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Civ. App. 71/2008

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

JIHAD BASMA
As Administrator of the Estate of
Adel Basma (Deceased) Intestate - APPELLANT

AND

MILFORD CHUKU JOHN & ORS - RESPONDENTS

CORAM:

Hon. Mr. Justice P.O. Hamilton - J.S.C.
Hon. Mr. Justice S.A. Ademosu - J.A.
Hon. Mrs. Justice C.L. Taylor - J.

ADVOCATES:

C.F. Margai, Esq. for the Appellant
S.K. Koroma Esq. for the Respondents

RULING DELIVERED ON 7th DAY OF July 2009.

In this matter a preliminary objection was taken by counsel on behalf of the respondents who submitted that the judgment appealed from was an interlocutory judgment and also that the appeal was out of time. The Notice of Preliminary objection is dated the 17th February 2009.

Counsel submitted that the appellant failed to seek leave of the Court to appeal against a judgment which is an interlocutory decision and secondly that the appeal was filed out of time. He contended that leave of either the Court below or of this Court ought to have been sought. In support of these grounds Counsel relied on Rule 10 (1) of the Court of Appeal Rules 1985 as amended by Constitutional Instrument No. 1 of 2003 which reads:

"10 (1) Where an appeal lies by leave only, any person desiring to appeal shall apply to the Court below by notice of motion within fourteen days from the date of the decision against which leave to appeal is sought or, pursuant to rule 64, to the Court by notice of motion within fourteen days

from the date of the refusal by the Court below, unless the Court below or the Court enlarges the time."

And also Rule 11 (1) which says:

"No appeal shall be brought after the expiration of fourteen days in the case of 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."

Finally Counsel relied on Sect 56 (1) (b) of the Courts Act 1965 which reads:

56(1) subject to the provisions of this section, an appeal shall be to the Court of Appeal.

(b) By leave of the Judge making the order or of the Court of Appeal, from an interlocutory judgment, order or other decision, given or made in exercise of any such jurisdiction as aforesaid:

A number of cases were cited by counsel for the Appellant bearing upon the distinction between an interlocutory and a final judgment. Among the cases cited were Coker V. Coker (1950-56) ALR SL130 at 132; Amoa Ababio & Anor V. John Edmund Turkson (1950) 13 WACA 35 at p. 36; Elijah J. Speck V. Gbassay Keister (1962) SLLR 126 at 128, and the case of Seven Up Bottling Company PLC V. Abiola & Sons Bottling Company Ltd & Anor. 2001 38 W.R.M. 55 at 59 – 69.

Distinction between interlocutory and final judgment was considered by the West African Court of Appeal in Blay V. Solomon (1947) 12 WACA 175. In that case the trial Judge ordered that an account as between the respondent and the third appellant be filed and that the property be sold by auction. The Court said for the reasons given in the judgment, this was an interlocutory decision.

From a long list of decided cases that I am aware of, it is clear to me that a final decision is one that brings the action to an end in contradistinction to an interlocutory decision which does not completely dispose of the matter.

In the Seven-Up Bottling Company V. Abiola (supra) the Supreme Court of Nigeria adopted the applicable test stated in Bozson V. Altrincham U.D.C. (1903) 1 K.B. 547 at page 548 to wit:

"Does the order as made finally dispose of the rights of the parties? It if does then I think it ought to be treated as a final order".

In the same matter Karibe-whyte J.S.C. in his contribution re-examined the i ssue of the applicable test and opined that:

"the ideal approach is to consider both the nature of the application and the nature of the order made in determining whether an order or judgment is interlocutory or final in respect of the issues before it, as between the parties to the litigation. Thus where the nature of the application does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue, both the application and the order or judgment must be interlocutory ..... However, where an application has the effect by the order, therefore of finally determining the claim before the Court, the order may properly be regarded as final."

The circumstances from which this appeal arises as can be gleaned from the Ruling of the High Court at pages 174 – 177 of the records dated the 1st of December, 2008 are as follows:

An application had previously been made to the Court for extension of time within which to apply to set aside the judgment of the Court. In spite of that refusal, Counsel for the defendant/appellant applied that he be heard notwithstanding the lapse of time for reasons stated and for the judgment to be set aside. The Judge said:

"I do not believe Counsel can disregard that refusal and now seek to have an application heard notwithstanding lapse of time and for the said judgment to be set aside. It clearly is an abuse of the process."

The Judge then ruled that she was functus officio and had no jurisdiction to entertain an application for the reliefs prayed for. The application was accordingly struck out with costs to the plaintiff assessed at Le 250,000.

We have considered the nature of the application and the nature of the order made by the Court. We are firmly of the view that the application made was interlocutory and that it was the interlocutory application that the Court refused to entertain on the grounds that it was previously made and refused and considered it to be an abuse of process. In

coming to this conclusion we took into consideration the fact that the defendant/appellant had not been heard as regards his defence. Although the judgment of the Court brought to an end and finally disposed of the rights of the of the parties who were heard and presented their case. It has to be borne in mind that it was against refusal to be heard or allowed to present his case that the defendant/appellant has appealed to this Court. The appeal is not on the merits of the judgment of the Court and therefore we cannot properly go into it. We have therefore confined ourselves to the issue raised. The result is that we hold that the objection is well taken. The appeal is therefore struck out, with costs to the plaintiff/respondent. Such cost to be taxed if not agreed.

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

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Hon. Mr. Justice S.A. Ademosu- J.A..

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Hon. Justice C.L. Taylor – J.