CIV. APP. 69/2018

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

Brian Nelson -Williams Appellant/Respondent
(Administrator of the Estate of
John Arnold Nelson-Williams)

And

Mr Mohammed & Mrs Isatu Jalloh 1st Respondents
Occupants and all Others
41off Spur Road
(AKA 41 Derrick Drive), Freetown

Mr Brima Bah and all other Occupants -2nd Respondents/Applicants
41R off Spur Road (AKA 41R Derrick Drive),
Freetown

Coram:
Hon. Ms. Justice Glenna Thompson JSC - Presiding
Hon. Ms. Justice Miatta Samba JA
Hon. Mr Justice Sulaiman Bah JA

Mr E. T. Koroma for the. 2nd Respondents/Applicants
Mr S. B. Mondeh for the Appellant/Respondent

RULING DELIVERED ON THE 10th DAY OF JUNE 2020

Glenna Thompson JSC

1. The genesis of this matter has been elaborately explained in the judgement of this court delivered on the 21st January 2020. The second Respondent/Applicant has now applied to this court for a stay of Execution of that judgement. In support of his application, he relied on an affidavit sworn to by the 2nd Respondent/Applicant (hereinafter the Applicant) on the 4th February, 2020 and the exhibits attached thereto. These are:
    - Exhibit BB1 – His Deed of Conveyance dated 23rd February 1995
    - Exhibit BB2 – The Writ of Summons dated 3rd July 2015
    - Exhibit BB3 – Judgment in Default of Appearance dated 3rd October 2015
    - Exhibit BB4(1-6) – Medical reports

- Exhibit BB5 – Judgment dated 21st January 2020
- Exhibit BB6 – Notice of Appeal to the Supreme Court
- Exhibit BB7 – Ruling of Alan Halloway JA (as he then was)
- Exhibit BB8 – Notice of Appeal to the Court of Appeal
- Exhibit BB9 – Ruling of the Court of Appeal

2. It is regrettable that none of the certificates accompanying each exhibit accurately describes the exhibit nor the exhibit numbers. We remind counsel of the need to ensure that documents should be identified and exhibited accurately. Failure to do so wastes valuable time and is likely to be reflected in costs.

3. The Appellant/Respondent (hereafter the Respondent) filed an affidavit in opposition sworn to on the 16th March 2020 by Brian Nelson-Williams. Attached to that affidavit are the following exhibits:

- BNW1 – Affidavit of Service of the writ of summons
- BNW2 (A-M) – Judgement in Default served on the Applicant
- BNW3 (A-F) – Copy of title deed of Thomas Nelson-Williams
- BNW4 – Report of Chaytor Committee (paragraph 11-14)
- BNW5 – Letter dated 3rd December 2013 from the Asset Commission.

4. On the 24th March, the day of the hearing, the Applicant served an Affidavit in Reply sworn to by Counsel Emmanuel Teddy Koroma on that same day. Attached to that affidavit are:

- ETK1 – The Affidavit of the Applicant Brima Bah (Although not referred to in the body of Counsel's affidavit
- ETK 2 – Pictures said to be of the Applicant's belongings on the day of execution.

5. Mr Mondeh, Counsel for the Respondent asked the court for leave to cross examine the deponent on that affidavit. This was refused on the basis that the contents and the issue on which he wanted to cross examine are irrelevant to the proceedings before us.

6. We find the contents of the affidavit in reply irrelevant, ill-conceived and objectionable because Counsel, Mr Koroma should know or ought to know that if he has legitimate points to raise of that nature, this hearing was certainly not listed for that and he should have advised his client appropriately. With the exception of paragraph 10, nothing in that

Affidavit was relevant to these proceedings. However, paragraph 4 is instructive for reasons which we will discuss later.

7. In view of the issue raised in paragraph 10 and the arguments as to whether execution had been completed, we granted leave to the Respondent to file an affidavit addressing only the issue of whether execution had been completed.

The Law

8. It is settled law that the court has an absolute and unfettered discretion in deciding whether or not to grant a stay. In considering whether to grant a stay of execution, the court must ensure that its processes are not being used inappropriately to keep a successful litigant from the fruits of his victory. A stay will only be granted upon proof of a prima facie good ground of appeal and the existence of special circumstances. The onus is on the applicant to show by affidavit evidence that the two requirements are met. Where the dissatisfied appellant can show on the balance of probabilities by way of affidavit evidence, special and/or exceptional circumstances, the court is likely to tip the balance in his favour. The need for special circumstances was explored in Winchester Cigarette Machinery Ltd v Payne & Anr (No2) The Times Law Reports, December 15, 1993. Hobhouse L.J said as follows: *'the appellant had to show some special circumstances which took the case out of the ordinary.* 'In Linotyle-Hall Finance Limited v Baker [1992] 4 All E.R.887 Staughton LJ stated as follows:

'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 prospects of success, that is legitimate ground for granting a stay of execution.'

Also in Africana Tokeh Village Limited v John Obey Development Investment Company Limited Misc App 2/94 (unreported) Justice G. Gelaga-King stated that *"where the court is shown special circumstances, it will use its discretion in favour of a stay. It is for the applicant to bring before the court those facts on which he relies as constituting special circumstances."*

The Arguments

9. At the hearing Counsel for the Applicant, Mr E. T. Koroma, relied on his affidavit in its entirety. He relied on the case of Rader v Jaber (1950-56) ALR SL 115, to argue that a stay of execution should be granted in

exceptional circumstances and is discretionary. This discretion should be exercised only after considering all the facts. Counsel submitted that part of the special circumstances in this case includes the fact that the Applicant has a legal interest in the property by virtue of exhibit BB1 which is the conveyance dated 23rd February 1995. He further submitted that the Applicant has been in undisturbed and quiet possession of this property since 1995, save for the action instituted by the Respondent for declaration of title and possession with respect to the property which the Respondent claims is part of the property of John Nelson-Williams (Deceased). Counsel asked the court to consider the physical challenges that this Applicant is going through. He asked the court to consider the medical report BB4 (1-6) and that part of the property has been specifically adapted for the Applicant. He stated that though the medical report is dated 2007 and the projection was only for one year, the Applicant is still suffering from a disability. The Applicant, he said has spent all his life savings and he will suffer undue hardship if a stay is not granted. He referred the court to the Africana Tokeh case supra. This court, he submitted has a discretion to grant a stay on terms. In view of the peculiar circumstances of this matter he implored the court to grant a stay. He further submitted that the appeal filed has a reasonable prospect of success because this court had wrongly upheld the appeal and he asked that in the interest of justice and fair play that this application be allowed, which he made pursuant to Rule 28 of the Court of Appeal Rules 1985.

10. In reply, Mr Mondeh, Counsel for the Respondent similarly relied on his affidavit in its entirety. He submitted that the Notice of motion dated 4th February 2020 is untenable as it is an abuse of process of the court. For the following reasons:

(a) That it does not show the grounds in which the application is made. He referred to Order 8 (4)(2) of the High Court Rules 2007 – which states that on the face of it the motion must give clear grounds on which the application is made.
(b) That the application does not show special circumstances that have a reasonable prospect of success if this court is going to entertain such application for a stay in this particular case.
(c) A stay of execution is an equitable remedy. Therefore, it is imperative that an affidavit in support must be made in good faith.
(d) Contrary to paragraph 3 of the Applicant's affidavit, it is clear the Applicant was served with the Writ of Summons.
(e) On the 30th October 2015, the Applicant and his privies were duly served the judgment that was entered in default of appearance.

(f) That the notice of appeal to the Supreme Court is frivolous and vexatious.

(g) There is no reasonable prospect of success

11. He submitted that it is clear from R28 supra, that an appeal shall not operate as a stay of execution. No immediate act shall be invalidated. He also referred to the Africana Tokeh case as providing authority for the proposition that the court has no power to undo a fait accompli. The ~~intermediate~~ immediate act after judgment has been carried out so seeking a stay now is of no moment. We disagree with Counsel's interpretation of the Africana Tokeh case. In fact the phrase "*.... This court has no power or jurisdiction to order a stay and, as it were, undo a fait accompli*" has to be read in context. It was part of the three questions Justice Gelaga-King raised for consideration in the application before the court. Having carefully considered the facts of the case and the authorities of Adama Mansaray v Ibrahim Mansaray Civ App 31/81unreported and Richard Zachariah v Jamal Morowah Misc. App 12/87 (unreported), the Learned Justice concluded "*.....this court has unfettered power and jurisdiction to order a stay of execution and may do so even though a writ of possession may have been issued and executed.....*"

12. As regards the Applicant's poor health, Counsel submitted that this is a court of law and this matter has been on for a very long time. The medical report is dated as far back as 2007. This, he submitted, does not amount to special circumstance.

Special Circumstances.

13. Counsel for the Applicant submitted that his client has a legal interest by virtue of the conveyance exhibited to the affidavit as exhibit BB1 and that legal interest must be considered as a special circumstance. The matter before us is not about title. We are quite aware that there is a conveyance. That said, if it needs saying at all, the mere production of a conveyance is not proof of a fee simple title. He must go further and prove that his predecessor in title had a valid title to pass to him. In fact the Conveyance may confer no title at all e.g. where the vendor had no title to pass. See Seymour Wilson v Musa Abess (1981) Civ. App. 5/79 S.C. (unreported) per Livesey-Luke C.J

14. In the absence of any evidence or submission to the Court as to how this constitutes special circumstance, we cannot conclude that the conveyance and purported legal interest based on it is a special circumstance.

15. The second ground put forward by Counsel is the Applicant's health. In support of this, the Applicant in Paragraph 6 of his affidavit in support, states as follows: *"that I am seriously sick and suffering from partial paralysis and this is the only accommodation I have and which I have acclimatised himself with.(sic)"* We assume that the applicant rather meant that which he has become accustomed to. Be that as it may, the Applicant exhibited in support of this assertion medical reports Exhibit BB 4(1-6) which are all dated 2007, the most recent being the Heath Care Professional Certification dated 12th December 2007. His prognosis is described as temporary but likely to improve within one year. The option of one year is specifically encircled. Given this prognosis and the fact that no other updated or recent medical report was provided by the Applicant, it is fair to conclude that the Applicant's condition has greatly improved in the over 12 years since that report was done. Indeed, the Applicant attended hearings unaided on the second floor of the Law Court Building which unfortunately, has no disable access or facilities. The first time we saw the Applicant in court with any support or walking aid was at the hearing of the 24th March.

16. The Applicant moved from the United States to Sierra Leone sometime ago. Further by the time of the hearing the Applicant no longer lived in the property as he had been evicted, with no evidence that his life expectancy has been shortened or that he has had any adverse impact over and beyond those that would ordinarily be expected in circumstances or situations such as these. There is therefore no or no sufficient evidence of ill health capable of supporting the Applicant's application for a stay of the judgment. We therefore conclude that we do not find this sufficient to constitute special reasons.

17. The third ground Counsel for the Applicant submitted was that there is a reasonable prospect of success in the Supreme Court. This court cannot speculate or prejudge the outcome of the appeal, but in order to strike a fair balance between the competing interests of the parties, we can make a preliminary assessment on whether the Applicant has an arguable case. Our views cannot in any way be binding on the court dealing with the appeal.

18. The Applicant's case is that this court should not have upheld the appeal by the Respondent against the ruling of Halloway JSC (then JA). In paragraph 3, the Applicant states as follows: "That no writ of

summons was ever served on me and therefore I had no knowledge of this *(sic)* proceedings." In paragraph 4, he states "That even the Default judgment obtained on the 30th October 2015, no notice of same was ever served on me before execution as provided by the Rules." We refer to our judgement of the 21st January 2020, in which this court exposed as a blatant untruth that the Applicant, then Respondent was not served with either the Writ of Summons or the Judgement in Default. If anyone needs reminding, this is what we said at paragraphs 44 and 45:

"I refer to the affidavit of the 2nd Respondent Brima Bah sworn to on the 6th July 2018 (Vol II, page 467) and filed by Manly-Spain. & Co. He described himself as the 8th Defendant in Paragraph 1 and in paragraph 2 denied knowledge of the judgment "dated 30th day of October 2018" *(sic)*. At paragraph 3, he deposed that "*.....after the writ of summons was served on me, I instructed my solicitors to enter appearance and file defence on my behalf.*" At paragraph 4 "*that it is never to my knowledge that my solicitors did not enter appearance and file in defence on my behalf to the Writ of Summons served on me.*" At paragraph 5, "*.....sometimes (sic) after service of the writ of summons on me a failed attempt of eviction on my property gave reason to believe that my solicitors have entered appearance and filed in defence on my behalf.*" At paragraph 6 "*... I know not that an action in litigation lie or subsists against me on the basis of that writ of summons served on me sometime ago.*" In the penultimate paragraph is stated "*That all I have deposed to in the affidavit is true and correct.*" I have quoted extensively from the 2nd Respondent's affidavit to show that not only was the 2nd Respondent aware that an action had been instituted against him he expressly accepts that that he was properly served. At page 576, Ibrahim Kamara, a Solicitor's clerk at DIJAMED CHAMBERS, deposed that on the 3rd July 2015, he personally served the Respondent with the Writ of Summons, who introduced himself to him. The 2nd Respondent accepted service and signed his way book. Mr Kamara then informed him that he had another sealed copy of the writ for the other occupants but the 2nd Respondent stated that he would challenge the action of all other occupants. The affidavit of the 2nd Respondent referred to above was sworn to and filed in support of a Notice of Motion dated 8th July 2018 seeking amongst other reliefs *"leave to file an appeal out of time against the judgment of the 30th October 2015 and an extension of time to file an appeal against the judgment of the 30th October 2015 to the Court of Appeal."* A draft defence

containing 6 paragraphs was also attached as well as a Notice of Appeal both of which are exhibited to the 2nd Respondent's affidavit. That Notice of Motion was properly filed and it was intended to be moved on the 10th July 2018.

Yet at page 523 (Vol II), the Notice of Motion dated 11th July 2018 filed on behalf of the 2nd Respondents herein the second order prayed for was "*.....that the Default judgement dated 30th October 2015 and all subsequent proceedings be set aside on the grounds of fatal irregularities in that: That no Writ of Summons was ever personally served on the 8th Defendant..*" The affidavit in support of that Notice of Motion is sworn to by the 2nd Respondent. In his paragraph 3, he says as follows: ..."*no writ of summons was ever served on me and therefore I had no knowledge of this proceedings.*" Attached is also a proposed defence and counter claim which is different from that which was exhibited to the affidavit of the 8th July 2018. Barely three days after filing the first Notice of Motion, the 2nd Respondents filed another on the 11th July 2018 with no reference to the first and with different facts deposed to in the supporting affidavit."

19. Mr Koroma was reminded of this by the Court. Mr Koroma's submission was that as the motion dated 6th July 2018 was not moved, the Court should disregard the affidavit sworn to in support of it even though he confirmed that it was his client who signed and swore to the affidavit in question. Counsel was effectively saying that it was alright to lie and attempt to deceive the court so long as the previous application was not proceeded with. One of the troubling and disturbing facts of this case is the fact that Counsel himself appears to find it impossible to refrain from joining his client's attempts to deceive the court. We observed that in paragraph 4 of the Affidavit in reply (sworn to by Counsel), Counsel stated that *"the signature in the way book acknowledging service of the writ of summons is completely different from the 2nd Respondent/Applicant (sic) signature."*. On the one hand Counsel is accepting that it was his client who filed the affidavit acknowledging service of the writ of summons, yet in the same submission he is alleging that the signature in the way book acknowledging the service which his client accepted, is not his client's. This is the first time this point has ever been raised and the issue of service was sufficiently explored at the hearing of the appeal.

20. It has not been suggested who allegedly forged the signature and the clear inference is that the suggestion that the signature was forged is a

belated attempt to corroborate and bolster the false statement in the Affidavit. This of course flies in the face of the Applicant's own admission. Counsel's excuse in the face of such overwhelming evidence of dishonesty, lies and deceit is that he is acting on instructions. We find this astonishing to say the least and can only conclude that Counsel is prepared to join his client's attempt to deceive the court.

21. As we have said before an affidavit is not a document to be taken lightly. It is a document that is sworn on oath. Making a deliberately false statement in an affidavit is a criminal offence and will also amount to perjury if produced in court with the intention that it should be relied upon. Those who swear to an affidavit are deemed to understand the consequences of swearing to a document which they know contains falsehoods. It would be an affront to justice and the integrity of the court were we to allow this to happen. It is, not to put too fine a point on it, surprising that experienced Counsel, aware he is presumed to be, that he is under a duty not to mislead the court, could seek to place before the court a contrary affidavit without proffering any explanation as to the disparity between the two, save that we should ignore the previous affidavit because it was not relied upon. Clearly both counsel and his client failed to appreciate or grasp the seriousness of their actions and the consequences that flow from such a blatant disregard for honesty and integrity in court proceedings.

22. This court finds the Applicant's conduct in this case to be such that he lacks credibility and is an unreliable witness of fact. He is prepared to say or do anything including committing perjury so long as it achieves his desired end. In our judgement of the 21st January, we stopped short of setting in motion criminal investigations into the offence of perjury. Instead of reflecting on the conduct that concerned the Court the Applicant on the contrary and astonishingly seems to have has been emboldened to repeat his untruth.

23. Finally, the fact that execution has already taken place does not preclude this court from ordering a stay. However, for the reasons we have stated above, we do not find that this case merits a stay of execution.

24. The order of this court is therefore as follows:

"The Applicant's motion dated 4th February 2020 is refused"

25. We further make the following ancillary orders:

i. The Applicant, specifically Mr Brima Bah and his Counsel Emmanuel Teddy Koroma ~~is~~ are referred to the Attorney General and Minister of Justice to be investigated for perjury pursuant to section 1(3) of the Perjury Act 1911

ii. That Counsel also be referred to the Attorney General to be investigated for aiding, abetting, counselling or procuring another person to commit perjury pursuant to Section 7(1) of the same act

iii. That Counsel Mr Emmanuel Teddy Koroma be referred to the General Legal Council for contravening Rules 2, 4, 5 and 42 of the Code of Conduct 2011, in that he knowingly or recklessly attempted to mislead the Court. Further that he failed to act with: honesty, competence, and professionalism as is reasonably necessary for the preparation and conduct of a case, failed to maintain his independence in the performance of his functions and engaged in activity which compromised his independence or which reasonably created the appearance of such compromise; failed to act with integrity to ensure that his actions do not bring the administration of justice into disrepute and a failure to act courteously and respectfully towards all persons with whom he has professional contact, including judges, other legal practitioners, court staff, litigants, witnesses, victims and clients and allowing himself to be used as a channel to insult or annoy either a witness or any other person in court. In this regard, an officer of the Court of Appeal Registry will swear to an affidavit attaching the judgment of the 21st January 2020 and this Ruling and cause the same to be delivered to the Secretary of the General Legal Council no later than 7 days from today.

26. Costs to the Respondent in the sum of Le10,000,000.00.

Hon. Ms. Justice Glenna Thompson JSC - Presiding

Hon. Ms. Justice Miatta Samba JA

Hon. Mr. Justice Sulaiman Bah JA