

MISC. APP. 30/2000 - 31/2000

IN THE COURT OF APPEAL OF SIERRA LEONE

FJ1/1991 L. NO.1

IN THE MATTER OF THE FOREIGN JUDGMENT

(RECIPROCAL ENFORCEMENT)

IN THE HIGH COURT OF JUSTICE (QUEENS BENCH DIVISION)

ROYAL COURT OF JUSTICE, TUESDAY 26th FEBRUARY, 1981

BEFORE

MR. R. BELL, Q.C.

Sitting as Deputy High Court Judge

LEWIS & PEAT (PRODUCE) LTD. † Judgment Creditor

V

ALMATU PROPERTIES LTD. - 1st Judgment Debtor

SOCIETE ALMATU AGENCIES LTD. - 2nd Judgment Debtor

MUSA KALIL SUMA - 3rd Judgment Debtor

M & R HOTELS LTD - 1st Garnishee

AUGUSTINE KOUN EN HOVEN - 2nd Garnishee

PAOLO PELLIZZARI - 3rd Garnishee

BETWEEN

LEWIS & PEAT (PRODUCE) LTD. - Plaintiff/Applicant

AND

PAOLO PELLIZZARI - Defendant/Respondent

CORAM:

HON. JUSTICE TOLLA THOMPSON, J.A.

HON. JUSTICE A.N.B. STRONGE, J.A.

HON. JUSTICE E.K. COWAN, J.A.

MR. T.M. TERRY FOR THE APPLICANT

MR. J. BANDA THOMAS FOR THE RESPONDENT

RULING DELIVERED THIS 24TH DAY OF JANUARY, 2001

TOLLA THOMPSON, J.A.

This ruling is on the two motions argued before us. Misc.App.30/2001 and Mis.App.31/2001 respectively.

The applicant in the motions among others applies for the following orders:

1. Variation of the orders of the 8th and 12th December, 2000 respectively.
2. Leave to appeal to the Court of Appeal.
3. Stay of proceedings relating to the hearing of the motion dated 7th July and 7th December, 2000 respectively.

The application is supported by the affidavit of Dunstan Samuel Vincent sworn to on the 22nd December, 2000 to which is annexed several exhibits.

In reply to the affidavit in opposition, there are two more affidavits sworn to on the 9th January, 2001 by Dunstan Samuel Vincent with exhibits attached.

Background

A short history of this case reveals that on the 26th February, 1991, judgment was given in the High Court of Justice (Queens Bench Division) England in favour of the plaintiff Lewis and Peat, the applicant herein. "The judgment was against three defendants, Alimatu Properties Ltd., Alimatu Agencies Ltd. And Musa Kalil Suma for the sum "\$800,000 together with contractual interest". A memorial of this judgment was sealed in this jurisdiction.

The Court Below

To satisfy the judgment or part thereof Garnishee proceedings was instituted by the applicant against the 3rd Garnishee Paola Pellizzari a tenant of Musa

Kalil Suma the 3rd defendant in the original action in the U.K. Consequently a Garnishee order absolute was made in the following words:

"Unless sufficient cause be shown to the contrary by the defendant (3rd Garnishee) the rent of \$120,000 be made by the defendant (3rd Garnishee) to the plaintiff (judgment creditor) in default execution might be issued"

The above order was made on the 16th June, 2000.

On the 7th December, 2000 Mr. Banda Thomas learned counsel for the respondent proceeded to apply by way of motion for a stay of the above order.

The application is still pending the court below. On the 28th November the applicant sealed a writ of fifa which he subsequently attempted to execute against the respondent.

Mr. Banda Thomas, successfully applied for the said fifa to be stayed; and the learned Judge granted the application in these words.

"The writ on the amount of US\$120,000.00 is not one that I can endorse and therefore no terms can be imposed on a stay. The result is that a stay of execution of the writ of fifa is granted pending the hearing and determination of the defendants application"

As a result of this order, made by the learned Judge, Mr. Terry learned counsel for the applicant applied to this court for the orders earlier on stated.

The Argument Before Us

Mr. Terry in his submission acknowledged the point that it is within the Judge's discretion to grant a stay, but submitted it should have been granted on terms. He referred us to the Supreme Court case of **BANK OF CREDIT AND COMMERCE v THE CHARGE D'AFFAIRES OF IVORY COAST EMBASSY IN SIERRA LEONE** Misc. App. 8/82.

He therefore is asking for a variation of the order for a stay on terms.

On the point of leave to appeal to the Court of Appeal, he submitted that the proposed ground of appeal disclosed a prima facie good grounds of appeal.

On the point of the order of the 16th June, 2000, he submitted that the order is a final order and that the fifa was in place.

Mr. Banda Thomas in reply referred us to Exhibit DSV1 the order of the 16th June, 2000 exhibited to the affidavit of Dunstan Samuel Vincent and submitted that the order is not a final order and that he had taken steps by YW2 to show sufficient cause why execution should not be levied. The motion is still pending before the learned judge in the court below, when the applicant proceeded to execute a fifa for the recovery of the sum in DSV1. This is the gist of the argument before us.

The Order of the 16th June, 2000

In my humble opinion the heart of the application before us is what interpretation is to be put on the order of the 16th June, 2000. Mr. Banda Thomas in interpreting the order contended that the order is not a final order. Mr. Terry on the other hand said that the order is final. To resolve these two contending positions, I shall start by giving the definition and the authoritative interpretation by eminent jurists of a final judgment or order and interlocutory judgment or order.

According to a 'dictionary of law' – final judgment or order means a judgment or order when an action is ended and interlocutory judgment or order means one which does not finally determine the rights of the parties. In interpreting final judgment Lord Fry L.J. in RE RIDDEL 1888 20 QBS P.517 said:

"Nothing can be a final judgment or order by which there is not a final and conclusive adjudication between the parties of the matter in controversy in the action."

Again in RE FAITHFUL, EX PARTE MOORE 1885 14 9BD, 627, LORD SHELBORNE, LORD CHANCELLOR said:

"To constitute an order a final judgment nothing more is necessary than there should be a proper litis contestatio and a final adjudication between the parties to it on the merits. That his order (for the payment of cost) was a judgment is plain and it is equally plain it was a final judgment"

IN THE MATTER OF THE GOLD COAST PROPERTY COMPANY

AND

IN THE MATTER OF CERTAIN LEASES AT KISSY BYE PASS ROAD, KISSY VILLAGE 2SLLR 1962 P.179.

The Court of Appeal referred to in the tests applied by Lord Alverstone C.J. in BOZSON v ALTRUNCHAM UBAN DISTRICT COUNCIL 1903 F/C Para.547 at Page 548 in the determination of final judgment or order. He said:-

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

I consider this test most appropriate and I shall adopt and apply it to determine whether the order of the 16th June, 2000 is final or not.

In the Oxford Dictionary the word "unless" means "except or on condition". On this meaning the order of the 16th June, 2000 will read thus except or on condition sufficient cause is shown. In my view, it presupposes that the respondent is given another opportunity to do something with respect to the order before execution. In deed it is significant to observe that at the time the applicant attempted to execute the fifa, Mr. Banda Thomas had already moved the court below on the order of the 16th June.

In expressing this view, I derive additional strength from the decision of KABBA v YOUNG 1937-49 ALR (SL) 245 in which Kingdom C.J. said:

"The learned trial judge after giving an interlocutory judgment on the 2nd of November, 1942 containing his findings of fact and decisions on points of law; delivered on January, 25th 1943 the following further judgment which the parties have regarded as final though in fact it is still only interlocutory since it does not finally determine the rights of the parties but gives direction for the working out those rights one step still remaining to perfect the judgment".

I entirely agree with Mr. Banda Thomas. There is no doubt that the order of the 16th June, 2000 was not a final order; and clearly attempted execution of the order by issuing a writ of fifa was irregular. The learned judge was right to order a stay of execution without imposing terms.

Variation of the Order for a Stay

As regards this order I am unable to grant the order sought in the light of what I have said with respect to the order of the 16th June. The application for variation is refused.

Leave to Appeal

The relevant paragraphs of the affidavit in support of Dunstan Samuel Vincent filed on the 14th December, 2000 are:

3. That the plaintiff/applicant is aggrieved by the aforesaid ruling referred to as Exhibit DSV1 and seek leave of this honourable Court of Appeal against the ruling (order) to the Court of Appeal on the proposed or intended grounds of appeal exhibited hereto and numbered Exhibit DSV2.
8. That the proposed grounds of appeal show not only prima facie good cause for leave to appeal but also discloses substantial grounds of appeal to the Court of Appeal.

Against the above averments there is the affidavit of Yada Williams.

14. That in the light of all the circumstances of this matter I verily believe that the propose appeal does not disclose any substantial ground and that there is no likelihood that the plaintiff/applicant can succeed on such frivolous grounds.

On perusal of the affidavit evidence and in the light of my pronouncement When dealing with the order of the 16th June 2000, it is my considered view that the applicant has not shown good reasons why leave to appeal should be granted. Leave is accordingly refused.

Stay of Proceedings

I now come to the order for a stay of proceedings. The application for a stay is supported by affidavit of Dunstan Samuel Vincent sworn to on the 14th December, 2000. Paragraphs 4,5,6 and 7 in particular aver as follows:

4. That I know for a fact that this is a proper case warranting the granting of a stay of all proceedings relating to hearing of the motions dated 7th July, 2000, 25th July, 2000 and 7th December, 2000 respectively without their affidavit are exhibited hereto marked Exhibits DSV3, DSV4, DSV5 respectively.
5. That unless a stay of proceedings referred to in the immediate hearing and determination of the contemplated leave to appeal in respect of which leave to appeal is now being sought the continued hearing of these motions and any determination in the interim period in favour of the defendant/respondent may very well render nugatory the contemplated appeal to the Court of Appeal in this court is inclined to grant the said leave to appeal against the ruling and order of the Honourable Mr. Justice S.A. Ademosu dated 12th day of December, 2000.
6. That the matters referred to in the foregoing paragraph in this affidavit clearly disclose special and exceptional circumstances for the granting of a stay of proceedings relating to the aforesaid motion.
7. 'That the interest of justice and the circumstances of the case also warrant the granting of a stay of proceedings relating to the hearing and determination of the contemplated leave to appeal in respect of which leave is being sought before this honourable court.'

As against these averments there is the affidavit of Yada Williams. The relevant paragraphs are para, 7, 11 and 13.

7. That the motion dated 25th July 2000 referred to in paragraph 4 of the affidavit of Dunstan Samuel Vincent was listed before the vacation court and that on the 8th of December, 2000 that court presided over by the Hon. Justice Massally judge ruled that the application ought to be properly made to the original court and that the status quo was to be maintained until such application is made to the original judge. A copy of the said order is produced shown to me and marked YW4.
11. That the motion dated the 7th December, 2000 and referred to in paragraph 4 of the said affidavit was an application inter alia to set aside the writ of *fifa* – a copy of the said notice of motion is produced shown to me and marked YW6.
13. That I have been informed by counsel representing the defendant/ respondent at the hearing of various applications in the High Court and verily believe that the motions referred to in paragraph 4 of the aforesaid affidavit have not been heard partly because of the plaintiff/applicant counsel's preliminary objections and partly because of his confrontational approach in court.

The general rule is that a stay of proceedings will be granted upon proof of a *prima facie*. Good ground of appeal and the existence of special or exceptional circumstances. The onus is on the applicant to show by affidavit evidence that the two requirements do exist. See AFRICANA TOKEH VILLAGE LTD. V JOHN OBEY DEVELOPMENT INVESTMENT CO. LTD. Misc. App. 2/94 unreported. CHERNOR SESAY & ANOR v ABDUL JALIL AND ANOR. 18/94 unreported.

I have considered the affidavit evidence in support and in opposition to the order prayed for. The two requirements mentioned have not been satisfied for me to grant a stay of proceedings.

In any case, I am of the view that the motion of the 7th December must be allowed to go on in the court below as it touches and concerns the order of the 16th June, 2000.

The application for a stay is refused.

For the foregoing reasons the application is dismissed with cost to be taxed in favour of the respondent.

Hon. Mr. Justice M.E.T. Thompson,
Justice of Appeal (Presiding)

(I Agree) Hon. Mr. Justice A.N.B. Stronge
Justice of Appeal

(I Agree) Hon. Mr. Justice E.K. Cowan
Justice of Appeal