Civ. App 49/2017

In the Court of Appeal- Sierra Leone

Mohamed Sherriff - **1st Appellant**
Abdul Karim Sherriff - **2nd Appellant**
Aminata Sherriff - **3rd Appellant**

vs.

Sulaiman Abubakarr - **Respondent**

Coram:

Reginald Sydney Fynn JA
Monfred Momoh Sesay JA
Eldred Frank Taylor-Camara JA

Counsel:
Julius Nye Cuffie Esq for the Appellant
A. Williams for the Respondent

JUDGMENT DATED …….. JULY 2020

Fynn JA

Background

1. This appeal is against a ruling given by the Hon Justice Momoh Jah-Stevens striking out the defence filed by the defendant now appellant and allowing Judgment to be entered on behalf of the plaintiff now respondent. The brief facts on which the decision appealed against arose are as follows: The defendants had failed to comply with directions that required them to file within fourteen days and twenty eight days respectively witness statements and other Court papers to form part of the court bundle. The plaintiff settled a court bundle without the defendants' papers (found at page 23-70 of the court records).
2. I take the opportunity to mention that the rules properly construed do not intend for the parties in a case to each file a bundle, thus resulting in "plaintiff's bundle" and "defendants bundle". On the contrary it is intended that one bundle only "the court bundle" ought to be filed with the plaintiff taking the lead to have this coordinated to include not only the documents the plaintiff intends to rely upon for his case but also those which the defendants would have included in the bundle and upon which the defence will rely for their case. Rule 9 of Order 40 provides therefore:

> *"Within 14 days from the date the action is set down for trial, the defendant shall identify to the plaintiff those documents central to his case*

which he wishes to be included in the bundle to be provided under sub-rule (2)"

3. Having filed the "Plaintiff's Bundle" the plaintiff next served this bundle on the defendant's, and we have at pages 72 & 73 of the court records an affidavit of service of the bundle and an affidavit of search for the defendants bundle (there strictly ought to be no such bundle) which turned out a negative result. The plaintiff then proceeded to file a motion to have the defendants' respective defence and counter claims struck off pursuant to Order 28 Rule 2(5) of the High Court Rules 2007.
4. This motion was successful. The LTJ ordered that the defences and counter claims which had been filed be struck off and the plaintiff was granted leave to enter judgment against the defendants. Relying on Order 28 R2(6) the defendants now approached the Court to have their Defences and counter claims restored. This proved an unsuccessful endeavour as the LTJ "refused to restore the defences and counter claims filed by the defendants, on the ground that no good or sufficient cause had been shown for the restoration of the same. The court also refused to stay the ruling of 26th April 2017 granting a declaration of title in favour of the respondents.

The Grounds of Appeal and the Submissions

5. Now before us, the appellant's filed synopsis of arguments on which they entirely rely. Arguing grounds one and two of their appeal the appellants synopsis state, that Order 28 R2(6) provides for the restoration of a defence upon terms as the court may find fit. They argue further that the orders of April 26th 2017 against which they now appeal had been wrongly granted *ex parte* thereby depriving the respondents now appellants the opportunity to be heard. They press the point strenuously that they were not properly served with the said motion papers and so they were unaware of the application which was then proceeded with in their absence.
6. In grounds three and four, the impugned decision having been made in the appellant's absence it is argued that "the proceedings in the court below were conducted without regard to the principle of fair hearing as provided for in the Constitution of Sierra Leone". They argue further still that the time within which summons for directions are returnable were deliberately shortened by the respondents from the statutory fourteen days to six days so as to prevent the appellants from being heard on the motion. This they argue further, gave the respondent an undue advantage.
7. The appellants' have relied on several cases key amongst them being **Evans vs. Bartlam** (1937), **Aminata Conteh v. APC** (civ. App 2004) , **Day vs. RAC Ltd.** (1999) and **R v Turner** 1910 1KB
8. The respondents also filed synopsis in which they allege that the appellants have no genuine desire to be heard. They also allege that the appellants are in breach of orders given by this court with respect to this appeal. The respondents direct the courts

attention to the affidavit of service in the file insisting that the appellants were properly served and ought to have taken advantage of the notice which the service had put them on.

9. The respondents argue further that Order 28 R 2(6) requires "good cause" to be shown but as the appellant's were relying on the fact that they had not been served with the motion papers it was open to the court being satisfied that they had been served to have refused to restore the defences as prayed for.
10. The respondent referred us to dicta found in the case of **Moses Kondowa et al vs. ATC Ltd et al** (Misc Ap 7/23) as well as to the interlocutory orders I made when the matter first came up to us for a stay of execution. Then I had stayed execution of the judgment below pending the hearing and determination of the appeal. I had also ordered costs to the favour of the respondents.

Deliberations

11. It may be important at the outset to deal with the issue of service. My brother Justice Taylor-Camara holds a varying view on this issue and he has written a seperate opinion founded mainly upon this issue. The appellants counsel strenuously wants to distinguish between his firm and his son who works with his firm and who was met at his place of business. It is this young man who the affidavit holds out had received service. It seems to me that the LTJ was correct to have deemed this to have been good service. It makes little sense to me for the process server to be burdened with an additional duty on arrival at business premises to decipher which one of the employees thereon has the responsibility of receiving service. Is this the address? do you work here? If both answers are in the affirmative it is my opinion that service can then be properly effected. A further question of "can you receive service for the firm?" or "Are you a partner?" are in my considered view certainly superfluous.
12. I also agree with the respondent that in any case the question of whether the appellant was served or not may not be the crucial question when the issue of restoring the defences was argued. Clearly Order 28 R2 (5) gives the court the authority where there has been a failure to comply with the orders given when the summons for directions was heard to *"make such order as it thinks just, including in particular an order that the action be dismissed, or as the case may be an order that the defence be struck out and judgment be entered accordingly".* It was for such a failure that the court struck out the defences.
13. Default judgments are not peculiar to O 28. They are available and specifically provided for under Order 13- Judgment in Default of Appearance as well as under Order 22 Judgment in default of pleadings. In these also where the necessary prerequisites have been satisfied and the case does not fall under any of the several exceptions and qualifications set out in the respective orders a party is at liberty to

enter judgment. He does not need to establish anything further than what is set out in the rules and relying on the other party's failure to have done a particular thing. This may well be a failure to enter appearance, a failure to file certain pleadings on time or even a failure to adhere to directions handed down. In either case a judgment in default may result.

14. There are similarly several rules which allow for the restoration of a case or pleadings struck in default. However when the defaulting party (the now appellants) approaches the court for a restoration of those defences it is the provision made in Or 28 R.2(6) that should govern the considerations and it provides clearly that the court may *"for good and sufficient cause order that the action or defence be restored upon terms as it thinks fit.* The court has a discretion to restore the defence but it must first be satisfied that "good and sufficient cause" has been shown.
15. I take the opportunity to contrast the considerations leading up to an Order 16 judgment with those resulting in an Order 28 or other default judgment as cited above. The former is a summary judgment and in order to allow it the LTJ has to evaluate the defence filed and then decide whether its a sham or that it raises triable issues. To my mind this calls for a much deeper evaluation. With a Judgment in default under Order 28 at the time the Judgment is granted there is no requirement at all to evaluate the defence or any other process. Rather there is a call to check whether the rules have been complied with. If some rule has not been complied with or some further procedure required may have been ignored then it is on the back of this failing alone that the judgment in default is allowed. The judgment therefore is not in any way linked with the strength and or weakness at all of any of the parties case. Unlike the Summary Judgment situation where the court must have evaluated the defence and found it lacking in triable issues. A Judgment in default has no such requirement.
16. However having secured the Judgment in default, if the losing party should return to ask for a restoration of "the action or the defence" as the appellant had done below the court then, has a discretion to oblige but must first satisfy itself that there is "good and sufficient cause". What would then amount to "good and sufficient cause"?
17. This court has recognized that Order 41 R 2 of the HCR 2007 generally allows that *"Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as it thinks fit"*. The court has reasoned further that *"according to the authorities 'the primary consideration in exercising the discretion is whether the defendants defence has merits to which the court should pay heed as a matter of common sense"*. (as per **Bash-Taqi** JSC in *Kamara vs. Davies Et al.)*
18. After the case of *Evans vs Bartlam* 1937 the prevailing thought has remained that a judgment in default even when regularly obtained will be set aside on terms except when there is no real defence to try. If for example the defence constitutes a claim

which is statute barred or "stale" then there will be no need to set the judgment aside. The defence must have "a real prospect of success" and this will be seen in the "degree of conviction that the defence carries".

19. I have considered the defences which the appellants want revived. In my opinion they undoubtedly disclose good and sufficient cause such as would have a prospect of success. The LTJ was wrong to have refused to restore the defences and counter claims when he was requested to do so. He ought to have done so albeit upon terms. The court even has the option of making those terms stringent particularly so in circumstances where the court is of the view that the restoration sought is not bona fides or where as in this case opposing counsel has raised with evidence the appellants lack of enthusiasm to comply with any restoration orders that may be made.
20. The respondents have alleged that the terms on which a stay was granted by this court have not been complied with, the respondents fear therefore that similarly, any terms on which the defences may now be restored will likewise not be respected.
21. Nonetheless we are of a firm conviction that the principles are clear upon which a judgment in default ought to be set aside and that they do apply to the present case. We do not wish to create any doubt in this respect but rather we wish to very strongly reinforce the view that cases are best decided on their merits except in the rare circumstances when the judgment of a peculiar circumstance may demand otherwise.

We shall allow the appeal and make the following orders:

i. This appeal is allowed.
ii. The appellants shall pay the cost of the application below.
iii. Each party will bear their own costs in respect of the proceedings before us.
iv. The defence and Counter claims below are hereby immediately restored.
v. This matter is hereby remitted to the court below and
    a. the defendants shall forward their list of documents to the plaintiff no later than 7th July 2020
    b. The plaintiff shall file a fresh court bundle including the defendants documents no later than 14th July 2020

……..***Reginald Sydney Fynn JA***