DRAFT

MISC. APP. 3/18

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE ORDER OF THE COURT OF APPEAL OF SIERRA LEONE DATED 12TH JULY, 2018

AND

IN THE MATTER OF SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE 1991 ACT NO. 6 OF 1991

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW MADE PURSUANT TO RULE 98 OF THE SUPREME COURT RULES 1982 PUBLIC NOTICE NO. 1 OF 1982 AND ORDER 52 RULES 1-8 OF THE HIGH COURT RULES 2007

Between:

Momoh Ansumana
Boris Farfell
Oleg Tsukanov
29 Off Beach Road, Lumley
Freetown - Applicant/Respondent

And

Voytouich Rostislav
Edward Myronenko
29 Off Beach Road, Lumley
Freetown - Respondent/Applicant

Coram:

Hon. Justice V. M. Solomon Jsc.

Hon. G. Thompson Jsc.

Counsel:

Mr. B. E. Jones Esq for the Applicant

Mr. M. P. Fofanah Esq for the Respondent

RULING:

1. INTRODUCTION:

The brief facts necessitating this application will be summarised as follows: That the Judgment dated 11th January, 2017 was entered by the High Court in favour of the applicant/respondents herein (therein referred to as the "Plaintiffs"). The Court gave 14 (fourteen) orders in favour of the plaintiffs. Thereafter the respondents/applicants (therein referred to as the "Defendants") applied for a stay of execution of only 2(two) out of the 14 (fourteen) orders. That application was refused. The defendants then applied to the Court of Appeal for a stay of execution of all the 14 (fourteen) orders therein. Counsel for the applicants/respondents herein took a preliminary objection to that application and by a majority ruling dated 12th July, 2018 his objection were overruled.

2. He then filed an Originating Notice of Motion dated 9th August, 2018 to this Court in which he is seeking reliefs for judicial review of the majority judgment on the grounds that the Court of Appeal lacked jurisdiction to give the said orders as the respondents /applicants had only applied for 2(two) orders in the High Court and so could not be granted all the orders in the judgment when that application was not made in the court below. Consequently, the respondents/applicants have now filed this present application that the Originating Notice of Motion dated 9th August, 2018 be struck out on the grounds that it is an abuse of the process of the Court.

3. APPLICATION:

The Notice of Motion dated 14th January, 2019 is supported by the affidavit of Bernard Jones to which is exhibited exhibits "A to E" respectively. There is an affidavit in opposition deposed to by M.P. Fofanah Esq. on 21st January, 2019. Both Counsel made oral submissions and various authorities submitted for our consideration.

4. SUBMISSION BY RESPONDENTS/APPLICANTS:

Counsel for the respondents/applicants submitted that the Originating Notice of Motion dated 9th August, 2018 be struck out on the grounds that it is an abuse of due process. He relied on all the documents as filed and submitted that the process for judicial review as prayed for on the Originating Notice Motion is not the appropriate process to challenge the decision of the Court of Appeal. The crux of counsel's submissions is that the appellants/respondents have initiated action in this court by asking for judicial review of the ruling of 12th July, 2018 when the correct process should be by way of appeal. He further submitted if the appellants/respondents claim that the Court of Appeal had no jurisdiction to have given the several orders on 12th July, 2018 then they should appeal the said ruling. Counsel relied on several authorities both within and outside the jurisdiction. He laid emphasis on a submission that judicial review should not be granted where an alternate remedy is available in this case, an appeal. He finally submitted the process of judicial review leaves intact the decision of the Court of Appeal and opens the door for the real litigation of the issues that the Court of Appeal has taken a decision on. In reply Mr. Jones Esq. submitted that this Court has supervisory jurisdiction over the Court of Appeal. There is a right of appeal and judicial review but that the authorities cited state that judicial review is not an appropriate method. The latter is rarely used in exceptional or special circumstances.

6. SUBMISSIONS BY APPLICANTS/RESPONDENTS:

Counsel or the applicants/respondents relied on his affidavit in opposition. He submitted that the affidavit in support did not disclose what is inappropriate about the process of judicial review a portion, the application herein is frivolous, vexatious and lacks merit. He submitted that the application is for the Court to quash the ruling the Court of Appeal of 12th July, 2018 on the grounds that it lacked jurisdiction to hear and determine the respondents application for stay of execution of certain orders without first applying to the High Court to stay those orders pursuant to Rules 28 and 64 of the Court of Appeal

Rules 1985 (hereinafter called 'The Rules"). He laid emphasis on the rules and submitted that his application to this court is for it to exercise its supervisory jurisdiction when the lower court had no jurisdiction to entertain such an application. He also relied on Section 125 of the Constitution of Sierra Leone 1991 (hereinafter called "The Constitution") which gives this Court its supervisory jurisdiction over all lower courts by quashing any ruling/judgment when it lacks such jurisdiction. Counsel submitted that Rules 28 and 64 are mandatory in that all application for a stay of execution a judgment should be filed in the Court which gave the judgment and if refused to a higher court. If a litigant does not follow this procedure and directly goes to the higher court for a stay then that court lacks jurisdiction to hear that application. He relied on the authorities of the respondents/applicants and urged this court to strike out the application herein.

6. FINDINGS:

The present application herein is in respect of one primary order which is that the Originating Notice of Motion dated 9th August, 2018 be struck out on the grounds that it is an abuse of due process of the court. The respondents have opposed the application and has averred that the remedy sought by judicial review is the correct procedure and not by way of appeal. This Court by Section 125 of the Constitution 1991 (hereinafter called "The Constitution") has supervisory jurisdiction over all Courts in Sierra Leone

> *"and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or wrights including Writ of habeas corpus, orders of certiorari mandamus and prohibition as it may consider appropriate for the purposes of enforcing or security the enforcement of the supervisory powers".*

The Supreme Court rules have not made provision as to the procedure to be followed in relation to the Writs of prerogative enumerated in

Section 125 thereof. But by Rule 98 of its rules of 1982 (hereinafter called "The Rules) it is expressly provided thus:

> *"98. Where no provision is expressly made in these Rules relating to the original and the supervisory jurisdiction of the Supreme Court, the practice and procedure for the time being of the High Court shall apply mutatis mutandis"*

Order 52 Rule 1(2) of the High Court Rules permits an application for judicial review and so too Section 19(2) (3) of the Courts Act, Act No. 21 of 1965.

7. Judicial review is a court's authority to examine an executive or legislative act and to invalidate the act if it is contrary to constitutional principles. The procedure is concerned with the review of the lawfulness of decisions and actions rather than an appeal. A decision can be questioned on two alternative grounds to wit: -

1. That it is not within the powers conferred by the statute.

OR

2. That any of the requirement of the statute have not been complied with.

A question for our consideration is whether the complaint of the respondents fall within any of the grounds referred to supra. The complaint as I understand it, is that the Court of Appeal by its majority decision had acted outside of the jurisdiction, that is outside of Rules 31 and 32 of the Court of Appeal Rules 1985 (hereinafter called "Appeal Rules"). The Court of Appeal in the case of Ash Bridge Investments Ltd. v. Minister of Housing and Local Government (1965) 1 WLR page 1320, Lord Denning MR said that the Court could interfere if the minister:

> *".....has acted on no evidence or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he ought not to have taken into account or vice versa. It is identical with the position*

where the Court has power to interfere with the decision of a lower tribunal which has erred in point of law".

This formula was adapted in be Rothschild v Secretary of State for Transport (1989) JPL page 173 where the court stated that under statutory review for an applicant to succeed in quashing the decision he must have been "substantially prejudiced" by the failure to comply with the statute procedural conditions. Under both substantive and procedural grounds of statutory review the Court possess a residual discretion not to quash a decision where there has been no prejudice or detriment to the applicant and to refuse judicial review in exceptional circumstance.

8. The crux of Mr. Fofanah is submission is that the Court of Appeal had no jurisdiction to entertain an application for a stay of execution of the entire judgment dated 11th January, 2017 (Exhibit "B") when the application for a stay of the judgment was limited to paragraph 21 of the said judgment and which stay was refused by the High Court on 18th July, 2017 marked "A". All the Judges in the Court of Appeal have referred to the requisite applicable rules to wit: Rules 31, 32 and 64 Court Appeal 1985. Rule 64 is very instructive and unequivocal to wit: -

"64. Except where otherwise provided in these rules or any other enactment where <u>any application</u> may be made to the <u>Court below or to the Court</u>, 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 <u>the application</u> determined by the Court".

(emphasis added)

The question then is what application? The Rule refers to "the application". This presupposes that the application made in the High Court is the same application that should be made. The Court of Appeal has also referred to Rules 31 and 32 respectively. These rules do refer to "the appeal" as filed and Rule 32 refer to the parties as

appellant and respondents not as applicants and respondents by which parties are referred to in cases of interlocutory applications. Rule 32 does refer to the general powers of the Court vis-a-vis judgments and any orders as may be required. It does not refer to rulings which are given in interlocutory applications.