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by its decision dated 21st June, 2013 granted the application by appointing an Arbitrator.

The Defendant/Applicant being dissatisfied with the decision of the High Court dated 21st June, 2013 proceeded to appeal against it by filing a Notice of Appeal dated 29th July, 2013. The Reliefs sought in the Notice of Appeal included a) that the Decision of the High Court dated 21st June 2013 be quashed b) a declaration that the arbitration clause clearly and concisely stated that arbitration should take place in Geneva in accordance with Swiss Arbitration Rules c) injunction and d) costs.

Meanwhile the appointed Arbitrator commenced and carried on with Arbitration proceedings and at its conclusion made an Award dated 14th April, 2014. The Defendant/Applicant then filed the present Notice of Motion dated 20th May, 2014 praying for the following orders:

1. That this Application be heard by this Honourable Court notwithstanding 2 (two) clear days have not been given.
2. That this Honourable Court do grant a stay of execution of the Arbitration Award dated 14th April, 2014, in this action herein pending the hearing and determination of this Application.
3. That the Judgment dated 21st day of June, 2013 and all subsequent proceedings be set aside on the grounds that the Defendant/Applicant had fulfilled its obligation under the Share Purchase Agreement in this matter.
4. Alternatively that this Honourable Court do grant an order that the Arbitration Proceedings between the Plaintiff/Respondent and the Defendant/Applicant be held in Switzerland on the grounds that Switzerland is the appropriate forum for the determination of the issues in dispute in the Share Purchase Agreement
5. Any further or consequential orders that this Honourable Court may deem fit in the circumstances.
6. That the cost of this application be borne by the Plaintiff/Respondent.

In support of the said Motion the Defendant/Applicant filed an affidavit of Adel Abufareess sworn to on the 20th May, 2014 as well as the supplemental affidavit of Africanus Sorie Sesay sworn to on the 20th June, 2014.

In opposing the application the Plaintiff/Respondent filed an affidavit sworn to by Emanuel Ekundayo Shears-Moses on the 25th June 2014.

At the hearing of this application Counsel for the Respondent raised an objection which was contained in the affidavit in opposition by Emmanuel Ekundayo Shears-Moses. Counsel's objection is that this court cannot by this application set aside the judgment of the High Court dated 21st June 2013 and all subsequent proceedings. Counsel also submitted that as regards the stay of execution prayed for such an application ought first to have been made in the Court below and it is only when it is refused that a similar application can be made in this Court.

Counsel for the Defendant/Applicant in response submitted that Rule 28 of the Court of Appeal Rules granted concurrent jurisdiction to both the High Court and the Court of Appeal. Counsel submitted that Rule 31 gives power to the Court of Appeal in unique situation, such as the present, where the applicant had consistently raised the issue of the jurisdiction of the court below. Counsel added that Rule 64 was a direction not a command and it therefore gives a flexibility to decide whether the Court below or this Court should be approached.

He relied on the decision of the Court in *Rub Sayie SL Ltd -V- FIB (SL) Ltd* delivered on 16th October 2012 where the Court of Appeal allowed an application for stay notwithstanding that such an application had not first been made in the Court below.

In dealing with the objections raised I find Rules 28, 31 and 64 of the Court of Appeal Rules, 1985 to be very instructive and I therefore reproduce them as follows:

Rule 28: *An appeal shall not operate as a stay of execution of proceedings under the judgment or decision appealed from except so far as the Court below or the Court may order, and no intermediate act or proceeding shall be invalidated, except so far as the Court below or the Court may direct.*

Rule 31: *The Court may from time to time make any order necessary for determining the real question in controversy in the appeal and may*

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amend any defect or error in the record of appeal, and may direct the Court below to enquire into and certify its findings on any question which the Court thinks fit to determine before final judgment in the appeal, and may make any interim order or grant any injunction which the Court below is authorized to make or grant and may direct any necessary enquires or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may rehear the whole case, or may remit it to the Court below to be reheard, or to be otherwise dealt with as the Court may direct.

Rule 64: *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 entitle to have the application determined by the Court.*

From the provisions of Rule 28 above it is clear that an appeal against a decision of the High Court does not operate as a stay of that decision unless that Court (the High Court) or the Court of Appeal grants such a stay. Rule 64 (which in my view is mandatory) requires that where (as in Rule 28) an application may be made either in the High Court or the Court of Appeal then that application ought to be made first in the High Court and only upon refusal can it be made in the Court of Appeal. In the instant case the second order sought in the Motion herein i.e. the order for stay of execution, ought to have been made in the High Court and can only be entertained in this Court when such an application is refused by the High Court. Indeed the application was for stay of execution of the Arbitration Award made by an Arbitrator appointed by the High Court by an order against which the Defendant /Applicant is appealing.

It is my view therefore that the application for stay of execution cannot be entertained in this court as there is no evidence before us that such an application had first been made in the High Court and refused.

Counsel for the Defendant/Applicant referred to the case of *Rub Sayie SL-v-FIB (SL) Ltd (above)*. I can authoritatively say that the situation there is clearly distinguishable from the instant case as I was a member of the panel that delivered that decision. In that case the Appellant without first applying for stay in the High Court proceeded to apply to the Court of Appeal for leave to adduce fresh evidence as well as a stay of execution of the decision of the High Court. The Respondent raised the objection that the Court of Appeal cannot entertain that application as an application ought to have been made first in the High Court and refused before coming to the Court of Appeal.

In our decision we considered the argument that the application was not only for stay of execution but also for leave to adduce fresh evidence and we concluded that *"[H]aving stated that the non-compliance is clearly not willful or meant to frustrate the ends of justice, it is our view that it would be in the interest of justice that the non-compliance be waived so that the application can be proceeded with."*

In the instant case the only other substantive orders sought (apart from the stay) were for the setting aside of the judgment dated 21st June, 2013 and ordering that the arbitration be held in Switzerland. I am afraid this is not the appropriate manner or forum to obtain such orders.

In the first instance I find the prayer for setting aside the decision of the High Court by this motion rather strange if not unfortunate. And to make short shrift of this prayer I shall state that this Court cannot set aside a decision of the High Court on an interlocutory application to this Court in the manner as in the present proceedings when in fact such a prayer is one of the reliefs prayed for in the substantive appeal filed. Indeed the appropriate procedure is to appeal against the decision of the Court below and I believe that is the subject matter of the Notice of Appeal filed herein.

As regards the prayer for ordering that the arbitration be held in Switzerland I note that section 12 Of the Arbitration Act cap 25 of the Laws of Sierra Leone empowers the High Court to set aside an award and this power extends to

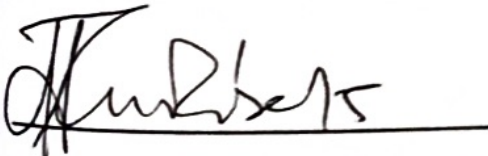
situations where the award has been "*..improperly procured.*" But perhaps even more pertinent in the present case is that it was a decision of the High Court to appoint a local arbitrator and any dissatisfaction with that decision is already a subject matter of the Appeal filed.

Having perused Rule 31 of the Court of Appeal Rules, I do not find it necessary to invoke same nor do I find it helpful or relevant in the Defendant/Applicant's case or circumstances.

In the light of the above I cannot find any reason why I could entertain the present application. The Defendant/Applicant has the option of vigorously pursuing the appeal, an option that does not seem to particularly interest them.

In the result the objections raised by Counsel for the Plaintiff/Respondent are upheld. The Notice of Motion dated 20th May, 2014 is accordingly dismissed.

The Cost hereof assessed at Le8million shall be borne by the Defendant/Applicant.

A handwritten signature in dark ink, appearing to read 'E. E. Roberts', is written over a horizontal line.

Hon. Mr. Justice E. E. Roberts, JSC