

CIV APP 1/99

**IN THE MATTER OF THE PRECIOUS MINERAL MARKETING COMPANY
(SIERRA LEONE) LIMITED**

AND

IN THE COMPANIES ACT CAP 249

SHEIKE ABDULLA ABDULKALIE BIN RAFAAH

- APPELLANT

AND

PRECIOUS MINERALS MARKETING COMPANY (SIERRA LEONE) LIMITED -

RESPONDENT

**CORAM: THE HON. MRS. JUSTICE V.A.D. WRIGHT J.A.
THE HON. MR. JUSTICE N.D. ALHADI J.A.
THE HON. MR. JUSTICE M.E. TOLLA THOMPSON J.A.**

**S. Vincent Esq. for the Appellant
F.M. Carew Esq. for the Respondent**

TOLLA THOMPSON J.A.

RULING DELIVERED ON 8/3/00

The appellant filed a notice of appeal against the ruling of Stronge J dated 23rd October 1998, on the 8th March 1999. This appeal was listed for hearing on the 25th November 1999. When the appeal came up, Mr. F.M. Carew Learned Counsel for the Respondent, who had earlier on filed a notice of intention to take a preliminary objection to the appeal pursuant to Rule 19 Court of Appeal Rules 1985, moved the court on the objection

The grounds of the objection are:

1. That the appeal filed on the 8th March 1999 is out of time allowed by the Rules of court, judgment having been delivered in this matter on the 23rd October 1998.
2. That the appellant has failed to apply to this Honourable Court and obtained an order for extension of time as provided for by the Rules of Court of Appeal
3. Failure to comply with Rule 9 (2) of the Rules of the Court of Appeal.

In answer to the notice of preliminary objection Mr. D.S. Vincent Learned Counsel for the Appellant filed an affidavit on the 28th October 1999 setting out his factual reasons or excuses for the notice appeal having been filed on the 2nd March 1999. The relevant paragraphs thereof read:

"2. That my notice of appeal dated the 4th day of January 1999 was filed by me on the 8th March 1999, because the Registry of the Court of Appeal was closed from the 6th January 1999 to sometime during the first week in March 1999 because of the AFRC/RUF invasion of Freetown on the 6th January 1999".

"3. That from my temporary residence at No. 4 Ranger Street, Freetown aforesaid where I arrived safely on Sunday the 24th January 1999 I had been making weekly checks to find out if the Registry of the Court of Appeal at Walpole Street, Freetown aforesaid was functioning."

"4. That on one such checks on or about Friday the 5th of March 1999, I discovered that the said Registry had started to function."

"5. That I immediately proceeded to file the said notice of appeal on Monday the 8th March 1999 that being the earliest day on which it was practicable."

"6. That my failure to file the said notice of appeal on the said 8th day of March 1999 was not willful, because it was impossible for me to gain access to the said Registry since it was closed during the period mentioned in paragraph 2."

On the 15th November 1999 with the leave of the court Mr. F.M. Carew filed an affidavit in apposition in response to the matters deposed in the affidavit of Mr. D.S. Vincent. The relevant paragraphs are:

"4. That in answer to the averment made in particular 2, 4, and 6, of the said affidavit whilst it is true that the rebels invaded Freetown on the 6th of January 1999, I am reliably informed by Mrs. Showers, Registrar of the Sierra Leone Court of Appeal and I verily believe that the said Registry was not formally closed during the said invasion."

"5. That failure of the appellant to file his notice of appeal within time was not due to the January incident as stated in the aforesaid affidavit, but his reliance on securing the order sought in the notice of motion dated 24th November 1998 requesting Hon. A.B. Stronge J to grant the appellant leave in High Court comply with the provision of Rule 27(3) winding up Rules 1929."

"6. That I am reliably informed by Mrs. Showers, Registrar of the Court of Appeal and verily believe that the Court Registry was fully operational in February 1999 and none of the Registry staff left the jurisdiction."

On the 6th November 1999, Mr. Vincent filed a supplemental affidavit. He was denied leave to use this affidavit, as he had no right to reply to Mr. Carew.

Mr. Carew in moving the court on the preliminary objection submitted that the notice of appeal was filed on the 8th March 1999 although the notice of appeal was dated 4th January 1999. The order appealed against was made on the 23rd October 1998. Consequently under Rule 11(1) of the Court of Appeal Rules the appeal is out of time. There is no evidence that the appellant applied to this court for an extension of time.

The appeal before us should be struck out.

Finally he said that if the appeal was a preliminary point the appellant should have come within 14 days of the ruling.

Mr. Vincent in reply, relied on the affidavit of the 28th October 1999. He submitted that when the order was made on the 23rd October 1999 the matter was adjourned to the 12th January 1999. He said that the order of the 23rd October 1998 was final. It brought the matter to a close. He refers to Halsburg laws of England, 3rd Edition volume 22 Page 743 Par 1607, he said further that the order of Mr. Justice Stronge was a final order because the petition has been removed from the Register.

On the point that the appeal is out of time, Mr. Vincent submitted assuming that the appeal was out of time, he relies on the affidavit sworn to on the 28th October 1999, that the three months should have expired on the 22nd January 1999 when the event of January 6th occurred. In support of this submission he cites the following cases Hughes and another v Griffiths English Report Volume 43 Page 129 and Munford v Hitchcock, same report Page 485. The unreported case of Kakay v Yambasu dealing with computation of time.

He submitted further: that if he had to apply for extension he was still out of time as on the 22nd February 1999, the Registry was still closed: It was not possible to file for it.

As to non-compliance of Rule 9(2) he said he filed his notice of appeal to comply with it.

Finally he said, on the whole what he has done is not willful or deliberate and invites the court to look at Rule 66 of the Court of Appeal Rules to take a decision.

Mr. Carew in answer to Mr. Vincent submitted that the ruling of Mr. Justice Stronge was an interlocutory order, because he did not decide the rights of the parties. He cites Halsburgs laws of England 3rd Edition Volume 22 Page 744 Par. 1608.

Finally he said, assuming that order was a final order there is no appeal before this court for the following reasons:

- (i) *The appellant is out of time under Rule 11(1)*
- (ii) *There is no application for enlargement of time and therefore this court cannot exercise that jurisdiction.*

I have tried to set out the respective contentions in a summary form. I hope by doing so I will be able to bring out the issues for a clearer determination of the preliminary objection at hand.

The points in the objection canvassed before us concern the Rules 11(1), 11(6) of the Court of Appeal Rules 1985. I shall also endeavour to bring into focus Rules 11(3), 1(4) and 38 of the Court of Appeal Rules and 064 r 7 of the annual practice 1961 as I consider them germane to this ruling:

Nature of the order

The first point I propose to deal with at this initial stage of the ruling is the nature of the order of Justice Stronge delivered on the 23rd October 1998.

Mr. Carew in his usual rumbustious manner forcefully argued that the order of the 23rd October 1998 was an interlocutory order. Mr. Vincent on the other hand contended that the order of the 23rd October 1998 was a final order as it brought the matter to a close.

"In a Dictionary of law" Final Judgement or Order is defined as a judgement or order when an action is ended and Interlocutory Judgement or Order is defined "as one, which does not finally determine the rights of the parties"

Head note 1 in the case of Kabba and another v Young 1937-49 ALR (SL) 243 states:

"A judgment that does not finally determines the right of the parties but gives direction for working out those rights is interlocutory not final"

In the Court of Appeal case of In the Matter of the Companies Act: In the Matter of the Gold Coast Property Company Ltd. AND

In the Matter of certain Leases at Kissy Bye Pass Road Kissy Village. Hereditament issued by B.L. Macfoy 2 SL LR [1962] Page 179. The court held; striking out the appeal, that where a judge after awarding judgment which is made

indeterminate in amount, orders certain enquires to be held; and adjourns the action for the Master to report his findings to the court such a judgment is interlocutory. Delivering the judgment, the Court referred to the test applied by Lord Alverstone C.J in Bozson v Altricham Urban District Council 1903 1.k.B 547 at 548: I consider this test most instructive on this point:

"It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made finally disposes of the rights of the parties?"

I shall adopt the above test in the determination of the issue whether the order of Stronge J. was a final or interlocutory order. In his ruling the Learned Judge immediately before striking out the petition said:

"In my judgment in the words of the closing lines of Rule 27(3) of the Companies Act (winding up Rules) I order that the petition dated the 23rd April 1997 for the winding up of Precious Minerals Marketing Company Ltd. be removed from the file in the Companies (winding up) office. The effect of the order is that the petition is struck out. Cost to be paid by the petitioner such cost to be taxed."

From the forgoing it seems clear to me that the "effect" of the order of the 23rd October 1998 was not only to strike out the petition simpliciter; but to bring to an end the winding up process by removing the petition from the winding up Registry. In my judgment this was a final order.

Appeal to the Court of Appeal

The pertinent question here. How does an appeal from a final decision or order come to the Court of Appeal? To help me answer this question, I think it is necessary to set out Rule 11(3) of the Court of Appeal Rules 1985.

11(3) states

"An appeal is deemed to have been brought when notice of appeal has been filed in the Registry of the Court"

The above rule makes it clear, irrespective of the date on the notice of appeal; the date when the matter is at the Court of Appeal is the date the appeal was filed.

The compliant of Mr. Carew is that the appeal is out of time the order having been made on the 23rd October 1998 and the appeal against the order filed on the 8th March 1999. Mr. Vincent acknowledges this fact when he said in his submission

"When the decision was given on the 23rd October 1998 it was my intention to file it before the 22nd January 1999"

Rule 11(1) of the Court of Appeal Rules states:

"No appeal shall be brought after the expiration of fourteen days in the case of an appeal against interlocutory decision or three months in the case of an appeal against a final decision unless the court enlarges time"

It is obvious to me that the appeal filed on the 8th March 1999 is caught by the above Rule and it is clearly out of time.

The next question I wish to pose. How does an appellant who is barred by Rule 11(1) [as in this appeal] come to the Court of Appeal? Does he come by filing his appeal irrespective of the fact that the appeal is out of time? I opine not. In my humble view he must resort to the appropriate Court of Appeal Rules and reasonable steps taken to apply for an enlargement of time pursuant to Rule 11(6) of the Court of Appeal Rules 1985.

Enlargement of Time

Let me at this stage make an observation. But for the preliminary objection this court would not have known that this appeal was filed out of time. It would have gone on before us as a regular appeal with all its attendant conditions fulfilled.

Having said this I will now continue with the ruling.

Rule 11(6) of the Court of Appeal Rules 1985 states:

"No application for enlargement time within which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought"

It is clear from the above rule that the application for enlargement of time must be within one month after the expiration of time within which to appeal.

I agree with Mr. Vincent that he was out of time "on the 22nd February 1999, when the Registry was closed" However I do not think this should have prevented him from applying subsequently. Certainly it did not prevent him filling the appeal out of time.

I am of the firm belief, notwithstanding that the appeal was out of time, it would not have prejudiced the appellant case, if he had applied for an enlargement of time using the matters deposed in the affidavit of the 28th October 1999 to support the application, as I hold the view that in a proper case where the circumstance and justice necessitate the making of an order, an order for enlargement may be ordered though the application was made out of time. See Rule 38 of the Court of Appeal Rules and 067 r 7 of the Annual Practice 1961.

At 1/2 out of time
the appeal was
out of time

Non compliance Rule 9(2)

In the light of what I have said in this judgement I do not think it is necessary for me to deal with the objection on the ground of non-compliance with Rule 9(2) of the Court of Appeal Rules.

In the result I hold that the appeal is not properly before this court. The objection is upheld.

What then should be the fate of the appeal? Should it be dismissed or be struck out? To answer this question I think it will be best to make references to cases, which have been determined by the Court of Appeal on a preliminary objection.

In the case of Daniel Foday v Mohamed Koroma [1962] SLLR p. 138. Where a notice of appeal was filed within the extended time, but no copy of the order extending time was annexed to the notice of appeal as required by Rule 14(4) of the West African Court of Appeal 1950 [now Rule 11(5) of the Court of Appeal Rules 1985]. Held striking out the appeal, that it could not be heard since the requirement of Rule 14(4) had not been complied with.

Also in the case of Elija J. Speck v Gbassay Keister 1962 2 SLLR Page 126 a similar decision was arrived at on a preliminary objection that Rule 14(4) of the West African Court of Appeal Rule have not been complied with. In his judgment Dove Edwin J.A. had this to say:

"In the circumstances the omission to follow the Rule is fatal and it is my opinion that the appeal is not properly before the Court and should be struck out."

I am persuaded by the decisions in these two cases and I shall adopt the same posture in this case and strike out the appeal. *The appeal is struck out. Case to the Respondent.*

150

