

MISC. APP: 7/93

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN

MOSES KONDOWA

&

THE DIRECTOR SL/IDA

3<sup>RD</sup> EDUCATION PROJECT

-PLAINTIFFS/RESPONDENTS

AND

AUREOL TOBACCO COMPANY LIMITED

- DEFENDANTS/APPLICANTS

&

OJO WILLIAMS

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

Dr. W. S. Marcus-Jones for the Applicants

J.B. Jenkins-Johnston, Esq., for the Respondents

Ruling delivered on the 25<sup>th</sup> day of November 1993

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

By Notice of Motion dated 4<sup>th</sup> March 1993, the Applicants were about to move this Court for an order for leave to appeal against the Order of Alhadi J. made on the 19<sup>th</sup> day of February, 1993, refusing a stay of proceedings herein and for a further Order that the civil proceedings in the High Court be stayed until the determination of a criminal action against the second defendant, Ojo Williams, or until further order. The Notice of Motion was supported by the affidavit of Walter Sydney Marcus Jones containing several exhibits. When the case was called, Mr. J. B. Jenkins Johnston of counsel for the Plaintiffs/Respondents informed the court that he had a preliminary objection to the hearing of the Motion. His objection was that the Notice of Motion was filed out of time and could not therefore be entertained. He stated that the Judge's order in respect of which leave to appeal was being sought was made on the 19<sup>th</sup> day of February, 1993, and that the application to this court was filed on the 15<sup>th</sup> day of March 1993. He referred to rr 10(1) and (4) of this court's rules and submitted

that the application herein was filed more than 14 days from the date rules and submitted that the application herein was filed more than 14 days from the date of the Judge's Order and further that the applicants had not applied for and extension of time to appeal. He relied on the case of Mohamed S. Mustapha and another (executors of the Estate of E. J. Speck deceased) Vs Gbessay Keister, 1963 SLR vol 3 138 and asked that the application be struck out with costs.

Dr. w. S. Marcus Jones of counsel for the Defendants/applicants complained that the Registrar of this court refused to give him a date for the hearing of the application as, according to him, it was the registrar of the Court of Appeal who gave the date. I shall say something about this later. He was, therefore, asking for extension of time and for the papers already filed to stand. He then, as if he was confessing and avoiding, submitted that he was not out of time because the application for leave to appeal was refused by the lower court on 2<sup>nd</sup> March, 1993, and that on the 4<sup>th</sup> March, 1993, his motion papers were ready.

It seems to me that the principal question which arises for determination is whether the application for leave to appeal was made within the time allowed by law, i.e. within 14 days from the date of the decision from which leave to appeal is sought. In resolving this issue, it is necessary to examine the provisions of rr 10(1) and (64) of the Court of Appeal rules, PN No.29 of 1985. R 10 (1) provides:-

"Where an appeal lies by leave only any person desiring to appeal shall apply to the court below or to the Court by notice of motion within fourteen days from the date of the decision against which leave to appeal is sought unless the Court below on the court enlarges time" R 64 provides:-

"Except where the otherwise provided in these rules or any other enactment, where any application may be made either to the court below or the court, it shall be made in the first instance to the court below, but if the court below refuses the application, the applicant shall be entitled to have the application determined by the court".

The procedure to be followed in the instant case under those two rules seems to be this, that where there is no contrary provision, the application for leave to appeal must be made in the first instance to the High Court within 14 days from the date of the decision against which leave to appeal is sought but if and when that court refuses leave, then another application may be made to this court. What then happened in the instant case? The decision of the High Court against which leave to appeal is sought was made on February 19, 1993. The affidavit of Dr. W. S. Marcus Jones and exhibit "WSMJ 3" shows that the application for leave to appeal against the decision and order of February 19 1993 (which had refused a stay of the proceedings) was refused on 2<sup>nd</sup> March 1993. The period between 19<sup>th</sup> February 1993 and 2<sup>nd</sup> March 1993 is eleven days. It is clearly within the fourteen days period stipulated in r 10(1). Mr. Jenkins Johnston in his preliminary objection did not mention the application for leave made to the High Court and the refusal by that court. If he had, he would have been constrained to admit and concede that the application to the High Court for leave to appeal was made within the 14 days as required by r 10 (1). He, however, maintained that the face of the notice of motion bears a rubber stamp of the Court of Appeal with the date 15/3/93 and it is this date which is the pith and substance on which counsel for the respondents buttressed his objection. A fortiori, he submitted that the Applicants had not applied for enlargement of time within which to apply for leave to appeal to this court and that even if they had, this court would have been obliged to refuse it because of r 10(4) which provides that:

" No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of fourteen days from the expiration of the time prescribed within which an application for leave to appeal may be made".

Leave to appeal, as I said earlier, was refused by the High Court on 2<sup>nd</sup> March 1993. Fourteen days from that date would be 16<sup>th</sup> March 1993. The matter came before us for hearing on the 23<sup>rd</sup> March, 1993 and even then, Mr. Jenkins Johnston maintained, there was no application for enlargement of time before us. So tantpis, as the French would say, the motion must not be heard and must of necessity be thrown out hook, line and sinker! In the light of these submissions it is pertinent to scrutinize the motion

papers. I find that the Notice of Motion is dated 4th March 1993. The affidavit in support was sworn to by Dr. Marcus Jones on the 4<sup>th</sup> March 1993, also. The Commissioner for [redacted] signed the affidavit as have been sworn before her on the 4<sup>th</sup> March 1993, is Mrs. A. Showers, the Master & Registrar, High Court, and I take judicial notice of her signature. Each and every one of the 5 exhibits referred to in the affidavit and exhibited were all proved before Mrs. Showers on 4<sup>th</sup> March 1993. Yet, Mr. Jenkins Johnston submits that because of the date 15/3/93 on the rubber stamp on the fact of the motion. Mohamed S. Mustapha's case, supra, ought to be applied and the motion struck out. It seems to me, however, that that case is easily distinguishable. In Mustapha's case, counsel for the Respondents had filed an affidavit in opposition, part of which reads as follows:-

" 2. The application of the Appellants herein for leave to appeal to Her Majesty's Privy Council herein dated March 29, 1962, was entered and filed herein on April 30, 1962, and made returnable the same day."

In the instant case there is no affidavit in opposition. No sworn evidence that the motion herein was filed only on 15/3/93. In Mustapha's case the Court of Appeal held that the application to appeal to the then Privy Council was made on April 30 1962, 52 days after the Order to be appealed against (instead of within 42 days). In the present case application for leave to appeal was made to the High Court within the period of 14 days stipulated in r 10(1) of our rules. For all these reasons I hold that Mustapha's case is inapplicable. It has been mooted that the way to comply with the provisions of r 10(1) and ensure that one is not caught out of time with the application for leave to appeal is not only to file the motion papers in the High Court, but to file them as well in the Court of Appeal within the 14 days, regardless of whether or not leave has been refused by the court below I reject this contention for several reasons. First, r 64 makes it clear that it is when the court below refuses the application that the Applicant is entitled to have the application determined by this court. Second, why should an Applicant be put to the expense and trouble of filing papers in this court only to discover later that the court below had granted leave? And that the filing of papers in this court had subsequently proved unnecessary and a waste of

valuable time? Who bears the costs thrown away? Why should an applicant be coerced into incurring and being mulcted in such unnecessary costs? Thirdly, the purpose of rr 10 and 64, surely, is not to create an injustice, but rather to ensure that applications for leave to appeal are made promptly and dealt with expeditiously so that the trial in the lower court will not be unduly interrupted or delayed. Fourth, from what can be gleaned from the 3 to 2 majority decision in the Supreme Court in SC CIV APP: NO 3/88 Nigerian national Shipping Lines Ltd Vs Abdul Ahmed (trading as Abdul Aziz Enterprises) un reported, it is clear that on a proper construction of the aforesaid rules, one can say in this case as was said in that case, that "The High Court having refused the application for leave to appeal ... the Applicants were entitled to make a fresh application to the Court of Appeal," per Warne, JSC, (Court), r 66 (waiver of compliance with rules) not forgetting O. 50 r 1 of the High Court rules (non-compliance with rules not to render proceedings void) be read as a whole. As I said in this court in the unreported case Misc.App:35/86 African Container Express Ltd Vs Abdul Ahmed (Trading as Abdul Aziz Enterprises) it is only then that the sense, meaning and intention of the framers may be collected ex antecedentibus et consequentibus. In other words, every portion and every provision of the rules must be brought into action in order to collect from the whole one uniform and consistent sense.

As is enshrined in section 145 (2) of the Constitution of Sierra Leone, Act No. 6 of 1991, Rules of Court are for regulating the practice and procedure of all courts in Sierra Leone. In my judgment the provisions of that section do not mean and cannot mean that the practice and procedure of the courts must be regulated in such a manner so as to defeat its ultimate purpose which is to ensure that justice is dispensed in a fair, organized, simple, speedy, effective, civilized and just manner. Rules of Court were never meant and were never intended to be used as instruments of oppression and injustice. It is for this laudable reason that it has been the practice in Commonwealth jurisdictions that whenever the court is satisfied that substantial justice requires its own regulations to be waived, or any slip to be remedied, it will interfere for that purpose and dispense with the strictness of its rules, except where a matter is directly regulated by Act of Parliament or Decree, as the case may be. Vide Smith Vs Baker (1864) 2 H & M 498 and Ferrand Vs

Mayor of Bradford 8 De G. M. & G 93. For all these reasons I have come to the conclusion that the preliminary objection ought to be overruled and it is hereby overruled.

There is a matter of practice, which I said earlier on I would revert to later. I refer to the practice of Solicitors lodging their motion papers with the Court of Appeal registry for the return date to be decided upon and filed in by registry officials. This practice is palpably wrong. By leaving the return date blank, Solicitors are in fact presenting and filing inchoate motion. As was said by R. B. Marke J. in this court in Mustapha's case, supra, no one has been able to cite any authority justifying the habit of lodging and incomplete notice of motion which left the return date blank for the Registrar to fill in. It is the duty and exclusive privilege of Solicitors and Applicants, after consultation with the Registrar, to fill in the return date, paying due regard, of course, to the length of notice required by law. If they fail to perform this duty then they will only have themselves to blame in future for the consequences.

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

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

Sgd Hon. Mr. Justice A. B. Timbo, J.A