

CIV.APP.04/2019

IN THE COURT OF APPEAL SIERRA LEONE
(GENERAL CIVIL DIVISION)

BETWEEN:

UNION TRUST BANK LIMITED

-APPELLANT/APPLICANT

AND

MOHAMED KAKAY

-RESPONDENT/RESPONDENT

BEFORE THE HONOURABLE JUSTICE MIATTA MARIA SAMBA, J.A
DATED THIS 8th DAY OF MAY 2019

CORAM:

HON. JST. MIATTA MARIA SAMBA, J.A PRESIDING

HON. JST. ANSUMANA IVAN SESAY, J.A

HON. JST. SULAIMAN BAH, J.A

Counsel:

O. Jalloh Esq for the Appellant/Applicant

E. Kargbo Esq for the Respondent/Respondent

Ruling:

1. On file is an application by way of Notice of Motion dated the 15th day of May 2019 for and on behalf of the Appellant/Applicant basically for an order of stay of execution of the Judgment of the High Court dated the 15th day of January 2019 pending the hearing and determination of the appeal to the Court of Appeal.

2. The application is supported by the Affidavit of Millicent Macauley-James sworn to on the 15th day of May 2019 and Supplemental Affidavits sworn to by the said Millicent Macauley-James on the 16th May 2019 and 22nd May 2019. To the Supporting Affidavit of 15th May 2019 are the following Exhibits:

Exhibits A and B are copies of the full text of the Judgment dated 15th January 2019 and a certified true copy thereof.

Exhibit C is a copy of a Notice of Appeal.

Exhibit D is a copy of the Respondent's Cross Appeal.

Exhibit E is a copy of a Lease Agreement between the Appellant/Applicant and the Respondent/Respondent.

Exhibits F and G are copies of a full text of the ruling of the High Court and a certified copy of same on an application for stay which was refused.

Exhibit H is a copy of a Garnishee Order Nisi obtained from the High Court.

Exhibit J is a copy of a Lease Agreement between the Respondent and a 3rd party.

Exhibit K is a copy of exchange rates published by the Bank of Sierra Leone.

3. To the Supplemental Affidavit of 16th May 2019 is attached a copy of the stamped judgment, same marked as Exhibit L

4. To the Supplemental Affidavit of 22nd May 2019 is attached is a copy of the state of comprehensive income for the Appellant/Applicant Bank for the period 2017 and 2018, same marked Exhibit K.

5. Counsel for the Applicant referred the Court to Exhibit A and submitted that in Exhibit A, the Learned Trial Judge agreed that the Respondent misrepresented to the Applicant when he said in Exhibit E2.1.2 that the premises will be fit for banking purposes. He referred to Exhibit C, a Notice of Appeal which he said has prospect of success at appeals. He referred and relied on the local Court of Appeal decision of *Richard Owiredo V Beijing Urban Construction Group Ltd*, Misc.App. 4/2008, delivered on the 18th day of July 2008 where Ademosu, J.A, said that 'a ground of law without more amounts to special circumstance to warrant a stay'. I shall quote what was said by the learned Judge to wit:

... it is not every ground of law that qualifies as a special circumstance for a stay of execution. For a ground of law to so qualify it ought to be shown it is substantial that a decision on it one way or the other will affect the substratum of the whole case and the applicant has some chance of success. I am satisfied that an issue of law has been raised on which the compelling right of the parties depend so that it is desirable to resolve it in the Court of Appeal

6. While I appreciate Counsel's submission that the appeal has a chance of success, (and I am not in any way saying it will succeed), I do not agree that Ademosu's position dispenses with the requirement of proof of special circumstances in an Affidavit. The Learned Judge's position rather supports the requirement that the appeal must have a chance of success as one of the considerations for granting a stay of execution. The Court shall therefore consider what Counsel raised on behalf of the Applicant as special circumstances which must warrant the Bench to exercise its discretion in granting a stay of execution of the Judgment of the Court below.

7. In opposing the application, Counsel for the Respondent/Respondent referred and relied on the Affidavit in Opposition of Mohamed Kakay, the Respondent/Respondent herein sworn to on the 20th May 2019 with the following Exhibits attached:

Exhibit MK1 is a copy of the Writ of Summons which commenced this action.
Exhibit MK2 (1&2) are copies of a Memorandum and Notice of Appearance and Defence filed for and on behalf of the Appellant/Applicant at the Court below.
Exhibit MK3 (1&2) are copies of the Judgment of the High Court and Court order dated 15th January 2019.
Exhibit MK4 (1&2) is a Notice of Appeal and an application for a stay before the High Court dated 22nd January 2019.
Exhibit MK5 (1&2) is a copy of a Cross Appeal and an Affidavit in Opposition to Exhibit MK4(2).
Exhibit MK6 (1&2) are copies of the title deed and valuation certificate of the Respondent's property at No. 9 Freetown Road.
Exhibit MK7 (1&2) are copies of conveyances of the Respondents properties at Carlton Carew Road, Off Wilkinson Road, Freetown; Off Regent Road, Lumley;

Bo-Taima kebbie Town Section, Bo; Off Peninsular Road, Sussex, Freetown and their respective valuation certificates.

Exhibit MK8 is a copy of a Lease Agreement between the Respondent and a 3rd party, FBN Bank (SL) Ltd dated 23rd April 2018.

Exhibit MK9 is a copy of a report prepared by a quantity surveyor in respect of the demised property, the subject matter of this application.

Exhibit MK10 is a copy of a ruling of the High Court refusing a stay of execution of the judgment of 15th January 2019.

Exhibit MK11(1&2) are copies of payment slip, receipt of payment and judgment in default on behalf of the Respondent/Respondent.

8. It is Counsel's position that the appeal filed by the Applicant raises no question of law neither does it raise any issue which will require consideration by this Court for the granting of a stay of execution of the Judgment of the High Court of 15th January 2019. It is Counsel's submissions that Counsel's use of the words "Having correctly held" in the Grounds of Appeal in Exhibit MK4(1 & 2) filed by the Appellant are in agreement with the judgment of the Learned Trial Judge. He considers the Appeal to be a sham and a waste of the Court's time.

9. Counsel referred to the case of *Sierra Leone National Shipping Co V Hussein Hammoud* Misc. App. 43/1996 C.A and submitted that to be successful on an application for a stay of execution, the Applicant must show an appeal with a prospect of success and also show special circumstances warranting the stay. I totally agree with Counsel's submission in that regard. It is Counsel's contention that the Applicant's supporting Affidavit, paragraphs 11-16 inclusive as well as the Supplemental Affidavit of 22nd May 2019 raise fresh issues which were not argued at the Court below.

10. In respect of the issue of special circumstances, Counsel referred to paragraph 10 of the Applicant's Supporting Affidavit which he argued is the only special circumstance relied on by the Applicant. I do not think there is in law any limitation as to the number of special circumstance that must be shown for the granting of a stay of execution or otherwise. If I accept Counsel's submission as I am bound to do, then it must appear to me that Counsel accepts that at least a special circumstance was raised by the Applicant. Counsel referred to paragraphs 9 and 10 of the Respondent's Affidavit in Opposition and submitted that the averment in paragraph 10 of the Supporting Affidavit hereinbefore referred to cannot be correct and that same cannot amount to special circumstances being that the Applicant is a corporate body which has been in existence for over 15-20 years with a basic objective of making profits. He argued that the Applicant bank collects moneys from depositors and loans out these moneys to other customers on interest basis.

11. He referred to paragraph 13 of the Supporting Affidavit and submitted that the Applicants averment therein is not correct; he submitted that the Respondent, is financially strong with about 4 separate real properties. The valuation certificates of each of the said properties are exhibited as Exhibit MK 6, 7 and 8. Counsel's point is that should the Court refuse the application for a stay of execution and the judgment of the Court below is executed, the Respondent

will be in the financial position to refund the judgment sum if the Applicant is successful at appeals. on the strength of this submission, Counsel submits that the *Linotype-Hell Finance Ltd V Baker* relied on by the Applicant is inapplicable. He argued that in the *Linotype-Hell Finance Ltd V Baker* case, a stay of execution was granted because the Court realized that the other party will be financially ruined if the stay was not granted. He referred to paragraph C on page 323 of the *Linotype Finance Ltd V Baker* case and submitted that in the instant case, the Applicant, being a reputable institution will not be financially ruined should the application for stay be refused. Well, my understanding of the meaning of the word 'reputable' differs from Counsel's in so far as mine has nothing to do with financial strength. The word reputable is the adjective for the noun, reputation, which is the beliefs or opinions people generally hold about someone or something. The Applicant Bank, being a reputable Bank as submitted by Counsel would mean a Bank of good repute, standing, renown Bank etc, which would not mean it is liquidated in physical cash.

12. Counsel referred to the Supplemental Affidavit of the 22nd May 2019 and submitted that Exhibit K attached thereto does not amount to a bank statement as same is undated and unsigned. He argued that Exhibit K is a ploy to deprive the successful litigant, in this case, the Respondent, of benefiting from the fruits of his judgment. He therefore asked that the Court discountenance Exhibit K.

13. Counsel argued that contrary to what the Applicant deposed to in paragraphs 15 and 16 of his Supporting Affidavit, the Respondent paid the complete stamp duties as seen in Exhibit MK11(1&2) same being receipts of payment.

14. Referring and relying on the cases of *Clement Bankole Cox V Sonny Edewu* Civ.App 32/2007, *Patrick Koroma V SALHOC* Misc.App. 9/2004 C.A, *Yusufu Bundu V Mohamed Bailor Jalloh* Misc.Appl 23/2004 C.A, *Boblyn Augustine V Abdul Koroma* Misc.App. 38/2004, *Sorie Tarawally V Sorie Mansaray* Misc.App. 27/2004 and *Sierra Leone National Shipping Company V Hussein Hammoud* Civ.App.43/06 Counsel urged the Court not to grant the application prayed for by the Applicant on the basis that the Applicant did not disclose any special circumstance in his Affidavits which should warrant the Court to grant a stay of execution in his favour, contrary, I must note, to Counsel's earlier submission that the Applicant referred to only one special circumstance in his Affidavit.

15. By way of a final reply, Counsel for the Applicant argued that all the authorities relied on by Counsel for the Respondent deal with possession or recovery of possession and nothing to do with monetary judgment and that these authorities are therefore inapplicable to the instant case. He argued that 'the Applicant being a reputable body' does not mean it is liquid in cash even though the Applicant has assets. I believe I have reacted to this point earlier. Counsel argued that the facts laid before the Court below does not support the Learned Trial Judge's ruling in refusing the Applicant's application for a stay; he said the ruling was based on conjectures and suppositions with no evidence before the Court to say the Applicant Bank must have been making profits.

16. He referred to Exhibit K and to paragraph 3 of the Affidavit sworn by Millicent Macauley-James on the 22nd May 2019 and argued that being a reputable body, they will not give false information to what is exhibited as Exhibit K. In view of the Applicant's financial position and the *ratio* in the case of *Linotype-Hell Finance Ltd V Baker*, Counsel urged the Court to grant the application for a stay of execution.

17. I have looked at the Notice of Motion dated 15th May 2019 and its Supporting and Affidavit sworn to by Millicent Macauley-James on even date and the Supplemental Affidavits sworn to by Millicent Macauley-James on the 16th and 22nd day of May 2019 with exhibits attached. I have also read the Affidavit in Opposition of the Respondent/Respondent, Mohamed Kakay sworn to on the 20th day of May 2019 with Exhibits attached. I have also read the several authorities submitted by both Counsel in support of their respective positions on the application herein.

18. Before going to the legal position in respect of the granting or otherwise of a stay, I wish to disagree with Counsel for the Respondent when he said that the Applicant, by all his Grounds of Appeal, agreed with the Honourable Learned Trial Judge's conclusion; that he therefore see no reason why the Applicant is before the Court of Appeal. I see no difficulty in understanding that by the use of the words "*That having correctly found that ... the Learned Trial Judge erred in law and fact when he held that*", Counsel for the Applicant is in disagreement with the conclusion reached by the Learned Trial Judge. Counsel's understanding therefore in each of those Grounds of Appeal is totally flawed.

19. The principles upon which a Court will grant a stay of execution ~~should~~ ^{be} not be called to question in this application by either side. The case of *Firetex International Co. Ltd V Sierra Leone External Telecommunications Ltd*. Misc.App. 19/2002 illustrates the rule governing a stay of execution. In that case, Tholla Thompson J.A (as he then was) dealt with various issues touching and concerning Rules 28 and 64 of the Court of Appeal Rules, 1985 and determined whether there were special circumstances to warrant a stay of the judgment of the High Court. Tholla Thompson while citing the cases of *Linotype-Hell Finance Ltd V Baker* (1992) AER 887, *Chernor Sesay & Anor v Abdul Jalil & Anor* 18/94, *Wilson V Church* 1879 12 Ch.D 454 and *Africana Tokeh Village Ltd V John Obey Development Investment Co Ltd* (Misc.App. 2/94) had this to say:

A Court must ensure that a successful litigant is not deprived of the fruits of his judgment and therefore it may be wrong to grant a stay of execution of a judgment pending appeal if the appeal is frivolous or a stay will inflict hardship on the successful party than avoid it and so on. But subject to this is the principle that when a party is appealing exercising his undoubted right of appeal, the Court ought to see that if successful, will not be nugatory.

The general rule is that a stay of execution will be granted upon proof of prima facie good ground of appeal and special circumstances. The onus is on the applicant to show by affidavit evidence that the two requirements do exist.

20. I have quoted the foregoing in *extensio* with the intention of seeking an answer to the question of whether the categories of special circumstances are closed. Gelaga-King, J.A (as he then was) in the *Lucy Decker V Decker* case defines 'special circumstance' as beyond the unusual circumstance, a definition which was adopted by the Learned Fynn, J.A in the *Dawnus (SL) Ltd V Timmis Mining Co.* Civ.App 18/2016.

21. Although most of our local cases have dealt with the issue of special circumstances, none has clearly established the boundaries of special circumstances although one would hope there must be a standard in determining what is special circumstance.

22. The 1999 Annual Practice at paragraph 59/13/2 under the rubric "Stay of execution of Proceedings Pending Appeal" provides some guidelines when it states that 'Nowadays, the Court may be prepared (provided the appeal has sufficient merit) to grant a stay even where the test is not satisfied, if the enforcement of the money judgment under appeal would result in the Appellant's house being sold or his business closed. But if the stay is granted, the Court should impose terms which (so far as possible) ensure that the Respondent is paid without delay, if the appeal fails, and the Appellant is prevented from depleting his assets in the mean time except for any legitimate and necessary expenditure".

23. The above position is what was adopted in *Linotype-Hell Finance Ltd V Baker* case and endorsed in the *Winchester Cigarette Machinery Ltd V Payne (No. 2)* 1993. The Times, December, 2015. I shall adopt the approach in the 1999 Annual Practice above referred to; the Court will balance the risks of injustice which may be occasioned by the grant or refusal of a stay.

24. I wish to reiterate on the distinction between an application for a stay on a judgment for possession and a stay on a judgment for a monetary judgment. In the case of *Yusufu Bundu V Mohamed Bailor Jalloh* Misc.Appl 23/2004 C.A, referred and relied upon by Counsel for the Respondent, the Learned Justices of Appeal had this to say: "what constitutes special circumstances justifying stay of execution in monetary judgment may not be the same in the case of judgment for delivery of possession". The consideration for a stay of execution of possessory judgments may be different from what is considered for a stay of execution on monetary judgments.

25. The Court must be mindful whether the grounds of appeal are likely to succeed in granting a stay. The grounds of appeal must be cogent and arguable. The Court does not need to consider the merits of the appeal; that is for the Learned Justices of Appeal on the Appeal panel. *Ogbuagu JSC in the Nigerian case of T.S.A. Ind. Ltd V Kema Investment Ltd* (2006) 10 WRN p 66 at 84 lines 15-30 opined that it is not every case where the ground of appeal raise point or points of law that a stay will be granted hence the necessity to consider the second requirement, the need to show special circumstances in an Affidavit.

Application of the Law

26. In respect of special circumstance, the Applicant referred the Court to paragraphs 10, 13 and 14 of the Supporting Affidavit of 15th May 2019. The Applicant's position is that the Applicant Bank has not made profits over the years and so paying the judgment sum as ordered will have adverse effect on its operations, customers, and the economy, being that its operations are funded by an annual budget which is secured mainly by taking of Depositors funds and loans. He also considers it a special circumstance that the Respondent has now let out the ^{premised} property to the FBN Bank. For his submissions on special circumstances, Counsel referred to the case of *Linotype-Hell Finance Ltd V Baker* (1993) 1 WLR p 321.

27. I refer to paragraph 13 which Counsel pleads as special circumstance and state that in light of the Respondent's submissions and Exhibits MK 6, 7 and 8 tendered which were not controverted by the Applicant, I do not believe the appeal process could be rendered nugatory in the event that the Appeal is successful, should this Court refuse a stay. I believe that had Counsel been privy to Exhibits MK6, 7 and 8, he would not have canvassed that line of argument on behalf of the Applicant in the absence of documents on the contrary.

28. The Court also notes the Applicant's argument that the Applicant Bank has not been making profits over the years. The Respondent refers to Exhibit K as a bank statement but I see it as the Applicant Bank's financial position in respect of profit and/or loss for the period 2017 and 2018. The Respondent has not preferred any document to the contrary; in other words, there is no document in evidence to show that in 2017 and 2018, the Applicant made a profit and not a loss. My understanding of the Applicant's argument is that if this Court is to refuse a stay and the Applicant is to pay the judgment sum before the appeal, the Applicant will have no option but use Depositors' moneys which said act will not be good for their operations considering their reputation and the Banking Regulations. Put succinctly, the Applicant's paying the judgment sum at this stage will ruin its business. Even though the Respondent does not accept this argument, as said, there is nothing in evidence other than oral submissions, to show that the Applicant made profits more than what is stated in Exhibit K now before the Court.

29. It is clear to the Court that both parties own real properties in their respective names which stands to reason that should either party fail at Appeals, the unsuccessful party will be in a position to pay the judgment sum and what ever costs and/or other charges/fines that may occasion the appeal. In other words, should the judgment sum as ordered be paid by the Applicant to the Respondent, by virtue of Exhibits MK 6, 7 and 8, the Respondent will be in a position to refund the said judgment sum, should the Respondent be unsuccessful at Appeals. The Applicant has also averred and deposed that though they lack liquid cash at this moment, they however have real property and that if a stay is granted in their favour and they loose at Appeals, they will be in a position to pay the judgment debt and what ever costs the Court may impose. I have no reason to doubt the financial strength and ability of either party.

30. I have looked at the cases referred to and relied on by Counsel for the Respondent and I must say that even though they deal with the granting or refusal of stay of executions, they do not deal with monetary judgments; they rather deal with possession or recovery of possession. This being a monetary judgment which is being appealed against and for which an application for stay is before the Court, the Court will therefore consider the case of *Linotype-Hell Finance Ltd V Baker* where Straughton LJ said at page 323 that:

It seems to me that, if a Defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.

31. I have said that it is not the function of this Court to go into the merits of the appeal; all this Court can do is to determine whether the threshold requirement of *prima facie* good grounds of appeal has been met. I take the view that the appeal is not merely perfunctory but that it raises some issue(s), which are worthy of further discussion and decision by the Court of Appeal.

32. Conclusion

It is not the objective of this Court to deprive the Respondent of the fruits of his judgment but the Court is minded to preserve the *status quo* until the final determination of the appeal not because the Court believes that the Respondent will not be able to refund the judgment sum to the Applicant in the event that he fails at appeals, but because the Court is satisfied that, this being a monetary judgment appealed against, the Applicant has shown circumstances special enough and an appeal on points of law which will make interesting read and determination which this Court and indeed the lower Court will rely on. It is my intention that the appeals be heard speedily in light of my Orders below.

33. Determination

In the circumstance, I make the following orders:

- a. The Judgment of the High Court dated the 15th day of January 2019, is hereby stayed pending the hearing and determination of the Appeal.
- b. That the Appeal be heard speedily as follows:
 - i. That the record of the appeal be settled within 28 days of the date of this Order.
 - ii. That the conditions of appeal be fixed within 28 days from the date of this Order.
 - iii. That the conditions of appeal be met within 32 days from the date of this Order.
 - iv. Liberty to apply.
- c. Costs occasioned by this application to be borne by the Applicant assessed at Le. 5,000,000/00.

Mansa, J.A.

Hon. Jst. Miatta M. Samba, J.A. (Presiding)

I disagree

Hon. Jst. Ivan Sesay, J.A.

I agree.

Sulaiman Bah, J.A.

Hon. Jst. Sulaiman Bah, J.A.