

MISC. APP. 19/2002

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: FIRETEX INTERNATIONAL CO. LTD - PLAINTIFF/RESPONDENT
AND
SIERRA LEONE EXTERNAL TELECOMMUNICATIONS
AND
SIERRA LEONE TELECOMMUNICATION CO. LTD. - DEFENDANT/APPLICANTS

CORAM:

HON. MR. JUSTICE M.E. TOLLA THOMPSON - JA
HON. MR. JUSTICE A.N.B. STRONGE - JA
HON. MRS. PATRICIA MACAULEY - JA

Mr. C.C.V. Taylor for the Applicant
Mr. A.F. Serry-Kamal for the Respondent

Ruling delivered the 26th day of June 2003

TOLLA THOMPSON J.A.

My Lords:

A brief background to this application indicates that following an action for damages for breach of contract etc., the High Court presided over by Mr. Justice J.E. Masallay on the 16th September 2002 delivered a judgment in favour of the plaintiff/respondent soon thereafter Mr. Justice Masallay left the jurisdiction on official business.

On the 24th of September 2002 the defendant/applicant applied to the High Court presided over by Mr. Justice L.B.O. Nylander for a stay of execution of the said judgment. The Learned Judge gave a ruling on the 21st October 2002.

It is against this background that the applicant moved this Court for a stay of execution of the judgment pending the hearing and determination of:

1. This Application.
2. The Civil Appeal No. 25/2002 now pending in the Court of Appeal.

The application is made pursuant to rules 28 and 64 respectively of the Court of Appeal Rules of 1985.

The applicant's motion is supported by the affidavit of Ransford Dennis Wright sworn to on the 25th September 2002 and filed herein with exhibits attached. A supplemental affidavit sworn on the 2nd December 2002 by Chukumeka Charles Valentine Taylor and filed herein with exhibits attached.

As against these affidavits there are the affidavits of Serry-Kamal sworn to on the 12th November 2002 and the 2nd December 2002 respectively with exhibits attached.

RULE 28 STATES:

"An Appeal shall not operate as a stay of execution of the proceedings under the judgment of decision appealed from except in 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".

RULE 64 STATES:

"Except where otherwise provided in these rules or by 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".

On a ^{close} scrutiny of rule 28 the following can be gleaned:

1. That an Appeal to the Court of Appeal does not operate as a stay of execution of the judgment or decision.
2. That an Order for a stay must be specifically obtained from the Court of Appeal.

As regards rule 64, it is plain and clear to me that this rule is a procedural rule. It illustrates the normal manner in which proceedings under the rule should be conducted -- The applicant must first apply to the Court below i.e., the High Court and if the application is refused, he can then apply to this Court if he so desires.

In my view therefore an application for a stay execution of a judgment in this Court must have the combined effect of rules 28 and 64 of the Court of Appeal Rules. It is beyond doubt that these are the rules, which the applicant has invoked to come to this Court; as a result of the ruling of Mr. Justice L.B.O. Nylander.

For the sake of clarity I shall hereunder reproduce the ruling in extenso, and it reads:

"Upon reading the Affidavit of Samuel Boston Griffiths sworn to on the 23rd October 2002 and upon listening to the submission and arguments from both sides. I have considered the authorities relied on both sides. The issue, which weighs heavily on my mind, is that a Court must not deprive a successful litigant the fruit of his judgment. But the successful litigant capability to make a refund in case of the appeal succeeding play deterrent to making an all out order for the total execution of the aggrieved judgment. Counsel for the applicant pointed out to the Court that a previous court order has been made against the respondent for a refund and this refund had not been made.

Counsel for the applicant urged the Court to grant a stay of execution of the mentioned judgment. Having carefully considered the total facts before me not forgetting the quantum of sum claimed noting that there would be an Appeal, I feel it will be equitable and just for the applicant to make a down payment of Le100 million to the respondent pending the outcome of the intended appeal to the Court".

From the affidavit evidence it appears to me that the applicant and the respondent have placed a different interpretation on the Learned Judge's ruling, see "CCVT2: PP1 and CCVT2 Pg2. For my part I prefer the interpretation of the ruling in CCVT2 Pg2.

Before turning to the affidavit evidence, let me make a slight comment on the affidavits filed by both sides. Affidavits are designed to place facts whether disputed or otherwise before the Court for whose help they are prepared. They are not designed to be used as a vehicle for legal arguments. Legal argument should come from Counsel in the matter and not in the form of an affidavit. Consequently I shall confine myself to the relevant averments dealing with the facts in the affidavit. Having said this I shall now proceed

It seems to me the relevant averments prayed in aid of the motion are contained in paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit of Ransord Dennis Wright and paragraphs 6, 7, 8, 10 and 14 of the affidavit of Chukumeka Charles Valentine Taylor.

They read as follows:

2. That on the 16th September 2002 the High Court presided over by the Hon. Mr. Justice J.E. Masallay delivered judgment on this matter in favour of the plaintiff/respondent herein. A copy of the said judgment is now produced shown to me and marked "RDW1"

3. That I am dissatisfied with the decision of the said High Court and I have instructed my Solicitor Mr. C.C.V. Taylor to lodge an appeal on our behalf in the Court of Appeal. The said notice dated 19th September is now produced shown to me and marked "RDW2"
4. That the company solicitor reliably informs me and I verily believe that the defendant/applicant have a good grounds of appeal with reasonable prospect of success.
5. That should the said order of the High Court be complied with the defendant/applicants liability to the plaintiff/respondent herein may exceed Le710,000.000 (Seven Hundred and Ten Thousand Leones).
6. That should the Court of Appeal allow our appeal it is unlikely that the applicant herein would ever recover from the plaintiff/respondent in satisfaction of the said judgment.
7. That I believe the forgoing would be the case in the plaintiff/respondent have not satisfied the order of the Court of Appeal dated 11th day of October 2002 i.e., Le61,400,000.00 already paid to the plaintiff/respondent by the defendant/applicant be repaid in the joint names of the Solicitor or both parties into an interest bearing account. A copy of the said order is now produced shown to me and marked "DW3".

Turning to the affidavit of Chukumeka Charles Valentine Taylor.

6. I have read the affidavit of Mr. Ransford Dennis Wright the second defendant Acting Managing Director shown to on 25th September 2002 in support of an application filed by me on the same date seeking an order staying execution of the judgment of this Honourable Court and I here confirm the truth and authenticity of the acts deposed to therein.
7. In support of the averment deposed to in paragraphs 5, 6 and 7 of Mr. Wright affidavit there is now produced and shown to me as bundle of documents marked "CCVT3 Pages 1-24.
8. Pages 1-4 of Exhibit "CCVT3" are a copy of an affidavit sworn to by the plaintiff/respondent Managing Director Samuel Boston Griffiths on the 23rd October 2002 in opposition to an interlocutory application filed by the defendant in the Court of Appeal.
10. In Paragraph 11, Mr. Boston Griffiths deposed to the same state of affairs of the Company when he deposes that the effect of the order will virtually to put my Company and other business ventures in which I have a stake to go out of business (and) will spell disaster for my Company and myself and earlier be

deposed that the amount ordered to be paid by this Honourable Court has been used to repay my overdraft to allow me to continue to do business.

14. For all the above reasons it is my humble submission that there are special circumstances which go to support the defendant application for a stay of execution of the judgment of the High Court.

He is a plaintiff acting in open defiance of an order of the Court of Appeal and at the same time asking for the huge amount of Le710,000,000.00 to be paid to it while contesting in effect that any amount paid to it will be swallowed up by its overdraft commitments to the banks. This the defendant will never be able to recover the said sum if their appeal were to succeed.

The plaintiff/respondent opposed the application and filed two affidavits sworn to by Abdul Franklyn Serry-Kamal earlier referred to. However, on the 11th of January 2002 before continuing his reply, Mr. Serry Kamal Learned Counsel for the respondent successfully applied for leave to use a third affidavit that of Boston Griffiths sworn to on the 19th December 2002 and submitted that he relies on the affidavit to the exclusion of the two previous affidavits.

The relevant averments of the affidavit of Boston Griffiths are to the effect that:

3. That the defendant/applicant have treated the Company in a most heartless manner. The main aim seems to be to put our Company out of business. Initially they terminated our Company contract with them and refused to pay bills our Company had submitted for payment even after judgment by the High Court they are still refusing to pay part of the judgment sum. Our Company pre-financed all the services and equipment provided to the defendant/applicant.
4. At the interlocutory state the Court made an order that the defendants paid the sum of Le11,450,000.00 to our Company for services already rendered and our equipment installed in the premises. The defendant/applicant paid Le61,450,000.00 to our Company. Later the Court of Appeal made an order staying the execution of that order and ordered to be paid into a bank account. Being dissatisfied with that order granting a stay of execution our Company appealed to the Supreme Court and applied a stay of execution of that order. Both the appeal and the application for a stay are still pending in the Court of Appeal. True copies of the notice of appeal and the application for a stay of execution are now produced and shown to me marked Exhibit "SBG 1 and 2"
7. My Company will be able to pay the whole of the judgment debt if so ordered by this Honourable Court or the Supreme Court. Our assets are in excess of Le10 billion (One Billion Six Hundred Leones) a true copy on our auditors report is now produced and shown to me and marked Exhibit 4, 1, and 3 respectively.

Mr. Taylor Learned Counsel for the applicant argued that it is not a stay of execution of the judgment delivered by Masallay J on the 16th September 2002 the ruling is tantamount to a refusal that is the reason he has come to this Court for an order for a stay of execution of the judgment. He said that the Court has an unfettered power to order a stay of execution of the judgment and the affidavit evidence shows an abundance of special circumstances, which would urge this Court to grant a stay in the instant case. In support of his submission he relies on the various averment in the affidavit of Ransford Dennis Wright and Chukumeka Charles Valentine Taylor.

Continuing he said the sum total of the submission is that the respondent has not shown any ability to pay and his reluctance in the light of the affidavit filed. These are the special circumstances he is relying on. In support of the submission he cites the case of Adama Mansaray v. Ibrahim Mansaray Civ. App. 31/81.

Mr. Serry Kamal in reply said that he relies on the affidavit of Boston Griffiths and submitted that the application was made to a Lower Court for a stay of execution of the whole judgment. There was a partial stay. They should pay Le100,000,000 of the total sum. It is his submission that he has not shown that the terms were onerous. He has not shown that the stay of execution was refused and only then he can invoke the jurisdiction of this Court under rule 64 of the Court of Appeal Rules. He refers "CCVT2 and 3".

In my view this application is not an application for a stay of execution of a judgment simpliciter, as it raises two points for consideration. The first point is whether the ruling of the Learned Judge ordering the payment of the sum of Le100,000,000 to the respondent pending the appeal without specific order for a stay of execution of the judgment subject to the usual undertaking by the respondent to refund the said amount to the applicant if the appeal succeed is a refusal. If so, whether this Court ought to grant a stay of execution in the light of the affidavit evidence presented.

In dealing with these points let me here stress that the procedure under rule 64 of the Court of Appeal rules, must be given considerable weight as the trial Court knows all about the case and can deal promptly with the application and the Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the trial Court. In which case the Court of Appeal will at least have known how the trial Court dealt with the application. This is not the case here; the application for a stay of execution came before another Judge!

A stay of execution is an intermediate act ordered by a Court of competent jurisdiction between judgment and the hearing of the appeal and therefore the order granting a stay must be clear, specific and unambiguous and it is normally made on terms subject to the usual undertaking, if it is a money judgment and money is ordered to be paid to the other side that money to be refunded if the appeal succeeds. See James International v. Seaboard West Africa Misc. Application 5/97.

In this case the Learned Judge ordered the payment of Le100,000,000 of the judgment pending appeal simpliciter there is no mention of a stay nor the terms and condition. I am

~~123~~

123

clearly of the view that this Court cannot regard the order of the Learned Judge ordering the payment of Le100,000,000 million pending appeal as a stay of execution of the judgment. To my mind if anything the payment of Le100,000,000 is a partial compliance with the judgment sum awarded.

I derive support from the case *Adama Mansaray v. Brima Mansaray* Civ. App. 37/81 unreported where it was held that the order which purported to grant a stay of execution was in law and in fact not a stay of execution of the judgment since it ordered compliance with the judgment. The Court went on to say:

"That the Learned Judge was in fact saying that the Appellant must do what he ordered regardless of the fact that an appeal has been lodged and also the content of the affidavit before it in support of the application for a stay".

In the result I hold that the order was a refusal of the application for a stay and the applicant is right to invoke rule 28 and 64 respectively of the Court of Appeal rules asking this Court for a stay of execution of the judgment.

I now come to the order for a stay of execution prayed for in the application.

A Court must ensure that a successful litigant is not deprived of the fruits of his judgment and therefore it may be wrong to grant a stay of execution of a judgment pending appeal for instance where an appeal is frivolous or a grant of a stay of execution will inflict hardship on the successful party than avoid it and so on. But subject to this is the principle that when a party is appealing exercising his undoubted right of appeal the Court ought to see that the appeal if successful is not nugatory, see Wilson v. Church No. 2 1879 12 Ch. D454.

The general rule is that a stay of execution will be granted upon proof of 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 *Linotype - Hall Finance Ltd. v. Baker* 1992 4 AER P.887. *Africana Tokeh Village Ltd. v. John Obey Development Investment Co. Ltd.* Mis. App.2/94 unreported. *Chemor Sesay Anor v. Abdul Jalil and Anor* 18/94 unreported.

I dare say the authorities cited above reflect the correct position of the law with regards to an application for a stay of execution of the judgment. I have no reason to differ in the circumstance.

I have considered the submissions of Learned Counsel I have also examined the relevant averments in the affidavit in support and opposition to the application. I believe that the applicant by his various averments has shown that special circumstances do exist for this Court to invoke its discretion and grant a stay of execution of the judgment on terms. But first I think it will be appropriate to set aside the order, ordering the payment of Le100,000,000. The order is set aside.

Accordingly I grant a stay of execution of the judgment on the following terms.

1. Applicant to pay the sum of Le50,000,000 into an interest bearing account in one of the commercial bank in Freetown within ten days from today and evidence of such account be made available to the Court and the respondent.
2. The applicant to enter into a bond guaranteeing the payment to the respondent the rest of the judgment debt and interest within ten days from today, if the appeal does not succeed.
3. Payment of the taxed cost of the lower Court to the respondent Solicitor subject to an undertaking by the Solicitor to refund same if the appeal succeeds.

Respondent to have the cost of this application which I assess at Le500,000.00

Thompson
A. M. Bankole
Respondent