

CIV APP 6/2002

IN THE HIGH COURT OF SIERRA LEONE

BETWEEN:

ABERDEEN BEACH RENDEVOUS - RESPONDENT

AND

ALEX HEROE - APPELLANT

CHRISTIAN DAVIES - RESPONDENT

ACCESS BANK - RESPONDENT

COUNSEL:

C F MARGAI ESQ and R B KOWA ESQ for the Appellant

MRS BASITA MICHAEL for the Plaintiff/Respondent

The other Respondents did not appear, and were not represented

CORAM:

THE HON MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HON. MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

THE HON. MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 8th DAY OF MAY, 2012.

1. Mr Alex Heroe, described herein as the 1st Defendant/Appellant (hereafter, "the Appellant") has applied to this Court by way of Notice of Motion dated 16 February, 2012 for the following reliefs:
 - i. That an interim stay of the judgment of Hon Mrs (sic) Justice V M Solomon, JA dated the 18th day of October, 2011 be granted in the action herein pending the hearing and determination of this application.
 - ii. That a stay of execution of the judgment of Hon Mrs (sic) Justice V M Solomon, JA be granted pending the hearing and determination of the appeal filed.
 - iii. Any other or further Orders to be made as the justice of the case may deem fit and just.
 - iv. Costs in the cause.
2. In the first relief claimed, there is an error: this Court cannot stay the judgment of a lower Court: it can only stay execution of the judgment of that Court. Secondly, there is no cause to be determined, so this Court

cannot award Costs in the Cause; the Cause was determined in the High Court; the appeal against that determination is yet to be heard and determined in this Court.

3. The Application is supported by the affidavit of the Appellant, Mr Alex Heroe, deposed and sworn to on 16 February, 2012. Exhibited to that affidavit, are the following documents>

AH1 is a copy of the writ of summons issued by the Respondent
AH2 pages 1 and 2 are copies of the memorandum and notice of appearance entered.

AH3 is a copy of the Defence filed on behalf of the Appellant

AH4 is a copy of the Judge's Summons issued by the Plaintiff company in the High Court dated 22 March, 2011

AH5 is a copy of the affidavit in support of that Summons deposed and sworn to by Mrs Michael on 22 March, 2011.

AH6 is a copy of the Judgment delivered by SOLOMON, JA on 18 October, 2011.

AH7 is a copy of the drawn-up Order of Court dated 18 October, 2011

AH8 is a copy of the Judgment of the Court dated 26 October, 2011.

AH9 is a copy of an Application dated 9 November, 2011 filed on behalf of the Appellant in the Court below, asking for leave to appeal, and for a stay of execution of the Orders of the Court, together with the affidavit in support of that Application.

AH10 is a copy of the Judgment of SOLOMON, JA dated 2 February, 2012 on the aforesaid Application

AH11 is a copy of the drawn-up Order of the Court dated 2 February, 2012.

AH12 is a copy of the Notice of Appeal dated 8 February, 2012 filed by the Appellant.

4. The Appellant deposed and swore to the following matters in his affidavit: That he was dissatisfied with the Judgment dated 18 October, 2011 and therefore instructed his Solicitors to appeal against that Judgment, which they did by filing the Notice of Appeal exhibited as AH12. He also instructed them to file the Application for a stay of execution of that Judgment, exhibited as AH9. SOLOMON, JA granted the Appellant leave to appeal as indicated on, and in exhibits AH10&11. He instructed further, that his Solicitors file an appeal on his behalf. The

Notice of Appeal, exhibit AH12 is dated 3 February, 2012 but was actually filed five days later on 8 February, 2012.

5. Mr Heroe deposes in his affidavit that, to quote him, ".....*that I am bound to suffer irreparable damage, financial loss and hardship if I am evicted from the premises which constitute a restaurant, bar and other entertainment facilities thus, bringing the business to a halt; that a halt of the business will further lead to financial loss which will lead to multiplicity of court action against me for my inability to pay my loans with the banks and other financial institutions; that my staff had already instituted an action against me claiming salaries and benefits due to the declining status of the business; that there is no probability that I would be re-instated to the status quo ante if the appeal succeeds since the premises may have been put into different use and the business discontinued; that it will be in the interest of justice if the status quo is preserved until the appeal is heard and determined and that I am prepared to expedite the hearing and determination of the appeal should the court be disposed to grant the stay of execution sought.....*"
6. In his arguments before us, Mr Margai, lead Counsel for the Appellant relied on the entire contents of this affidavit, and said further that the obligation to pay rent to the Plaintiff/Respondent (hereafter "the Respondent") rested on the business known as Paddy's, and not on the Appellant. After arguments had closed, Mr Margai forwarded to the Bench, a copy of extracts from HALSBURY'S LAWS OF ENGLAND 3rd Edition Volume 1, Title "Agency" pages 146 to 245. Regrettably, he has not tried to relate nor, to tie up the whole of the extracts, with his arguments before us. He has put an asterisk against the heading "Part 10. Relations between Agent and Third Persons" and another against paragraph 518 on page 231. The question of whether the Appellant should have been sued as an agent for Paddy's Bar and Restaurant, is a matter which will be determined by the Bench presiding over the appeal. We are however satisfied that none of the extracts have a bearing on whether we should grant a stay of execution of the Judgment of the lower Court or not.
7. Further, the citation on page 231 is self-defeating as far as the Appellant's supposed contention is concerned: It shows that in certain circumstances it will be quite proper to sue the agent, as he will be held

personally liable if it turns out he was the real principal. Also, personal liability may be imposed on an agent by the express terms of the contract, by the ordinary course of business, or by usage.

8. It was because I was aware of these principles, that I kindly drew Mr Margai's attention to the Respondent's contention in the affidavit in opposition deposed and sworn to by Mrs Michael, that Mr Heroe was a party to the Lease dated 2 February, 2006 and that the same was executed by him and Mr Davies, for and on behalf of Paddy's Bar and Restaurant, an unincorporated body; that a letter dated 19 May, 2010 was addressed by the Appellant to Mr Tony Yazbeck, Aberdeen Beach Rendevous, and that there was also another letter dated 28 September, 2010 addressed to Mr Yazbeck by the Appellant's wife, Mrs Hannah Heroe. These documents were all exhibited to Mrs Michael's affidavit. It was in this vein that I invited Mr Margai's comments on, or response to these contentions, but my invitation was rebuffed.

9. As I have stated above, Mrs Michael filed an affidavit in opposition deposed and sworn to by her on 27 February, 2012.

10. Exhibited to that affidavit are the following documents:

BM1 is a copy of the writ of possession dated 14 February, 2012

BM2 is a copy of the Praecipe for writ of possession

BM3 is a copy of the Lease dated 2 February, 2006 and duly registered as No. 158 at page 123 in volume 98 of the Record Books of Leases kept in the office of the Registrar-General, Freetown

BM4 is a copy of a letter dated 19 May, 2010 addressed by the Appellant (it appears it was unsigned) to Mr Yazbeck

BM5 is a copy of another letter dated 28 September, 2010 written by the Appellant's wife, Mrs Hannah Heroe. It is not addressed to anybody in particular, but from its contents, it is clear it was addressed to Mr Yabeck, as was a follow-up to Appellant's letter of 19 May, 2010.

11. The matters deposed to by Mrs Michael, were as follows: The Respondent had already recovered possession of its property. She was informed, and verily believed that the Appellant had not been opening for business for some time, and that his business had started declining before the action was instituted against him in December, 2010, hence his inability to pay rent. The Appellant had pleaded with the Respondent to remain in occupation, but the Respondent had refused. Because the business had

not been open for a while, the writ of possession had to be read to the Appellant at his house. The Appellant had not shown any special circumstances which merit a stay of execution of the judgment of the lower Court.

12. She deposed further that arguments as to the locus standi of the parties had not been raised in the Court below, but this, Mr Margai denies. In any event, whether the issue was raised or not is not relevant for the purposes of this Application. The issue rather, is whether such an argument may constitute a good ground of appeal which has a likelihood of succeeding in this Court, and that would merit a stay of execution of the judgment of the Court below. On the basis of the authority provided by Mr Margai, and as stated above, this is not really a good ground of appeal.
13. Another argument proffered by Mrs Michael in her affidavit, was that the Lease between the parties had expired on 31 March, 2010, and that action was instituted thereafter. At that time, Appellant was in arrears with the annual rent. She deposed further that in view of the contents of exhibits BM4 and 5 respectively, it will be a travesty of justice to allow the Appellant to continue ~~to continue~~ to occupy the premises. The Respondent will suffer tremendous loss because no rent has been paid by Appellant since 2009, and in any event, the lease expired on 31 March, 2010. *Whe*
14. In her arguments before us, Mrs Michael said that there must be a legal basis for the exercise of the Court's discretion. The Applicant must establish special circumstances; the burden was on him. She referred to paragraphs 9-11 of the Appellant's affidavit, in which the Appellant had deposed to the hardship and loss he would suffer if execution of the judgment of the lower Court was not stayed. The point being made here, was that as business was so bad, with the Appellant not being able to make ends meet, there was no likelihood he would be in a position to pay rent if he were allowed to continue to occupy the premises. He was already in arrears. As Mr Margai had nothing further to add, arguments closed at this stage.
15. The principle on which a stay of execution of judgment could be granted is too well known to warrant the citation of cases: It is, that the Applicant must show special circumstances why the successful litigant in the Court below, should be deprived of the fruits of his or her judgment.

There is no burden on the Respondent to satisfy the Court that a stay should not be granted. If the Appellant can show that there are such circumstances which should warrant that the judgment of the Court below should not be executed, this Court will grant a stay of execution. The circumstances are wide and varied, and this Court cannot, and will not close the categories. One such is that if the Appellant were to succeed in his appeal, such success would be rendered nugatory because the res would have disappeared, or, would be no longer available. In the instant case, ~~for instance~~, it seems to be the Appellant's argument that if a stay were refused by this Court, the Respondent may very well lease the property to third parties, and if he were successful on appeal, the property will no longer be available. This line of argument may well succeed in cases, where for instance, the tenant has spent a considerable amount of money on developing the property, and would not wish to lose the benefit of his investment. No such claim has been made by the Appellant in this case. It might also succeed, I put it no higher than that, in cases where a tenant is up to date with his rent, and the dispute between himself and his landlord, hinges on some other issue, such as breach of a covenant to repair, or, of a covenant, not to sublet without prior permission. In such cases, this Court might think that the justice of the case requires that the successful litigant be deprived of the fruits of his judgment for a while until this Court determines whether the lower Court was correct in its findings or not.

16. Impecuniosity has never been a ground for granting a stay of execution of judgment. As TEJAN-JALLOH, JA said in MISC21/2006 DAKHLALLAH v HORSE IMPORT AND EXPORT COMPANY LTD, CA Judgment delivered on 14 February, 2006 at page 3 of her judgment: "*A defendant cannot obtain a stay of execution by arguing that he would be ruined and that he has an appeal which has some prospect of success....*" Similarly, merely saying I cannot pay, but I must, by all means, continue to remain on someone else's property, has never been an attitude which has been condoned by, or found favour with these Courts. The evidence before us, is that the Appellant's business had been failing before the action herein was instituted. According to exhibits BM4&5 respectively, it was because of this misfortune that the Appellant had been unable to pay the rent due, and had fallen into arrears. He has not disputed that he

is indebted to Respondent. He is saying, in effect, wait until I am able to pay you. If we were to grant him a stay of execution, it would mean that we would be perpetuating a situation which cannot be resolved: Appellant will remain on the property without being able to pay rent; his liabilities will continue to increase. This, we cannot do. We are not swayed by the argument that because execution has already been levied, a stay will be futile, because we are fully aware that we can grant a stay even in these circumstances.

17. The plain truth is that the Appellant has not shown us anything which could remotely be described as circumstances which should convince us to grant his wishes. His Application is therefore dismissed with Costs to the Respondent, Aberdeen Beach Rendevous, such Costs assessed at Le.. *10,000.00*

N C Browne-Marke

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

A Showers

THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

I agree

N Matturi-Jones

THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL