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Misc. App. 2/94

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

AFRICANA TOKEH VILLAGE LIMITED - APPLICANT

AND

JOHN OBEY DEVELOPMENT INVESTMENT CO LTD - RESPONDENT

CORAM:

HON MR JUSTICE M O ADOPHY J A
HON MR JUSTICE G GELAGA KING J A
HON MR JUSTICE A B TIMBO J A.

Francis A. Gabbidon, Esq., for the applicants
Terence Terry Esq., for the respondents.

RULING DELIVERED THIS 26th DAY OF APRIL, 1994.

G. GELAGA KING J A .: The applicants, by a notice of motion dated 8th February, 1994, have applied to this Court, inter alia, for:

> 'A stay of execution of the order and all subsequent proceedings of the Hon. Justice Patricia Macauley dated 15th December, 1993, granting leave to the respondent to enter summary judgement against the applicant pending the hearing and determination of the appeal, civ. app. No 3/94 against the said order.'

The supporting affidavit discloses that on the 2nd day of February, 1994, the applicants applied to Patricia Macauley J. for a stay of execution of the order of 15th December, 1993. She then made the following orders:

> '...It is this day ordered that the writ of possession having been effected cannot be overturned by this court.
> It is further ordered that a stay of execution be granted on the following terms:
> (1) That the defendant/ applicant pays to the solicitor of the plaintiff/respondent the sum of Le15 million in respect of the arrears of rent.
> (2) That the defendant/applicant pays to the solicitor of the plaintiff/respondent the costs assessed by the court i.e. three million leones.
> (3) That the defendant/applicant pays costs of Le500,000 (five hundred thousand leones) as costs of this application.
> (4) All payments to be made within 10 days.'

The applicants contend that the first part of the order is an outright refusal to grant a stay, that the learned Judge was not asked to overturn the writ of possession, but to grant a stay of execution. With regard to that portion of the order granting a stay on terms, they submit that it also tantamounts to a refusal because it would, in fact, deprive them of any remedies to recover the monies if the appeal succeeds, since the Judge did not order the plaintiffs' solicitor to give the usual personal undertaking.

The respondents, on the other hand , maintain that as regards the first order there is nothing to stay - possession had been taken on the 16th December, 1993, and, therefore, there was nothing to stay. According to them, our courts do not grant unenforceable orders. They submit that with respect to the arrears of rent, a stay had been granted on terms on 4th February, 1994. They say that if they are right, then there has not been a refusal of a stay to vest this Court with jurisdiction and that in fact we have no jurisdiction in those circumstances to grant a stay of execution.

It seems to me that the principal questions which fall to be considered in this application for a stay of execution are:

1. Whether once a writ of possession has been executed or is purported to have been executed, this Court has no power or jurisdiction to order a stay and, as it were, undo a fait accompli.
2. Whether the order that the various sums of money be paid to the respondents' solicitor without a corresponding order that he give his personal undertaking amounts, in fact, to a refusal.
3. Whether in all the circumstances this Court ought to grant a stay of execution.

In resolving these issues, it is pertinent to note that a notice of appeal has already been filed in this matter so Rule 28 of the Court of Appeal Rules P.N.No 28 of 1985 applies. The Rule provides that:

> "An appeal shall not operate as a stay of execution of proceedings under the judgement or decision appealed from except so far as the Court below or the Court may order, *and no intermediate act or proceeding shall be invalidated, except so far as the Court below or the Court may direct*"

It is clear fom that Rule that any intermediate act done or any proceeding carried out between the judgement and the hearing of the appeal is valid, unless this Court or the Court below invalidates it. This Rule has been the basis of the decisions taken by this Court in those cases referred to on the point by counsel during argument. In ***Adama Mansaray v. Ibrahim Mansaray, civ. app. 31/81 (unreported)*** , on an application made to the Court below for a stay of execution, Johnson J.,In granting a stay on terms, ordered that 12c and 12 d Henessy Street, the subject matter of the stay of execution and the pending appeal, be conveyed to the respondent (in spite of the application for a stay) and that the registered conveyance be kept by the Master & Registrar pending the determination of the appeal to this Court. This was done. It was an intermediate act and valid. The appellant, thereafter, came to this Court and submitted that the order purporting to grant a stay of execution was not in law or fact a stay of execution since it had in fact ordered compliance with the judgement which was being appealed against. This Court agreed. They invalidated Johnson J's Order and in setting it aside ordered that the Master & Registrar bring up for cancellation the said registered conveyance.

In *Richard Zacharlah v. Jamal Morowah Misc. App. 12/87* (unreported) the plaintiff in the Court below had obtained judgement in default of appearance against the defendant against whom the plaintiff subsequently executed a writ of possession for, and obtained possession of, the shop in question. The defendant thereafter applied to Mrs Marcus Jones J., to set aside the default judgement The learned Judge in setting aside the default judgement further ordered that the shop be repossessed by the defendant . The plaintiff then applied for a stay of execution of the repossession order on the ground that he had already executed his writ of possession and furthermore that he was appealing to this Court. Mrs

Marcus Jones rejected this plea. On application made to this Court for a stay of proceedings consequent on the refusal, I said:

> 'I cannot accept the contention, even on a prima facie basis, that merely because a substantial part of a default judgement has been executed it cannot be set aside ... the mere fact that the applicant had been put in possession does not make the setting aside of the default judgement wrong. If the applicant succeeds when the case is tried on its merits, he can be compensated by damages'

We dismissed the application and a similar application to the Supreme Court was struck out with costs.

In my judgement and in the light of the authorities, the answer to the first question posed supra must be that this Court has unfettered power and jurisdiction to order a stay of execution and may do so even though a writ of possession may have been issued and executed, provided, of course, that the application for a stay was first made to the Court below as provided in Rule 64 of this Court's Rules. Indeed, abundant power is given to this Court by rr 31 and 32 of our Rules.

Rule 31 provides that this Court "may make any interim order ... and generally shall have as full a jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance ..."

Rule 32 provides that this Court "shall have power to give any judgement and make any order that ought to have been made, and to make such further or other order as the case may require ..."

The same principles apply to the second question. Where the Court below purports to grant a stay of execution on terms, but those terms are so onerous or illusory or so grossly unreasonable as to amount to a refusal (as in Mansaray's case supra), then this Court, on application made to it thereafter, in exercise of its concurrent jurisdiction, will review and examine the terms and, where necessary, set them aside or vary them. In the case that is before us, all the various sums ordered by the learned Judge to be paid were to be paid to the respondent's solicitor who is not a party and who was not ordered to give his personal undertaking to repay them if the appeal succeeds. It is trite law that in the absence of such an undertaking the solicitor receiving the monies cannot be ordered to repay them. Vide Hood-Barrs v. Crossman [1897] A.C. 172 and also Swyny v.Harland [1894] 1 Q.B.707. In my judgement, therefore, the terms ordered by the learned Judge were, with respect, wholly and plainly unreasonable and unrealistic and tantamount to a refusal.

The final question now remains: Under what circumstances will this Court order a stay of execution? It is well settled by a long line of cases going down to the nineteenth century that it is in the discretion of the Court to grant or refuse a stay. Vide: The Ratata [1897] P. at p.132 and

A. G. v. Emerson(1889) 24 Q.B.D., pp.58&59.

The discretion will only be exercised in favour of the applicant where he can convince the Court that the special circumstances of the case so warrant. It has been said in Atkins v. G. W. Railway (1886) 2 T.L.R. 400 that:

> 'As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds.'

It is necessary to emphasize that that is only a general rule. The wide discretionary powers of the Court and the principle on which it will act when

considering an application for stay are clearly and well stated In Halsburys Laws of England 3rd edition vol 16, para 51 at p35 as follows:

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

Where the Court is shown special circumstances, it will use its discretion in favour of a stay. It is for the applicant to bring before the Court those facts on which he relies as constituting special circumstances. Of course, each case will depend on its merits. Vide: Tuck v. Southern Counties Deposit bank (1889) 42 Ch. D. 471. In the instant application, the affidavit and exhibits in support disclose, inter alia, that the land and premises in question constitute the main restaurant in the applicants' hotel used by tourists from abroad and residents; that the period December to May each year is the peak period for tourists who visit Sierra Leone; that if the applicants are deprived of its use irreparable damage and financial loss will be suffered by them; that the learned Judge did not or did not sufficiently or adequately consider their counterclaim and did not give any valid reasons why the discretion of the Court could not be exercised in granting relief against forfeiture. And that even in the drawn-up Final Judgement the learned Judge made no order in respect of their counterclaim.

I have read and considered the affidavit in opposition together with the exhibits and also taken into consideration what was said by the respective counsel. I am satisfied that the applicants have shown special circumstances which merit the exercise of this Court's discretion in the granting of a stay of execution in their favour.

In my judgement, the order of Macauley J. dated 4th February,1994,and all subsequent proceedings of the learned Judge ought to be set aside and are hereby set aside. We grant a stay of execution pending the hearing and determination of the appeal herein on the following terms:

1. That the applicants regain possession of the said land and premises delineated on plan L.S. 4140/87 dated 24th February, 1988, situate lying and being off Peninsula Road, Toke Village and measuring 1.3517 acres and that a writ of restitution do issue, if necessary.
2. That the applicants pay into Court the sum of Le15,000,000 (fifteen million leones) in respect of arrears of rent within ten days of this order.
3. That the costs of the Summary Judgement be taxed and paid to the respondents' solicitor on his written personal undertaking to repay them if the appeal succeeds.
4. That the costs of the application for a stay of execution in the Court below be taxed and paid to the respondents' solicitor on his written personal undertaking to repay them if the appeal succeeds.
5. That the costs of this application be costs in the cause.
6. That there be a speedy hearing of the appeal herein and that the record be prepared and be ready within 4 weeks of the date of this Ruling.

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

----------Hon Mr Justice M. O. Adophy (Presiding) J.A

----------Hon. Mr Justice A.B. Timbo J.A