

Stay

170

CIV APP 63/2008

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

SIERRA LEONE SHIPPING COMPANY -PLAINTIFF/APPLICANTS

AND

ALBERT GOMEZ - 1ST RESPONDENT

AND

THE SHERIFF OF SIERRA LEONE - 2ND RESPONDENT

AND

MARTIN MICHAEL - 3RD RESPONDENT

CORAM:

The Hon. Mrs. S. Bash-Taqi, JSC - Presiding
The Hon. Mr. Justice P. O. Hamilton, JSC
The Hon. Mrs. Justice A Showers, J

Barristers

E. Kargbo, Esq. for the Plaintiff/Applicant
O. Jalloh, Esq. for 1st Respondent
Mr. C. F. Margai and R. B. Kowa, Esq. for the 3rd Respondent

RULING DELIVERED ON THE 30th DAY OF JANUARY 2009

S. BASH-TAQI, JSC: - The Plaintiff/Applicants, by a Notice of Motion dated 4th December 2008, applied to this Court, inter alia, for an Order:

1. That this Honourable Court grants a Stay of Execution of the Judgment of the Hon. Mr. Justice D. B Edwards dated 10th November 2008 and all subsequent proceedings pending the hearing and determination of an appeal against the said Judgment.

The Supporting Affidavit is sworn to by Sylvester Bundar Fomber attached to which are several exhibits including Exhibit "SBF 8" the Order of the High Court refusing to grant a Stay of Execution of the said Judgment and Exhibit "SBF4, a Notice of Appeal against the said Judgment to the Court of Appeal.

It is against this background that the Appellant/Applicant has applied to this Court for a stay of execution pursuant to Rule 64 of the Court of Appeal Rules 1985.

During the course of the hearing, Mr. E. Kargbo obtained leave to file and use two Supplemental Affidavits sworn on 15th December 2008 and 9th January 2009 attached to which are exhibits "A 1-2" and "SBF 1" respectively. He applied and obtained leave to withdraw Exhibit "SBF 8" attached to the Supporting Affidavit of 4th December 2008, and substitute therefore Exhibit "SBF 1" attached to the Supplemental Affidavit of 9th January 2009.

In support of his application, Counsel relied on the contents of the Affidavits more especially paragraphs 6 to 18 of the Supporting Affidavit of 4th December 2008, paragraphs 1 of the Supplemental Affidavit of 15th December 2008 and 9th January 2009 and the exhibits attached thereto. He relied on these paragraphs collectively to high light the Special Circumstances justifying the grant of a stay of execution by this Court; he also submitted that Exhibit "SBF4", the Notice of Appeal, discloses arguable and substantial grounds of appeal.

The 'Special Circumstances' relied on by the Appellant/Applicant justifying the grant of a stay can be gathered from the three Supporting Affidavits. They are basically, that the property the subject matter is one of the main assets of the Company; that it is leased out to third parties and the Applicants utilized the rents derived from such letting to sustain and maintain their business as well as to pay the salaries of their workers. Secondly, that they have recently spent large sums of money refurbishing the property, so that if a stay is not granted, they would not only suffer huge financial losses that would cripple their business but also lead to the total collapse of their business; this in turn would cause irreparable damage and hardship to their business and third parties. He relied on the following decisions to buttress his submissions, namely: -

1. *Africana Tokeh Village Co Ltd. vs. John Obey Development Investment Co Ltd* Misc. App. 2/94 (unreported);
2. *Clement Bankole Cox vs. Sunny Idowu* Civ. App. 32/2007 (unreported)
3. *Linotype Hell Financial Ltd vs. Baker* {1992} 4 All E. R. 887;

Counsel further submitted that Exhibit "SBF4" the Notice of Appeal, discloses substantial grounds of appeal and good prospects of succeeding particularly as it challenges the legality and propriety of the sale of the Applicants' property to the Respondents (see paragraph 7 of the Affidavit in Support); that the Appeal also call into question the provisions of Section 9 of CAP 22 of the Laws of Sierra Leone as to whether or not the same was breached. He urged that these are serious issues of law that ought to be considered by the Court in deciding whether or not a discretion should be exercised in favour of granting the Stay of Execution.

Mr O. Jalloh, of Counsel for the 1st Respondent did not file an Affidavit in opposition, he nonetheless strongly opposed the application. He contended that the Applicants have not shown any reason or special circumstances warranting the granting of a Stay of Execution as required by the numerous authorities. He reminded the Court of the

principles under which a Stay of Execution may be granted by the Court and submitted that the supporting affidavits show no such special circumstances; that the grounds of appeal show no reasonable prospect of success, and that the steps taken by the Applicants in this matter are an abuse of process, in that they are seeking, by this application, to set aside processes that had been taken in another action, namely - CC 503/03 G No.10 - Between Albert Gomez v SLNSC; that they could have applied to set aside those processes in that other matter, rather than come back with a fresh Writ of Summons: (i.e. CC124/05 S. No. 8), to set aside the processes that were taken in CC 503/03 G. No. 10.

As regards the Applicants' contention that they have spent money in refurbishing the property, Mr. Jalloh, submitted that at the time this was being done, the Applicants were aware that the property had already been sold pursuant to a judgment of the court; therefore what the Applicants on the property when the matter was still pending does not amount to special circumstances. He relied on the case of *Yusufu Bundu v Mohamed Bailor Jalloh Misc. App. 23/04* page 3, and also on *Heckmet Joseph v MacThompson & Oths Civ. App. 65/05*. He denied that the Applicants depended on the monies received from the property to run their business. Counsel also denied the contention that the property is Government property, and submitted that this cannot be relied on as special circumstances, the Government not being a party to the proceedings. With reference to Order 46 Rule 11 Counsel submitted that the Applicants have not shown that the Respondents are trying to sell or dissipate the Res. He further relied on the decision in *Desmond Luke v Bank of Sierra Leone Misc. App. 22/2004*, and submitted that no legal reasons have been shown for this Court to grant the stay. He urged us to dismiss the application.

Mr. Margai, like Mr. Jalloh did not file an Affidavit in Opposition, he nevertheless, opposed the application and adopted Mr. Jalloh's submissions. In addition, he canvassed the Court that the 3rd Respondent is a bona fide purchaser for value without notice; that the grounds of appeal do not suggest that there was collusion on the part of the 3rd and 2nd Respondents on the sale of the res. Mr. Margai further referred to Sec. 8 of CAP 22 and to the cases of *Evelyn Ayo Pratt v Jacklyn Carew & Others v. Isha Deen Sesay, Misc. App. 7/2005*; *V. O. S. Olunloyo v Adedapo Ndeniran 2001 37 W. R. N SC.89/99 1 -13* at page 3 at page 7. He urged us to dismiss the application.

It has been held in a number of cases in our jurisdiction that this Court has unfettered power and discretion to grant a stay of execution provided the applicant can satisfy it that special or exceptional circumstances exist to warrant doing so (see *African Tokeh Village Ltd v John Obey Development Investment Co. Ltd. Misc. App. 2/94* (unreported)). Another requirement in an application of this nature is that the Applicant must show that he has prima facie good grounds of appeal. The rationale behind the principle is that the Courts will not make a practice of depriving successful litigants of the fruits of their successes. (See *Patrick Koroma v S/Leone Housing Corporation and Dolcie Beckley Misc. App. 9/2004* (unreported) and similar cases. This is so because "a judgment of the Court is presumed to be correct and rightly made until the contrary is proved". In *Olualayo v Adeniran [200] 37 W. R. N. SC 89/1999*, Kutigi JSC, held in that case that:

"A discretion to grant or refuse a stay must therefore take into account the competing rights of the parties". A discretion to grant or refuse a stay must only be taken after considering the facts of the case to see whether special circumstances exists to invoke the Court's power and jurisdiction. See Radar v Jaber ALR (SL) 1950-56 P. 115 which was quoted with approval by the Court of Appeal in Commercial Enterprises Ltd v Whitaker Properties & another Misc. App. 12/91 (unreported). If special circumstances do exist the Court has the unfettered power to grant a stay of execution and may do so even though a writ of possession has been issued and execution has taken place.- See Richard Zachariah v Jamal Morrowah Misc. App. 12/87; African Tokeh Village Ltd v John Obey supra (unreported).

And where there is an appeal pending as in the situation herein, the special circumstances which have received approval are when execution would:

- (a) destroy the subject matter of the proceedings;
- (b) foist upon the court a situation of complete helplessness; or
- (c) render nugatory any order or orders of the appeal court;
- (d) paralyze in one way or the other, the exercise by the litigant of his constitutional right of appeal; or
- (e) provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo;

A litigant applying for a stay of execution must thus show special or exceptional circumstances pleading eloquently the balance of justice weighing in his favour, even though what constitutes special circumstances may vary from case to case."

A discretion to grant or refuse a stay must only be taken after considering the facts of the case to see whether special circumstances exists to invoke the Court's power and jurisdiction. See Radar v Jaber ALR (SL) 1950-56 P. 115 which was quoted with approval by the Court of Appeal in Commercial Enterprises Ltd v Whitaker Properties & another Misc. App. 12/91 (unreported). If special circumstances do exist the Court has the unfettered power to grant a stay of execution and may do so even though a writ of possession has been issued and execution has taken place.- See Richard Zachariah v Jamal Morrowah Misc. App. 12/87; African Tokeh Village Ltd v John Obey supra (unreported).

adopt the principles law propounded by the above authorities. Although the case of *Muralayo, supra*, involved a monetary judgment, the principle that there must be special or exceptional circumstances disclosed by an applicant seeking the stay, which would render it inexpedient to enforce the judgment, is the same as in other cases not involving a monetary judgment. The circumstances to be disclosed must be those that go to the enforcement of the judgment and not those which go merely to its correctness (See *T. C. Trustees Ltd v Darwen (Successors) Ltd* (1969) 1 All E. R. 271 at 274.

The Applicant in his Supporting Affidavit pleaded that execution of the judgment will not only cause them hardship but will also lead to financial ruin since the continuation of their business depends on the profits derived from the property, the subject matter of the action (See paragraph 10 of the Affidavit in Support). Although Counsel for the

Respondent in his oral submissions disputed this averment, he has not shown any evidence to the contrary, nor did he refute the further averment that the Applicants had expended huge amounts of money in refurbishing the property prior to the final judgment of the Court dispossessing them of the property, save to say that the Applicants knew when they were carrying on the works that the property had already changed hands.

The contention that a refusal of a stay would lead to the Applicant's financial ruin has been held in some cases in our jurisdiction as special circumstances. In *Africana Tokeh Village*, supra, this Court recognized that the land and premises constituted the main asset of the Applicants' business, and that a refusal of a stay depriving them of its use it would cause them irreparable damage and financial loss of business, as constituting special circumstances meriting the exercise of the Court's discretion to grant the stay of execution applied for.

With respect to the appeal filed, while we are not entitled to go into its merits, we are nevertheless permitted to consider whether the grounds of appeal disclose prima facie good grounds with reasonable prospects of success. Therefore reading through Exhibit "SBI4", we note that there is an allegation of a breach of a Statute, namely, Sec. 7 of CAP22 of the Laws of Sierra Leone. We are of the view that the allegation of breach or non-compliance with the provisions of a Statute raises a question of the interpretation of the particular Statute, and in our view, involves a serious question of law which may go to the question of the legality or otherwise of the sale of the res in this case. If the exercise of a public duty is patently flawed or is alleged to be so flawed, or it appears to have been done without justification or jurisdiction, this would, in my view, impact on an issue upon which an appellate court may base its discretion to grant a stay of execution of the judgment, especially where the exercise of such a public duty has been ordered by the court. Therefore where an Applicant has shown in his grounds of appeal serious issues touching the legality or otherwise the exercise of a public duty, and the grounds of appeal show prima facie some prospect of success, this, in our view would amount to a legitimate ground for granting a stay of execution in the circumstances of this case.

In our Judgment, we hold, that to enforce the judgment in the meantime will be ruinous to the Applicants with the unnecessary consequence of hardship; and it will also provide a situation in which even if the Applicant succeeds in his appeal, there would be no return to the status quo.

In our Ruling, we grant a stay of execution of the Order of Edwards J, and all subsequent proceedings pending the hearing and determination of the appeal on the following terms:

- a) That the Applicants be restored to the position before the issue and execution of the Writs of Fieri Facias and possession by the High Court with respect to the property situate and being at 2A and 4A Off Spur Road Wilberforce Freetown;

b) That in view of the nature of this action, there be a speedy hearing of the appeal and that the Records be prepared by the Appeal Registry within 4 weeks from the date of this Ruling.

c) That the Applicants pay the costs of this application, agreed at £2,500,000/each of the Respondent

SIGNED SBalch

I agree..... [Signature]
HON MR. JUSTICE P. O. HAMILTON

I agree..... A. Showers
HON MRS JUSTICE A SHOWERS