



IN THE HIGH COURT OF SIERRA LEONE  
COMMERCIAL AND ADMIRALTY DIVISION  
FAST TRACK COMMERCIAL COURT  
OFF WALLACE JOHNSON STREET-GOVERNMENT WHARF

MISC APP. 413/15

ECOBANK SIERRA LEONE LIMITED

PLAINTIFF

AND

AMSMT CONSTRUCTION & GENERAL SUPPLIES  
SHAKA M TURAY  
PRINCE BAH

1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT

REPRESENTATION:

KELFALLAH, CONTEH & CO.

COUNSEL FOR THE PLAINTIFF

FORNAH-SESAY, CUMMINGS, SHOWERS & CO.

COUNSEL FOR THE DEFENDANT

COURT REPORTER: CHRISTIANA KAMARA

**BEFORE THE HON. MR. JUSTICE SENGU KOROMA J. RULING**  
**DELIVERED ON THE 13<sup>TH</sup> NOVEMBER, 2015**

By a notice of motion dated the 21<sup>st</sup> day October, 2015, the Plaintiff herein applied to this court for the following orders:

1. That an interim order be granted preserving all monies and payments due the 1<sup>st</sup> Defendant in respect of past, present or future Invoices and Local Purchase Orders due and owing from Sierra Block Concrete Products Limited pending the hearing and determination of this application.
2. That an Order be granted preserving all monies or payments due to the 1<sup>st</sup> Defendant in respect of past, present and future Invoices and Local Purchase Orders due and owing from Sierra Block Concrete Products Limited pending the hearing and determination of this matter.
3. Any other Order (s) that this court may deem fit and just.
4. That the cost of this application be cost in the cause.

In support of this application is the affidavit of Mohamed Sheik Kamara sworn to on the 21<sup>st</sup> day of October, 2015 together with the exhibits attached thereto. The said affidavit purports to establish that the 1<sup>st</sup> Defendant was granted banking facilities by the Plaintiff in consideration of which the Defendant executed joint and several guarantees in favour of the Plaintiff. The deponent further deposes that the Defendant is in default of repayment of the sum of Le572, 208,871.24.00 (*Five Hundred Seventy Two Million Two Hundred and Eight Thousand Eight Hundred Seventy One Leones, Twenty Four Cents*)

The deponent finally avers that he has been informed by the General-Manager of Sierra Block Concrete Products Limited that they were holding funds/monies which are due the 1<sup>st</sup> Defendant and that unless



this Honourable Court orders a preservation of the said funds, the 1<sup>st</sup> Defendant would not utilize them to liquidate its indebtedness to the Plaintiff.

1. Before proceeding, I would want to comment briefly on the notice of motion and affidavit in support filed herein.

The main condition to be fulfilled in making an application of this nature is that the Applicant must be a party to an existing cause or matter. In other words, there must be in existence a cause or matter which has been filed in the courts. It is therefore desirable that the said cause or matter is exhibited as an attachment to the affidavit in support. In the instant case, no such document has been exhibited. Also, though there is an Originating Summons filed in respect of the substantive matter, the title thereof is different from that of the notice of motion filed herein.

The affidavit in support, I must say is poorly drafted. It refers to non-existent Defendants as there is no indication in the title of the action as to who are the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or that they even exist.

Furthermore, reference is made to interest at the rate of 22.5 percent from 1<sup>st</sup> October, 2015 unto payment. In support of this, the deponent exhibits the 1<sup>st</sup> Defendant's Statement of Accounts –Exhibit 'D'. But there is no mention in it of interest rate payable in future.

I have brought up these issues to remind Counsel of this need for diligence in the drafting and filing of court documents. I shall return to these issues in due course.

2. Counsel for the Plaintiff in his submission relies on Order 35, Rule 2 of the High Court Rules, 2007 which deals with Detention and Preservation of property. He also refers the Court to the English Supreme Court Practice, 1999, paragraph 29/8/A/9. He concludes that the Plaintiff is seeking an interim preservation of all monies or payments due the 1<sup>st</sup> Defendant in respect of any past, present and future Invoices, and Local Purchase Orders due and owing from Sierra Block Concrete Products Limited pending the hearing and determination of this application and subsequently the substantive action.



4. The application is opposed by the Defendants who have in the title of their Affidavit in Opposition clearly stated the parties involved in this action. The Affidavit in Opposition is sworn to by Michaela Kadijatu Conteh on the 4<sup>th</sup> day of November, 2015. She deposes that a Writ of Summons has been issued by the 1<sup>st</sup> Defendant against Sierra Block Concrete Products Limited and its Country Director, seeking several reliefs, amongst which is the recovery of the sum of Le 187,255.271 (One Hundred and Eighty Seven Million, Two Hundred and Fifty Five Thousand Two Hundred and Seventy One Cent) due and owing but that Sierra Block Concrete Products Limited are relying on a Tripartite Domiciliation Agreement executed between the 1<sup>st</sup> Defendant herein, Sierra Block Concrete Products Limited and the Plaintiff herein in refusing to make the said payment to the 1<sup>st</sup> Defendant. In paragraph 8 of the said affidavit, the deponent deposes that she has made an undertaking to this Honourable Court that the Defendant shall not, in anyway, whatsoever, solicit/procure payments from Sierra Block Concrete Products Limited until the said Honourable court has had an opportunity of hearing and determining the issues in dispute. It is important to note at this point that paragraph 3 of the affidavit in support refers to the Tripartite and Domiciliation Agreement as the consideration given for the grant of the facilities to the 1<sup>st</sup> Defendant.

In her submission, Counsel for the Defendants argues that the provision of the High Court Rules, 2007 relied on by the applicant does not apply to "*money*" but to "*property*". In her view, "*money*" cannot be categorized as "*property*".

Counsel for the Plaintiff in his reply submits that "*property*" for this purpose is "*money*" which they want preserved. He rejects the argument that the undertaking made by Counsel for the Defendants is sufficient because the High Court Rules, 2007 whose validity is derived from a Statutory Instrument supersedes an undertaking made by Counsel.

5. I have carefully listened to both Counsel and note that the main point in dispute is whether Order 35 Rule 2 is the applicable provision. What does order 35 Rule 2(1) say?



Order 2(1) provides that "on the application of any party to a cause or matter, the court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or to which any question may arise in the action".

6. The source of the Court's power to order the detention custody or preservation, or the inspection of property is its inherent jurisdiction to secure by orders just and proper trial of issues. As Lord Diplock puts it in "THE SISKANA" (1979) AC 210, "it presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant to which the order sought are but ancillary". It therefore cannot exist in isolation. As I mentioned earlier, the Plaintiff failed to exhibit any evidence that an action has been instituted against the Defendants. Had the Defendants not filed an affidavit in opposition stating the correct parties in the action before this court, this lapse by Counsel for the Plaintiff would have been fatal to his case.

7. What are the conditions to be fulfilled in order for an application under Order 35 Rule 2 to succeed:-

- a) The Plaintiff must have commenced proceedings in connection with the subject matter of the application. This has already been dealt with.
- b) The subject matter of the application must be "property". Counsel for the Defendant has argued that "*money*" is not "*property*" in the context of Order 35 Rule 2. Counsel for the Plaintiff has argued to the contrary.

What is the correct position. I will seek to resolve this issue by moving it from the general to the particular that is by looking at the law of property and how it would apply to this application. There are two types of property: Real and Personal-(Personal Property also referred to as "movable property). Personal property is anything other than land that can be the subject of ownership, including stocks, money, notes, patents and copy right as well as intangible property. By this definition, money can be classified as personal property and could therefore fall under the category of "property" referred to in order 35 (2).



C) Order 35 rule 2 further requires that the property shall be in the possession of the Respondent. In this case however, the money is not in the actual possession of the Respondent since it has not been paid over by Sierra Block Concrete Products Limited (SCPL). This defect can be cured by importing the doctrine of constructive possession. A piece of property is said to be in the constructive possession of a person when he has the power and intent to possess and control it. In the instant case, it is clear that the Respondent is in constructive possession of all monies due and owing to them by Sierra Block Concrete Products Limited by virtue of the Tripartite Domiciliation Agreement hereinbefore referred to. My conclusion therefore is that the Applicant is in constructive possession of the money referred to herein.

8. Having said this, it is my view that for the purpose of proper case Management, it would be appropriate for the substantive matter herein to be consolidated with the matter between the Respondent herein and Sierra Block Concrete Products Limited. This is because the right to relief claimed in both causes or matters are in respect of or arises out of the same transaction or series of transactions; that is the Tripartite Domiciliation Agreement.

9. In the circumstances, I make the following Orders:-

- I. That all monies/payments due the 1<sup>st</sup> Defendant in respect of any past, present or future Invoices and Local Purchase Orders due and owing from Sierra Block Concrete Products Limited be paid into the Judicial Sub-Treasury pending the hearing and determination of the substantive matter herein.
- II. That the Respondent files an affidavit in opposition to the Originating Summons within three (3) days from the date this ruling is read in court.

- III. That the Applicant files a reply within three (3) clear days, after the expiration of the period limited for filing the affidavit in opposition.
- IV. That the Deputy Master and Registrar shall within three (3) days thereafter assign the claim to a judge who shall conduct a Pre-trial Settlement Conference as required by Rule 5 (1) of the Commercial and Admiralty Court Rules, 2010.
- V. No order as to costs.



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Hon. Mr. Justice Sengu Koroma (J.)