this provision of the constitution and in furtherance of the provision of this section, parliament may make laws regulating the registration function and operation of political parties"

[p.82]

I will not be wrong to say that in consequence of the provision above the Political Pal1ies Act No. 3 of 2002 was belatedly enacted. The title of the Act is as follows:

"Being an act to establish the Political Parties Registration commission for the registration and regulation of the conduct of political parties in accordance with sec. 34 and 35 of the Constitution and to provide for related matters".

JURISDICTION/LEGAL CAPACITY

The Supreme Court by this appeal has been asked to exercise its appellate jurisdiction — the power vested in the Supreme Court to correct the legal errors of the commission if there is one and if possible to reverse the decision accordingly. However before addressing the issues in the appeal, there are serious preliminary points which call for this courts attention.

The appellants in their case at page 11 of the record contend that the Supreme Court has jurisdiction to entertain this appeal and that the appellant appeal is derived from sec 35 (7) of the constitution. Mr. Fofana, learned counsel for the appellant submitted that the commission failed to address their complaint and as the Supreme Court has the jurisdiction to hear the appeal they have come to seek redress.

As I said in the case of Hinga Norman v. Sierra Leone Peoples Party (SLPP) and others Se. 2/2005 that "with reference to a country's judicial system jurisdiction simply means the authority which the court has within that system to decide on matters litigated before it. It is usually conferred by the constitution of that country or statute. Therefore if a constitution of a country states that court has no jurisdiction in certain matters; it is impossible for it to assume jurisdiction". In my humble opinion the principle of law holds good and it makes no difference whether the court sits on a matter in its original or appellate jurisdiction.

It is usually the case that when a court is confronted with litigation it is of the ought most importance, for the court to ascertain whether it has the jurisdiction to entertain the suit — see Central Bank of Nigeria v. Barclays Bank 1976: 6sc 179 page188. However a court ought not to decline jurisdiction in a specific case if in doing so it will defeat the purpose for which it was set up, provided in the circumstance of the specific case its assumption of jurisdiction does not amount to a violation of its jurisdiction, but

can rather be logically deduced as a necessary adjunct of the jurisdiction under which it operates. I hasten to add here that this does not apply to this case under my pen.

The point on jurisdiction will not be complete if no mention is made of competence, of the court as jurisdiction is in some cases inextricable linked with competence of the court. Indeed in the opinion of some jurist the two are sometimes interchangeable. In Adeigbe v. Kinshino 1965 a ALL N.L.R. 249 the Supreme Court of Nigeria inter alia held "that a court is competent when it has lawful authority to hear and determine the proceedings before it"

The appellant in its case dealing with locus standi contends that they are legally qualified to petition the respondent herein as well as appeal against the decision of commission on the grounds stated in their notice of appeal; by virtue of the fact that the 1st appellant is an association registered as a political party pursuant to sec. 12 of the Act and was presented with a final certificate. Mr. Fofana in his submission said the 1st appellant is a political party registered under sec.2 (1) of the Act. The 2nd appellant is the secretary general of the 1st appellant and has a special interest in the petition.

[p.83]

Since the issue of locus standi-legal capacity to some extent is linked with the court jurisdiction to entertain the matter it follows therefore that if the appellant in this case has no locus standi to come before us this court will have no jurisdiction to entertain the matter.

What then should be the outcome of a matter whenever the twin juggernaut plea of jurisdiction and capacity is successfully raised in the lower or in the appeal court by the defendant/respondent or the court suo motu?

Buraimoh Oloriode and Lothers vs Simeon Oyebe & others 1984 Sc. I and RTEAN V NURTN 1992 NWLR 381 AT 391 are instructive on this point.

In Buraimoh Oloriode and others v Simeon Oyebi and others supra the Supreme Court of Nigeria held that where a Plaintiff has no locus standi the action should be struck out and not be dismissed since the action has not been tried. And in RTEAN V NURTN supra. The Supreme Court stated the reason for striking out instead of dismissing such an action. The court said:—

"When a court hold that a plaintiff has no locus standi in respect of a claim the consequential orders to be made is striking out of such claim and not a dismissal of the claim. The rational is that the holding that a plaintiff has no locus 'standi goes to the jurisdiction of the court before which such an action is brought when the question that the plaintiff has no locus standi to institute an action arises, all that is being said in effect is that the court before which such an action is brought cannot entertain the adjudication of such an action. The court cannot dismiss the merit of which it is not competent to enquire into.

A dismissal presumes that the court looked into the claim and found it wanting on merit. But it can only so look into the claim if the claim falls within the court jurisdiction.

A dismissal postulates that the action was properly constituted."

ISSUES

I shall now go in to consider whether this court has jurisdiction to hear the appeal pursuant to Sec. 35 (7) in view of the capacity of the Appellants.

Let me say the issue before the court does not touch or fall under section 16 and 17 of the Act as both sections concern the refusal of registration of an Association to register as a political party.

A political pal1y cannot invoke sec. 12 of the Act to register and by extension a political party cannot avail itself of the provisions under sec. 16 and 17 of the Act. It will not be out of place if I say a little about this. There is no dispute or disagreement the 1st Appellant — People Movement for Democratic Change is a political party registered pursuant to Sec.12 of the Act. Indeed the 2nd Appellant in the Petition to the Commission stated that the 1st Appellant is a political party. There is also no dispute that the Commission was established for "registration and regulation of the conduct of political parties" in accordance with section 34 or 35 of the Constitution: the 1st Appellant is one of such parties. I dare say 1st Appellant was right to petition the Commission on the purported infraction of the Constitution by the Respondent. Before I continue let me digress a little and say a few words about the Commission as an administrative body. Much play has been made of tile function and powers of the Commission. I therefore pose the question whether it has got authority to act within the legal frame work of the Constitution or is it a mere administrative body as a watch dog so to speak over the activities of political parties? The short title of the Act is to establish the Commission to register and regulate the conduct of political parties. The object is enacted under 6 (i) as follows:—

"The object for which the Commission is established is for the Registration and supervision of the political parties in accordance with the constitution"

and Sec. 6 (2) went, on to state the function of the Commission, which are:—

(a) To monitor the affairs or conduct of the parties so as to ensure their compliance with the Constitution.

(b) To monitor the accountability of political parties to their membership and electorate of Sierra Leone

(c) To promote political pluralism and the spirit of constitutionalism among political parties.

(d) When approached by the persons or party concerned to mediate any conflict or dispute between or among the leadership of any political party or between or among political parties.

(e) To do all such things as will contribute to the attainment of the object stated in sub Section 1.

It seems to me that from the title, object and function, the Commission cannot be looked upon as a decision making entity as it does not possess the requisite authority; it is not a judicial or quasi judicial tribinal, if anything it is an administrative body charged with the responsibility to supervise, monitor and control the activities of political parties.

Section 11 makes it mandatory for an Association wishing to function as a political party to apply to the Commission for Registration. If the Commission is satisfied with the Association, the Association will then be registered after sixty days as a political party. As evidence of registration a certificate will be issued to the new political party. See Sec. 12 of the Act.

Sometimes the Commission can refuse to register — and the reasons for such refusal is contained in Sec. 16 of the Act.

It states:—

Pursuant to sub section 5 of Sec. 35 of the Commission shall refuse to register as a political party if the association by whatever name called if the Commission is satisfied that

(a) The membership or leadership of the association

(i) is restricted to members of any party, tribal ethnic group or religion or

(ii) includes a non citizen or a person prohibited from membership or leadership of a political party under the constitution or this Act;

[p.85]

(b) The name, symbol, colour or motto of an association has exclusive or partly Significant or connotation to member of any particular tribe or ethnic group or religious faith

(c) The Association is formed for the sole purpose of securing or advancing the interest and welfare of a political tribal or ethnic group, community, geographical area or religious faith;

(d) The Association does not have a registered office in each of the Provincial Headquarter towns in the Western Area or

(e) The association concerned has contravened any provision of the constitution of the Act regarding its formation or application for registration.

On a close scrutiny of section 35 (5) of the Constitution it is plain and clear to me that Section 16 and 17 of the Act is a reinvention or carbon copy of section 35 (5) of the Constitution.

Under Section 17 an Association which has been refused registration of the provision under Sec. 16: May appeal to the Supreme Court pursuant to Sec. 17 sub section 1. It states:

"Any Association aggrieved by the decisions of the Commission refusing its application for registration may appeal to the Supreme Court made up of three Judges whose decision shall be given within 30 days of the hearing of the appeal."

This is a provision by which an association can appeal against the refusal of the Commission to register a political party it has no relevance to any other infraction of the act.

The main issue concerns section 35 (7) of the Constitution which I think is the pivot of the appeal.

The vehicle by which the appellant has invoke our jurisdiction to entertain the appeal. The appellant says that the Commission has failed to address its complaint about an infraction of the Constitution — To be precise the eligibility of the Vice President Mr. Solomon Berewa Vice President of the Republic of Sierra Leone leader of the S.L.P.P. and want to determine such eligibility in the affirmative. It urges the Commission to apply to the Supreme Court for an Order to cancel the certificate of the Respondent. The Commission failed to act accordingly. That is why the appeal is before us.

Sec. 35 (7) states:—

"Any association aggrieved by the decision of the Political Party Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final."

Section 35 (8) states:—

"For the purposes of this section the expression Association include anybody of person corporate or incorporate who agree to act together for any common purpose or an association formed for any ethnic, social, cultural occupational or religious purpose and "political party means by association registered [p.86] as a political party as prescribed by sub section 5."

I note a Political party carries the same meaning both in the act and the Constitution. See Section 1 of the Interpretation Section of the Act and Section 35 (8) an interpretation section for the purposes of sec. 35. The indication here is that a political party has to be an association before registration and on registration it becomes a political party. This same process applies to section 18 of the Act. On merging the political parties revert to an association and on registration it becomes a political party once more.

At the latter stage of the proceedings Mr. C. F. Margai learned Counsel for the Appellants in his usual eloquent forceful and yet jocular style was adamant in his submission that section 35 (7) sub section 7 is the right vehicle, by which to ground this appeal: My reaction to this submission is that learned counsel will want the court to invoke logic to accommodate the appellant under sec. 35 subsection 7 and say if the association includes corporate or incorporate body or person and that political party means an association, then a political party will mean corporate and incorporate body. With the greatest respect I cannot accord that intention to the legislature. Plainly and succinctly political party means an association after registration under sec. 12 of the act.

The Association appealing under this section must be aggrieved by the decision of the Commission. Does the Appellant fall into the category of aggrieved association? But first let me caution myself that in interpreting the expression an "aggrieved association" I should not put any interpretation on it that would work injustice, hardship or inconvenience unless it is clear that such was the intention of the legislature.

In a dictionary of legal terms the expression "aggrieved party means one who has been injured or has suffered a loss, a person aggrieved by a judgment, decision or decree whenever it operates prejudicially and directly upon her property monetary or personal right and it is used almost exclusive in a legal

context". — The meaning will be clearer if I refer to the dictum of Lord lames in Re Sidebottom exparte Sidebottom 1880 14 Ch P.459. He put it this way..... "That a man aggrieved means "a man who had suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something."

I am incline to adopt Lord lames definition and apply it to an aggrieved association with the context of sec.35 (5).

CONCLUSION

In view of what I have said I do not think that the Appellant can avail itself of the provision of sec. 35(7) to appeal to this court. This provision is exclusively applicable to an aggrieved association which presupposes that the association has not yet been registered as a political pasty under sec.12 of the Act. In any case I do not consider the appellant an aggrieved association — It does not fall within such category as it is not qualified under section 35 (7) to be so described."

With regard to sec. 27(1) of the Act I agree that the appellant can urge the Commission to invoke the above section; that is, if the Appellant comes properly before the Commission on matters contained in the fact, the Commission may apply to the Supreme Court. But if the Commission fails or refuses to apply to the Supreme Court the Appellant cannot seek redress by way of appeal to Supreme Court. The application to the Supreme Court under sec.27 (1) of the Act is the preserve of the Commission.

[p.87]

In the result I hold that this court has no jurisdiction to entertain this appeal brought by the Appellant. The appeal is struck out.

No order as to cost.

SGD.

HON. MR. JUSTICE M.E.T. THOMPSON, J.S.C.

I Agree.

JUSTICE DR. ADE RENNER-THOMAS, C.J.

I Agree.

MS. JUSTICE U.H. TEJAN-JALLOH, J.S.C.

I Agree.

MR. JUSTICE G. SEMEGA-JANNEH, J.S.C.

I Agree.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

CASES REFERRED TO

1. Hinga Norman v. Sama Banya and Ors (S.C 2/2005 judgment delivered the 31st day of August 2005, unreported)

2. Guaranty Trust Company of New York v. Hannay & Company ((1915) 2 KB 536 at 563)

3. Uzouckwu v. HRH Ezeonu II (1991) 6 NWLR pt 200, p 708

4. The State v. Onagoruwa ((1993) 2 NWLR Pt 221, p 33

5. Dr. Braithwaite v. Grassroots Democratic Movement [1998] 7 NWLR 307

6. Okoro v. Nigerian Army Council [2000] 3 NWLR 77

7. Re Sidebotham, Ex parte Sidebotham (1880) 14 Ch.D 458 at 463, C.A.

8. Buxton v. Minister of Housing and Local Government ([1961] 1 QB 278

9. A-G of Gambia v. Njie ([1961] 2 All ER 504 at 511 PC

10. Morehbishe and 2 others vs. Lagos State House Assembly (2002) 3 134, (Nigerian case, unreported)

11. Adeigbe v. Kinshino 1965 a ALL N.L.R. 249

12. Rtean V Nurtn 1992 NWLR 381 at 391

STATUTES REFERRED TO

1. The Constitution of Sierra Leone, Act No. 6 of 1991

2. The Political Parties Act No. 3 of 2002

3. The Political Parties Registration Act No. 3 of 2002

SORIE TARAWALLI v. SORIE KOROMA

[SC. CIV. APP. 7/2004] [p.4-18]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 16 JANUARY 2007

CAROM: JUSTICE DR. ADE RENNER-THOMAS, C.J.

MR. JUSTICE E.C. THOMPSON DAVIES, J.S.C.

MRS. JUSTICE V.A.D. WRIGHT, J.S.C.

MR. JUSTICE M.E.T. THOMPSON, J.S.C.

MS. JUSTICE S. KOROMA, J.A.

BETWEEN:

SORIE TARAWALLI — APPELLANT

AND

SORIE KOROMA — RESPONDENT

(As Administrator of the Estate of Sorie Mansaray)

AMADU KOROMA ESQ. FOR THE APPELANT

MRS. J. KING FOR THE RESPONDENT

RENNER-THOMAS, C.J.

This is an appeal against the judgment of the Court of Appeal dated the 21st day of April 2004 in favour of Sorie Mansaray, the Plaintiff in the High Court. The said Plaintiff died before the determination of this Appeal and was ordered to be substituted by the Respondent herein. Thus all references to the Respondent herein include, where the context so permit one to the Plaintiff in the High Court. By the said-Judgment the Court of Appeal set aside that of the trial judge in favour of the Defendant (hereinafter referred to as "the Appellant") dismissing the claim of the Respondent and made the following orders:

"1.A declaration that the title to all that piece or parcel of land and hereditaments situate lying and being at 43 Will Street, Freetown in the Western Area of Sierra Leone vests in the Plaintiff

2. Damages for trespassing onto the plaintiff's land at 43 Will Street, Freetown in the sum of Le69,000.00 be paid to the plaintiff by the defendant.

[p.5]

3. An injunction restraining the defendant, by himself, his servants, agents, or howsoever otherwise from continuing their trespass onto the said land by remaining thereon or in any way dealing with the said land.

4. Costs of the proceedings in the court below and this appeal be costs to the plaintiff/appellant to be taxed if not agreed."

The Respondent's claim was for the following reliefs contained on the statement of c1aim:—

(1) A declaration of title of all that piece of parcel of land and hereditaments situate lying and being at 43 Will Street, Freetown in the Western Area of the Republic of Sierra Leone.

(2) Damages for wrongfully entering the plaintiffs land at 43 Will Street, Freetown, destroying property beacons and his fruit trees.

(3) An injunction restraining the said defendant, by himself, his servants. agents or howsoever otherwise from continuing their trespass upon the said land, by remaining thereon or in any way dealing with the said property.

For reasons which will become more apparent later in this judgment it is important to set out in extenso the particulars of the Respondent's claim as indorsed in the Writ of Summons and the defence filed by the Appellant herein in answer to the Respondent's claim.

The particulars of claim are as follows:—

"The Plaintiff is and was at all material times the owner and entitled to possession of a piece or parcel of land and hereditaments situate lying and being at 43 Will Street Freetown in the Western Area of the Republic of Sierra Leone a description whereof is as follows:—

"Starting from beacon marked FC591/80 on an bearing of 119°24' for a distance of 92.96 feet to beacon marked FC592/80 on a bearing of 221°01' for a distance of 147.0 feet to beacon marked FC593/80 on a bearing of 312°15' for a distance of 49.0 feet to beacon marked FC942/79 on a bearing of 22°43' for a distance of 134.0 feet to beacon marked FC591/80 which is the point of commencement thus enclosing [p.6] an area of 0.2247 acre or thereabout as is delineated on the Survey Plan numbered L.S. 694/80 dated 30th April 1980".

(1) The Plaintiff became seised of this said piece of parcel of land by means of a Statutory Declaration dated 17th December 1982 by the Plaintiff supported by Sorie Turay and Santigie Sesay registered as No.222 of page 30 in volume 22 of the Books of Statutory Declaration kept in the office of the Administrator and Registrar General Freetown.

(2) The predecessor in title of the plaintiff being his father Langima Mansaray (Deceased) had been in full, free and undisturbed possession of the said land for a considerable period of time preceding the date of the said Statutory Declaration as is evidenced therein.

(3) On or about May 1992 the defendant and his agents wrongfully and without any proper or lawful right or title entered the plaintiff's land removed plaintiff's beacon and destroyed his fruit trees. Thereafter the defendant set himself up as owner of the said property to the detriment of the plaintiff and his heirs.

(4) By reasons of the matters aforesaid the plaintiff has been subjected to humiliation and has suffered great mental anguish and stress and he has been deprived of the use and enjoyment of part of his said land and has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGE

(a) Two beacons destroyed at 2,500.00 each	=	Le5000.00
(b) Three pear trees at Le6,000.00 each	=	Le18, 000.00
(c) Four Guinea Mango trees at Le10,000. 00 each	=	Le40,000.00
(d) Banana Trees destroyed	=	Le6,000.00

Le69.000.00

(5) Despite repeated requests and demands by the plaintiff and his Solicitor to the Defendant to vacate the plaintiffs land he has still failed refused or neglected to do so and threatens and intends unless restrained by' an injunction from this honourable Court to continue in occupation of the said land and to trespass thereon. "

The defense filed on behalf of the Appellant stated as follows:—

[p.7]

"The Defendant cannot admit or deny paragraphs 1, 2, and 3 of the particulars of claim but will aver that the Will Street to which the same relate is not the same place or Street as "Off Morgan Street".

(1) The Defendant as to paragraph 4 of the particulars of claim will aver that he is the owner of a piece of parcel of land, situate, lying and being OFF MORGAN STREET, Freetown, by virtue of a conveyance of sale dated 17th January, 1989, registered as No. 71, at Page 99 in Volume 422 in the Book of Conveyances kept in the Office of the Registrar-General in Freetown, bounded.

(2) The Defendant will further aver as to paragraph 4 of the particulars of claim that neither the Defendant not his agents did the several acts complained of on the Plaintiff's land.

(3) The Defendant as to paragraph 5 of the particulars of claim will aver that the Defendant by his Solicitor fixed appointments on at least 2 occasions with the Plaintiff through his Solicitor to visit both the Plaintiff's land and the Defendant's land to ascertain any encroachment if any with the assistance of Surveyor but that the plaintiff failed to turn up as arranged. Further the Defendant will aver that if the plaintiff suffered as alleged in paragraph 5 of the particulars of claim, he the Defendant is not responsible or in anyway liable for same.

(4) As to paragraph 6 of the particulars of claim, the Defendant repeats paragraph 4 of this defense.

(5) Save as is hereinbefore specifically admitted, the Defendant denies each and every allegations of fact as if the same were set forth and denied seriatim ".

A reply was filed on behalf of the Respondent in the following terms:—

"(1) Save that the Plaintiff admits that "Will Street" is not the same as "Off Morgan Street", the Plaintiff denies paragraphs one (1) and two (2) of the Defence herein and repeats that he is the owner of the land and premises situate lying and being at [p.8] Will Street and numbered 43 Will Street for Municipal purposes".

(2) Paragraph three (3) and four (4) of the said Defence is categorically denied, the contents thereof being false, and the Plaintiff avers that locus was not visited by the Solicitors aforesaid because the Defendant failed to turn up on the appointed day as he had taken a Surveyor to the said land on the previous day.

(3) Save as is hereinbefore specifically admitted, the Plaintiff joins issue with the Defendant on his defense".

Based on the pleadings as set out above the Appellant, in my view, was not resisting the claim of the Respondent for a declaration that he was the owner of the piece or parcel of land described in paragraph (1) of the particulars of claim

I must hasten to state however that notwithstanding the fact that the Appellant did not resist the Respondent's claim for such a declaration the Respondent must satisfy the Court that he is entitled to such a declaration before it could be properly made.

In giving judgment in favour of the Appellant the learned trial judge found as a fact that the Respondent had failed to establish with any degree of certainty that the land the subject-matter of the Statutory Declaration relied on by the Respondent as proof of his title was indeed the same land that was allegedly being trespassed on by the Appellant. He went to state that this view was buttressed by the evidence of PW3, DW2, and DW3 to the effect that the two pieces of land were separate and distinct.

The learned trial judge concluded as follows:—

"It seems clear to me from the evidence of the aforementioned witnesses that two completely different parcels of land are involved. I am inclined to believe the evidence of these three witnesses. They impressed me as witnesses of truth. Moreover, DW3 is a Staff Surveyor attached to the Ministry of Lands and Housing. I would regard him as an independent witness.

[p.9]

I find as a fact that the defendant is and was at all material times of this act the fee simple owner [sic] and in possession of the entire land he occupies ". [emphasis mine]

When the matter came before the Court of Appeal that Court did not expressly upset the findings of the learned trial judge referred to above as to the location of the Respondent's land relative to that of the Appellant.

Indeed, Muria J.A. (as he then was) in delivering the reasons for the Judgment of the Court of Appeal on the 21st day of April 2004 had this to say:—

"The plaintiff claims title to his land, and which is not disputed by the defendant. In his defense the defendant neither admitted nor denied the plaintiff's claim. He simply relies on his claim of title to his land. The plaintiff's land is at 43 Will Street while the defendant's land is off Morgan Street. They are two separate lands, and are about 150 feet apart ".

He continued:—

"As to plaintiff's claim for declaration of title, the Court finds that the trial Judge erred in failing to make the declaration as claimed. The evidence puts it abundantly clear that the plaintiff's title to his land is incontrovertible. Exhibit A, the certified copy of which is Exhibit B, (Statutory Declaration) has never been challenged at all".

With the greatest respect to the learned Justice of Appeal it is not sufficient for a plaintiff s claim for a declaration of title to a piece of land to be supported by uncontroverted evidence simpliciter to entitle that plaintiff to such a declaration.

In a long line of cases reviewed by this Court in Macauley v Stafford and Ors (S.C Civ App No.l/73,judgment delivered the 13/7/76, unreported) and in the leading authority of Seymour Wilson v. Musa Abbess (Sup Ct Civ App 5/79, judgment delivered 17/6/81, unreported) it has been established that in action for a declaration of title the plaintiff must succeed on the strength of his title and not on the weakness of the defendant's title.

In other words, as stated by Webber C.J. in delivering the Judgment of the West African Court of Appeal in Kodolinye v. Odu [1935] 5 W ACA 336 at p.337-338)

[p.10]

"The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration ".

This passage was cited with approval by Livesey Luke C.J. in the Seymour Wilson case (supra).

What then must a plaintiff who claims or a defendant who counterclaims for a declaration of title prove to be entitled to same?

In this regard, a distinction should be made between a documentary or paper title and a possessory title. In the Western Area of Sierra Leone, which used to be a Crown Colony before combining with the Protectorate of Sierra Leone to become the unitary State of Sierra Leone at independence in 1961, in theory at least, the absolute or paramount title to all land was originally vested in the Crown (in the

same way as in England, the largest estate a person deriving title from the Crown can hold being the fee simple). After independence such absolute title was deemed vested in the State as the successor in title of the Crown. According to the State (formerly Crown) Lands Act, No. 19 of 1960, all grants of such title made by the Crown and later the State were said to be made in fee simple (see section 2 of the State Lands Act, No. 19 of 1960). Thus, a declaration of title in favour of a plaintiff without more is a shorthand for saying that plaintiff is seised of the said land in fee simple.

For a person relying on a paper title he must be able to trace his title to some grant by" the Crown or the State. This is how Livesey Luke" puts it in the Seymour Wilson case (supra).

"But in a case for a declaration of title the plaintiff must succeed by the strength of his title. He must prove a valid title to the land. So if he claims alee simple title he must prove it to entitle him to a declaration of title. The mere production in evidence of a conveyance in fee simple is not proof of a fee simple title. The document may be worthless. As a general rule the plaintiff must go further and prove that his predecessor in title had title to pass to him. And of course if [p.11] there is evidence that the title to the same land vest in some person other than the vendor or the plaintiff, the plaintiff would have failed to discharge the burden upon him. "

In the instant case, there is no question of making such an enquiry as all that the plaintiff relies on to establish his title is a Statutory Declaration, Exhibit "A". It is trite law that a Statutory Declaration is not a document of title. At best is might said to be an attempt to record evidence of how a person came to claim possessory title to a piece of land. It does not by itself establish the fact of a possessory title to entitle a person basing his claim thereon to a declaration of title. (See Bright v. Roberts (1964-66) ALR (S.L) 156).

A plaintiff who relies on the fact of possession by himself or his predecessor in title must prove more than just mere possession. It is true that proof that a claimant was in possession before the defendant is prima facie evidence of his having a better title than the defendant and that such prior possession raises a presumption that the claimant is seised in fee. As it is some times put colloquially "possession is nine-tenths of the law". However, if I may continue in that vein, to be entitled to a declaration of title he must prove that he has a better title not only as against the defendant but that there is no other person having a better title than himself.

How then can he prove this? He can do this by showing that the title of the true owner has been extinguished in his favour by the combined effect of adverse possession and the limitation statute. The nature of the root of possessory title is thus explained by Megarry and Wade:

"Limitation is thus not per se a mode of transferring property from one person to another. But it may operate as such when combined with the principle that adverse possession gives a title. If S (squatter) wrongfully takes possession of land belonging to O (owner), O immediately acquires a right action against S for recovery of the land. If O takes no action in twelve years (normally) his right of action becomes barred and his title extinguished by limitation. Scan no longer be disturbed by O, and as against the rest of the world S is protected by the fact of his possession. Possession by itself gives a good title against all the world except someone having a better legal right to possession".

(The Law of Real Property 4th ed page 1004).

[p.12]

In the instant case, apart from the Statutory Declaration admitted in evidence the Respondent did not adduce any independent evidence to show that he and those through whom he claims have extinguished the title of the true owner or that they have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim. In my opinion, for this reason alone, the Respondent cannot be said to be entitled to the declaration of title as claimed in the Writ of summons and I so hold. As a result, I would set aside the first order made by the Court of Appeal and to that extent the present appeal succeeds.

I now turn to the next claim which is for damages for trespass. It would appear that the learned trial judge did not direct his mind to the fact that though damages for trespass are frequently claimed together with a declaration of title to the land allegedly trespassed on the two claims must be considered as separate and distinct issues. For one thing, as has been established earlier in this judgment, a claim for a declaration of title demands a much higher degree of proof (see Dunstant E. John & Reuben L. Macauley vs. William Stafford & ors, (supra.)

In a case for trespass all the plaintiff has to prove is a better right to possession than the defendant. One way to do this is to show that he has a better title to the land. According to Livesey Luke in Seymour Wilson case (supra):

"But better title in the context of an action for trespass is not necessarily "valid" title. In a case for trespass the court is concerned only with the relative strengths of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession succeeds, even though there may be another person, not a party, who has a better title than he ".

Thus, in the instant case, though the Evidence adduced by the Respondent may not be sufficient to entitle him to a declaration of title there was some evidence before the learned trial judge that he was in possession of a piece or parcel of land that he alleges that the Appellant was trespassing on. The Plaintiff in the Court below himself gave evidence that as far back as 1945 he had been in possession of the land in question. Apart from using the land for the purpose of growing fruit trees he also built a structure made of zinc and started to pay City Rates for the same. He then had this to say in support of his claim:

[p.13]

"The defendant first challenged my title in 1985. He started working in my land. I protested. Both of us reported at the Criminal Investigation Department (C.I.D.). At the C.I.D. they looked at our respective documents and conclude that mine is numbered 43 Will Street and the defendant property is situate at Morgan Street. Later C.I.D. personnel visited the same ……..

We made indications to the C.I.D personnel. When the defendant was asked about his claim to the land he said that some one sold to him. Therefore the defendant ceased to go to the land. Subsequently the

defendant re-entered the said land. As a result I went to one Mr. Barber a Law Officer. An invitation was then sent to the defendant. Both of us appeared before the said Mr. Barber. It was revealed that my land was registered. He gave both of us his advice. Thereafter the defendant ceased going to the land. After a period of three years he re-entered the said land".

This evidence was never challenged or controverted in any way. The defendant never gave evidence at the trial. It is true that acts of possession on the part of the Appellant in respect of the land that the Respondent also claims could be inferred from the fact that he started to build a house thereon some time in 1985. Apparently, subsequent to 1985, a survey plan dated 6th December, 1988 was produced in his name and a Conveyance, Exhibit "B" executed in his favour in January 1988.

Based on the above evidence alone one might be tempted to conclude that the Respondent had a prior and therefore better right to possession.

But unfortunately, that was not all the evidence led at the trial. Further evidence led by both sides tended to raise some doubt as to the exact location of the Appellant's and the Respondent's land respectively.

Before going further to deal with this issue of the identity of the land the subject-matter of the alleged trespass it must be emphasized that it was agreed all round that both parties were claiming possession to some land or the other in the area of Will Street and Morgan Street respectively

In answer to a question put to him under cross-examination the Plaintiff, P.W.2, stated thus:

[p.14]

"It is true that Will Street is not Morgan Street. The Defendant lives at Morgan Street. It is true that the Defendant has land at Morgan Street ".

The licensed Surveyor, F.D. During, who gave evidence on behalf of the Plaintiff as P.W.3 prepared an encroachment plan which he tendered as Exhibit "H." Referring to Exhibit "H" he had this to say:

"On Exhibit "H" I can see the properties of the Plaintiff and the Defendant. The property of the Plaintiff is situate off Will Street and that of the Defendant is situate off Morgan Street",

Another licensed Surveyor, J.M. Samura, testified on behalf of the Defendant as D.W.2. He tendered what he described as an encroachment plan as Exhibit "M". I fail to see how this witness could describe Exhibit "M" as an encroachment plan when it clearly depicts the two properties in question at a distance from each other. He confirmed this in his oral testimony as follows:

"The property of the Defendant is situated off Morgan Street. The property of the Plaintiff is situated off Will Street. Will Street is not the same as Morgan Street. "

Under cross-examination D.W.2 went on further to testify as follows:

"It is true that the Plaintiff's land is not where it should be. [Emphasis mine] It is true that from the documents shown to me the two lands are apart".

A third surveyor gave evidence at the trial. This witness, R.A. Sandy, was not a licensed Surveyor but "a staff Surveyor who claimed that he was a Civil Servant attached to the Ministry of Lands and Housing". He gave evidence that the plans in Exhibit "B" and Exhibit "D" depicting the lands claimed by the Respondent and Appellant respectively were charted in Cadastral Sheet and that they did not overlap.

However, under cross-examination by Counsel for the Plaintiff he stated referring to Exhibit "H" the encroachment plan tendered by P.W.3;

"It appears correct to me"

[p.15]

He gave this answer despite the fact that like most of the other witnesses he had maintained that Morgan Street and Will Street are two different Streets and are about one hundred feet apart.

In my opinion, the apparent doubt about the exact location of the respective properties claimed by the Plaintiff and the Defendant, which seemingly was the basis for the trial judge's dismissal of the Plaintiff's claim, could have been cleared if P.W.3, D.W.2 and D.W.3, the three surveyors who testified at the trial, had accompanied the Court on the visit to the locus in quo.

Unfortunately, the only Surveyor present at the locus and who took measurements of the land in dispute was a certain Mr. Coker who never testified at the trial before or after the visit to the locus.

In the light of the above analysis of the available evidence what conclusion can this Court, as a Court of rehearing, reach as to the location and identity of the subject-matter of the trespass by the Appellant as alleged by the Respondent?

In this regard, it is my considered opinion that I can safely rely on the oral and documentary evidence adduced by P.W.3, Mr. During, and the short answer of D.W.3 relating to the correctness of Exhibit "H" given under cross-examination. Mr. During visited the land in dispute armed with both Exhibit "C" and Exhibit "D" copies of the Statutory Declaration and Conveyance of the Plaintiff and Defendant respectively. Armed with these documents he was able to produce Exhibit "H," an encroachment plan clearly showing the land claimed by the Defendant delineated on Survey Plan No. LS 2658/88 virtually overlapping that claimed by the Plaintiff delineated on Survey Plan No. LS 694/80. I say virtually overlapping because the extent of the encroachment is 0.0798 acre out of the total area of 0.0846 acre claimed by the Defendant in Exhibit "D". This is in contrast with a total of 0.2247 acre claimed by the Plaintiff in Exhibit "B".

P.W.3 also testified that the said properties are described as being off Will Street and off Morgan Street respectively as opposed to actually being on Will Street and Morgan Street respectively.

As stated earlier, neither the oral nor the documentary evidence adduced by P.W.3 relating to the alleged encroachment by the Appellant on the Respondent's land to the extent of 0.0798 acre as shown on Exhibit "H" was challenged or controverted in any significant way by the Defendant's [p.16] witnesses or his Counsel. Indeed, in the excerpt from his evidence quoted above D.W.3 acknowledged that Exhibit "H" the encroachment plan produced by P.W.3 appeared "correct" to him".

Indeed, if the learned trial judge had properly evaluated the evidence of P.W.3 and D.W.3 the only conclusion he could have arrived at was that there was an encroachment, if not an overlapping, in respect of the land claimed by the Appellant vis-a-vis that claimed by the Respondent. As a result I hold that the Appellant is indeed liable to the Respondent for trespass as claimed in the Writ of Summons.

The Court Appeal having found the Appellant so liable went on to order damages in the sum of Le69.000/00 without more. This award has not been challenged in any way. Suffice it to say I see no reason for interfering with it. I would therefore uphold the second order made by the Court of Appeal and to that extent the present appeal fails.

I shall now deal with the claim for an injunction. Before I do so, I must observe that the Plaintiff did not, as he could well have done, claim for recovery of possession of the land encroached upon by the Defendant. Instead the Plaintiff sought to obtain as it were the same objective by seeking a perpetual injunction in the following terms:

"restraining the said Defendant by himself, his servants, agents or howsoever otherwise from continuing their trespass upon the said land by remaining thereon or in any way dealing with the said property"

I say this because I read in the Case for the Appellant that the Appellant had been evicted from the property in dispute. This was not made an issue in this appeal But for what it is worth I can only say in passing that none of the orders made by the Court without more could be the basis of such eviction.

It is trite law that an injunction, unlike a claim for recovery of possession which is a remedy at law, is an equitable remedy and therefore could be granted and rejected at the discretion of the court.

As to the principles governing the grant or refusal of an injunction in a case such as the instant one the following passage to be found in Clerk and Lindsell on Tort is quite instructive:

"The grant of an injunction being an equitable remedy is always discretionary and this discretion belongs to the trial Judge: an p.17] appellate court may not substitute its own views on the merits of the case but may interfere only "if the Judge misdirected himself in law, took into account irrelevant matters or failed to take into account relevant matters ". The principles governing the exercise of the discretion differ according to the nature of the injunction sought. Where an injunction is sought to restrain the continuation of a wrongful act which interferes with the claimant's rights and is prohibiting in substance as well as in form, then in the absence of special circumstances, the claimant is entitled to his injunction "as of course", The most that a defendant can hope for is a suspension of the operation of the injunction to enable him to take steps to bring the nuisance (as it usually is) to an end". (18th ed; page 1639)

In this case, though the injunction was granted by the Court of Appeal it was in effect exercising the powers vested in the trial judge. Applying the principle stated in the passage just quoted from Clerk and Lindsell I see no grounds for interfering with the exercise of the said discretion by that Court. The injunction sought was a prohibitory one to restrain the continuation of a wrongful act, trespass by the Appellant on the Respondent's land. Having analysed the totality of the evidence I hold that there is evidence that unless restrained therefrom the Appellant by himself his agents or howsoever wise intend to continue the said trespass upon the said land by remaining thereon. In the absence of any special circumstances in the instant case I hold that the injunction was properly granted as of course.

Having said that in order to aid the Appellant/Defendant comply with the terms of the injunction the same should be worded more precisely and unambiguously. The finding relating to the trespass by the Defendant relates only to 0.0798 acre of the Plaintiffs land not the whole land which is imprecisely described simply as being at 43 Will Street Freetown. A more precise description of the land to which the injunction relates is as is contained in Exhibit "H" the encroachment plan produced and tendered by P.W.3. I shall vary the third order made by the Court of Appeal accordingly.

In the circumstances the appeal partly succeeds and I make the following orders:

(1) The first order of the Court of Appeal granting a declaration of title in favour of the Respondent herein is hereby set aside.

[p.18]

(2) The Order of the Court of Appeal awarding damages for trespass to the Respondent is hereby upheld.

(3) In lieu of the injunction granted by the Court of Appeal an injunction is hereby decreed restraining the Defendant, the Appellant herein, by himself, his servants, agents or howsoever otherwise from continuing to trespass on that portion of the Respondent's land measuring 0.0798 acre and delineated in the encroachment plan tendered herein and marked Exhibit "H".

(4) Each party to bear its own costs of the proceedings in this Court and in the Courts below.

SGD

Hon. Mrs. Justice V.A.D. Wright -J.S.C.

SGD

Hon. Mr. Justice M.E.T. Thompson - J.S.C.

SGD.

Hon. Ms. Justice S. Koroma - J.A.

CASES REFERRED TO

1. Kodolinye v. Odu [1935] 5 W ACA 336 at p.337

2. Macauley v Stafford and Ors (S.C Civ App No.l/73, judgment delivered the 13/7/76, unreported)

3. Seymour Wilson v. Musa Abbess (Sup Ct Civ App 5/79, judgment delivered 17/6/81, unreported)

4. Bright v. Roberts (1964-66) ALR (S.L) 156

STATUTES REFERRED TO

1. Lands Act, No. 19 of 1960

STANDARD CHARTERED BANK (S.L.) L TD v. MRS. FRANCES FOREWA

[S.C. CIV. APP. NO. 2/2005] [p.206-215]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 23 OCTOBER 2007

CORAM: MS. JUSTICE U.H. TEJAN-JALLOH, J.S.C.

MR. JUSTICE G. SEMEGA-JANNEH, J.S.C.

MR. JUSTICE M.E. T. THOMPSON, J.S.C.

MR. JUSTICE P.O HAMILTON, J.A.

MS. JUSTICE S. BASH-TAQI, J.A.

STANDARD CHARTERED BANK (S.L.) L TD— APPELLANT

AND

MRS. FRANCES FOREWA

(AS ADMINISTRATRIX OF THE ESTATE

OF J.S FOREWA (DECEASED)) — RESPONDENT

COUNSEL:

MR. PATRICK LAMBERT AND WITH HIM MS. MARIAMA

DUMBUY A FOR THE APPELLANT

MR. E.E.C. SHEARS-MOSES AND WITH HIM MRS. M.A.P.

DAVIES FOR THE RESPONDENT

SEMEGA-JANNEH J.S.C.

On the first of November 1965, Standard Chartered Bank Sierra Leone Limited (Appellant herein and hereinafter referred to as "the [p.207] Bank") employed John Augustus Forewa (Respondent herein and hereinafter called "Mr. Forewa") as a clerk. He rose through the ranks and as at the time his services were terminated by letter dated the 23rd October 1992 (Exhibit C-1") he had reached the rank of manager and was aged forty-three (43) years old. The termination letter alleged that the Bank's investigation of Mr. Forewa revealed that he was negligent in his duties and guilty of misconduct; as a result his services were terminated with immediate effect.

The investigations referred to were in respect of allegations that Mr. Forewa during his tenure as manager of the Bank's Makeni branch had suppressed cheques instead of following the Bank's procedure in respect of the processing of cheques. The termination letter is the result of the investigations. Mr. Forewa was, at the time of his termination, paid one month's salary in lieu of notice and given his terminal benefits. Mr. Forewa protested the termination by a letter dated the 30th November 1992 (Exhibit 'D') and when he received no response he instructed his solicitor.

The solicitor caused a Writ to issue in which Mr. Forewa claims the following reliefs:

"a. The salary he would have earned up to and including the retiring age of 60 years (he being 43) years at an annual salary of Le.2,682,819.00 (Two Million Six hundred and eighty-two thousand eight hundred and nineteen Leones) with prospect of a salary increase to wit for 17 years.

b. Leave pay for 17 years at 15% of the Plaintiffs basic annual salary

AND

c. Rent subsidy for 17 years at 10% of the plaintiff's yearly basic salary.

d. Lunch allowance of Le.25,000.00 (Twenty-five thousand Leones) monthly

e. Monthly car allowance of Le.25,000.00 (Twenty-five thousand Leones). He also claims general damages

[p.208]

The learned Judge of the High Court, A.B. Raschid, J, after reviewing the evidence concluded that the Bank had breached the contract of employment in that the Bank, amongst others, failed to give Mr. Forewa a fair opportunity to defend himself and, therefore, gave judgment to Mr. Forewa. In his judgment, he concluded that since no contractual term for notice to terminate the employment was in evidence he would resort to the common law principle of reasonable notice and, after taking into account the circumstances "including the nature of the employment and the difficultly of getting such another or a like one", held that twelve months notice was reasonable. He accordingly awarded Mr. Forewa the following:

Eleven month's salary	—	Le.2, 459,250.08
Eleven month's car allowance	—	275,000.00
Eleven month's lunch allowance	—	275,000.00
Rent allowance of 11 months	—	368,887.00
Total	—	Le.3, 378,137.69

The Bank being dissatisfied with the judgment appealed to the Court of Appeal on the following grounds:

"1. That the learned Judge misdirected himself on the evidence when he held that there was no agreement relating to the notice to be given by the Defendants (the Bank) before terminating the Plaintiffs (Mr, Forewa's) employment. (Bracketed words added).

2. That the learned trial Judge erred in law in holding that in the absence of an agreement the Plaintiff was entitled to 12 months salary in lieu of notice of termination of his services.

3. That the judgment is against the weight of the evidence."

[p.209]

From the Grounds of Appeal it is clear that the Bank did not appeal the decision of A.B. Raschid.J that the Bank breached the contract of employment with Mr. Forewa by the manner the termination was carried out. Notwithstanding the fact that the breach of contract was not an issue in the appeal and that as a matter of fact the issue was not argued before the Court of Appeal, F.C. Gbow J. dealt with the issue and, rightly, without making any determination. The thrust of Counsel's arguments centered on what period of notice was applicable on the facts of the case.

The Court of Appeal in the judgment of F.C. Gbow J. examined the evidence and came to the same conclusion as the trial court that there was no acceptable evidence of a contractual term of notice. The court held that in the circumstances the Common Law principle of reasonable notice was the applicable yardstick and allowed twelve months as reasonable, with V.AD. Wright J.S.C. dissenting on this point, thus confirming the judgment of A.B. Raschid J. In the result, the Appeal was accordingly dismissed.

Once more the Bank was dissatisfied and appealed to this Court. The grounds, without the particulars, are as follows:—

(1) That the Court of Appeal failed to consider and give due weight to the available oral evidence given by P.W.1, P.W.2 and D.W.2 at the trial as to the quantum of notice required to terminate the Plaintiffs employment.

(2) The Court of Appeal erred in law in holding that twelve months' notice was reasonable in the circumstances of this case.

(3) The Court of Appeal erred in law when it held that the Appellants/Defendants were obliged to produce a copy of the Respondent! Plaintiff's Letter of appointment after Notice to produce was served on them.

[p.210]

This Court is now being asked to determine more or less the same issues raised in the hearings below, that:

1. There were some evidences to support a decision that there was a contractual term of one month notice to terminate the employment or payment of one month's salary in lieu.

2. If in the event the common law principle of reasonable notice applicable, whether twelve months notice is reasonable in the circumstances of the case.

The third ground of appeal is linked to the issue of a contractual term of notice and, in that regard, I will deal with the question in the course of this judgment.

Mr. Forewa's case is that the available evidence on contractual notice to terminate employment of the Bank's staff relates to one month's notice or one month's salary in lieu of notice but that this affects only non managerial staff below supervisory level. This is reflected in the collective agreement between the Bank and the Clerical Insurance Bank, Accounting, Petroleum, Industrial, and Commercial Employers Union (Exhibit "E") — the only written document evidencing a period for notice to terminate in evidence. This fact is confirmed by the evidence of the Bank's witness (DW2) and paragraph 4 of the statement Defence, Mr. Forewa also gave evidence that he was subsequently given a document (Exhibit 'F') which dealt with terms and conditions of Senior Staff. Exhibit 'F' apparently did not contain provision as to notice to terminate, Besides Exhibit 'F', Mr. Forewa was given in 1998 a pamphlet covering the terms and conditions of Service of Senior Staff. As in the case of the appointment letter, Mr. Forewa could not find the document.

The Bank's case is that by the contract of employment Mr. Forewa's "employment was terminable at any time at the discretion of either party by giving one month's notice or payment of one month's salary in lieu thereof", He relies on the evidence of P,'N. 1 (the Plaintiff), P.VV.2 and D.W.2.

[P.211]

Counsel for tile Appellant's argument that the evidence of P.W.1, P.W.2 and D.W.2 supported the Bank's contention that the requisite notice for the termination of Mr. Forewa's employment was rejected by both the trial court and the Court of Appeal. The evidence of Mr. Forewa (P.W.1) in page 42 lines 1 — 2 in which he says that the Bank's management never informed him that either side could give one month's salary in lieu of notice, and his evidence in the same page 42 lines 24 — 27 that as a permanent staff he could have left his employment by given one month's notice are not inconsistent or in conflict

contrary to the submission of Counsel for the Appellant. In the first instance Mr. Forewa made a statement of fact hat he was not informed and in the second instance he felt he could terminate his employment by giving a month's notice. His two statements can equally be correct without being contradictory. This is not to say that the second statement was correct. One is not sure at what point in time Mr. Forewa was referring in response to a question from the Bank's Counsel in the trial court. The bank had permanent staff below supervisory level and thereby subject to exhibit "E". I am of the view that Mr. Forewa was merely expressing an opinion and not a matter of fact or law. In the event Mr. Forewa was wrong in his opinion or statement, does mere expression of that opinion or statement make it a fact of the employment relationship? The issue of notice is a question of fact evidenced by agreement and not by what one of the party thinks the agreement is.

The evidence of P.W.2, Albert Binga Bayoh, a Senior Employment Officer, Department of Labour, Bo, was called by the Plaintiff. I am not sure as to why he was called as a witness but I am certain that his evidence is not helpful at all in determining the issues. Under cross examination he speaks of an ordinary monthly paid worker giving one month's notice to terminate his employment and the employer being able to terminate the worker's employment for minor offence by giving him a month's salary in lieu. He also states that were there is no specific provision for termination that a month's notice is required on either side and where there is a specific contract the general law does not apply. What was the purpose of this cross-examination in eliciting such, answer? It appears the purpose was to tell the trial court what the law is. I am sure the witness had no [p.212] pretensions of knowing the law better than the trial court. His evidence in Chief was just as unhelpful. His evidence in chief was in effect telling the trial court that a vital element was missing in exhibits 'F' that is, provision for the termination of an employee's services. This is evidence that PW1 has already given and, of course, the trial court could know that by reading exhibit 'F'. I have spent time discussing the evidence of the witness only to illustrate the need for counsel to consider well the purpose of calling a witness or what counsel wants to elicit under cross-examination if it is all necessary to cross-examine.

The evidence Ayodele Randal. Head of Human Resources Division of Bank, does not further the Bank's counsel argument that either the Bank or Mr. Forewa could give the other ode month's notice or one month's salary in lieu. The witness's statement that "according to the terms and conditions of service either party can terminate by the giving of a salary in lieu" gives the impression or imply that there was a written document agreement containing terms and conditions of Mr. Forewa's employment. There is no such document in evidence to support counsel's contention. On the other hand if the witness wants it understood that the terms and conditions were given orally one would expect him to give evidence of the circumstances in which the said terms and conditions were given. One would also have expected her to say whether she was present at the time and, if not the source of the information. I conclude that she was only giving evidence as Head of Human Resources of the Bank and could not give any basis for the piece of evidence in issue. The piece of evidence seems to have been snatched out of the air as it has no basis and is not rooted into the ground. Such is the work of magicians who conjure up things from nowhere and not for witnesses who appear before the courts whose concerns are of facts and reality.

In my view the Court of Appeal (and the trial court before it), after due consideration of the evidence was right in coming to the conclusion that there was no plausible evidence of the period of notice that

Mr. Forewa was contractually entitled as a Manager. I am of the considered opinion that ground one of the Grounds of Appeal has no basis and, therefore, fails.

[p.213]

In my considered view it is now settled law that in the absence of expressed stipulation or agreement on notice for the determination of the employment contract, a requirement of reasonable notice would be implied by the Common Law, and any termination of the employment contract by either party without reasonable notice being first given to the other or payment in lieu thereof, would be a breach of contract. See Payzu Ltd Vs Hannaford (1918) 2 K. B. 348; and Richard Vs. Koefod (1969) 3 WLR 1264. There is no predetermined yardstick of what constitute reasonable notice; decided cases may serve as a useful guide but each case depends on its peculiar circumstances, such as the nature of the job; the length of service; the age of the individual etc. The list is inexhaustible.

The real bone of contention between the Bank and Mr. Forewa is the question of quantum of damages. I have already stated that the finding of breach of contract by the trial court has not been appealed against and the issue that stands out now to be dealt with is the quantum of damages.

The Court of Appeal and the trial court before it resorted to the Common Law principle of reasonable notice and after due consideration reached the conclusion that twelve months was reasonable in the circumstances. Ground 2 of the Grounds of Appeal complains that twelve months in all the circumstances was wrong. I will now consider the issue. Mr. Forewa, a man of not much formal education, rose through the ranks from a clerk to the position of manager at the time he was wrongly dismissed after serving the Bank for 27 years. At the time of his dismissal there were only a few banks in the country. There was the very strong likelihood of word spreading in the small banking community of the actual reason for the banks dismissal of Mr. Forewa. There was also the likelihood of any potential employer, and in tile case of a Bank, certainty, requiring references. He was trained as a banker and moving into other job areas was going to be difficult.

The Court has not been provided with cases that dealt with the issue of reasonable period of notice in respect of dismissed bank employees. There are [p.214] a plethora of cases on printers dealing with reasonable notice. The case of Grundy and Sun Printing and Publishing Association (1916) 3 T.L.R 77 is one of them. The period of notice in these cases range from six months to twelve but the determination of the period of notice usually turned on the custom of the trade. I am inclined to follow the case of MASON v MAYOR, Alderman, Councilors and Citizens of Freetown — 1950-1956 — ALR SL 138 which by analogy, I think,. is closer to the instant case. In Mason case the employee was a waterworks man. He had worked for the Council and its predecessor for 19 years. He was not the Head of Department but the second in command, and was engaged in work for which there were only very few employers in the country (i.e. Sierra Leone) and he might have considerable difficulty in finding other suitable employment. In the Mayor's case Smith, CJ stated that "A reasonable notice therefore depends on the particular job and the particular circumstance of the employment" and after describing the circumstance as given above, considered six months notice reasonable and not the one month's payment of salary in lieu of one month's notice.

I have already given the inhibiting circumstances in Mr. Forewa's case and they all indicate that Mr. Forewa would have found it extremely difficult, as in fact happened, in finding other suitable or comparable employment. In the circumstances of this case I am of the view that six months notice should have been given, and I so hold. The measure of Mr. Forewa's damages is the difference between the six months salary in lieu of notice which he might have received and the one month's salary in lieu that had been paid to him including his entitlements as claimed over the five months period.

The arithmetic works out as follows:—

Five months salary	—	Le.1,117,841.20
Five months car allowance	—	125,000.00

[p.215]

Five months lunch allowance	—	125,000.00
Five months rent allowance	—	167,675.00
TOTAL	—	Le.1,535,516.20

Mr. Forewa is entitled to the sum of Le.1,535,516.20 in damages, and I so hold.

I the premises I give judgment in the sum of Le 1,535,516.20 to Mr. Forewa. If the judgment sums given in the Court of Appeal have been paid, the difference is to be refunded by the estate of Mr. Forewa.

Each party to bear its costs

Signed

HON. JUSTICE G. SEMEGA-JANNEH, J.S.C

I AGREE

HON. MS. JUSTICE U.H TEJAN-JALLOH, J.S.C

I AGREE

HON. MR. JUSTICE M.E. TOLLA-THOMPSON, J.S.C

I AGREE

HON. MR. JUSTICE P.O. HAMILTON, J.A

I AGREE

HON. MS. JUSTICE S. BASH-TAQI, J.A

CASES REFERRED TO

1. Mason v Mayor, Alderman, Councilors and Citizens of Freetown [1950-1956] ALR SL 138

2. Grundy and Sun Printing and Publishing Association (1916) 3 T.L.R 77

3. Payzu Ltd Vs Hannaford (1918) 2 K. B. 348

4. Richard Vs. Koefod (1969) 3 WLR 1264

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AIAH MOMOH v. SAHR SAMUEL NYANDEMOH

[SC.CIV. APP. 6/2006] [p.1-16]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 9 JUNE 2008

CORAM: MR.JUSTICE G.B. SEMEGA-JANNEH

MR. JUSTICE BODE RHODES-VIVOUR

MRS. JUSTICE S. BASH-TAQI

MS. JUSTICE S. KOROMA

MR. JUSTICE S.A ADEMOSU

BETWEEN:

AIAH MOMOH — APPELLANT

AND

SAHR SAMUEL NYANDEMOH — RESPONDENT

SOLICITORS/COUNSEL

S.M. SESAY ESQ. FOR THE APPELLANT

N.D. TEJAN-COLE ESQ. FOR THE RESPONDENT

JUDGMENT

BODE RHODES-VIVOUR, J.S.C

The facts in this case are fortunately refreshingly clear, but only a few of the facts thereof are germane to the points in this appeal. I will not set out all the facts but will be content with such facts as are relevant for the purpose of highlighting the points in this appeal which are material to the issues in the judgment. The respondent as plaintiff, on the 3rd day of June 1998 took out an Originating Summons against the Appellant, as Defendant asking the High Court of Sierra Leone to determine the following:

1. That the Deed of Conveyance dated the 25th day of August, 1992 and expressed to be made between Alhaji Tejan Sowe therein referred to as the Vendor of the one part and Sahr Samuel Nyandemoh and Aiah Momoh therein referred [p.2] to as Purchasers of the other part conveying ALL THAT PIECE OR PARCEL OF LAND together with the Building(s) situate lying and being at No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone and registered as number 909/92 at Page 139 in Volume 463 in the Record Books of Conveyances kept in the Office of the Administrator-General, Roxy building, Walpole Street, Freetown aforesaid jointly owned by the Plaintiff and the Defendant may be partitioned between them.

2. That the Deed of Partition be settled in accordance with draft to be prepared by an Independent Surveyor jointly appointed and approved by both parties.

3. Alternatively, that the aforementioned property be sold by public Auction or by Private treaty to the highest bidder at a price not below the reserve price to be set by an independent Valuer such price to be sanctioned by the Court.

4. The sale and distribution between the Plaintiff and the Defendant would be more beneficial to the parties than a division of the property between them.

5. That the Plaintiff do have the conduct of the sale and the Plaintiff and the Defendant execute the Deed of Conveyance. In default of either party signing the said Deed, that the Master and Registrar do execute the same on behalf of the default party.

6. That either party be at liberty to bid at the said sale and in the event of the Plaintiff being Purchaser thereof the Deed of Conveyance to be executed by the Defendant or the Master and Registrar.

7. That an account of the rents and profits of 37, Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone, collected or received by the Defendant as the Plaintiffs Agent and payment of what shall be found due on taking such account.

[p.3]

8. That the costs of this application be borne by the Defendant, such costs be taxed.

The following affidavits were filed in support of the Originating Summons:—

(a) Affidavit of Nasiru Deen Tejan-Cole sworn on 30/9/98

(b) Affidavit of Sahr S. Nyandemoh sworn on 6/10/98

(c) Affidavit of Fawaz Ayoub sworn on 15/10/98

(d) Affidavit of Ola Thomas sworn on 6/11/98

(e) Affidavit of Raymond Awoonor-Renner sworn on 22/9/99

In opposing the Originating Summons the defendant relied on the following affidavits:—

(a) Affidavit of Aiah Momoh sworn on 3/7/98

(b) Affidavit of Man so Dumbuya sworn on 11/7/98

(c) Affidavit of C.F. Edwards Esq. sworn on 20/10/98

(d) Affidavit of Sallieu Kamara sworn on 22/10/99.

On 22/11/99, the learned Trial Judge, The Honourable Mr. Justice A.M. Stronge heard Counsel and read all the affidavits. Thereafter this is what His Lordship had to say:—

"…… It is considered that there is a dispute as to fact and that the best expeditious and economical disposal of the proceedings will accordingly best be secured by hearing the Summons partly on oral evidence with or without cross-examination of any of the deponents as the Court may direct".

[p.4]

His Lordship then ordered as follows:—

1. That the deponents to the affidavits filed in this action do attend before the Court at a date and hour to be fixed for cross-examination thereon but the parties to be at liberty to supplement their evidence by oral evidence and adduce further evidence;

2. The cost of and occasioned by this application shall be costs in the cause.

Counsel complied with His Lordships orders above and on the 9th of February 2001 judgment was entered in favour of the Plaintiff as follows:—

1. That property No.37, Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone be sold by Public Auction or by Private Treaty to the highest bidder at a price not below $250,000 (Two Hundred and Fifty Thousand United States Dollars) or its equivalent in Leones at the current Bank rate of exchange at the time of such sale, such price to be approved by the Court.

2. That Solicitors for both parties do have conduct of the said sale and the Plaintiff and Defendant execute the Deed of Conveyance to the purchaser and in default of either party signing the said Deed of Conveyance the Master and Registrar of the High Court do the same on behalf of the defaulting party.

3. That either party be at liberty to bid at the said sale and in the event that either party being the purchaser thereof the Deed of Conveyance be executed by the other party or in default by the Master and Registrar, High Court.

4. That an account of all rents and profits received by either party from the said property since the purchaser thereof be submitted by each party with liberty to [p.5] either party to surcharge and falsify such accounts to be sanctioned by the Court.

5. That the proceeds of the said sale be distributed as between the parties having regard to the account as sanctioned by the Court.

6. That the costs of the Action be borne by the Defendant, Aiah Momoh such costs to be taxed.

Dissatisfied with the judgment of the trial Court, the Defendant/Appellant brought an appeal before the Court of Appeal, (hereinafter referred to as the Court below).

In its judgment delivered on the 11th day of July 2006 the Court below, Coram Justice's M.E.T. Thompson, P. Macaulay, dismissed the appeal relying heavily on the provisions of Order 41 Rule 13, and Order 42 Rule 8 of the Supreme Court Rules Cap 7. There is nothing on the printed Record to show whether the third Judge on the panel, Justice G. Gelaga King concurred or dissented.

The Defendant/Appellant was dissatisfied with the judgment of the Court below. He has come before this Court on a further and final appeal.

In the Notice of appeal filed on the 25th day of July 2006, six grounds of appeal were filed on behalf of the Appellant. They are:—

1. The decision of the Court of Appeal is against the weight of the evidence.

2. There was no Originating Summons issued in these proceedings to commence the same.

3. These proceedings from their nature ought to have been commenced by the issue of a Writ of Summons since there was a dispute about the ownership of this property.

[p.6]

4. The normal method of commencing a civil action is by Writ of Summons. The procedure adopted was wrong. There were no pleadings filed, the action was never entered for trial and therefore the whole proceedings were a nullity.

5. The Court of Appeal failed to consider whether the procedure adopted ensured that there was a fair trial of the issues in dispute between the parties in dispute.

6. The Court was not properly constituted when it delivered its judgment and the judgment itself is that of only two of the Justice's of Appeal. The judgment of the third Justice is yet to be delivered.

At the hearing of the appeal on the 24th of April 2008 both Counsel relied on their argument contained in the statements. Judgment was thereafter reserved.

I have examined the six grounds of appeal and I consider grounds 3, 4 and 5 to be fundamental and crucial, in that if they succeed the entire proceedings at the trial Court would be declared a nullity and it would be an academic exercise to consider any of the other issues. Courts are to determine live issues and not waste precious judicial time engaging or indulging in academic exercise.

I shall take grounds 3 and 4 together since they are allied. The issue easily distilled from grounds 3 and 4 is:—

"Whether the trial judge was right to continue the proceedings by Originating Summons after he found that the affidavits before him revealed dispute on facts".

In his written address learned Counsel of the appellant Mr. Serry-Kamal observed that the Originating Summons procedure is limited to special cases where there is no disputed fact contending that the proper direction was for the trial judge to order that the action should commence by Writ of Summons. Finally he submitted that Order 41 Rule 13 and Order 42 Rule 8 of the 1960 High Court Rules were not applicable.

[p.7]

In reply, learned Counsel for the respondent Mr. N.D. Tejan-Cole observed that in a suit commenced by Originating Summons the affidavits are the pleadings and so the need to order for pleadings to be filed does not arise.

He submitted that since the objection was not made or taken at the trial Court it cannot constitute a ground of appeal.

Concluding his submissions he finally submitted that specific provisions of Originating Summons is permissible under Order 42 and 45 of the 1960 High Court Rules.

He urged us to dismiss the appeal with costs.

The Law/Rules applicable to an action is the Law/Rules existing when the cause of action arose. After a diligent examination of the affidavits in support of the Originating Summons, I am satisfied that the

cause of action arose sometime in 1996. The Rules existing and in force at the time and so applicable to this case are the Supreme Court Rules Cap 7 of 1960. The Rules supra were applicable to trials in the High Court. The rules applicable now are the High Court Rules of 2007, the Court of Appeal Rules 1985, and the Supreme Court Rules 1982, but they are all not material to this case.

The Respondent as Plaintiff brought an action against the Defendant/Appellant on an Originating Summons seeking reliefs earlier alluded to.

The learned trial judge heard Counsel, examined the affidavits and observed that there are dispute of fact and that the best expeditions and economical disposal of the proceedings will accordingly best be secured by hearing the Summons properly on oral evidence with or without cross-examination of any of the deponents as the Court may direct. Now, can it be said that the learned trial Judge's order is correct. What are the dispute of fact in the affidavits. In the affidavits in support of the Originating Summons the Respondent/Plaintiff deposed that the House at No.37 Malama Thomas Street, Freetown in the West Area in the Republic of Sierra Leone is owned jointly by the Appellant and himself. He seeks an order by his Originating Summons for the Court to Order the partition of the property or outright sale and the proceeds therefrom to be divided by both of them.

[p.8]

In the 27 paragraph affidavit deposed to by the appellant on page 40 of the printed Record and in opposition to the affidavits in support of the Originating Summons the deponent states that he is the sole owner of the property, and there is a deposition of fraud, to the effect that fraud was perpetrated by one Fawaz Ayoub to include the Respondents named in the Conveyance. The deponent claims to be an illiterate. See paragraphs 4, 26 of the said affidavit.

A Plaintiff seeking partition of property which the adversary claims that he is the sole owner, and at the same time asserts that there was fraud in the preparation of the Conveyance, are indeed substantial dispute of fact. The main dispute of fact is who as between the Litigants is the owner of No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone.

On being served with these affidavits the proper thing for Counsel for the Plaintiff Mr. N.D. Tejan-cole to have done was to discontinue the suit and issue a Writ of Summons and Statement of Claim for the Court to determine who in fact is the owner of No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone.

The Trial Judge also fell into a grave error by ordering trial to continue on an Originating Summons, oblivious of the provisions of Order 2 Rule 1 of the Supreme Court Rules Cap 7 of 1960 which states that:

"Every action in the Supreme Court unless otherwise expressly provided for shall be commenced by a Writ of Summons which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action."

On the state of the affidavits the correct order to have been made by the learned Trial Judge was to order Counsel to file pleadings. Furthermore pleadings in this case are mandatory in that, how may I ask

would the Appellant prove fraud which he deposed to in his affidavit. It is very well settled that fraud must be pleaded and particularized and where fraud is not pleaded the Court would not entertain any evidence on it (fraud). See Tamakloe v Basel Trading Co. 6.W.A.C. p231. The learned Trial Judge's order denied the Appellant of his inalienable right to prove his case.

Order 42 Rule 10 supra states that:

"(10) the determination of any question of construction arising under a Deed, Will or other written instrument and declarations of the rights of persons interested: Provided that a Judge shall not be bound to determine any such question of construction if in his opinion, it ought not to be determined on Originating Summons."

All that the above says is that questions of construction are to be determined on Originating Summons but a Judge in his wisdom may decide such an issue on any other Originating process he finds convenient. Nowhere in the 1960 Rules is there such a procedure as the Trial Judge ordered, particularly where there is a deposition on fraud. The orders/directives of the Trial Judge were wrong.

The Court of Appeal was of the view that the proceedings by Originating Summons was Correct, relying heavily on the provisions of Order 41 Rule 13 and Order 42 Rule 8 of the 1960 Rules to affirm the Judgment of the Trial Court in these words:

"It seems to me that the learned Trial Judge had these two High Court Orders in mind when he adjourned the Summons from Chambers to open Court and also when he ordered the sale of the property situate at No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone. Again this ground of appeal lacks merit and therefore fails ".

It is very necessary now to examine Orders 41 Rule 13 and 42 Rule 8 Supra. Order 41 is Titled Applications and proceedings at Chambers I shall set out its provisions (Rule 13) verbatim et literatem. It says:—

"In every cause or matter where any party thereto makes any application at chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order directions of a judge and upon the hearing of such application it shall [p.10] be lawful for the Court to make any order and give any directions relative to, or consequential on the matter of such application as may be just; any such application may, if the judge thinks fit, be adjourned from Chambers into Court or from Court into Chambers".

It is a fundamental rule of interpretation of legislation that where the words of the legislation are clear and unambiguous the words should be given their simple and ordinary meaning. It is only then that the intention of the Law Maker/Legislators can be known; After all the object of all interpretations is to find out the intention of the Legislature. And in interpreting Legislation it is not the duty of the Judge to fill in the gaps as wrongly suggested by Lord Denning LJ (as he then was) in Seaford Count Estate Ltd, v Asher 1949 2 K.B. Page 498-499.

Where Judges fill in the gaps they would be delving into uncharted territory. It would amount to a naked usurpation of legislative function under the disguise of interpretation. See Mayor and ST Mellons Rural District Council v New Port Corp 1952 ACP 189, Fisher v Bell 1960 3 ALL E.R. Page 731.

Now, to the interpretation of Order 41 Rule 13 of the Supreme Court Rules 1960. Order 1 supra defines Originating Summons thus:—

"Originating Summons" means every summons other than a summons in a pending cause or matter",

With the above definition it becomes clear that "Summons" in Rule 13 of Order 41 supra is not Originating Summons. It is Summons. What then is the difference between "Originating Summons" and Summons. "Originating Summons" is one of the ways civil proceedings are commenced in Sierra Leone. The other ways are by Writ of Summons, Originating Motion and Petition. That is to say Originating Summons is one of the ways an action or proceedings is launched.

"Summons" on the other hand are for interlocutory applications. Quite a number of interlocutory applications are made by Summons e.g. Summons for directions, to renew a Writ, [p.11] to amend a Writ or Originating Summons. I shall now delve into a brief history of Originating Summons. A Judges Summons is an Originating process. Trial in a Judges Summons is conducted by affidavit evidence, i.e. you prove your case by affidavit evidence.

The main advantage of Originating Summons is simplicity resulting from the elimination of pleadings. It is applicable where there is no substantial dispute on questions of fact, and suitable for the determination of questions of construction. Where the issue between the parties is in controversy pleadings must be ordered. An Originating Summons would no longer be appropriate. A Writ of Summons and statement of claim/pleadings would best present the plaintiff case while a statement of defence (Pleadings) would be the best answer to the plaintiff's case.

"By way of summons or otherwise" means by way of Summons or any other process e.g. motion etc. best suited for interlocutory applications. The Court below fell into a serious error in interpreting "Summons" in Order 41 Rule 13 to mean Originating Summons. The Summons therein means Summons. Or otherwise means any other process for interlocutory applications and clearly not an Originating Summons which is used to commence non contentions suits to do with interpretation of Instruments etc."

Rule (8) of Order 42 reads as follows:—

"(8) applications for or relating to the sale of property by auction or private contract, and as to the manner in which the sale is to be conducted and for payment into Court and investment of the purchase money."

The above becomes relevant only after the issue of ownership is resolved. The issue of ownership of the said property has not been resolved, so the above is irrelevant for now.

It is irrelevant if the learned Justices of the Court of Appeal were of the view that the Originating process was an Originating Summons or a Summons whichever. Their Lordships [p.12] are wrong because none of these processes allow pleadings, and pleadings are mandatory on the state of the affidavits.

Affirming the Judgment of the trial Court is unsupportable in the light of what I have been saying.

This is a case where the trial judge exercised his discretion which he did not have; to give orders that were clearly wrong. Indeed this Court is always loath to interfere with the discretion of a Judge, but here we are compelled to do so. This is so because the discretion was wrongly exercised and tainted with illegality and substantial irregularity. The procedure adopted by the learned trial Judge after he found that there were disputes on facts in the affidavits departed from decided authorities and settled practice. The learned Trial Judge ought to have struck out the Originating Summons. His Lordship did not do that. Instead he exercised his discretion and gave orders unknown to contemporary practice. The exercise of discretion by the learned Trial Judge in clear breach of what the Law requires is/was perverse in the circumstances. Where a Court disregards clear provisions of its Rules after full knowledge and adopts a strange procedure to hear claims, the entire procedure amounts to a mockery in judicial administration and a clear violation of the plainest principle of reason and justice.

I now turn to the points raised in the submission of the learned Senior Counsel for the Respondent, Mr. N.D. Tejan-Cole and in the process I shall deal with Ground 5, the substance therein being whether the Appellant had a fair trial. Mr. N.D. Tejan-Cole's points are:—

1. That objection not made or taken at the trial cannot constitute a ground of appeal;

2. An Appellant could not set up in the Appeal Court (Objection) which was not put forward and was not in issue at the trial Court;

3. Once it becomes apparent that a point has not been raised in the Court below it is properly to be regarded as an abuse of the process of the Court to seek and to raise it on appeal for the first time on appeal.

The substance of all that I have been saying has to do with the correct originating process to be used where plaintiff files in Court an Originating Summons seeking in the main Partition of property and the Defendant claims ownership of the same property.

Nowhere in the 1960 Rules is there such a procedure as the Trial Judge ordered. Apparently the order was made by the learned Trial Judge in exercise of his discretion, which he did not have in this case, in the light of the clear provision of Order 2 Rule 1 of the 1960 Rules. The well settled position of the law is that Originating summons cannot be used to commence suits where there are substantial disputes of fact, as in this case.

It must be noted that Legislation on Partition, the Partition Acts 1868 and 1876 relates to situations where the ownership of the property to be partitioned is not in dispute. In this case the property to be partitioned, No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra

Leone is in dispute. The Appellant/Defendant claims to be the sole owner of the property. See paragraph 26 of his affidavit on pages 40-42 of the Printed Record.

Partition can never be ordered, when ownership of the property is left unresolved. The correct course would be to resolve the issue of ownership of No.37 Malama Thomas Street, Freetown in the Western Area of the Republic of Sierra Leone before Partition of the said property can be considered, and the only way to resolve ownership of property is by Writ of Summons and statement of claim/defence, i.e. pleadings. Now it is well settled that Jurisdiction of the Courts can only be ousted in the following instances:—

(a) Where the Court is not properly constituted as regards the numbers and qualifications of its members and a member is disqualified for one reason or another;

(b) Where the subject matter of the case is not within the jurisdiction of the Court;

[p.14]

(c) When the case has not come to the Court through the due process of Law and conditions precedent to the exercise of the said jurisdiction have not been fulfilled.

This case falls under (C) above. In the light of all that I have been saying it is so obvious that this case was not before the trial Court by due process.

A case comes before the Court by due process if it is properly before the Court.

The learned Trial Judge exercised his discretion on his whims and fancies instead of judicially and judiciously. A judicial and judicious exercise of discretion is exercise of discretion with sufficient, correct and convincing reason. This was lacking in this case. With the facts available due process was not followed, and such a situation where the case should be heard on Writ of Summons and pleadings but was not questions the jurisdiction of the trial Court to hear the case. Suppose for instance the rules provide that claims for Title to land, trespass shall be heard on a Writ of Summons and pleadings but Plaintiff brings such claims by Petition and the Defendant does not object, and trial proceeded to conclusion. Clearly the judgment would be a nullity. This is substantive as opposed to procedural where for instance the defendant waived a flaw, e.g. service of Originating process on him. Entered appearance filed a statement of defence. He cannot be heard to complain thereafter. The former example applies in this case. The directives of the trial judge was a fundamental error that renders the judgment a nullity, notwithstanding that the Appellant/Defendant did not object at the trial Court.

There is a distinction between a mandatory provision, Order 2 Rule 1 of the Supreme Court Rules Cap 7 of 1960 which cannot be waived and a mere procedural requirement in the course of trial which can be waived. See Smythe v Wiles 1921 2 KB p66, Papadoponlos v Papadoponlos 1929-1931 Probate Division p55, where it was held that parties cannot by consent confer jurisdiction upon a tribunal, which by law has no such jurisdiction. The Courts have complete control over how suits should commence, consequently a party in the case has nothing to waive, neither can it be said that a party acquiesced.

[p.15]

An Appellant could set up in the Appeal Court an objection which was not put forward and was not in issue at the trial Court if what he is setting up has to do with the jurisdiction of the Court. In this case the Trial Judge had no jurisdiction to hear by Originating Summons what should be heard by Writ of Summons and pleadings. Since this issue is substantial, very fundamental and touched on the jurisdiction of the Court it can be raised informally, although it is desirable some process is filed so that the adverse party is not taken by surprise. Afterall jurisdiction can be raised at anytime even for the first time at the Supreme Court. Finally, judicial discretion must at all times be exercised judicially and judiciously and not arbitrarily, or unrestrained or at the whim and fancies of the Judge. In this case once the Trial Judge found that there were disputes on facts in the affidavits he had no option but to order pleadings.

Furthermore not ordering pleadings denied the Appellant the opportunity to plead fraud and prove it. He was thus denied a fair hearing and once a party is denied his right to fair hearing in a proceeding such proceedings are a nullity.

This appeal is allowed. The following orders are made—

(a) The Judgment of the High Court (A.N. Stronge J.A.) given on 9th February 2001 is hereby set aside.

(b) The Judgment of the Court of Appeal delivered on 11th July 2006 is hereby set aside.

(c) All the monies held in Account No 2032189 at the Sierra Leone Commercial Bank Limited shall remain in the said Account pending the final decision of the Courts on the ownership of No. 37 Malama Thomas Street Freetown, in the Western Area of the Republic of Sierra Leone.

(d) Trial shall proceed afresh by Writ of Summons and statement of claim if the parties decide to resolve the issue of ownership of No.37 Malama Thomas Street Freetown, in the Western Area of the Republic of Sierra Leone.

[p.16]

(e) Each party shall bear its own costs.

SGD.

HON. MR. JUSTICE BODE RHODES-VIVOUR - J.S.C.

I agree.

SGD.

HON. MRS. JUSTICE S. BASH-TAQI - J.S.C.

I agree.

SGD.

HON. MS. JUSTICE S. KOROMA J.A.

I agree.

SGD.

HON. MR. JUSTICE S.A ADEMOSU - J.A.

Ref: BR-V/HJ

[p.17]

SEMEGA JANNEH, J.S.C.

I have had the privilege of reading in draft the judgment of my learned brother, the Honourable Justice B. Rhodes-Vivour-J.S.C., and I agree with the central conclusion and reasoning behind it. I allow the appeal. However, had drafted this opinion as I wish to express my own perspectives of the matter.

[p.18]

THE FACTS

It is necessary to give the background facts for a better understanding of the issues. The premises situate at and known as number 37 Malamah Thomas Street, Freetown, in the Western Area of Sierra Leone, was purchased out of the proceeds of the sale of an alluvial diamond. The facts relating to the purchase, and also the assignment of the said premises, which is disputed, from one Alhaji Tejan Sows, exhibited as "A" to the affidavit in support of SAHR SAMUEL NYANDEMOH (Respondent herein) sworn on the 2nd June, 1998, ought to be viewed from two different perspectives, that of Mr. Nydandemoh and Aiah Momoh (the Appellant herein) respectively. According to the said affidavit of Mr. Nydandemoh, he was permitted to work by his friend, one Mr. Hassana Koroma, under his alluvial Diamond Mining License, at a part of his mining plot situate at Njorpowahun, Nimiyama Chiefdom, Kono, District, Eastern Province. He, as a Supporter, subsequently invited Mr. Momoh to join him in the business as one of his three Tributors. The Tributors, it appears, are the persons engaged in the physical work such as digging for diamonds within the allocated site. The Tributors, as custom requires, are entitled to half the value of the find (diamonds) whether retained by the Supporter or sold by him to another person. In the instant case, it was sold for Le 50,000,000.00 (Fifty Million Leones). The two Tributors were given Le5,000,000.00 (Five Million Leones) and the balance of Le 45,000,000.00 was jointly retained by Mr. Nyandemoh and Mr. Momoh. It was from this balance that 37, Malamah Thomas Street, Freetown, was purchased. According to the affidavit in opposition sworn to by Mr. Momoh on the 3rd July, 1998 he, Mr. Momoh, denies the said version of Mr. Nydandemoh and claims exclusive ownership of the diamond in issue. He expected the assignment of the said premises to be made to him solely, and protested when he learnt that it was made in the joint names of himself and Mr. Nydandemoh. The Partnership Agreement dated the 13th February, 1993; the Sharing of Rents

Agreement dated the 27th June 1993; and the Lease Agreement dated the 31st March, 1999, exhibited to the said affidavit of Mr. Nyandemoh as "B" "C" and "E", respectively, are said by Mr. Momoh not to be his deeds — he being an illiterate. In short, he denies and challenges the facts and exhibits that Mr. Nyandemoh relies upon on his application contained in the originating summons.

[p.19]

THE GROUNDS OF APPEAL

1. The decision of the Court of Appeal is against the weight of the evidence.

2. There was no originating summons issued in these proceedings to commence the same.

3. These proceedings from their nature ought to have been commenced by the issue of a writ of summons since there was a dispute about the ownership of this property.

4. The normal method of commencing a civil action is by a writ of summons. The procedures adopted were wrong. There were no pleadings filed, the action was never entered for trial and therefore the whole proceedings were a nullity.

5. The Court of Appeal failed to consider whether the procedure adopted ensured that there was a fair trial of the issues in dispute between the parties in dispute.

6. The Court was not properly constituted when it delivered its judgment and the judgment and the judgment itself that of only two of the Justices of Appeal. The judgment of the justice yet to be delivered.

No argument has been proffered in respect of ground one by the Applicant. As a consequence, it is treated as abandoned and shall not be dealt with. Grounds 3, 4 and 5 have been argued together and rightly so. The three grounds relate to the same issue(s) and ought to have been crafted as one ground of appeal. I will deal with the issue(s) raised by grounds 3, 4, and 5 and then decide on grounds 2 and 6.

[p.20]

THE ISSUES

(1) Was the learned trial Judge right in law in proceeding with the hearing of the Originating Summons in the face of the facts disclosed by the affidavits filed, and his own conclusion that there was dispute as to the facts, and more specifically, the ownership of the diamond; the premises situate at 37 Ma/amah Thomas Street, Freetown; and the proceeds of sale of the said premises.

(2) If the learned trial Judge was wrong, what was the course open to him instead of proceeding with the hearing of the Originating Summons.

THE COMMENCEMENT OF ACTION

How an action is commenced in the High Court is found in Order 2 rule 1 of the Supreme (now High) Court Rules of 1960 Cap. 7 of the Laws of Sierra Leone which provides:

"1. Every action in the Supreme Court unless otherwise expressly provided for shall be commenced by writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action" (emphasis provided).

It is clear from the provisions of rule 1 of Order 2 of the High Court Rules of 1960 that an action must be commenced by a writ of summons unless such an action is expressed to be commenced by another method of procedure. By necessary implication, such an expression is generally found in or given by a particular statute dealing with a particular matter or matters, or, by the Rules of Court.

The other procedures within the purview of rule 1 of Order 2 of the High Court Rules 1960 include the Originating Summons. By Order 41 rule 1 every application at chambers, not made ex-parte, shall be by summons. In such instances, if the application is made within an existing action or suit, the ordinary summons is used but when the application is outside an on-going action and, by its nature, is intended to or commences an action, then the procedure to be employed is the originating summons. At this juncture, it should be noted that where the High [p.21] Court Rules or statute prescribes an originating summons as the method of procedure; the proceedings so commenced constitute an action. See Re Fawsitt, 30 Ch. D.231, and Order 71 rule 1A of the English Rules of 1960 for the definition of an originating summons. It should be borne in mind that the High Court Rules were amended by rule 3 of the Supreme (now High) Court (Amendment) Rules 1969 - Public Notice No.41 of 1969 by the deletion therefrom of the words "1st day of January, 1957" and the substitution thereto of the words "1st day of January, 1960", and also in respect of rule 3 of Order 52 which now reads:

"3. Where no other provision is made by these Rules the procedure, practice and forms in force in the High Court of Justice in England on the 1st day of January, 1960, so far as they can be conveniently applied, shall be in force In the High Court"

It should further be borne in mind that our High Court Rules of 1960 are an abridgement of the Supreme Court Rules of England.

Before closing on this issue, let me give a few examples in which another method of procedure other than the writ of summons is expressed or authorized by the following statutes: the Registration of Instrument (Amendment) Act, 1964; and the Adoption Act, 1989; and by the High Court Rules 1960: Order 45 rule 1, under the rubric — ADMINISTRATION AND TRUSTS; FORECLOSURES AND REDEMPTION; and by implication, Order41 rule 7 under the caption: APPLICATIONS AND PROCEEDINGS AT CHAMBERS; and paragraph (10) of Order 42 under the caption: BUSINESS TO BE DISPOSED OF IN CHAMBERS. Several of such rules in the English Rules of 1960 are listed in the explanatory notes at page 1397 under Order 54 rule 4B under the rubric: Form and issue of Originating Summons.

THE REASONING

Mr. Tejan-Cole, Counsel for Mr. Momoh, in his argument, recognizes that there is a dispute as to a basic fact, that is, ownership of the alluvial diamond from which its proceeds of sale, the premises, 37 Malamah Thomas Street, Freetown, was purchased and thereby transferring the dispute to the ownership of the premises. And because of Mr. Momoh's claim of inclusive [p.22] consequential orders for partition or sale in the High Court Rules of 1960, or by statute. In this regard, I have searched in the High Court Rules of 1960 for provisions expressing the use of an origination summons and found none. The same applies in respect of statutes. Mr. Tejan-Cole has not provided any rule of court or statute requiring the use of an originating summons that is on the point. It follows that the action was not commenced in accordance with the provisions of rule 1 of Order 2 of the High Court Rules, 1960, and the law; the commencement of the action therefore, was irregular.

The originating summons commencing the action sought orders for partition or sale of 37 Malamah Thomas Street, Freetown, and an account of the rents of the premises collected. It has not been shown, in my view, that the originating summons is the proper procedure for commencing action for such orders (or claims). Mr. Tejan-Cole, in the statement of case for the Nyandemoh, points out that the relevant statutes as regards partition or sate are the Partition Act, 1868, and the Partition Act, 1876, of England and made applicable in Sierra Leone by virtue of Section 74 of the Court Act, 1965, Act 31 of 1965, but fail to point out whether these statutes (or any one of them) express or require that action for order (or claims) for partition or sate should be commenced by originating summons. The rule of court that Mr. Tejan-Cole seems to be relying is Order 42 paragraphs (7), (9) and (10) under the caption: Business to be disposed of in chambers, and reproduced hereunder:

"(7) Application connected with the management of property".

"(9) Such other matters as the Judge may think fit to dispose in chambers".

"(10) The determination of any question of construction arising under a deed, will or other written instrument and declaration of the rights of the persons interested.

Provided that a Judge shall not be bound to determine any such question of construction if, in his opinion, it ought not to be determined on originating summons"

[p.23]

The order gives a list of the business or matters that may be disposed of in chambers. This can be clearly discerned in the opening paragraph of the Order which states:

"The business, to be disposed of in chambers by Judges, shall consist of the following matters, in addition to the matters which under any other rule or by statute maybe disposed of in chambers"

and proceeds to list the matters numbered (1) to (10). It can be clearly seen that the Order does not indicate the procedure to be employed to bring the matter before the Judge in chambers. The corresponding Order in the English Rules of 1960 is Order 55 rule 2. In this English Order, as in the other Orders, the procedure to be applied, be it summons or originating summons or petition or etc., is specifically given. In respect of the list of matters in Order 42 of our Rules, if a procedure is not provided

for bringing a matter before a judge in chambers, the procedure or practice in respect of the same may be imported from the English Rules, 1960, by virtue of Order 52 rule 3, reproduced herein, at page 5 Supra. By the generality of the English Rules, 1960, and our Rules, I surmised the procedure applicable within an ongoing action or suit would be a summons (or motion) but, where it is intended to commence an action in respect of a matter, it would be an originating summons or originating motion or a petition. The writ of summons is not intended for matters that are ordinarily heard in chambers but the judge may receive or hear certain evidence or matters in the suit commenced by writ of summons in chambers by virtue of Order 42 paragraph (9) or by his inherent jurisdiction. Obviously, paragraph (10) cannot be for the purpose of commencing an action as the judge in chambers is not a party to the action, and in the instant case, he must have been completely oblivious of the decision to file, or, of the filing of the Originating Summons. The order (or claim) for an account of rents collected by Mr. Momoh, in my view, does not come within the purview of paragraph (7) of Order 42. A quick reference to Order 55 rule 2 (13) of the English Rules, 1960, at page 1486, under the Rubric: Applications as to management of property, which is exactly of the same wording (ipsissima verba) as paragraph (7) would reveal support for the view expressed. The extend of the rule under the rubric: Scope of paragraph, is explained thus:

[p.24]

"This paragraph refers to application in proceedings when the estate is or trusts are being administered. On an application by summons for payment out of court of the proportion of the life tenant's special contribution payable under part V of the Finance Act, 1948, attributable to the income of the life tenant from an estate being administered by the court it was held that the order could properly be made on summons under this paragraph (Re Willins, (1949) W.N. 1936)"

As regards paragraph (10) of Order 42, it can be said, that by implication, it expresses that application may be made for "the determination of any question of construction arising under a deed, will or other written instrument and declarations of rights of the persons interested". The implication is embedded, and may be read from the proviso, in paragraph (10) of Order 42. In the English Rules, 1960, Order 54A rule 1, provides.

"1 In any Division of the High Court, any person claiming under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a determination of the rights of the persons interested"

In my judgment, the originating summons in question does not in any way indicate or manifest an application for the determination of any question of construction arising out of the Deed of Conveyance dated the 25th day of August, 1992. The paragraph1 of the originating summons merely rehearse the Deed of Conveyance and prays, among others; for its partition between Mr. Nyandemoh and Mr. Momoh. Therefore paragraph (10) of Order 42 is not applicable in the circumstances.

As regard regards the decision of the Court of Appeal, composed of Justice M.E. Tolla-Thompson — J.A.; Justice G. Gelaga-King (who did not indicate dissent or concurrence); and Justice P.E. Macauley, I am of the view that the Court, with all due respect to the Justices of Appeal, misapprehended the crucial point

in issue, and this misapprehension appears to have [p.25] arisen from its misperception of the facts as can be discerned from the brief statement of the facts in the judgment which, for clarity, is in part reproduced hereunder:

"The Brief Facts of the case is that the plaintiff Sahr Samuel Nyandemoh and the defendant Aiah Momoh were business partners. The plaintiff and defendant jointly owned property situate at 37 Malamah Thomas Street, Freetown as evidence by elect (Sic) of conveyance dated 25th August 1992. A dispute arose as to the management of the said property."

These 'facts' represented the version of Mr. Nyandemoh as reflected in his said affidavit in support particularly in paragraphs 16-22 and 26-30. Even the affidavit alone clearly manifests a history of disagreement between Mr. Nyandmoh and Mr. Momoh as to the ownership of the alluvial diamond; the premises known as 37 Malamah Thomas Street, Freetown; and that Mr. Momoh has been asserting ownership and control over the premises. And if there is any doubt from the said affidavit of Mr. Nyandemoh, and I cannot understand any one having a doubt that there is a dispute as to ownership of the alluvial diamond and the said premises, the said affidavit in opposition sworn to by Mr. Momoh, particularly paragraphs 2-7, 13, 15 and 16; 20-23, 25 and 26, ought to dispel any doubt. The affidavit discloses denials of and challenges to material averments in the said affidavit of Mr. Nyandemoh; claims of ownership of the alluvial diamond and premises; allegation of fraud and other misdeeds by Mr. Nyandemoh and his alleged confederates. The trial Judge recognized the dispute as to ownership and the need to determine same. See page 6, supra.

The Court of Appeal's reliance on Order 41 rule 13 and Order 42 paragraph (8) of the High Court Rules, 1960, which, respectively, provides:

"13 In every cause or matter where any party thereto makes any application at chamber, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of a judge and upon hearing of such application it shall be lawful for the court to make any [p.26] order and give any directions relative to, or consequential on, the matter of such application as may be just, and any such application may, if the judge thinks fit, be adjourned from chambers into court or from court into chambers" (Emphasis Provided)

"(8) applications for or relating to the sale of property by auction or private contract, and as to the manner in which the sale is to be conducted, and for payment into court and investment of the purchase money".

Should be viewed within the context of this misapprehension of the issues and misperception of the facts After citing the above rule 13 and paragraph (8), the learned Justice of Appeal, (as he then was) the Hon. Mr. Justice E Tolla-Thompson, J.S.C., who delivered the judgment of the court, concluded, and I quote:

"It seems to me that the learned trial judge had these two High Court Orders in mind when he adjourned the summons from chambers to open Court and also when he ordered the sale of the property situate at 37 Malamah Thomas Street".

Rule 13 of Order 41 is cited in the Judgment of the Court of Appeal to show that the trial Judge had the jurisdiction, to transfer the hearing of the originating summons from chamber into count. I do agree with the learned Honourable Justice but hasten to add that this rule 13, in my view, has no relevance or bearing to the Amended Grounds of Appeal in the Court of Appeal which states:

"5 That the whole procedure are null and void and ought to be set aside on the grounds that there is original summons properly issued out of the Masters Office"

"6 7/76 learned Trial Judge having ruled out that there was a dispute as to the fact in the matter the proper course was to have ordered that the matter be set down for trial as a normal action commenced by writ of summons, properly set down for trial"

and issues in contention. The issues were: (1) whether the originating summons properly issued from the Master's Office and (2) the originating summons was not the proper procedure given the factual dispute. I can see that Mr. Serry-Kamal, of counsel, did not help matters and invited the court's reaction when he submitted that "The 1960 High Court Rules does not allow the court to continue the originating summons in open court". The issue was and still is whether the learned trial judge was right to proceed with the hearing of the originating summons in the face of the factual dispute, and not whether the court could order or give direction, as it did, for the hearing of the originating summons to be continued in chambers or that "the matter be set down for trial as a normal action commenced by writ of summons, properly set down for trial".

This brings us to the issue of what the learned trial judge could have done in the situation that presented itself. It seems to me the learned trial judge faced with the situation, attempted to alter the nature of the hearing, or, manner of the trial, to conform to a trial by writ of summons as much as the circumstances permit by giving the said directions of the 22nd day of November 1999 at pages 130-131 of the records (see page 6 above) which is akin to continuing the proceedings as if begun by writ of summons. In my judgment, the High Court Rules, 1960, do not permit the trial Judge to give such orders or directions, or embarked on such a course. Nor can such a rule be imported from the English Rules pursuant to rule 3 of Order 52 of our High Court Rules, 1960, because there is no such or appropriate rule in the English Rules of 1960. The appropriate English rule first came into existence in the English Rules in 1964 as a result of the recommendation of the Evershed Committee (Final Report: para. 101 see page 578 of the English Rules of 1960) and is manifested in Order 28 rule 7. To illustrate the point, it is enough to reproduce sub-rule (1) of rule 7 of Order 28 which provides:

[p.28]

"7-(1) Where in the case or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so

begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof”

The only English rules that can be imported into our local Rules pursuant to Order 52 rule 3 are rules that are contained in the English Rules of 1960, and not rules made thereafter. At this juncture let me point out, for purposes of clarity, that rule 13 of Order 41 of our High Court Rules is present, in the same wording, in the English Rules in Order 54 rule 9. This rule 9 of Order 54 and rule 7 of Order 28 are both in the English Rules of 1964. This leads to the eluctable conclusion that the two rules are not meant to, and do not serve, the same purpose. After reading the two rules, I came to the same conclusion.

As regards paragraph (8) of Order 42, I am of the view that the Court of Appeal cited it in the judgment to indicate that trial, court had the jurisdiction to order sale of the premises and, therefore, the prayer for an order of sale was properly before the trial court. My reasoning in respect of rule 13 of Order 41 as regards the misapprehension as to the crucial issue and misperception of the facts applies to paragraph (8) of Order 42 of our High Court Rules, 1960.

However, let us suppose that the action was properly commenced for the purpose of obtaining the orders sought. It is clear to me that the orders sought assume or presuppose that the Deed of Conveyance is accepted by Mr. Momoh and that he is not claiming ownership of 37 Malamah Thomas Street, Freetown, which the Deed of Conveyance conveys to Mr. Nyandemoh and Mr. Momoh jointly. We know the situation to be the contrary. We also know from the said affidavits of Mr. Nyandemoh and Mr. Momoh that Mr. Momoh has been and is claiming exclusive ownership of the premises and has been and is alleging fraud and other wrongful acts, not only in respect of the Deed of Conveyance but also in respect of other material documents exhibited to the said affidavit of Mr. Nyandemoh. In pleadings, the allegation of [p.29] fraud requires particularization. It is very clear in my mind, and was obvious to the learned trial judge, that he, the trial Judge, needed to determine ownership before he could possibly deal with the orders prayed for. In the circumstances of this case, I hold that the issue of partition or sate cannot be dealt with unless and until the issue of ownership is determined; if in doing so, joint ownership is found, then and only then, can an order for partition or sale be made. The procedures that follow the filing of a writ are better suited for determining disputes that are grounded on facts and, more so, where fraud is alleged.

I am of the firm view that the learned trial judge instead of giving the following direction:—

"1. That the deponents' to the affidavits filed in this action do attend before the court at a date and time to be fixed for cross examination thereon but the parties to be at liberty to supplement their evidence by oral evidence but to adduce further evidence"

ought to have struck out the action with liberty for either party to commence an action by writ of summons. See the Ghanaian Supreme Court case of POKU and Another Vs KWAO and Another [1989-90J 2 GLR, which, if not in all fours, has commonality with the instant case in respect of the issue or complaint that the action was commenced by a wrong procedure in the given facts of the respective cases.

THE CONCLUSION

In the circumstances I hold that commencement of the action by an originating summons is an irregularity which constitutes such a fundamental defect in procedure that the proceedings before the trial Judge cannot be allowed to stand. Accordingly, I hereby set aside the judgment of the trial Judge given on the 9th day of February 2001 and that of the Court of Appeal delivered on the 11th day of July 2006, without prejudice to the sale of the premises, 37 Malamah Thomas Street, Freetown, which was executed pursuant to orders of Court, with liberty to either Mr. Nyandemoh or Mr. Momoh to issue a writ. The proceeds of sale to remain in the custody of the court, and in the savings account numbered 2032189 at the Sierra Leone Commercial Bank Limited in which the proceeds of safe have been deposited pursuant to the orders of court to await further orders of the courts.

[p.30]

As can be seen by now, the issues raised by grounds 2 and 6 have become irrelevant and redundant; and it would serve no purpose, in respect of the Appeal, for this court to deal with the said grounds of appeal.

SGD.

HON. JUSTICE GIBRIL B. SEMEGA-JANNEH (PRESIDING)

CASES REFRERRED TO

1. Tamakloe v Basel Trading Co. 6.W.A.C.A. p. 231

2. Seaford Count Estate Ltd, v Asher 1949 2 K.B. Page 498

3. Mayor and ST Mellons Rural District Council v New Port Corp 1952 ACP 189,

4. Fisher v Bell 1960 3 ALL E.R. Page 731

5. Smythe v Wiles 1921 2 KB p.66

Papadoponlos v Papadoponlos 1929-1931 Probate Division p.55

STATUTES REFERRED TO

1. Supreme Court Rules Cap 7 of 1960

IBRAHIM A.H. BASMA v. ADNAN YOUSSEF WANZA

[CIV.APP.4/2007] [p.73-78]

DIVISION: SUPREME COURT, SIERRA LEONE

CORAM: MR. JUSTICE M.E.TOLLA THOMPSON, JSC

(PRESIDING)

MR. JUSTICE G. SEMEGA-JANNEH, JSC.

MR. JUSTICE N.C. BROWNE-MARKE, JA

BETWEEN:

IBRAHIM A.H. BASMA — APPLICANT

AND

ADNAN YOUSSEF WANZA — RESPONDENT

AND

BASSAM IBRAHIM BASMA — APPLICANT

AND

ADNAN YOUSSEF WANZA — RESPONDENT

Mr. S. Sesay for the Applicant

Mr. Yada H. Williams and Mr. O. Jalloh for the Respondent

RULING

MR. JUSTICE M.E. TOLLA-THOMPSON, JSC

My Lords the applicant by motion applies for the following Orders:

1. Leave to deposit title deeds pursuant to the Orders of the Court of Appeal dated 7th March 2008 and an extension of time within which to deposit same.

2. Applicant be allowed to file certified true copies thereof and in the alternative.

3. That this court grants a stay of execution of the Court of Appeal judgment dated the 7th day of March 2008 and all subsequent proceedings thereto pending the hearing and determination of the appellant appeal to the Supreme Court.

4. Such further or other Order as the Court shall deem fit.

[p.74]

The application for the above orders is supported by the affidavit of Bassam Ibrahim Basma:— the application sworn to on the 27th October 2008 with several Exhibits annexed.

BACKGROUND

A short history of this case as far as it is relevant to this application is that on the 24th May 2007 the Court of Appeal gave judgment for the respondent and sometime thereafter the appellant moved the Court of Appeal for a stay of execution of the judgment. The stay of execution was granted in the following terms:

''The stay of execution of the judgment of the Court of Appeal dated 24th May 2007 is granted. It is further ordered that because of the special circumstances of this matter the applicant/respondent deposit the title Deeds to the properties listed in the affidavit of Ibrahim Abdul Hussein Basma sworn to on 21st June 2007 to the Registrar of the Court of Appeal until final determination of the appeal. The title deed to be deposited within 30 days of this Order"

It is the non compliance of the above order which has precipitated this application to this Court.

THE ARGUMENT

When the motion came up for hearing Mr. Williams learned counsel for the respondent raised the issue of the courts jurisdiction to entertain the Motion in view of rule 60(2) of the Supreme Court Rules. We overruled his objection and allowed learned counsel for the applicant Mr. Sesay to move his Motion. In moving the motion Mr. Sesay referred us to the affidavit in support of the motion and the various exhibits annexed thereto and submitted that he relied on the affidavits in its entirety.

[p.75]

He also referred us to rule 34 of the Supreme Court Rules and submitted that he is invoking the said rule to support his application. He urged the court to grant the application, and submitted that if the application is not granted, it will render the appeal which is now before the Supreme Court nugatory. It will be of little value. Mr. Williams in reply said that he does not wish to go into the merit of the application, but to repeat and rely on his earlier submission, that the court lacks jurisdiction to entertain the application, he said that there is no basis in law for the application. An application for stay can only be made pursuant to rule 60(2) of the Supreme Court Rules.

Continuing he submitted that it is quite clear that a stay of execution was granted by the Court of Appeal and therefore an application for a stay in the Supreme Court can only be made, after a refusal by the Court of Appeal. Therefore he argued the court is not competent to grant the application. In support of this submission, he cites the Supreme Court case Aiah Momoh v Sahr Samuel Nyandemore Civ.App.6/2006 unreported: in particular the dictum of Rhodes Vivour JSC.

Also submitted that the court is not competent to grant the 1st and 2nd Orders.

Finally he said if there is a failure to comply with the terms of the stay the applicants should apply to the Court of Appeal.

Presumably the lack of jurisdiction raised here by Mr. Williams relates to the absence, of the practice and procedure adopted by the applicant, and not one which relates to the status of the application. In order words this court has no power to grant the orders prayed for, because the applicant has not followed the practice and procedure laid down by the rules, to bring such a matter before the Supreme Court.

[p.76]

Mr. Williams refers to rule 60(2) of the Supreme Court Rules — r.60 (2) states:

subject to the provision of these Rules and to any other enactment governing the same an application for stay of execution or proceedings shall first be made to the Court of Appeal and if that court refuses to grant the application the applicant shall be entitled to renew the application to the Supreme Court for determination.

This rule is identical to rule 64 of the Court of Appeal rules which is also a procedural rule.

PROCEDURAL RULE

The Court of Appeal granted a stay of execution of the judgment on terms, which, obviously the applicant was unable to fulfill and misguidedly came to this court asking for a variation of the terms of the stay or a stay of execution of the judgment by this court; presumably with modify condition.

It is the usual practice that in seeking a variation, of any order, the application must first be made to the court which granted the original order, in this instant the Court of Appeal, if the application fails, then to a higher court — Supreme Court.

In the case of an application for a stay of execution of a judgment, in the Supreme Court, such application is made pursuant to rule 60 (2) of the Supreme Court Rules, supra. It is a procedural rule which illustrates the manner in which proceedings for a stay of execution of a judgment under the rule should be conducted. Thus the applicant must first apply to the Court of Appeal and if refused the applicant "shall be entitled to renew the application" to this court.

[p.77]

When I perused the application, my initial thought was that the applicant is desperate, and eager to fulfill the condition of the stay, not because he was keen to prosecute the appeal but merely to forestall the writ of fifa and prevent the sale of the applicant's property.

JURISDICTION

Mr. Williams sole ground of objection to the application is the courts lack of jurisdiction to entertain the application, and if the objection is upheld it is enough to put an end to the application.

I agree with Mr. Williams, this court cannot entertain this application as it is. However this is not always the case. There is a settled principle of law that a court ought not to decline jurisdiction if it can assume

discretionary powers which will not amount to a violation or usurpation of the courts jurisdiction. Such power is usually described as an adjunct or incidental to the courts jurisdiction under which it operates. I am persuaded by the above principle, arid it is worth considering in this application.

During the argument and submission certain issues emerged which though unconnected with the application proper, are germane and incidental to it, which, in my considered opinion, this court ought to deal with under its discretionary powers.

It is a known fact that the substantive appeal is before the Supreme Court. Indeed the Supreme Court, sometime ago granted an order for substitution of the deceased appellant by the applicant herein.

Again, it is well known that there are legal moves by the respondent for the sale of the properties of the applicant to satisfy the judgment debt. It is my view-that any sale of the properties, when the Supreme Court is already seised of the appeal will destroy the substratum of the appeal and render it nugatory.

[p.78]

Therefore, in my judgment, I shall rely on the principle that "there must be an end to litigation" coupled with the axiom that "procedural rules are intended to serve as hand maiden of justice and not to defeat it," and invoke the court's discretionary power to waive the strict application of the rules, in order to ensure that the parties herein have a fair opportunity to argue their respective case in the Supreme Court.

CONCLUSION

In all the circumstances I think this is a case in which the respondent can be adequately compensated with cost, for the tardiness on the part of the applicant. Accordingly I order that the appeal in the Supreme Court be heard, within 4 weeks from today 11/12/08. In the meantime the sale of the applicant's property by both parties is put on hold, subject to further orders of the court.

I assess cost at.....to the respondent.

Signed:

HON. JUSTICE M. E. TOLLA THOMPSON, JSC. (PRESIDING)

SGD.

HON. JUSTICE G. SEMEGA-JANNEH, JSC

I agree.

SGD.

HON. JUSTICE N. C. BROWNE-MARKE, J.A.

CASE REFERRED TO

1. Aiah Momoh v Sahr Samuel Nyandemore Civ.App.6/2006, unreported.

STATUTE REFERRED TO

1. The Supreme Court Rules

THE SIERRA LEONE ENTERPRISES LTD. v. THE ATTORNEY-GENERAL & MINISTER OF JUSTICE & ANOR.

[S.C. 4/2005] [p.31-38]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 18 JULY 2008

CORAM: MS JUSTICE U.H. TEJAN-JALLOH, Ag. C.J.

MRJUSTICE G.B. SEMEGA-JANNEH, J.S.C.

MR. JUSTICE BODE RHODES-VIVOUR, J.S.C.

MRJUSTICE M.E.T. THOMPSON, J.S.C.

MS. JUSTICE S. KOROMA, J.A.

BETWEEN:

THE SIERRA LEONE ENTERPRISES LTD. — APPELLANT

AND

1. THE ATTORNEY-GENERAL & MINISTER OF JUSTICE — DEFENDANT

2. THE MINISTER OF LANDS HOUSING &THE ENVIRONMENT DEFENDANT

SOLICITORS/COUNSEL

B. MACAULAY JNR. ESQ. FOR THE APPELLANT

L.M. FARMAH ESQ. FOR THE 1ST AND 2ND RESPONDENTS

O.I. KANU ESQ. WITH HIM

JUDGMENT

By way of Originating Notice of Motion brought under Section 21, 28, 122 and 124(1) (a), of the Constitution, Part XVI Rules 89-98 of the Supreme Court Rules 1982, the Plaintiff seeks from this Court

the interpretation of Section 21(1) of the Constitution, and Orders of this Court granting the following reliefs:

[p.32]

(a) A Declaration that the Plaintiff is the fee simple owner free from all incumbrances of the property at Fisher Lane, Kissy, Greater Freetown in the Western Area of the Republic of Sierra Leone.

(b) That the Defendant vacates the property and deliver possession of same to the Plaintiff.

(c) Damages to be paid by the Defendants jointly and severally for contravention of the Plaintiffs fundamental rights provided by Section 21 of the Constitution as from the 14th of October 2005 until possession of the property is delivered to the Plaintiff.

(d) An injunction restraining the Defendants, and or severally, by themselves, their servants or agents or howsoever or otherwise from conveying, leasing, mortgaging, parting with possession or in any way whatsoever disposing of the property or part thereof.

(e) Any further order or relief as this Honourable Court may deem fit and just.

In support of the Originating Notice of Motion is an eight paragraph affidavit deposed to by Mr. Nabil Bahsoon, a director in the Plaintiff Company. Annexed to it are documents marked, Exhibits NB1A, NB1B, and NB2.

Berthan Macaulay (Jnr.) Esq., a legal practitioner deposed to an eight paragraph affidavit verifying statement of Plaintiff' case. Annexed to it are documents marked Exhibits BMJ1A and B respectively.

Mr. Nabil Bahsoon deposed to a further four paragraph affidavit verifying statement of Plaintiffs case.

There are series of correspondence between the parties marked as Exhibits. On being served with the Originating process in this suit O.I. Kanu Esq. State Counsel, entered conditional appearance for the Defendants and filed a three paragraph affidavit verifying statement of the 1st and 2nd Defendants case.

[p.33]

The facts in this case are simple and straightforward.

On the 15th of March 2000 the 2nd Defendant executed a Deed of Conveyance in favour of the Plaintiff. (See Exhibit NB2). By the said Deed of Conveyance the Plaintiff went into possession and remained therein i.e. on the subject matter of the case. A parcel of land situate lying and being at Fisher Lane, Kissy, Greater Freetown in the Western Area of the Republic of Sierra Leone.

On the 5th day of October 2004 the 2nd Defendant wrote to the Plaintiff informing it that the Government of Sierra Leone has instructed it to take possession of the land. Letters were exchanged by the Plaintiff and the 2nd Defendant, and on the 29th day of August 2005 the 1st Defendant gave the Plaintiff 7 days Notice to vacate the land and handover same to the 2nd Defendant. The Plaintiff

complied and since 14th of October 2005 the 2nd Defendant has been in possession of the Plaintiffs land and is still in possession of the said land.

We heard learned Counsel for the Plaintiff, Mr. B. Macaulay Jnr., on 9/7/2008 and on 15/7/2008 he concluded his submissions. In his closing speech learned Counsel for the Plaintiff observed that the land was validly conveyed to the Plaintiff by the 2nd Defendant, and that it was wrong for the 2nd Defendant thereafter to compulsorily acquire the said land without complying with the provisions of Cap 116, Laws of Sierra Leone 1960. He submitted that the rights of the Plaintiff under Section 21 of the Constitution have been contravened. Relying on Rockson v Agadzi another 1979 G.L.R. P.106. State Insurance Corporation v Botchavav 1992-93 GBLR P. 168.

He urged us to grant all the reliefs sought.

After listening attentively to Mr. B. Macaulay Jnr's. Submissions, Mr. L.M. Farmer, learned counsel for the Defendants informed us that he was not contesting the case since the acquisition of the property was not properly done.

Before I go into the issues in this case I intend to comment on learned Counsel for the Plaintiffs oral application to amend one of the section under which this application was brought. As long ago as 1879 the Courts have held that a party is not bound to state under which Rule or Order he proposes to move. There is no hard and fast rule that the Order and Rule must be [p.34] stated on the Motion paper although it is desirable that they be so stated. See Hall VC in Re Barkers Estate 1879 10ChD P.165 stating the Section, Rule, Order is to be regarded as a procedure to be taken but failure to take it does not, and ought not render such non compliance fatal.

I now turn to the substantive matter. Affidavit evidence of the Plaintiff has not been controverted. The position of the Law is that where material facts in support of an application have not been controverted by the Defendant, the facts contained in the said affidavit in support of the application are to be taken by the Court as true.

It has been clearly established by the Plaintiff that he is the owner of the parcel of land at Fisher Lane, Kissy, Freetown in the Western Area of the Republic of Sierra Leone and that the 2nd Defendant acquired the said land contrary to the provisions of Section 3 of Cap 116 of the Laws of Sierra Leone 1960 and Section 21 of the Constitution. The Plaintiffs case is very clear and credible since the Defendants Counsel concedes. When the adverse party concedes as is the case here, that means that there is no defense to the Plaintiffs case, and where there is no defense to the Plaintiffs case the Court is still entitled to be satisfied that the evidence adduced is credible and sufficient to sustain the claim. In this case the Plaintiff has supported his case with documentary evidence, to wit: Exhibit NB2 to show that he is the owner of the property, and Exhibit BMJ29 the Defendants letter ordering the Plaintiff to vacate the land in clear contravention of Section 3 of Cap 116 of Sierra Leone 1960 and Section 21 of the Constitution. The well laid down position of the Law is that where documentary evidence supports oral or affidavit evidence such affidavit evidence becomes more credible. This is so because documentary evidence serves as a hanger from which to assess oral or affidavit evidence. The Exhibits supra lend more credence to to Plaintiffs case. Section 28 of the Constitution confers original jurisdiction on the

Supreme Court to hear and determine matters pertaining to fundamental rights. In interpreting these fundamental rights and provisions of the Constitution the Courts use the technique of interpretation laid down by Hon. Justice Udo Udoma, Justice of the Supreme Court of Nigeria in N. Rabiu v the State 1981 2 NCLR P.93. The principles stated by Udo Udoma JSC were reaffirmed by the Privy Council Per Lord Diplock while interpreting the Constitutions of Gambia and Mauritius in AG of the Gambia v Momodu Jobe 1984 ACP. 689 at P.700. His Lordship said inter alia.

[p.35]

"……. Where the question is whether the Constitution has used an expression in the wider or in the narrower sense, in my view, this Court should whenever possible, and in the response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the object and purposes of the Constitution……."

Lord Diplock said:

"That a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction."

To my mind and taking a guide from the above, the Constitution and the fundamental rights provisions should be given liberal interpretation. By so doing the true intention of the legislature would be achieved.

Section 21(1) of the constitution states that:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(a) the taking of possession or acquisition is necessary in the interest of defense, public safety, public order, public morality, public health, town and country planning, the development or utilization of any property in such manner as to promote the public benefit or the public welfare of citizens of Sierra Leone;

and

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having any interest in or right over the property; and

[p.36]

(c) provision is made by law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation;

Black's law Dictionary (5th Edition) defines "Public Interest" as follows:

"Something in which the public, the community at large has some pecuniary interest, or some interest by which their loyal rights or liability are affected."

Subsection (a) of Section 21(1) are examples of public interest others are such as for the building of schools, housing estates, making land available for agricultural purposes.

The Constitution makes it mandatory that adequate compensation must be paid to the original owners of the land and payment must be prompt. See Ereku v The Gov. of Midwestern State 1974 10 SC P.59. Consequently a revocation/acquisition of land without compensation is null and void.

The position of the law is that the Government of Sierra Leone can acquire or revoke interest in land for the overriding public interest, but Notice must be given and adequate compensation paid.

By virtue of the provisions of Part I Section 3 to 20 of Cap 116 Laws of Sierra Leone (Public Lands) the Government of the Republic of Sierra Leone has power to acquire land for public purposes, and this can only be validly done after adequate compensation has been paid for the land.

In this case none of the provisions in Cap 116 supra were followed and that is why learned Counsel for the Defendants conceded to the Plaintiffs claim. For this reasons I hold that the parcel of land situate at Kissy was lawfully conveyed to the Plaintiff.

It is now time to examine the reliefs sought by the Plaintiff and I shall examine them seriatim.

(a) Declarations are granted when the party seeking it is confronted with a looming danger. The fact that the 2nd Defendant is on the Plaintiffs land illegally and remains there with no justification whatsoever entitles the Plaintiff to a declaration as prayed.

[p.37]

(b) The Defendants being illegally on the Plaintiffs land are hereby ordered to vacate the land and deliver possession of same to the Plaintiff immediately.

(c) The Plaintiff simply claims damages without specifically stating whether it is general or special damages. It is settled principle that if damages are special in nature credible evidence will have to be called in order that the amount pleaded may be proved. Without proof special damages can not be awarded. As regards general damages it need not be proved. It is the loss which flows naturally from the Defendants act. The way in which general damages is quantified is by relying on what would be the opinion and judgment of a reasonable person. See

Odulaia v Haddad 1973 11SC P.360

Incar (Nig) Ltd, v Benson Transport Ltd. 1975 3SCP.117

Jaber v Basma 14WACA P. 140

Oduro v Davis 14WACA P.46

The Plaintiff is entitled to general damages.

(d) In Marengo v Daily Sketch Ltd. 19481 ALL E.R. P.406

"The House of Lords held the view that an injunction shall not be expressed to be granted against the Defendant, his servants, and agents…… for that would suggest that a direct order had been made against such servants and agents who were not parties to the case and could not therefore be bound by an injunction."

The Supreme Court of Sierra Leone is not bound by the decision of any Court in the world. Decisions of the House of Lords are only of persuasive authority on this Court.

My Lords I am persuaded by the view of the House of Lords in Marengo v Daily Sketch Ltd. supra.

[p.38]

This application succeeds. Accordingly

1. Declaration is granted as prayed.

2. The Defendants are hereby ordered to vacate the Plaintiffs land immediately.

3. Damages awarded to the Plaintiff is assessed as Le2,000,000 (Two Million Leones)

4. An injunction is granted restraining the Defendants from further interference with the Plaintiffs land.

5. The Plaintiff shall have costs which I assess as Le15,000,000/00 (Fifteen Million Leones).

Signed By:

HON. MR. JUSTICE BODE RHODES-VIVOUR, J.S.C

I AGREE: HON. MS. JUSTICE G.B. SEMEGA-JANNEH, Ag. C.J

I AGREE: HON. MR. JUSTICE G.B. SEMEGA-JANNEH, J.S.C

I AGREE: HON. MR. JUSTICE M.E.T THOMPSON, J.S.C

I AGREE: HON. MS. JUSTICE S. KOROMA, J.A

Ref: BR-V/HJ

[p.39]

SEMEGA-JANNEH JSC.

I have had the opportunity of reading the leading judgment in draft by my learned brother, Hon. Mr. Justice B. Rhodes-Vivour and I too, give judgment to the Plaintiff.

However I wish to make a brief contribution on a point which I consider to be of significance. The leading judgment has given a brief account of the facts and therefore, I have no need to traverse same.

[p.40]

The original jurisdiction of this Court vis-à-vis the protective provisions, namely, Sections 16 to 27 (inclusive) of the Constitution 1991 is limited to the enforcement of the said sections. The relevant section of the Constitution, 1991, that pertains to the enforcement of the said sections is section 28; but for our immediate purpose Subsections (1) and (2) of Section 28 are the material provisions and they are reproduced hereunder for charity:

"(1) Subject to the provisions of subsection (4), if any person alleges that any of the provisions of sections 16 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him by any person (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respects to the same matter which is lawfully available, that person, (or that other person), may apply by motion to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subjection (1); and

(b) to determine any question arising in the case of any person which is referred to in pursuance of subsection (3), and may make such order, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said sections 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

The question that necessarily arises in what is meant by enforcement in relation to or in the context of the subject matter of the action and how is this Court to enforce compliance of subsection 21(1) of the Constitution it being the material subsection. In my view enforcement in [p.41] this context means reversing the purported acquisition and the taking possession of the property in question by the government. This Court can do so by nullifying the purported acquisition and the taking possession of the property; and by giving orders and/or directions that would give back the Plaintiff possession of the property.

In my judgment section 28 under which this action is apparently brought does' not allow for the grant or award of damages; the action is without prejudice to any other action with respect to the same matter which is lawfully available to the Plaintiff. On what would an award of damages be grounded: on breach

of contract or trespass or negligence or what? Such grounding would take the action out of the ambit of section 28(1) and (2) of the constitution, 1991, and therefore outside the jurisdiction of this Court. For the same reasons above this Court has no original jurisdiction in the action to determine the title to the property.

In the premises, I make the following orders:

1. The purported acquisition and the taking possession the property situate at fisher Lane, Kissy, Freetown, Western Area by the Government of Sierra Leone is hereby declared null and void.

2. The Defendants to forthwith vacate the property and deliver possession of same to the Plaintiff.

3. An injunction against the Defendants by themselves, their servants or agents or however from any unlawful interference with the property.

4. Costs in favour of the Plaintiff in the sum of Le15,000,000/00

SGD.

HON. MR. JUSTICE GIBRIL B. SEMEGA-JANNEH, J.S.C.

Ref: GBS-J/HJ

CASES REFERRED TO

1. In Marengo v Daily Sketch Ltd. [1948] 1 ALL E.R. P.406

2. Ereku v The Government of Midwestern State 1974 10 SC P.59

3. Odulaia v Haddad [1973] 11SC P.360

4. Rabiu v the State [1981] 2 NCLR P.93

5. Incar (Nig) Ltd, v Benson Transport Ltd. [1975] 3SCP.117

6. Hall VC in Re Barkers Estate [1879] 10 ChD P.165

7. Rockson v Agadzi another [1979] G.L.R. P.106

8. State Insurance Corporation v Botchavav [1992-93] GBLR P.168

9. Jaber v Basma 14WACA P.140

10. Oduro v Davis 14WACA P.46

STATUTED REFERRED TO

1. Cap 116 Laws of Sierra Leone (Public Lands), 1960

2. The Constitution, 1991

THE GOVERNOR OF BANK OF SIERRA LEONE v. THE COURT OF APPEAL OF SIERRA LEONE & 3 ORS.

[SC. MISC. APP. NO. 3/2007] [p.42-72]

DIVISION: SUPREME COURT, SIERRA LEONE

DATE: 11 JULY 2008

CORAM: MR. JUSTICE G.B. SEMEGA-JANNEH, J.S.C.

MR. JUSTICE B. RHODES-VIVOUR, J.S.C.

MR. JUSTICE M.E.T. THOMPSON, J.S.C.

MRS JUSTICE S. BASH-TAQI, J.S.C.

MR. JUSTICE S.A. ADEMOSU - J.A.

IN THE MATTER OF SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE, ACT NO. 6 OF 1991

AND

IN THE MATTER OF AN ORDER FOR JUDICIAL REVIEW OF AN ORDER CONTAINED IN THE JUDGMENT OF THE COURT OF APPEAL DATED THE 6TH DAY OF DECEMBER 2007 IN THE MATTER INTITULED CIVIL APPEAL NO. 48/2005 BETWEEN THE GOVERNOR OF BANK OF SIERRA LEONE (APPELLANT) AND THE OFFICIAL RECEIVER AND LIQUIDATOR OF SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED (RESPONDENT) AND PREVIOUS MINERALS MARKETING COMPANY LIMITED (CREDITOR RESPONDENT)

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI TO QUASH THE AFOREMENTIONED ORDER OF THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

THE GOVERNOR OF BANK OF SIERRA LEONE

SAM BANGURA BUILDING

GLOUCESTER STREET — APPLICANT

FREETOWN

AND

THE COURT OF APPEAL OF SIERRA

LEONE PRESIDED OVER BY HONOURABLE

JUSTICE U.H. TEJAN-JALLOH (JUSTICE OF THE

SUPREME COURT), HONOURABLE

JUSTICE S.A. KOROMA (JUSTICE OF THE

COURT OF APPEAL), AND HONOURABLE

JUSTICE A.N.B. STRONGE (JUSTICE OF

THE COURT OF APPEAL AS HE THEN WAS)

ROXY BUILDING, WALPOLE STREET

FREETOWN — 1ST RESPONDENT

AND

[p.43]

THE OFFICIAL RECEIVER AND

LIQUIDATOR OF SIERRA LEONE

PETROLEUM REFINING COMPANY LIMITED

12 WILBERFORCE STREE — 2ND RESPONDENT

FREETOWN

AND

PRECIOUS MINERALS MARKETING

COMPANY LIMITED

12 WILBERFORCE STREET — 3RD RESPONDENT

FREETOWN

AND

THE ATTORNEY GENERAL

AND MINISTER OF JUSTICE

3RD FLOOR GUMA BUILDING

LAMINA SANKOH STREE — 4TH RESPONDENT

FREETOWN

COUNSEL:

PATRICK LAMBERT ESQ. FOR THE APPLICANT

VALESIUS V. THOMAS ESQ. FOR THE 2ND RESPONDENT

F.M. CAREW ESQ. AND AMADU KOROMA FOR THE 3RD RESPONDENT

NO REPRESENTATION FOR THE 1ST AND 4TH RESPONDENTS

SEMEGA-JANNEH - J.S.C.

INTRODUCTION

In the year, 1972, the Government of Sierra Leone (the Government) was desirous of establishing a petroleum refinery for obvious reasons. The Government, in pursuit of the [p.44] realization of this objective, invited certain oil companies, namely, THE BRITISH PETROLEUM COMPANY LIMITED (hereinafter called "B.P."), SHELL PETROLEUM COMPANY LIMITED, TEXACO AFRICA LIMITED, MOBIL PETROLEUM COMPANY LIMITED AND AGIP S.P.A. (hereinafter collectively referred to as "the Oil Companies") as partners (or shareholders) in the formation of a company that would establish and operate the petroleum refinery as a profit making enterprise and, at the same time, meeting the petroleum, and associated products, requirements of Sierra Leone. THE SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED (hereinafter called "the Refining Company") was duly incorporated and the Petroleum Refinery (the Petroleum Refinery) was established in Freetown.

In the same year, 1972, the Government on the one part and the Oil Companies on the second part and the Refining Company on the third part entered into an agreement to regulate and guide the business and trading relationship between the parties. This agreement was ratified and confirmed by the Parliament of Sierra Leone by the passing of THE SIERRA LEONE PETROLEUM COMPANY LIMITED AGREEMENT (1972) RATIFICATION ACT 1972 (hereinafter referred to as "the Ratification Act").

In accordance with the Ratification Act, the Refining Company operated on a purchase and sale basis, that is to say, it purchased its requirements of crude petroleum and feedstock for processing at the Petroleum Refinery and sold the products which it manufactured or blended therefrom. The Oil Companies had the right and obligation to supply the Refining Company suitable crude petroleum and feedstock and, in fact, did supply these on a commercial basis. The Oil Companies or their marketing affiliates operating in Sierra Leone (the Marketing Affiliates) were to purchase from the Refining

Company all the products derived from domestic processing. Among the obligations of the Government under clause 18 of the Ratification Act are as follows:—

"(b) The Government will provide and authorize without undue delay the transfer abroad of all foreign exchange requirements of the Refining Company including in particular its requirements for the purchase of crude petroleum and feedstock from the Oil Companies for domestic processing.

[p.45]

(c) The Government will provide and authorize without undue delay the transfer abroad of the foreign exchange required by the Oil Companies for remittance, inter alia, of the Refining Company's dividends, loan interest payments, loan repayments, service fees, and capital distribution and of the proceeds of any sales of Refining Company shares, each such remittance being made in the currency in which the original investment, if any, to which it relates, was made."

The Refining Company operated the Petroleum Refinery on these bases, and in the process, owed the Oil Companies debts for crude petroleum supplied.

THE FACTS

On or about the 31st day of May, 1993, the Secretary of State, Department of Trade, Industry and State Enterprises, acting for and on behalf of the Government, a creditor, petitioned the High Court for the winding up of the Refining Company. The High Court (the Winding Up Court) on the 16th July, 1993, ordered that the Refining Company be wound up by the Court under the provisions of the Companies Act, 1938, Cap. 249, and made consequential orders, amongst which, is:

"(1) That Mr. Jonathan A. Thomas, the Official Receiver appointed for the purpose of the winding up, of the said Company, is hereby appointed Liquidator of the said Company."

The Liquidator proceeded to conduct the winding up of the Refining Company. This process was continuing when by a letter dated the 15th day of January, 2000, the Liquidator informed the Managing Director of PRECIOUS MINERALS MARKETING COMPANY (SL) LIMITED of his intention to apply for his release as Liquidator of the Refining Company. Earlier on the 20th December, 1984, B.P. had informed the Refining Company that it has transferred all its rights, title and interest in the debts for the crude petroleum supplied by it, that is to say, has assigned the debt to Precious Minerals Marketing Company (SL) Limited (hereinafter referred to as the Assignee-Creditor). By a letter dated the 13th January 2000, P.M. Carew Esq., Solicitor for the Assignee-Creditor, notified the Registrar of Companies, for and on behalf of the Assignee-[p.46]Creditor, of his objection to the application for the release of the Liquidator. By a letter dated the 17th January 2000, P.M. Carew informed the Liquidator of his instructions to serve the Assignee-Creditor's objection to his release as Liquidator on the Registrar of Companies.

By a JUDGES SUMMONS dated the 6th day of June, 2000, the Liquidator applied, among others, for an order by way of direction that he be at liberty to apply for the dissolution of the Refining Company and for his release as Liquidator. The Liquidator further prayed to the Winding Up Court to give such

directions with regard to the objection taken by the Assignee-Creditor to the Notice of Intention to apply for the release of the Liquidator.

The Assignee-Creditor, who was served with the Judges Summons, filed an affidavit in opposition sworn by Mr. P.M. Carew on the 8th June, 2000 (Exh. "PL 7" (See pages 37-38 of the Record). The Winding Up Court (Judge) after considering the affidavit of Mr. P.M. Carew, in opposition, gave direction, among others, to the Liquidator based primarily on the annexed exhibits to the affidavits of the Liquidator sworn to on the 6th June, 2000, and marked: exhibits "G3" and "H" respectively, that the Liquidator "demands from the Governor of the Bank of Sierra Leone (the Bank) payment to the Liquidator of all Leone deposits, plus accrued interest, that were deposited by the Company (the Refining Company) at Barclays Bank (SL) Limited (Barclays) and Standard Chartered Bank Limited (Standard Chartered) for payment to B.P. for petroleum products that were supplied to the company, which deposits are part of the Pipeline Funds held by the Bank of Sierra Leone as stated in the Governor's letters respectively dated the 24th November 1994 to the Liquidator (See 28 of the Record) and the 1st May, 1997, to the Attorney-General and Minister of Justice." [Brackets provided] (See p.34 of the Record).

The Liquidator, in compliance with the Winding Up Court's direction, forwarded the said Judge's Order to the Bank. The Bank replied through the Deputy Governor by letter dated the 5th September, 2000, (Exh. PL 10) (at page 51 of the Record) in which the Bank denied being in possession of the said deposits. At the sitting of the 23rd October, 2000, the Liquidator, through Mr. Valesius V. Thomas, of Counsel, reported to the [p.47] Winding Up Court, the position of the Bank as expressed in the Deputy Governor's letter of the 5th September, 2000. The Winding Up Court, after hearing Counsel, Mr. Valesius V. Thomas and Mr. P.M. Carew, made the following Orders, amongst others:

(1) That the Governor of the Bank of Sierra Leone be made a party to the proceeding.

(2) That the Applicant (the Liquidator) serves the Governor, Bank of Sierra Leone, with the summons and all affidavits in this matter so far filed within days i.e. by the 30th day of October, 2000.

(3) That the Governor, the Bank of Sierra Leone, having been served with the above papers not later than the 30th October, 2000, must file and serve affidavits within one week on all interested parties i.e. latest 7th November 2000. (Exh. "PL11") (at page 52 of the Record).

The Bank was duly served, and on the 31st October, 2000, a conditional appearance was entered on the Bank's behalf, and subsequently, an affidavit was filed sworn to by Mr. Ibrahim Khalil Lamin, Acting Director, International Finance Department of the Bank, reiterated the Bank's position that the said Leone deposits were not transferred to the Bank, relying on the letter dated the 19th July 1995, ("Exh. IKLI") (at page 56 of the Record) in which Standard Chartered confirmed that they "are holding an amount of Le.8,860,208 which at the prevailing rate was the equivalent of USD6,917,696" in their Books. An affidavit was filed on behalf of the Assignee-Creditor sworn to by Mr. Ivan Cecil Adeyemi Gordon, adducing evidence by a way of letters from Standard Chartered and Rokel Commercial (Rokel) (successor to Barclays) confirming that the deposits were with the Bank (see pages 57-58 of the Record). On the basis of the said affidavit of Mr. Gordon and further confirmations from the Commercial Banks directly to the Bank, Mr. I.K. Lamin filed a further affidavit sworn on the 28th March, 2001, and (see

page 68 of the Record) expressed the Bank's willingness and readiness to transfer the Leone funds deposited with the Bank back to the said Commercial Banks for "disposal according to the instructions of the Official Receiver and Liquidator of the original depositor, the Sierra Leone Petroleum Refining Company Limited". A further affidavit [p.48] sworn to by Mr. I.C.A. Gordon was filed in which he avers that the amount due was not the amount of Leones deposited but their equivalent in Dollars at the relevant time, and that payment should be made to the Liquidator and transferred to the Assignee-Creditor not for the purpose of administration.

After hearing arguments of Counsel on diverse dates, the Winding Up Court, on the 14th July, 2005, made the Orders following:

1. That the pipeline deposits of US$11,304,899.79 held by the Bank of Sierra Leone (the Bank) be paid over to the Liquidator of Sierra Leone Petroleum Refining Company Limited (in liquidation) (The Refining Company).

2. That no order as to interest is made as the amount was held by the Bank of Sierra Leone for externalization.

3. That the costs of this application be taxed and paid by the Bank of Sierra Leone as it did not make a clear breast that the amount had been deposited with it by the commercial banks for externalization.

[Brackets provided]

The facts are given in detail because a clear perspective of the facts is a prerequisite to an insightful appreciation of the issues of the proceedings before the respective Courts.

THE APPEAL TO THE COURT OF APPEAL

The Assignee-Creditor being dissatisfied with the Winding Up Court's Order of the 14th July, 2005, appealed to the Court of Appeal under the provisions of Section 211 of the Companies Act, 1938, which provides:

"211 — Appeals from any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same [p.49] manner and subject to the same conditions as appeals from any order or decision of the Court in cases within its ordinary jurisdiction."

The Grounds of Appeal

(1) That the Learned Judge erred in law when he made the Order on the 14th July 2005 in that he had no jurisdiction to order that the Respondent pays to the Liquidator the sum of USD$11,304,899/79 as there was no claim before him for the sum of USD$11,304,899/79 or for any amount in United States Dollars.

(2) That the Learned Judge erred in law when he made the Order of the 14th July 2005 in that he had no jurisdiction to make the Order in United States Dollars and his Order was made per incuriam in view of the decision of the Supreme Court of Sierra Leone in the matter S.C. CIV APP. NO.1/98 Between CASTROL LIMITED AND JOHN MICHAEL MOTORS LIMITED which sets out and limits the

instances/occasions in which the Courts of the country have jurisdiction to make an order in foreign currency.

(3) That the Learned Judge erred in law when he made the Order of the 14th July 2005 in that he had no jurisdiction to make the said Order in view of inconsistencies therein contained vis-à-vis his previous Order made on the 19th June 2000 in which he ordered inter alia that ".... The Liquidator of Sierra Leone Petroleum Refining Company Limited (in liquidation) demands from the Governor of Bank of Sierra Leone payment to the Liquidator of all the Leone deposits, plus accrued interest that were deposited by the Company at Barclays bank (SL) Limited and Standard Chartered Bank Limited...." which is the Order that the Respondent Applicant was called upon to answer.

(4) That the Learned Judge erred in law when he in effect ordered that the Appellant pays to the Liquidator/Respondent the sum of USD$11,304,899/79 when the money was received by the Appellant in [p.50] Leones (that is the sum of Le11,304,899/79 without any evidence of the rate of exchange vis-a-vis the United States Dollars and the Leones (either at the time the Respondent received the monies from Standard Chartered bank Sierra Leone Limited and Barclays Bank Sierra Leone Limited or at the date of making the Order before the Judge.

(5) That the judgment is against the weight of the evidence.

The Grounds of Appeal are rooted in the issue of jurisdiction of the Winding Up Court to make the Order of the 14th July, 2005.

The Court of Appeal was primarily being asked to determine whether the Winding Up Court (or Judge) had the jurisdiction to make the Order of the 14th July 2005. The Court of Appeal in its judgment of the 6th December, 2007, affirmed the Order of the 14th July, 2005, to the extent it is limited by the variation made by it that the amount of US$11,304,899.79 or its equivalent in Leones be paid to the Assignee-Creditor and not to the Liquidator. The Bank (Applicant therein) being dissatisfied with the judgment of the Court of Appeal, has applied to this Court by Originating Motion dated the 21st December 2007 for reliefs under Section 125 of the Constitution, 1991.

The Reliefs Sought

(a) For an Order of Certiorari to quash the Order numbered 1 of the Certified Order of the Court of Appeal and which is "contained in its Judgment dated 6th December 2007 on the grounds that:

i. the Court of Appeal did not have jurisdiction to make neither was there any legal basis for the making of the said Order requiring the Applicant herein to pay to the Precious Minerals Marketing Company Limited herein to pay to the Precious Minerals Marketing Company Limited the sum of US$11,304,899.79 as there was no action or claim brought by the said Precious Minerals Marketing Company Limited for the sum of [p.51] US$11,304,899.79 and a fortiori there was no trial leading to the making of the said Order against the Applicant.

ii. there was no cross-appeal before the Court of Appeal by Precious Minerals Marketing Company Limited for the sum of US$11,304,899.79 against the Applicant herein.

iii. the Court of Appeal has no original jurisdiction to entertain, hear and determine any claim by Precious Minerals Marketing Company Limited against the Applicant herein that could have led to the making of the said Order for the payment to the said Precious Minerals Marketing Company Limited of the sum of US$11,304,899.79.

iv. the Court of Appeal did not have any jurisdiction to make the said final Order without first hearing in full and disposing of all the grounds of appeal in the matter pending before it.

(b) If the first Order sought herein is granted then a direction be issued to the Court of Appeal Ordering it to set aside the Order of the High Court dated the 14th July 2005.

(c) Alternatively if the first Order sought herein is granted and the second Order sought is refused then an Order of mandamus be made directed to the Court of Appeal to hear the appeal of the said matter before it in full.

(d) If the third Order sought herein is granted then a further Order be made prohibiting the Court of Appeal from hearing and determining any claims by said Precious Minerals Marketing Company limited for relief against the Applicant herein in respect of which no action has been instituted.

(e) A Stay of Execution of the Judgment of the Court of Appeal dated the 6th December 2007 pending the hearing and determination of this motion.

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(f) Any further or other relief as to the Court may seem just.

(g) That the Costs of this application be provided for.

THE ISSUE AND ITS DETERMINATION

Whether or not the Winding Up Court of the High Court or the Court of Appeal has the Jurisdiction to order payment by the Bank of the sum of US$11,304,899.79 or its equivalent in Leones to either the Liquidator or the Assignee-Creditor

To determine the issue a Court would have to examine the purpose of a winding up of a Company and the functions of the Court and Liquidator in the context of the Companies Act, 1938, the Rules and the general law in relation to the facts.

The Purpose Of Winding Up And The Duties Of The Court And Liquidator

The purpose of winding up of a company by the Court, is for the collection of the assets of the company, and for same to be applied in the discharge of its liabilities (see Section 192 of the Companies Act, 1938). A procedure available to the Court for the discharge of the duty is delineated in Sections 203 of the Companies Act, 1938, which empowers the Court to summon persons suspected of having property or assets of the company or the matters connected therewith and section 204 which is not relevant for the purposes of the matters before the Court. See rules 76 and 77 of the Companies (Winding Up) Rules of

1929. The Court, after determining that a person has an asset belonging to or is indebted to the Company, either on the basis of the examination of the person, or even without examination of the person, on the basis of other evidences, may require the person to deliver to the Liquidator "any money, property or books and papers in his hands to which the Company is prima facie entitled" by virtue of section 193 of the Companies Act, 1938, which provides:

"193 The Court may, at any time after making a winding up order, require any contributions for the time being on the list of contributories, and any trustee, receiver, banker, agent or officer of the company to pay, deliver, [p.53] convey, surrender or transfer forthwith,, or within such time as the Court directs, to the Liquidator any money, property or books and papers in his hands to which the Company is prima facie entitled."

It must be borne in mind that if there is a dispute as to ownership, there is no power to determine the dispute under this provision. See Re Palace Restaurants, Limited, [1914] 1 CH 492 at p.500. My view is that if there is dispute as to ownership or a fundamental triable issue in dispute that is not inherent in the administration of the company or the winding up process, the aggrieved party ought to find recourse in the Courts in their ordinary jurisdiction outside the judicial winding up process. The reason being, in my view, that the duty of collecting the assets of the Company being wound up is imposed on the Winding Up Court. The Court generally carries out this duty through the Liquidator as officer of the Court and, in some instances, under the specific direction and control of the Court. See sections 192, 182, in particular sub-section (3); and 187 of the Companies Act 1938. See also Halsbury's Laws of England, 3rd edition, para; 1144 at pages 583-584. Clearly the Companies Act, 1938, contemplates actions or settlement of disputes outside the winding up process under the Winding Up Court. This, in my view, is made manifest by section 182 (1) (a) of the Companies Act 1938, which provides that the Liquidator, with the sanction either of the Court or of the Committee of inspection, is empowered:

"(a) to bring or defend any action or legal proceeding in the name of and on behalf of the Company."

This provision enables the Liquidator to sue (or defend) in the name of a Company which is being wound up under the Companies Act, 1938 for assets or debts or other matters that do not come within the purview of section 193 of the companies Act, 1938. See Russian and English Bank Baring Brothers and Co, [1936] A.C.405 H.L.; [1936] 1 All E.R. 505.

[p.54]

Direction of the Court to Demand Payment of the Leone Deposits With the Bank

The Order of the Winding Up Court relevant to the proceedings is the direction given the Liquidator on the 19th June, 2000, to demand payment of the Leone deposits from the Bank; the direction was given in relation to the Liquidator's application to the Court contained in the Judge's Summons of the 6th June, 2000 made under section 183(3) of the Companies Act, 1938 which states:

"(3) The Liquidator may apply to the Court in manner prescribed for directions in relation to any particular manner arising under the winding up"

and specifically to the application for the Court to give such directions with regard to the objections taken by the Assignee-Creditor to the Notice of Intention by the Liquidator to be at liberty to apply for his release as Liquidator, and for the dissolution of the Company. The objection of the Assignee-Creditor is re-iterated in the affidavit of Mr. P.M. Carew sworn on the 8th June, 2000, specifically the paragraphs reproduced hereunder:

"4. The Liquidator, being responsible for the collection and distribution of the Company's Assets under Rule 76 of the 1929 Company Winding Up Rules, failed to collect from the Bank of Sierra Leone which Bank held certain amounts paid into the Bank's accounts for externalization of such funds in favour of B.P. International Limited until the said debts were assigned to the Creditor herein.

5. That the said Liquidator had full Notice of the Oil Debts owed to the Creditor and yet failed to collect the assets held by the Bank of Sierra Leone and pay same to the Creditor (vide Ex. "G1" in the said affidavit of Valesius V. Thomas). (Note: the affidavit is that of Jonathan A. Thomas, the Liquidator, sworn on the 6th June 2000. Valesius V. Thomas is Solicitor for the Liquidator)

(Brackets provided).

[p.55]

6. That whatever arrangements or understanding the Liquidator had with the Bank of Sierra Leone at a meeting of Creditors for crude oil supplies at the office of the Governor on Friday the 12th September, 1994, at 2.00 p.m (vide Ex "G1" in the said affidavit of Valesius V. Thomas) does not and will not absolve the Liquidator of his responsibility under rule 76 of the 1929 Company Winding Up Rules.

7. That the Liquidator, as will be seen in the attachments to "Ex B" of Mr. Valesius V. Thomas's said affidavit the Liquidator has paid various creditors but has taken no concrete or reasonable action to secure the interest of the Creditor herein in the execution of his duties as Liquidator of the Sierra Leone Petroleum Refining Company Limited (in liquidation).

The Winding Up Court based its said direction contained in its Order of the 19th June 2000 on the evidence affidavits of Jonathan A. Thomas, the Liquidator, sworn on the 6th June, 2000, with the annexed exhibits and the affidavits of Mr. P.M. Carew sworn on the 8th June 2000 and the 12th June 2000 respectively and after considering the arguments of Counsel, Mr. Valesius V. Thomas and Mr. P.M. Carew, for the Liquidator and the Assignee-Creditor respectively (see pages 81-82 of the Record). Let it be noted that the affidavits of Mr. P.M. Carew sworn to on the 8th and 12th June 2000, respectively, are in all materials particular the same except that the affidavit of the 12th June, 2000, corrected the erroneous reference to Valesius V. Thomas for Jonathan A. Thomas, the Liquidator. Perhaps, this explains the filing of two affidavits whose material contents are exactly the same.

As at the time the Court made its Order of the 19th June, 2000, it must have been and was, abundantly clear to both counsel and the Court that:

(1) the Refining Company owed the Assignee-Creditor crude oil debts payable in US Dollars and

[p.56]

(2) that the Commercial Banks had deposited Leone sums with the Bank, equivalent to the US Dollar debts, for externalization to B.P.

In my view, it was clear that the direction of the Court was for the Liquidator to demand for payment of the "Leone deposits" made by the Commercial Banks to the Bank and not its equivalent in US Dollars as at the time the Leones were deposited. The wording of the Order cannot reasonably be given any other interpretation or meaning. In my judgment, had the Bank forwarded the Leone deposits to the Liquidator that should have legally discharged its obligations and. prevent any need for its direct participation in the winding up process. Unfortunately, the Bank, in reply to the letter of the Liquidator dated the 4th September 2000 (at page 50 of the Record — (Exh. "C1") denied the transfer of the said Leone deposits by its letter dated the 5th September 2000 (at page 50 of Record — ("Exh. C2") annexed to the affidavit of the Liquidator sworn on the 10th October 2000 (at pages 44 and 45 of the Record). The denial by the Bank may sound unreasonable but given the lack of institutional memory and the woeful state of record keeping in our institutions, including the Courts, and more telling and relevant, the letter of Standard Chartered dated the 19th July 1995 and addressed to the Director of International Finance of the Bank (at page 56 of the Record - (Exh "IKL1") which clearly states :—

"We are forwarding the attached claim from Precious Minerals Marketing Company (SL) Limited (the Assignee-Creditor) who have claimed the rights of USD6,917,696 under the Commercial Pipeline Debt Repayment Scheme. Standard Chartered Bank Sierra Leone Limited confirms that we are holding an amount of Le.8, 860,208 which at the prevailing rate was the equivalent of USD6, 917,696 in our books……."

and exhibited to the affidavit of Ibrahim Khalil Lamin Sworn on the 8th November, 2000, as Exh. "IKL 1" (at page 55 of the Record) The letter of Rokel (successor to Barclays) dated the 24th November, 2000, addressed to Mr. P.M. Carew may also be of help in the understanding of the transactions between the Commercial Banks and the Bank in its advise:

[p.57]

"that the amount of Le5,460,252.63 being the equivalent of USD4,387,203.79 is held in our pipeline suspended items at the Bank of Sierra Leone by order of Sierra Leone Petroleum Refining Company Limited for BP Oil International." (Emphasis provided)

It appears the Commercial Banks maintained individual accounts in respect of funds for externalisation and the funds were released for, or were externalized upon availability of the requisite foreign exchange and after due authorization by the competent authority, that is, by the Government directly or by the Bank. The inward flow and the outward flow of foreign exchange are ordinarily controlled under powers conferred by Statute and/or Regulations, and when there are scarcities or difficulties in the availability of foreign exchange, Government regulates the inward and outward flow of foreign exchange through the Central Bank, and prioritize the externalization of foreign exchange in manner, hopefully, consistent with Government policy and the requirements and import needs of the country. Sierra Leone, I believe,

was no exception to that which some of the developing countries in the sub-region and other parts found themselves in the 80s and 90s in respect of the then prevailing scarcity of foreign exchange. However, in respect of the Leone deposits in question, what matters for the purpose of the proceedings is that they were and are with the Bank for externalization.

The Debt Buy-Back Operation Vis-A-Vis the Crude Oil Debts

There is a misperception that the Crude Oil Debts are owed by the Government to the Oil Companies. I fail to see the legal or factual basis for such a perception or conclusion. From the undisputed and accepted facts stated above, it is clear that the Government, like the Oil Companies, was and still is a shareholder in the Refining Company. The Oil Companies, apart from being shareholders, had business and commercial relationship with the Refining Company in which the Oil Companies sold and supplied, on commercial basis, crude petroleum and other feedstock. There is no evidence that Government guaranteed payments of these sales.

[p.58]

The misperception, in my view, arose out of the Debt Buy-Back Operation instituted by the Government under World Bank/DA Sponsorship aimed at reducing Government liabilities to both public and private creditors, and included buying debts owed by Government and paying Creditors a percentage of the debt due them. It seems control and direction of the Debt Buy-Back Operation was placed with the Bank. The legal obligations and liabilities remained the same; the Refining Company was and still is the debtor for the crude oil supplied. Funds were deposited in the Bank for externalization and until that was done and the funds reach the creditor, the Refining Company was and still liable for the crude oil debts; and settlement of the debts remains its sole obligation and not of the Bank as was made clear in the meeting of the Creditors of the 2nd September 1994 in which the Assignee-Creditor was represented in the opening in paragraph 4 where the Minutes state:—

4. In 1982/83 the SLPRC (the Refining Company placed funds with the Bank of Sierra Leone for externalization to the crude oil suppliers, who have still not received payment for crude supplies. However settlement of debts is not the obligation of the Central Bank (the Bank). (Brackets provided)

The Government, by the Debt Buy-Back Operation, was trying to settle the debts, including that owed by the Refining Company, through Donor funds made available to the Debt Buy-Back Operation, by reason of policy and not legal obligation. However, it is correct, and must be borne in mind, that under Clause 18, under the rubric: FOREIGN EXCHANGE, of the Ratification Act, 1972, Government might have been under an obligation to "provide and authorize without undue delay the transfer abroad" the requisite foreign funds equivalent to the Leone Deposits with the Bank by the Commercial Banks for settlement of the debts owed by the Refining Company to the Oil Companies including that owed to the Assignee-Creditor. A breach of these provisions by the Government may provide a basis for legal recourse to the Courts by the Oil Companies against the Government.

The Debt Buy-Back Operation is, and must be viewed as being, outside the winding up process. However, the recovery of the assets (or funds) of the Refining Company [p.59] remains within the

mandate of the Liquidator as was pointed out in paragraph 6 of the said two affidavits of P.M. Carew, Esq. In my considered opinion, the Liquidator cannot participate and abide by the decisions or any payments under the Debt Buy-Back Operation, with or without the sanction of the Court, if such are to impact negatively on the assets (Leone deposits) of the Refining Company with the Bank, in terms of reduction of such assets or their neutralization, without the consent of the other creditors. In law the Court is obligated to collect the assets of the Company being wound up and settle its liabilities in accordance with law and prescribed rules, including rules relating to preferential payments under Section 249 and for Creditors that rank pari pasu. In short, the Assignee-Creditor is not entitled to preferential treatment in relation to payments by the Refining Company, and should not get through the back door treatment that it is not entitled through the front door.

The Orders of the Winding Court Making the Bank a Party to the Winding up Proceedings

Consequential upon the Bank's denial of being in possession of the Leone deposits made by the Commercial Banks and upon hearing the views of Counsel, Mr. Valesius V. Thomas and Mr. P.M. Carew, ordered on the 23rd October 2000 that the Bank be made a party to the winding up proceedings and be served with the summons and all the affidavits in the matter. This was duly done and conditional appearance was entered on the Bank's behalf, on the 31st October, 2000, by its Solicitors, Renner-Thomas and Co., represented by Dr. Renner-Thomas (as he then was). Dr. Renner-Thomas conceded on the strength of the letters confirming the Leone deposits from the Commercial Banks exhibited as "FMC 3" and "FMC4" to the affidavit of P.M. Carew Esq. sworn on the 4th December 2000 (at pages 58, 65 and 66 of the Record) (reflected also in the affidavit of I.K. Lamin as exhibits "IKL2" and "LKL3" — at pages 68, 70 and 71 of the Record) that at some stage after 1995, certain monies might have been transferred by Rokel and Standard Chartered in a designated account — the Pipeline Account and sought the Court's indulgence to allow time for the Bank to verify the exact amounts transferred to the Bank; and that once that has been done the Bank would comply with the Order of the Court (of the 23rd October 2000 for the payment of the Leone deposits to the Liquidator) to a limited extent in that payment could not include interest as the [p.60] account was not interest bearing; and that the Court was aware of the fact vide the affidavit of the Liquidator, Jonathan A. Thomas, sworn on the 10th October 2000 at paragraph 5 thereof (see page 44-45 of the Record). After diverse adjournments, Dr. Renner-Thomas was able to confirm the amount in the Pipeline Account at Le5460257-63 in respect of the Leone deposits by Barclays/Rokel for remittance to B.P. by order of the Refining Company (at page 98 of the Records), and stated that it was available to the Court or Barclays. In respect of the Leone amounts deposited by Standard Chartered for externalisation, Dr. Renner-Thomas invited the Winding Up Court to make an appropriate order in view of the statement by Standard Chartered that the funds are still in their books. It should have been a simple matter for the Winding Up Court to do in view of paragraph 3 and 4, in particular where Mr. Ibrahim Khalil Lamin, the Director, International Finance Department of the Bank, states that the Bank is ready, willing and able to transfer the funds referred to in Exhibits "IKL 2" and "IKL 3", and originally due for externalisation to B.P., to the respective Commercial Banks for disposal according to the instructions of the Official Receiver and Liquidator of the Refining Company. Not an unreasonable proposal; the control of the funds were said to be still vested in the Commercial Banks. The Leone amount reflected in Exhibit "IKJ 2" is Le8, 860,208. In effect, the respective Leone amounts

held in the Pipeline Account are: Leones 5,460257-63 and Leones 8,860,208 from the account of Barclays/Rokel and Standard Chartered respectively, making a total sum of Leones: 14,320,465.

After the due determination of the amounts of Leone deposits by the said Commercial Banks, the duty of the Winding Up Court, in my considered view, was to direct the payment of the said sums to the Liquidator by the Bank in compliance with the Court's Order of the 19th June 2000 which the Bank said it is ready, willing and able to make available as the Court directs. To both Counsel, Mr. Valesius V. Thomas and Dr. Renner-Thomas, the course for the Winding Up Court to take was clear: since the Order of the 19th June 2000 the proceedings that followed was to identify the Leone deposits and amounts involved, and since this had been done, the Order of the 19th June 2000 ought to have been followed pursuant to Section 192(1) of the Companies Act, 1938. This position is consistent with my view. There is no basis for the assertion by Mr. P.M. Carew that what the Commercial Banks deposited with the Bank is in U.S Dollars — U.S $6,917,696 by Standard Chartered and U.S. $ 4,387,203-79 by Barclays/Rokel adding [p.61] to a total of U.S $11,304,899-79. In my view, the assertion is not grounded in the evidential facts, or, the application of the relevant law to those facts. In short, the assertion is not tenable.

Notwithstanding the arguments proffered by the Mr. Valesius V. Thomas and Dr. Renner-Thomas, the Winding Up Court, on the 14th July 2005, in a short ruling, was of the view that it was abundantly clear from Exhibits "IKL 2" and "IKL 3 and "H" that the Bank held funds in respect of the Debt Buy-Back Operation and that the sums stipulated in Exhibit "H" are U.S$ 6,917,696-00 for Standard Chartered and U.S $4387203.79 for Barclays/Rokel — making a total of U.S $11,304,899-79 and that these sums were still being held by the Bank for externalisation and form a debt by the Government to B.P.; and consequently made the following orders:

(1) The Pipeline Deposit of U.S $11,304,899-79 held by the Bank of Sierra Leone to be paid to the Liquidator.

(2) No order is made as to interest. The amount was held for externalization.

(3) Costs awarded against the Bank of Sierra Leone for not making a clean breast that the amount had been deposited with it by the Commercial Banks for externalization. Such costs to be taxed.

Again, in respect of Order (1), my considered view is that it is not grounded on the facts before the Court and cannot be justified by application of the relevant law on the facts, as have been expressed in the preceding discourse of the relevant issues or matters. In my judgment, the Winding Up Court, in respect of the Order, made the Order outside its jurisdiction. At the time the Court made its Order of the 19th June, 2000, it was seised of the facts that Leone deposits were made to the Bank for externalisation in foreign exchange; and this central fact and other supporting facts had not changed at the time the Order of the 14th July, 2005, was made. On what factual basis then was the Order of the 19th June, 2000, supplanted by the Order of the 14th July, 2005? In my judgment, there is no factual or legal basis for it; the Order of the 14th July 2005 was based on a false assumption that the Bank held foreign exchange funds under the Debt Buy-Back Operation and that those funds were for the settlement of the debts owed by [p.62] the Government to B.P. There is no evidence that the Bank held such foreign exchange

funds under the Debt Buy-Back Operation and that the Government owed debts to B.P.; as indicated in the discourse above, the Debt Buy-Back Operation was outside the winding up process and not within the control of the Court or Liquidator.

It is abundantly clear on the evidence that the Government was not owing B.P. or the Refining Company any debts; and if in fact the Government owned the alleged foreign exchange funds, and intended them for settlement of the alleged debts it owed to B.P. that would have placed the funds completely outside the winding up process. The duty of the Court in the winding up process is to cause to be collected the assets of the Refining Company, and to settle its liabilities; the assets to be collected must belong to the Refining Company and no one else. See section 192(1). Ownership of the assets or funds by the Government, by necessarily implication, excludes the funds from the jurisdiction of the Winding Up Court and the winding up process.

The Considerations By And The Conclusions Of The Court Of Appeal.

The Court of Appeal, as in the case of the Winding Up Court, misperceived the essence and real nature of the Debt Buy-Back Operation in the context of the legal relationship between the parties concerned, with particular reference to the Government, the Bank, the Oil Companies and the Refining Company, vis-a-vis the Crude Oil Debts and Government policy; thus leading, in my view, to erroneous conclusions, with all due respects, by the Court of Appeal. There is no dispute that the Refining Company, as a legal person, owed the Oil Companies, including B.P., debts in U.S. Dollars. The debts owed to B.P., as in the case of the other creditors, were proved under the provisions of Section 247 of the Companies Act 1938, and is recognised by the Winding Up Court (See paragraphs 4,5,6,7 and 8 of the affidavit of Jonathan A. Thomas, the Liquidator, sworn on the 6th June 2000 — Exhibit PL 6 (and at page 3-6 of the Record) The debts owed to B.P. by the Refining Company, at all material times, stood at U.S$ 11,037,459-00. It is this debt, owed by the Refining Company that the Government was willing to pay through the Debt Buy-Back Operation, albeit at an agreed reduced amount, either as a matter of policy or for some other reason. The reasons are irrelevant, but the decision of the Government to pay the debts that it did not owe was a matter for the [p.63] Government and not the Liquidator; what matters to, and the duty of the Liquidator, is to collect the assets (funds) owned by the Refining Company. The U.S Dollar amount, erroneously referred to in the Debt Buy-Back Operation as Government debts to B.P. by both the Winding Up Court and the Court of Appeal, was infused in the relationship between the Bank, the Commercial Banks, the Refining Company and B.P., leading to the respective Orders of the 14th July 2005 and the 6th December 2007.

The Court of Appeal in its judgment of the 6th December 2007, affirmed the Ruling of the Winding Up Judge of the 14th July 2005, at least in part, on the basis of the contractual obligation of the Government under Clause 18 (b) and (c) under the rubric: FOREIGN EXCHANGE. After quoting sub-clause (b) and making reference to sub-clause (c), the Learned Justice of Appeal, Ms. S. Koroma, proceeded to state:

"There is abundant evidence to show that the Oil Company creditors supplied petroleum and other products to the company in foreign currency. Exhibits "D, "E" and "F" attachments to the affidavit of

Jonathan A. Thomas referred to above buttress this point. I therefore hold that the Learned Judge was right to pronounce his Ruling dated the 14th July 2005 in foreign currency. It is obvious that the loss felt by B.P. International which was assigned to the Creditor/Respondent was in foreign currency. Appellant's Counsel submitted that even if that loss was in foreign currency, the responsibility for paying that debt was that of the company in Liquidation. I am not convinced by that argument. There is evidence that the Leone equivalent of the debt owed by the company was deposited in the Pipeline Account for externalisation in 1982/83 well before the liquidation process started".

The quotation also confirms in my mind that the Learned Justice of Appeal was of the view that the debts owed by the Refining Company were settled by the company before the liquidation process upon the Leone sum being deposited for externalisation by the Bank. Again if this were the correct legal situation, then the funds deposited belong not to the Refining Company but to B.P. and therefore outside the winding up process and the control of the Liquidator. The result would be that the Winding Up Court has no jurisdiction to deal with the deposits or direct that they be transferred to the Liquidator.

[p.64]

I am clear in my mind, that the view expressed explains the learned Justice of Appeal's decision to order that the sum of US$ 11,304,899-79 or its equivalent in Leones be paid to the Assignee-Creditor. I am further re-inforced in this view by the Learned Justice of Appeal (at page 16 of the judgment) by her words, and I quote:

"There is evidence that the company paid debts owed to B.P. International through the established channels. It is my view that the moment the two commercial banks deposited the, Leone equivalent into the Pipeline Account the obligation of the company was concluded. It was left to the Appellant (the Bank) to do its part and externalize the foreign exchange component to the creditor. This was a policy of Government and its implementing agent, the Appellant. I hold that the refund of monies in the custody of the Appellant should be made to the assignee (Assignee — Creditor) of B.P. International, the Creditor/Respondent" (Emphasis and brackets provided)

But does the learned Justice of Appeal's view reflect the correct legal situation? The learned Justice of Appeal's view could have been tenable if there was cogent evidence that the Bank was an agent of B.P. and' received the funds in question as such an agent. In my view, there is no such, or any, evidence to support that position. On the contrary, the facts are supportive of the view that the Bank is holding the Leone deposits for the Commercial Banks, who received the funds from the Refining Company, until such funds are externalized and reach the designated creditor, in this case, B.P. In that regard, the Leone deposits are assets (funds) of the Refining Company and, therefore, included in the winding up process and under the control of the Liquidator.

Another misperception by the learned Justice of Appeal, with all due respects to her (see page 13 of the Judgment), and others, are of the relationships between the Bank, the Government, the Commercial Banks, the Refining Company and B.P. in the context of, or in relation to, the Leone deposits for externalisation. Clearly, as regards the [p.65] Bank's role as financial adviser to Government, the Bank,

under the provisions of subsection (1) of section 41 of the Bank of Sierra Leone Act, 2000, which provides:

"(1) The Bank shall act as the financial adviser to the Government" (Emphasis provided)

is mandatorily/statutorily made the financial adviser of the Government. Subsections (2) and (3) set out the circumstances in which the Bank may be required to give, and its duties to give, financial advice to the Government.

As regards the Bank's role as agent of the Government, section 43 of the Act which provides:

"43 The Bank may act generally as agent for the Government

(a) Where the Bank can do so appropriately and consistently within this Act and with its duties and functions as a Central Bank; and

(b) On such terms and conditions as may be agreed between the Bank and the Government"

(Emphasis provided)

is not categorical or mandatory. I understand from this that the Bank may serve as general agent of the Government upon agreed terms and conditions, only where it is appropriate and consistent with the duties and functions of the Bank. There is no evidence of agreed terms and conditions between the Bank and Government as regard the Leone deposits. The Bank may in fact be the general agent of the Government but was it acting as the Government's agent in the matter of the Leone deposits for externalization? I think not. The matter of the Leone deposits is quadripartite: that is, it involves the Refining Company giving the Leones to the Commercial Banks who in turn deposits the sum with the Bank for Externalization to B.P., subject to approval and the availability of the requisite foreign exchange to B.P. There is no evidence that the Bank [p.66] received the Leone deposits under the provisions of the Ratification Act or upon the instruction of the Government to receive same on its behalf.

In my view the Bank's acceptance of the deposits must be viewed in the context of its general powers under section 36, subsection (1) (c) in particular, of the Act, and its foreign exchange regulatory role under Part VI of the Act, and foreign exchange regulations. In my view, on the deposits being made with the Bank, either in a specific account of the depositor (the Commercial Banks in this case) or a designated Account (the Pipeline Account), such deposits, in consideration of fundamental principles of Law, are being held by the Bank as bailee of the Commercial Banks. The Bank as a central bank deals with the Commercial Banks and not their customers. The financial service provided by the individual Commercial Bank in processing the repayment in the requisite foreign exchange of the crude oil debts owed by the Refining Company to the Oil Companies, in the instant case to B.P., was a service offered and provided by the individual Commercial Bank in the ordinary course of its business as between the individual Commercial Bank and its customers for which the individual Commercial Bank normally charged a fee. The contractual relationship for the financial service is clearly between the individual Commercial Bank and its customer.

Before concluding on the matter of the US$ 11,304,899-79, let me deal with the case of Castrol Limited vs. John Michael Motors Limited S.C. Civ. App No. 1/98 (unreported) in relation to the Orders of the Courts that the Leones deposits be paid in the Dollar equivalent at the time. I largely agree with the understanding of the learned Justice of Appeal. The Castrol case merely identified and adopted the principles restated by Lord Goff in Attorney-General of the Republic of Ghana and the Ghana National Petroleum Corporation vs. Texaco Oversesas Tankship Limited (the Texaco Melbourne) (1994) Lloyds Law Report 473 which is as follows:

"First it is necessary to ascertain whether there is an intention to be drawn from the terms of the contract that damages for breach of contract should be awarded in any particular currency or currencies In the absence of such intention the damage should be calculated in the currency in which the loss was felt by the plaintiff or which truly expresses his loss"

[p.67]

In addition, the Castrol case decided that where the plaintiff claims damages in foreign currency but failed to prove, on the basis of the said restated principles, that he was entitled to judgment that should be pronounced in foreign currency, the Court, if the Plaintiff has proved damages, albeit in foreign currency, may convert the damages suffered into the local currency, that is, the Leones. Of course where the Plaintiff fails to prove his claims, it becomes irrelevant whether the claim is in foreign currency or Leones. The Court would simply not pronounce judgment in his favour!

In the instant case, the issue of damages, in my view, does not arise. The issue here is what the Bank is required to transfer to the Liquidator: the Leone deposits or their equivalent in US. Dollars. The learned Justice was clearly of the view that once the Leones deposits were made, they automatically transform into their Dollar equivalent at the time. Therefore if the liability were in damages the pronouncement in a foreign currency could be made on the basis of the first part of the restated principle. The error of the learned Justice of Appeal, with all due respect, was ordering the Bank to transfer to the Assignee — Creditor assets (funds) that it never held for or owed to them or to the Refining Company.

THE CONCLUSION

An argument of the Assignee-Creditor, by its counsel, which first found expression before the Winding Up Court, is that monies referred to in Exhibits. “IKL2" and "IKL3" do not and cannot form part of the assets of the Refining Company for the purposes of the winding up process. As a result, Mr. P.M. Carew urged the Court to pay same to the Assignee — Creditor but argued that if the Court was disposed to order that the said monies be paid to the Liquidator, it should be for onward transmission to the Assignee — Creditor because the said monies were already due to be paid to B.P., (see pages 105 and 106 of the record). In the Court of Appeal, the argument was expanded by counsel for the Assignee — Creditor by arguing that since the Liquidator had completed his duties, filed his returns and was seeking liberty to apply for his release, therefore, the funds in the custody of the Bank could not be the assets of the company in liquidation, that is, the Refining Company (See page 4, under the rubric — Relief (A) (iv) of the [p.68] Statement of Case of the Assignee — Creditor in the Court The argument found final crystallization as expressed in open court that the assets (the funds) in the possession of the Bank

belong to the Assignee — Creditor. If this position is factually and legally tenable, clearly, it would have been improper and wrong to object to the release of the Liquidator; and since by the argument the Bank is holding on to the funds for the Assignee — Creditor, its recourse for the return of the funds should be against the Bank, and not indirectly by improper use of the winding up process. But as stated earlier the Assignee — Creditor's argument is not a correct reflection of the factual and legal situation. The Refining Company remains the owner "of the assets (the Leone deposits) in the possession of the Bank as the property never passed to B.P. (or its authorized agents). It is for this reason that B.P. proved the debts in the liquidation process; and it is for the same reason that the objection to the application of the Liquidator for liberty to apply for his release was made. To date, there is no retraction of these facts through a judicial or legal process before the Winding Up Court for it to take cognizance of any factual changes and act accordingly. Therefore, the factual situation in the context of the winding up process, taking into account the statements and acts of the Assignee — Creditor, remains the same: the Leone deposits belong to the Refining Company. The Winding Up Court's powers are limited to directing payment of these Leone deposits (and not their US Dollar equivalent at the time) to the Liquidator and, therefore, its Order of the 14th July, 2000, is not within the confines of its powers or jurisdiction.

The Court of Appeal in affirming the Winding Up Court's Order of the 14th July 2000, by the very fact itself or by necessary implication, acted outside its jurisdiction since the Winding Up Court itself has no authority under the Companies Act 1938 or the Law to vest on the Liquidator assets (funds) that are not owned (including any excess if any) by the Refining Company (in liquidation). The Court of Appeal, with all due respects, further acted outside its jurisdiction when it ordered payment of US$ 11,304,899-79 (or its equivalent in Leones at the present bank rate) to the Assignee — Creditor instead of the Liquidator. If the said Dollar sum belongs to the Refining Company, then, according to Law, it should vest onto the Liquidator. On the other hand, if the sum is not that of the Refining Company, it is outside the winding up process, and, therefore, outside the winding up jurisdiction of the Court and, it follows, that of the Court of Appeal.

[p.69]

In the synopsis, the Liquidator in arguing for payment of US$11,304,899-79 or its current equivalent in Leones instead of the Leone deposits altered his position from that argued before the Winging Up Court. Before this Court Mr. Valesins V. Thomas, for the Liquidator, failed to file a statement of case and synopsis of argument; and seemed to be sitting on the fence. This is objectionable as the role and functions of the Liquidator are statutory; he is obliged to vigorously pursue the collection of the assets of the company in liquidation and the interest of the creditors. In the instant matter it means, in my view, filing the requisite pleadings and arguing for the payment of the Leone deposits to be made directly to the Liquidator so that he can administer same according to Law.

Upon the application of Mr. Lambert, the Court ordered that record of the proceedings of the Court of Appeal be provided. Its apparent from his statements and submissions that the purpose of obtaining the record was to show that counsel did not complete their addresses before the Court retired and the court, at the next sitting, the notices for judgment having been sent, delivered judgment. The application is to be seen in the light of ground (1V) under relief (a) contained in the Originating Notice of

Motion dated the 21st day of December 2007. The reliefs sought are premised on grounds (1) to (1V) under relief (a).

In my judgment, counsel did not need the notes (or minutes) of the Court of Appeal to support ground (1V) under relief (a); the grounds are based on Law. The complaint, in my view, is against the decision or order of the Court of Appeal that the sum in issue be paid by the Bank to the Assignee-Creditor in the absence of any legal basis or jurisdiction to do so. I am of the firm view that had the Court availed counsel, (and I am assuming that the Court of Appeal did not) the opportunity to complete their addresses, it would (and does) not alter the legal situation in respect of the said decision or order; whether counsel had completed their respective addresses or not, the question whether the Court of Appeal had the Jurisdiction to make its order of the 16th December 2007 would have remained. In any event the record of the Court of Appeal as constituted by the relevant Court documents, including the judgment, synopsis or statement of case of the respective parties and the record of the Winding Up Court, have been made [p.70] available and are before this Court. A record of a Court does not have to contain everything; what need to be included are relevant materials that the Court need for the determination of the subject-matter or issues before it. In my view all the materials needed for such determination in the instant case are before this Court.

In my judgment Part V of the Supreme Court Rules, 1992, deals with appeals and are not relevant to the matter before this Court. The rules that are relevant and applicable to the matter, in my considered view, are found in Part XVI captioned ORIGINAL JURISDICTION that is, Rules 89-98. The Applicant (Plaintiff) is seeking the reliefs pursuant to the supervisory jurisdiction of this Court under Section 125 of the Constitution, 1991. The matter is an action (original) and not an appeal.

The reliefs/remedies sought are ordinarily granted or refused on the basis of evidence adduced and the application of the relevant law. This matter (or action) having been commenced by an Originating Notice of Motion (see Form 8 set out in the First Schedule to the Supreme Court Rules, 1982) the requisite evidences are adduced by affidavits. The requisite affidavits (in support and in opposition) and the statement of case etc. were duly filed pursuant to the rules of this Court and the evidences and materials including the relevant documents such as the statement of cases and judgment in the Court of Appeal and rulings by the Winding Up Court are thereby brought before this Court. In my view this Court is seised of all the relevant materials to deal effectively with the subject-matter of this matter (or action).

Moreover, after reading paragraphs 20-26 of the affidavit in support sworn to by Patrick Lambert, of Counsel, particularly paragraph 24, J am firmly of the view that Counsel did reply and that the Court of Appeal was being asked to make a final decision/judgment; and the Court therefore proceeded to do just that in its judgment of on 6th December 2007. Furthermore, paragraph 33 of the affidavit in opposition sworn to by Amadu Koroma, of Counsel, on the 23rd January 2008 shows that written arguments were ordered by the Court of Appeal and submitted by the parties. Paragraph 33 is not controverted. The arguments (or statements of case or addresses) are before this court.

However, since it would appear the creditors of the Refining Company, other than the Assignee-Creditor, have been settled leaving only the Assignee-Creditor to be paid; and [p.71] since payment of the Leone deposits to the Liquidator would be a mere formality as same would have to be paid by the Liquidator to the Assignee-Creditor, the Court is inclined to order payment of same directly to the Assignee-Creditor to avoid further delay.

Directions/Orders

In the premises and pursuant to powers conferred by section 125 of the Constitution, 1991, I hereby do give the directions and orders following:

(1) The Winding Up Court's Order of the 14th July 2000 and the Order of the Court of Appeal of the 6th December 2007 are hereby set aside.

(2) The Bank of Sierra Leone (The Bank) is hereby ordered to transfer the Leone deposits amounting to 14,320,460-63 to Precious Minerals Marketing Company (SL) Limited (The Assignee-Creditor).

(3) The Bank of Sierra Leone to pay interest at the rate of 10% per annum on the said sum of Leone 14,320,460-63 from the 5th September 2000 to the 11th July 2008 to Precious Minerals Marketing Company Limited.

(4) In the circumstances, parties to bear their respective costs in the High Court, the Court of Appeal and this Court.

SGD.

HON. MR. JUSTICE GIBRIL B. SEMEGA-JANNEH, JSC(PRESIDING)

SGD.

HON. MR. JUSTICE B. RHODES-VIVOUR, JSC

SGD.

HON. MR. JUSTICE M.E.T. THOMPSON, JSC

SGD.

HON. MRS. JUSTICE S. BASH-TAQI, JSC

SGD.

HON. MR. JUSTICE S.A. ADEMOSU, JA

CASES REFERRED TO

1. Attorney-General of the Republic of Ghana and the Ghana National Petroleum Corporation vs. Texaco Oversesas Tankship Limited (the Texaco Melbourne) (1994) Lloyds Law Report 473

2. Russian and English Bank and Another v Baring Brothers [1936] A.C.405 H.L.; 1 All ER 505

3. Re Palace Restaurants, Limited, [1914] 1 CH 492 at p.50

STATUTES REFERRED TO

1. Bank of Sierra Leone Act, 2000

2. The Sierra Leone Petroleum Company Limited Agreement (1972) Ratification Act 1972

3. Companies Act, 1938

4. The Supreme Court Rules, 1992

5. Companies (Winding Up) Rules of 1929

6. The Constitution, 1991

7. Halsbury's Laws of England, 3rd edition, para; 1144 at pages 583-584