

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ALICE KENNY - APPELLANTS
ISATU BANGURA
ELIZABETH BANGURA

AND

OSMAN MANSARAY - RESPONDENT

CORAM

Hon Ms. Justice S. Koroma J.S.C.
Hon Mr. Justice P.O. Hamilton J.S.C.
Hon Mr. Justice A.N.B. Stronge J.A.

SOLICITORS

M.P. Fofana Esq. for Appellants
C.J. Peacock Esq. for Respondents

JUDGMENT DELIVERED ON THE 8th DAY OF July 2009.

HAMILTON J.S.C. – This Court did earlier upheld this appeal, gave orders as to cost and undertook to give reasons for the decision later. We do so now.

This is an appeal against the Judgment and Ruling of Hon. Mr. Justice L.B.O. Nylander J. delivered on 11th July, 2002 and 26th May, 2004 respectively. The appeals were dated 2nd June, 2004 in respect of Civ. App. 19/2004 and 1st June, 2004 in respect of Civ. App. 18/2004.

Both Appeals were contained in one record. The Court was of the candid opinion that both Appeals were inter related and therefore depended on one another. The outcome of Civ. App. 18/2004 will fully take care of Civ. App. 19/2004 i.e. whether it can be proceeded with or not. Arguments were heard and the synopsis submitted was considered. That of Civ. App. 18/2004 was first considered and the Appeal was upheld on 13th March, 2007 with reasons to be given later.

The Appellants herein (shall hereinafter be referred to as Appellants/Respondents) and the Respondent herein (hereinafter referred to as the Respondent/Appellant).

This Appeal by the Appellants/Respondents was against the Ruling of the Learned Trial; Judge dated 26th May, 2004 granting an Order to the Respondent/Appellant an extension of time with which to Appeal to the Court of Appeal against the said Judgment of the said Presiding Judge dated 11th July, 2002. The Order granting an extension of time to file the Appeal is what has been appealed against by the Appellants/Respondents (Civ.App.18/2004). The contention is that Civ. App. 19/2004 could not have been in the Court of Appeal if the Order granting the extension of time to Appeal was refused. Therefore if Civ. App. 18/2004 succeeds then Civ. App.19/2004 brought pursuant to the Order or Ruling of 26th May, 2004 would be of no importance.

The Grounds of Appeal are as follows:-

1. That the Learned Trial Judge acted in wrong principles of law in granting an extension of time for which to appeal.
2. That the Learned Trial Judge failed and/or did not consider the response of the Plaintiff's Solicitor in granting an extension of time for which to appeal.
3. That the Order/Decision of the Learned Trial Judge is against the weight of the affidavit evidence.

The entire grounds of appeal raised a jurisdictional question thus – whether the Learned Trial Judge had jurisdiction to grant the Respondent/Appellant leave and an extension of time to Appeal when time for appealing has expired.

Counsel for the Appellant/Respondent submitted that it was fifteen (15) months after the judgment and more than nine (9) months after appearing as new Counsel for the Respondent/Appellant that he filed a motion “seeking not an enlargement of time within which to set aside the judgment of 11th June, 2002” but “an extension of time within which to file a Notice of Appeal to the Court of Appeal against the said judgment.” He further submitted that this move by Counsel clearly acknowledged that the said Judgment was full and complete and therefore Order XII Rule 2 of the High Court Rules, 1960 dealing with default judgments in which “one party does not appear” no longer applied to this case.

Counsel for the Appellants/Respondents further submitted that the application was contrary to the Spirit of Rule 11 sub-rules 1, 2 and 6 of the Court of Appeal Rules, 1985 (Public Notice No.29 of 1985) especially the provisions of Rule 11(6) which is mandatory considering the maximum time frame within which to appeal.

Counsel for the Respondent/Appellant C.J. Peacock Esq. in his synopsis submitted that Rule 11(1) of the Court of Appeal Rules supra empowers the Court to enlarge time to appeal in the case after the expiration of three (3) months against the Judgment of the High Court dated 11th July, 2002 provided that the conditions in Rule 11(4) of the said Court of Appeal Rules are complied with and even entertain an application for an enlargement of time under Rule 66 of the said Court of Appeal Rules.

In order to assist in understanding the provisions of these rules I shall set them out hereunder:

Rule 11(i) – “No appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision unless the court enlarges the time.

- (2) The prescribed period of appeal shall be calculated from the date of the decision appealed against.

Provided that where there is no appeal as of right the prescribed period shall be calculated from the date upon which leave to appeal is granted.

- (4) Any application for enlargement of time within which an appeal may be brought shall be supported by an affidavit setting forth good and sufficient reasons for the application and grounds of appeal which prime facie show good cause for the enlargement of time to be granted.
- (6) No application for enlargement of time within which to appeal shall be made after the expiration of the time prescribed which an appeal may be lodged."

Rule 11 has been quoted above because it is clear that it was eighteen (18) months after the judgment that Counsel for the Respondent filed a motion seeking not an enlargement of time to set aside the judgment but rather an extension of time within which to file a notice of appeal to the Court of Appeal against the judgment of 11th July, 2002. In my humble opinion Counsel for the Respondent recognises and acknowledges the judgment as complete as such Order XXV of the High Court Rules 1960 does not apply.

The High Court is only empowered to grant leave within the statutory time period allowed for appeals. Both the application for leave to appeal and the granting of leave must all be within the

statutory period but not otherwise. Now there can be no question that when time to appeal has been fixed by Statute and leave to appeal is required the intending appellant ought to file his appeal within such a period fixed, unless of course he obtains an appropriate order for an extension of time at the proper forum.

Where for any reasons a person is desirous to appeal to the Court of Appeal runs out of the statutory period of doing so, only the Court of Appeal can extend the time and grant him leave to do so. The High Court is only empowered to grant leave to appeal within the statutory period allowed for appealing and no more.

It was common ground that the Respondents application for leave to appeal out of time was outside the statutory period. The provision in it express terms is mandatory.

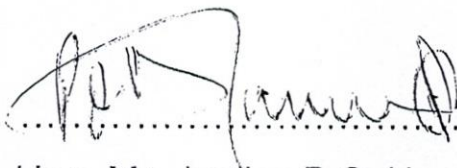
In the Nigerian case of *Bamaiya v. Attorney-General of the Federation* (2001) 38 WRN 1 at 24-25 the Supreme Court held that "*the word shall in the ordinary meaning of the word connotes a command, and which must be given a compulsory meaning. It has a peremptory meaning which is generally imperative and mandatory. It has the significance of excluding the idea of discretion to impose a duty*".

The issue is whether the Learned Trial Judge ought to have granted the Respondent's/Appellant's application for leave to appeal out of time. The answer is clearly in the negative as his ruling rendered

nugatory a mandatory rule of the Court of Appeal Rules 1985 (Public Notice No. 29 of 1985).

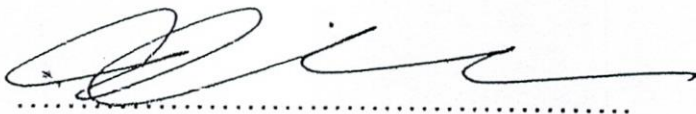
In view of all what I have said above this appeal (Civ. App.18/2004 succeeds and is allowed. The Ruling of the High Court dated 26th May, 2007 granting the Respondent/Appellant leave to appeal out of time is declared a nullity as it was given without jurisdiction.

Cost of Le.1,000,000.00 (One Million Leones) was awarded on 13th March, 2007 still remains the cost in this appeal.



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Hon. Mr. Justice P.O. Hamilton J.S.C.



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Hon. Ms. Justice S. Koroma J.S.C.