MISC APP 1/2012

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:
MR KARIFA - APPLICANT
AND
INTERNATIONAL ASSOCIATED SERVICES (SL) LIMITED - RESPONDENT

COUNSEL:
CENTUS MACAULEY ESQ for the Applicant
L JENKINS-JOHNSTON ESQ for the Respondent

CORAM:
THE HON. MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL
THE HON. MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL
THE HON.MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 8th DAY OF MAY,2012.

1. This is an Application brought by the Applicant, Mr Karifa dated 19 March,2012. The Applicant applies for the following Orders: That Leave be granted to appeal against the Order of JOINER,J sitting in the Fast Track Commercial Court, (FTCC) dated 17 February,2012; that the Order made by JOINER,J on 17 February,2012 and all subsequent proceedings be stayed pending the hearing and determination of the Application, and, pending the hearing and determination of the appeal, if leave to appeal is granted; any further or other Order, and Costs.
2. The Application is supported by the affidavit of Mr Macauley deposed and sworn to on 19 March,2012. Exhibited to that affidavit are several documents;
   CM1 is a copy of the writ of summons issued on 7 June,2011.
   CM2 are copies of the memorandum and notice of appearance
   CM3 is a copy of the Judgment in default of defence in another matter in which the Respondent was Plaintiff. Mr Macauley claims this was the document served on his firm by the Respondent's Solicitors, but Mr Jenkins-Johnston demurs. However, during the course of the hearing the correct judgment in default was exhibited as "MSB2" to an affidavit

deposed and sworn to by Mr M S Bangura, Mr Macauley's partner in the firm of Applicant's Solicitors.

CM4 is a copy of an Application dated 25 October,2011 filed by the Applicant in the High Court.

CM5 is a copy of an Order of Court dated 17 February,2012 made by JOINER,J.

CM6 is a copy of an ex parte motion dated 26 January,2012 filed by the Applicant in the High Court

CM7 is a copy of an Application filed by the Applicant in the FTCC, dated 1 March,2012.

CM8 is a copy of a search fee receipt dated 1 March,2012 issued to Applicant's Solicitors.

CM9 is a copy of a letter dated 13 March,2012 written by Applicant's Solicitors to the Hon the Chief Justice.

CM10 is a copy of a letter dated 16 March,2012 written by the Deputy Master and Registrar of the FTCC to Applicant's Solicitors

CM11 is a copy of the drawn-up Order made by JOINER,J dated 12 March,2012.

CM12 is a copy of Applicant's proposed Defence and Counterclaim

CM13 is a copy of Applicant's proposed Notice and Grounds of Appeal.

3. To return to Mr Macauley's affidavit, I shall paraphrase the facts he deposes to. The writ of Summons herein was issued against the Applicant. Appearance was entered on his behalf, but no Defence was filed. judgment in default of defence was therefore entered against him on 23 September,2011. Negotiations were commenced for the purpose of settling the matter, but that notwithstanding, Respondent's Solicitors proceeded to enforce the judgment in default by Garnishee proceedings. On 17 February,2012 Mr D B Koroma and Mr L Jenkins-Johnston attended before JOINER,J in the FTCC and he made the following Order: Judgment in default of Defence dated 23 September,2011 is restored with immediate effect; this matter is adjourned to Friday the 24th February,2012 at 9.30am on which date Plaintiff/Applicant must ensure that all Garnishees mentioned in the Plaintiff' Applicant's ex parte Notice of Motion dated 20th October,2011 must complete giving their testimonies." This Order was made on the Applicant's Application dated 26 January,2012 exhibited as CM6. That Application had sought an

Order, among other things, for a stay of the judgment in default, and all other proceedings. Applicant's Solicitors then filed another Application dated 1 March,2012 in the FTCC, exhibit CM7. It was paid for as evidenced by the receipt exhibited as CM8. That Application sought Leave of JONER,J to appeal against his decision of 17 February,2012; and, for a stay of execution of the default judgment dated 23 September,2012.

4. Mr Macauley deposes that JOINER,J refused to give Applicant's Counsel audience on the ground that the Application did not disclose special circumstances warranting a hearing. Repeated attempts were made through the FTCC's Registrar, for JOINER,J to grant audience to Applicant's Solicitors, but to no avail. Applicant's Solicitors then addressed a letter to the Honourable the Chief Justice dated 13 March,2012 - exhibit CM9.
5. On 16 March,2012 Mr Mansaray, Deputy Master and Registrar, FTCC, addressed a letter to Applicant's Solicitors - exhibit CM10. It reads: "*We acknowledge receipt of your letter related to the above subject-matter dated 13th March,2012 addressed to the Honourable Chief Justice and copied to us. The Honourable Mr Justice St George Joiner of the Fast Track Commercial Court has instructed that we convey to you that the position of the Court has not changed. That your motion dated 1st March,2012 and all its attachments have not revealed the requisite special circumstances to warrant the hearing of your Application. As regards your letter dated 15th March,2012, please be informed that there is no matter before this Court that is intituled 215/2011 HUAWEI TECHNOLOGIES CO LTD VS COMIUM (SL) LTD AND ANOTHER.*" The difficulty with this method of dismissing an Application, is that it is not permitted by the Rules. The Commercial and Admiralty Court Rules,2009 - Constitutional Instrument No. 2 of 2010 governs procedure and practice in the FTCC. It states in Rule 4(1) that "*Unless otherwise provided in these Rules, the High Court Rules,2007 shall apply with the necessary modifications, adaptations and exceptions as are necessary to give effect to these Rules.*" No specific provision is made in these Rules for the hearing of Interlocutory Motions. It follows that such Motions should be dealt with in accordance with the High Court Rules,2007. We have not yet adopted the English practice of a "hearing on paper" . So, in effect,

JOINER,J had refused the Applicant's Application for leave to appeal against his own decision of 17 February,2012 without hearing Counsel.

6. Prior to this letter, on 12 March,2012 JOINER,J had heard Respondent's Counsel ex parte, on a Garnishee Application which he granted in the following terms: " *That the Defendant/Judgment Debtor.....appear before the Fast Track Commercial Court..... on Monday the 19th of March,2012 at 9.30am to answer questions as to what means he has to satisfy the balance of the Judgment debt owed to the Judgment Creditor herein.....That if the Defendant.... fails to appear before this Court as Ordered above he will suffer a penalty for holding this Court in contempt. The matter is adjourned to the 19th March,2012 at 9.30am...No Order as to Cost*"- exhibit CM11.
7. Mr Macauley deposes also that his client will continue to be embarrassed and prejudiced by the actions of JOINER,J, and that these actions have necessitated this Application. He deposes further that the Applicant has a good defence to the Respondent's claim, and also good grounds of appeal against the Order of JOINER,J dated 17 February,2012. The defence and Counterclaim, exhibit CM12 do have some merit, but that is not the main issue here. The main issue is whether there are good and sufficient grounds of appeal which may likely succeed in this Court, against the Order made by JOINER,J on 17 February,2012; and whether, having been refused a stay of execution by JOINER,J, this Court should grant the Applicant one.
8. The Application is opposed by the Respondent, and it has filed an affidavit in opposition deposed and sworn to by Mr Leon Jenkins-Johnston, a partner in the firm of its Solicitors, and also Counsel in Court, on 28 March,2012.
9. According to Mr Jenkins-Johnston, the Applicant was indebted to the Respondent in the respective sums of USD8,000 and Le7,660,000 for work done at the Applicant's resort, Shangrila. An invoice in both respective sums, dated 21 April,2010 is exhibited as "LJJ1". A letter before action dated 23 May,2011 - exhibit "LJJ2" was then addressed to the Applicant. When he failed to respond, the Respondent instituted the action herein, and judgment in default was obtained against the Applicant. on 23 September,2011. By letter dated 20 October,2011 - exhibit "LJJ3" the Applicant was informed of the judgment. It seems rather odd to me

that though judgment was obtained a month before on 23 September,2011, Respondent's Solicitors only informed Applicant of that judgment by letter dated 20 October,2011 demanding payment of the judgment debt the very next day 21 October,2011, a Friday, the end of the working week. Some practitioners have developed this sort of practice as a way of stampeding an unsuccessful litigant into complying with the judgment of the Court, without seeking any relief from the Court on pain of execution being levied against him. Mr Jenkins-Johnston did not, while addressing us, explain why it took him one month to notify the Applicant. Perhaps, he did not do so because there was none, other than the possible explanation I have suggested above.

10. To support my apprehension that Mr Jenkins-Johnston's intention was to stampede the Applicant into paying upfront, there is the affidavit supporting a Garnishee Application brought by the Respondent, exhibited to Mr Jenkins-Johnston's affidavit as "LJJ4". It was deposed and sworn to the very day the letter was written, 20 October,2011 by Mr Musa Sharaffdeen, the proprietor of the Respondent company. It appears that the Respondent and his Solicitors and his Counsel, were not really interested in the justice of the Respondent's case, but to embarrass and to coral the Applicant into paying the judgment debt without any opportunity to seek redress in our Courts. At this stage, Mr Jenkins-Johnston felt quite comfortable to enter into negotiations with the Applicant as recorded by him in paragraph 9 of his affidavit. He had a gun to the head of the Applicant: the Garnishee Application. The letter he has exhibited as "LJJ5 page 1" was only written on 8 February,2012 long after the Garnishee proceedings had been launched.
11. In paragraph 10 of his affidavit, Mr Jenkins-Johnston deposes "*that contrary to the allegations in paragraphs 6,7, and 8 of the affidavit of Centus Macauley, it was the Court which wrote to us on the 13th of February 2012 inviting us to Court. A copy of the letter from the Court is exhibited hereto and marked "LJJ6" and our response "LJJ7.*" LLJ6 is dated 13 February,2012 and is quite telling. It was not even copied to Applicant's Solicitors, even though its contents dealt with an Application which had been made by them. Mr Mansaray is there saying that because a Motion has been struck out by one Judge, it cannot be heard by another Judge. Obviously, he does not know the difference between striking out a

motion, and dismissing one. The Motion he was of course referring to, was that dated 26 January,2012 - exhibit CM6. Whether or not the Costs ordered by SOLOMON,JA to be paid, had actually been paid, was no busy of the Deputy Master and Registrar; that was a matter for Respondent's Solicitors. They would know the means of enforcing the Costs Order. So, Mr Mansaray ended up by inviting Messrs Jenkins-Johnston & Co to go to Court and enforce the default judgment on a date of their choosing. Respondent's Solicitors kindly obliged with the request, by letter doted 15 February,2012 - exhibit "LJJ7" fixing the date of hearing for another Friday, the end of the week, 17 February,2012. It was not copied to Applicant's Solicitors. At that time, Applicant's Solicitors had already addressed a letter to the Chief Justice - exhibit CM9, complaining about all that had transpired. That letter to should have been copied to Respondent's Solicitors as it concerned litigation in which they were involved. Solicitors should now realise that by virtue of their own disciplinary rules, they cannot address correspondence to the Court concerning litigation pending in that Court, without copying Solicitors on the opposite side. Naturally, Respondent's Solicitors complained about this omission in their response addressed to the Chief Justice dated 19 March,2012 - exhibit "LJJ8,9&10" and in paragraph 13 of Mr Jenkins-Johnston's affidavit.

12. The effect of exhibit "LJJ6" dated 13 February,2012, is that unwittingly, Mr Mansaray had communicated to Respondent's Solicitors, the very conclusion which JOINER,J would reach in Court in the presence of both Messrs Jenkins-Johnston on 17 February,2012 - exhibit CM5. How it is that the Deputy Master and Registrar knew 4 days before what a Trial Judge would decide on 17 February,2012 has not been explained by Mr Jenkins-Johnston. The only Application which was before JOINER,J on 17 February,2012 was the Applicant's Application dated 26 January,2012 - see LJJ6 Mr Mansaray's letter addressed to Respondent's Solicitors only, paragraph 1 - "*I have been directed to inform you that the above matter in which you are on record as represented (sic) the Plaintiff has been assigned to the Honourable Justice St George Joiner of the Fast Track Court.*" Later, Mr Mansaray says, "*This state of affairs is considered unacceptable and the Judge has directed that you might wish*

to come to Court for enforcement of the Judgment dated 23rd September,2011..... "

13. My last comment on the 17 February,2012 decision of JOINER,J is that it says in paragraph 1: " *That the Judgment in Default of Defence dated 23rd September,2011 is restored with immediate effect.*" Does this mean it had been held in abeyance, or had been set aside. If the latter were the case, our jurisdiction does not recognise restoration of a judgment which has been set aside. If a judgment is set aside on terms, it stands until the terms are fulfilled; so it need not be restored. Nor does our jurisdiction recognise holding a judgment in abeyance, ex parte.

14. My view is that JOINER,J should have heard arguments on the Applicant's Motion dated 26 January,2012, notwithstanding the earlier motion asking for the same reliefs which had been struck out by SOLOMON,JA. He did not do this; nor did he hear Counsel on an Application for Leave to appeal against the Order he made on 17 February,2012. The Justice of the case demands that such leave be granted now, and that all proceedings in the High Court, be they Garnishee proceedings or other forms of execution, be stayed until the hearing and determination of the appeal to be filed by the Applicant. We cannot stay all subsequent proceedings, because such an Order will apply to proceedings in this Court, and that would prevent us from making the Orders we now make.

15. We therefore make the following Orders:

i. This Honourable Court grants Leave to the Applicant herein to appeal against the Order made by JOINER,J in the Fast Track Commercial Court Division of the High Court on 17 February,2012. This Appeal shall be filed within 7 days of the date of this Order.

ii. The Applicant shall ensure that the Record is settled within 14 days of the date of this Order, and that the same is forwarded to the Honourable the Chief Justice not later than 21 days after the date of this Order, for the purpose of fixing a Panel to hear the Appeal.

iii. This Honourable Court Orders a Stay of execution of the Judgment in Default of Defence dated 23 September,2011. Consequently, the Garnishee Order Nisi is lifted or set aside.

iv. As to Costs, each party shall his and its own Costs, as the Respondent has been as much to blame as the Court below, for the proceedings in this Court.

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

THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

I agree

THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL