Civ. App 1/2017

IN THE COURT OF APPEAL OF SIERRA LEONE

VOTOVITCH ROSTISLAV
EDUARDO MYRONENKO - APPELLANTS

AND

MOMOH ANSUMANA &
BORIS FARFELL -RESPONDENTS
OLEG TSKANOV

CORAM;
HON. MR. JUSTICE REGINALD SYDNEY FYNN JA
HON. MR. JUSTICE DESMOND BABATUNDE EDWARDS JA
HON. MR. JUSTICE ELDRED FRANK TAYLOR-CAMARA

YH Williams Esq. for the Appellants
M.P Fofannah Esq. for the Respondent

Ruling delivered on ..... December 2018

Reginald Sydney Fynn JA

1. The Respondents have filed a preliminary objection pursuant to R19 of the COA Rules urging that this Appeal not be heard at all. The objections rest on three grounds which were argued by MP Fofannah for the respondents. First, amongst these is that part of the appeal relates to a judgement which was given more than three months ago. Fofannah argues that where time within which to appeal has expired a party who wishes to appeal must first apply for time within which to appeal to be enlarged. He argues that R 11 of the Court of Appeal Rules provides that unless time is so enlarged the court cannot properly hear such an appeal. The respondent submits that a part of the present appeal clearly relates to a judgment for which time to appeal has expired. He submits that the applicant needs have extension of time to appeal before he can appeal against that judgment or any part of it
2. On the second ground, the respondent argues that the notice of appeal was filed before the judgment which is being appealed against was drawn up. This the respondent

argues is in contravention of Order 43 R 2, 5, 6(1) and 7 of the High Court to Cap 274, The Stamp Duty Act, section 12 & 14 thereof, the respondent submits that by acting as they have ie. filing an appeal without drawing up an order, the applicant has circumvented the Stamp Duty Act. appellants'

3. Thirdly, the respondent has argued that a motion dated 16th February 2017 was filed seeking to amend the Notice of Appeal. However, this has not been moved. Counsel submits that the consequence is that the parties before the court are not those truly affected by the ~~application~~ appeal.
4. In his reply, YH Williams referred the Count to S. 28(3) of the constitution of Sierra Leone Act No. 6 of 1991 also citing the majority ruling in case of **Skye Bank Vs. Khalilu Jabbie**. Williams argues that time did not run until the matter which appeared to be still in progress was brought to an end. Referring to paragraph 205 of the judgement, he summits that clearly there were still things to be done before the final judgement. He maintains that the Judgment of 19th September 2016 itself anticipated that further processes were pending in the case and so time could not have started to run against the appellant. In the alternative Williams submits that even if time within which to appeal had expired on the first judgment the present Notice of Appeal is severable and only the offending portions need to be stuck off if at all.
5. YH Williams agues further in relation to the second ground and the non-drawing up of the judgment appealed against, that there is no rule which stipulates the exact time for the drawing up of an order/judgement. He argues further still that the duty to draw up an order is primarily that of the successful party ie the person(s) who benefits from the order.
6. As a general alternative position the appellant submits that R66 provides that an appeal shall not come to an end for non-compliance with the rules as the Court can waive any such non-compliance.
7. The first issue we are to determine is whether the appellant has filed this Notice of Appeal outside the time within which an appeal ought to be filed. The Notice of Appeal is dated 18th January 2017 and it seeks to appeal against judgments given on 19th September 2016 and 11th January 2017. 19th September 2016 is clearly more than three months away from 11th January 2017 this puts the Notice of appeal outside the period available for appealing final judgments.
8. However regarding that first judgment ie the one dated 19th September 2016 counsel has argued that the judgment itself envisaged that further action/process would follow it. Does this therefore mean that this was an interlocutory judgment? It is generally accepted that one of the indications that a judgment is interlocutory is the fact that it does not bring the matter to a complete end but rather leaves room for further process to be done. In his submission, though the appellants alluded to the fact that the

judgment of 19th September 2016 was not final they did not go so far as to say that it was interlocutory in fact. Clearly if this judgment had been reckoned as an interlocutory one then the right to appeal would have expired after fourteen days by R 10(1) of the Court of Appeal rules. Also any such right to appeal would not have been automatic but rather dependent upon and exercised only with the leave of the court. Would this not have complicated the issues further as neither leave to appeal nor an enlargement of time has been sought even though both would in those circumstances have been necessary?

9. However still as a final judgment, as earlier mentioned the three months within which to appeal have elapsed before the Notice of Appeal was filed. Counsel argues though that the judgment itself envisaged that something more needed to be done therefore time did not start running. He cites the case of **Khalilu Jabbie** in support of this proposition.
10. My reading of the majority ruling in the **Khalilu Jabbie v Skye Bank** does not disclose an intention on the part of my brethren there, to lay general guidelines on the failure to apply for extension of time. The ruling does not make any direct pronouncements on that specific issue save that it did in fact accept a notice of appeal filed out of time and without the party first seeking extension of time. I note that in that case the second judgment had sought to rectify that which was being appealed against. The present objection is made in completely different circumstances.
11. It is my opinion that **Khalilu Jabbie v Skye Bank** was decided in the peculiar circumstances of that case. I do not therefore consider the majority ruling in the **Khalilu Jabbie v Skye Bank** as binding upon us in this regard. The time within which to appeal a final judgment is three months. Those three months elapsed with respect to the judgment of 19th September 2016 before the notice of appeal herein was filed. A need arose thereby for an application for enlargement of time but none was sought.
12. The following passage from the white book is helpful as to the necessary attitude of the court when there has been a failure to do a required thing:

> *"Where leave to appeal is required it must be obtained before service of a notice of appeal. Where leave to appeal is required a valid notice of appeal can only be served after leave has been granted"* (see 1999 white book 59/1/5).

13. The reasoning here is not unlike what would be expected where there is a need to apply for enlargement of time in which to appeal; *When time within which to appeal has expired* ***a valid notice of appeal*** *can only be filed after the time within which to appeal has been enlarged.*
14. Thompson Davies JSC makes the point clearly in the **Nigerian National Shipping Lines Ltd v Abdula Ahmed (Trading as Abdul Aziz Enterprises)** case where he first approvingly quotes Dove Edwin JA **Elijah Speck vs. Gbassay Keister** before continuing

"In the circumstances the omission to follow the rules is fatal and it is my opinion that the appeal is not properly before the Court and should be struck out"

'It seems clear to me that in all the circumstances, the Appellant here have failed to follow the Rules by applying to the Court of Appeal,; to have their application determined when they were out of time without first obtaining an order granting them an enlargement of time; there was no appeal before the Court; that omission was fatal. It could surely not have prejudiced the Appellants' case if they had. chosen to obtain an enlargement of time to apply to the Court of Appeal, On that basis the Appellants have no rights to complain about the Court of Appeal's decision, the Court had no jurisdiction in the matter, it could not have adjudicated on it and therefore could not; have assumed jurisdiction even where there is a fresh step or waiver by the Respondents of any non-compliance with any of its rules……'

15. On the question of whether R66 can cure this failure to apply for enlargement of time I will reproduce what I said in the **Kallilu Jabbie** case:

> *"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. It remains my view that it is the Notice of Appeal that is the vehicle by which an appeal comes to this court. When that vehicle is defective, the appeal does not arrive at the court and so there is truly nothing before us; in which case we are not in the position to administer a cure even if we wanted to.
17. The opinion expressed in **Auto Import Export v Adebayo & Others** SC49/1997 is also helpful in this regard,

> *"……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……"*

18. Can we now sever the defective portion of the notice of appeal from the rest of it as alternatively argued by counsel for the appellant? I will decline this invitation. The grounds of appeal have not been organized so as to readily lend itself to such easy dissection. Even though the notice refers to two judgments in its body the grounds are not distinctive as to which refers to which judgment whilst in the portion "reliefs

sought" only one of the judgments is referenced. The court will not in these circumstances seek out what can be saved and what cannot be.

19. The court will however not lose sight of the provisions of R 66 of the Court of Appeal Rules in so far as they provide for an appeal to survive despite non -compliance with the rules. The court is similarly mindful of its general powers under Rules 30 and 31
20. I do not see a need to discuss the other grounds of objection raised by the respondent considering that this one ground does dispose of the matter without more. Suffice it to say that in my opinion stamp duty is aimed at the party who is to benefit from the judgment. Also it is my opinion that drawing up a judgment is not time bound.
21. Counsel has argued that opposing counsel has taken objections and positions different from positions he opposing counsel had held in previous cases. Whilst this might pose some intellectual moral question I dare say it is not an uncommon occurrence in the practice of the law. Additionally I note that at least in one such case the **Khallilu Jabbie** case present counsel were on different sides of a similar argument. Surely not one but both have shifted their position on the issue for the purposes of the present argument.

Guided by the foregoing considerations I will strike out the Notice of Appeal herein. I will also grant the appellant liberty to refile the Notice of Appeal limiting the same only to the judgment of 11th January 2017.

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VOYTOVITCH ROSTISLAV & ANOR V MOMOMOH ANSUMANA & OrS

SEPERATE CONCURRING

RULING: JUSTICE F TAYLOR-CAMARA delivered the .... day of December 2018

This appeal was scheduled to come up for hearing before this Court. However, a preliminary objection has been taken by the Respondents to the hearing of the appeal on the grounds and in the circumstances ably set out in the Ruling of Fynn, JA, which Ruling I have had the privilege of reading in draft. I will not therefore repeat them here.

It seems to me that the issues to be determined, are whether the Appellants' Notice of Appeal should be struck out, and if so, whether partially or in full. This is a most unusual case in that the Appellants have attempted to appeal two decisions of the High Court (both by Alhadi, J), in one Notice of Appeal. It is all the more unusual because of the time gap between the two decisions. The first decision was dated 19 September 2016 (the September decision), and the second decision is dated 11 January 2017 (the January decision), a gap of just under four months. Mr Fofanah for the Respondents, argues that the September decision was interlocutory by nature and as such if it was intended to appeal against it, notice of such appeal could only be filed with leave of the Court, and the application for leave needed to be made within 14 days of the decision as provided for by R10 (1) of the Court of Appeal Rules (CARs). He argues further, that even if the view were taken that the September decision was a final decision, leave to appeal would still be needed together with an order granting enlargement of time within which to appeal. This is because R11(1) allows for three months within which a final decision can be appealed against. If an appeal is not lodged within those three months then an application will have to be made for an enlargement of time within which to appeal under R11 as well as leave to appeal under CAR R10. Mr Fofanah goes on to argue that incorporating two appeals within one Notice of Appeal offends against the CARs and he therefore urges this Court to strike out the Notice of Appeal in its entirety and dismiss or vacate the appeal.

As indicated earlier, this is a most unusual case in that the Appellants have attempted to appeal two decisions of Alhadi, J, in one Notice of appeal. Mr Williams, counsel for the Appellants, has not attempted to demonstrate to this Court that he may properly do this within the Rules. He proceeds instead on the assumption that there is nothing stopping him from doing so. I beg to differ. It is clear that the Rules envisage that if any decision of the Court is to be appealed, such decision will be appealed within the set timeframes unless there are special reasons for not so doing. If the decision is an interlocutory decision then the capacity to appeal must be with leave of the court i.e. it is subject to the discretion of the court. This is because the effect of such appeal can have the consequence of delaying proceedings in the substantive matter. It means the trial Court cannot give a final decision until all the interlocutory matters, especially those that may have a direct bearing on the final decision, have been dealt with and deliberated upon. The Court will therefore need to be satisfied that the issue is significant or substantive enough to warrant the proceedings or any final decision being delayed until the interlocutory issues have been resolved. Hence not only is leave required, but the time within which to appeal is also substantially curtailed. The

expectation is that such interlocutory issues will be speedily dealt with so that the trial in the substantive matter can proceed to conclusion.

In an appeal from a final decision however, leave to appeal is not required. The appellant has a right to appeal and must do so within three months of the decision to be appealed against. Only if such appeal is not filed and served within the three month period will the prospective appellant need to obtain leave to appeal and an enlargement of time within which to appeal.

In argument Mr Williams submitted that he was entitled to include the September appeal in his notice of appeal because there were still matters that had not been decided and time did not begin to run until the matter had been brought to an end. This to my mind appears to be an acceptance that the decision was interlocutory, although Mr Williams could not quite bring himself to admit this. I am of the clear view that the decision was interlocutory. A reading of the first through fourth orders of the September decision shows that they are clearly interlocutory in nature. The Court was ordering that certain investigations be conducted by a court-appointed investigator within a specified timeframe and that the status quo re the assets in dispute, be maintained pending the determination of those investigations. The purpose of those investigations was to assist the Court in arriving at a final decision on the substantive trial issues. At no point in that decision was the trial judge making a final decision on the respective rights and wrongs of the parties. It was not therefore a final decision or order. It was an interlocutory Ruling. As such, if the Appellants wished to appeal the decision, it was incumbent upon them to seek leave to appeal of the Court, such application to be made within 14 days. If they could not so do, then they needed to apply to the Court for an enlargement of time within which to appeal. The Appellants did not do either.

I do not think it was appropriate that an attempt should have been made to include an appeal against that decision in the manner adopted by the Appellants. I think that if indeed it were open to the Appellants to file an appeal against that decision, then such appeal should have been contained in a separate Notice of Appeal. The issues in the September decision were quite different from those in the January decision and the attempt to combine the two only leads to a muddling of the issues.

I have already stated my view that the September decision was an interlocutory decision. But even if the September decision were for any reason to be regarded as a final decision, the Appellants would have had three months within which to file and serve an appeal. This they did not do. Nor did they seek to apply for leave to appeal and an enlargement of time. In my view therefore, regardless of whether the September decision is regarded as an interlocutory or final decision, the Appellants were out of time for filing and serving a Notice of Appeal in regard to that decision, and, having failed to make the appropriate application to rectify the position, I am of the view that they cannot be allowed to be heard on appeal against that decision. I am therefore minded to uphold the objection and strike out the appeal in so far same relates to the September decision.

This still leaves the issue of the January decision. The Notice of Appeal is dated 16 January 2017, just five days after the January decision. The January decision is generally agreed to be a final judgment and indeed, the drawn up judgment describes itself as such. Paragraph 21 of

that judgment sets out the orders flowing from the judge's findings of fact. From a reading of these it is clear that the trial judge was deciding the issues between the parties and was making a final determination in the action. If an aggrieved party wanted to appeal that judgment as the Appellants did, then they needed to file and serve a Notice of Appeal within three months. This the Appellants did by their Notice of Appeal. The question is whether that appeal remains valid given the appeal against the September decision has been struck out? I think the answer to this must in principle be in the affirmative, at least insofar as such appeal can be properly formulated in an amended Notice of Appeal so as to dissect and differentiate the appeal against the September decision from the appeal against the January decision without prejudicing the Respondents. The Notice of Appeal was filed within five days of the January decision and as such was well within the time frame limited for filing an appeal against a final decision. The Notice may have been defective and non-compliant insofar as it contains an appeal against the September decision, but this should in no way render the appeal against the January decision void. CAR 66 clearly states that non-compliance with the CARs or any rule of practise shall not prevent the further prosecution of the Appellant's appeal if the Court is of the view that the non-compliance was not wilful and that it is in the public interest that the non-compliance should be waived. Whilst it may be argued that the non-compliance in this case was wilful in the sense that the inclusion of the September decision appeal was a conscious decision to file an appeal, it was not in my view wilful in the sense that it was a deliberate attempt to flout the Rules, which is the interpretation of 'wilful' I believe the CARs are referring to in R66.

Although I think that in principle the appeals against the two decisions can lawfully be separated, the question that remains is whether in practice this can be done without entering into a full forensic review of the Notice of Appeal to ensure not only that it omits all references to the September decision, but also does not introduce any new matter not already contained in the Notice of appeal and for which no leave has been applied for or granted. As already indicated, it is not for this Court to undertake a forensic review of the parties' pleadings. It is for counsel for the Appellant to make a proposal that complies with the decision of this Court and which does not prejudice the Respondent or which results in this Court being drawn into a protracted trial of the pleadings. I am prepared to grant the Appellant an opportunity to prepare and submit for consideration, an amended Notice of Appeal which is confined to the January decision and deletes all references to the September decision and which amended notice does not prejudice the Respondents or lead to a protracted argument as to its compliance with this Court's Ruling.

I agree with my brother Fynn, JA with regard to his comments on Mr Fofanah's other objections re filing of a Notice of Appeal without a drawn up order being in place, and the persons named as being affected by the appeal not being parties to the action or the appeal. Even if there has been non-compliance as alleged by the Respondent, I do not see that any such transgression, even if it exists, warrants this Court striking out the appeal. There is a pending application to amend and the Court will consider this if and when it is moved to so do.

Eldred Taylor-Camara

Justice of Appeal

December 2018