

MISC.APP.23/2004

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

YUSUFU BUNDU

- APPLICANT/PLAINTIFF

AND

MOHAMED BAILOR JALLOH

- RESPONDENT/DEFENDANT

CORAM:

Hon. Sir. John Muria JA

Hon. Tejan-Jalloh JA

Hon. Raschid J

HEARING: 13 July 2004

RULING: 23 July 2004

Advocates:

Appellant: E.E.C. Shears-Moses Esq.

Respondent: N.D. Tejan-Cole Esq.

RULING

Delivered the 23rd day of July 2004. *Alh.*

MURIA, TEJAN-JALLOH JJA, and RASCHID J: By his Notice of Motion filed on 25th June 2004 the applicant seeks a stay of execution of the judgment of the High Court dated 31st March 2004 pending the determination of his appeal to the Court of Appeal. Under the said High Court judgment, the defendant/respondent had been granted an order for the recovery of possession of the property described as No.36 Hanga Road, Kenema (formerly No.34 Hanga Road, Kenema) Eastern Province of Sierra Leone and the applicant now comes to this Court.

The brief background to this case is that the plaintiff by a writ of summons issued on 24th September 1988, the plaintiff claimed specific performance of the agreement for the sale of the property No.36 Hanga Road, Kenema (formerly No.34 Hanga Road, Kenema) and an order to set aside the Deed of Conveyances dated 2nd February 1988 also made between the defendant and the plaintiff in respect of a property other than the above mentioned property. The High Court dismissed the plaintiff's claims and granted the defendant's counter-claim for possession of the property. The plaintiff now appeals to the Court of Appeal. The High Court, however, refused stay of execution of its order on 16th June 2004, and the plaintiff now comes to this Court seeking a stay of execution of the same.

It is obvious from the applicant's supporting affidavit and exhibits that the main reasons for seeking a stay of execution hinge on the fact that he is still in occupation of part of the property in question and renting part of it to one Adel Kousa who in turn sublet it to GTZ, a non-government organisation. He expressed the fear that if he is dispossessed, the tenant will be entitled to claim against him damages for breach of contract, which he would not be able to pay. Unfortunately for the applicant, such a contention, even if it is true, does not amount to 'special circumstances' justifying a stay of execution of a judgment for possession. The fear by the applicant of the difficulty in refunding the rental paid by the sub-tenant and payment of damages for breach of contract is outside the concern of the respondent who had been granted an order of possession of his property by the Court. In fact on the evidence before the Court, since the Writ was issued on 24th September 1988 to which the defendant respondent counter-claimed, the applicant has continued to sublet the property. He was prepared to take the risk of being dispossessed and he must now accept consequence of that risk in having to repay his sub-tenant. The likely hardship brought upon the applicant himself in this case cannot be termed "special circumstances" justifying interfering with a judgment for possession.

As I have said in the *Bank of Sierra Leone v Desmond Luke*, 913H July 2004) Court of Appeal, Misc. App.22/04 when considering what constitutes "special circumstances" in cases of stay of execution, a distinction must be drawn between monetary or liquidated judgments and those of non-monetary or unliquidated judgments. In a liquidated judgment or order, if the affidavit in evidence shows that there is a real risk that damages and costs as ordered by the Court would not be refunded if the appeal succeeds, then such factors would amount to "special circumstances" justifying stay of execution. We note that the Court in *Linotype-Hell Finance Limited v Baker* [1993] 1 WLR 321, considered such a rule to be too stringent a test in today's situation. That case, however, is not concerned with an order for delivery up possession as in the present case. A person against whom a judgment or order to deliver up possession has been issued, needs to show in the affidavit "special circumstances" justifying stay of execution against him beyond simply filing of a notice of appeal. The applicant must make out a strong case for depriving the respondent of the benefit of the judgment he has obtained in his favour. Such a position was clearly stated in *Earnest Farmer and Another v Mohamed Labi*, a 1945 case reported in the Sierra Leone Law Recorder, Vol.3, page 66. In that case the respondent obtained a judgment and an order against the applicant for delivery of possession of premises. After distinguishing the case of *Wilson v Church* LR 12 Chancery 454 which concerned a stay of execution of a monetary judgment, his Lordship Graham Paul CJ said:

"The only question before me is as to whether a case has been made out for depriving the plaintiff of the benefit of the judgment which he has obtained. It is for the applicant for a stay of proceedings to make that case before the court, and in my opinion, he has failed to show any special reason why the court should do so. If this application were granted it would be a precedent

which would have the effect of making every appeal against a judgement for possession in this class of case of *ipso facto* a stay of execution."

This Court recently applied these principles in the case of the *Bank of Sierra Leone v Desmond Luke* (14 July 2004) Court of Appeal, Misc. App.22/2004. Each case will, of course, be considered on its own facts.

In the course of his argument, Mr. Tejan-Cole of Counsel for the respondent submitted that since the judgment is not a monetary one but rather on delivering up possession, the principles of "special circumstances" do not apply. With respect, the Court cannot accede to that contention. The principle that for a stay of execution to be granted the applicant must establish "special circumstances" or "special grounds" or "special reasons" (by whatever it is called) applies to all applications for stay of execution. The distinction is, however, in its constitution and application. As I have indicated earlier, what constitutes "special circumstances" justifying stay of execution in monetary judgment may not be the same in the case of judgment for delivery of possession. I do, however, agree with Counsel that mere filing of noticed of appeal alleging inconsistencies in the trial judge's judgment does not amount to "special circumstances", nor does the possible inability to refund his sub-tenant for damages for breach of contracts can count as "special circumstances" in the present case.

There is another important factor to be considered here. It is not so much about the applicant but rather with regard to the sub-tenant who is the other person (not a party to the proceedings) in actual possession also of part of the property. They are also affected by the judgment for delivery of possession and as such they must be served with written notice to give them the opportunity to apply to the Court. There is, however, evidence before the Court to suggest that both Mr. Adel Koussa and the sub-tenants had been notified (see Exh.YB4 A-B of the applicant's affidavit) in or about April 2004. There is nothing before me in this

application to show that, having been notified of the Order of the Court, the sub-tenants have taken the opportunity to apply to the Court for any relief. Their position is therefore of little help to the applicant here or to themselves. As in *Ernest Farmer and Another v Mohamed Labi and Bank of Sierra Leone v Desmond Luke*, the property in the present case is that of solid premises which cannot be disappeared or be dissipated. If the appeal is successful it would be quite within the power of the Court to make the necessary order that the property be given up to the appellant.

In the present case, there is nothing before the Court to show that there are "special circumstances" justifying the grant of a stay of execution, and the application must be refused.

Application refused with costs.



BY THE COURT