CIV APP 24/2008

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

WURIE BARRIE - APPELLANT

AND

ALHAJI DURAMANI BANGURA - RSPONDENT

COUNSEL:
E E C SHEARS-MOSES ESQ for the Appellant
J B JENKINS-JOHNSTON ESQ for the Respondent

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE S A ADEMOSU, JUSTICE OF APPEAL (Now deceased)

Judgment delivered on 16th April, 2015

THE APPEAL

1. This is an appeal brought by the Appellant by way of Notice of Appeal filed on 2 May,2008 against the Judgment/Ruling of TAYLOR,J dated 24th January,2008. The Grounds of Appeal, with slight amendments so that they make some sense, are as follows:
   (1) The Learned Trial Judge denied herself the opportunity of hearing the entire evidence and (of) deciding the case on its merits
   (2) The Learned Trial Judge erred in failing to consider that the Defendant was denied the opportunity of being heard by the entry of a judgment in default of defence.
   (3) The Learned Trial Judge ignored the affidavit showing that the Appellant had a defence.
   (4) The Learned Trial Judge was wrong to hold that the Defendant had delayed applying to set aside the Judgment in default of a defence, ignoring the steps he immediately took when he knew of a judgment against him. He took steps to set it aside.

(5) The Learned Trial Judge failed to consider the several adjournments and delays occasioned by the Respondent's Solicitor causing the Appellant to ask for a change of venue of trial which also led to a delay.

(6) The Learned Trial Judge failed to evaluate the evidence, by way of affidavit, before the court.

2. The reliefs sought from this Court are as follows:

(1) That the ruling be set aside and one in favour of the Appellant be substituted therefor.

(2) That the Appellant be granted leave to file a defence out of time and defend the action.

(3) That all subsequent proceedings consequent upon the judgment in default of defence be set aside.

(4) That the parties return to the status quo when a writ of summons was issued.

(5) That the Respondent bears the Costs of this Appeal.

FACTS OF THE CASE

3. The facts of the case are as follows and are to be found at pages 1 -4 of the Record. Henceforth, reference to page numbers in this Judgment shall be references to pages in the Record. The Respondent was and is the leasehold owner of property at 43 Mahei Boima Road, Bo. He agreed to Sub-Lease it to the Appellant in 2002 on the basis that Appellant would erect a temporary structure on it. The Appellant, on the contrary, erected a permanent structure on the land, and the Respondent terminated the sub-lease for this reason. Thereafter, after the intervention of third parties, the Respondent agreed to sub-lease the property again to the Appellant for a period of 10 years commencing 1 March,2002. A deed was prepared to this effect by the Appellant's Solicitor. After the same had been prepared, the Appellant refused to sign it, but continued to occupy the property. By letter dated 20 July,2005 the Appellant was given notice to quit the premises, but he refused to do so. The Respondent then instituted action against him, in the High Court, Freetown, for recovery of possession of the property, an Injunction, Mesne profits and Costs, by way of writ of summons issued on 2 August,2005. On 21 September,2005 the Appellant entered appearance to the writ in Freetown, and gave Notice of the same to Respondent's Solicitor in Kenema, that same day - pages 6 & 7.

4. On 19 October,2005 Mr Abdulai M Bangura, then Solicitor for the Respondent, deposed and swore to an affidavit of search – page 8. In his affidavit, he deposed that he had searched the file in the District Registry, Bo, and had found out that the Appellant had not filed a defence to the Respondent's claim.

RESPONDENT'S APPLICATION FOR LEAVE TO ISSE WRIT OF POSSESSION

5. By Notice of Motion dated 11 November,2005, the Respondent applied to the High Court in Bo for liberty to issue a writ of possession against the Appellant pursuant to a Judgment in default dated 19 October,2005 - pages 10 -13. That Application was supported by the affidavit of Mr Bangurah, deposed and sworn to the same day. Exhibited to the affidavit are: a copy of the affidavit of service of the writ of summons; a copy of the default judgment dated 19 October,2005 signed by the Registrar, High Court, Bo; and a copy of a letter dated 20 October,2005 addressed to the Appellant by Mr Bangurah, forwarding therewith, a copy of the default judgment, and demanding compliance with its terms. In paragraph 4 of his affidavit, Mr Bangurah refers to an affidavit of service of the letter, supposedly exhibited thereto as "AMB4" but it has not been included in the Record. That Application was heard by TUNIS,J on 25 November,2005 in the presence of Mr Nabie, Appellant's then Counsel - pages 220 – 226. The Learned Judge granted the Orders prayed for by the Respondent. A praecipe for a writ of fieri facias was filed on 2 December,2005 by Mr Bangurah, and directed to the Master's Office in Freetown.

APPELLANT BECOMES AWARE OF DEFAULT JUDGMENT

6. So, as of 25 November,2005, the Appellant was aware, through his then Solicitor and Counsel, of the default Judgment. 12 days later, i.e. 7th December,2005, he made his first application to the Court for that Judgment to be set aside. 12 days can in no wise constitute delay. That the Application took several twists and turns, and metamorphosed into a later application filed 2 years later, we have found out, was not the fault of the Appellant. The Court's processes, and the manner in which TUNIS,J and the first Counsel for the Respondent treated the separate applications may perhaps be responsible in different measures, for the inordinate delay in bringing the whole episode to a speedy conclusion. This

initial assessment is directed in particular at the point made by Mr Jenkins-Johnston at pages 1-2 of his synopsis, that there was undue delay on the part of the Appellant. The 2007 Application was not the first one made by the Appellant.

APPELLANT'S 1ST APPLICATION TO SET ASIDE DEFAULT JUDGMENT

7. By Notice of Motion dated 7 December,2005, Appellant applied to the High Court sitting in Bo for, inter alia, leave to file a defence out of time, and for a stay of execution of the default judgment - pages 16 - 29. The Appellant deposed and swore to an affidavit in support of the Application - pages 18 & 19. In short, the Appellant deposed that he was unaware of the default judgment. A proposed defence was exhibited - page 29. The Application came up before TUNIS,J for hearing on 12 December,2005 - pages 226 -228. Objection was taken by Mr Bangurah to the hearing of the Motion on the ground that its supporting affidavit was unsigned by the Deponent, the Appellant herein. It appears at page 228 that TUNIS,J did not allow the Motion to be moved because there was no affidavit of service. She awarded Costs in the sum of Le250,000.

FURTHER APPLICATIONS MADE BY APPELLANT

8. Several other Applications were filed by the Appellant, trying to get the Default Judgment set aside, but none of them were successful. They were heard by TUNIS,J. There were also several changes of Solicitors on the part of the Appellant, until the current Solicitors, Shears-Moses & Co were appointed by him on 31st January,2008. Respondent also changed Solicitors and appointed Mr Amadu Koroma in place of Mr Bangura.

APPELLANT'S APPLICATION DATED 17TH MARCH,2006

9. A Notice of Motion dated 17 March,2006 filed by the Appellant was heard by TUNIS,J. She reserved Ruling on this Application on 3 July,2006 - page 261. It appears that she did not deliver a Ruling as the date mentioned was the last occasion on which the matter came up before her.

APPELLANT'S APPLICATION DATED 11 OCTOBER,2007

10. Finally, the Appellant, through his then Solicitor, Mr A J M King, filed a Notice of Motion dated 11 October,2007. It is the Ruling on this

Application by TAYLOR,J which forms the subject matter of this appeal. At this point in time, the High Court Rules,2007 had come into force.

11. The Notice of Motion and the affidavit in support thereof, together with the documents exhibited thereto, are to be found at pages 126 – 154. The Application was for the following Orders: That a stay of execution of the Judgment in default dated 19 October,2005 be granted; that the judgment in default which was a final judgment, or, purported to be a final judgment, be set aside for irregularity: final judgment was entered for mesne profits, an unliquidated demand which ought to have been assessed by the Court; an Injunction was Ordered in the default Judgment instead of the claim for the same being set down for trial or, on a motion for judgment, it being an equitable remedy. Alternatively, the Appellant prayed that the default Judgment be set aside on the ground that he had a good defence on the merits, to the Respondent's claim, and that he be allowed to file such a defence out of time. The Appellant also asked to be restored to possession of the premises he had built at 43 Mahei Boima Road, Bo, as he had been evicted from the same by Bailiffs from the Under-Sheriff's office, and that his personal property taken in execution by the Bailiffs, be returned to him. The reasons for making the Application are to be found in his affidavit at pages 128 – 131. The proposed defence and counterclaim is at pages 149 – 150.
12. The Application first came up for hearing before TAYLOR,J on 18 October,2007. Mr King's arguments in favour of the granting of the Application are at pages 263 -265. The Respondent was absent at that hearing. When the matter came up for hearing again on 14 November,2007, Mr Amadu Koroma, Counsel for the Respondent took an objection to this motion being heard - page 266. He said Ruling on the earlier motion of 17 March,2006 was still pending, and that the Court should not entertain two motions praying for the same reliefs. He asked that the Motion of 11 October be struck out. The objection was overruled by TAYLOR, J on 20 November,2007 – page 268.

RESPONDENT'S AFFIDAVIT IN OPPOSITION

13. The Respondent filed an affidavit in opposition deposed and sworn to by him on 23 November,2007 and it is to be found together with the documents exhibited to it, at pages 164 – 201. Essentially, the Respondent's arguments were that the Appellant's application had come too late in the day, as execution had been levied, and that the Appellant

had himself instituted an action against the Respondent in respect of the same property. Further, the Appellant had no valid defence to the Respondent's claim. The action instituted by the Appellant amounted to an abuse of process. The Appellant's remedy lay in an appeal to this Court only. The Appellant filed an affidavit in reply deposed and sworn to by him on 29 November,2007 – pages 202 & 203. Mr. King was allowed to argue in reply – pages 271 & 272.

TAYLOR, J'S RULING OF 24 JANUARY,2008

14. Ruling was delivered by TAYLOR,J on 24 Janaury,2008 at page 274. This is what she had to say: "*I have considered the arguments advanced by both counsel and refuse the application on the following grounds: (1) That the defendant/applicant has delayed in seeking the orders prayed for in the notice of motion as he has not come within a reasonable time; (2) That during the period of delay the plaintiff/respondent has acted on the judgment and third parties have acquired rights in respect of the subject matter of this action; (3) That since the judgment the defendant/applicant has taken a fresh action c.c. 4/05 (S) 2005 B No. 1 against the plaintiff/respondent in respect of the same subject-matter in the High Court ,Bo. No order as to costs.*" No authorities were cited by the Learned Judge to support the conclusion she had reached, even though some of the relevant ones were cited to her by Counsel for the Appellant.

AUTHORITIES NOT CITED AND CITED

15. Neither Counsel cited, nor did the Court refer to the leading Court of Appeal case of J T CHANRAI v PALMER [1970-71] ALR SL, 391. However, to his credit, Mr Jenkins-Johnston, who appeared for the Respondent in this appeal, has cited relevant case law: Civ App 22/2007 -DR RAYMOND KAMARA v MRS VIRGINIA AYO DAVIES, Judgment of BASH-TAQI, JSC and the English Court of Appeal's decision in ALPINE BULK TRANSPORT CO IVS v SAUDI EAGLE SHIPPING CO. LTD [THE SAUDI EAGLE] [1986] 2 Lloyd's Rep. 221 at 223, C.A. Surprisingly, Counsel for the Appellant has not really done the same. The authorities cited by him, with the greatest respect to him, have been superseded by more recent authority.

J T CHANRAI LTD v PALMER

16. In J T CHANRAI v PALMER, LUKE, JSC made it clear that where a case had not been ~~had~~ heard on its merits, a judgment obtained in default could be set aside. That was a case in which judgment was entered against the appellant company because it had failed to appear by Counsel at the trial. The Respondent's Solicitor went on to present the case for the Plaintiff. Judgment was given in favour of the Respondent at the end of the evidence of the only witness other than himself. The reasoning of LUKE, JSC applies with greater force, in our view, in a case such as this one where judgment in default was not entered after hearing the evidence of the plaintiff in Court, but by merely applying to the Master and Registrar to sign judgment in default. This was the first issue the Learned Judge should have taken into consideration, but from the brevity of her Ruling, set out in extenso, supra, it is clear that she did not do so.

RICHARD ZACHARIAH v MOROWAH

17. See also Misc Appl 12/87 - RICHARD ZACHARIAH v MOROWAH, C.A where GELAGA-KING, JA in delivering the judgment of the Court had this to say at page 3 of the printed judgment: "... *The Law as I understand it is that the discretionary power of a judge to set aside a default judgment is unconditional and unless and until the Court has pronounced a judgment on the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow ~~and of~~ the rules of procedure...*"
18. We agree that she was entitled to take into account delay in applying for the default judgment to be set aside. We have set out above, the obvious reasons for the delay. TUNIS, J, then sitting in Bo, did not deliver a Ruling on the earlier Application made in March,2006. The delay was clearly not the fault of the Appellant alone. So, it ought not to have weighed in the balance against him. We do not agree that the Appellant was guilty of undue delay in making his application to the Court. Delay caused by a Defendant "*sleeping on his rights*" as it where, will certainly not inure to the benefit of a litigant wishing to have a default judgment set aside.

ARGUMENT THAT PROPOSED DEFENCE LACKS MERIT

19. Mr Jenkins-Johnston has also argued, quite forcefully, that the Appellant's defence lacked merit: that he had no good and triable defence. We have studied the proposed defence and counterclaim to be

found, in the first instance at pages 85 & 87. The Appellant was in effect, averring that he thought the payment he had made to the Respondent was for the purchase of the property, and not for a lease. There are suggestions there, that the Respondent had misled him into believing that he, the Respondent, had a right to sell the property, when as a matter of fact, all that he held was a leasehold, and that that leasehold had in fact expired at the time of their transaction. These, we think, were triable issues. It was for this absence of true ownership that the Appellant counterclaimed for the return of his money at page 87. In any event, the Learned Judge in the Court below did not at any point in time in her Ruling, advert her mind to the merits of that draft defence. We agree with reasoning of BASH-TAQI, JSC in Civil Appeal 22/2007 – DR RAYMOND KAMARA v MRS VIRGINIA AYODELE DAVIES & others, cited by Mr Jenkins-Johnston, but, as we have stated above, we do not think the Appellant's proposed defence, lacked any chance or prospect of success.

FINAL JUDGMENT FOR MESNE PROFITS INCORRECT

20. Further, we are of the view also that the Learned Judge should have in the least, set aside that portion of the Judgment ordering the payment of mesne profits. The default judgment was final. Mesne profits are always assessed by the Court, and so a figure cannot be ascribed to it in a final judgment in default. Such a Judgment, should of necessity, be interlocutory as regards the element of mesne profits. The Appellant's properties, it appears, were sold pursuant to the writ of fieri facias issued at the instance of the Respondent in order to recover the amount awarded as mesne profits – see page 111. The Notice of Sale is dated 20 December,2005 at which point in time, the Appellant had made his first application to the Court for the default judgment to be set aside.

APPELLANT'S CAUTIONED STATEMENT TO THE POLICE

21. At page 6 of his synopsis, Mr Jenkins-Johnston has referred to a statement the Appellant was said to have made to the Police in connection with his relations with the Respondent. The statement is at pages 199 – 201. We note, firstly, that it was obtained under caution. The effect of this is that a criminal complaint had been made against the Appellant, and he was being asked to give his own version of events. We are sure that Mr Jenkins-Johnston is well aware of the provisions of Sub-Section 3(3) of

the Evidence (Documentary) Act, Chapter 26 of the Laws of Sierra Leone,1960: "*Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.*" The Appellant was "*a person interested ....*" in "*anticipated proceedings*". The statement was made on 14 July,2005. On 20 July,2005, the Respondent gave the Appellant Notice to Quit the property – see paragraph 9 of the writ of summons at page 22. The writ was issued on 22 August,2005, 5 weeks later. We do not even know whether the notice to quit was legal and enforceable, and whether it gave a date it would expire, as none was stated in the writ – all of these, issues which would have been dealt with at the trial. When arm-twisting by getting the Police involved, did not succeed, the Respondent resorted to the proper method of enforcing his rights.

3RD PARTY RIGHTS

22. The other argument which has been canvassed by the Respondent, is that 3rd parties have acquired rights over and in the property, and that setting aside the judgment in default, will adversely affect those rights. In his affidavit in opposition, deposed and sworn to on 29 March,2006, the Respondent deposed in paragraphs ~~paragraph~~s 18 & 19 thereof, that he had rented out the property to tenants, and that if he was ordered to reinstate the Appellant, this would expose him to financial hardship, and possibly, litigation brought these new tenants. This was on 29 March,2006. But, on or about 8th December,2005 he knew that the Appellant had applied, for the first time, to the Court below for a stay of execution of the default judgment, and for him to be restored to occupation of the property – see pages 16 – 27. For him, i.e. the Respondent to go ahead and rent out the subject matter of that application, shows that he wished to present the Court with a 'fait accompli'. This Court is not necessarily bound by such actions as we shall shortly show.

CASES ON STAY OF EXECUTION AFTER EXECUTION LEVIED AGAINST APPELLANT

23. In Misc Appl 12/91 – COMMERCIAL ENTERPRISES LTD v WHITAKER'S PROPERTY & OTHERS, Judgment delivered 23 July,1991, ALGHALI,J.A. sitting as a Single Justice of Appeal, held that although "*walking*

possession" was all that the Respondent had regained in that case, and not lawful possession through the Under-Sheriff, and that thus, execution was incomplete, he was prepared to grant a stay of execution of the Judgment of the Court: RICHARD ZACAHRIAH v MOROWAH. There, GELEGA-KING, JA said "... *As I have said, the mere fact that the applicant has been put in possession does not make the setting aside of the default judgment wrong. If the Applicant succeeds when the case is heard on its merits, he can be compensated in damages.*" This was a case in which MARCUS-JONES, J had set aside a judgment in default of appearance, and had restored the respondent therein to possession of property at 30 Goderich Street, Freetown. Also, in Misc App 2/94, AFRICANA TOKEY VILLAGE LIMITED v JOHN OBEY DEVELOPMENT CO. LTD, GELEGA-KING, JA in delivering the Ruling of the Court on a similar application as that in this case, said at page 3 of the printed Judgment, after citing what he had said in the earlier case of ZACAHRIAH v MOROWAH: "....*In my judgment and in the light of the authorities, the answer to the first question posed supra must be that this Court has unfettered power and jurisdiction to order a stay of execution and may do so even though a writ of possession may have been issued and executed, provided of course, that the application for a stay was first made to the Court below.....*" It is clear then, that recovery of possession by a plaintiff of his property pursuant to a default judgment, is not a bar to the Court restoring possession to the defendant in default. Jus Tertii is indeed a well-known principle of Law, as canvassed by Mr Jenkins-Johnston at page 3 of his synopsis. But it certainly does not preclude a Court from granting the sort of relief which the Appellant applied for in the lower Court.

ALLEGED ABUSE OF PROCESS BY APPELLANT

24. The last issue, is the argument canvassed by Mr Jenkins-Johnston at pages 3 -4 of his synopsis that the Appellant was guilty of abuse of process by bringing a fresh action against the Respondent in respect of the same property. He says that as far as he is aware, that action is still pending in Court. We do not find it necessary to pronounce on the propriety of that course of action taken by the Appellant. All we would say is that if the Appellant is so convinced that that action amounts to an abuse of process, then he should take the appropriate action in the Court

below – be it an application to set aside the writ issued in that action, or, otherwise.

25. For all these reasons, we are of the view that that the appeal should succeed.

ORDERS:

26. We shall therefore make the following Orders:

(1) The Ruling of The Honourable Mrs Justice C L Taylor delivered on 24 January,2008 is set aside in its entirety.

(2) Consequently, the writ of possession and fieri facias combined issued at the instance of the Respondent on 2nd December,2005 and the Notice of Sale dated 20th December,2005 issued by the Under-Sheriff, are set aside

(3) The Appellant shall be restored to the property at 43 Mahei Boima Road, Bo not later than 21 days of the date of this Judgment and Order.

(4) The proceeds of sale of the Appellant's properties obtained pursuant to the sale carried out by the Under-Sheriff shall be refunded to the Appellant by the Respondent.

(5) The Appellant is granted Leave to defend the action brought by the Respondent in the Court below, and to file his Defence and Counterclaim within 14 days of the date of this Order.

(6) After the filing of such Defence and Counterclaim, the procedure laid down in the High Court Rules,2007 shall be followed by the parties.

(7) The Appellant shall have the Costs of this Appeal only, Such Costs to be taxed. NCBM.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS,
JUSTICE OF THE SUPREME COURT