Tyler et al v. Heirs of Cole [2012] LRSC 5 (5 July 2012)

Albert Tyler, Musa Dunso, Lemeni Kamara, Matejay Dukuly, Sekou Konneh, Oldlady Saysay, Sakubu Kromah and all those authorized and operating under their authority of the City of Monrovia, Liberia APPELLANTS Versus **The Intestate Estate of the late Jesse G. Cole** by and thru its Administrators, Thomas K. Moore and Melvin McCrumade, also of the City of Monrovia Liberia APPELLEES

APPEAL

HEARD: May 30, 2012 DECIDED: July 5, 2012

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

The appellees, administrators of the intestate estate of the late Jesse G. Cole, filed an action of ejectment against the appellants in the court below on May 25, 2007. This complaint was withdrawn and amended and again filed on June 20, 2007. Basically, their seven-count complaint filed before the Civil Law Court, Sixth Judicial Circuit, alleged that the late Jesse G. Cole, before his demise, acquired nine (9) acres of land in the Paynesville Community from the Republic of Liberia in 1887. Since his acquisition of said property, the late Jesse G. Cole and his heirs have notoriously and openly been in possession of said property without any dispute until 2007, when the appellants obtained a photocopy of their deed under the pretext of purchasing a portion from the administrators.

As the appellees narrated in their complaint, as administrators, they sold portion of the intestate estate to various individuals. Sometime in January 2007, the appellants herein approached the appellees requesting them to sell portion of the disputed property to them. In their request to purchase, the appellees alleged that the appellants cleverly and cunningly obtained a copy of the appellees' deed for the property, requiring it for their perusal and consideration to purchase. To their dismay, the appellees said, appellants without the fear of God took advantage of the photocopied deed and presented themselves as owners of the land, selling parts of the disputed property to strangers who accordingly bought certain portions and began construction thereon.

The appellants filed separate answers to the complaint, basically denying the appellees' allegation and proffering various deeds said to be property deeded to them by their grantors, Albert Tyler, David Tyler, and Jerry Tyler.

The records show that in support of their case, the appellees' counsel wrote to the Foreign Ministry requesting authenticity of the deeds of both parties proffered to their complaint and answer. On May 7, and 23, 2007 the Foreign Ministry wrote to Counsel for the appellees the following letters:

May 7, 2007

Cllr. A. Kanie Wesso
Kanie, Koiwue Legal Redress, Inc.
109 Ashumn Street, Opposite LTC Building,
P.O. Box 18271000 20,
Monrovia, Liberia

Dear Cllr. Wesso:

I am pleased to present my compliments and to acknowledge receipt of your letter dated May 7, 2007, requesting the Bureau of Archives, Ministry of Foreign Affairs, for the authentication and/or verification of a Public Land Sale Deed reportedly issued to the late Jesse C. Cole by the Republic of Liberia in 1887.

In this connection, a diligent search of the Archives was undertaken and that our records show that the aforementioned deed exists. The said deed was executed in 1887 and originally registered in Volume 26, page 489, but due to the mutilation of said Volume 26, page 489, was re-registered in Volume N/N-99A. The deed contains nine (9) acres of land situated at Old Field Paynesville bearing lot number N/N.

Further research on the claims of Albert Tyler, Musa Dunzo and Lemeni Kamara is on-going and that research results will be communicated to you shortly.

Kind regards.

Sincerely yours,
Jackson K. Purser

DIRECTOR OF ARCHIVES

May 23, 2007

Dear Cllr. Wesso:

I represent my compliments and refer to my communication dated May 7, 2007 relative to your request for the authentication and/or verification of land deeds in favor of Jesse C. Cole on the one hand and Albert Tyler, Musa Dunzo and Lemeni Kamara, on the other hand.

In this connection, I wish to inform you that the Bureau has thoroughly searched its records which show the following:

1. That the copy of a certified copy of a Development Grant reportedly issued to Charles and Nancy Tyler by the Republic of Liberia in 1903 and recorded in Volume 5 page 65 was not found;

2. That there is no Volume 5 but rather Volume 5 & 6 (together) which cover the period 1830 to 1850, whereas the Volume 5 (as stated on the said photocopy of the deed presented to this office) is said to cover the year 1903; and,

3. It is observed that there are alterations in the copy presented to this office, judging from the variation in the typewritten prints contained in the body and Certificate of the said deed.

It is our hope, therefore, that the information provided supra will satisfy your inquiries.

Kind regards.

Very truly yours,
Jackson K. Purser
DIRECTOR OF ARCHIVES

These communication from the Foreign Ministry were attached to the appellants complaint; however, after several pre-trial application made to the court which was heard and decided, the plaintiffs, appellees herein filed a motion requesting the court to submit the matter to arbitration. Appellants

interposed no objection and the court ruled submitting the matter to arbitration.

Thereafter, before the board of arbitration was set up, the records show that on February 18, 2008, the appellees' counsel made an application to the court to rescind its ruling granting the application for arbitration. The application to court reads as follows:

AND NOW COME MOVANT$ IN THE ABOVE ENTITLED CAUSE OF ACTION REQUESTING YOUR HONOR AND THIS HONORABLE COURT TO RESCIND YOUR JUDGMENT/RUUNG AS CONTAIN IN THE MINUTES OF COURT OF AUGUST 24TH 2007 AND AUGUST 30TH 2007 AT SHEET 8 AND 9 RESPECTIVELY FOR REASON SHOWETH THE FOLLOWING TO WIT:

1.Movants submit and say that they are plaintiffs in an Ejectment Action filed before this Honorable Court on June 20th 2007, attaching thereto their complaint exhibit P/1 in bulk which contain deeds and certificates of discovery and non- discovery from the Ministry of Foreign Affairs. Attached hereto is Movants' exhibit M/1 in bulk to form a cogent part of Movants Motion.

2. That on August 22, 2007 Movants herein inadvertently filed a Motion for Arbitration before Your Honor and this Honorable Court for the sole purpose that the above entitled cause of action be submitted for arbitration which Your Honor and this Honorable Court granted; thereby, communicating with the Ministry of Lands, Mines and Energy, thru the Clerk of Court, Ellen Hall on August 28th 2007. Movants request Your Honor and this Honorable Court to take keen judicial notice of the letter dated August 28th 2007, under the signature of the Clerk of Court, Ellen Hall which letter is contained in the case filed before Your Honor.

3. Movants say that having carefully peruse the case file, they have discovered that they did attached exhibit P/1 in bulk to their complaint which exhibit contain therein certificates of non-discovery from the Ministry of Foreign Affairs against the Respondents and in favor of Movants.

Wherefore, and in view of the foregoing, Movants request Your Honor and this Honorable Court to rescind your ruling of August 24th & 30th 2007, because the Motion for Arbitration as filed was done inadvertently since indeed and in fact a certificate of non-discovery has been issued which

suggest that the Respondents herein have no title vested in them. Movants so pray and submit.

Respectfully submitted
The Plaintiff by & thru his Legal Counsel

This application to the court by counsel for appellees alleging that their motion filed for arbitration was done inadvertently was resisted by the appellants who stated that because the appellants had acquired deeds from the same grantor, arbitration was the best way to amicably resolved the matter; besides, counsel for appellees had taken oath by his affidavit attached to his motion for arbitration to amicably resolve the matter by arbitration.

This motion to rescind the ruling for arbitration was heard by the court and the Judge ruled as follows:

Court's Ruling
From the records before this Court, it is undisputed that the parties in exchanged of their many pleadings, acquiesce to the setting-up of a board of arbitration, which was accepted by the court and which board for reasons best known to the parties has not been fully constituted just right to this Motion. In the mind of the court, the motion is hereby denied and the Clerk of this Court is to immediately send a letter to the Ministry of Lands, Mines and Energy requesting the said Ministry to produce a chairperson for the said board on or before March 28, 2008, to immediately commence the process. Along side of this request, surveyors representing both parties are also requested to be present on Friday, at the hour of 10:00 a.m., on March 29, 2008, to be given instruction for the process without delay. AND IT IS HEREBY SO ORDERED.

Unfortunately, the judge's did not delve into the issue of the genuineness of the deeds presented and raised by the appellants in their motion to rescind. He absolutely assigned no justification for denial of the application.

We must note here that Section 64.2.2 (e) of our Civil Procedure Law Revised states that on application the court may stay an arbitration proceeding commenced or threatened on a showing by an applicant adversely affected thereby that the right to proceed to arbitration has been waived by the adverse party. This section of our statute requires that where such issue is

raised, the court shall proceed forthwith and summarily to hear and determine the issues in support of and in opposition to the application with or without a jury where it deems such procedure necessary. If the determination is made in favor of the adverse party the court may order the parties to arbitration.

Clearly, it was a matter for the court to have ascertained whether in fact the appellants deed relied on in the ejectment action was fraudulent and upon which finding the court could have determined the matter without the aid of the arbitration board.

Counsel for appellees excepted to this ruling which was noted by the court and thereafter the parties proceeded to carry out the board's investigative survey.

The survey by the board of arbitration was conducted. Thereafter, the majority members of the board filed their report with the court making the award in favor of the appellees. The report stated that the appellees' deed conformed to the ground location, except that in the board's computation, only eight acres were feasibly accessible and bounded. Reference the appellants, the majority report said that appellants did not show any concrete point on the ground representing their claimed areas nor did they present a deed of any kind.

The appellants' surveyor who declined to sign the majority report wrote the court as follows:

Ministry of Internal Affairs
P.O. Box 9008
Capitol Hill Monrovia, Liberia
June 20, 2008

His Honor Judge Karboi K. Nuta
Assigned Circuit Judge Presiding
Sixth Judicial Circuit Court
Civil Law Court, Montserrado County, Republic of Liberia

May It Please Your Honor:

We present our compliments and wish to state our reason of not signing the Report of the Board of Arbitration set up by this Court.

Your Honor, when the Board was set up, we met at the request of the Chairman and agreed on a day for the reconnaissance survey. All the parties were present and cooperated including Joe C. Tyler's Estate Administrator. We observed that the parcel of land in question was not sold by Layee Kamara but Joe C. Tyler's Administrators and Mr. Kamara was a buyer from the Tyler. Tyler's admitted selling and also presented a map of said area and said **his** surveyor was Kumeh who is also member of this Board. (Emphasis ours)

The board publicly asked/requested the Tylers to submit their title documents to the board through their Surveyor Mr. Isaac Kumeh to help the Board in carrying out its mandate.

Your Honor, we want to regrettably say here that thus far, we are or were surveyors of the Tyler's Estate, all efforts to get these documents failed and as the result, it was needless to sign the report because we did not take part in the field work.

Thanks for your understanding.

Sincerely yours,
Isaac D. Kumeh
REGISTERED LAND SURVEYOR

On the 9th day of May A.D. 2008, an assignment was sent out for May 13, 2008, for reading of the board of arbitration's report. When the case was called, counsel for appellants did not show up. The Sheriff's returns stated that the assignment was served on counsel for the appellants through his secretary. Noting the absence of the appellants' counsel, the court appointed Attorney Nancy Sammy to receive the minutes of the proceedings on behalf of the absent counsel. After the reading of the board of arbitration's report, the Judge noted that the ruling on the board's report would be made upon issuance of a notice of assignment.

An assignment for court's ruling on the board of arbitrations' report was sent out on the 27th day of May for ruling on the 2nd day of June 2008. The record shows that this assignment was signed for by counsel of the appellants. Counsel for the appellants was again not present for the ruling, and the court

noting the absence of the appellant's counsel, appointed counsellor Cooper Kruah to take the ruling on behalf of the appellants.

The court confirmed the ruling of the board, finding the appellants liable to the appellees, and ordered a writ of possession be placed in the hands of the Sherriff for service on the appellants and the appellants be evicted.

The appellants' counsel filed a three count bill of exceptions for our review assigning error to the court below. Two of these counts we view as essential to the appeal.

In count 1 of their bill of exceptions, appellants allege that they were not served the assignment for the reading of the arbitrator's report as reported by the Sheriff, and the court by entertaining the reading of the board of arbitrator's report without securing appellants presence in court for the reading of the report, denied the appellants the opportunity to either accept or reject the award, and in the case where the report was objected to, the appellants would have taken recourse to the statute controlling for filing of objections to an arbitration's award as provided by the statue. The court below having failed to comply with this statutory provision, the appellants say they were not afforded an opportunity to be heard.

Section 64.11 of our 1LCPLR which provides for vacating of an award by a party upon a written motion reads:

Vacating an award:

1. Grounds for vacating. Upon written motion of a party the court shall vacate an award where:

(a) The award was procured by corruption. Fraud, or other undue means; or

(b) There was partiality in an arbitrator appointed as a neutral, except where the award was by confession; or there was corruption or misconduct in any of the arbitrators; or

(c) An arbitrator or the agency or person making the award exceeded his powers or rendered an award contrary to public policy; or

(d)The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or

otherwise conducted the hearing contrary to the provisions of sections 64.5 or 64.6.

The fact that the relief granted in the award was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm an award.

2. Time for application. An application under this section shall be made within thirty days after delivery of a copy of the award to the applicant except that if the application is predicated upon fraud, or corruption, or other undue means, it shall be made within thirty days after such grounds are known or should have been known.

3. Rehearing. Upon vacating an award, the court shall order a rehearing and determination of all or any of the issues except where the award was vacated upon the ground that the dispute was not referable to arbitration. In vacating the award upon grounds urged under sub-paragraph 1 (b) of this section the rehearing shall be before new arbitrator appointed in accordance with section 64.3. A rehearing shall be conducted in the same manner and upon the same time limitation for a hearing under this chapter.

4. Confirmation of award on denial of application to vacate. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

This issue of the appellants in their bill of exceptions raises a fundament legal issue of notice which this Court has expounded on in various opinions, that no one shall be personally bound until he has had his day in court, or by which it is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard: Krauh and Solo Vs. Weah. 42LLR148, 156 (2004); Wolo Vs Wolo. 5LLR 423, 428 (1937). We therefore went to the records to ascertain whether in fact the appellants were served the notice of assignment to appear for the reading of the report.

Our review of the court's file shows that the notice of assignment dated May 9, 2008, was signed by the appellees' counsel and has a notation, "Received May 12, 2008, 1:20p.m.". The Sheriff's returns states that the assignment was duly served on the secretary of the appellants' Counsel. Counsel for the appellees in his argument before us insisted that the assignment was served on the secretary at appellants' office and that the notation Received May

12, 2008, 1:20p.m was made by the secretary at the appellants' office. He further argued that counsel for the appellants appeared in court for another matter shortly after the reading of the report and he was told of the Judge's ruling on the board's report but he made no effort to get the report or filed an objection thereto.

Unfortunately, this court is limited only to record before it and the record shows no evidence that counsel for appellants signed for said assignment or persons properly recognized under the law to sign on his behalf did sign for and receive said assignment. In our Jurisdiction, evidence of personal service of an assignment is the appearance of the signatures of the parties on the assignment, their counsels, or those designated by law to receive said assignment.

We must state that there is no evidence sufficient to establish that appellants' counsel did personally receive the assignment for the reading of the board of arbitrator's report; however, there is no dispute that appellants' counsel did receive the assignment for the court's ruling on the board's report. The records, which the appellants do not deny, show that counsel for appellants signed for and received on the 27th of May, 2008, the assignment for the court's ruling on the board's report slated for June 2, 2008, but he failed to appear.

This brings up the question, whether under the facts and circumstances in this case, the appellants fundamental right of notice was violated so as to warrant a remand of this case as prayed for by the appellants?

Procedurally, the reading of the board's report is precedent to the making of a final ruling on an arbitration report. In which case, counsel for appellant having received this assignment for ruling on the board of arbitration's report was immediately placed on notice that the board's report was filed and read before the court. We must then ask, what prevented appellants' counsel from ascertaining from the court whether in fact the report was read in court and for him to obtain a copy thereof. Chapter 64.11 (2) of our CPLR quote verbatim supra provides that a party may upon written motion file an objection to vacate an award after such grounds are known or should have been known. The assignment for ruling on the report which the counsel for appellants received should have placed him on notice for the timely filing of his objections, if any, to the arbitrator's report. In other words, the

appellants had thirty days from the date he had notice or reason to believe that the report was made to legally file his objections to said report.

This Court in Gbae vs. Geeby 14LLR 147, 150-151 (1960), defines "Day in Court" as the time appointed for one whose rights are called judicially in question or liable to be affected by judicial action, to appear in court and be heard in his own behalf. This phrase, as generally used, means not so much the time appointed for a hearing as he opportunity to present ones claims or rights in a proper forensic hearing before a competent tribunal." (emphasis ours).

Also in the case, Jos Hansen & Soehne (Liberia) LTD vs. Reeves and CitiBank, 35LLR 10, 20 (1988), this court classified notice into two grades: actual and constructive. Actual notice defined as the notice expressly and actually given and brought home to the party directly. Constructive notice on the other hand, defined as information or knowledge of fact imputed by law to a person, although he may not actually have it, because he could have discovered the fact by proper diligence and his situation was such as to cast upon him the duty of inquiring into it. Constructive knowledge is based on the premise that one has no right to shut his eyes or ears to avoid information and then say he had no knowledge.

With the constructive notice that the report had been presented and read in court, the appellants did not attend the hearing for the court's ruling on the arbitrators' report to raise this issue of non service to be determined by the court, nor did the appellants file the necessary motion objecting to the said arbitrators' report in the time frame require by law. This court has said, in order for a party to bring up an issue on appeal, the party must have first raised it before the trial court to be considered and ruled on, as it will not rule on a matter for which the trial court has original jurisdiction.

This Court dealt with the issue of a party first raising an issue before the trial court to be determined by it before raising it on appeal, in the case, Express Printing House. Inc. and Shabani vs. Reeves and BCCI. 35LLR 455 (1988). In this case, heard in the Debt Court, several notices of assignment were served on plaintiff-in- error and his counsel but they failed to appear. A final notice of assignment was served on plaintiff-in-error and his counsel but again they failed to appear. The record showed that counsel for the plaintiff-in-error had signed for the assignment. Plaintiff in error having received and signed

for the assignment but did not show up, the court rendered a default judgment. Counsel for Plaintiff-in-error contended that the signature appearing on the notice of assignment from the Debt Court was not his signature, in spite of the fact that the Sheriff's returns showed that the notice of assignment was personally received by him. The facts in the aforementioned case further revealed that the plaintiff-in-error, after the judgment, personally taxed the bill of cost without any reservation. The Supreme Court in its ruling of this matter, said, at the time of taxing of the bill of cost, counsel for the plaintiff-in-error did not raise any issue in respect to the court's alleged failure to have notified him of the trial of the case, nor did he question the genuineness of the signature appearing on the notice of assignment or call upon the court to conduct an investigation regarding the signature appearing on the notice of assignment so as to enable the trial court to pass upon the issue. This court reiterated the principle under our practice and procedure governing our appellate review that issues not raised in the court below to be passed upon by the trial court to form a basis for our appellate review cannot be raised for the first time since the original jurisdiction of this Court is defined by the Constitution of Liberia.

In this case now before us, we are convinced that the appellants had constructive notice of the reading of the report and ample opportunity to have brought to the trial court's attention that they were not served the assignment for the reading of the board's report, or to file their objections to vacate said report for determination by the court when they were served the assignment for ruling on the arbitrators' report. The statue controlling does not make it discretional for a judge to hear such objection, but makes it mandatory. The appellants having failed to bring the issue of non-service to the attention of the trial court or to file their objections after having received constructive notice of presentation of the board's report, they cannot now raise this issue before us, especially when the trial court was not given the opportunity to hear and pass on it. We must emphasize that this Court cannot and will not exercise original jurisdiction to pass on this issue as it is deemed as having been waived by the appellants.

Furtherance to the issue raise in count 1 of the appellants' bill of exceptions, we note that the appellants have not stated the grounds for any objection they might have to the board's report. Section 64.11 CPLR supra states the grounds that would warrant vacating an award.

This brings us to the second count of the appellants' bill of exceptions in which appellants say a member of the board of arbitration did not sign the report; yet, the trial judge ruled without questioning the absence of the signature of this surveyor, Isaac D. Kumeh.

We must comment that this is a matter where the arbitration report was well written and clearly stated. The report states that the appellees area described and set out in the deed covered the location on the ground except that the actual area mapped up when computed was eight acres instead of nine acres, a phenomenal which results because of the measurement used back in the 1900s, and which differs from present measurement. The deed presented by appellees was 141 years old.

On the other hand, the appellants presented a map but failed to present a deed of any kind. The board's report stated that in order to bring peace and harmony among the parties, the arbitrators unanimously agreed to give the appellants' grantor time to come with their deed which would assist the board render a fair judgment in the matter. On the date agreed on for the appellants to come forth with their deed to conduct the survey, the appellants were present but came with no deed. The survey was conducted anyway. The report said the survey was conducted under a cordial atmosphere. The appellants did not bother to show any concrete point on the ground representing their claimed areas; pertinent information could not be traced or found as a result of their failure firstly, to produce their deed for their property, and secondly to show property corners which is important for map making and setting out their property. Even the appellants own surveyor, Mr. Isaac D. Kumeh whom appellants say did not sign the report and the Judge ruled without questioning his absence, wrote to the court that he refused to participate in the survey and did not sign the report because appellants' grantor failed to come forth with their deed as requested by the board and which would evidence their claim to the disputed property. Their failure to produce said deed then led him to decline participation in the survey area realizing that they could not prove ownership of the disputed property. His report clearly lends credence to the award, and it would have been absurd for the Judge to have ruled otherwise because he did not sign the report. Besides, Section 64.5(f) of our CPLR states, "Determination by majority of arbitrators. The hearing shall be conducted by all the arbitrators, but the majority may determine any question and may render an award.

The appellants, prayer to this Court on appeal is that this Court should vacate the award and the Judgment, remand the case to the court below with instructions to appoint another board of arbitration, which new board shall then immediately proceed in the manner provided by statute, and to rule all cost against the appellees.

The prayer of the appellants brings to mind the case, Kevin vs. Juvico Supermarket 23LLR 201, 205 (1974), decided by this Court. In this case, the evaluation of property pledged by the appellant in an appeal bond was not set forth in the affidavit of sureties appended to the appeal bond, but it was contained in the bond and in the certificate of valuation also appended to the bond. The appellee moved to dismiss the appeal on the basis of this omission. This Supreme Court stated that the motion to dismiss was predicated on a mere technicality, since the valuation could clearly be established by reference to the other documents. The motion to dismiss was therefore denied.

In similar light, we see the appellants fringing their appeal on mere technicality. We cannot grant the appellants' prayer simply because they allege that they were not served the notice of assignment for reading of the arbitration's report when they had adequate notice and time to have brought this up before the trial court.

We are convinced that the board of arbitrations' award was fair, and nowhere in the records have we seen any legal ground that would warrant a remand of the case or would reverse the ruling of the Judge below. Besides the Director of Archives of the Foreign Ministry said in his letter quote supra that the appellants' grantor deed was not found and that Volume # 5 did not cover the year 1903 as the appellants deed stated, but rather the years 1830-1850.

We adopt the position in this case that mere technicalities which do not go to the merits of the case are not favored in modern practice. A careful perusal of the records shows that the appellants had notice to have filed their objection to the board of arbitration's report or should have firstly filed this issue of non-service of assignment before the trial court to rule and make a determination thereof. Besides, from a review of the records before us, we are convinced that no amount of objections could have made the court below to rule otherwise, and we are not prepared to reject the trial court's ruling which we see as being proper in the administration of justice.

The appeal is therefore denied with costs ruled against the appellants. The Clerk of this Court is ordered to send a mandate down to the court below to enforce its judgment. AND IT IS HEREBY SO ORDERED.

The Appellant was represented by Counsellor Lawrence A. Yeakula of the Liberty Law Firm. The Appellee was represented by Counsellor A. Kanie Wesso of the Kanie Koiwue Legal Redress, Inc.