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MISC APP. 2.2011

IN THE COURT OF APPEAL OF SIERRA LEONE
(CIVIL JURISDICTION)

BETWEEN: -

1. PELICAN MARINE COMPANY LTD -PLAINTIFFS/ RESPONDENTS
2. ANTHONY NWOKEKU
3. MOHAMED SERRY

AND

OLUSEGUN B. JAJI - DEFENDANT/APPLICANT

B. Macauley Jnr. Esq. for the3rd Plaintiff/Respondent
E. Pabs Garnon Esq. for the Defendant/Applicant

RULING DELIVERED THE 17th DAY OF June 2011

Counsel for the 3rd Plaintiff/Respondent, B. Macauley Jnr. has raised two objections to the hearing of an application filed by Notice of Motion dated 31st March 2011 on behalf of the Defendant/Applicant herein seeking, inter alia, leave to appeal against the interlocutory order of the High Court dated the 28th day of February 2011 to the Court of Appeal of Sierra Leone. He is opposed to the application being heard as he submits that it is not properly before the court.

Counsel for the 3rd Plaintiff/Respondent referred to the said application and submitted that an application for leave to appeal to the Court of Appeal can be made when there has been a refusal of such an application in the High Court. He relied on rules 10 and 64 of the Court of Appeal Rules, 1985 which he submitted when read together support his contention that there has been no application for leave to the higher court which has been refused.

He referred to his affidavit in opposition sworn to on 5th April 2011 and to exhibit "BMJ1" attached thereto which is a certified copy of the proceedings before the High Court on 28th March 2011. He submitted that a perusal of the proceedings discloses that the High Court Judge exercised her discretion in refusing to hear the Defendant/Applicant on his application for leave to appeal on the basis that the said Defendant/Applicant was in contempt of the court's order. He maintained that the court did not make any pronouncement on the merits or demerits of the application for leave to appeal nor did it say that it was refusing the application.

Counsel further drew the court's attention to the case cited in the Ruling by the learned High Court Judge, namely **Hadkinson v Hadkinson** {1952} where the Court of Appeal held that it could not hear the application as the Applicant was in contempt and when he had purged his contempt the court proceeded to hear the appeal. He urged that the court had applied that principle in this case and refused to hear the Applicant until the contempt is purged. He stressed that no pronouncement was made on the merits of the application. He submitted that in these circumstances, one cannot contend that there has been a refusal of the application for leave of appeal.

In response to these submissions counsel for the Defendant/Applicant, E. Pabs Garnon Esq. submitted that the fundamental issue now before the court is whether or not the Defendant was in contempt.

He went on to state that before the court can make any determination as to whether or not to hear the Defendant the court must firstly make a determination as to whether the Defendant was in contempt. He pointed out that the said issue was determined by the Judge without any inquiry and it was made after a direct question was put to counsel for the Defendant. He told the court that the question asked was whether or not Seacoach Boat Co. Ltd was operating on the premises of the 1st Plaintiff. To which question counsel answered in the affirmative and thereupon the Judge ruled that the 1st Defendant was in contempt. He submitted that Seacoach Boat Co. Ltd was not a party to these proceedings and that whatever actions are imputed upon Seacoach Boat Co. Ltd rightly or wrongly cannot under any circumstances be transposed to the Defendant. He maintained that Seacoach Boat Co. Ltd is a separate legal entity.

Counsel referred the court to Exh **"BMJ1"**, the Ruling of the Court and stated that it is clear on a perusal of the said Ruling that the substantive notice of motion before the court was never moved. He contended that bearing in mind that for all interlocutory appeals an application should be made to the court below and if that court refuses hearing the application, then the Applicant has the right to

apply before that court for a stay or for leave to appeal against the order of refusal but in this instance, the lower court has made a statement that it will not hear the application he submitted that effectively the refusal to hear the Applicant, amounts to a refusal of leave to appeal. He concluded that in effect the Applicant is left without recourse in the courts.

In answer, counsel for the 3rd Respondent submitted that the issue is whether refusal of the Judge in the lower court to hear the application amounts to a refusal within the meaning of Rule 64 of the Court of Appeal Rules, 1985. He went on to make a distinction between a case where the Judge hears the application and thereafter refuses it and another situation in which the Judge refuses to hear the application at all. He urged that in both these cases the provisions of Rule 64 would apply. He mentioned a third situation where the Judge refused to hear the application as a result of an objection being taken on the ground that the Applicant is in contempt of the court's order and the Judge rules that he cannot hear the application whilst the Applicant is in contempt. Counsel refused to Exh **"WNB"** attached to the affidavit in support herein where stated it is that the Judge will not hear the motion. He submitted that in this instance there has not been a refusal in accordance with rule 64 of the Court of Appeal Rules. He maintained that the court states that as long as the Applicant is in contempt, it will not hear the application. He urged the court to dismiss the application.

Having set out the submissions of counsel in this matter. Let me first of all say I do not agree with counsel for the Applicant when he concludes that the Applicant is left without recourse in the courts. The learned Judge in her Ruling made it clear that on the Defendant/Applicant's admission that they are operating their business in contravention of the injunction; the court will not hear the motion. There has therefore not been a refusal in this instance in accordance with rule 64 of the said Rules as canvassed by counsel for the 3rd Respondent. His submissions on the point are well grounded and I agree with them.

The court therefore cannot hear the application for leave to appeal to this court and it is hereby dismissed with cost assessed at $1,000 million

A-Showers

A. Showers

SIGNED: - A. SHOWERS

JUSTICE OF COURT OF APPEAL