

CIV.APP 4/2013

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: - DESMOND DAVIES -APPELLANT

AND

MARCELLA DAVIES - RESPONDENT
(Suing by her Attorney
ROLAND NYLANDER)

CORAM

HON. JUSTICE A. SHOWERS, J.A.
HON. JUSTICE V. M. SOLOMON, J.A.
HON. JUSTICE N.F. MATTURI-JONES, J.A.

Advocates

G. K. Tholley Esq. for the Appellant
S. K. Koroma Esq. for Respondent

RULING DELIVERED THE 2nd DAY OF July 2013

SHOWERS, J. A:

S. K. Koroma Esq. of counsel for the Respondent has raised a preliminary objection to the hearing of the appeal filed on behalf of the Appellant herein. His grounds of objection are as follows

1. That the decision of the High Court which has been appealed against is an interlocutory decision and leave of either the High Court or of the Court of Appeal must be sought before the appeal to the Court of Appeal can be filed.

2. That the decision can only be appealed against within 14 days of its delivery by the High Court whereas the present appeal was filed after 14 days have elapsed.
3. That no leave for an extension of time within which to appeal was obtained by the Appellant before filing the said Appeal.

Counsel for the Respondent referred the court to the Order of Court against which the appeal is filed and submitted that it ordered that the defence filed in the matter be struck out as it discloses no reasonable defence. Judgment was accordingly entered in favour of the Plaintiff. Counsel submitted that the said Order was an interlocutory Order and not a final Order in which case leave of the court making the Order ought to have been obtained. He relied on the notes found in the **Supreme Court Practice 1999** as well as the following cases: **Hunt vs. Allied Bakeries Ltd {1956} 3 All E. R. 512**; **In re Page, Hill vs. Fladgate {1910} 1 Ch. 489** and the local 2009 Court of Appeal case of **Jihad Basma vs. Milford Chuku John**.

Counsel further relied on the notes in the **Supreme Court Practice 1999** under Order 59 rule 1 (a) which state inter alia that all orders striking out or refusing to strike out pleadings in whole or in part are interlocutory. He contended that leave of the court was not sought before the notice of appeal was filed and further argued that it was a mandatory provision. Consequently he urged the court to strike out the appeal.

Counsel for the Respondent also pointed out that the appeal was not filed within the period of 14 days prescribed by Rule 10 (i) of the Court of Appeal Rules 1985 as amended. Further that there is no evidence that an extension of time was granted the Appellant to enable him to file his appeal out of time. For all these reasons he prayed the court to strike out the appeal with costs.

In response to these submissions, counsel for the Appellant contended that an order striking out a defence is a final order as the Defendant has no other option but to appeal against such an Order, unlike the case where the Plaintiff is at liberty to institute a fresh action if his statement of claim is struck out. Counsel relied on the case of **Salaman vs. Warner** {1891} 1 Q. B. 735 where it was held that the question whether an Order is final or not depends on what would be the consequences of the decision of the court.

He submitted that the learned Judge in the Ruling of the High Court examined the merits of the case before coming to his conclusion and in such a case his decision cannot be said to be interlocutory but final. He urged the court to overrule the objection.

We believe that this issue of whether an Order is interlocutory or final has been discussed in a number of cases both locally and internationally. Counsel for the Appellant has relied on the case of **Salaman vs. Warner** (supra).

In that case "final order" is defined as "one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation."

In the case **Hunt vs. Allied Bakeries Ltd** (supra) it was held that as a general rule, an order for striking out a statement of claim whether on the ground that it disclosed no reasonable cause of action or was frivolous and vexatious or both was an interlocutory Order for which leave to appeal was required.

We are of the view that the same principle applies to the case where the defence is struck out for lacking merit. We derive authority for this principle from the cases cited as well as the notes found in the **Supreme Court Practice 1999** relied upon by counsel for the Respondent. The notes in paragraph 59/A/16 at page 1016 of the said **Supreme Court Practice 1999** clearly state as follows

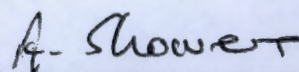
"The grant or refusal of an application to strike out an action or any other proceedings, or to strike out any pleading in whole or in part is interlocutory whether the application is made under O.18 r. 19 or under the inherent jurisdiction of the court".

Order 18 r. 19 referred to above is the equivalent of our Order 21 rule 17 which provides for striking out pleadings and indorsements.

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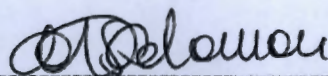
In the light of the foregoing the Appellant is required to seek the leave of the court before filing his notice of appeal. His failure to do so is therefore a fatal flaw in the proceedings.

Furthermore the appeal is out of time. The objection raised is therefore upheld. The appeal is accordingly struck out with costs to the Respondent.



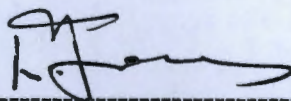
HON. JUSTICE A. SHOWERS, J. A.

I AGREE



HON. JUSTICE V. M. SOLOMON, J. A.

I AGREE



HON. JUSTICE N. F. MATTURI-JONES, J.A.