

CIV APP 46/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ABU KABBA (ALIAS COACH) - APPELLANT

AND

MELISSA MUHLEMAN -RESPONDENTS

HAMON KISI KAMARA

CORAM:

THE HON MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HON MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

THE HON MR JUSTICE A S FOFANAH, HIGH COURT JUDGE

COUNSEL:

M LTARAWALLY ESQ & O JALLOH ESQ for the Respondents

ELVIS KARGBO ESQ for the Appellant

JUDGMENT DELIVERED THE ~~22 DAY OF NOVEMBER, 2011.~~ *6th day of December* *6/12/11*

1. The Respondents in this appeal, have applied to this Court, by way of Notice of Motion dated 19 May, 2011 for Security for Costs in the sum of Le50,500,000 to be given by the Appellant, Abu Kabba, and that the Costs of the Application be borne by the Appellant.
2. The Application is supported by the affidavit of Melissa Muhleman deposed and sworn to by her on 19 May, 2011. Exhibited to that affidavit are "B", a copy of the Judgment and Order of this Court, SEY, J Presiding, dated 13 October, 2010; "C" a copy of an affidavit deposed and sworn to by Musa Pious Sesay, Barrister and Solicitor on 5 June, 2009 in an Application for Committal for Contempt made in the same action in the High Court; and "D", a copy of a Notice of Appeal dated 5 November, 2010 but filed on 9 November, 2010 according to this Court's stamp on its face.
3. The 1<sup>st</sup> Respondent Mrs Muhleman, deposes that during the trial of the action, the Appellant was seldom in Court, due to the fact that he resides outside the jurisdiction of this Court. In her Judgment delivered on 13 October, 2010, SEY, J awarded Damages in the sum of Le20million, and

Costs in the sum of Le5million. These Costs remain unpaid by the Appellant. In Mr Sesay's affidavit deposed and sworn to on 5 May, 2009, Mr Sesay deposed, inter alia, that "*..the said Defendant (i.e. the Appellant herein) who is ordinarily resident in the United States of America but was in the jurisdiction when this proceedings (sic) commenced.*" The Respondents contend that <sup>there</sup> is clear evidence that the Appellant would be beyond the reach of this Court in the event that he loses his appeal, and Costs are again awarded against him. The

- Respondents argue further, that this appeal is likely to generate additional Costs amounting to a total figure of Le50,500,500 as itemised in paragraph 8 of the 1<sup>st</sup> Respondent's affidavit.
- 4. The Appellant opposes the Application. He has filed two affidavits deposed and sworn to respectively on 16 November, 2011 by one Foday Sesay, Office Assistant, Cemmats Group, who claims to be his brother, and the person taking care of Appellant's property at 66D Freetown Road, Lumley; and secondly, by one Bankole Khadara alias Frank Williams. In his affidavit, Mr Sesay deposes that he usually receives money to buy building materials, and ensures that construction work is done in the house and in its compound. On 7 February, 2011 he was at his place of work when Bailiffs entered the compound. He could not gain access to the premises. All of Appellant's properties were kept in the house including a car with registration number AEA 051, whose keys are with him. He
  - exhibits a list of the properties as "FS1." He deposes further, that since the execution, he has not been able to gain access to the premises, and he learnt that '*all the doors of the house that were closed containing properties and building materials of Mr Abu Kabba, are now opened.*' Copies of photographs showing the house are exhibited as "FS2 1-4".
- 5. I shall now turn to the documents exhibited. "FS1" is signed by the deponent, but it is undated, and there is no evidence as to when it came into existence. Normally, before the Bailiffs levy execution against the losing party's property, an inventory is done. This inventory tells us the quantity and nature of the property taken in execution. The list exhibited by Mr Sesay is unverified. We do not know by which power or authority, Mr Sesay has sworn to his affidavit. He is not an Attorney for the Appellant; if he had been one, surely he would have exhibited a duly executed Power of Attorney. In fact, we do not know who he is, other



than what he has deposed to in his affidavit. I think it would be extremely dangerous to rely on such evidence in support of the Appellant's position. But to go further, it is pertinent to examine closely, the pictures exhibited by Mr Sesay to his affidavit. He deposes, and he wants this Court to believe, that together, they constitute evidence that there are properties in the house sufficient to satisfy the Judgment of the Court below, and of this Court, in the event that Judgment is given against the Appellant. The pictures show a gated compound with house inside, partly finished. It appears to be occupied, due to the presence of window and door curtains. A man is shown in front of the building in the first picture. The left back portion of a car could be seen in the second picture. Its registration number is obscured, but the first letter, 'A' could clearly be seen. Since the registration numbers of the vast majority of cars in Sierra Leone begin with the letter 'A', this does not really take us anywhere. This picture certainly is not proof that that car is the one referred to in paragraph 4 of Mr Sesay's affidavit. Why Mr Sesay, or, for that matter, Mr Kargbo, Appellant's Counsel, chose to exhibit this particular picture is beyond my ken.

6. Mr Khadara's affidavit deposes to the events of 7 February, 2011 when execution was levied against the property belonging to Appellant. He claims that his personal properties were taken by the Bailiffs as part of the execution. He deposes further that *"...at that time the Bailiff met me, the caretaker of Mr Abu Kabba, Foday Sesay was not around. The other apartments in the ground floor and the entire top floor were closed. That in my presence the bailiff handed the keys of my flat to the Respondent/Applicant and told them to take the house. That all the properties of the Appellant were in the house and were not removed up to the time the bailiff left."* Well, Mr Khadara has not stated his status in this property; i.e. whether he was a caretaker-on-site, a tenant or licensee, a trespasser or a visitor who had stayed longer than he ought to. So, we do not know whether he truthfully knows anything about Appellant's properties. All we can say for certain, is that his properties were removed.
7. The importance of this issue of whether Appellant had or has personal properties on or in the premises, or in the house in those premises, is that it bears on the related issue of whether the Appellant has sufficient

- property within the jurisdiction to satisfy the Judgment of the High Court, and the likely Costs of this Appeal. In a case in the High Court in which Mr Kargbo was Counsel for the Defendants, and in which I gave Interlocutory Judgment in his favour, I explained the importance of both issues. In that case, *ALCON CONSTRUCTION ENTERPRISES v MR & MRS ABDALLAH* Interlocutory Judgment delivered 4 November, 2009 I said at paragraph 5: "*Order 23 of the English Supreme Court Rules, 1999 is in the same terms as our Order 26. The notes to Rule 3 of that Order at page 432 under the rubric "Foreign Plaintiff with property in England", state, inter alia, that "security for costs will not be required from a person permanently residing out of the jurisdiction, if he has substantial property, whether real or personal, within it.....but...the property must be of a fixed and permanent nature which can certainly be available for costs."* Several cases are cited by the Editors of that work in support of that proposition, including the case of *KERVOKIAN v GURNEY* [1937] 4 All ER 468, in which the subject matter was a Greek statue of considerable value. Here, the property involved is a house constructed by the Plaintiffs situate at Babadorie, Lumley. I should think that the house would be of considerably more value than the sum of Le56m+ plus interest claimed by the Plaintiff company, since that sum represents in the Plaintiffs estimation, quantum meruit for work done". In that case, there was no dispute as to who owned the house. The dispute was about whether the owners were indebted to the Plaintiff company for work done in building the house.
8. If the Appellant in this case has substantial assets within the jurisdiction, it would be fool-hardy of this Court to Order that he should provide security for costs. But, as has been made to appear to us by the documents filed by both sides, it would seem that the Appellant has no intention to satisfy any judgment which may be given against him, so long as he remains safely out of the jurisdiction, and out of the long reach of our Courts.
  - 9: Now, Mr Kargbo has rightly argued that the Appellant has complied fully with the requirements of Rule 14 of this Court's Rules, 1985: He has given security as determined by the Registrar. As such, his appeal cannot be dismissed pursuant to Rule 16(1). That Rule provides that: "*If the appellant has failed to comply with the requirements of rules 13(4) and*



14, the Registrar shall certify such facts to the Court, which may thereupon order that the appeal be dismissed with or without costs" Mr Kargbo argues further, that Rule 16(1) does not apply to Rule 15, under which Respondents have applied. Rule 15 provides that: "The Court, may, where necessary, require security for costs or for performance of the orders to be made on appeal, in addition to the sum determined under rule 14." Clearly, this means, additional powers are given to this Court, In Banc or In Curia, to Order an Appellant, in certain circumstances, to provide security over and above that determined by the Registrar. Express provision has not been made for the consequences of failure to comply with an Order made pursuant to Rule 15, as is the case with Rule 14, but that does not leave this Court powerless to ensure compliance with any Order it may make.

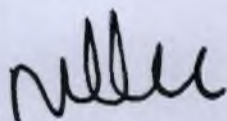
10. But let us first examine the circumstances in which an Order for Security for Costs could be made under Rule 15. I shall refer to the English Supreme Court Practice, 1999. At paragraph 59/10/32 under the rubric, Security for the costs of an appeal, the Learned Editors state: "Security for the costs of an appeal may be ordered where there are special circumstances which, in the opinion of the Court, render it just to order security, or on any statutory grounds..... The categories of special circumstances are not closed..... In deciding whether to award security for the costs of an appeal to the Court of Appeal, the Court takes into account the fact that the appellant has already had the issue concerned determined in the Court below, and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant any order for costs made by the Court of Appeal; but the Courts retain a discretion whether to award security and is not bound to do so in all cases where 'special circumstances' are established" At paragraph 59/10/35 it is stated: "It has long been the practice of the Court of Appeal to order provision of security where the appellant is resident abroad..... The rationale is undue delay or expense in enforcing the costs order abroad." These notes are of course based on the English Order 59 Rule 10(5) which provides that: "The Court of Appeal may, in special circumstances, order that such security be given for the costs of an appeal as may be

*just."* See also Order 3 Rule 11 Nigerian Court of Appeal Rules, 1981 as cited in NWADIALO's CIVIL PROCEDURE IN NIGERIA 2<sup>nd</sup> Edition (2000) where it is said at page 844: "*Additional security for Costs or otherwise may be required where necessary.*"

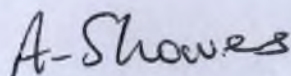
11. Here, we have an Appellant who has failed and, or, deliberately refused to comply with the Costs Order made by the Court below. Should we in justice, allow him to continue with litigation in this Court, notwithstanding that default? I should think not.
12. Rules 31 and 32 respectively of the Rules of this Court, confer general powers on this Court. The Court is empowered to make any interim Order. "*The Court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs'....*" We therefore, in my respectful opinion, have the means at hand to ensure that an Order made under Rule 15 is enforced, notwithstanding the absence of any express sanction for its defiance. An Order in the terms suggested in paragraph 59/10/42 of the White Book, 1999 might be appropriate. There, it is stated: "*The time provided for giving security is usually 28 days; it is also provided by the order that the appeal be stayed meanwhile and that in default of the appellant giving security within the time limited, the appeal do stand dismissed with costs without further order.*"
13. I find firstly, that the Appellant ordinarily resides out of the jurisdiction of our Courts. Secondly, that there is no evidence before this Court that he has assets, or sufficient assets within the jurisdiction, to satisfy any Order for Costs which may be made against him, in the event that he loses his appeal. The Respondents are thus entitled to Security for Costs in this Appeal. The Respondents are asking for a total sum of Le50,500,000. This sum is composed in the main, of Solicitors' and Counsel's fees in the event of the Respondents succeeding in this Court. Sitting here, I cannot say what the Taxing Master will allow on Taxation if the Respondents were to succeed in this appeal. But I do believe Le50,500,000 is rather on the high side. I think Le25million would be more appropriate in the circumstances.
14. In the premises, the Order of this Court is as follows: The Appellant shall provide security for the costs of his appeal in the sum of Le25million, the same to be secured by a Bank Guarantee provided or issued in the same



- amount by any reputable Bank in Sierra Leone, within 21 days of the date of this Order, inclusive of today's date. The appeal shall be stayed until the said Appellant has complied with this Order. If the Appellant fails to so comply with this Order, in exercise of the powers conferred on this Court by Rules 15, 31 and 32 of the Court of Appeal Rules, 1985, the appeal shall stand dismissed as of ~~13 December 2011~~ <sup>2012</sup>. The Costs of this Application, shall be Costs in the appeal. There shall be liberty to apply.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL



THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE A S FOFANAH, JUDGE OF THE HIGH COURT.

