



IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

CASE NO: FTCC 037/15

BETWEEN:

FAWAZ BUILDING MATERIALS COMPANY LTD -PLAINTIFF

AND

SEBASTIAN JOSEPH -DEFENDANT

REPRESENTATION:

Ngakui & Partners

-Counsel for the Plaintiff

I. P. Mamie Esq.

-Counsel for the Defendant

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.

RULING DELIVERED ON THE 4TH DAY OF NOVEMBER, 2015

JUDGEMENT DATED THE 4TH DAY OF NOVEMBER, 2015

This is an application by Judge's Summons dated the 11th day of July, 2015 for the following Orders:

1. Recovery of the sum of Le372.350,466 consisting of the following:-
 - a) Le261, 083,702 (Two Hundred And Sixty One Million Eighty Three Thousand Seven Hundred Two Leones) being money received from the sale of stock but not paid into the company's accounts.
 - b) Le111,266.764 being shortage discovered during stock taking
2. Any further Order (s) or relief (s) that this Honourable court deems fit.
3. Cost

The application is supported by the affidavit of Abdul Hamid Fawaz sworn to on the 10th day of July, 2015 together with the exhibit attached thereto. The plaintiff exhibited the following documents:

- **Exhibit AH1** - A list of Debtors
- **Exhibit AH2** - Record of Stock taking
- **Exhibit AH3** - Undertaking made by the Defendant
- **Exhibit AH4** - Writ of Summons
- **Exhibit AH5** ¹⁻² - Memorandum of Appearance and Notice of Appearance.
- **Exhibit AH6** - Amended writ of summons
- **Exhibit AH7** - Order of this court dated 6th day of July, 2015

Counsel for the plaintiff relies on Order 16 of the High Court Rules, 2007. He argues that the Defendant has no defence to the action. He refers to Exhibit 7 which is the Order of this Honourable court dated the 6th day of July, 2015. In the said Order, paragraph 3 thereof, the Defendant was to file to his defence within 10 days of the service on him of the amended

Writ of Summons. However, the Defendant filed his defence on his 25th day of July, 2015 about 19 days after the date of the said Order. Counsel for the Plaintiff may have a point here but the question is did he follow the Rules? I will refer Counsel to Order 2 Rule 2 of the High Court Rules, 2007. The procedure hereunder is for the party claiming the irregularity to do the following:

- a) Make an application by either summons or motion,
- b) State the grounds of the objection in the summons or notice of motion
- c) The application must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

Counsel for the Plaintiff did not make any application after being served with the defence out of time but instead proceeded to file a reply and defence to counter-claim. The submission of Counsel for the Plaintiff in this respect does not therefore meet the test of procedural aptitude.

Counsel for the Defendant opposes the application and files an affidavit in opposition sworn to on the 27th day of July, 2015 and a supplemental affidavit sworn to on the 21st day of September, 2015, respectively.

Counsel attaches 18 exhibits. He argues that the Defendant does not only have a defence but also a counter claim against the Plaintiff. Counsel clarifies that the Defendant was an employee of the plaintiff and loaned out building materials to third parties on credit with the knowledge of the said plaintiff. He exhibited AJS1 which is a copy of the Debtors' list. It should be noted that this same list has been exhibited by the Plaintiff in his affidavit in support of this application. The Defendant further exhibits the following documents:-

- **A.J.S. 2** - Ledger showing that some payments have been made by the Debtors.
- **A.J.S. 5** - Photostat copy of a Debtor's list prepared by the police during the period when the Defendant was arrested.
- **A.J.S. 7,8,9** - Receipt of payments made to the Plaintiff.

Counsel also exhibits the Defendant's defence to the action. He also exhibits documents showing that the defendant's Vehicle was forcefully taken from him in part satisfaction of the money due and owing. He particularly exhibits ASJ17 which supposedly establishes that some of the money being claimed has actually been repaid by the debtors.

Counsel for the Plaintiff files an affidavit in reply. In the said affidavit, the plaintiff denies all the allegations made by the defendant in his respective affidavits.

I have perused that affidavits filed by both Plaintiff and the Defendant and the submissions made by their respective counsel. The main issue for determination is whether the Defendant has a defence to the claims made by the Plaintiff. Counsel for the Defendant argues that the defendant gave out the loans within his actual or apparent authority as the Manager of the company. Counsel for the Plaintiff has not denied this but states that the Defendant must have ensured that the monies were paid back. This brings me to one important point: if the defendant has the authority to give out loans within his authority as an agent of the company and there is no evidence that he breached his warranty of authority, does it not follow that the company has a right of action against the debtors and not the Defendant? To my mind, that logical answer to this question is yes. How come then that the Defendant is before this court for those debts, Why has he been subject to gross embarrassment and harassment?

At the heart of the Order 16 of the High court Rules, 2007 is Rule 3 thereof which provides that unless {1} the court dismisses the application or {2} the Defendant satisfies the court

{a} that there ought to be tried, or

{b} that there ought for some other reason to be a trial, the court may give Judgment for the Plaintiff.

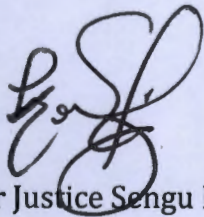
The court may give such judgement for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the claim or remedy or relief claimed.

It is also fundamental to an application under 16 that this procedure can only be successful "on the ground that defendant has no defence" to a particular claim. This summary process, therefore, should not be employed for tactical purposes. This application could be dismissed where the Plaintiff knows of an arguable defence {Paragraph 14/7/4 of the Supreme Court Practice, 1999}. This is all the more important, now that the affidavit of the Plaintiff can be made on statements of information and belief. As clearly stated in paragraph 14/1/8 of the English Supreme Court Practice, 1999,"thus if a defendant serves his defence, as he is entitled to do so, before the issue of the summons, the Plaintiff may well be unable to swear an affidavit stating a belief that there is no defence to this action. In the instant case, the Defendant has filed his defence and counter claim, and most significantly, the Plaintiff has filed a reply and a defence to the counter claim without taking advantage of any procedural defect on the part of the defendant.

My conclusion is that in this instant matter, there is a clear dispute of the facts which ought to be tried and there is also a dispute as to the amount due and owing (if due at all) which

requires the taking of accounts. This application therefore fails and I hereby make the following Orders:-

1. Application for summary Judgement herein is hereby refused.
2. Leave is granted to the defendant to defend the action.
3. That since the plaintiff has filed his Reply and Defence to the Defendants Defence and counter claim, the matter proceeds to the Pre-trial Settlement Conference
4. Cost of Le5, 000,000.00 (Five Million Leones) to be borne by the Plaintiff to the Defendant.



Hon. Mr Justice Sengu Koroma J