

Misc. App 1/2016

IN THE COURT OF APPEAL OF SIERRA LEONE

JAMES BULL -
(Trading as LUMA MICRO FINANCE TRUST)

APPELLANT/APPLICANT

AND

ROKEL COMMERCIAL BANK -

RESPONDENT /RESPONDENT

PRESIDING;

THE HON MR. JUSTICE REGINALD SYDNEY FYNN JA

Counsel;

Dan Fofanah Esq. for the Appellant/Applicant

A.Showers Esq. for the Respondent

RULING dated 1st June 2016

FYNN JA

1. The Applicant has filed a Notice of Motion dated 23rd December 2015 in which he seeks for the enlargement of time within which to appeal the Judgment of Justice A Showers dated 9th June 2015. In the event that time is enlarged within which to appeal, he seeks further that the execution of the said judgment be stayed pending the hearing and the determination of the appeal.
2. The applicant has filed an affidavit of substantial length and detail in support of the application he has similarly annexed several exhibits to the affidavit and these shall be referred to as may be found necessary
3. The bulk of the affidavit in opposition as well as the exhibits filed to support the motion, the affidavit filed by the respondent in opposition as well as the affidavit in reply devote a significant time to rehashing the case which was already tried and judgment given. I

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have not found this revamping of all the facts which were presented to the Honourable trial Judge and which if this application is successful will come before us for consideration necessary. It will be sufficient in such an application if counsel were to remain strictly guided by the requirements for an application such as this one.

4. Rule 11(4) of the Court of Appeal Rules provides:

Any application for enlargement of time within which to appeal may be brought shall be supported by affidavit setting forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause for the enlargement of time to be granted.

5. As mentioned already the applicant has filed an affidavit supporting his application but does that affidavit "set forth good and sufficient reasons"? In answering this question I am guided by the following dictum:

"All the relevant factors must be taken into account in deciding how to exercise the discretion to extend the time. Those factors include the length of the delay, whether there is an arguable case on appeal, and the degree of prejudice to the defendant if the time were extended" (see Van Stillevoeld BV El Carriers 1963 1 AER 699 at p. 704 as per Griffiths LJ quoted favorably by Joko-Smart JSC in Sesay & Others vs. Kamara (1999) Supreme Court Unreported).

6. The judgment which is intended to be appealed against was delivered on 9th June 2015 and it took the appellant another six months on to 23rd December 2015 to make up his mind to file an appeal. Whilst this delay is significant I do not find it inordinately so, considering that our courts have granted extension of time in cases with significantly worse delay provided always that there is an arguable issue being raised for appeal. (see the dictum of the Hon. Justice Umu Tejan- Jalloh CJ in Mansaray v Kenny & Two Others (unreported) where the appeal was 15 months late)
7. A successful party will not be lightly deprived of the fruits of his judgment in a contested case. A party who seeks to stay any such judgment has the onus of demonstrating to the court that circumstances do exist which will make it unjust for the successful party to proceed with execution of the judgment below whilst the appeal is still pending. The Firetex Case¹, The African Tokeh² case as well as the dictum of Gelaga-King JA in Decker vs. Decker(Unreported) are too well known and settled for there to be a need to repeat

¹ Firetex International Co. Ltd. vs. Sierra Leone External Telecommunications Ltd. Misc. App. 19/02

² Africana Tokeh Village v John Obey (19940 Unreported)

them or the principles governing a stay of execution here. Especially considering that counsel did not contend one with the other as to what those principles are.

8. A question that I have had to contemplate though is whether in fact the special circumstances which should be urged on the court in considering a stay of execution should be the self same facts which have been raised in the court below and which have already been adjudicated upon, without more.
9. This thought is of particular note in the present case where the proposed appeal Ex JB7, on every proposed ground advanced has an admixture of facts and law. And where in his arguments it is these same facts that counsel urges the court to accept as being the special circumstances which surrounds his client and the appeal. I shall set out some of counsel's arguments on this matter for the sake of clarity:
 - I. Counsel urged that the bank had changed the interest rates on the loan without reference to the applicant
 - II. He argues that the wrong person may have been sued and that this applicant may not even be the proper person liable on the loan...notwithstanding his being a guarantor
 - III. The respondent bank failed to give notice to the applicant as required by the guarantee form and mortgage deed that they were about to enforce the applicants undertaking
10. These were all matters which were before the court below or which properly ought to have been before that court and upon which the Honourable Trial Judge contemplated before reaching her judgment. These matters also form the gravamen of the appeal and will be retried by this court. Whilst I find that they raise arguable and good grounds of appeal, I take the view that they cannot now by themselves, and without more, at this stage be relied upon as the special circumstances which should make a stay of execution available to the applicant. They need something more compelling.
11. The applicant has additionally, submitted on issues which touch non-representation or inadequate representation. Whilst these form part of the appeal they were not before the court below for consideration. This court is mindful that this is an easy resort for any unsuccessful litigant and I take the view that there was in fact sufficient representation to satisfy the basics of the maxim *audi alterem partem*. Strictly speaking the applicant was present and was heard. However in the course of arguments before me it came out clearly that on occasion this applicant was his own lawyer and had to change counsel (at

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least once) and that even when he had a lawyer the Honorable Trial Judge found fault with the processes employed by counsel which, significantly, may have deprived the applicant of having had his full day in court. I refer here to the applicant's would-be counter claim which was "disregarded"(and rightfully so) because it was advanced in an unorthodox manner; within an affidavit in opposition. An appeal now gives the applicant another opportunity for this counterclaim to receive full consideration and a decision on its merits.

12. I am mindful of Sir John Muria's caution in Luke vs Bank of Sierra Leone (Unreported) that "moral, social and political" matters are not proper considerations for the grant of a stay of execution. However on the whole I can conclude that this applicant is in a distinctive circumstance and I am minded to grant the present application. I am however also aware that this applicant had previously had a favourable hearing on a similar application before the Hon. Mr. Justice Sengu Koroma J. (as he then was) but that the applicant had failed to follow through with those orders for reasons which I have found to be utterly unimpressive, I shall therefore grant a stay on terms.

In the circumstances I make the following orders:

1. Time within which to appeal against the Judgment of the Hon. Mrs. Justice Showers JA (as she then was) dated 9th June 2015 is hereby enlarged
2. The execution of the Judgment of the Hon. Mrs. Justice Showers JA (as she then was) dated 9th June 2015 is hereby stayed pending the hearing and determination of the appeal herein on the condition precedent that the appellant pays the sum of Le 150 Million into his account at the Respondent bank no later than 30th June 2016 (or into an account opened there for this purpose) and that this account shall thereafter remain frozen for the duration of the appeal.
3. That in the event that the appeal herein is successful the Respondent bank shall return the amount of Le 150 Million to the applicant no later than five (5) days from the date of such judgment or as that judgment shall direct
4. Costs to be taxed if not agreed by the parties.

Reginald Sydney Fynn J A.....



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