

CIV APPEAL 24/2019

IN THE COURT OF APPEAL OF SIERRA LEONE
(CIVIL APPELLATE JURISDICTION)

BETWEEN:

COMMERCE AND MORTGAGE
BANK FORMERLY HPC - PLAINTIFF/RESPONDENT
MORTGAGE AND SAVINGS (SL)

AND

AUGUSTINE MORRAY FALLAY - APPELLANT/APPLICANT

F. K. GARBER FOR APPELLANT/APPLICANT
BERNARD JONES FOR THE PLAINTIFF/RESPONDENT

RULING

By Notice of Motion dated 25th March 2019 the Appellant/Applicant has applied for the following Orders:-

1. That the Court grants an interim stay of execution of the Judgment/Ruling of the High Court of the Honourable Mr Justice Abdul Rahman Mansaray J granted on the 13th day of March 2019 and all subsequent proceedings pending the hearing and determination of this application.
2. That the Court do grant a stay of Execution of the Judgment of the High Court of the Honourable Mr Justice Abdul Rahman Mansaray J granted on the 13th day of March 2019 and all subsequent proceedings pending the hearing and determination of the Civ App 24/2014 filed in the Court of Appeal on the 22nd day of March 2019 for the Appellant/Applicant.
3. That the Defendant be restored back into possession of the property situate lying and being at Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone.
4. Any further Order/Order(s) that this Honourable court may deem fit and just.

5. That the cost of this application be cost in the cause.

The Appellant/Applicant is relying on the affidavit of Augustine Morray Fallay sworn to on the 25th day of March 2019. There are exhibits attached to the affidavit. Exhibit AMF 1, is a photocopy of the Ex parte Originating Notice of Motion, AMF 2, is the Memorandum and Notice of Appearance. AMF 3, is photocopy of the Judgment, AMF 4, is a photocopy of a Mortgage Deed dated 15th October 2015. AMF 5, is a photocopy of Plan with LS No 1987/96. AMF 6 is a photocopy of a Demand Note AMF 7 is a copy of the Motion to set aside the Judgment in the High Court. AMF 8, 1-9 is a photocopy of the Ruling of Mansaray J, AMF 9 is a copy of the Notice of Appeal. The Appellant/Applicant is relying on the entire content of the said affidavit. The application is made pursuant to Rule 28 of the Court of Appeal Rules P.N. No 29 of 1985. Counsel for the Appellant submits that there are special circumstances which the Court ought to consider, he refers the Court to paragraph 13 which he submits is exhaustive in the affidavit in support. There are very good grounds of appeal which the Appellant believes has a real chance of success. F K Garber Esq emphasized on the issue that the Plaintiff/Respondent is desperate to dispose of the property and if same is sold the Applicant will not be in a position to exercise his right to redemption. Counsel submits that the Judgment obtained in the Court below was by an Ex parte application, the Appellant was never given the opportunity to be heard. The property in question is the only property of the Appellant/applicant.

According to Counsel for the Appellant/Applicant the right to be heard is a fundamental principle of the Rule of Law. The Court may consider it as a special circumstance where there is a fundamental breach of the Rule. Order 41(2) under the Rubric Judgment by Default may be set aside". Enables a party who was not heard to apply to set aside a Judgment obtained by Default.

Counsel refers the Court to the case of Samati Bibharati and Kumar Ramendra Naradan Bay (Ho.L.) Privy Counsel decision from the High Court. The principle of Law stated is that a violation of some principle of law or procedure must be such, as erroneous proposition of law for which ought to be corrected. Counsel submits that relying on Order 35/2/1 of the Annual Practice 1999 "Effect of the Rule", the right to set aside for the other side to be heard justifies special circumstance.

In summary this is the argument of Counsel for the Appellant/Applicant.

In opposing the application B Jones Esq for the Respondent stated. Firstly that there are no special circumstance for grant of stay. He referred this Court to the Home Mortgage Finance Act 2009 Act No 4 which gives the exclusive right of the Mortgagor to institute an action to recover the amount on the Mortgage Deed.

Counsel submits that the Appellant/applicant has not paid a single cent towards the amount owed to the Respondent Bank. The right to sell and the right to equity of redemption are granted by the Act. Exhibit AMF 4 the Mortgage Deed represents the contract between the parties. Clause 5.3 gives the Mortgagor the right to re-enter and sell. He urged the Court to respectfully look at the contract agreement entered into.

The application for determination is for a stay of execution of the Judgment of Abdul Rahman Mansaray J dated 13th day of March 2019, pending an appeal to the Court of Appeal.

The Appellant has already appealed to the Court of Appeal. I have gleaned the grounds of appeal, it discloses very arguable grounds. The crux of the issue is that the Respondent had proceeded to enter judgment Ex parte. Counsel for the Respondent has argued that the Home Mortgage Act 2009 gives exclusive right to the Mortgage to enter and sell. I agree that it is the position under the Act. However, the right of the mortgagee to be heard cannot also be taken away from the mortgage. The application of a provision in a Statute ought not to be restrictive and oppressive.

There are a plathord of cases in our jurisdiction with respect to stay of execution. Are there special circumstances in this application? Counsel has referred me to paragraph 13(i) to (vi) of the affidavit of Augustine Morray Fallay the Appellant/Applicant. Indeed it discloses special circumstances, in my view it constitutes special circumstances. The applicant has deposed in paragraph 8 that he was making frantic effort to pay the debt. It is not in dispute that the Appellant has been evicted from his premises. In the *Africana Tokeh v. John Obey* Court of Appeal (unreported) the Court did not only grant a stay of execution but ordered that the Appellant should be put back into possession of the property (status quo ante).

I have considered the submissions of Counsel in this matter. I hold that the Applicant has made a case for the granting of a stay of execution of the judgment of Justice Abdul Rahman Mansaray J pending the hearing and determination of the appeal to the Court of Appeal. I shall make the following Orders:-

1. A stay of execution of the Judgment of the High Court of the Honourable Mr Justice Abdul Rahman Mansaray J granted on the 13th of March 2019 and all subsequent proceedings pending the hearing and determination of the Civ App 24/2019 filed in the Court of Appeal is hereby granted.
2. That the Respondent Solicitor shall have the cost of the application if not agreed to be taxed.
3. I further order the Under Sheriff to remove the security personnel from the premises of the Appellant/Applicant and to put into possession the Appellant/Applicant pending this hearing and determination of Civ App 234/2019 filed in the Court of Appeal.

Dated at Freetown this 6th day of ^{June} ~~May~~, 2019.

.....
Hon. Justice Alusine Sesay JSC