

**IN THE HIGH COURT OF SIERRA LEONE****BETWEEN:-****DR. CHRISTIAN TILLY HARTWELL BELL****AND****VALERIE I. BELL****- PLAINTIFFS****AND****ELLEN BENDU****- DEFENDANT****CORAM:****Hon. Sir John Muria J.A.****Hearing: - 13 July 2004****Ruling: - 8 October 2004****Advocates:****For Plaintiffs: - C.C.V. Taylor, Esq.****For Defendant: - C.F. Margai Esq.****RULING**

Delivered this 8 day of October 2004.

**MURIA J.A.** This is an application by way of Notice of Motion by the Defendant/Applicant seeking to set aside the order of this Court (Doherty J) made on 13<sup>th</sup> May 2004 on the ground of irregularity.

Alternatively, the Applicant seeks to set aside the judgment on the ground that the action has been brought against the wrong person. Naturally, the Plaintiffs/Respondents oppose the application, supporting the judgment as regularly obtained, and that it ought to stand.

## **BRIEF CIRCUMSTANCES OF THE CASE**

The brief circumstances of this case are that the plaintiffs who are husband and wife, by a Writ issued on 5<sup>th</sup> February 2004 sued the defendant, claiming a declaration of title over a piece of land off Hamilton Beach, Hamilton Village, recovery of possession of the said land, damages for trespass, and an injunction restraining the defendant and/or her servants from trespassing or remaining on the said land. Service of the Writ on the defendant was effected on Friday 16<sup>th</sup> February 2004, following which, the Solicitor for the defendant entered a conditional appearance on behalf of the defendant on the following day, 17<sup>th</sup> February 2004. By the 28<sup>th</sup> April 2004, no action has been taken by the defendant pursuant to her conditional appearance, and no defence has been filed. The plaintiffs for judgment and the Court granted their application on 13<sup>th</sup> May 2004. This application is to set aside that judgment.

## **CONDITIONAL APPEARANCE**

Before I process further with this matter, let me briefly deal with the question of conditional appearance, sometime also known as an appearance "under protest". It is so called because the defendant objects to the jurisdiction of the Court or that the writ is irregular. The defendant's right to mount these objections is preserved as soon as he or she enters a conditional appearance. However such a right is not without limitation. The defendant must exercise that right within the limit time provided and if he or she fails to do so, the conditional appearance becomes unconditional, unless he or she obtains an extension of time or otherwise directed by the Court.

In the present case, the defendant entered a conditional appearance so that she could apply to set aside the writ within ten (10) days of the entry of the conditional appearance. No such application was made within the time stated and so the conditional appearance became unconditional, consequently, as a rule, unconditional appearance must be taken to amount to a waiver in the issue or service of the writ. The defendant in this case must be taken to have waived any irregularity in the issue or service of the writ on her.

**Should default judgment be obtained under rule 7 or rule 11 of Order 23?**

The first ground of challenge to the judgment relied on by the defendant/applicant is that the judgment was irregularly obtained because the plaintiff applied for the same under rule 11 of Order 23. The applicant's contention is that the applicable provision is rule 23. In order to appreciate the application of the two rules relied on by Counsel in this case, I set out the two rules of Order 23.

"r.7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs" (Emphasis is mine)

.....

"r.11. In all other actions than those in the proceeding rules of this Order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment

shall be given as upon the statement of claim the court shall consider the plaintiff to be entitled to"

It would be observed that rule 11 clearly applies to “all other actions” than those mentioned in rules 2 to 10 of Order 23. Hence under rule 7 if the defendant makes default in filing a defence within the time allowed the plaintiff may enter judgment in default, as a matter of course, immediately after the time for defence has expired. The procedure of applying for judgment by motion as in rule 11, is not necessary. The plaintiff would be well entitled within rule 7 to simply file an entry of default judgment. However, the plaintiff is not bound to enter judgment in default. He may do so if he wishes. It is a procedure open to him to take. Thus in appropriate cases, the plaintiff may elect to apply by notice to the defendant, particularly in land cases. Order 27 r 7 of the former English Rules of the Supreme Court (frequently cited in this Court as The Annual Practice) from which Order 23 r 7 of our High Court Rules was derived, appears to take into account the need for leave to enter judgment in certain cases involving land, such as where the relief is for delivery of possession: *Lircata Properties Limited v Jones* {1967} 1 WLR 1257 {1967} 3 All ER 386. The court retains the discretion, if it considers it reasonable to do so, to grant such leave.

It will also be noted that the plaintiff's writ in this case is endorsed with the claims, not only for possession of land but also for damages for ***trespass and injunction***. By giving the natural meaning to the words of rule 7 of Order 23, the plaintiffs' claims in this case do not fall squarely on that rule. Hence, the plaintiffs took the rule 11 procedure “out of abundance of caution” to use Counsel's words, to seek leave for judgment and gave notice to the defendant's solicitor.

The defendant through her solicitor was notified of the hearing of the application for judgment. When the application was heard on 13<sup>th</sup> May 2004, neither Counsel for the defendant nor the defendant herself was present. The court heard the plaintiffs and granted the judgment. This case falls into the category of "other actions" envisaged in rule 11 where leave is necessary before judgment in default is granted. In my judgment there is no irregularity in the procedure taken by the plaintiffs under r. 11 in this case.

The next ground relied on by the applicant/Defendant is that the Writ has been irregularly issued in that the action was said to have been at the suit of "Ellen Bondu". Counsel for the Defendant/Applicant contended that the plaintiff ought to have amended the writ but failed to do so. In response to this argument, Counsel for the Plaintiffs/Respondents submitted that the Defendant/Applicant has waived any irregularity on the writ. I feel there is force in the plaintiffs' submission.

Looking at the Writ on its face that part of the Writ where the defendant's name was written after the words "at the suit of:" should have been corrected so that the plaintiffs' name should appear therein. The writ, however, was clearly issued, naming the defendant herself as the defendant and addressed to her. It was served on her personally on 16<sup>th</sup> February 2004 at her address stated on the writ. A conditional appearance was entered on her behalf, the next day, 17<sup>th</sup> February 2004. Nothing has been done by the defendant

following that conditional appearance which became unconditional thereafter. The rule is clear, that when conditional leave becomes unconditional, it must be taken to amount to a waiver in the issue or service of the writ. **See *Western National Bank and Co. vs. Perez & Company* {1991} 1 QB 304** where the defendants were held to have waived their objection on the irregularity as to the names of the defendants. It is too late in the day for the defendant to have raised such an objection having taken a "fresh action" in submitting to the jurisdiction following the conversion of her conditional appearance to one of unconditional appearance.

There is, of course, inherent power in the court to set aside default judgments. It can do so on terms or otherwise. The court will always retain the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure. **See *Evans v Bartlam* {1937} 2 All ER 646** cited by Counsel for the Defendant/Applicant. There must be basis for the court to exercise its discretion in this regard. In the present case, I think this include showing that there is disclosed a defence on the merits. The onus is on the defendant to show that on the affidavit in support of her application. See also ***Berthan Macauley v Jim Diamantopoulos* {1962} SLR 14**. Unfortunately, the court has not been furnished with any proposed defence in this case nor can it be satisfied that a defence is merited on the affidavit materials before the court.

In the present case, the defendant's application cannot be sustained and must be refused.

Signed: - Hon. Justice Sir John Muria J.A.

Jsm/ebk.