



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

Case No: FTCC 120/15

THE MATTER BETWEEN:

TARIA ENTERPRISES

- PLAINTIFF

AND

NATIONAL REVENUE AUTHORITY

- DEFENDANT

REPRESENTATION

TEJAN-COLE, YILLAH &

BANGURA

- COUNSEL FOR THE PLAINTIFF

BETTS & BEREWA

- COUNSEL FOR THE DEFENDANT

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

JUDGEMENT DELIVERED ON THE 8TH JULY, 2016

1. This is an application for Summary Judgment dated the 18th April, 2016 in which the Plaintiff/Applicant (hereinafter referred to as the "Applicant") is praying for the following Orders:-
 - 1) That liberty be granted to the Plaintiff/Applicant to enter final Judgment against the Defendant/Respondent for recovery of the sum of Le 152,992,000/00 (One hundred and fifty-two million, nine hundred and ninety-two thousand Leones), being 70% balance payment due and owing the Plaintiff by the Defendant by virtue of a contract duly executed between the Plaintiff and the Defendant and in respect of which the Plaintiff/Applicant had fulfilled its obligations.
 - 2) Interest on the said sum at the rate of 25% per annum from August 2009 until Judgment.
 - 3) Immediate release of the Performance Bond submitted by the Plaintiff in respect of the contract.
 - 4) Any further or other Order(s) that this Honorable Court deems fit and just.
 - 5) That the costs of this Applicant be borne by the Defendant/Respondent.

FACTS

2. The facts are set out in the respective Affidavits and Exhibits attached thereto and can be summarised as follows:-

3. The Defendant/Respondent (hereinafter referred to as "Respondent") contracted the Applicant to supply and install split unit Air conditioners and fans at its office situate at Customs House, Cline Town, Freetown for a contract price of Le 218, 560,000/00
4. The Respondent made an advance payment of 30 percent to the Applicant upon the Applicant submitting a Performance Bond.
5. The Applicant and the Commissioner-General of the Respondent were both charged by the Anti-Corruption Commission in relation to the contract. They were subsequently acquitted and discharged after trial.
6. After the acquittals, the Applicant wrote various letters of demand to the Respondent requesting the payment of the outstanding 70 percent of the contract price as they had performed fully under the said contract.
7. The Respondent agrees that there was a contract with the Applicant to supply and install Split Unit Air conditioners and fans at its office situate at Cline Town, Freetown but avers that the Applicant did not supply in accordance with the contract. In effect the Applicant did not perform in accordance with the terms of the contract and was therefore not entitled to the 70 percent outstanding payment.
8. The Respondent averred in his Defence that the action is statute barred.
9. The Respondent counter-claimed for the refund of Le 45,000,000.00 price paid as advance to the Applicant.

THE LAW

10. The Application herein is made under Order 16 of the High Court Rules, 2007. The circumstances under which an Order 16 Application are made and granted are too well known to be repeated here. However, in the submissions of Counsel, certain issues were raised relevant to that aspect which I shall address in due course.
11. It will be necessary to note at this stage that both parties are not disputing the existence of a contract. What they are disputing is the performance thereof.

SUBMISSIONS OF COUNSEL FOR THE APPLICANT

12. Mr. M. S. Bangura, Counsel for the Applicant in his submission relied on the entirety of the Affidavit and argued that contrary to the averment in the Respondent's statement of Defence, the action is not statute-barred. Furthermore, the Applicant performed fully under the contract.

RESPONDENT'S SUBMISSIONS

13. Mr. Elvis Kargbo submitted that the Applicant did not perform in accordance with the terms of the contract and so was not entitled to Summary Judgment. In any event, an Application had been made to set aside a Judgment in default of Defence in this matter which was allowed and the matter was ordered to proceed to trial. It was

therefore not proper for the Applicant to apply for Summary Judgment after leave to defend the action had been granted.

14. Mr. Kargbo also argued that the Order application should not be granted as the Applicant had already filed a reply and Defence to the Respondent's counter-claim.

Finally Mr. Kargbo argued that the action was statute-barred.

APPLICANT'S REPLY

15. Mr. Bangura replied that an Application under Order 16 could be made even after the filing of Defence. Contrary to the submission of Mr. Kargbo, there is a world of difference between a Judgment in default of Defence and a Summary Judgment.
16. He finally submitted that the Respondent had no Defence to the action except probably that he claim was statute-barred. The issue of non-performance was only coming up as an afterthought. Mr. Bangura referred the Court to Exhibit GG7. He also referred the Order 14 A of the English Supreme Court Practice, 1999.

ISSUES

17. The following questions need to be determined in this matter:-
 1. Whether the action filed herein is statute-barred.
 2. Whether after setting aside a Judgment in default of Defence, the Court can subsequently grant Summary Judgment.

3. Whether an Applicant who has filed a reply and Defence to counter-claim could proceed to apply for Summary Judgment.
18. I shall now proceed to deal with the above issues.

1. IS THE ACTION STATUTE-BARRED?

19. A limitation period is the period of time within which a party to a contract (or other causes of action) must bring a claim. In Sierra Leone, the Limitation Act, No 51 of 1961 governs this aspect. The instant case is one of contract; the failure of the Respondent to pay outstanding sum due and owing on a contract.
20. In accordance with Act No 51 of 1961, an action for breach of contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. Counsel for the Respondent is arguing that the cause of action is statute-barred. He has however not expanded on that as one would have expected.
21. I have perused the Agreement dated 5th August, 2009-Exhibit Ex GG3. The agreement was under the said contract to take effect on the said date, in the absence of any contrary intention. On the 28th October, 2009, the Applicant herein wrote to the Respondent informing them of the completion of performance under the said contract-Exhibit GG6. On the 9th March, 2010, the Acting Commissioner General of the Respondent wrote to the application

informing her that she was under directives from the Anti-Corruption Commission not to dispose of, or otherwise make payments in respect of any of the three DFID-funded contracts under investigation. The contract herein being one of them.

22. On the 14th November, 2011, N. D. Tejan-Cole Esq. acting on behalf of the Plaintiff demanded the payment of the outstanding balance on the contract sum. This letter was written after the acquittal and discharge of the Plaintiff by the High Court of Sierra Leone-Exhibit GG 8. The Defendant replied to this letter on the 5th December, 2011(Exhibit GG9) explaining that they could not make payment as the matter was sub-judice and asked the Plaintiff to exercise patience and revert to them after the determination of the appeal. On the 15th July, 2015, Solicitors for the Plaintiff, Tejan-Cole, Yillah and Bangura wrote to the Defendant after the ACC had filed a notice of abandonment of the appeal against the Plaintiff demanding payment. It was at this point that the Defendant through their Solicitors, Elvis M. B. Kargbo-Exhibit EKS dated 30th July, 2015 raised the issue of non-conformity with the terms of the contract.
23. I have referred to these correspondences between the parties to establish that the Plaintiff did not sleep on her rights but continued to demand payment. The Defendant's initial excuse for not paying up was initially the High Court trial and subsequently the Appeal. To my

mind therefore, the cause of action accrued on the 23rd June, 2015 when the Appeal was abandoned. Counsel for the Defendant argued that the acquittal of the Plaintiff had nothing to do with the contractual relationship between the parties. I agree with him, however, Counsel is ignoring the fact that it was his clients who raised the issue of the trial and appeal as explanation for failing to conclude the contract.

2. WHETHER AFTER SETTING ASIDE A JUDGEMENT IN DEFAULT OF DEFENCE, THE COURT COULD SUBSEQUENTLY GRANT AN APPLICATION FOR SUMMARY JUDGEMENT

24. The answer to the second question is quite simple. A Judgment in default of Defence is granted where the Defendant fails to file a Defence to a claim within the period allowed by the Rules. The effect of a Judgment in default is that the Defendant admits all the allegations in the statement of claim indorsed on the writ. A Judgment in default is not a Judgment on "its merits" and a Judgment in default of Defence creates very limited estoppels, precluding the Defendant from setting up in a subsequent action which was necessarily and with complete precision, decided by the previous Judgement. For this proposition, I refer you to the case of NEW BRUNSWICK RY Co.-v-BRITISH AND FRENCH TRUST CORP (1939) AC 1 and the English Supreme Court Practice 13/0/10 at page 138.

25. Summary Judgment on the other hand is a procedure for enabling a Plaintiff or a Defendant making a counter-claim to obtain Judgment without proceeding to trial on the ground that he believes his opponent has no Defence to the action.
26. The two procedures are different and it does not follow that failure to obtain a Judgment in default of Defence will prevent a party from applying for Summary Judgment. A significant difference is that Judgment in default of Defence could be set aside whilst the only remedy open to a party against whom Summary Judgment has been given is to appeal.
27. If the Defendant does not enter a Defence, Judgment in default will be entered against him which is purely procedural. A Summary Judgment would entail the determination of issues of fact and law. A decision in favour of one of the parties finally disposes of the matter.

3. WHETHER THE APPLICANT EHO HAS FILED A REPLY AND DEFENCE TO COUNTER-CLAIM WOULD BE ENTITLED TO SUMMARY JUDGEMENT

28. The next issue raises an important point viz: whether after having been served with a Defence and counter-claim, a Plaintiff who files a reply and Defence to counter-claim would be entitled to Summary

Judgment. The general rule is that if the Defendant has served a Defence, it may be sufficient to enable the Defendant to be given leave to defend but not if it is a sham Defence. In the instant case, the Plaintiff filed and served on the Defendant a reply and Defence to counter-claim dated the 9th day of February, 2016. It was after this that the Plaintiff filed and served a Judge's Summons for Summary Judgment. There is nothing procedurally wrong with this, as there is authority to the effect that a Plaintiff can successfully apply for Summary Judgment one month after Defence was served. See *MCLARDY-v-SLATEUM* (1890) 24QBD 504.

29. However, in this case, the Defence as I see it is not a sham and the Plaintiff in his reply and Defence to the counter-claim tried to disapprove of the allegations contained in the counter-claim. The Sierra Leone Supreme Court case of *AMINATA CONTEH -v- ALL PEOPLES CONGRESS PARTY SC. CIV APP 4/2004* dealt extensively with the principles governing the grant of leave to the Defendant to defend. Justice Virginia .A. Wright JSC had this to say:-

“The position of the law has been well settled. As a general rule where a Defendant shows by his Affidavit that he has reasonable ground for setting up a Defence he ought to have leave to defend the claim brought by him. The Court has to take into account all the circumstances of the case including triable issues in deciding whether

leave to defend ought to be given". The case of JONES-v-STONE (1894) AC 122 laid down the Rule that where there are questions of facts in dispute, Summary Judgment ought not to be given."

30. Her Ladyship continued: "In SHEPPARDS & Co-v-WILKINSON AND JAVIS (1889) 6 TLR 13 Court of Appeal it was stated that a Defendant ought not to be shut out of defending unless it is very clear indeed that he has no case in the action under discussion. Thus where a Defendant has filed a Defence which discloses a triable Defence, it will be a travesty of Justice for a Court to refuse him leave to defend...." Judgment should be ordered under Summary Judgment where assuming all the facts are in favour of the Defendant (s), they do not amount to a Defence in law.
31. Applying the foregoing principles, I hold that the Defence filed raises triable issues and the best interest of Justice would be served if the matter proceeds to trial.
32. In the circumstances, I Order as follows:
 1. Leave to defend is hereby granted
 2. That the Defence, Reply and Defence to counter-claim already filed and served do stand

3. That the parties do appear before this Court on Tuesday, 12th July, 2016 for further directions as to the future conduct of the matter.
4. Costs in the cause.



Hon. Justice Sengu M. Koroma JA.

JUDGEMENT