

Civ. App. No.45/2014

IN THE COURT OF APPEAL FOR SIERRA LEONE

(CIVIL JURISDICTION)

Between:

Estate of Khalilu Jabbie - Appellant/Applicant

(Represented by Mr. Bockarie

Enssah as Court-Appointed

Administrator of The Estate

of the Deceased Khalilu Jabbie)

And

Skye Bank (SL) Limited - Respondent/Respondent

Coram:

Hon. Justice V.M. Solomon - JSC.

Hon. Justice M. Deen Tarawally - JA.

Hon. Justice R.S. Fynn - JA.

Counsel:

Mr. M.P. Fofanah for the Appellant/Applicant

Mr. R.S.V. Wright for the Respondent

29th Feb 2016

HON. MRS. JUSTICE V.M. SOLOMON JSC.

RULING

(1) The Appellant/Applicant by motion paper dated 5th October, 2015 is seeking the following orders to wit:

1. *That the full Court of the Justice of the Appeal Court sitting pursuant to Sections 128(2) and 130(b) of the Constitution of Sierra Leone, 1991 (Act No.6) do reverse or vary the ruling and order(s) therein of the Hon.*

Mrs. Justice Showers JA. sitting as a single Justice of the Appeal, in which the Learned Justice made the following Orders on the 15th June, 2015:

"The Notice of Appeal dated 25th August, 2014 is clearly filed in contravention of Rule 11(i) of the Court of Appeal Rules 1985 being out of time. The application is therefore granted and the Notice of Appeal dated 25th August, 2014 is hereby struck out. No order as to costs".

2. *That a stay of execution of the said Ruling/Order(s) and of the Judgment of the High Court dated 6th August, 2013 be granted pending the hearing/determination of this application.*
- 3 *That a stay of execution of the said Ruling/Order(s) as well as the judgment of the High Court dated 6th August, 2013 be granted pending the hearing and determination of the Appellant's Appeal if allowed to stand by this honourable Court.*
4. *That the costs of this Application be costs in the cause.*
5. *Any other or further order(s) that this honourable Court may deem fit and just.*

There are two affidavits in support both sworn to by Mohamed Pa-Momo Fofanah Esq. counsel for the applicant herein. There is an affidavit in opposition deposed to by Ailarah Hamid, a solicitor in the firm of solicitors working for the respondent.

- (2) The brief facts leading up to this present application are vital. A judgment was delivered on the 6th August, 2013, shortly thereafter solicitors for the respondent filed a motion paper for rectification of the judgment sum from Le515,913,488.25 to Le971,418,741.57. A ruling on that application was delivered on the 25th June, 2014. The appellant/applicant then filed his appeal in the Court of Appeal registry on the 25th August, 2014. An application was filed on 16th October,

2014 to strike out the appeal filed and the ruling was delivered on 15th June, 2015 in which the said appeal was struck out. The present application is filed pursuant to Sections 128(2) and 130 of the Constitution of Sierra Leone 1991 (hereinafter called "The Constitution"). The notice of appeal was struck out by a single appellate judge and this present application is before the full panel of three Justices. It is the duty of this court is to vary or reverse the ruling of the single appellate judge only in cases where it is based on wrong principles of law. In all applications for a stay of execution of a judgment special circumstances should be established and the appeal should have good grounds; as it is settled law that a successful litigant is not to be deprived of the fruits of his judgment.

- (3) The application of 9th September, 2013 seeking rectification of the judgment sum has necessitated all the subsequent applications. The appellant/applicant in the affidavit in support has deposed that he was awaiting the outcome or ruling of that application and hence did not file an appeal as he was of the view that the matter was still in progress. That view was endorsed by Justice Showers JA. (as she was then) in her ruling and she had this to say:-

"Counsel for the Appellant has indeed raised a plausible argument that he could not have filed his notice of appeal before the Court's Ruling as he could not know the outcome of the application".

She went further:

"However, having known the Court's Ruling on 25th June, 2014 which was that the Court refused the application for a variation of its judgment of 6th August, 2013, Counsel then knew that the final judgment of the Court was that of 6th August, 2013".

If indeed the ruling of the 25th June, 2014 merely confirmed the judgment of 6th August, 2013 then a question I pose is when did time start to run? How could counsel have known the outcome of the ruling before its delivery? How can an application be made to rectify a judgment sum by such a large quantum of about Le400 million? This is a substantial sum as the judgment is a monetary judgment, albeit, in respect of a mortgaged property at 65 Pademba Road, Freetown (herein after called "mortgage property"). In judgments relating to foreclosure of a mortgage, the right of redemption arises and once the principal sum, interest, and all costs are paid, a mortgager has the right to redeem the mortgaged property. No mortgage agreement can take away that right. The respondent has argued that the mortgaged property had been sold as the 24 hours period granted to the appellant/applicant has lapsed. A fortiori the mortgaged property had been sold but it was not duly conveyed to the purchaser till 2nd June, 2015, a period of 22 months after the judgment was delivered. The evidence is that negotiations and part payment was made sometime between September, to October, 2013 and the purchaser was allowed to pay on an installment basis. The application was not for amendment of an error but rectification of the judgment. The rectification sought was so substantial that the Learned Trial Judge refused the application and confirmed his previous judgment of 6th August, 2013. I refer to the case of Civ.App 9/2012 Osman Sulaiman Mansaray vs. Alice Fatmata Kenny & ors S/C decision delivered on the 15th May 2014 in which the court held that justice of the case demands that the appellant be heard even though his appeal was out of time. It was a dispute on title to a piece of land in Kissy, Freetown. The appellant appealed to the Supreme Court on several grounds; that the Court of Appeal acted on wrong principles in law in holding that the high

court had no jurisdiction in granting leave to the appellant to appeal; and that such leave renders nugatory a mandatory rule of the Court of Appeal Rules 1985; and that such leave is given without jurisdiction. The court did state that an application for extension of time within which to appeal made to the trial judge 15 months after the decision to appeal was out of time and made in the wrong forum. It is only the court of appeal which had such jurisdiction to enlarge time. The appellant had built a two-storey building on the said land from which he had been evicted. His proposed defence was struck out for want of prosecution. The Supreme Court ordered a retrial of the action in "common justice" and that he should be given an opportunity to present his case. The Supreme Court relied on the case of *Grimshaw v Dunbar* (1953) 1 ALL ER 350 CA at 355 per Jenkins LJ in which a new trial was ordered and he said thus:

"Be that as it may, a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the Court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, then that litigant who is accidentally absent should be allowed to come to the Court and present his case, no doubt on suitable terms as to costs....."

(Emphasis mine)

The respondent contend that the property had been sold to a 3rd party one Alhaji Umaru Kamara who is fully seized of the property by virtue of a deed of conveyance registered at page 56 in volume 679 in the book of conveyances. The Supreme Court per U. H. Tejan-Jalloh CJ held:

"This is a valid point which ought to be considered in dispensing justice in this case. Such third party allegedly has an interest in the property which cannot be ignored. He ought to be given an opportunity as well to protect his interest if any."

The facts here are very similar to the present application. It is in the interest of justice that the appeal be restored for hearing and the purchaser, the 3rd party will be given the opportunity to present his case as well as to protect his interest. I am fortified in my view by Rule 66 of the Court of Appeal Rules 1985 PN No: 29 in which the rules provide interalia:

"Non-compliance on the part of an appellant with these rules or with any rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court considers that the non-compliance was not willful and that it is in the interest of justice that the non-compliance should be waived. The Court may in such manner as it thinks fit, direct the appellant to remedy the non-compliance, and thereupon, the appeal shall proceed....."

(Emphasis mine)

In the premises therefore, after due consideration of the affidavit evidence; the Rule 66 referred to supra; the entire circumstances of this case; and in the interest of justice; I hereby order that the appeal be restored for its hearing and determination.

(4) The second order sought is an interim order which is already spent and will not be deliberated in this ruling. Having held that the notice of appeal dated 25th August, 2014 is to be restored, in considering the 3rd order sought, I need to consider whether the grounds of appeal are good; and whether the appellant/applicant has shown special circumstances to justify a stay of the judgment of the 6th August, 2013. It is established that the legal basis for granting a stay of execution is that the applicant must establish two things; that there are special or exceptional circumstances justifying the grant of a stay of execution and that there are good grounds of appeal. This court's unfettered discretion and power whether or not to grant a stay of execution is to be exercised judiciously after due consideration of the facts as presented. I refer to the case *Desmond Luke v. Bank of Sierra Leone*, Misc.App22/2004, Court of Appeal ruling in which it is stated thus:

"One of the underlying reasoning for imposing such condition on the applicant is that the successful litigant should not be deprived of the fruits of the Judgment in his favour, a principle that is well known within our jurisdiction..... The question to be determined therefore it has the applicant demonstrated that there are special circumstances present in the case justifying the grant of a stay? The onus is on the applicant".

(Emphasis mine).

(5) This court is to draw a distinction between monetary and non monetary judgments. In the case of land, a factor that is considered is that of its non-perishable nature. See the cases of: *Misc. App. 22/2004 Bank of S.L. v. Desmond Luke (14th July 2004) C.A.*; *Misc. App. 23/2004 Usufu Bundu v. Mohamed Bailor Jalloh (23rd July, 2004)*; *Civ. App. 3/2014 Mohamed Ibrahim Basma & Ors. v. Toufic Huballah*; *Civ. App. 46/2013*

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Amadu Kamara, Mariama Kamara v. Andrew Bella Fofanah Jnr.; CC. 492/06 *Martin Andrew Rekab v. Victor Dumanski*. All these cases have clearly established the principle that in cases of a stay of execution of a judgment relating to recovery of possession of land, the court will refuse to grant a stay unless the applicant can establish a strong case for depriving the plaintiff/respondent of the fruit of his judgment that is, special circumstances and good grounds of appeal. The principles therein apply to the present matter herein. These principles have been used and applied out of the jurisdiction of Sierra Leone for e.g. in the case of Professor V.O.S. Olunloyo (Carrying on business under the name and style "*Tekcon Associates*" vs. *Adedapo Adeniran S/C Nigeria S.C.* 89/1999 (2001) 37 W.R.N. per Idris Legbo Jutigi JSC in which he had this to say:-

"A discretion to grant or refuse a stay must therefore take into account the competing rights of the parties..... the special circumstances which have received judicial approval are when execution would:

(f) destroy the subject matter of the proceedings;

(g) foist upon the Court a situation: of complete helplessness; or

(h) renders nugatory any order or orders of the Appeal Court;

(i) paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal;

(j) provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo".

He went further and held thus:

"There must be special circumstances disclosed by the applicant seeking stay which render it inexpedient to enforce the judgment. The special circumstances which the Court will take into account to entitle it to stay execution of the judgment are, as a general rule, such circumstances which go to the enforcement of the judgment and not those which go merely to its correctness: see TC Trustees Ltd. v. J.S. Darwen (successors) Ltd. (1969) 1 ALL ER 271 at 274".

- (6) In the instant case, the applicant has shown special circumstances to warrant this court to exercise its discretion in his favour and to wholly reverse the ruling of 9th June, 2015. He has good grounds of appeal and has shown special circumstances why this court should stay the execution of the non-monetary judgment that is, the recovery of possession of 65 Pademba Road, Freetown. Though the judgment herein is monetary, in the event of failure to repay the judgment sum, the mortgaged property was to be sold by private treaty and the respondent was to have immediate recovery of possession of the said mortgaged property. It is noted from the affidavit evidence that payment was forwarded to the respondent but it was refused even when the prospective purchaser had not fully paid up the purchase price of \$250,000/00. The said payment was forwarded on the 2nd July, 2014 and was refused by letter of the 3rd July, 2014. Considerations for monetary and non-monetary judgments vary as the latter would not dissipate. If at the time payment was forwarded, it was accepted and the "proposed sale" stopped then all these proceedings including an appeal would not have been necessary. Instead the respondent proceeded to continue the sale of the property to a 3rd party in spite of pending litigation in the high court.

(7) A vital issue for consideration of my unfettered discretion as to whether or not to grant a stay is whether the respondent had acted bona fides in its relationship with the appellant. It cannot be said that the respondent acted *bona fides*. Nor can I refer to the purchaser as a purchaser for value without notice. The respondent negotiated with this purchaser during the hearing of its motion application for rectification. The negotiation and final conclusion of the sale to the 3rd party purchaser lasted for 22 months. The payment forwarded was in June, 2014 and the sale was only concluded in July, 2015. There is a proviso in the sale agreement to opt out to wit:-

"We Messrs Skye Bank (SL) Limited shall withhold the Conveyance and will only release same upon receipt of the final installment payment from Mr. Mohamed Bobo Bah".

The latter was also given the option to opt out if he so desire. The agreement provides thus:

"If Mr. Mohamed Bobo Bah also comes back to the Bank saying he wants a refund of the deposit amount (\$140,000.00) same shall be refunded after the sale of the property by the Bank. The Bank will only pay back from the sale proceeds of the property".

The respondent herein had foreseen the possibility of the purchaser opting out of the sale agreement and was willing to refund his deposit after it had agreed on the sale the mortgaged property. Mr. Bah the purchaser then proceeded to evict all the occupiers in the mortgaged property. On the affidavit in support it is deposed that occupiers were evicted even before the ruling of 15th June, 2015 and without a court order. This serious allegation against the respondent was not addressed by its solicitors. A

further allegation that the mortgaged property is been altered was also not addressed. This court will frown upon any litigant who acts arbitrarily and without due process. I refer to my previous rulings *Civ.app 46/2013 Amadu Kamara, Mariama Kamara vs. Andrew Bella Fofanah Jnr; Cc:492/06 Martin Andrew Rekab vs. Victor Dumanski & Or*, in which I held interalia that this court will not grant a stay of execution to an applicant who has not acted bona fides, or in full compliance with due process. The evidence is that family members of the applicant were removed from the mortgaged property which has caused hardship on the applicant and his family. I will also refer to *Civ.App63/2008 Sierra Leone Shipping Co vs. Albert Gomez and The Sheriff of Sierra Leone and Martin Michael* delivered on the 30th January 2009 in which Bash-Taqi Jsc held thus:

"A discretion to grant or refuse a stay must only be taken after considering the facts of the case to see whether special circumstances exists to invoke the court's power and jurisdiction. See Radar v Jabar ALR (SL) 1950-56 p.115 which was quoted with approval by the Court of Appeal in Commercial Enterprises Ltd v Whitaker Properties & Another Misc.App 12/91 (unreported). If special circumstances do exist the Court has the unfettered power to grant a stay of execution and may do so even though a writ of possession has been issued and execution has taken place - See Richard Zachariah v Jamal Morrowah Misc.App12/87; African Tokeh Village Ltd v John Obey supra (unreported).

I adopt the principles law propounded by the above authorities."

(Emphasis mine)

The Court of Appeal in the aforesaid granted a stay of execution of the judgment and restored the applicant into the position he was before the execution of the judgment. In the light of the affidavit evidence which has not been rebutted, the appellant/applicant is to be restored into possession of the mortgaged property at 65 Pademba Road, Freetown pending the hearing and determination of the appeal. That is the appellant/applicant is to be restored to his state of occupation before the execution. The applicant should now proceed to prosecute his appeal and I shall grant this stay of execution with conditions thereto.

- (8) In the premises therefore, it is view of this court that litigants and their counsel ought to act with candour and work in the interest of justice. The several applications filed show unprecedented and in cordial relationship between parties who had been in a fiduciary relationship. This court is not only a court of law, but a court of equity, and the interest of justice is paramount. A successful litigant should not be deprived of the fruits of its judgment but the circumstances here are peculiar and it is in the interest of justice that a stay of execution of the judgment be granted subject to the conditions therein.

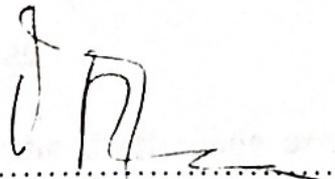
It is hereby ordered as follows:

- (1) That the notice of appeal dated 25th August, 2014 is to be restored for its hearing and determination.
- (2) That the records of appeal be settled within 21 days and the same be submitted before the Hon. Chief Justice for constituting a panel for the speedy determination of the appeal.

- (3) A stay of execution of the judgment dated 6th August, 2013 is hereby granted pending the hearing and determination of the appeal in the Court of Appeal.
- (4) The Appellant/Applicant is to be restored into possession of 65 Pademba Road, Freetown, and that a writ of restitution do issue if necessary.
- (5) Each party to bear its costs.

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Hon. Justice V.M. Solomon JSC

I agree:..........

Hon. Mr. Justice Deen-Tarawally - JA.

IN THE COURT OF APPEAL OF SIERRA LEONE

Estate of Khalilu Jabbie (*Represented by* - APPELLANT/APPLICANT
Mr. Bockarie Ensah as Court appointed Administrator
of the Estate of the deceased Khalilu Jabbie)
AND

Skye Bank (SL) Limited - RESPONDENT

CORAM:

HON. JUSTICE V.M.SOLOMON - JSC

HON.JUSTICE M. DEEN-TARRAWALLY - JA

HON. JUSTICE R. S.FYNN - JA

Counsel;

M.P Fofannah Esq for the Appellant/Applicant

R S V Wright Esq for the Respondent

RULING dated 29th February 2016

HON. JUSTICE REGINALD S. FYNN JA

I have had the opportunity of reading the draft ruling prepared by The Hon. Justice V M Solomon JSC and I hold a different view to that which it expresses. My opinion on the matter is as follows:

1. In this application the Applicant seeks a reversal or the variation of orders given by a Justice of this court sitting alone. These orders were given on 15th June 2015 and briefly put they struck off the applicant's Notice of Appeal dated 25th August 2014 finding that they are in contravention of R 11(1) of the Court of Appeal Rules.
2. S.130 (b) of the Constitution of Sierra Leone Act No 6 of 1991 makes provision for the full panel of three to hear and review the decision of the single Justice of Appeal. However the law on when it is proper to allow such a variation or reversal has come to

crystallize admitting only situations where the single justice has been found to have committed some error in the law. If no such error in the law has been found I take the view that the ruling or orders of the Justice should not be disturbed except some glaring and manifest injustice will result.

3. In the present case the applicant wants his Notice of Appeal restored. The single Justice had found that it was filed out of time and had refused to restore it. The computation of the time within which to appeal would usually admit to any contention as the rule provides with clarity that

" no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision or of three month in the case of an appeal against a final decision unless the court enlarges the time"(R11 (1) Court of Appeal Rules)

4. There is no doubt that the judgment of 6th August 2013 which it is sought to be appealed against is a final judgment. And that a Notice of Appeal should ordinarily have been filed on or before 6th November 2013. However this usually straightforward computation is given a nuance in this case as after the said judgment an application was filed by the respondent asking for a rectification of the judgment. This application for a rectification the applicant argues caused the judgment to become uncertain thereby depriving the applicant a clear a straightforward computation of time within which to appeal.
5. I have asked myself whether time had stopped running whilst the rectification application was being made. I have also asked myself whether the judgment was any less a judgment of the court whilst the rectification was being sought. In both instances I have had to answer in the negative.
6. No rule has been canvassed before us that will suggest that time within which to appeal should stop running in these circumstances and I know not of any such rule. Also it is my opinion that the judgment remained good and true notwithstanding and during the rectification application. The pith of the judgment was that the mortgaged property would be sold to recover the loaned amount if the latter was not paid. This was not up for rectification and appears quite certain unless appealed against successfully.
7. I have also asked myself whether there was a possibility that the outcome of the rectification ruling could at all have made this applicant satisfied with the judgment and so cause him give up his quest to appeal. Again I have had to come up with a negative

answer. In fact it seems that regardless of what the outcome of the rectification application was going to be the applicant was poised to appeal.

8. In my opinion the applicant had two possible courses of action open to him which could have avoided his present quandary. Firstly, he could have appealed against the judgment within the stipulated time and then later amended that notice of appeal in the event the ruling on the rectification application had made such an amendment necessary (as it turned out there would have been no need).
9. Secondly, he could have waited for the rectification order and then using the "uncertainty" as good cause he could have approached the court for enlargement of time within which to appeal (which I dare say would have made quite a compelling case for enlargement). Neither of these paths was taken.
10. The applicant has proceeded to file his Notice of Appeal on 25th August 2015 against a judgment dated 6th August 2013. The Notice of Appeal is undoubtedly filed out of time for it to be within the law time must first be enlarged. This is exactly what the Hon. Justice Showers JA (as she then was) found and her Ladyship made no error in law when she struck it off.
11. I am of the opinion that to allow this Notice of Appeal to stand, by enlarging the time within which to appeal when the applicant has not asked for this specifically will be to act gratuitously and in direct contravention of the rules, considering especially that the arguments before this panel turned mainly on this very point.
12. This point of view finds persuasive support in the Nigerian case of Auto Import Export v Adebayo & Others SC49/1997 where it was opined as follows:

".....failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the statutory requirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain. Such irregularity can by no means be regarded as a mere technicality but constitutes an incurable defect that must deprive the appellate court of jurisdiction....."
13. It cannot be denied that this Court has the power to enlarge the time within which to appeal and that it will readily exercise that power in a fitting case when same has been

properly invoked. Courts should resist the pull of introducing outcomes different from that which the parties actually asked for and litigated. (see Ayode vs. Spring Bank PLC & Another 2013).

14. This applicant did not ask the single justice to enlarge time nor has he asked this panel to do so (neither in his papers nor in his viva voce submissions). To grant enlargement of time *suo motto* will in my opinion bring an outcome which was not prayed for to bear on the parties. This in my opinion significantly undermines the time limits fixed by the rules, open the flood gates and generally create room for *laissez faire*.
15. I am also of the considered view that R.66 is not intended to be used to make substantive orders which have not been asked for. This rule (R.66) could be resorted to where there is a minor slip or irregularity in a party's papers but not when there has been such a major and foundational failing as filing out of time and without first seeking for enlargement of time.
16. I would strike out the Notice of Appeal of 25th August 2014 the rest of the orders sought would need no further consideration as there is no subsisting appeal.

Ordered as follows;

- a. Notice of Appeal dated 25th August 2014 is hereby struck out.
- b. The applicant shall bear the costs of the application which will be taxed if not agreed upon by the parties



..... The Hon. Mr. Justice Reginald Sydney Fynn JA