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Civ. App. 62/2005

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN;

HENNEH WAFTA - APPELLANT/APPLICANT

AND

ALHAJI SANU BARRIE - RESPONDENT

CORAM;

HON MR JUSTICE J. KAMANDA, J.A.
HON MRS JUSTICE S.BASH-TAQI, J.A.
HON MR JUSTICE G. GELAGA KING, J.A.

Berthan Macaulay (Jnr) Esq., for the Applicant
Abdul Serry-Kamal, Esq., for the Respondent

RULING DELIVERED ON THE 4TH DAY OF MAY, 2006

HON MR JUSTICE G. GELAGA KING, J.A.: A Notice of Motion dated 9th November, 2005 was filed by the Applicant as a preliminary matter, prior to the hearing of the Grounds of Appeal herein. I opine that, more appropriately, it should have, in that circumstance, been entered as a Miscellaneous Application to distinguish it from the substantive appeal hearing itself. Be that as it may, the motion seeks two main orders:

1. That this Hon. Court do grant an injunction restraining the respondent by himself, his servants, agents or howsoever otherwise from conveying, selling, mortgaging, or in any way disposing of the property delineated in survey plan L.S. 2922/95 dated 21st December, 1995 and the building thereon and forming part of the conveyance marked exhibit "BMJ 6E2" to the affidavit of Mr Berthan Macaulay (Jnr) sworn to on the 9th day of November, 2005 in support of the application herein, pending the hearing and determination of this application.

2. That an identical injunction as in 1. above be granted, pending the hearing and determination of the appeal herein.

The Notice of Motion is supported by the affidavit of Mr Berthan Macaulay (Jnr) sworn to on the 9th day of November, 2005 and filed herein and counsel for the Applicant said he was making the application under rule 31 of this Court's Rules, Public Notice No.29 of 1985. He based his submissions on the affidavit and exhibits in support. Ex. "BMJ1" is a copy of the writ of summons issued by the respondent against the applicant in which he claimed:

"(1) Recovery of possession of the premises known as 18 Sani Abacha Street Freetown, the property of the plaintiff.

(2) Mesne profits at the rate of $200,000 US per annum from the 1st day of January, 2002 until possession is delivered up.

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(3) Interest thereon at such rate as the court shall allow."

To that writ the Applicant filed a Defence and Counterclaim, ex. "BMJ2", and pleaded rather incomprehensibly in paragraph 6:
"Save as herein expressly admitted the Defendant **admits** each and every allegation of fact contained as if the same were set out and traversed seriatim.".
He then went on to plead in similar incomprehensible vein in paragraph 8:
". . . The **Defendant** did not execute the said conveyance but wrote back to the Defendant requesting that the purchase price be increased to United States Dollars One Hundred and Twenty Thousand which said sum the Defendant eventually agreed to pay." Emphasis mine.

Judgement was eventually entered for the plaintiff, the Respondent herein and the Applicant's Counterclaim was dismissed, as exhibited in "BMJ4".

Mr Macaulay went on to submit that he was asking for an injunction to be granted in order to preserve the status quo vis a vis the property in dispute and cited the following cases:

American Cyanamid Co. v. Ethicon 1975 1 All E. R. 504
Haja Adama Mansaray v. Alhaji Ibrahim Mansaray *Civ. App. 37/81 (unreported)*
Eboe v. Eboe *[1961] G.L.R. 432 (High Court),* and
NB Landmark Ltd. v. Lakiani *[2001-2002] SGLR*

Mr Serry-Kamal, in reply, referred to his affidavit in opposition sworn to on 24th January, 2006 and filed herein and submitted that there was no legal basis for the application as there was no provision in the Rules of this Court which allows the application for an injunction to be made after judgement has been delivered by the trial court and which empowers this Court to grant it. He referred to O. 37 r. 10 of the High Court Rules which makes provision for a plaintiff before or after judgement to apply for an injunction to restrain a defendant from the repetition or continuance of the wrongful act or breach of contract complained of and submitted that that there was no similar provision in this Court's Rules. He argued that in the instant application it is the unsuccessful defendant who is applying for an injunction against the successful plaintiff. Mr Serry-Kamal submitted further that the proper course was for the Applicant to apply for a stay of execution of the judgement. Referring to paragraphs 2, 3 and 4 of his affidavit, he stressed that Respondent has no intention of selling the said property and there is no evidence that the respondent is in the process of trying to sell the property. He contended that rule 31 deals specifically with the substantive appeal when it comes to be considered.

Mr Berthan Macaulay, responding, contended that the Respondent's argument ran counter to the express wording of r. 31, which expressly states that this Court may grant any injunction which the court below is authorized to grant and that generally this Court has as full jurisdiction over the whole proceedings as if they were instituted in this Court as a court of first instance. He posited that this all-embracing generality relating to jurisdiction is buttressed in s. 129 (3) of the Constitution of Sierra Leone, Act No. 6 of 1991. He maintained that the application is not for a stay of execution. He finally referred to r. 22 of our Rules which states that after an appeal has been entered and until it has finally been disposed of this Court is seised of the proceedings as between the

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parties.

It seems to me that the principal questions which arise for determination in this application are twofold, namely:

(I) Whether this Court has the power, under rule 31, at this stage of the proceedings to grant the application for an injunction, and

(II) If it does have the power, whether we ought to grant it.

There is, also, an incidental question: whether the proper course is to apply for a stay of execution as contended by the Respondent, rather than an injunction as prayed for by the Applicant who contends that after his counterclaim for specific performance and damages had been dismissed by Ademosu, J., in the High Court, there was nothing to stay , citing Eboe v. Eboe and NB Landmark Ltd. V. Lakiani, supra. He has, therefore, not applied for a stay, but instead has opted for an injunction. This incidental question can be disposed of in a short shrift and in terms of a local adage: 'Don't take off your jacket when you have not been invited to a fight'. In other words, it is the unfettered and undoubted right of the Applicant to decide, for better or worse, on what course he will take. And he has exercised that right by seeking an injunction and not a stay of execution, so that is the end of that contention.

I shall now go on to principal question (I) which must necessarily hinge on the construction of rule 31. The relevant portions of which read:

"The Court . . . may make any interim order or grant any injunction which the court below is authorized to make or grant. . .and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance..."

In construing that section, regard must also be had to r.22 which states:

"After an appeal has been entered and until it is finally disposed of, the Court shall be seised of the whole of the proceedings as between the parties thereto."

The appeal in this matter has been filed and this Court is , therefore, seised of the whole proceedings, including the instant application between the Applicant and the Respondent. That being the case and applying rule 22, this Court certainly has the power under r.31, at this stage of the proceedings, to grant any injunction which the High Court has the authority to grant, even though the Appellant has not even begun to argue his grounds of appeal. Has the High Court the authority to grant the injunction sought? If it has, then so also has this Court of Appeal, because of r.31 as well as s.129 (3) of the Constitution which states, inter alia, that "the Court of Appeal shall have all the powers, authority and jurisdiction vested in the Court from which the appeal is brought".

Both parties agree that the High Court by O. 37 r.10 is empowered, with or without terms, "to restrain . . .the respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract." I am not persuaded that this is the appropriate authority in the instant case. I would myself call in aid the provisions of s. 25 (8) of the Judicature Act 1873 which state

that "the High Court may grant. . . an injunction. . .in all cases in which it appears to the Court to be just or convenient so to do. . ." And so may the Court of Appeal. For these reasons, principal question (I) must be answered in the affirmative.

Now that we have held that this Court has the power to grant the injunction sought, I shall now adumbrate on principal question (II): Ought we then to grant the injunction sought? In answering this question it is instructive to refer to the guidelines in deciding whether or not to grant an interlocutory injunction which are to be found principally in the case of American Cyanamid v. Ethicon, supra. But before I dwell on those guidelines, let me state that the fundamental question that has to be answered when the court is hearing an application for an interlocutory injunction is what weight should it give to the relative strengths of the parties' case?

It may be recalled that in the American Cyanamid application for an interlocutory injunction both Graham J. at first instance and the Court of Appeal based their approaches on a perceived rule of law that the court should not grant the interim injunction unless the applicant had shown that on the whole of the affidavit evidence, a prima facie case had been made out. As this was a primary issue, no injunction could issue unless the applicant had first made out his case on the affidavit evidence then before the court. As Russell L.J. put it and the other members of the court agreed [1974] F.S.R. 312, 333:
". . .if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end to interlocutory relief."

However, in the House of Lords, Lord Diplock, who gave the only speech said that this *sine qua non* was a "technical rule" of "comparatively recent origin" which would stultify the court's discretion to grant interlocutory relief by reference to the balance of probabilities. He had this to say at page 408:

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability,' 'a prima facie case,' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. **The court no doubt must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious issue to be tried."** (Emphasis mine).

He then went on to say that the court should go on to consider whether the balance of convenience lay in granting or refusing the interlocutory relief that is sought. In this regard, the overriding principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained. He opined that "if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage." In the case before us where the injunction is applied for under a counterclaim, the defendant is to be regarded as a 'plaintiff and the plaintiff as a 'defendant.'

Lord Diplock's guidelines which I accept and adopt may be summarized as follows:

(1) Has the applicant shown that there is a serious question to be tried?

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(2) Is there doubt as to whether the remedies respectively available to the parties in damages would be adequate?
(3) Where does the balance of convenience lie?

It was only as a component of (3) that the strengths of the parties' case ought to be considered by the court, and even then only when it was plain whose case was the stronger. It may then be in place to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application.

I now turn to consider the present application and principal question (II) in the light of those guidelines and the applicable legal principles. My first observation is that the writ herein was issued on the 9th day of August, 2002, claiming recovery of possession of the said property and mesne profits. The defence and counterclaim was delivered and filed on 18th day of September, 2002, counterclaiming specific performance and damages for breach of contract. Significantly, there was no claim for an injunction of any sort then, nor during the trial, nor up to the time when judgement was delivered on the 21st day of October, 2005, nor up to the time when notice of appeal was filed on the 1st day of November 2005.

Rather unusually and strangely, it is only after the Applicant's counterclaim had been dismissed in the court below, the trial having ended, and when his appeal arising therefrom is about to be heard in this Court that the Applicant has applied for an injunction, for the first time, on the 9th day of November, 2005. It is important and helpful to reflect on the fact that even though more than three years have elapsed between the filing of what I might call the injunctionless counterclaim and the hearing of this application, the status quo has been preserved, there being no evidence before us that the Respondent wishes, or threatens to sell mortgage, lease or otherwise dispose of the said property. Indeed, if the contrary were the case, then the Applicant should have led affidavit evidence that the Respondent is threatening or intending to do that which he is not entitled to do. And the Applicant has not so alleged. See on this point **Draper v. British Optical Association** *[1938] 1 All E.R. 115.*

On the contrary, the Respondent's counsel in paragraph 2 of his affidavit in opposition swore as follows:

"I am informed by our client and I verily believe that he has no intention of selling, mortgaging or otherwise disposing of any part of his property known as 18, Sani Abacha Street, Freetown."

The Applicant in his submissions highlighted his reason for the application as the need to preserve the status quo. Quite apart from what I have just said, supra, in relation to status quo, as I have already premised, we are obliged to look at the whole case, and have regard to the strength of the claim as well as the defence. It may not be enough for the Applicant to show that he has an arguable case that the Respondent may infringe his right. See **Hubbard v. Vosper** *[1972] 2 QB 84.* In any event, the trial stage has passed and this is an application for an injunction pending the appeal herein. And when one looks at the case as a whole and paragraphs 6 and 8 of the Applicant's defence, above, which I was impelled to term incomprehensible, the question whether there is a serious issue to be ruled upon in the application before us seems, to put it euphemistically, to hang in the balance.

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In all the circumstances of the case and taking cognizance of the relative strengths of the parties' case as revealed by the affidavit evidence before us, I have come to the conclusion that damages recoverable at common law, if the Applicant were to be successful in the appeal, would be adequate remedy and the Respondent would be in a financial position to pay them. (See paragraph 3 of the affidavit in opposition.) I opine that the balance of convenience lies in not granting the injunction that is sought. To my mind the Applicant has failed to establish to the required degree, in relation to an application of this sort and in relation to all the other factors that have to be taken into account, that he ought to be granted an interlocutory injunction restraining the Respondent by himself, his servants, agents or howsoever otherwise from conveying, selling, mortgaging, or in any way disposing of the said property.

I, therefore, refuse to grant the injunction and will dismiss the application.

Costs in the cause & Order - Accordingly

Hon Mr Justice G. Gelaga King, J.A.

I agree

Hon Mr Justice J Kamanda, J.A.
(presiding)

I agree

Hon Mrs Justice S. Bash-Taqi, J.A.