CIV/APP. 89/17

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

AIR COTE D'IVOIRE - APPELLANT
SIAKA STEVENS STREET
FREETOWN

AND

IBEACHUSI OKECHUKWU - RESPONDENT
28 GODERICH STREET
FREETOWN

Coram

Hon Mr.Justice Reginald.S Fynn JA

Hon Mr. Justice Desmond B. Edwards JA

Hon Mr. Justice Eldred Taylor –Camara JA.

Ibrahim S. Yillah for the Appellant

Augustine K.Musa for the Respondent

Judgment Delivered this 22nd Day of November 2018

Notice of Appeal and Grounds Of Appeal

1. By Notice of Appeal dated and filed on the 14th of December 2017 the Appellant herein appealed to this Honourable Court against the Judgment of the Hon Mrs. Amy Wright J. dated 27th November 2017. The grounds of the Appeal are as stated as follows-:

1. That the Learned Judge erred in law and misdirected herself when she considered only paragraphs 4 and 8 of the Affidavit in Opposition in concluding that there was no defence to the action on merit.

2. That the Learned Judge erred in law and misdirected herself when she widened the scope of Order 16 of the HCR CI No 8 of 2007, the purpose of which is not to conduct a mini trial but to ensure that there are no triable issues.
3. That the Learned Judge erred in law and consequently misdirected herself when she concluded on the basis of paragraph 8 of the affidavit in opposition that a 3rd party interfered with the luggage of the respondent without calling evidence from both sides to determine whether this occurred .
4. That the Learned Judge erred in law when she only relied on Article 18.1 and completely disregarded Article 22(2) of the Warsaw Convention of 1929, which states as follows:-

> "In the carriage of registered luggage and of goods, the liability of the carrier is limited to the sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at the delivery and has paid a supplementary sum if the case so requires."

5. That the Learned Judge erred in law and fact when she held in her conclusion at paragraph 16 of the said judgment that "the Appellant herein was negligent and /or complicit in the interference that resulted in the loss of items the respondent claims were missing from his luggage by confirming that the piece of paper the respondent found in his luggage was proof that his suitcase was interfered with.
6. That the judgment was against the weight of the evidence.

BACKGROUND

2. The plaintiff in the High Court - Fast Track Commercial Court now the respondent had issued a Writ of Summons as amended dated 25th April 2017 seeking reliefs against the defendant now Appellant as follows:

i. Recovery of items lost in the Plaintiff's baggage carried on flight No.HF769 of the Defendant's airline.

ii. In the alternative, recovery of the value of the said items in the baggage amounting to the tune of Le 50,875, 000 (Fifty Million Eight Hundred and Seventy-Five Thousand Leones)

iii. Interests pursuant to Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap. 19 of the Laws of Sierra Leone 1960.

iv. Damages for breach of contract, and

v. Costs.

3. The amended writ of summons was served on the defendant on the 25th of April 2017 and the defendant now Appellant entered appearance to the writ of summons on the 26th Of April 2017. On the 19th of May 2017, the plaintiff applied to the High Court presided by Justice Amy Wright J for Summary Judgment on all the reliefs as stated on the writ of summons aforementioned including damages for breach of contract. The said application was supported by the affidavit of Ibeachusi Okechukwu, the plaintiff herein, sworn to on the 19th of May 2017 who attempted to verify the facts and deposed that in his belief the defendant does not have a defence to the action. That affidavit had a few exhibits to wit exhibit IO1-IO4. IO1 was a letter of complaint of missing items dated 23rd February 2017 received 3 days after disembarkation: IO2 was a letter dated 8th March 2017 written by the solicitor for the plaintiff to the defendant as a follow up requesting amicable settlement of the issue: exhibit IO3 is the amended writ of summons issued in this action while IO4 is the memorandum and notice of Appearance

3. The particulars of claim of the plaintiff showed that he travelled from Nigeria to Sierra Leone en route Abijan via Cote d'ivoire Airline on the 17th of February 2017 and on his arrival after reaching his destination at home in Freetown he allegedly discovered that some items had gone missing from his baggage whilst travelling on the defendant's airline from Lagos to Freetown. He however only made a report about the missing items with the Defendant's office three days after his arrival in Freetown. On the 1st day of June, 2017, the Appellant's Solicitors Tejan-Cole, Yillah & Bangura filed an Affidavit in Opposition and exhibited a Proposed Defence which they claimed raised triable issues:

4. The Learned Judge considered the application and concluded that there were no issues or questions in dispute which ought to be tried. She granted summary judgment as follows:

- Recovery of the value of the items lost in the plaintiff's baggage amounting to the sum of Le 50,875,000.00
- Interest at the rate of 18%per annum from the 25th day of April 2017 to the date of this order
- Damages assessed at 15,000,000.00
- Costs assessed at 5,000,000.00 in favour of the plaintiff

5. It is against the said Judgment that the Appellant has appealed to this Honourable Court.

Filing of Synopsis of arguments

6. Both parties relied on their respective synopsis. The parties also made oral submissions emphasizing on the points they had raised in their respective synopsis. This court heard counsel on both sides.

Arguments

7. Grounds 1, 2, 3, 5 and 6 can be grouped together and concern whether the case as dealt with by the presiding Learned Judge Hon Justice Amy Wright J was suitable for disposal under Order 16 of the High Court Rules CI No 8 2007 dealing with applications for Summary Judgment. The appellant's counsel argued that the case presented was unsuitable for Summary Judgment for several reasons, chief among which, was that 1) the nature of the claim indorsed on the writ of summons included damages for which there can be no summary judgment but that the learned Judge went on to give summary judgment of damages assessed at Le15,000,000.00 there being with no assessment of damages to arrive at same and 2) that the facts of this case disclosed several triable issues. He referred the court to Order 16 rule 1(1) which states ***"where in an action to which this rule applies a defendant has been served with a statement of claim and has entered appearance, the plaintiff may on notice apply to the court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ or to a particular part of the claim except as to the amount of damages claimed".***

8. He referred to the writ of summons for which damages were claimed and to the judgment for which the sum of Le 15,000,000 was assessed as damages and submitted that the same ought not have formed part of the summary judgment and that this having been done as evinced by the

Application for summary judgment and the order for summary judgment was clearly in contravention of Order 16 Rule 1 of the High Court Rules 2007. On the issue of facts showing triable issues, the Appellant's counsel argued that their defence raised a series of triable issues that should have warranted this case proceeding to a full blown trial but that the same was denied as a result of the Summary Judgment of Hon Justice Amy Wright J which they are constrained to appeal against.

9.In his argument, counsel for the respondent submitted to this court that for Summary Judgment to be granted against a defendant the only criteria was that the plaintiff having served his statement of claim, the defendant must have filed his memorandum and notice of Appearance and that this was the case as the defendant now Appellant entered appearance on the 26th of April 2017 after issuance and service of the writ of summons indorsed with a statement of claim on the 25th of April 2017. On the issue of whether the appellants defence in the High Court raised triable issue(s), the respondent's counsel argued that the proposed defence exhibited to the affidavit of Ayodele Lissa sworn to on the 1st of June2017 and filed therein never traversed the plaintiff's case in any material way to have constituted a good defence on the merits warranting a full blown Trial. Consequently, he concluded that the Hon Mrs Justice Amy Wright J was right in granting the summary Judgment against the defendant now appellant and on the terms so granted.

Consideration of the issues

10. On the issue of whether this case is a proper one for proceeding under Order 16 there are 2 separate considerations viz, 1)The Preliminary/technical considerations/requirements and 2) The substantive consideration/ requirements. Dealing with the preliminary considerations, the question really is whether the application comes within appropriate procedures set out by the terms of Order 16 under which it was made. To come within the appropriate procedure and terms of Order 16 requires the following to have been done viz, 1) that a statement of claim must have been served on the defendant and the defendant must have entered appearance: ii) that the indorsement(s) on the writ of summons ***must not*** be a claim by the plaintiff in respect of any of the following actions viz, libel, slander, malicious damage, false imprisonment or seduction or an admiralty action in rem; iii) that the application was by Judges summons supported by an affidavit which is not defective, as for instance, failing to verify the facts on which the claim is

based and failing to state that in the deponent's belief there was *no defence* to the action or part of the claim. As preliminary requirement they constitute conditions precedent for the plaintiff employing the summary judgment process under order 16 of HCR 2007.

11. In this matter before the Court of Appeal the Respondent wants this court to believe that all these preliminary/technical requirements/ conditions/ consideration were fulfilled. We note with certainty that the writ of summons dated 25th April 2017 was indorsed with a statement of claim and that the same was served whereupon the defendant entered appearance thereafter on the 26th of April 2017 We also note with certainty that the claim on the writ of summons did not contain any of those actions to wit. libel. slander. malicious damage. false imprisonment or seduction or an admiralty action in rem for which applications for summary Judgment is prohibited. Further even though the affidavit in support of the Judges summons sworn to on the 19th of May 2017 did not quite elegantly verified the facts on which the claim is based. it was undeniably to the effect that in the deponents belief that there was no defence to the aforesaid claims. The aforesaid constitute facts which if not present could form the basis for a preliminary objection being raised. See **the Supreme Court Practice 1999 under the rubric preliminary requirement para14/1/4 page 165**. Where any of these preliminary considerations are missing the court is under obligation to dismiss the application. Once those preliminary conditions are all satisfied, the court has an obligation to hear the application for summary judgment. Thus in the case at hand. there being no preliminary issues as gleaned from the facts presented, Hon Justice Amy Wright J was right to hear the Application for Summary Judgment. This does not however mean that she was compelled to grant the Application at all cost. There is a marked distinction between the preliminary requirements for hearing the application and the requirements for granting the application. the first being the preliminary technical requirements with the latter being the substantive requirements. As a matter of fact. it is not in every case in which the procedure may be appropriate or the primary or preliminary requirements in place that it becomes proper to grant summary judgment. The consideration to grant or refuse summary judgment constitute the substantive requirements and requires consideration of a) whether there is no defence at all: or b) whether the defence or proposed defence filed even though filed is a sham i.e. destitute of any merit and cannot stand or c) whether there is an issue arising from the facts of the case as gleaned from the pleadings to be tried. See Order 16(3) (1) of the High court Rules Cl No8 of 2007 which provides. "Unless on the hearing of the application the court

dismisses the Application or the defendant satisfies the court with respect to the claim or part of the claim to which the application relates *that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part,* the court may give judgment against the defendant.

12. The obligation of the defendant under Order 16 is to show cause against the plaintiff's application and this is normally done by one of 2ways - a preliminary /technical objection that the claim is not within the terms of the Order in which cases the Judge dismisses the Application or by showing a defence on the merits which requires the defendant placing before the court through his defence or proposed defence issues traversing the plaintiff's case which ought to or must be tried rather than short cutting the case by summary judgment .

13. Where there is no defence at all meaning that "for purposes of this judgment" the defendant never filed a proposed defence or defence, the natural conclusion is that so long as this is a case where there are no preliminary issues to be considered like not having entered appearance or the case not falling within those cases for which summary judgment could not be given, Summary Judgment must and ought be granted. Similarly so, when there is a defence filed but the defence is merely a sham in the sense of a defence for defence sake or defence fulfilling all righteousness, but which could not in the strictest terms be a proper or adequate defence, as it does not raise any issue, the natural course of event is to order Summary Judgment against the defendant. However in a situation where the defence filed raises an issue or a defence on the merits pursuant to the last ambit of Order 16(3) above, the case should not then be decided summarily. The last ambit of Order 16(3) as underlined above thus provides for a defence on the merits. A defence on the merits is one which shows a bonafide defence on the merits or raises an issue/dispute which ought to be tried because it has a reasonable prospect of success. It is clear from the case presented that this case does not fall within the first 2 categories as there was a proposed defence filed vis a vis no defence filed and that the defence filed could not be any stretch of imagination be referred to as a sham and therefore "no defence" within the rules . A sham defence has been described as a false or fictitious defense, interposed in bad faith, and manifestly untrue, insufficient, or irrelevant on its face. **See Black's online dictionary 2nd edition; see also MCLARDY VS SLATEUM (1890) 24 QBD 504**. A close look at the proposed defence exhibited in the defendants Affidavit in opposition shows that it raised several

issues. What this court has to decipher is whether this proposed defence was considered by the learned Judge?

14. It is however evidently clear that contrary to what the respondents counsel said about the proposed defence not traversing the issues raised by his claim that this was manifestly the opposite as the proposed defence by itself traversed his claim and raised several issues which ought to be tried. Those issues could be enumerated as follows- 1. That the defendant, now appellant, the airline averred that it was not privy to the contents of the missing baggage because the plaintiff did not declare same at the time he was checking in before he boarded the flight. 2. That the defendant Appellant claimed that a security check and nothing more was carried out in the respondents luggage as reflected by the security slip.3.That the defendant relied on article 22(2) of the Warsaw convention 1929 which limited liability of the carrier in case of non disclosure or declaration to not more than US$20 .00 per kilograms; 4) That the plaintiff never produced any receipt showing cost of the alledged missing items. 5.That the plaintiff respondent never reported any item missing from his baggage at Lungi International Airport where the baggage on arrival was sealed and 6. That the report of stolen items only came after 3 days after arrival and that the defendant averred that it was not negligent in handling. The reasoning of the judge based on 1 above should have been– if you did not state that you had those items in your baggage how can you now say they were missing – so there was need to prove whether in fact there were any missing items as alledged. The reasoning on 2 above should have been if there was a security slip does it not prima facie explain why the bag was opened if at all in the first place? and by whom? - was invariably a 3rd party. How then should the defendant be responsible- there was need to find out through a trial. The reasoning on 3 above should have been was that fact as part of the contract of carriage of goods by air not saying never mind your claim if we are liable at all you yourself have not produced any document to show to us that you declared those missing items prior to departure we know for certain you never declared. Thus if at all we are liable this must be of a lesser amount than they have claimed –need for trial. The reasoning on the 4th issue raised should have been if the plaintiff did not produce receipts for the alledged missing items how then did plaintiff come to a conclusion that it cost in total Le50.875.000.00- need for prove – leave to defend and so on and so forth for the rest. These statements were direct denial by the defendant that they were responsible for the alledged stolen

items. At the hearing of the summons for summary judgment it was the duty of the learned Judge Hon Mrs Justice Amy Wright J to pit the plaintiffs claim as against the defendants claim and come to a conclusion whether this case require full trial or summary judgment. It does not appear to us from the records in this case that this was done. In **JONES V STONE (1894) AC 122** the court held that the power to give summary judgment under order 14 which is Sierra Leone's Order 16 was only intended to apply to cases where there is *No Reasonable Doubt* that the plaintiff was entitled to judgment and where it was inexpedient to allow the defendant to defend for the mere purpose of delay. Clearly as against the forgoing it is clear that there is reasonable ***doubt*** that the plaintiff is entitled to summary judgment. Thus in the same **JONES V STONE (1894) AC 122 it was** further held that leave to defend ought and must be given unless it is clear that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to Summary judgment. In the same vein, the cases of **SAW V HAKIN (1889)3 TLR 72, WARD V PLUMBLEY(1890) 6TLR AND IRON CLAD ETC AND CO V GARDNER** all hold true that where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bonafide defence he ought be given leave to defend.

15. With similar tenor the case of **SHEPPARD & CO V WILKINSON (1889) 6TLR 13** establishes the fact that the summary jurisdiction conferred by Order16 must be used with great care and a defendant ought not be shut out from defending unless it is clear that indeed he has no case to the action under discussion . In **CODD V DELAP (1905) 92 LT 810 HL** it was held that leave to defend must be given to the defendant unless is clear that there is no real substantial questions to be tried. In the case for which the defendant/ appellant has now appealed could it be denied that there were substantial questions to be tried? Certainly not. In the Supreme Court case of **AMINATA CONTEH VS APC SC.CIV APP.4/2004 unreported,** a much stronger test than as laid in the aforementioned cases was applied when it was held that the test with respect to applications of this sort is to examine the issues of law and fact raised and to determine whether the defendant has a good chance of succeeding. It is not sufficient to show that there are triable issues but there must be a prospect of success. It is for the Judge to look at the issues raised and the law on the matter to see if there is any prospect of success. The Learned Judge should have

used this test and examined whether there was any prospect of success by the defendant. There is no evidence before us that she did.

16.The Learned Judge in the opinion of this court clearly ignored the many triable issues disclosed by the Appellant herein in their affidavit in opposition inclusive of the proposed defence filed, and chose to rely entirely on evidence that does not even remotely address the substantive issues needed to have been addressed by the Court. She instead despite all the controversies as brought out by the facts on the defendants pleading decided that the defendants were culpable. In this case the evidence on which the plaintiff based his case/claim was inherently incredible such that it becomes unsafe to reach such a conclusion without calling evidence through a full blown trial. As an Appeal court we fail to see anything specific that showed clearly and without doubt that judgment must be given summarily against the defendant /appellant. In the absence of that the summary judgment ought and must be reversed and the Appeal on grounds 1,2,3 5 and 6 must of necessity succeed and be allowed.

17.Turning to the 4th Ground which stated that the Learned Judge erred in law when she only relied on Article 18.1 and completely disregarded Article 22(2) of the Warsaw Convention of 1929, which states as follows:- ***"In the carriage of registered luggage and of goods, the liability of the carrier is limited to the sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at the delivery and has paid a supplementary sum if the case so requires."***

18. This provision was relevant in the light of the averment in the proposed defence and was to the effect that even if you say items were missing and supposing you were right and correct, the appellant cannot be liable beyond this amount as provided by law when you have not declared what was in your baggage, but yet still, the learned Judge gave Summary Judgment against the defendant for a sum which was way beyond their expected liability, to wit Le50,875,000.00. Even if they were liable, which was never admitted, it was therefore wrong for the Summary Judgment to have been granted on such terms.

19. The Appellant has made a heavy weather of the fact that the nature of the claim indorsed on the writ of summons included damages for which there can be no summary judgment but that the learned judge went on to give summary judgment of damages assessed at Le15,000,000.00 with

no assessment of damages. This is not a matter that comes under the technical consideration or substantive consideration. It only relates, provided that the plaintiff have been handed judgment over the defendant, to the terms under which you may grant orders for Damages for breach of contract. Damages for breach of contract having been claimed, it was incumbent on the Judge to have only made a declaration for breach of contract non inclusive of damages as the quantum of damages must be assessed and proven separately and not by summary judgment. The Appeal also succeeds on this issue as we are unable to see how same was proven and assessed and arrived at.

Against the foregoing, all things considered, this court orders as follows:

1. The appeal be allowed and the Judgment of the Hon Mrs Justice Amy Wright J dated 27th November, 2017 and all subsequent proceedings be and are hereby set aside .
2. That this case is referred back to High Court for a full trial on the merit.
3. That this Honourable Court orders repayment to the Appellant of the sum of Le 35,000,000/00 (Thirty-Five Million Leones) from the Sub-Treasury which was paid in compliance with Order 1 of the orders of the Hon. Mr. Justice R.S. Fynn dated 11th January, 2018.
4. That the costs of this Appeal be borne by the Respondent herein to be taxed..

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Hon Mr. Justice D. B Edwards JA

I agree

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Hon Mr.Justice Reginald.S Fynn JA

I agree

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Hon Mr. Justice Eldred Taylor –Camara JA.