



IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL DIVISION

CIV. APP. 6/19

ZUBAIRU KAMARA

APPLICANT

AND

MR. SAIDU SESAY

RESPONDENT

REPRESENTATION:

E.T. KOROMA ESQ. COUNSEL FOR THE APPELLANT/APPLICANT

BRIMA KOROMA ESQ. COUNSEL FOR THE RESPONDENT/RESPONDENT

HON. MR. JUSTICE SENGU MOHAMED KOROMA- JSC
(SITTING ALONE)

RULING DELIVERED ON THE 29th DAY OF MAY, 2019
SENGU KOROMA JSC

1. This is an application by way of Notice of Motion dated the 28th day of February, 2019 filed for an on behalf of the Appellant/Applicant herein (hereinafter referred to as the "Applicant") praying for the following orders:
 - 1) That this Honourable Court grants an interim Stay of Execution of the Judgment dated the 24th day of January, 2019 and the Ruling dated the 15th February, 2019 respectively and all subsequent proceedings pending the hearing and determination of this application.
 - 2) That leave be granted for the Notice of Appeal dated the 31st January, 2019 to be amended accordingly as verged in the Proposed Amended Notice of Appeal
 - 3) That if Order 2 is granted, that this Honourable Court grants a stay of Execution of the Judgment dated the 24th January, 2019 and the Ruling dated the 15th February, 2019 respectively and all subsequent proceedings pending the hearing and determination of the said appeal against the Judgment in the Court of Appeal
 - 4) Any further Order(s) that this Honourable Court may deem fit and just.
 - 5) That the costs of this Application be costs in the cause.
2. At the hearing of the Application, the affidavit of ZUBAIRU KAMARA sworn to on the 28th February, 2019 was intended to be used.
3. The Application came up for hearing on the 13th day of March, 2019. At the said hearing, Brima Koroma Esq. Counsel for the Respondent raised a preliminary objection on the ground that the Application violates Rule 64 of the Court of Appeal Rules, Public No. 29 of 1985. He argued that in accordance with Rule 64, the Applicant ought to have made the application for a stay first in the High Court and if refused, could then apply to the Court of Appeal as right.
4. Brima Koroma Esq. referred to a plethora of cases in support of his objection -viz, AFRICANA TOKEY VILLAGE -V- JOHN OBEY DEVELOPMENT CO (MIS.APP2/94) C.A (unreported); ADAMA MANSARAY- V- IBRAHIM MANSARAY(CIV.APP.37/84) (Unreported); FIRETEX INTERNATIONAL V-SIERRA LEONE EXTERNAL TELECOMMUNICATION(MIS.APP.19/2002)(Unreported) ; and REV. ARCHBALD COLE -V- ABU BLACK & ORS.
5. Emmanuel T. Koroma Esq. Counsel for the Applicant in his response argued that his learned friend had misconstrued his application. The

substance of his application was for leave to amend the Notice of Appeal. The prayer for a stay only comes into play when the leave to amend has been granted. He submitted that it would be an exercise in futility if an amendment is granted but the Judgment had already been executed.

6. Emmanuel T. Koroma Esq. further submitted that Rule 64 of the Court of Appeal Rules, 1985 is not applicable here in that an application for leave to amend Notice and Grounds of Appeal should not be made to the High Court.
7. He submitted that Rule 31 of the Court of Appeal Rules, 1985 gives wide powers to the Court of Appeal to grant leave to amend.
8. Emmanuel T. Koroma Esq. concluded by submitting that his application was not strictu facto an application for a stay but rather that for leave to amend. He however pleaded with the Court to grant an interim stay of Execution
9. Brima Koroma Esq. in reply reiterated the point that the Application for a stay must first be made to the High Court; though Counsel for the Applicant is arguing otherwise, there are prayers in the said Application for (a) an interim stay and (b) an interlocutory stay. He submitted that an application for a stay is a distinct application from that for leave to amend.
10. My comment here is that this Application and objection to it represents a trend in our Courts wherein in arguing a preliminary objection, on a point Counsel on both sides in fact end up to argue the entire application. This is not good practice.
11. In the instant case, the objection is based on non-compliance with Rule 64 of the Court of Appeal Rules 1985 simpliciter. All the other submissions made by Counsel are irrelevant at this point and I shall accordingly ignore them.
12. Emmanuel T. Koroma Esq. argued that the substance of his application was for leave to amend the Notice of Appeal dated 31st January, 2019 and that the application for a stay was just secondary. He however submitted that it would be an exercise in futility if the leave is granted but there is no stay of execution of the Judgment appealed against. This was contradictory. Counsel was arguing in one breath that his Application was mainly for leave to amend but in another breath, he argued that it would

be fruitless to be granted leave when the Judgment would have been executed.

13. To my mind, Counsel for the Applicant made two distinct prayers which required separate conditions to be fulfilled. In other words, the Application for leave must be treated independent of the application for a stay. As the Applicant has not argued his application for leave to amend (though he made reference to the powers of this Court under Rule 31), I shall not make any determination on it at this stage.
14. On the objection made regarding non-compliance with Rule 64, I shall start by stating that provision in extenso:-
15. Rule 64 provides that: "Except otherwise provided in these Rules or by any other enactment, where an 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"
16. In NIGERIA NATIONAL SHIPPING LINES -V- ABDUL AZIZ (TRADING AS ABDUL AZIZ ENTERPRISES) KUTUBU CJ had this to say "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."
17. Earlier in his Ruling, the learned Chief Justice whilst dealing with Rule 10 (2)- an interlocutory application for enlargement of time within which to apply for leave said obiter, "... the Jurisdiction of both the Court of Appeal and the High Court are concurrent". This dictum found support in the English Supreme court Practice, 1999, paragraph 59/13/9 which provides that "The application must be made in the first instance to the Court below, but if it is refused, the Application to the Court of Appeal is not an appeal: the Jurisdiction is concurrent"
18. In order to determine whether the Applicant had made an application to the High Court for a stay, I perused the affidavit in support and the only information I gleaned in that regard was in paragraph 34 thereof. In the said paragraph deponent averred that "That I am further informed by my erstwhile Solicitor that my application for a stay was never considered despite it has been filed and served before the application for writ of possession" My comment on this is that no mention is made of refusal which is the operative word in this context. In fact no application was apparently moved. It has always been my view that Counsel must be

vigilant in prosecuting their matters. To abandon procedural requirements and seek solace in a higher court just because your Application has not been listed for hearing in a lower court is not my understanding of professional diligence.

19. In conclusion, as no application for stay of Execution in the High Court of the Judgment dated 24th February, 2019 and Ruling dated 15th February, 2019 had been made and refused, this Court is bereft of Jurisdiction to hear that part of the Application herein.

20. In the circumstance, I order as follows:-

- 1) The preliminary objection is upheld. This Court lacks Jurisdiction to hear that part of the Application herein relating to Stay of Execution of the Judgment and Ruling of the High Court dated the 24th January, 2019 and 15th February, 2019 respectively
- 2) That the Applicant is at liberty to move this Court on the other prayers in the said Application herein.
- 3) Costs of this application shall be costs in the cause.


HON. MR. JUSTICE SENGUM KOROMA JSC