

Mis.App 1/2018

1.

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN

MORIA MICIVER-SLOWE
7 SANI ABACHA STREET
FREETOWN

-PLAINTIFF/ APPLICANT

AND

HABIB SALMAN

-FIRST RESPONDENT

EKUNDAYO SAMUEL SHAW

-SECOND RESPONDENT

COUNSEL

B.E. Jones Esq. for the Plaintiff

A.M. Kamara Esq. for the Respondents

**RULING DELIVERED ON THE 17th DAY OF JULY 2018, BY
HONOURABLE MR JUSTICE MONFRED MOMOH SESAY J.A.**

By a Notice of Motion dated the 18th January, 2018, the Applicant applied to this Court for the following reliefs:

- i. that this Honourable Court grants a stay of proceedings of the matter intituled CC 63/16 S No. 6 in the Court below pending the hearing and determination of this application
- ii. that this Honourable Court grants a stay of proceedings of the matter intituled CC 63/16 S No. 6 in the Court below pending the hearing and determination of the interlocutory appeal if leave is granted to appeal.

- iii. that the Honourable Court grants the Applicant herein leave to appeal to the Court of Appeal the Decision/Ruling of the Court below dated the 24th day of November, 2017.
- iv. Any further or other orders deemed necessary and fit.
- v. Cost be costs in the cause.

The Application is supported by three Affidavits all sworn to by Bernard Eldred Jones on the 18th, 30th and 31st January, 2018 respectively.

There is also filed an Affidavit in Opposition sworn to by Alhaji Mustapha Kamara on the 30th January, 2018.

This matter first came up in this Court on Wednesday, the 31st January, 2018 when Learned Counsel, B. E Jones Esq. for the Applicant commenced moving the Court. I had cause to adjourn the matter to Monday, the 12th February, 2018 as there was no representation for the Respondents. On the 12th February, 2018, I had cause to further adjourn the matter to Tuesday the 20th February, 2018 when B.E. Jones Esq. completed moving the Court. A.M. Kamara Esq. who appeared for the First Respondent replied and I reserved the Ruling which is what I am delivering now.

BACKGROUND

The dispute in this matter arose over ownership of a piece or parcel of land situate, lying and being at Freetown Road, Lumley in the Western Area of Sierra Leone. The Plaintiff (the First Respondent herein) commenced an action against the Applicant and Second Respondent herein by Writ of Summons dated the 12th April, 2016. After close of pleadings, the trial

proper commenced before Honourable Mr. Justice Komba Kamanda J in the course of which proceedings, Justice Kamanda J reportedly ordered the case closed for the Defendant.

This was on the 13th of November, 2017. The Applicant herein (Second Defendant therein) applied to the court (i.e. the High Court as presided over by Kamanda J) to set aside the Ruling of he 13th November, 2017 closing the case for the Defendants, that leave be granted the Defendants to reopen their defence and that the Learned trial Judge, Kamanda J. recuses himself from the matter. These reliefs were refused and the Court further ordered that a *locus* visit to the property be made on the 25th November, 2017. The Ruling was given on Friday, the 24th November, 2017.

The Applicant (second Defendant therein) further applied to the same Court praying for a stay of the proceedings and leave for the Second Defendant therein (The Applicant herein) to appeal to this Court against the Ruling of the 24th November 2017. These reliefs were refused in the Ruling of Kamanda J dated the 15th January, 2018. The Court further ordered that matter was adjourned to the 20th January, 2018 for the *locus* visit.

It is after this last Ruling of the Court below that the Applicant has applied to the Court for stay and leave to appeal against the Ruling of Kamanda J dated the 24th November, 2017. I had already granted an interim stay of the proceedings of the matter in the Court below (i.e. CC 63/16 2016 S No. 6 pending the hearing and determination of this application.

THE LAW ON STAY OF PROCEEDINGS AND LEAVE TO APPEAL AGAINST AN INTERLOCUTORY DECISION/ORDER

Learned Counsel for the Applicant, B.E. Jones Esq. in the course of his arguments, said the application was made pursuant to Rules 10 ⁽¹⁾ and 28 of The Court of Appeal Rules, 1985, Public Notice No. 29 of 1985. I think that Rule 10 ⁽²⁾ is also relevant for consideration in this matter. What do these Rules provide? Rule 10 ⁽¹⁾ and ⁽²⁾ provide as follows:

“10 ⁽¹⁾ Where an appeal lies 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 the time”.

“(2) Any application for leave to appeal or for enlargement of time within which an application for leave to appeal may be made, shall be supported by an affidavit setting forth good and sufficient reasons for the application and by proposed grounds of appeal which prima face show good cause for leave to appeal, or enlargement of time within which to apply for such leave should be granted” (emphasis added by me).

My reading of both sub-rules of Rule 10 reveal the following requirements for such an application.

- i. that when an appeal lie by leave only (not as of right());
- ii. that the applicant shall apply to the Court below or to the Court (*i.e. the Court of Appeal*);
- iii. that the application shall be by Notice of Motion;

- iv. that the application shall be made within fourteen (14) days from the date of the decision against which leave to appeal is sought;
- v. that the fourteen (14) day time limit may be extended by the Court below or by the Court if Appeal;
- vi. that the affidavit in support of the application must disclose good and sufficient reasons;
- vii. that there must also be annexed proposed grounds of appeal which must *prima facie* show good cause for the leave to appeal.

The first question that requires my consideration from Rule 10 is when does an appeal lie by leave only. This question brings into focus Section 56 ⁽¹⁾ of The Courts Act, 1965, act No.31 of 1965 which provides as follows:

“56 ⁽¹⁾ Subject to the provisions of this Section, an appeal shall lie to the Court of appeal –

- a) from any final judgement, order, or other decision of the Supreme Court (to be read as “High Court” pursuant to Section 7 of The Laws (Adoption) Act 1972, Act No 29 of 1972) given or made in the exercise of its original, prerogative or supervisory jurisdiction in any suit or matter, and
- b) by leave of the judge making the order or of the Court of Appeal, from any interlocutory judgment, order or other decision given or made in the exercise of any such jurisdiction as aforesaid:

Provided that no appeal shall lie, except by leave of the Court or judge making the order or of the Court of Appeal:-

- i. from an order made ex parte; or

- ii. from an order as to costs only; or
- iii. from an order made by the consent of the parties”

(emphasis added by me)

My reading and understanding of section 56 ⁽¹⁾ as quoted above is that appeal shall lie by leave only in the following situations:

- i. non-final judgments, orders or other decisions. That is to say, in any interlocutory judgments, orders or other decisions;
- ii. from an order made ex parte;
- iii. from an order for costs; and
- iv. from an order made by the consent of the parties

By Order 59 Rule 1A of The English Rules, 1991 as in the English Supreme Court Practice, 1999 (i.e. The White Book 1999) at paper 1011, the Learned Authors commented as follows:

“that an order was not final unless it would have finally determined the whole case....Any order which is not final....is by necessary implication interlocutory”.

This Court has also held the same view through the mouth of Warne J.A (as he then was now deceased) in the case of J.A. Beckley v Dauda Kamara (an infant suing by his next friend and legal next-of-kin, Brima Koroma, Misc App 32/84), the Court of Appeal constituted by Warne, Marcus Cole and Navo JJA. Warne J.A. said that “*in the case of a final order no leave is required from the Court below or from this court if made within time*”

Rule 10 ⁽¹⁾ and ⁽²⁾ gives the Court below and this Court concurrent jurisdiction in dealing with such applications. However, Rule 64 of the said Court of Appeal Rules prescribes the procedure to follow in such a situation. That is

to say, an applicant must first apply to the Court below and if the court below refuses, the applicant as of right can make a fresh application to this court. The Rule provides that:

“ Except where otherwise provided in these rules or by 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”

Rule 10 (2) and (4) read together gives the applicant twenty-eight (28) days within which to make this type of application. The first fourteen (14) days runs from the date of the decision and the second fourteen (14) days for enlargement of time after the expiration of the first fourteen (14) days.

On the law on stay of execution, this Court has settled the position which is that the applicant must show prima facie good grounds of appeal and the existence of special or exceptional circumstances by affidavit evidence (see Firetex International Co. Ltd v Sierra Leone External Telecommunications and Sierra Leone Telecommunications Co. Ltd Misc. App 19/2002 ; Desmond Luke v Bank of Sierra Leone, Misc . App 22/2004; Herbert Nelson Okrafor (Suing through his Attorney, Derrick Pratt v Sorie Kargbo, M’bayo Turay, Amadu Bai-Sesay and Philip Kai Ansumana Misc. App 65/2017 etc.

In all the cases on stay of execution, the Courts are mindful of not depriving the successful litigant of the benefits of the judgment in his favour.

However, in the present matter, there is no final judgment yet. The litigation is still alive and the applicant is here for a stay of the proceedings in the

Court below whilst the interlocutory orders of the Trial Judge dated the 24th November, 2017 are contested in the Court of Appeal.

I therefore hold the view that the requirement of prima facie good grounds of appeal is the same in both applications for stay of execution of a judgement and stay of proceedings but the special or exceptional circumstance for stay of proceedings would be considered with a different lens altogether. What is important is that the applicant by affidavit evidence must show something unique or out of the normal run of things. When once that is done, the applicant is entitled to either a stay of proceeding or execution. This is not to suggest any radical departure from the established rules enunciated by this Court and the Supreme Court on stay but I would make bold to say that facts or circumstances that are labeled exceptional circumstances have never been pronounced closed.

THE EVIDENCE AND SUBMISSIONS OF COUNSEL

The evidence in respect of this matter is found in the affidavits filed as mentioned earlier in this Ruling.

There are three affidavits in support of the application all sworn to by Bernard Eldred Jones on the 18th, 30th and 31st January, 2018 respectively and the summary of the averments are:

- i. that after the institution of the action below by a Writ of Summons dated 12th April, 2016, the applicant applied to be added as a party which application was granted on the 9th of June, 2016, thereby the Applicant became the Second Defendant below;

- ii. that the Applicant (as Second Defendant) therein filed her Statement of Defence and Counter –Claim and that in the course of the proceedings before Kamanda J, the trial judge showed open bias against the Defendants and subsequently prematurely ordered the closure of the case for the defence ; the said orders having been granted on the 13th November, 2017;
- iii. that the Applicant applied by Notice of Motion dated the 20th November, 2017 to the trial Judge/Court to set aside his said orders of the 13th November, 2017 for leave for the Applicant to proceed with her defence by calling witnesses and for the trial judge to recuse himself from the matter.
- iv. that on the 24th November, 2017, the trial judge refused the reliefs prayed for and ordered that a locus visit be held on the 25th November, 2017
- v. that by Notice of Motion dated the 27th November, 2017, the Applicant applied to the trial Court for a stay of proceedings and leave to appeal against the Ruling of the 24th November, 2017.
- vi. that the prayers for stay of proceedings, leave to appeal against the Ruling of the 24th November, 2017 and for the trial judge to recuse himself from the trial were refused by an order of the Court dated the 15th January, 2018.
- vii. that the special circumstance in this matter are disclosed in the bias conduct of the matter by the trial judge and that should the proceedings below be allowed to go on whilst an appeal is being

pursued, the outcome will be a waste of time and economic hardship on the Applicant if the appeal succeeded.

There is also exhibited the Proposed Notice of Appeal which has the following grounds of appeal:

- i. that the Learned Trial Judge was wrong in law to refuse to set aside its decision of the 13th day of November, 2017 after same has been cited as an irregularity.
- ii. that the Learned Trial Judge was wrong in law to prevent the Appellant from calling witnesses when the Appellant has elected to give evidence in defence to the claims against her and to proceed against the 1st Respondent herein upon a counter-claim.
- iii. that the Learned Trial Judge was wrong in law to have ordered a locus in quo without compliance with the provisions for doing so under the High Court Rules 2007.
- iv. that the decision of the Learned Judge is against the weight of the evidence

There is an Affidavit in Opposition sworn to by Alhaji Mustapha Kamara on the 30th January, 2018 and the averments in same can be summarized as follows:

- i. that the Applicant has not shown any special circumstances;
- ii. that the Applicant was given ample time to proceed with her case but treated the court with levity; and

- iii. that the Court of Appeal was notorious for inordinately delaying matters

In the course of their arguments, B. E. Jones Esq. submitted that special circumstances in this case are found in the Applicant's claim of bias against the trial judge and that should stay be refused and the proceedings allowed, it would amount to economic hardship on the Applicant who would have to pursue both the appeal and the proceedings below. He further submitted that the premature closure of the defence for the Applicant amount to denial of justice and was therefore special circumstance.

On the issue of the leave to appeal, counsel submitted that the grounds of appeal as stated in the proposed Notice of Appeal are good grounds and will give the Court of Appeal the opportunity to consider the requirements in Order 41 Rule 4 (4), Order 18 Rule 2 (2) and (3) and Order 42 of the High Court Rules, 2007, which he argued, have been flouted by the trial judge.

Counsel referred the court to case law authorities including:

- i. Civ. App 4/2008 Eleady Cole v Eleady Cole and Another (unreported)
- ii. Westminister Aviation Services v Dauda Bangura Misc. App 14/2016 (unreported)
- iii. Nika Fishing Co. Ltd v Lavina Corporation, Supreme Court of Nigeria SC1162/2002

On his part, Learned Counsel for the Respondent, A.M. Kamara Esq. submitted that the Applicant has not shown any special circumstance to

warrant the grant of stay of the proceedings and further that the Applicant has not shown good grounds of appeal as disclosed in the proposed Notice of Appeal i.e. Exhibit D. He argued that Grounds 1 and 2 are not in compliance with Rules 9 (1) and (2) of The Court of Appeal Rules, 1985 as they do not state the particulars of error alleged and that the provisions of the Rule are mandatory.

REVIEW OF THE EVIDENCE AND THE RELEVANT LAW

I shall now proceed to consider the evidence and submissions of Counsel and relate them to the relevant law and to see whether the Applicant has shown:

- i. that the Ruling of Honourable Justice Komba Kamanda dated the 24th November, 2017 is an interlocutory Ruling/Decision;
- ii. that she has *prima facie* goods grounds of appeal; and
- iii. that there exists special or exceptional circumstances to warrant this court exercise its discretion in her favour

On the first requirement, I need to ascertain what that Ruling/Decision was. It is attached as Exhibit B which is as follows:

“BEFORE THE HONOURABLE MR JUSTICE KOMBA KAMANDA (J) DATED
THE 24TH DAY OF NOVEMBER, 2017

UPON READING THE NOTICE OF MOTION dated the 21st day of November, 2017 and affidavit in support thereof together with the exhibit attached thereto and UPON HEARING A Kamara Esq. of Counsel for the Plaintiff/Respondent herein and B. E Jones Esq. of Counsel for the 2nd Defendant/Applicant herein. IT IS HEREBY ORDERED AS FOLLOWS:

1. that the application to set aside the Ruling of the Court dated the 13th day of November 2017 on the basis of irregularity is refused.
2. that the application that the 2nd Defendant/Applicant is to reopen his Defence by calling Witnesses is refused.
3. that the 2nd Defendant/Applicant and his Counsel are to be present at the locus in quo on Saturday, 25th November, 2017 and thereafter Counsel is to present his Closing address after the locus report may have been tendered in evidence and cross-examination conducted.
4. that the application that the Learned Trial Judge Komba Kamanda (J) recuses himself from sitting as a trial judge in this matter is refused.
5. cost in the cause”

The reliefs as contained in the said Writ of Summons dated the 12th April, 2016 in which the main claims by the Plaintiff against the Defendant is for a declaration of title and possession of a property situated at Freetown Road, Lumley Freetown in the Western Area of the Republic of Sierra Leone. These

claims are the subject matter of the action CC 63/16 2016 S No. 6 which is pending before the Honorable Mr. Justice Komba Kamanda J.

Matching the said Ruling/Decision dated the 24th November, 2017 with the said claims, it is clear that that Ruling/Decision does not finally determine the issues before the Court below as stated in the claims and statement of defence and counter-claim.

I am therefore satisfied that the said Ruling/Decision dated the 24th November, 2017 is an interlocutory decision and to appeal against such a decision, leave must be sought and granted pursuant to section 56 (1) of The Courts Act, 1965.

The next legal hurdle for the Applicant is whether she complied with Rules 10 (1) & (2) and 64 of The Court of Appeal Rules, 1985 as highlighted and explained above.

The evidence before this Court is that by Exhibit C, the Applicant applied to the Court below by Notice of Motion dated the 27th November, 2017 for the following reliefs:

- i. stay of proceedings pending the hearing and determination of the application;
- ii. Stay of proceedings pending the hearing and determination of the interlocutory appeal if leave to appeal was granted, and;
- iii. leave to the Second Defendant to appeal to the Court of Appeal the Court's Decision/Ruling of the 24th day of November, 2017, amongst others.

The Court below heard the application and delivered a Ruling on the 15th day of January, 2018 in the following terms:

“UPON READING THE NOTICE OF MOTION dated the 27th day of November, 2017 and the affidavit in support, thereof together with the exhibits attached thereto and UPON HEARING A Kamara Esq. of Counsel for the Plaintiff/Respondent herein and B.E. Jones Esq. of Counsel for the 2nd Defendant/Applicant herein IT IS HEREBY ORDERED as follows:

1. that the application for a stay of proceedings in this matter is refused .
2. that the application for leave to appeal to the Court of Appeal the decision/ruling of the 24th day of November, 2017 is refused.
3. that the matter is adjourned for a locus visit (that was aborted) to the 20th January, 2018.
4. Cost in the cause.

The Applicant then applied to this Court by Notice of Motion dated the 18th January, 2018 for the reliefs of stay of proceedings and leave to appeal amongst others, are the subject of this Ruling.

I therefore find and I am satisfied and hold that the Applicant complied with Rules 10 (1) & (2) and 64 of the extant Rules of this Court. After the Decision/Ruling of the Court below on the 24th November 2017, the Applicant first applied to the said Court below for stay of proceedings and leave to appeal to the Court of Appeal on the 27th November 2017 i.e. after three (3) of that Decision/Ruling and the Court below refused the said reliefs on the 15th

January, 2018. After the refusal, the Applicant then applied to this court on the 18th January, 2018. I note that the Applicant is a vigilant litigant who did not sleep on her wings.

The next hurdle for the Applicant to jump is whether the grounds of appeal as disclosed in the proposed Notice of Appeal (i.e. Exhibit D) show a *prima facie* good grounds of appeal.

In the Affidavit in Support sworn to by Bernard Eldred Jones dated the 18th January, 2018, the deponent at paragraph 11 averred that "*that the issues raised in the appeal touches and concerns the manner in which the proceedings are conducted and it will give an opportunity for the jurisprudence to be improved*" I do not agree with the deponent that what he has averred is a requirement for applications for stay or leave to appeal i.e. that the consideration of the grounds of appeal would "*give an opportunity for the jurisprudence to be improved*" The legal requirement for the grounds is that they must *prima facie* show good grounds of appeal. This means that just by the way they are formulated and/or drafted, the grounds of appeal must show their weight or strength in conjunction with the evidence before the Court.

I have already referred to and quoted the said grounds of appeal earlier in this Ruling and it is my considered view that they appear to me to be good grounds of appeal as they alleged bias and denial of opportunity for the Applicant to present her case before the trial court. Whether or not they have merit is not for this Court to consider in this application.

I noted the submission of Counsel for the Respondent, A.K Kamara Esq. that the Applicant did not state the particulars of the error in drafting the grounds of Appeal which, he argued, was a mandatory requirement of Rule 9 (1) and

(2) of the Court of Appeal Rules 1985. I hold that this is the wrong forum for such submission. This Court is merely dealing with the application for leave to appeal and stay of proceedings. It is not dealing with the substantive appeal which fate is what is to be determined in this application. I would therefore advise Learned Counsel A.M. Kamara Esq. to wait for the appropriate forum i.e. if the need arises and /or if leave to appeal is granted.

The next issue which I must consider is whether the Applicant has shown special circumstances for both reliefs.

Both by the affidavit evidence and by his oral submissions, B.E. Jones Esq. relied on the claims of bias by the trial judge against the Applicant and denial of opportunity to fully defend the claims against her and prosecute her counter-claim against the Plaintiff. Counsel argued that to refuse the stay would lead to economic hardship on the Applicant if the appeal should succeed as she would have to start proceedings all over again.

These arguments or evidence of economic/financial hardship and the consequent moral or sentimental appeal by themselves have never been accepted by this Court as evidence of special or exceptional circumstances.

In the case of Desmond Luke v Bank of Sierra Leone, Misc. App 22/2009 Court of Appeal (unreported) Sir John Muria cautioned that *“such considerations....do not and ought not to form the basis of the Court’s discretion to grant or refuse a stay.....”*

I agree with this caution. So also is an allegation of bias. It has not been a basis for stay.

However, as noted earlier in this Ruling, I am alive to the special facts and circumstances of this case. The litigation below is still alive and has only been temporarily halted. The merits of the matter below is yet to be determined and I have held that the Applicant has not only complied with rules 10 (1) and (2) and 64 of the Rules of this Court but also held that the proposed grounds of appeal are prima facie good grounds and I am minded to grant leave to the Applicant to appeal. What purpose would be served should I grant leave to appeal and refuse stay? I think it would lead to two actions going on simultaneously – one in this Court and one in the Court below. This by itself and the outcomes of the cases would not be in the interest of justice. The Applicant is questioning the fairness of the proceedings below. Should this be of concern? I think so.

In applications of this nature, it would be prudent to consider the totality of the special facts and circumstances of each case. Hon. Mr. Justice S.A Ademuso J.A (as he then was, now deceased) in The case of Richard Owiredu v Beijing Urban Construction Group Limited (carrying on business as Bintumani Hotel) (2008) Misc. App 4/2008 quoted with approval what was said in the case of Tuck v Southern Counties Deposit Bank (1889) 42 Ch.d 471 61LT that *“the court should consider all the facts before deciding whether they constitute proper facts for its discretion to be exercised”*

It is not every ground of law that qualifies as special circumstance for stay of proceedings or execution of judgment. A legal ground relied on for stay should be shown to be substantial and its determination one way or the other would affect the whole case. I am satisfied that serious issues of law have been raised on which the rights of the parties depend and it would therefore be desirable to resolve them without any interruption in the Court of Appeal.

The Respondent did not sufficiently contradict or challenge the evidence and submission on behalf of the Applicant. Of course I am aware that the onus is on the Applicant to show the existence of special circumstances and *prima facie* good grounds of appeal, but the Respondent would have assisted the Court if he led evidence to contradict that of the Applicant.

Both in the Affidavit in Opposition and by his submissions, Learned Counsel A M. Kamara Esq. simply said that the Applicant has not shown special circumstances and that she was given the opportunity to pursue her case but treated the court with levity. These averments were not supported by any further evidence.

My eyes caught paragraph 6 of the Affidavit in Opposition which stated that “*that experience has taught me that matters in the Court of Appeal usually take several years for Ruling or Judgment to be delivered*”. This, in my view, is not only an indictment against this Court by one of its officers but it ought also not to have been made as order 31 Rule 6 of the High Court Rules 2007 is against such averments. It is scandalous. This Rule provides that “*The court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive*”. (emphasis added by me).

I would advise Counsel to be cautious in the future as to what to say by way of evidence before a court. The Rules of evidence and procedure should not only be known by counsel but ought to be adhered to.

In view of the premises, I grant the main reliefs prayed for in this application

Consequently, I order as follows:

- i. that leave is granted to the Applicant to appeal to the Court of Appeal the Decision/Ruling of the Court below dated the 24th November, 2017
- ii. that stay of the proceedings in the Court below relating to the matter CC 63/16 S No. 6 pending the hearing and determination of the interlocutory appeal for which leave has been granted is also granted.
- iii. Costs of this application be costs in the cause.



Hon Justice Monfred Momoh Sesay – J.A.

17/7/18