Neutral Citation Number FTCC 252/16 {2016) C26 (Fast Track Commercial Court)

Case No: FTCC 060/2017

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
FAST TRACK COMMERCIAL COURT

Law Court Building
Siaka Stevens Street
Freetown

Date: 11 May 2021

Before:

THE HONOURABLE MR JUSTICE FISHER J

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Between:

Mohamed Bangura **Plaintiff**

-and-

Dalian Shenghai Ocean Fishing Co **Defendants**

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No appearance for the Plaintiff
L M Baryoh for the 1st Defendant
AS Sesay for the 2nd and 3rd Defendant

Hearing dates: 22nd, 30th 31st March 2021
19th, 21st,29th April 2021
4th May 2021

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APPROVED JUDGEMENT

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. In pending proceedings before me, the defendants by way of separate notices of motions dated 16th April 2021 and 29th April 2021, sought several orders as prayed for on the face of the motions. The 1st defendant's motion, FTCC 060/17 is dated 16th April 2021 whilst the 2nd and 3rd defendant's motion is dated the 23rd day of April 2021.

Summary of background facts.

2. The background facts can be summarised as follows. By way of a writ of summons dated the 1st day of March 2021, the plaintiff sought leave to amend the writ of summons dated 21st day of April 2017, in the manner underlined in RED on the proposed amended writ of summons, pursuant to Order 23 rule 5 of the High Court Rules 2007.

3. In support of the application was the affidavit of Elvis T Enoh, sworn to on the 18th day of March 2021. Before me, Mr Enoh appeared for the plaintiff and applied for the said amendment. During the course of his application I enquired from him whether his application was being made inter-partes or ex-parte. He replied it was interpartes. I pointed out to him that I had not seen an affidavit of service evidencing service of the notice of motion on the other parties. He then applied for the matter to be treated as an ex parte notice of motion and prayed for the orders on the face of the motion. He relied upon the affidavit and relied upon order 23 rule 5(2) and 5 of the High Court Rules 2007.

4. I considered the matter and ruled that the motion was interpartes and not ex parte and consequently there had to be service of the notice of motion. I ordered the Plaintiff to serve the notice of motion on the defendants. On the next adjourned date, counsel for the 1st defendant informed the court that he had not been served with the notice of motion, notwithstanding the court order to do so. A further order was given for the plaintiff to serve the motion papers on the 1st defendant and an order was given for the 2nd and 3rd defendants to file all necessary documents they relied upon. I have seen no evidence of compliance with these orders by the plaintiff.

5. Subsequently, I received a letter of recusal from the plaintiff's solicitors requesting that I recuse myself from the proceedings on grounds that can only be described as spurious. I considered the matter and declined to recuse myself from the proceedings,

for the reasons given in my ruling dated 3rd May 2021. I did order notices to be sent to the plaintiff and his solicitors but despite the affidavit of service evidencing service upon them, they have failed to appear in this court to proceed with the matter.

6. When the matter resumed before me, counsel for the 1st, 2nd and 3rd defendants applied for certain orders which they had prayed for in their notice of motion, which had been filed earlier. I shall now proceed to deal with the respective motions.

Application of the 1st defendant

7. By way of a notice of motion dated 16 April 2021, the 1st defendant sought a number of orders as prayed for on the notice of motion. In summary, the 1st defendant prayed:

    1. That the Hon court strike out the notice of motion and affidavit filed by the plaintiff dated the 1st day of March 2021, on grounds of irregularity, to wit;

        i. The memorandum of appointment of solicitor is irregular and defective;

        ii. The issue of res judicata;

        iii. That the notice of motion is inconsistent with the Commercial and Admiralty Court Rules 2020.

    2. The application is supported by the affidavit of Fatmata Conteh sworn to on the 16th April 2021.

Applications of the 2nd and 3rd Defendants

8. With respect to the 2nd and 3rd defendants, by way of a notice of motion dated 29th April 2021, the defendants prayed for a number of orders on the face of the motion. In summary, the 2nd and 3rd defendants prayed;

    1. That the Hon court strike out the writ of summons dated 21st day of April 2017 and all subsequent applications on the grounds that the said application amounts to an abuse of the process of the court, as the contents of the said writ of summons had already been considered, determined and disposed of by the Supreme Court, in the matter intituled SC.CIV.1/2018.

2. That this Hon court strikes out the writ of summons dated 21st day of April, 2017 and intituled FTCC 060/17 No .40 on the grounds it discloses no cause of action against the applicants.

3. That the Hon Court dismisses the substantive action, instituted by a writ of summons dated 21 April 2017, intituled FTCC 060/17 No.40 on the grounds that the plaintiff lacks locus to institute an action against the defendant.

4. That the Hon court strikes out the notice of motion dated 1st March 2021, filed by Enoh & Partners, on the grounds that the intended amendment is to re-litigate issues already considered, determined and disposed of by the Supreme Court in the matter intituled SC.CIV.1.2018.

9. I shall now turn to the arguments of the 1st defendant's application.

10. In summary, the 1st defendant argued that the memorandum of appointment and notice of change of solicitor dated 16th February 2021 is irregular, defective and consequently contrary to Order 59 of the High Court Rules 2007. He argued that solicitors for the 1st defendant were never copied, neither were they served with a change of solicitor, as required by Order 59 rule 1 sub rule 3.

11. In addition, counsel argued that the new solicitors Enoh and partners, failed to comply with Rule 18 subrule 1 para (c) of the Commercial and Admiralty rules 2020, in that the rules require that any such applications must be accompanied by a written address in support of the relief sought. This the solicitor for the plaintiff has failed to do.

12. Counsel for the 1st defendant also argued that the principle of res judicata applies to this case, in that the reliefs sought in the proposed amended writ of summons had already been considered, heard and determined by the Supreme Court. In reliance, he relied upon the court order which is exhibited as FC1 and prays that the writ sought to be amended by the plaintiff, be struck out. In simple terms he also raises the issue of res judicata.

13. Whilst I note that there are other legal objections raised by both counsel for all the defendants, there are two key legal grounds raised by both counsel which are firstly, the issue res judicata and the question of abuse of process. I shall now deal with both issues simultaneously.

Res Judicata

14. The principle of res judicata is of vital importance in legal proceedings. ***Res judicata*** (RJ) or ***res judicata***, also known as **claim preclusion**, is the Latin term for "a matter decided" and refers to either of two concepts in both civil law and common law legal systems and refers to a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) re-litigation of a claim between the same parties. In the case of *res judicata*, the matter cannot be raised again, either in the same court or in a different court. A court will use *res judicata* to deny reconsideration of a matter.

15. The doctrine of *res judicata* is a method of preventing injustice to the parties of a case supposedly finished but perhaps also or mostly a way of avoiding unnecessary waste of resources in the court system. *Res judicata* does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion.

16. It is important to recognise that where the issue of res judicata is raised, a party affected may also be able to rely upon the doctrine of abuse of the court's process in certain circumstances. In the UK Supreme Court case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* UKSC 46, [2014] AC 160, Lord Sumption was of the view that *Res judicata* and the power to deal with an abuse of process in accordance with *Henderson v Henderson 1843-60 3 Hare 100* had distinct juridical bases. However, they both had 'the common underlying purpose of limiting abusive and duplicative litigation. The underlying public interest is the same: that there should be finality in litigation and that a party should not be vexed twice in the same matter.' The following four principles referred to by Lord Sumption as falling under the general "portmanteau term" *res judicata* were considered:

    1. Once a cause of action has been held to exist or not, that outcome may not be challenged by either party in subsequent proceedings ("cause of action estoppel"). The bar is absolute in respect of all points decided unless fraud or collusion is alleged;

2. even where the cause of action is not the same as in the later action, if some issue necessarily common to both was decided on the earlier occasion then the decision is binding on the parties ("issue estoppel");

3. the preclusion of a party raising in subsequent proceedings matters which were not but could and should have been raised in earlier ones (Henderson v Henderson 3 Hare 100, per Wigram QC at 114 to 116) (the "Henderson v Henderson principle"); and

4. the existence of a general procedural rule against abuse of proceedings ("abuse of process").

Abuse of process and the inherent power of the court.

17. The existence of the power to prevent its process being used for a collateral purpose or as an instrument of injustice has long been recognised as long ago as 1885 in the case of *Metropolitan Bank v Pooley 1885 10 App cas 10*. This is part of the inherent jurisdiction of the court. The power is one that is derived "from the very nature of the court as a superior court of judicature, to ensure they are indeed instruments of justice rather than oppression. Lord Blackburn had this to say:

"The court had inherently the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the court had the right to protect itself against such abuse".

18. The court will always exercise its jurisdiction to ensure that the ends of justice are not thwarted by those who use its procedure for improper ends. This policy was stated in Hunter v Chief Constable for the Western Midlands, 1982 AC 529 (HL) by Lord Diplock when observing that the case concerned:

"The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people"

19. In the celebrated case of *Johnson v Gore-Wood & Co 2002 A.C.1*, Lord Bingham in the House of Lords was of the view that the Henderson v Henderson principle whilst

separate and distinct from cause of action estoppel and issue estoppel, has much in common. The Learned Judge had this to say:

" "*The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied...that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all...It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court...*"

20. Issue estoppel applies Issue estoppel applies whether or not the court in the first proceedings addressed the merits of the issue. In *SC Finance Co Ltd v Masri and another (No.3)* [1987] QB 1028 the Court said at p.1047,

'The decision in *Khan v Golecha International Ltd* [1980] 1 WLR 1482 makes it clear that an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such an order has not heard argument or evidence directed to the merits.

21. Upon a review of relevant authority, the authorities establish that Issue estoppel, however, is dependent on the first set of proceedings having been disposed of by an order of the court (or a tribunal). In appropriate circumstances, court proceedings can be discontinued rather than dismissed. If they are dismissed, then in principle issue estoppel may be invoked if the same party seeks to rely on the same matters in new litigation against the same opponent. If they are discontinued that is not the case – see e.g. *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236 at [30] (although).

22. Whilst these are persuasive authorities, I have had regard to local authorities in Sierra Leone, in particular the case of *Huballah v Sow (CIV.AFP.32/2007) (2011) SLCA 06 (23 June 2011)*, a decision of the Court of Appeal which is binding on this court. In that case, he relied upon Spencer- Bower AD Turner's book titled " Res Judicata" 2nd ed at page 9, paragraph 9, in which the plea is explained thus:

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 to such litigation as against any other party or privy thereto..... is estopped in any subsequent litigation from disputing or questioning such decision on the merits whether it be used as the foundation of an action or relied upon as a bar to any claim."

23. Hamilton JSC had this to say:

" In my humble opinion for the plea to succeed there are five (5) elements to it:

(1) The parties or their privies are the same in both previous and present proceedings;

(2) The claim or the issue in dispute in both proceedings is the same;

(3) The res or subject-matter of the litigation in the two cases is the same;

(4) The decision relied upon to support the plea of estoppel per rem judicatum must be valid and subsisting; and

(5) The Court that gave previous decision relied upon to sustain the plea must be a Court of competent jurisdiction.

24. The Judge further went on to cite the decision of the court in *Wilson v Genet 1970-71 ALR 114 at 118*, where Tambieh JA had this to say:

"Although it is settled principle of law that even when a claim has been wrongly decided either on facts or on a pure question of law, the judgment operates as an estoppel by record in a subsequent suit on the same cause of action'

25. It is therefore the case that if I find as a matter of fact that there is an earlier decision of a higher court on the same facts, I am bound by that decision and in accordance with the decision in Wilson and Genet, the judgment would operate as an estoppel by record in a subsequent suit before me, regardless of the correctness or otherwise of the decision.

26. There are other grounds of the application before me that I may need to deal with. Suffice to say, the issue of res judicata lies at the heart of the application of both the 2nd and 3rd defendant's objections to this action by the plaintiff. It is therefore necessary for me to identify the relevant facts that relate to the application relying on

res judicata at this time. I shall deal simultaneously with the arguments of both counsel.

Relevant facts

27. Mr AS Sesay in his arguments for and on behalf of the 2nd and 3rd defendants argued that:

1. The plaintiff filed two separate writs of summons between July 2015 and April 2017, seeking the same reliefs. The first writ is dated 24th July 2015, hereinafter referred to as writ 1. The second writ is dated 21st April 2017 and is referred to hereinafter as writ 2.

2. On account of the similarities in both writs, solicitors for the 2nd and 3rd defendants in filed an application for a stay of proceedings in writ 2, after the judgement of the Honourable Justice AS Sesay JA, (as he then was).

3. That The Hon Justice Miatta Samba J(as she then was) made two orders, striking out writ 2 on the grounds that the said writ of summons was an abuse of the courts process and stayed all further proceedings against the 2nd and 3rd defendants, thereto pending the hearing and determination of an appeal filed to the Court of Appeal.

4. That prior to the filing of writ 2, solicitors for the defendants in writ 1, had filed notices of appeal on the judgement of the Hon Justice AS Sesay JA (as he then was). The plaintiff having lost in the Court of Appeal, again filed an appeal to the Supreme Court. That appeal was successful in a judgement dated 29th November 2019.

5. That the Supreme Court made a number of orders and most significantly, the following:

   i. The plaintiff could only recover a specified sum as an agent and promoter's fees.

   ii. The relief for specific performance is refused.

   iii. The defendants shall render an account of fishing activities between June 2015 and October 2015.

iv. The matter is remitted to the High Court to inquire into the profit derived from all fishing activities and to determine what percentage is to be recovered by the plaintiff.

v. Interests and cost.

28. Leaving aside the issue of whether the application by the plaintiff raises issues of res judicata, it unarguably the case that the sole basis upon which this matter ought to come back to the High Court after determination by the Supreme Court, was by way of the orders of the Supreme Court, which was very specific. Where the Supreme Court has given judgement on the proper course of conduct of any matter, every court below the supreme court is bound by that decision. In a situation where the Supreme Court gives directives to a lower court, that court must comply with those directives. In simple terms, without the decision and directives of the Supreme Court which cloaks the High Court with jurisdiction to reopen the case albeit to a limited extent, the High court would be functus and would lack the jurisdiction to determine by way of reopening the matter.

29. Counsel for the plaintiff failed to apply his mind to the fact that the Supreme Court in its decision of 29th November 2019 had set the jurisdictional basis upon which the High Court could reopen the matter. Any matter not covered by the Supreme Court decision, deprives the court of jurisdiction to reopen the case. It is noteworthy to mention that counsel for the plaintiff did not exhibit the Supreme Court decision in his affidavit in opposition, for obvious reasons. He could not have failed to realise the significance of that decision to the detriment of his case. Having admitted at para 5 of his affidavit that the second writ was struck out on grounds of abuse of process, it is rather disingenuous of him to seek to mislead this court by filing to provide the decision of the Supreme Court. The assertion at para 5 of the affidavit in opposition he swore to on the 21st April 2021 that there was a case against the 1st defendant is wholly untruthful, as he knew the Supreme Court had said there was no such case and had dismissed the appeal, save for the limited reliefs it granted. Such conduct I conclude borders on professional misconduct.

30. Further evidence of the disingenuous nature of the application is the suggestion at para 6 of the affidavit in opposition that as at 29th May 2017, which is the date of the court order striking out writ 2, there was a similar matter, ie writ 1 that was ongoing,

for which judgement was given for the plaintiff, hence the reason for the proposed amendment to reflect the status of the plaintiff as per the judgement of the Supreme Court. Such a submission is misconceived and hopelessly unarguable. It is clear from the contents of para 6 of the affidavit in opposition that the decision upon which the proposed amendment is sought was overturned by the Supreme Court in its decision. There can be no basis to seek to reopen a matter already decided by the Supreme Court for the reasons given in the affidavit in opposition, either as a matter of law or common sense. This application to amend writ 2 which is clearly dead, I conclude, I hopeless and has no arguable merits.

31. This application by the plaintiff is clearly an attempt to reopen by way of an appeal in the High Court the decision of the Supreme Court. Such a course of conduct clearly has no merits and is a vile attempt to abuse the process of the court. The court should normally express its displeasure by an award of punitive costs. There are numerous reasons why a litigant may wish to bring a case or mount a defence which has no prospect of success. The administration of justice demands that the bringing of such cases should be discouraged. One way in which the courts have sought to discourage such cases is by compensating the successful litigant, and punishing the advocate for the unsuccessful side by awarding costs against the advocate for assisting in bringing the hopeless case.

32. Such awards are made on the ground that the court has an inherent jurisdiction to ensure that its procedure is not abused and used to achieve an injustice to one of the parties, and to punish misconduct of those who appear before it. The dividing line between novel litigation and cases which are an abuse of process and a waste of time can be a difficult one to draw. Some would argue that the tension between these two public policies is reason enough not to award costs against an advocate bringing or defending "hopeless" causes. I have come to the conclusion that the jurisdiction to award such costs is justified in the interests of protecting clients and maintaining professional standards.

33. In the leading case of *Ridehalgh v Horsefield, [1994] Ch 205, 206 (CA)*. Lord Bingham when addressing the clear tension between the competing policy interests was recognised the following:

"There is a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients' interests by fear of incurring personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a backdoor means of recovering costs not otherwise recoverable against a legally aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest… is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their [opponents or their] lawyers.

34. If the objectives of the court are to be achieved, rather than thwarted by such abuses, it is necessary for the court to be able to act immediately against the perpetrators of the abuse. One such perpetrator is the advocate who is central to the bringing of such a case. Moreover, it is the advocate's duty to advise a litigant as to the rules applicable to bringing a matter before the court and to ensure, as far as possible, that such rules are complied with. Culpability for bringing a hopeless case before the courts therefore lies with the advocate as much or more than with the litigant.

35. The ability of the court to sanction advocates by awarding costs against them acts as an important signal to the profession as to what standards of conduct are acceptable, and a considerable financial deterrent against breaching those standards. Such a disincentive is particularly necessary in light of the considerable pressures, from the client or from the financial pressures of legal practice, to take a case. Such a sanction ensures that the courts are equipped to be instruments of justice rather than injustice. Without an effective weapon to prevent advocates assisting in abuses of the court's process, the court would be open to be used as a tool of injustice and oppression.

36. The jurisdiction to award costs against advocates is justified because it is an effective measure to reduce the incidences of hopeless claims and defences being brought before the court. While the court will always be wary of denying a litigant access to the courts where a case is meritless, and this is apparent to any competent advocate, it ought not to be brought before the court. Holding responsible the advocate who has brought the case despite its having no prospect of success will act as a more effective deterrent than other measures that might be proposed.

Costs

37. Order 57 provides the jurisdiction to award costs of and incidental to proceedings in the court. To that extent the courts do have the power to determine who pays and to what extent costs ought to be paid, even by a legal practitioner. Order 57 rule 9 provides the legal basis upon which a court may make an order against a solicitor personally. In accordance with Order 57 rule 9 sub rule 3, I propose to make a wasted costs order personally against the solicitor, Elvis T Enoh in this case. In accordance with the provisions of Order 57 rule 9 sub rule 2, I hereby direct that Mr Elvis T Enoh appears before this court on the next adjourned date to show cause why an order for costs should not be made against him personally.

Disposal

38. In the light of the findings of this court as outlined above, this court finds that the application by the plaintiff to amend a writ of summons dated 1st March 2021 amounts to an abuse of the process as the contents have already been considered, determined and disposed of by the Supreme Court and is therefore struck out. In addition, the writ of summons dated 21st Day of the April 2017 that had been struck out by a court of competent jurisdiction amounts an abuse of the process as the said writ had already been struck out on the basis that the institution of the said proceedings amount to an abuse of the process, in that the res of the matter had been considered and determined by the Supreme Court in a matter intituled SC.CIV.1/2018.

The Hon Mr Justice A Fisher J

Justice A. Fisher J

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