

Civ. App. 20/2010

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

**BETWEEN:**

**LAROSE GAYE - PLAINTIFFS**  
**3 VINCENT DRIVE**  
**OFF WILKINSON ROAD**  
**FREETOWN**

**AND**

**SIERRA LEONE PORTS AUTHORITY - DEFENDANT**  
**QUEEN ELIZABETH QUAY**  
**CLINE TOWN**  
**FREETOWN**

**CORAM**

**HON. JUSTICE P.O. HAMILTON - J.S.C**  
**HON. JUSTICE E.E. ROBERTS - J.A.**  
**HON. JUSTICE V.M. SOLOMON - J.A.**

**SOLICITORS**

**L.B. JENKINS JOHNSTON ESQ. FOR APPELLANTS**

**A.S. SESAY ESQ. FOR RESPONDENTS**

**JUDGMENT DELIVERED ON THIS 13<sup>th</sup> DAY OF November, 2013**

**HON. JUSTICE P.O. HAMILTON**

This is an Appeal and a cross Appeal against the judgment of the High Court delivered by the Hon. Justice A. Showers J.A. delivered on the 16<sup>th</sup> April, 2010.

A brief background of the Appeal could be given as follows:

The Plaintiff (hereinafter referred to as the Respondent/Cross Appellant) entered into a contract with the 1<sup>st</sup> Defendant and Managing Director of the 2<sup>nd</sup> Defendant Company (hereinafter referred to as the Appellant/Cross Respondents) for the purchase of a Ten Tonne Leyland Tipper Truck. The contract was not in writing but was evidenced by a proforma invoice dated 16<sup>th</sup> September, 2002. The agreed price was US\$95,000 (Ninety Five Thousand Dollars) of which 50% was paid by the Respondents to the Appellant. Delivery was to have been between 14 to 16 weeks but it was delayed for two years from the date the contract was entered into.

After a lengthy discussion with the General Manager an alternative DAF Tipper Truck was supplied which was a used and old one. The truck was received by one Mr. Demby of Sierra Leone Ports Authority (S.L.P.A.) on behalf of the Respondent/Cross Appellant herein. After keeping the vehicle for ten (10) months it was then sold by auction at the S.L.P.A. Quay. Since the Truck did not meet the specification it was decided to renegotiate the price but it did not go through and the Appellant's Solicitor demand of the balance of US\$47,500 (Forty Seven Thousand Five Hundred Dollars) which the Respondent refused to pay. Judgment was given in favour of the Appellant for the payment of 50% of the balance claimed amounting to US\$23,750 (Twenty Three Thousand Seven Hundred and Fifty Dollars) with interest at 10% per annum from February, 2005 until payment.

It is against this judgment that the Appellants have appealed and the Respondents have Crossed Appeal.

The Grounds of Appeal of the Appellants are as follows:

- 1. That the LTJ having found in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in a matter which lasted for 3 years and 2 months was wrong and exceeding by unreasonable to hold that "Each Party to bear its own Costs".*

2. *That the Decision and the reasoning of the Learned Trial Judge when having found in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, she decided to reduce the amount claimed INTO HALF, was arbitrary, unfounded and unsupported, to wit:*

*“There is also evidence that the Defendant conceded that the Vehicle supplied was not brand new and was prepared to accept a reduction in price, which offer the Plaintiffs were prepared to entertain and did not reject. [See Exh. “C”, the letter from the Defendant and Exh. “D” the Plaintiff’s response to his said letter]. This issue cannot in the circumstances of this case be ignored as it indicates that this condition in the contract regarding the supply of brand new vehicle was waived by the Plaintiffs. It is rather unfortunate that this issue of reduction in price was not concluded by the parties. It is also quite unfortunate that the vehicle is no longer available for a proper valuation to be done. Be it as it may, I do not believe it would be equitable for the Plaintiffs to pay the full price to the Defendant who has himself offered to take a reduction in price. I shall therefore in the circumstances allow the Defendant 50% of the balance claimed amounting to US\$23, 750 (Twenty Three Thousand Seven Hundred and Fifty Dollars) .....*”

The grounds of Appeal in the Cross/Appeal are as follows:

- i. *That the learned trial judge was wrong in fact and in law and therefore misdirected herself in arriving at the decision when she held that property in the goods have been passed to the Appellant as stated in page 12 to wit:*

*There is evidence that the bill of lading and all the documents and specification appertaining to the said vehicle on its arrival at the Freetown port.*

*ii. That the learned judge erred in law and fact when she held that the intention of the parties was for property to pass when the plaintiff cleared it from the port.*

*iii. That the learned trial judge erred in law and fact when she held that:*

*In the circumstances of the case the plaintiff after taking delivery of the said vehicle failed to reject it and return the documents of title within reasonable time as the period of two months after taking delivery cannot in anyway be described as reasonable.*

*iv. That the learned trial judge erred in law and fact when she held that the Appellant acted in a way inconsistent with the respondent's right by allowing the said vehicle to be listed down for auction when the property in the vehicle has passed to the Appellant.*

The main issue for determination in this Appeal is whether the LTJ having found in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was correct to reduce the judgment amount by half.

Counsel for the Appellants in his synopsis submitted that the LTJ was not in a position to determined that there should be a reduction since she did conclude that the discussion that should have formed the basis of a renegotiation was never concluded.

Counsel further submitted that since the Respondents had allowed the vehicle which is the subject matter to be auctioned off deprived the LTJ the opportunity to examine the vehicle or for it to be valued to enable her reach a just and equitable conclusion.

The LTJ at Page 195 of the record said:

*"The Defendant has therefore proved his counterclaim on a balance of probabilities that he is entitled to recover some payment from the Plaintiffs. The question is whether he is entitled to recover full 50% payment for the vehicle under the contract. There is evidence that the contract price of the vehicle is US\$95,000 50% of which price has already been paid the Defendant. There is also evidence that the Defendant conceded that the vehicle supplied was not brand new and was prepared to accept a reduction in price, which offer the Plaintiffs were prepared to entertain and did not reject. See Exh. "C" the letter from the Defendant and Exh. "D" the Plaintiffs response to the said letter. This issue cannot in the circumstances of this case be ignored as it indicates that this condition in the contract regarding the supply of a brand new vehicle was waived by the Plaintiffs. It is rather unfortunate that this issue of reduction in price was not concluded by the parties. It is quite unfortunate that the vehicle is no longer available for a proper valuation to be done. Be it as it may, I do not believe it would be equitable for the Plaintiffs to pay the full price to the Defendant who has himself offered to take a reduction in the price. I shall therefore in the circumstance allow the Defendant 50% of the balance claimed amounting to US\$23,750".*

Reading through the records and the entire evidence there is no evidence on what basis the LTJ relied to reach the 50% of the balance claimed by the Appellants which amounted to US\$23,750. In my humble opinion there was no evidence led nor was there anything to show the basis of the calculation. The LTJ in her own judgment at Page 195 of the records did admit that the issue of a reduction of price was never concluded when she said:

*“It is rather unfortunate that the issue of reduction in price was not concluded by the parties. It is also quite unfortunate that the vehicle is no longer available for a proper valuation to be done .....*”

In my humble opinion therefore the deduction by the LTJ was not necessary and she ought not to have reached such a conclusion.

There was an issue raised by the Appellant in his Appeal which ought to be considered by this Court and that is the refusal of the LTJ to award costs to the successful Defendant/Appellant considering the length of the trial and the several adjournments at the instance of the Plaintiff/Respondent. It is well settled that an intermediate appellate Court such as the Court of Appeal is duty bound to consider all the issues that are properly raised before it.

Counsel for the Appellant on this issue of cost cited Rules 9(1), 31 and also Rule 32 of the Court of Appeal Rules 1985 (P.N. No.29 06 1985) which gives this Court the 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 an order as to costs .....

 (Emphasis mine)

Normally cost follow the event which simply means that success in litigation is followed by the assessment and award of cost – see Masco Star v. Richard S.A. and Another Civ App 6/2000 unreported. However, cost is at the discretion of the Judge. The assessment and award of cost is at the discretion of the Court or Judge but that discretion must be exercised judiciously. It means that such award must be reasonable and appropriate to the circumstances of the case. Cost should not be refused to a successful party except for reasons not connected to the case – see: Campbell & Co. v. Polloe (1927) A.C. 732.

The issue of cost in this case ought to be considered taking into consideration the length of time involved in this trial, the resources used in the matter together with the expenses involved. These are issues for which cost must follow the event and must be awarded to the successful party. Cost therefore ought to have been awarded to the Appellant herein in this Court and the Court below.

**THE CROSS APPEAL**

The Cross Appeal is based on four grounds which grounds in its totality raises only one issue and that is whether the goods (the vehicle) had already passed on to the Cross Appellant.

It must be noted that a Cross Appeal is a distinct and independent appeal and whatever be the fate of the main appeal, may not (not does not) affect the cross appeal. This is because not only does Rule 9(1) of the Court of Appeal Rules 1985 (Public Notice No.29 of 1985) provides as follows:

*“All appeals shall be by way of re-hearing and shall be brought by notice (in these Rules called “the notice of appeal”).....”*

It is settled that a Cross Appeal, is akin to a Counter-claim and to be valid a competent notice of appeal must be filed. This is why that where a party is seeking to set aside a finding which is crucial and fundamental to a case, as in this instant case, he can only do so through a substantive cross appeal. This is because the effect of the cross-appeal, is to call for the reversal of the decision and that the error is so crucial and fundamental. The entire grounds of appeal in this cross appeal as stated earlier raises one issue which is whether the goods (the said vehicle) had passed to the cross appellant or not.

Counsel for the cross appellant submitted that the property in the goods had not passed as at the time the Cross Appellant registered his rejection of the vehicle in April 2005 since the terms of the contract must state the specific time in which the property must pass.

Counsel for the Cross Respondent submitted that the property in the goods had passed to the Cross Appellant who took delivery and failed to reject it by returning it and the documents within a reasonable period of two months.

*Section 19(1) and (2) of the Sale of Goods Act Cap 225 provides:*

*"Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

*(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case".*



In my humble opinion since the terms of the contract in this case did not expressly state the specific time in which the goods must pass the conduct of the parties and the circumstances of the case must be taken into consideration.

The LTJ at Page 193 of the records said:

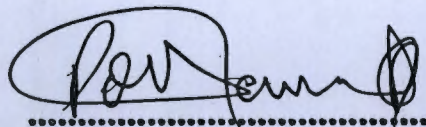
*“From the conduct of the parties and the circumstances of this case it seems to me that the intention of the parties was for property to pass when the Plaintiffs cleared it from the Port. They had all the documents pertaining to the vehicle with them and must have known that the documents were in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and yet they were prepared to take necessary and yet they were prepared to take necessary steps to clear the vehicle and take possession of it. Furthermore even when they purported to reject the vehicle they kept back the documents of title instead of returning them to the Defendants which would have enable them to take possession of it and thereby mitigate their loss”.*

The LTJ went on at Page 194 of the records and stated:

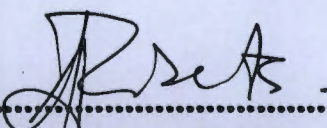
*“In addition if they were of the view that they had rejected the vehicle they ought to have taken due care of it and avoided the possibility of it being included in the list of goods that were to be auctioned off. I agree with the Defendant that the property in the vehicle has passed to the Plaintiffs and by their conduct in allowing the said vehicle to be auctioned off did an act inconsistent with the Defendant's right to the said vehicle”.*

I entirely agree with this reasoning of the LTJ in this regard.

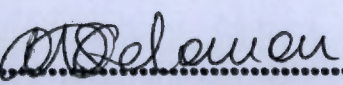
In the final result or analysis and for the reasons stated above the appeal has merits and therefore succeeds. I so hold. The Cross Appeal is without substance and merit I accordingly dismiss it with cost in this Court and the Court below such cost to be taxed.



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**HON. JUSTICE P.O. HAMILTON - J.S.C.**

I AGREE:  .....

**HON. JUSTICE E.E. ROBERTS - J.A.**

I AGREE:  .....

**HON. JUSTICE V.M. SOLOMON - J.A.**