

MISC.APP. 19/19

2019

Z.

NO.

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

BETWEEN:

KALPATARU POWER TRANSMISSION LIMITED – PLAINTIFF/RESPONDENT
77 AZZOLINE HISGHWAY

AND

ZENITH BANK (SIERRA LEONE) LIMITED – 1ST DEFENDANT/APPLICANT
18-20 RAWDON STREET
FREETOWN

THE MANAGING DIRECTOR – 2ND DEFENDANT/APPLICANT
ZENITH BANK (SIERRA LEONE) LIMITED
18-20 RAWDON STREET
FREETOWN

CORAM:

HON. JUSTICE MUSU D. KAMARA, JA (Presiding)

HON. JUSTICE ANSUMANA IVAN SESAY, JA

HON. JUSTICE SULAIMAN BAH, JA

SOLICITORS:

E. KARGBO ESQ., COUNSEL FOR THE 2ND APPLICANT

T. KELLIE ESQ., COUNSEL FOR THE PLAINTIFF/RESPONDENT

RULING DELIVERED ON THE 21st DAY OF July 2020

This is an application by way of notice of motion dated the 8th day of November, 2019 in which this Applicant is seeking the following orders.

1. That this Honourable Court grants an interim stay of proceedings of this matter currently in the High Court pending the hearing and determination of this application.

2. That this Honourable Court grants leave to the defendants Zenith Bank (SL) Ltd, to appeal against the ruling of the High Court dated 23rd day of October, 2019 ~~is~~ the Court of Appeal.
3. That upon leave be granted by this Honourable Court a stay of proceedings in this action be granted pending the hearing and determination of this appeal.
4. Any other order(s) that this Honourable court may deem fit and just in the circumstance.
5. Costs in the cause.

This application is supported by the affidavit of SAIDU WILL ESQ., sworn to on the 8th day of May, 2019, counsel for the Applicant relied on the under mentioned exhibits

- a. Exhibit SW.1 - copy of an offer of advance payment Guarantee dated 16th August, 2016.
- b. Exhibit SW.2 - copy of a Writ of Summons dated 18th October, 2018 against the Respondent and the 1st Defendant claiming damages for breach of Contract, etc.
- c. Exhibit SW.3 - A copy of statement of Defence and Counterclaim dated 2nd May, 2019 to the afore Mentioned writ of summons.
- d. Exhibit SW.4 - copy of a Court Order granting an interim Injunction on behalf of centurion restraining Respondent from claiming the advance payment guarantee held by the Defendant/Applicants and at the same time restraining the defendant/Applicant from releasing payment under the advance payment guarantee to the Plaintiff.
- e. Exhibit SW.5 - a copy of a Court Order vacating the same by Which time the advances payment guarantee had expired.
- f. Exhibits SW.6 - Copies of Court Order striking out the Plaintiff Notice of Motion papers in a bid to restore the Validity of the advance payment Guarantee dated the 6th November, 2019 and 8th day of February, 2019.

- g. Exhibits SW.7 - copies of letters addressed to the Plaintiff stating that the guarantee had expired which affects its validity to honour payment to them as indicated in paragraph 7 of the Defendant/Applicant statement of defence.
- h. Exhibits SW.8 - a copy of a letter dated 7th January, 2019 addressed to the Defendant/Applicant in which the solicitor for Centurion Engineering made it clear that the contract between them and the Plaintiff/Respondent had been avoided and that Centurion had no intention of renewing the expired advance payment guarantee.
- i. Exhibits SW.9 - a copy of a writ of summons dated 22nd February, 2019 issued by the Plaintiff against the Defendant demanding for immediate repayment of Le 271,181,055.00 of the advance payment guarantee as a result of their failure to restore the validity of it.
- j. Exhibit SW.10 - a copy of appearance entered for and on behalf of the Defendant/Applicant.
- k. Exhibit SW.11 - a copy of a statement of defence filed in response to the writ of summons dated 22nd February, 2019.
- l. Exhibit SW.12 - a copy of Court Order dated the 15th April, 2019 adjudged by consent order of both Centurion Engineering and the Plaintiff/Respondent to file their defence to the writ of summons dated 13th October, 2018.
- m. Exhibit SW.13 - a copy of application to enter final judgment Pursuant to Order 16 of the High Court Rules 2007.
- N. Exhibit SW.14 - copy of Court Order pronounced by Hon. Justice M.P. Mami refusing the summary Judgment but at the same time giving an order that the sum of Le 271,181,055.00 being 10% of the contract prices be paid into the Sierra

Leone Commercial bank in an interest yielding accounts etc.

- O. Exhibits SW.15 - copies of Notice of Motion and affidavit for joinder of parties pursuant to order 18 Rule 6(2) of the High Rules.
- P. Exhibit SW.16 - copies of a proposed Notice of Appeal
- q. Exhibit SW.17 - copies of Notice of Motion dated the 25th day of October, 2019 asking the High Court for interim stay of execution of Order 2 of the Court order dated 23rd October, 2019 and all subsequent proceedings pending the hearing and determination of the applicant, leave to be granted to the Defendant to appeal and equally stay of proceedings. The order refusing this application dated the 7th November, 2019 is also exhibited.

Counsel for the Defendants sought the leave of this Honourable Court to file and use two (2) supplemental Affidavits both sworn to on the 14th December, 2019 and 6th February, 2020 respectively both sworn to by Saidu Will. Leave was granted and counsel for the Applicant relied on SW.1 and SW.2 exhibited in the Supplemental Affidavit sworn to on the 14th December, 2019 and these are copies of letters dated 26th November, 2019 and letter of 3rd December, 2019 both showing payment of the advance payment guarantee to Centurion Engineering Limited and enclosed receipt of payment respectively.

In response to the afore mentioned application Tamba Kellie Esq., solicitor for the Plaintiff/Respondent filed an affidavit in opposition sworn to on the 25th November, 2019 and a Supplemental Affidavit sworn to on the 25th February, 2020. The Respondent solicitor relied on eleven (11) exhibits to counter the Applicants case.

Exhibit TK1 & TK2 - are copies of irrevocable undertaking communicated in the advance payment Guarantees dated 19th April, and 16th August, 2018 respectively

Exhibit TK3 - copy of a sub-contract dated 30th March, 2018 between the Plaintiff/Respondent and Centurion Engineering the Defendant/Applicant's Account party.

Exhibit TK4 & TK5 - copies of the Plaintiff/Respondent instruction to the bank for funds transfer to the Account party Centurion Engineering account with the Defendant/Applicant.

Exhibit TK6 – copy of first demand to the Defendant/Applicant for payment in the sum of Le 271,181,055.00

Exhibit TK7 – copy of a letter dated 31st January, 2019 requesting to honour its guarantee according to its term.

Exhibit TK8 – a copy of letter dated the 8th February, 2019 denying any liability to pay the bond.

Exhibit TK9 – a copy of writ of summons dated 18th October, 2018.

Exhibit TK10 – a copy of another similar writ of summons dated 22nd February, 2019 instituted and filed out of the High Court Registry.

Exhibit TK11 – copy of a statement of Defence in response to the aforementioned writ of summons.

The supplementary affidavit filed and used by the Plaintiff/Respondent sworn to on the 25th February, 2020 has two exhibits attached thereunto and they are

Exhibit TK12 - a copy of demand letter under the advance payment guarantee (Extension) dated 30th October, 2018.

Exhibit TK13 - a true copy of another letter. The Plaintiff/Respondent solicitor relied on the entirety of the content of both affidavits.

THE LAW AND ITS APPLICABILITY IN THIS PRESENT CASE

The solicitor for the applicant had asked this court for two sister prayers in his notice of motion dated the 8th day of November 2020 namely stay of proceedings pending the hearing and determination of the appeal and leave to file the said appeal. An interim stay of proceedings was ordered by this court on the 14th day of November 2019

It is a well settled principle that every court has an inherent jurisdiction to stay proceedings for stated reasons which include, but not limited to, abuse of process. Indeed in matters on appeal, especially interlocutory, the courts have always exercised an inherent jurisdiction to stay proceedings pending appeal, lest all their efforts should become fruitless, a waste of time and

resources. The inherent jurisdiction of the Courts is derived from the common law, which is part of the laws of Sierra Leone by virtue of section 170(1) of the Sierra Leone constitution.

The court's inherent power to stay proceedings has become so entrenched in the law as to assume the status of indispensability unless clearly ousted by statute. The editors of Halsbury's Laws put it this way in the 4th edition, Reissue, page 422, para. 533: "The court's general jurisdiction to stay proceedings in proper cases is not limited by the Civil Procedure Rules, and indeed is distinct from the jurisdiction conferred by the rules, since the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively." The same reference work at para. 529 page 420 re-states the principle thus: "The Court's power to stay proceedings may be exercised under particular statutory provisions, or under the Civil Procedure Rules or under the court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation" This passage was quoted with approval by this court in the case of **Republic v. High Court (Commercial Division) Tamale; ex parte Dakpem Zoboguna Henry Kareem & ors; (Dakpema Naa Alhassan Mohammed Dawuni. Interested Party); Civil Motion J5/6/2015, dated 4 June 2015, unreported.** See also the case of **Republic vs. High Court, (General Jurisdiction), Accra; Ex parte: Magna International Transport Ltd. (Ghana Telecommunications Co. Ltd Interested Party) (J5/66A/2017) [2018] GHASC 53 (07 November 2018**

Coming back home, "Stay of Proceedings" simply put is a ruling by the Court in Court Proceedings halting further legal process in a trial. Rule 28 of the Court of Appeal Rules, 1985 which is *ipsisima verba* Order 59 Rule 13 of the English Supreme Court Rules, 1999 provides as follows: "An appeal shall not operate as a stay of Execution or 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

In the case of **NATIONAL POWER AUTHORITY AND DR W.S MARCUS-JONES misc app 3/2006 court of appeal unreported** the presiding judge Hon Justice Umu Tejan Jalloh had this to say at page 2 "Stay of proceedings in appeal will only be granted if there are special circumstances warranting it or if good and sufficient causes are shown. The mere allegation that the applicant/defendant has good grounds of appeal

and that it will be in the interest of justice to grant it are not special circumstances or good and sufficient cause"

The circumstances of this application is such that the applicant/defendant has averred in his affidavits in support that two writ of summons have been instituted with regards the same claim and amount and this is tantamount to an abuse of the legal process. Besides the Applicant is equally saying that the stated amount claimed has already been paid to a third party, Centurion Engineering Limited and this is confirmed by exhibit SW1 and Exhibit SW 2 in the supplemental affidavit sworn to on the 14th December 2019. Moreover an application was filed by the applicants solicitor for a joinder or third party proceedings to join Centurion Engineering Limited which said application was not considered at all by the court below. All of these factors are centered on an abuse of the legal process and on law and procedure for which this court will take into consideration in granting a stay of proceedings until they are settled in the appeal court. In the circumstances this court will grant a stay of proceedings of the action in the High court pending the hearing and determination of the appeal in the court of appeal

Let me now turn to the other prayer which is leave to appeal against the judgement of the High Court dated the 23rd day of October 2019. With reference to the aforementioned it is important to refer to Rule 11(i) - "No appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision unless the court enlarges the time.

(2) The prescribed period of appeal shall be calculated from the date of the decision appealed against.

Provided that where there is no appeal as of right the prescribed period shall be calculated from the date upon which leave to appeal is granted. However since this is leave to appeal this Honourable court will not consider the aforementioned provision but will rather grant the applicant/Defendant leave to appeal because of the prima facie triable issues contained in the proposed grounds of appeal without attempting to go into its merit.

CONCLUSION

In the circumstance, this court will make the undermentioned orders

1 Interim Stay in the high court pending the hearing and determination of this application dated the 14th November 2019 granted by this court is hereby vacated

2. Stay of proceedings in the High Court pending the hearing and determination of the appeal is granted

3. Leave to appeal against the ruling of the High Court dated the 23rd day of October 2019 is granted

4. Cost in the cause.

Hon Justice. Musu D.Kamara JA (presiding Judge) 

Hon Justice Ansumana Ivan Sesay JA

I AGREE 

Hon. Justice Sulaiman Bah JA

I AGREE 