



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

Case No: FTCC 76/15

XINGWONG BUSINESS LIMITED

-PLAINTIFF

AND

KINGHO INVESTMENT COMPANY

-DEFENDANT

REPRESENTATION

C. F. MARGAI & ASSOCIATES -COUNSEL FOR THE PLAINTIFF

TANNER LEGAL ADVISORY -COUNSEL FOR THE DEFENDANT

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

RULING DELIVERED ON THE 24TH APRIL, 2017

BACKGROUND

1. On the 1st December, 2016, this Court delivered Judgment in favour of the Plaintiff as follows:-
 - 1) That the Defendant is liable to the Plaintiff for the sum of USD 1,274,201 being money due and owing the Plaintiff in respect of construction works by an agreement dated 10th December, 2013.
 - 2) Penalty of US \$ 100,000/00.
 - 3) Interest thereon at the rate of 10% per annum from the 23rd day of September, 2015 to date of Judgment.
 - 4) Costs to the Plaintiff to be taxed if not agreed.
2. By a Notice of Motion dated the 21st December, 2016, the Defendant applied to this Court for a stay of Execution of the said Judgment pending the hearing and determination of the Appeal already filed. This Court on the 24th February, 2017 granted the Stay of Execution sought on the following terms:-
 - a) The Applicant to pay the sum of US \$ 1,100,000/00 into interest bearing account in one of the well established Commercial Banks in Sierra Leone with the Solicitors for the Applicant and Respondent as co-signatories within ten (10) days from the date of this Order.
 - b) That the said sum of US \$ 1,100,000/00 shall be paid out to whosoever shall succeed on the appeal.
 - c) Payment of the agreed or taxed costs to the Respondents' Solicitors subject to an undertaking by the said Solicitor to refund same if the Appeal succeeds.
 - d) Respondent to have cost of this application assessed at Le 10,000,000/.
3. The Defendant failed to comply with the terms of the stay within the time limit specified though the stay of Execution remained in place as the Plaintiff did not continue with the Garnishee Proceedings already commenced.
4. On the 22nd March, 2017 the Plaintiff by a Notice of Motion prayed this Court for the following Orders:-

- a) That the Orders made on the 24th February, 2017 be vacated as the Defendant herein failed to comply with same.
 - b) Any other Order (s) that this Honorable Court may deem fit and just.
 - c) Costs of this application to be borne by the Defendant.
5. This application was supported by the affidavit of Robert B. Kowa sworn to on the 22nd day of March, 2017 together with the exhibits attached thereto. Paragraph 5 of this affidavit was instructive. In it the deponent averred that the Defendant had since the Judgment failed, refused and/or neglected to comply with the said terms of the Order. The Defendant's attitude was in effect contemptuous to this Honourable Court.
 6. The Defendant replied to application on the 11th April, 2017. He relied on the entirety of the affidavit sworn to by Dahia He on the 10th April, 2017. He submitted that the terms given by this Honourable Court were onerous and were tantamount to a refusal. Counsel for the Defendant further submitted that the terms of the stay amounted to part execution of the Judgment dated 1st December, 2016.
 7. Counsel for the Defendant also submitted that making the Plaintiff's Solicitor a co-signatory to the account ordered to be opened was a circuitous way of enforcing the Judgment. Counsel finally prayed this Court to vary the terms of its Order dated 24th February, 2017.
 8. Counsel for the Defendant relied on the cases of *Africana Tokeh Village Ltd v John Obey Dev. Inv and Adama Mansaray vs. Ibrahim Mansaray*.
 9. Counsel for the Plaintiff, R. B Kowa responded by establishing that his colleague misapplied the ratio decidendi of the *Africana Tokeh Village* case in that in that case, the Trial Judge in the Court below ordered payment to be made to the Solicitor of the Plaintiff/Respondent whilst in the instant case payment was to be made into an interest bearing account with Solicitors of the Plaintiff and Defendant as co-signatories. The payment of Solicitor's fees in this case was to

be prefaced by the Plaintiff's Solicitor making the usual undertaking in writing. In the Adama Mansaray Case, the Complaint was that the Order purporting to grant a stay of execution was not in law or in fact a stay of execution since it had in fact ordered compliance with the Judgment which was being appealed against. The court agreed because the Trial Judge had ordered that 12^C and 12^D Hennessey Street the subject matter of the stay be conveyed to the Respondent despite the stay. In this case, the account was to be managed by both parties.

10. At the end of the submissions, I proceeded to grant the orders prayed for including an award of costs of Le 20,000,000/00 against the Defendant and adjourned the matter for reasons for the Judgment to be given. The said reasons are contained in this Ruling.
11. The Application before this Court was for it to vacate its Orders granting a stay of the Judgment dated 1st December, 2016 on terms. These terms have not been complied with by the Defendants. It is quite clear from the affidavits of both parties and submissions made by their respective Counsel that the Defendant did not comply with the said Orders. The reason given by the Defendant was that they were onerous and therefore amounted to a refusal of stay. What is baffling however, is that, after the grant of the stay on terms, the Defendant did not make any application to this Court to vary same as required by the Rules.
12. There is no doubt that "this Court has a discretion whether to impose terms on the grant of a stay. As regards the debt or damages awarded, there is no general practice: according to the circumstances, (example, the probability of them not been recovered if the appeal is successful and the chances of success in the appeal) the money may be ordered to be paid into Court, or only part of it. The Defendant may be ordered to pay the money to the Plaintiff, the Plaintiff giving security for repayment if the appeal is successful, or the Defendant, or if the Plaintiff prefers that course to pay into Court (**MERRY v NICKALLS 1873**) **LR 8 ch. App 206**-this passage is quoted from the English Supreme Court Practice, 1999 paragraph 59/13/7. Applying this principle, the Order was for

the payment of the sum of US \$ 1,100,000/00 into an “*interest bearing account with the Solicitors for the Defendant and Plaintiff as signatories*” and that “*the said sum shall be paid out to the successful party on appeal*”. Even the costs were only to be paid after Solicitor for the Plaintiff makes “an undertaking to refund same should the appeal succeed.” To my mind, this is not a “circuitous” way of enforcing the Judgment of this Court dated 1st December, 2016 as Counsel for the Defendant so inelegantly and disappointingly puts it. I therefore hold that the terms granted were not onerous and would serve the interest of justice to vacate them because of non-compliance with same by the Defendant. This is so because the Court must always be mindful of the starting principle that the successful party should not be deprived of the fruits of the Judgment in his favour.

13. As regards the authorities cited by Counsel for the Defendant, I would only say, with respect, that they were surprisingly misapplied. The cases cited relate to Judgments/Rulings in respect of which applications were properly made to the Court of Appeal to determine whether the terms of the stay were so onerous that they would amount to a refusal of stay. Furthermore, the facts and circumstances are different. In the instant case, the Defendant did not do so but deliberately failed to obey the lawful Orders of this Court and only raised the issue of the terms being onerous when replying to the Plaintiff's application for this Court to vacate the said Orders. It came out during the submissions of Counsel that the Defendant in contempt of this Court proceeded to comply with the conditions of Appeal. This is a very sad development in our system of Civil Justice which I hope would stemmed in its tide. Even if the said authorities had been applicable, I would have followed the approach laid down in the case of **LINOTYPE-HELL FINANCE LIMITED –v- BAKER (1992) 4 ALL ER 887** endorsed in **WINCHESTER CIGARETTE MACHINERY LTD-v- PAYNE (No. 2) 1993**. The Times December 1993 to the effect “*that indications in past cases should not fetter the Court's discretion.*”

14. I must add that decisions of Superior Courts are followed by virtue of their ratios decidendi. It is not sufficient to merely cite a case to state a legal position if the ratio decidendi is not consistent with the case before the Court.
15. These are the reasons for the Orders given by this Court dated 11th April, 2017



Hon. Mr. Justice Sengu Koroma JA.