

**BIRAHIM DIAGNE , Appellant v. OSMAN
DUKULY, by and through his attorney-in-fact, DR.
DEIMEI DUKULY, Appellee**

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT,
MONTSERRADO COUNTY.

Heard: November 22, 1999. Decided: December 17, 1999.

1. Where title is not in issue, a special proceeding to recover possession of real property may be maintained in a circuit court or a court of a justice of the peace or a magistrate.
2. In summary proceedings to recover possession of real property, the trial court can grant to a petitioner a relief, which may include a judgment for rent due and for damages for wrongful entry on or withholding of property, subject of the proceeding.
3. The court shall grant summary judgment if it is satisfied that there is no genuine issue of dispute as to any material fact and that the party in whose favor judgment is granted is entitled to it as a matter of law.
4. A judge cannot review, alter or modify the ruling, judgment or judicial acts of another judge with concurrent jurisdiction.
5. A succeeding judge cannot entertain or pass upon a judicial act of his predecessor having concurrent jurisdiction, upon a motion for summary judgment after the case had been ruled by his predecessor to a regular trial.
6. While the ruling on a motion to intervene in a suit at the trial court is pending before the Supreme Court on appeal, it is both premature and erroneous for the trial court to proceed to conduct a trial of the main suit.
7. An agreement of majority co-tenants of a property held by them as tenants in common with the minority co-tenants for the lessee of the property to exercise the option to renew the lease on terms specified in that agreement is binding on the minority co-tenants.

The late Momolu Dukuly and the Cestos Nimba Corporation executed a lease agreement for a certain period of ten years with option for renewal for another period of ten years. The annual rent for the certain period was stipulated in the least agreement; but the annual rent for the optional period was agreed to be negotiated. While the certain period of the lease was still in force, the Cestos Nimba Corporation assigned its leasehold interest to appellant, who was one of the major shareholders of the Cestos Nimba Corporation. Appellant

continued to perform under the lease agreement until the certain period ended.

At the time of appellant's exercise of the right to the optional lease period, Momolu Dukuly was dead and appellee (his son) and his three daughters had succeeded to the late Momolu Dukuly's interest in the property. So negotiation for the annual rent for the optional period had to be concluded with the consent of all four heirs of Momolu Dukuly.

With the three daughters, appellant reached an agreement for the annual rent; but with appellee, appellant never reached an agreement. Appellee therefore instituted an action of summary proceedings to recover possession of real property, claiming that he was acting for himself and his three sisters. Appellee also asked for damages in the amount of US\$300,000.00 for the wrongful withholding of the property by appellant.

In his answer, appellant contended that he had an agreement with the three sisters and that appellee, as a co-tenant-in-common could not institute legal action to recover the property from appellant. Appellant also contended that summary proceedings to recover possession of real property would not lie since title, in the form of the lease agreement, was in issue.

Appellee's three sisters, who had reached an agreement with appellant for the renewal of the lease, filed a motion to intervene in the case, but this was resisted by appellee. Thereafter the motion to intervene was heard and denied by the judge; and these three sisters appealed to the Supreme Court for a review.

While the appeal from the ruling denying intervention was pending before the Supreme Court, the judge called the case for hearing at the trial court. Disposition of the law issues was argued and the judge ruled certain issues to trial.

When the succeeding judge came into jurisdiction over the trial court, he entertained a motion for summary judgment, filed by appellee and resisted by appellant. The succeeding judge granted the motion for summary judgment on the grounds that appellant had admitted to the main issue that he was occupying the demised premises without a lease

agreement. In addition to ordering the ouster and eviction of appellant from the demised premises, the succeeding judge also held him liable to appellee for the amount of US\$300,000.00 in damages as unpaid rent. Appellant appealed to the Supreme Court for a review; but pending the appeal, the succeeding judge had appellant evicted and ousted from the demised premises as allowed in summary proceedings to recover possession of real property.

On appeal the Supreme Court held that even though the case ought to be tried by a judge without the aid of a jury, the succeeding judge had reviewed the judicial act of his predecessor when he entertained and passed upon a motion for summary judgement after the case had been ruled by his predecessor to a regular trial. This conduct of the succeeding judge, the Supreme Court held, is contrary to the rule that a judge has no power to review the act or ruling of another judge of concurrent jurisdiction. In addition to the succeeding judge's error in granting a summary judgement after the case had been ruled to a regular trial by his predecessor, the Supreme Court also ruled that the motion for summary judgment should not have been entertained when the ruling on the motion for intervention was still pending. The Supreme Court ruled that trial of the summary proceedings to recover possession of real property should have awaited the outcome of the intervention proceeding on appeal.

Notwithstanding these errors committed by the succeeding judge, the Supreme Court said that even though the succeeding judge erred, its review of the case would not dwell on this erroneous acts of the succeeding judge but instead on the facts and circumstances of the case.

Based on that position, the Supreme Court found that an agreement for rent for the first five years of the optional period had been concluded based on what appellee's three sisters had concluded with appellant. The Supreme Court, however, also found that appellant had not paid that rent and ordered that the rent for the first five years be paid. The Supreme Court also ruled that the issue of damages should not have been decided in the summary judgment since it was an issue of fact alleged

by appellee and disputed by appellant. The Supreme Court held that the issue of damages should await the final determination of the appeal from the intervention proceeding and then that issue should form a part of the summary proceeding to recover possession of real property. On the issue of whether a co-tenant in common can recover possession of real property under lease by his other co-tenant to a lessee, the Supreme Court said that such issue is properly disposable in the appeal on the intervention proceeding and so did not pass on it in this case.

The Supreme Court finally ruled that the parties remain in *status quo* until the trial of the summary proceeding to recover possession of real property has been conducted at the court below. The judgement of the trial court was therefore *affirmed with modification*.

F. Musah Dean, Jr. and *G. Moses Paegar* appeared for appellant. *Frederick D. Cherue* appeared for appellee.

MR. JUSTICE JANGABA delivered the opinion of the Court.

It is provided by our Civil Procedure Law, Rev. Code 1, that where title is not in issue, a special proceeding to recover possession of real property may be maintained in a circuit court or a court of a justice of the peace or a magistrate. Civil Procedure Law, Rev. Code 1:62.21.

The trial court can grant to a petitioner in such a proceeding a relief which may include a judgment for rent due and for damages for wrongful entry thereon or withholding of said property, subject of the proceeding. *Ibid*, §1:62.22. Thus, a party against whom a judgment is rendered is required to pay rent due and damages for wrongful entry on or withholding of the subject property.

Our revised Civil Procedure Law also provides the basis for granting summary judgment in our jurisdiction. The relevant statutory provision provides, *inter alia*, that the court shall grant summary judgment if it is satisfied that there is no genuine issue as to any material fact and that the party in

whose favor judgment is granted is entitled to it as a matter of law. Civil Procedure Law, Rev. Code 1: 11.3(3). This statutory provision provides the grounds upon which a court can grant a motion for summary judgment. Firstly, the court granting such a motion should be satisfied that there exists no genuine issue of any material fact which warrants a full trial; and secondly, a judgment in a motion for summary judgment can be rendered in favor of a party who is entitled to it as a matter of law.

This case is before us on appeal from the judgment in a motion for summary judgment, growing out of a summary proceedings to recover possession of real property.

The facts, as gathered from the certified records forwarded to us, show that Osman Dukuly, appellee, by and thru his attorney-in-fact, Dr. Meimei Dukuly, for himself and his three sisters, Neh Dukuly Tolbert, Dah W. Dukuly and Bindu Dukuly, instituted an action for summary proceedings to recover possession of real property on January 21, 1993 against Birahim Diagne, appellant, in the Civil Law Court of the Sixth Judicial Circuit during its December 1993 Term, praying said court to oust, evict and eject appellant from certain premises described in the complaint and place them in possession thereof. Appellant claimed that he and his three sisters are heirs of the late Momolu Dukuly, who died possessed of a parcel of real property located in Billima, Bushrod Island, Monrovia, Liberia, containing 27.10 acres of land, out of which a 9.0 acre compound, with buildings thereon, was leased to the Cestos Nimba Corporation for ten (10) years, commencing June 10, 1982 and ending June 9, 1992. An optional period of ten (10) years was reserved to the Cestos Nimba Corporation.

It was alleged that the Cestos Nimba Corporation subsequently assigned its leasehold rights to appellant for and during the remaining term of the lease, ending June 9, 1992. Appellee further alleged that the leasehold right expired on June 9, 1992, but that appellant refused to re-deliver possession of the property and has since then illegally and wrongfully occupied and withheld possession of the subject property from appellees

and his three sisters without the renewal thereof, notwithstanding the exchange of communications between the parties. Appellee therefore prayed the trial court to oust and evict appellant from the demised premises and repossess him and his three sisters of said premises; appellee also prayed for the sum of US\$300,000.00 (Three Hundred Thousand United States Dollars) as damages for the illegal and wrongful withholding of the demised premises by appellant.

On February 1, 1993, appellant filed returns to the petition, alleging that he was one of the three shareholders of the Cestos Nimba Corporation, the original lessee which constructed all the buildings on the subject property, and thereafter appellant subsequently purchased the leasehold rights from the aforesaid Cestos Nimba Corporation. Appellant also alleged in his returns that he was surprised to receive letters from appellee Osman Dukuly because, he, appellant, had previously negotiated with the agents of appellee's three sisters with respect to his exercise of the option reserved to him for renewal of the lease agreement for another period of ten years, commencing June, 1992. Appellant submitted that he and the agents for appellee's three sisters arrived at an agreement for the optional period for the lease and an agreement for rent of US\$16,000.00 (Sixteen Thousand United States Dollars) per annum.

Appellee also contended that the appellee Osman Dukuly's demand for US\$75,000.00 (United States Dollars Seventy-Five Thousand) as annual rental for his $\frac{1}{4}$ share of the property was exorbitant and was not made in good faith; instead such demand is tantamount to coercion and harassment. It was also alleged by appellant that he could not negotiate with appellee Osman Dukuly personally because of the absence of both appellee and his agent from Liberia.

Appellant further challenged the authority of appellee Osman Dukuly to sue as agent for and behalf of his sisters pursuant to his power of attorney and that there was no authority from the said other three co-owners of the property either to appellee Osman Dukuly or his agent, Dr. Deimei Dukuly, authorizing him to sue on their behalf. Another issue raised by appellant is that the four owners of the property are

tenants in common and that a co-tenant in common cannot evict a lessee who has an agreement with the other three co-tenants in-common.

Appellant denied illegally withholding possession of the demised premises from the appellee on ground that he has in good faith exercised the option and has an agreement for the continuation of the occupancy and enjoyment of the property. As such appellant contended that summary proceedings to recover possession of real property could not lie because title was in issue.

Based on these contentions and submission, appellant prayed the trial court to dismiss the petition.

A reply was filed by appellee and the pleadings in this case rested.

On April 27, 1993, the law issues in this case were disposed of by His Honour M. Wilkins Wright, then Resident Circuit Judge, who ruled the case to trial of the facts. On the 29th day of April, A. D. 1993, the three sisters of appellee Osman Dukuly filed a four-count motion for intervention along with a thirteen-count returns to the action of summary proceedings to recover possession of real property.

The intervenors alleged in their motion to intervene that neither Meimei Dukuly nor Osman Dukuly has been authorized by them to represent their interest in the summary proceedings to recover possession of real property; and as such, they prayed to be permitted to intervene as party respondents in the main suit as their interests and aspirations were adverse to appellee, Osman Dukuly. The intervenors also alleged in the returns substantially that appellant has their authority and agreement to, enjoy, use and possess the subject property. Hence, they prayed the trial court to dismiss the petition for summary proceedings to recover possession of real property.

Appellee Osman Dukuly filed a seven-count resistance principally contending that he has the right as one of the tenants-in-common to preserve the property of his late father on behalf of his sisters in the absence of any power of attorney from them, and to evict appellant from the property for the

benefit of all his co-tenants. Appellee Osman Dukuly prayed the trial court to deny the motion to intervene. The trial court, presided over by His Honour M. Wilkins Wright, the Resident Circuit Judge, ruled on May 20, 1993, denying the motion of the intervenors, to which ruling exceptions were noted and an appeal announced to this Court. That appeal is pending undetermined.

A motion for summary judgment was subsequently filed by Appellee Osman Dukuly, praying the trial court to render a judgment as a matter of law, on ground that there was no genuine issue as to material facts to warrant a full trial. This motion was resisted.

On the 11th day of November, A. D. 1997, His Honour Timothy Z. Swope, Assigned Circuit Judge, granted the motion for summary judgment, holding that appellant should be evicted and ousted from the demised premises and also that appellant is liable for damages in the amount of US\$300,000.00 (Three Hundred Thousand United States Dollars) as rent due for the period appellant wrongfully withheld the subject property. Appellant excepted to this judgment and announced an appeal to this Court; however, as provided by law, appellant was evicted pending the hearing and determination of his appeal.

On appeal, appellant, though his counsel, raised and argued five issues before this Court contending: (1) that summary judgment cannot be granted where a case has been ruled to trial as a consequence of the disposition of laws issues; (2) that summary proceedings to recover possession of real property will not be granted when there is a dispute between the same parties as to the existence of a valid lease agreement between them for the tenant to continue his use and enjoyment of the property under the optional term; (3) that a summary judgment in an action for summary proceeding will not lie when there is a dispute between the parties as to the quantum of damages; (4) that by entertaining and passing on the motion for summary judgment, Judge Swope reviewed the ruling of Judge Wright, both of whom had concurrent jurisdiction, since Judge Wright had ruled the case to trial before the motion for summary

judgment was filed; and (5) that a motion for summary judgment cannot be entertained and granted while an appeal from a denial of the motion to intervene is still pending before the Supreme Court.

Based on these submissions and issues, appellant prayed this Honourable Court to reverse the judgment of the lower court, repossess appellant of the property to continue his enjoyment thereof.

Appellee on the other hand raised three issues before this Court for our consideration. Appellee contended that Judge Swope acted properly when he granted the motion for summary judgment and awarded damages, since there was no genuine issues of material facts in dispute; that is, all the material issues of fact had been admitted by appellant. This material issue of fact, alleged to be admitted by appellant, was identified by appellee to be that appellant was in possession of the premises without a lease agreement, whether *de jure* or *de facto*.

As to the issue of damages, appellee contended that he and his co-owners of the property are entitled to damages for the illegal withholding of the premises by appellant without paying any rent.

Appellee also submitted that Judge Swope did not review the ruling of his colleague, Judge Wright, since the case was ruled to trial by a judge, sitting alone as trier of the issues of law and trier of facts. Accordingly, co-appellee Osman Dukuly stressed that Judge Swope properly terminated the case summarily when he was satisfied that all of the issues of facts submitted had been admitted by appellant and that there were no genuine issues of material fact in dispute.

We are in disagreement with the assertion of appellee Osman Dukuly that Judge Swope did not review the judicial acts of Judge Wright, when indeed Judge Wright was satisfied that there existed a genuine issue of material fact and therefore ruled the case to trial but Judge Swope subsequently entertained and granted a motion for summary judgment in favor of appellee as a matter of law. The ruling of Judge Wright on the disposition of the law issues, which ruled the

case to trial, constitutes a judicial act, and the entertainment and subsequent granting of a motion for summary judgment by Judge Swope is a review of such judicial act.

This Court has consistently held and still holds that a judge cannot review, alter or modify the ruling, judgment or judicial acts of another judge with concurrent jurisdiction. *Dennis et al. v. Philips, et al.* 21 LLR 506, 514 (1973); *Donzo v. Tate*, 39 LLR 72 (1998).

The trial judge erred in this respect. However, the conduct of Judge Swope in reviewing the acts of his colleague of concurrent jurisdiction is not the basis upon which this case will be decided.

The facts and the legal issues raised in the briefs and argued by counsel for both parties present one cardinal issue for the determination of this case, which is, whether or not appellant wrongfully withheld the subject property after the expiration of the lease agreement.

A recourse to the records in this case indicates that the appellant, as lessee, wrote a letter dated May 29, 1992 to the heirs of the late Momolu Dukuly, expressing his desire to them for the renewal of the lease agreement for another ten (10) years, in exercise of his right of option for such renewal, and requested a meeting with them for that purpose. It is shown by said letter that appellant talked with various heirs, who expressed their interest in his continuous occupancy and enjoyment of the property, but they preferred the payment of United States dollars instead of Liberian dollars as rent for the optional period. Appellant therefore wanted advice from the heirs as to how much United States dollars they would require him to pay for the optional period, which he considered as the crucial point for negotiation for his enjoyment of the optional period.

We also observe from the records in this case that several communications were exchanged between the legal counsel of appellee's three (3) sisters and appellant's legal counsel in July, September and October, 1992, regarding the terms and conditions for the optional period of the lease agreement. On September 26, 1992, the three (3) sisters through their counsel,

wrote and proposed that appellant pay the amount of US\$16,000.00 (Sixteen Thousand United States Dollars) per annum and requested his reply. On October 14, 1992, appellant agreed and accepted the terms of the optional period as modified by a letter of the three (3) heirs and therefore agreed to pay US\$16,000.00 (Sixteen Thousand United States Dollars) per annum for the first two (2) years. Thus, the letters exchanged between the three (3) other heirs of the late Momolu Dukuly and appellant concluded the terms of the optional period of the lease agreement.

It is shown by the records in this case that at the time the terms of the optional period were concluded, appellee Osman Dukuly, was out of the bailiwick of Liberia and also had no agent here.

Subsequently, Osman Dukuly appointed Dr. Meimei Dukuly on the 30th day of October, A.D. 1992 as his attorney-in-fact to transact and handle his business and matters relating to his $\frac{1}{4}$ share or interest of the property. He authorized and empowered his agent to attend meetings along with his counsel and the representatives of his sisters, as well as with appellant, with the view of negotiating and concluding the terms of an extended agreement in keeping with his written proposals. This power of attorney was probated and registered on November 6, 1992.

On November 20, 1992, Osman Dukuly also wrote a letter to appellant informing him to pay his one-fourth share of the rent for the property, and demanding an annual rent of US\$75,000.00 for the first five (5) years, and an amount to be agreed upon for the final five (5) years. He also informed appellant to negotiate with his agent due to his engagement abroad and attached his proposals for the optional period of the lease to said letter. Three other letters from his counsel were sent to appellant informing him to meet with the terms of the optional period, failing which, he would seek legal redress.

The September 26, 1992 letter of the three (3) sisters of appellee Osman Dukuly to appellant and his reply of October 14, 1992 thereto, concluded the terms of the optional period of the lease agreement. This conclusion of the terms of the

optional period authorizes and empowers the appellant for the continuous use, occupancy, enjoyment and possession of the subject property pending the execution of a written contract consistent with the agreed and accepted terms of the parties in their letters. This Court cannot ignore the express consent of the three (3) other heirs of the late Momolu Dukuly in the absence of the other heir or his agent in Liberia at that time. The latter proposals of Osman Dukuly as to the terms of the optional period resulted to the failure of the heirs to agree for the consummation of the contract by all parties concerned. The lessee therefore, acted in good faith in exercising the optional period of the lease, and he is not therefore responsible for the failure to consummate the contract when all the heirs were not in one accord.

The records in this case show that the three (3) sisters filed pleadings in the court below claiming that they authorized and empowered appellant, the lessee, to continue to use and occupy, enjoy and possess the premises. Their appeal from the denial of their motion to intervene is presently pending before this Court undetermined. This Court therefore holds that the appellant could not have illegally and wrongfully withheld the premises in the face of the written letters of the other heirs as well as their judicial declarations and admissions, authorizing and empowering appellant to possess and enjoy the property. Until the contrary can be established, appellant is not liable to pay damages in the contemplation of the statute of wrongful withholding of the premises.

Appellant accepted and agreed to pay the annual rental of US\$16,000.00 (Sixteen Thousand United States Dollars) for the optional period and remained on the premises without any payment of said rental. He is therefore liable for the sum of US\$80,000.00 (United States Dollars Eighty Thousand) as rent due from 1992 up to and including 1997, at which time he was evicted from the premises.

The other issues raised by both parties in their briefs as to the capacity of one co-owner of a tenant-in-common being able to evict a lessee without authority of all the tenants will be decided in the appeal of the intervenors pending before this

Court. For, to do so at this time, we will delve into the merits of such appeal perfected before us.

We reiterate that the trial judge erred when he granted a motion for summary judgment where there were genuine issues of material facts as shown by records in this case, as well as the pendency of an appeal before this Court from the denial of a motion to intervene.

Wherefore, and in view of the foregoing, it is the considered opinion of this Court that the judgment of the court below appealed from should be, and the same is hereby affirmed in part, with modifications, as follows: (1) that appellant is only liable for the payment of the annual rental of US\$16,000.00, totaling the sum of US\$80,000.00 as rent due for the period of five (5) years commencing from 1992 up to 1997; (2) that the issue of damages should await the final determination of the intervenors' appeal and the matter of summary proceeding to recover possession of real property; (3) that all parties in this litigation should remain in status quo pending the final determination of this case.

The Clerk of this Court is hereby ordered to send a mandate to the court below commanding the judge presiding therein to resume jurisdiction and give effect to this opinion. Cost to abide final determination of this case. And it is hereby so ordered.

Judgment affirmed, with modifications.