

IN THE COURT OF APPEAL OF SIERRA LEONE

(CIVIL JURISDICTION)

BETWEEN:

SEA COACH BOAT CO. LIMITED – RESPONDENT/RESPONDENT

70^A OFF SIR SAMUEL LEWIS ROAD

ABERDEEN

FREETOWN

AND

STACO INSURANCE COMPANY (SL) LIMITED

24 UPPER BROOK STREET

FREETOWN

- APPELLANT/APPLICANT

CORAM: HON. MR. JUSTICE MONFRED MOMOH SESAY - JA

HON. MISS. JUSTICE MIATTA MARIA SAMBA - JA

HON. MR. JUSTICE SULAIMAN AHMAD BAH - JA

COUNSEL:

Roland S.V. Wright Esq for the Appellant/Applicant

Editayo Pabs-Garnon Esq for the Respondent/Respondent

RULING DELIVERED ON THE 16TH DAY OF JANUARY, 2020

MONFRED MOMOH SESAY, JA:

By Notice of Motion dated the 18th April, 2019 the Appellant/Applicant applied to this for the following reliefs, namely:

1. That this Court grants an interim stay of execution of the judgment of the Honorable Mr. Justice Sengu-Koroma JA (as he then was and sitting at the High Court now Justice of the Supreme Court of Sierra Leone) dated the 15th April, 2019 pending the hearing and determination of this application.

2. That this Court grants a stay of execution of the judgment of the Honourable Mr. Justice Sengu Koroma JA (as he then was and sitting at the High Court now Justice of the Supreme Court of Sierra Leone) dated the 15th April, 2019 pending the hearing and determination of the appeal i.e. Civ. App. No/. 30/19.
3. Any further and /or other order(s) that this Court deems fit.
4. Costs.

The application is supported by the affidavit of Adekunle Michael Aderinola sworn to on the 18th day of April, 2019 and a Supplemental Affidavit sworn to by the same deponent as the Affidavit in Support on the 10th July, 2019.

There is filed an Affidavit in Opposition sworn to by Editayo Pabs-Garnon on the 24th May, 2019.

The matter was heard by this Court on two of its sittings i.e. on the 27th June and 11th July 2019 and on the last said hearing the Court granted an interim stay of the execution of the said judgment pending the hearing and determination of the application and reserved Ruling which we now deliver.

THE EVIDENCE AND SUBMISSIONS OF COUNSEL

The evidence put before this Court are those contained in the affidavits on behalf of both parties.

The summary of the evidence in the affidavit in support and the supplemental affidavit filed on behalf of the Appellant/Applicant are as follows:

- (a) That final judgment was delivered on the matter intitled F.T. C.C. 057/13 2013 S. No. 57 at the Fast Track Commercial Court presided over by Hon. Mr Justice Sengu-Koroma JA aforesaid on the 15th April, 2019 in favour of the Respondent/Respondent who was the Plaintiff.

- (b) That the Appellant/Applicant the Defendant then, applied through his solicitor for a stay of execution but that the application was refused.
- (c) That the Appellant/Applicant filed an appeal against the said final judgment in this Court.
- (d) That there are "significant special, unique and peculiar circumstances" in this matter to warrant a grant of stay of execution which said special circumstances include:
- that paying the judgement debt would pose a threat to the insurance industry as it would open a floodgate for speculative/fictitious and/or fraudulent claims to be brought as fake claims would be filed like playing lotteries in anticipation of winning underserved compensation.
 - that paying the judgment debt of US\$187,000 would amount to granting the Respondent/Respondent an interest free loan to rescue a flagging business and/or recapitalize an expanding business to the detriment of genuine parties like the Appellant/Applicant should the appeal succeed which appeal might last for a number of years before it is determined.
 - that paying the judgment debt would send dangerous signal to the effect that there is now an incentive for fraudulent claims.
- (e) That a stay would not actually affect the business of the Respondent/Respondent because the vessel in question i.e. Princess Caroline has never been put to use for three years after its purchase because of its physical constraints and was therefore not generating any income.
- (f) That the appeal raises serious questions of law and contain extremely good grounds that have high prospects of success.

There are twelve grounds of appeal drafted as follows:

1. That the learned trial judge erred in law and misdirected himself when he concluded that the vessel MV Princess Caroline was insured by the Defendant at the time of the alleged loss.
2. That the learned trial judge erred in law and misdirected himself by totally disregarding the terms of the Insurance Policy and the Institute Time Clause which stated that the vessel must be seaworthy and must possess a period survey report before it can be validly covered by the insurance policy.
3. That assuming that the vessel was originally validly insured, the learned trial judge erred in law and misdirected himself by failing to consider the fact that the alleged loss occurred after the expiration of the original insurance policy and before renewal of the insurance policy.
4. That the learned trial judge erred in law and misdirected himself by misapplying or totally failing to apply the definition of perils of the sea to the facts of the case.
5. That the learned trial judge erred in law and misdirected himself when he relied on and accepted the narrative of the Expert Witness whose narrative was discredited.
6. That the learned trial judge on his motion introduced and/or relied on evidence that was not adduced at the trial when he stated that two new members attempted to drop an anchor when the storm occurred but that in fact the evidence was that there was no one on board the vessel on the night it broke free.
7. That the learned trial judge erred in law when he applied the doctrine of vicarious liability when he held that the Defendant was liable for the alleged negligence of an independent contractor.
8. That the learned trial judge erred in law and misdirected himself by imputing liability on the Defendant on the basis of an alleged liability of a Third Party.

9. That the learned trial judge erred in law and misdirected himself by holding the Defendant liable in negligence when the Defendant did not owe the Plaintiff any duty of care and/or did not breach any duty owed the Plaintiff.
10. That the learned trial judge erred in law and misdirected himself when he relied solely on the evidence of the Expert Witness to conclude that the vessel was total loss to the exclusion of other evidence before the Court.
11. That the learned trial judge misdirected himself when he held that the facts surrounding the accident and the subsequent sinking of the vessel were not in dispute when those facts were comprehensively controverted by the Defendant.
12. That the learned trial judge erred in law and misdirected himself by failing to determine the actual cause of the alleged loss but contradicted himself by determining the cause of the accident on two separate grounds.

In the Affidavit in Opposition the deponent averred that the Appellant/Applicant purports to be a reputable company and that the affidavits in support of the application do not contain any special circumstances to warrant this Court to grant a stay of execution of the said judgment.

Learned Counsel for the Appellant/Applicant submitted that:

1. an appeal does not operate as a stay unless a stay is granted by either the High Court or this Court;
2. a successful litigant must not be deprived of the fruits of the judgment but that where special circumstances are shown by the Applicant, then a stay should be granted. Learned Counsel referred the Court to paragraphs 6-8 inclusive of the Affidavit in Support dated the 18th April, 2019.

He also relied on the following case law authorities, namely:

- i. Africana Tokeh Village Limited (Applicant) v John Obey Development Investment Co. Ltd (Respondent) Misc. App. 2/94 Court of Appeal of Sierra Leone (unreported)
- ii. Chang Shu Hua v Goon Fook Hong Civil Appeal No. W-02-1263-2004 Court of Appeal of Malaysia
- iii. Boblyn Augustine v Abdul Koroma Misc. App. 38/2004 Court of Appeal of Sierra Leone (unreported)
- iv. Edward Garnem v Farnah Jawara and The Jawara Family Misc. App. No. 42/2011 Court of Appeal of Sierra Leone (unreported)

Learned Counsel for the Respondent/Respondent Editayo Pabs-Garnon,
on his part submitted that:

1. the purpose of an application for stay was for the Applicant to show special circumstances but that the Appellant/Applicant has not shown a single special circumstances.
2. paragraphs 6-8 of the Affidavit in Support are merely speculative arguments of law which should be put forward during the arguments of the appeal.
3. there was no evidence to substantiate the averments in paragraph 6(c) of the Affidavit in Support which stated that should the Appellant/Applicant pay the judgment debt, it would not be able to pay the personnel.
4. the Appellant/Applicant does not have good grounds of appeal as stated in paragraph 8 of the Affidavit in Support.

Learned Counsel relied on the following case law authorities:

- i. Firetex International Co. Ltd v. Sierra Leone External Telecommunications and Sierra Leone Telecommunication Co. Ltd. Misc. App. No. 19/2002 Court of Appeal of Sierra Leone (unreported).

- ii. Chang-Tave v Chang-Tave (CS 153/2002) (2003) SCSC 7 (06 March 2003).
- iii. Jalloh v Turay Civ. App. 27/2005 Court of Appeal of Sierra Leone (unreported).
- iv. Chibuku Products Limited v John Miller Miscellaneous Civil Cause Number 50 of 2017 the High Court of Malawi.

THE LAW ON STAY OF EXECUTION

What is “stay” in law? It is, in my view, an order of an appropriate Court temporarily putting on hold the execution of its order or the order of another Court until something or act occurs. It is ordered between judgment and the hearing and determination of an appeal thereon.

I seek legal support from the dictum of Tolla Thompson JA (as he then was now deceased) in the unreported matter of Firetex International Co. Ltd v Sierra Leone External Telecommunications and Sierra Leone Telecommunications Co. Ltd Misc. App. 19/2002 Court of Appeal of Sierra Leone. In his Ruling delivered on the 20th day of June, 2003, the Learned Judge said that a stay was “an intermediate act ordered by a Court of competent jurisdiction between judgment and the hearing of the appeal...”

Rules 28 and 64 of the Court of Appeal Rules, 1985 Public Notice (PN) No. 29 of 1985 are of moment in this matter and I think it would be useful to reproduce them here.

Rule 28 provides as follows:

“An appeal shall not operate as a stay of execution of proceedings under judgment or decision appealed from except so far as the Court below or the Court may order, and no intermediate act or

proceedings shall be invalidated, except so far as the Court may direct.”

Rule 64 provides that:

“Except where otherwise provided in these rules or by any other enactment, where any 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.”

My reading of Rules 28 and 64 informs me that they provide for four issues.

- (i) that an appeal does not operate as a stay;
- (ii) that an aggrieved litigant should first appeal against a decision before he can properly apply for a stay of the decision he has appealed against;
- (iii) that it gives concurrent jurisdiction to both the Court below (i.e. the High Court) and this Court (i.e. the Court of Appeal) on the power to grant a stay of execution;
and
- (iv) that an aggrieved party must first apply to the Court below and if the Court below refuses the application, then the Applicant as of right can apply again (not appeal) to this Court for the same relief i.e. stay.

Until these procedures are followed, this Court does not have jurisdiction to entertain an application for stay. I am satisfied that the Appellant/Applicant has followed the procedures as evidenced in the averments in paragraphs 3 of the Affidavit in Support and Paragraph 5 of the Supplemental Affidavit and Exhibit AMA2^B which is the drawn up Ruling dated the 16th April, 2019 by Hon. Mr.

Justice Sengu-Koroma JA (as he then was now JSC and sitting at the High Court) refusing the first application for stay.

I also note with satisfaction that an appeal has been properly filed as averred in paragraph 4 of the Affidavit in Support and Exhibit AMA3 which is the Notice of Appeal in the Registry of this Court on the 18th April, 2019. This is another jurisdictional issue which the Appellant/Applicant has complied with.

Having considered these preliminary legal requirements for an application of this nature, I shall now proceed to consider the substantive legal requirements for an application for stay. The law is that an Applicant must show prime facie good grounds of appeal and the existence of special or exceptional circumstances by affidavit evidence. If these requirements are not met, a stay of execution would not be judiciously granted. The rationale for the insistence on these two requirements is to ensure that the successful party is not deprived of the enjoyment of the fruits of the judgment in his favour. But if the Applicant meets these requirements, then a stay should be granted so as not to make the appeal nugatory should the appeal succeed. The decision therefore as to whether or not to grant a stay involves a fine balancing of the competing interests of the Applicant (i.e. the losing party) and the Respondent (i.e. the winning party).

These principles of stay have been affirmed and settled in this jurisdiction particularly by this Court in a number of cases including: Firetex International Co. Ltd (Supra); Desmond Luke v Bank of Sierra Leone Misc. App. 22/2004 CA; Boblyn Augustin v Abdul Koroma Misc. App. 38/2004 CA; Africana Tokeh Village Limited v John Obey Development Investment Co. Ltd Misc. App. 2/94 CA; Patrick Koroma v Sierra Leone Housing Corporation Misc. App. No. 9/2004 CA; Yusufu Bundu v Mohamed Bailor Jalloh Misc. App. No. 23/2004 CA; Herbert Nelson-Okrafor (Suing through His Attorney Derick Pratt) v Sorie

Kargbo, M'bayo Turay, Amadu Bai-Sesay and Philip Kai Ansumana Misc. App. No. 65/2017 and many more.

In Patrick Koroma v Sierra Leone Housing Corporation, Sir John Muria JA in delivering the Ruling of the Court had this to say:

“The principles applicable in determining whether a stay should be granted or not are well known and have been applied in numerous cases by the Courts in this jurisdiction. The Applicant must show that he has prima facie good grounds of appeal and that there are special circumstances justifying a stay... One of the underlying reasons for imposing such condition on the Applicant is that the successful litigant should not be deprived of the fruits of the judgment in his favour, a principle that is equally well known in this jurisdiction.”

The Courts, in their application of these principles on stay, have made a distinction between monetary (i.e. liquidated) judgments or orders and non-monetary (i.e. unliquidated) judgments or orders. In judgments for payment of money, special circumstance would include the Applicant showing that should the appeal succeed, there would be the real risk that the money ordered by the trial Court would not be paid (see Firetex International Co. Ltd (supra) and Union Trust Bank Limited v Mohamed Kakay Civ. App. 04/2019 (unreported)).

In judgments or orders for delivering of possession of land, on the other hand, the Applicant must show he has a stronger legal or equitable right over the property (see Patrick Koroma v Sierra Leone Housing Corporation and Desmond Luke v Bank of Sierra Leone (supra)).

In some applications for stay, moral, social and political considerations are put up as arguments by the Applicants in support of their applications for stay. However, such considerations and/or arguments should not be the basis for granting of stay of execution.

Muria JA in the case of Desmond Luke v Bank of Sierra Leone emphasised that

“Such considerations ... do not and ought not to form the basis for the exercise of the Court’s discretion to grant or refuse a stay of execution of the order of the Court.”

Earlier in his said Ruling, Muria JA said,

“The Court’s power to grant a stay of execution is discretionary and must be exercised based on legal principles.”

On the second requirement relating to the strength of the grounds of appeal, the rule is that the grounds of appeal should be strong and stand prospects of success. As a matter of law, it is not sufficient to simply state or aver that the grounds of appeal are strong and may succeed to amount to special circumstance. The weight or strength of the grounds must show itself prima facie vis-à-vis the evidence as stated in the affidavit in support of the application.

I must emphasise here that it is not the business of the Court in an application for stay to go into the merit of the grounds of appeal. That is for the Court when hearing the appeal. What the Court should consider at this stage is a prima facie case of the strength of the grounds as drafted and put before the Court.

Ademosu JA (as he then was now deceased) said in the case of Richard Owiredo v Beijing Urban Construction Group Limited (Carrying on business as Bintumani Hotel) Misc. App. No. 4/2008 CA (unreported) on this issue that:

“As this Court has said before 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.” (emphasis mine)

I am satisfied that the principles applicable to stay of execution as affirmed and applied in the local authorities cited above are the correct principles of law and I shall apply them in this matter.

REVIEW OF THE EVIDENCE, ARGUMENTS AND THE LAW

Before I proceed to review the evidence etc, let me emphasise that the onus is on the Applicant to show the special circumstances as highlighted above and that he must do so by affidavit evidence.

I have already paraphrased the relevant paragraphs of the affidavits as filed by both parties.

I wish to deal with two preliminary issues that caught my eyes in the affidavits in support of the application. The first is that some of the paragraphs contain statements of law which should not be put as averments in an affidavit as affidavits should state facts, not law, Order 31 Rule 5(1) of The High Court Rules, 2007 provides that:

“An affidavit shall contain only facts that the deponent can prove, unless any provision of these Rules provides that it may contain a statement of information or belief or both.” (emphasis mine)

This Court has also made a binding pronouncement on the contents of an affidavit in the case of Firetex International Cop. Ltd v Sierra Leone External Telecommunications and Sierra Leone Telecommunication Co. Ltd Misc. App. 19/2002 where Justice Tolla-Thompson (JA as he then was now deceased) said that, “Affidavits are designed to place facts whether disputed or otherwise before the Court for whose help they are prepared. They are not designed to be used as a vehicle for legal arguments. Legal arguments should come from Counsel in the matter not in the form of an affidavit.” (emphasis mine).

The second preliminary issue has to do with the averment in paragraph 6(b) that,

“Paying the money to the Respondent/Respondent at this stage, particularly if in the end the appeal is successful... that might last for a number of years before the appeal is finally concluded.”

(emphasis mine)

This averment of the seemingly inordinate delay in the hearing and determination of appeals by this Court is not only disparaging but scandalous of this Court.

The Learned Authors of The Supreme Court Practice 1999 (i.e. the White Book) stated at paragraph 18/19/15 page 350 that “If any unnecessary matter in a pleading contains any imputation on the opponent, or makes any charge of misconduct or bad faith against him or anyone else, it will be struck out, for it then becomes scandalous.” (emphasis mine)

In fact, the practice of hearing appeals by this Court has changed tremendously and positively. Appeals are now heard on two sittings including the first for directions for filing and service of synopsis and on the second sitting Counsel make oral submissions during which they may add to their written submissions and/or answer questions from the Court.

Besides, there are now in office about nine (9) substantive Justices of Appeal who constitute several panels that sit regularly particularly on Tuesdays and Thursdays. Gone are the days when this Court did not have sufficient judges to constitute a panel which, inter alia, resulted in delays of hearing and

determining matters as the Chief Justice had to get Supreme Court Judges or the few High Court Judges to constitute a panel.

Granted that both averments were made by the deponent, Adekunle Michael Aderinola, Counsel who filed the Processes and are officers of this Court owe this Court a duty to safeguard and protect the integrity of this Court (and other Courts) by advising their Clients on what to say in such circumstances. I say no more on this issue.

On the evidence before this Court for the application, the material paragraphs are paragraphs 6 – 8 inclusive of the Affidavit in Support sworn to on the 18th April, 2019.

It is my considered view that these paragraphs have disclosed special circumstance as they relate to the shipping and insurance industry. Paragraph 7 for example discloses the fact that the vessel in question has never been put to use for three (3) years after purchase because it was not sea worthy. This fact was not controverted. It also reinforces the other averments in paragraph 6 that deals with conduct requiring good faith in the industry.

The fact of the status of the vessel i.e. that it had physical constraints that could not be overcome which made it not to be put to use for 3 years after purchase suggests to me that it was not sea worthy up to the time of the incidents that led to this matter which made the situation worse. Could such a circumstance of vessel which is the subject of this litigation be able to generate sufficient funds to pay back the judgment debt should the appeal succeed? I do not think so. As stated earlier in this Ruling, in applications for stay of execution involving monetary or liquidated payments, special circumstance would include showing that there would be the real risk of the judgment debt, if paid, would not be recovered should the appeal succeeded. I think that the physical status of the vessel indicates such a real risk.

Besides, the grounds of appeal as framed discloses serious questions of law which should be allowed to be determined (whichever way that is). Questions as raised include those relating to negligence, vicarious liability, what constitutes “perils at sea”, use of extraneous material by the Court etc.

Furthermore, the Respondent/Respondent does not seem to be ready to grab the fruits of the judgment in his favour. The judgment was given on the 15th April, 2019 (See Exhibit AMA2^A). There was then an application by the Appellant/Applicant for a stay which was refused by the learned trial judge (See Exhibit AMA2^B). The application for stay to this Court was then filed on the 18th April, 2019 and the matter was adjourned several times before it was heard on the 27th June and 11th July, 2019 when we granted an interim stay of execution pending the hearing and determination of the application. It therefore took almost three (3) months (i.e. 90 days) after the judgment before the Court lawfully restrained the Respondent/Respondent from accessing and enjoying the fruits of the judgment in his favour. Would staying it any further until the appeal is heard and determined be prejudicial to the Respondent/Respondent? I do not think so in such circumstances.

I must say that what constitutes special circumstances had not been closed. Each case should be considered on its special facts and circumstances and the Court must consider all the facts before taking a position whether to grant or refuse a stay.

I am encouraged by the dictum of Hon. Mr. Justice S.A. Ademosu JA (as he then was now deceased) when he said in Richard Owiredu v Beijing Urban Construction Group Limited (supra) quoting Tuck v Southern Countries Deposit Bank (1889 42 Ch. D. 471; 61LJ 34) that “the Court should consider all the facts before deciding whether they constitute proper facts for its discretion to be exercised.”

CONCLUSION

In view of the premises, it is my considered opinion that the justice of this case requires us to exercise our discretion in granting a stay of execution of the judgment of Hon. Mr. Justice Sengu Koroma JA (as he then was and sitting at the High Court and now Justice of the Supreme Court of Sierra Leone) dated the 15th day of April, 2019.

I so hold and order.

I make no order as to costs.



Hon. Justice Monfred Momoh Sesay

Justice of the Court of Appeal.

I AGREE..........

Hon. Justice Miatta Maria Samba

Justice of the Court of Appeal

I AGREE..........

Hon. Justice Sulaiman Ahmad Bah

Justice of the Court of Appeal