CIV.APP.41/2004

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

HAJA SILLAH
BAIMBA SILLAH
SHEKU SUMA
ABDUL RAHMAN — APPELLANTS

AND

PATRICK FREEMAN — RESPONDENT

CORAM:
Hon Justice U.H. Tejan-Jalloh, JA
Hon Justice S. Koroma, JA
Hon Justice A.N.B. Stronge, JA

*Hearing:* 16th November, 2006
*Judgment:* 19th December, *2006*

*Advocates:*
E. Pabs-Garnon Esq., for the Appellant
A.Y. Brewah Esq., for the Respondent

*JUDGMENT*

Delivered this 19th day of December, 2006.

TEJAN-JALLOH JA: This is an appeal against the Judgment of Hon. Justice Sir John Muria JA. Dated the 26th day of August 2004 in which he made the following orders.

1. That Judgment to be entered against the Defendants/ Respondents.

2. That the Plaintiff do recover Immediate possession of the premises situate at 17 King William Street, Freetown.

3. That cost should be to the Plaintiff/Applicant.

The Appellant being dissatisfied with the said Order of Honourable Justice Sir John Muria JA, appealed to the Court of Appeal on two grounds. Both grounds were argued together by Counsel.

GROUNDS OF APPEAL:-

1. The Learned Trial Judge erred in law in granting leave for the Respondents to enter final Judgment for recovery of possession in respect of 17 King William Street, Freetown.

2. The Learned Trial Judge erred in law in granting the Order Sought upon an Exparte Application pursuant to Order X1 Of the High Court Rules 1960 as amended.

BACKGROUND OF CASE

1. The Writ of Summons was issued by the Plaintiffs on the 21st of June 2004.
2. An Appearance was entered by the Defendants on the 28th of June 2004.
3. An affidavit of Search filed by the Plaintiffs on the 14th of July 2004.
4. Judgment in Default of Defence entered on the 4th day of August 2004.
5. Judge's Summons (Order 11) filed on the 12th of August 2004.
6. Leave to enter final judgment granted to the Plaintiff on the 26th day of August 2004.

7. Motion to set aside judgment in default of Defence 14th of October 2004.
8. Interim Stay of execution of Judgment in Default of Defence granted 19th October 2004.
9. Order refusing to set aside Judgment in default of Defence 28th of May 2005.

The two grounds of appeal can be considered together. Ground one which is that the learned Trial Judge erred in law in granting leave to the Respondent to enter final judgment for recovery of possession in respect of 17, King Williams Street, Freetown:-

The application for final judgment was made during the long vacation: Ord. 64 r,5 of the Annual Practice 1960 explicitly states that the time of long vacation should not be reckoned in the computation of time appointed or allowed for filing any pleading unless otherwise directed by the Court or a Judge. It is clear therefore that Judgment in default of defence cannot be obtained during the long vacation. See Macfoy vs. United Africa Co. Ltd. (1960) A.C. House of Lords Page 157) where Lord Denning dealt with the effect of delivering a Statement of Claim in the long vacation The Judge's summons for final judgment is dated 12th August, 2004. There can be no doubt that that time does not run during the vacation. The final Judgment purportedly obtained is therefore irregular.

The Respondent contends that the Judge's summons pursuant to Order X1 was not made exparte but the Appellants denied being served and they were entitled to be served; appearance having been entered in their behalf. There is no evidence of service of the Judges summons in the record.

In the circumstances we hold that the Judge's summons for final Judgment was made exparte which renders the proceedings not only irregular but renders it a nullity: See Craig v Kanssen (1942) All E.R. 108.

We are aware of the case of Hamp Adams v Hall (1911) 2 KB 942 at Page 94 4 945, where Buckley L.J. said at page 945:

> "where a Plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter strictism juris."

Vaughan – Williams LJ also said at Page 944:

> "where proceedings are taken by a plaintiff in the absence of the Defendant, it is most important that there should be at every stage a strict compliance with the rule, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule not as mere irregularity which can be waived, but a matter which prevents any further proceedings from being taken on the writ."

As there was no strict compliance with the rules, we are bound to hold that the appellants were justified in asking the Court to set aside the Judgment ex-debito – justifae.

As for the proposed defence filed, the defence on the merit, which the defendant is required to show need only disclose an arguable or triable issue and not that it has the merit to succeed.: Drayton Giftware Ltd v Varyland Limited (1982) 132, Mew L.J. 558. See also Swain vs. Hillman and other 1 All E.R. P.91 at Page 95 para. 1. In an action for possession, it is enough if it is shown that there is no relationship of Landlord and tenant. In the instant case the Appellant claimed to have purchased the property. We are of the view that triable issues meriting their determination have been shown. In the premises, the appeal is allowed. Judgment dated 26th August 2004 is hereby set aside with costs to be taxed.

Hon Justice U.H. Tejan-Jalloh JA.....

Hon Justice A.N.B. Stronge JA: A.B. Stronge

Hon Justice S. Koroma JA: .....