



**IN THE COURT OF APPEAL OF SIERRA LEONE**  
**CIVIL DIVISION**

MISC. APP. 13/17

FATME MOURTADA

APPLICANT

AND

FADEL ABASS MOURTADA  
DAYOUB TRADING (SL) LTD

RESPONDENT

**REPRESENTATION:**

C.F. MARGAI & ASSOCIATES

COUNSEL FOR THE PLAINTIFF

FORNAH-SESAY, CUMMINGS, SHOWERS CO. COUNSEL FOR THE DEFENDANT

CORAM:

HON. MR. JUSTICE M.F. DEEN TARAWALLY

JA

HON. MR. JUSTICE R.S. FYNN

JA

HON. MR. JUSTICE SENGU KOROMA

JA

## **RULING DELIVERED ON THE 26<sup>TH</sup> OCTOBER, 2017**

### **SENGU KOROMA JA**

1. This is an application by Notice of Motion dated the 30<sup>th</sup> May, 2017 for the following orders:
  1. That this Honourable Court do grant leave to the Defendants/Applicants herein to appeal against the Ruling of the Honourable Justice A.B. Halloway dated the 15<sup>th</sup> day of February, 2017.
  2. A stay of Execution of the Judgment dated 6<sup>th</sup> June, 2016 and all subsequent proceedings pending the hearing and determination of the Appeal.
  3. Any further Order(s) that this Honourable Court may deem fit and just in the circumstances
  4. Cost to be costs in the cause.
2. The Application was supported by the Affidavit of Adewale Showers sworn to on the 30<sup>th</sup> day of May, 2017 together with the exhibits annexed thereto.
3. The affidavit in support had seventeen exhibits. Mr. A. Showers appearing for the Defendants/Applicants (hereinafter referred to as "the Applicants") relied on the entire contents of his affidavit. He submitted that the proposed grounds of Appeal were not frivolous as they raised serious questions of law which ought to be tried by this court.
4. Mr. Showers also submitted that he was applying to this Court for a Stay of Execution of the Judgment of the High Court dated 16<sup>th</sup> June, 2017. In support of this submission, he relied on the case of ABDUL KARIM WURIE – V- THE ATTORNEY-GENERAL & MINISTER OF JUSTICE delivered on the 28<sup>th</sup> January, 2016 and the case of DAWNUS (SL) LTD –V- TIMIS MINING CORP. (2016) SLCA 18 (unreported)
5. Mr. C.F. Margai acting for the Plaintiff/Respondent (hereinafter referred to as the "Respondent") opposed the application and made the following submissions.
6. Firstly, that in the Notice of Change of Solicitors, the firm of FORNA-SESAY, CUMMINGS AND SHOWERS was named as the new solicitors whilst in paragraph 7 of the affidavit in support reference was made to the firm of FORNA-SESAY as the solicitors retained by the Respondents.
7. Secondly, that there was nothing in the Order of the High Court dated the 15<sup>th</sup> day of February, 2017 to appeal against. Mr. Margai further submitted that as the Ruling dated 15<sup>th</sup> February, 2017 was interlocutory, an



application for leave to appeal must be made within fourteen days – Rule 10 of the Court of Appeal Rules, 1985. The Ruling was delivered on the 15<sup>th</sup> February, 2017 and by virtue of Rule 64 of the Court of Appeal Rules, 1985, the Applicant ought to first apply to the Court below for leave. The Applicant failed to do so but instead filed a Notice of Motion in the High Court on the 17<sup>th</sup> May, 2017 seeking several other Orders.

8. Mr. Margai submitted that the only way open to the Applicant was an application for an extension of time. He referred this Court to the dissenting judgment of FYN, JA in the matter of the Estate of KALILU JABBIE (Represented by Bockarie Engah as Court Administrator) –v- SKYE BANK (SL) LTD Misc. App. and the case of NIGERIAN NATIONAL SHIPPING LINES –V- ABDUL AZIZ (Trading as ABDUL AZIZ ENTERPRISES).

On the application for a stay of Execution, Mr. Margai argued that this was granted by Hon. Justice Kamanda J. on the 24<sup>th</sup> May, 2017 which was still in force. There was therefore no need for an application for such an application to be made to this Court.

9. Mr. Showers in reply firstly admitted that clerical error was made in respect of the name of the firm of Solicitors in paragraph 7 of the affidavit in support but argued that it would not prejudice the Respondent's case.

With regards to compliance with Rules 10 and 64 of the Court of Appeal Rules, 1985, he referred this Court to Exhibit AS 5 of the affidavit in support.

#### **ISSUES FOR DETERMINATION**

10. There are two issues here for determination to wit:-
1. Whether the Applicant herein complied with Rules 10 and 64 of the Court of Appeal Rules, 1985; and
  2. Whether the Application for a stay of Execution is necessary in view of the Ruling of Kamanda, J dated 17<sup>th</sup> May, 2017.
11. Before determination these issues, it will be necessary to review the authorities cited by counsel.
12. In the case of ABDUL KARIM SESAY WURIE –V- ATTORNEY-GENERAL AND MINISTER OF JUSTICE cited by A. Showers Esq., Fyn, JA granted leave to appeal on the ground that the proposed grounds of appeal "being raised purely on an application based on law and not on facts ... I find that the seriousness of the legal question raised provide enough good cause on which an application for leave can be granted". His Lordship also granted a stay of execution of the Ruling appealed against on the ground that it



would be absurd if leave to appeal was granted while the trial would proceed in the Court below.

13. In DAWNUS (SL) LIMITED AND TIMIS MINING CORP, Fynn JA adopted the meaning given to special circumstances by Gelaga-King JA in the case of AFRICANA TOKEH VILLAGE LTD VS. JOHN OBEY MIS. APP. 2/94 (Unreported) and exercised his discretion to grant a stay of proceedings.
14. The Respondents relied on the case of NIGERIAN NATIONAL SHIPPING LINES –V- ABDUL AZIZ (Trading as ABDUL AZIZ ENTERPRISES). In this matter, the application was to the Supreme Court seeking special leave to appeal against the Ruling of the Court of Appeal refusing leave to appeal on the ground that the Applicant was out of time, which deprived the Court of jurisdiction to hear the application. The Supreme Court in determining the issues in the Appeal dealt extensively with the construction of Rules 10(1), 10(4) and 64 of the Court of Appeal Rules, 1985. Kutubu CJ had this to say "By virtue of Rule 10(1) both the High Court and the Court of Appeal have concurrent jurisdiction in the matter of applications to these Court for leave to appeal an enlargement of time. The application must be made within 14 days. Where the application is refused after the 14 days period specified in Rule 10(1), an applicant must apply for enlargement of time together with an application to the Court of Appeal for leave to appeal, in view of the provisions of Rule 10(4), which taken together with Rule 10(1) gives the Applicant 28 days for time to run out".
15. Kutubu, CJ in his leading ruling held that the words of Rule 10(1) are plain and unambiguous and must be strictly applied. In doing so he relied on the dictum of Lord Esher MR in R-V- JUDGE OF THE CITY OF LONDON COURT (1892) 1 QB.27 "If the words of an Act are clear, you must follow them even though they may lead to manifest absurdity". He accordingly upheld the ruling of the Court of Appeal.
16. I have dealt with this case extensively because it is the leading authority on this subject in Sierra Leone.
17. In the case of estate of KALILU JABBE –V- SKYE BANK (SL) LTD, Fynn JA in his dissenting judgment stated as follows:-  
"This applicant did not ask the single judge 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 sotto motto will in my opinion bring an outcome which was not prayed for to bear on the parties. This in my opinion will significantly undermine the time limits fixed by the Rules..."



18. This Ruling appears to apply the ratio decidendi of the Nigerian National Shipping Line case.
19. The English Supreme Court Practice, 1999 (The white Book) gives an insight into application for leave to appeal. It states at paragraph 59/1/31A as a fundamental principle, that appeal lies against the Order made by the Judge, not against the reasons he gave for his decision. The obvious question one would ask is, what is the effect of Orders given by the Judge which do not speak to the application before him as in the instant case. Here, the Applicant applied to the High Court by Notice of Motion dated 8<sup>th</sup> December, 2016 seeking inter alia, leave to dispose of the substantive action on a point of law based on the following question "whether the Letters of Administration granted on the 16<sup>th</sup> day of March, 2016 are valid in law..."
20. The Learned Judge in his Ruling stated that "By reason of ... the fact that the determination of the issue aforesaid raised by the parties herein as contained in their respective application by Notice of Motion dated 8<sup>th</sup> December, 2016 and 25<sup>th</sup> January, 2017 cannot be determined herein unless at a trial, it is hereby ordered as follows:-
1. That the trial of the counterclaim is hereby fixed for Wednesday, 1<sup>st</sup> March, 2017.
21. It is my view that in the instant case, the Order given cannot be treated in isolation from the reason given therefor. To my mind, it amounts to a refusal of the application giving the Applicant the right to appeal against the said orders. Paragraph 59/1/31A of the English Annual Practice, 1999 will therefore not apply here.
22. Having said this, it is noteworthy that the grant of leave to appeal and or extension of time to appeal is governed by Rules. As I mentioned earlier, this court has to determine whether or not the Applicants have complied with Rules 10 and 64 of the Court of Appeal Rules, 1985. It will be important for the sake of clarity to state the relevant Rules.
- Rule 10(1) provides that:-
- "Where an appeal lie by leave only, any person desiring to appeal shall apply to the court below or to the Court by Notice of Motion within fourteen days from the date of the decision against which leave to appeal is sought unless the court below or the court enlarges time"
- Rule 10(4) prescribes:



"No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of fourteen days from the expiration of the time prescribed within which an application for leave to appeal may be made."

Rule 64 provides as follows:-

"Except where otherwise provided in these Rules or any other enactment, where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the court below, but if the Court below refuses the application, the applicant shall be entitled to have the application determined by the court".

**23.** These provisions were extensively reviewed by KUTUBU, CJ in the NIGERIAN NATIONAL SHIPPING LINES CASE and reached the following conclusions:-

- a. Rule 10(1) – it means simply that an applicant can make his application either to the Court below or this Court within fourteen days from the date of the decision appealed against unless that period is enlarged either by the Court below or this Court
- b. Rule 10(4) makes it mandatory for an applicant who is seeking an enlargement of time within which to apply for leave to do so within twenty-eight days from the date of the decision appealed against which leave is sought. By way of clarification, His Lordship expressed the view that this provision only applies when no application whatsoever has been made to the Court below or court of Appeal.
- c. Rule 64 makes it obligatory for an applicant to first make his application to the court below and where that court refuses the application, he shall proceed to have the application determined by the Court of Appeal.

**24.** Has the Applicant in this case complied with the Rules?

The Ruling the Applicant is seeking leave to appeal against was delivered on the 15<sup>th</sup> day of February, 2017 and on the 1<sup>st</sup> March, 2017, the Applicants filed a Motion seeking leave to appeal against the said ruling. The application was refused by the court below on the 11<sup>th</sup> May, 2017. The application was apparently for an enlargement of time within which to appeal as could be discerned from the Order dated 11<sup>th</sup> May, 2017. The applicant filed the present application on the 30<sup>th</sup> May, 2017.

**25.** It has been held that the Court of Appeal though it lacks the right to entertain an appeal from an Order allowing an extension of time to appeal, does have jurisdiction (subject to the requirement of leave to appeal) to



entertain an appeal against a refusal of an extension of time for appealing to the Court below. In this case, the time within which to seek leave to appeal started to run from the 12<sup>th</sup> May, 2017. This means the Applicant had fourteen days from this date to seek leave to appeal against the ruling dated 11<sup>th</sup> May, 2017, when the application to the Court for enlargement of time was refused. They filed their application to this Court on the 30<sup>th</sup> May, 2017, four days after the expiration of the fourteen days. It was argued that at this point, an application for enlargement of time should have been made to the Court below and refused before seeking leave from this Court.

- 26.** It should be noted that the application for enlargement of time was made to the High Court when the Applicant was already out of time. However, by virtue of the Court of Appeal Rules, 1985 Rule 10 (4) as clarified by Kutubu CJ in the NIGERIA NATIONAL SHIPPING LINE CASE, the time lines will only apply where there had been no application whatsoever to the Court below or this Court. It appears to me that where such an application has been made to any of these Courts, time will start to run from the date of Ruling on any such application. It will be illogical to start the computation of the relevant period from the 15<sup>th</sup> February, 2017 which will clearly conflict with Rule 10 (1) of the Court of Appeal Rules, 1985 in that the Application cannot come before this Court until and unless it has been refused in the Court below. Time must start to run from the date of the refusal of the application by the Court below. In the instant case, on the 11<sup>th</sup> May, 2017.
- 27.** The Learned Judge in the exercise of his discretion refused the application for enlargement of time. There are many authorities for the proposition that on appeal will not be entertained from an Order which was within the discretion of the Judge to make (English Supreme Court Practice, 1999 59/1/14 2. The question here is not the proper exercise of discretion which I believe the trial Judge has exercised but whether that exercise could lead to injustice. The reason given by His Lordship was that entertaining such an application for leave to appeal would only serve to delay and frustrate the ends of justice and same would be in bad faith (paragraph 17 of the affidavit in Support). The Judge by giving reasons fulfilled the requirements of judicial exercise of discretion.
- 28.** I have however looked at this issue from the perspective of what the determination of main ground of appeal would achieve. To my mind, without attempting to go into merits of the appeal, the issue for



determination in the appeal "whether the learned Judge with respect erred in law and in consequence misdirected himself in holding that even if the Letters of administration granted on the 16<sup>th</sup> March, 2016 is invalid in law, it would not determine the entire cause or matter herein without a full trial of the same" is of sufficient public importance to be given an opportunity to be heard on appeal.

- 29.** As regards the time limit, I note that most, if not all authorities concerning enlargement of time to appeal deal with inordinately long periods of delay based mainly on the nature of the claim. In the Nigerian Shipping Lines case for example, the matter was a commercial transaction in which time was of the essence. This matter on the other hand concerns land and property. In any event, by the Order of the High Court dated 17<sup>th</sup> May, 2017, the Applicants have been restored into the premises.
- 30.** IN THE MATTER OF PRECIOUS MINERALS MARKETING COMPANY (SL) LIMITED AND IN THE MATTER OF THE COMPANIES ACT, CAP.249 (Misc.App.6/2000), the Court of Appeal held that the following conditions must be taken into consideration in determining whether to grant a stay.
- Length of delay
  - The reasons for the delay
  - Whether there is an arguable case on the appeal
  - Degree of prejudice to the Defendant/Respondent each time the time is extended.
- 31.** After considering the said conditions, the said Court granted enlargement of time to appeal in the exercise of its discretionary powers. This was notwithstanding that the Applicant was out of time.
- 32.** In any event Rule 66 of the Court of Appeal Rules, 1985 provide that "Non-compliance on the part of an Appellant with the Rules or any of the Rules of practice for the time being in force shall not prevent the further prosecution of the appeal if the Court considers that non-compliance, was not willful and that it is in the interest of Justice that the non-compliance should be waived". The non-compliance should be waived.
- On the issue of stay of execution of the Judgment dated 6<sup>th</sup> June, 2016, I agree with Mr. Margai that the Applicant is not properly before this Court at this stage.
- 33.** A Notice of Motion dated 17<sup>th</sup> May, 2017 was filed by the Applicants herein seeking a stay of execution of the said Judgment. On the same day, Hon. Justice Kamanda, J. granted an interim injunction and adjourned the



matter to 24<sup>th</sup> May, 2017 for hearing. No evidence has been provided by the Applicant to prove that the said order has been revoked. It is therefore in force. The Applicant can only apply to this Court a stay when there has been a refusal in the Court below. Since there has been no such refusal; this Court will not entertain that part of the relief sought but would instead Order that the said interim stay remains in the force until otherwise ordered.

**34.** For the reasons given above, I order as follows:-

- 1) Leave is hereby granted to the Defendant/Applicant to appeal to the Court of Appeal against the Order of the High Court dated the 15<sup>th</sup> day of February, 2016
- 2) That the interim stay of execution of the Judgment dated 6<sup>th</sup> day of June, 2017 granted by Kamanda J. on the 17<sup>th</sup> day of May, 2017 shall remain in force.
- 3) There shall be liberty to apply.
- 4) Costs in the cause.

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HON. MR. JUSTICE SENGU M. KOROMA JA

HON. MR. JUSTICE M.F. DEEN TARAWALLY JA .....  
(PRESIDING)

HON. MR. JUSTICE R.S. FYNN  
JA .....