



IN THE COURT OF APPEAL OF SIERRA LEONE
CIVIL DIVISION

CIV. APP. 52/2005

BEATRICE AWOONOR-RENNER & ANOR. APPELLANT/APPLICANT
(As Attorney for the Children of Dr.
Bernard Awoonor-Renner)

AND

RAYMOND AWOONOR RENNER & ORS. RESPONDENT/RESPONDENT
(Personally and As Attorney For
Ernest Awoonor-Renner and Walter
Awoonor-Renner)

REPRESENTATION:

GARBER & CO. FOR THE APPLICANT

SERRY-KAMAL & CO. FOR THE 3RD RESPONDENT

CORAM:

HON. JUSTICE SENGU MOHAMED KOROMA JA (SITTING ALONE)

RULING DELIVERED ON THE 7th JUNE, 2018
BY HON. MR. JUSTICE SENGU M. KOROMA JA.

1. This is an application by way of Notice Motion dated the 18th day of August, 2017 for and on behalf of the 3rd Defendant/Applicant herein, (hereinafter referred as the “Applicant”), Beatrice Awoonor-Renner pursuant to Rule 16 (3) and Rule 66 of the Court of Appeal Rules, 1985 for an Order that the dismissal of the within appeal be set aside and the appeal restored to the Courts calendar together with such other and further relief as this Court may deem just and proper.
2. The application is supported by the affidavit of Beatrice Awoonor – Renner Esq. sworn to on the 16th day of August, 2017 and duly filed herein
3. The case of the Applicant is laid out in the affidavit of Beatrice Awoonor-Renner and the oral submissions of her Counsel-Maurice Garber Esq. of Garber & Co.
4. In her affidavit, Beatrice Awoonor-Renner gives a background to the present application and the reasons for failing to comply with the Rules. She avers that the Hon. Justice J.E. Massallay delivered Judgment against the Applicant herein in the High Court in the matter MISC. APP. 31/97 but she was not in Freetown at the time the said Judgment was delivered due to the fact that she was out of the Jurisdiction for medical treatment.
5. As she was still out of the Jurisdiction at that time, she instructed her then Solicitor, Mr. Nicholas Browne-Marke (as he then was) to file an appeal which he did. The said Notice of Appeal dated 3rd October, 2005 on behalf of the 3rd Defendant is marked BAR 2. After the filing of BAR2, the matter is stalled as the file had not been transferred from the High Court Registry to the Court of Appeal Registry because it had gone missing. The situation remained the same when she returned to Freetown in 2006.
6. This remained the status until they were served with a Notice of Motion dated 16th December, 2015 in which the Solicitor for the Plaintiffs sought

an Order from the High Court for the partition and sale of all the properties that were the subject of the aforementioned Appeal-Exhibit BAR2. The said Notice of Motion dated the 16th December, 2015 is marked Exhibits BAR3. Attached to said Motion paper as one of the Exhibits is an Order of Court dismissing the Appeal of the 3rd Defendants (the Applicants herein) pursuant to Rule 16 (1) of the Court of Appeal Rules, 1985 for failure to pay certain fees and expenses due to the Court. The Order of Court dismissing the Appeal of the Applicant herein is marked BAR4.

7. The Deponent explains that her failure to comply with Rule 16 (1) was due to the fact that she and her solicitor had not known that the file had been found and so the non-payment of fees was inadvertent. Furthermore, she was not aware of or given notice that payment of the sum fixed for estimated expenses and security for costs had been demanded or otherwise due.
8. Despite this fact, the Plaintiff's Notice of Motion-Exhibit BAR3 was assigned to Justice Alusine Sesay, who granted the said Orders on the 2nd March, 2016. The said order is marked Exhibit BAR5. The Applicant herein filed a Notice of Appeal dated 21st March, 2016 with the Court of Appeal against Exhibit BAR5 which is marked Exhibit BAR6. A contemporaneous motion was filed for a Stay of Execution of Order of 2nd March, 2016 which was granted.
9. She was however not able to file the motion for reinstatement of the earlier appeal as her Solicitor J.B. Jenkins-Johnston Esq. (Deceased) had passed away and they had to brief another Solicitor, Garber & Co. who filed a Notice of Change of Solicitors on the 27th October, 2016. The new Solicitors need time to study the file thus the delay.
10. The Deponent finally avers that there are several other irregularities, errors of law and failures by the Presiding Judge to understand the nature of the bequests; whether the contingencies therein had been fulfilled and whether the bequests in the will created a joint tenancy.

11. It appears to me that the affidavit of Beatrice Awoonor-Renner is aiming at approaching this application from two angles. First on facts, in that the Applicant had not known that the file had been found and was also given no notice of the Application to dismiss the appeal on an administrative ground; second, that there are legal issues in the matter that require its determination in the Court of Appeal. These legal issues are clearly set out in Paragraph 31 of the affidavit of Beatrice Awoonor-Renner.
12. In his oral submission to the Court, Maurice Garber Esq. Counsel for the Applicant herein in addition to arguing on factual issues laid out in the affidavit of Beatrice Awoonor-Renner Esq. submits that his clients has a meritorious appeal as they have both procedural and substantive challenges to the Orders of Massallay JA which could best be resolved in the Court of Appeal. He refers to Exhibit BAR1, page 19 thereof and submits that the Learned Trial Judge did not give final Orders. He refers to paragraphs 29, 30 and 31 which he submits, draws the attention of this Court to the merits of the appeal. He concludes by praying this Court that the appeal be restored.
13. Mr. Garber additionally cites the following legal authorities in support of his submissions;
 - i. CHARLES JOHNSON-V- TAJCO delivered on the 7th October, 2007 (Unreported)
 - ii. WESTMINSTER AVIATION SERVICES –V- DAUDA BANGURA (2016) delivered on the 6th May, 2016. (Unreported)
 - iii. DEVENEAU’ –V- JOHN KAMARA & MOHAMED KAMARA (Supreme Court, Civ. App. 6/2012) (Unreported)
14. The Application is opposed by the Plaintiff/Respondent (hereinafter referred to as “the Respondent”) and her Counsel, Ms. Wara Serry-Kamal relies on the affidavit of Ore Emma Awoonor Renner sworn to on the 27th day of September, 2017. In the said affidavit, the deponent avers that though the Applicant is claiming that she was not within the Jurisdiction

when the Judgment was delivered, she was aware of the decision as a new Solicitor was appointed a mere two months thereafter who filed a Notice of Appointment dated 30th September, 2005 and a Notice of Appeal a few days later on the 3rd October, 2005. The Notice of Appointment and Notice of Appeal are exhibited and marked “OEAR4 and OEAR5” respectively.

15. The Deponent further avers that the Counsel for the Applicant informed Respondent’s Counsel by letter dated 2nd February, 2006 of her appointment of Browne-Marke & Co. after which the Applicant abandoned the case and did not follow up to ensure that her appeal was perfected and put before the Court but continued to collect rent and still continues to benefit from the proceeds thereof. Instead, it is the Counsel for the Plaintiff/Respondent who diligently pursued the Appeal, searched for the file and ensured that it was located and the matter placed before the Court of Appeal.
16. A summons to the parties by the Registrar of the Court of Appeal to settle the records was issued dated 17th November, 2008 to Browne-Marke & Co, V.V. Thomas and Basma, and Macauley, (the Solicitors in the matter) herein exhibited as OEAR 8¹⁻³. On the day notice to settle the record was served on the Applicant’s Counsel, he diligently filed notice responding to that summons- Exhibit OEAR 9. A Notice fulfil the conditions of appeal dated the 24th day of November, 2008 was served on all Counsel on the 1st December, 2008. The affidavit of service of the said notice is exhibited as OEAR 10 1-14.
17. The Applicant herein was to fulfill the conditions of Appeal no later than the 15th December, 2008 but she failed to do so. By an Order dated the 15th June, 2009, the Registrar of the Court of Appeal certified to the Court that the Applicant had not complied with the conditions of appeal. As a result, a notice of hearing dated the 17th September, 2009 was sent to the parties indicating “Dismissal” and gave the date of hearing as the 24th September, 2009. The Appellant did not appear at the hearing and the Appeal was

dismissed on the 24th September, 2009. This is consistent with Rules 16(1) of the Court of Appeal Rules, 1985 as they failed to comply with Rule 13(4) and 14 thereof.

18. Pursuant to the said dismissal, the Respondent restored the matter and filed an application dated the 16th day of December, 2015 that gave the Court an update on the status of the properties in question and sought among other remedies, the partition by sale of 7 Lightfoot Boston Street, 6 Wilberforce Street and Bishop Farms, Lumley, as well as sought an account by the 2nd and 3rd Defendants (the Applicant herein) of all rent received since the inception of the suit. These orders were granted by Alusine Sesay, JA on the 2nd March, 2016.
19. The Defendants being dissatisfied with the decision of Alusine Sesay JA, the 3rd Defendant (Applicant herein) “purported” (in the words of the Deponent) to appeal that decision and order – exhibit OEAR 18 ¹⁻³.
20. The Deponent avers that the 3rd Defendant has and continues to benefit from the subject matter of the appeal and has no intention of sharing unless she is compelled to do so by this Honourable Court; hence the “purported” appeal that was filed in March, 2016 and this motion to restore an appeal that was dismissed some 8 years ago.
21. The Deponent finally avers that the applicant has not put forth an iota of evidence that this Court ought to consider as “good and sufficient cause” to restore the appeal.
22. In her oral submission, Miss Warah Serry-Kamal for the Respondent argues that the application is of no moment as the Applicant has not shown good and sufficient cause as required by Rule 16(1) of the Court of Appeal Rules, 1985. The Applicant had notice of the hearing and of settlement of the records but failed to countenance them. She has been indolent and not vigilant in the prosecution of the appeal. This is because she was and is still benefitting from the status quo.

23. On the affidavit in reply filed, Ms. Serry-Kamal argues that the 3rd Applicant do not have any meritorious appeal.
24. In his reply, Mr. Garber submits that there are substantive issues of law to be determined in the appeal. He argues that it would be inconceivable that a party who has paid Counsel will fail to pay Le 15,000,000/00 to settle the records of the appeal. He believes that benefit of the doubt should be resolved in favour of the Applicant.

REVIEW OF THE AUTHORITIES

25. Counsel for the Applicant first cited a decision of the High Court in the case of CHARLES JOHNSON –V- TAJCO LIMITED (2007) CC.269/07 (unreported) delivered on the 17th day of October, 2007. This case deals with an application to set aside a Judgment in default and all subsequent proceedings thereto. This application deals with setting aside the dismissal of the named appeal and the appeal restored in the Court’s calendar.
26. These are two different processes and so the rationes decidendi cannot be the same. Different Rules apply in the CHARLES JOHNSON CASE, where the Application was made under Order 22 of the High Court Rules, 2007, which provides that “The Court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of this order”. Rule 16(3) of the Court of Appeal Rules, 1985 on the other hand provides that “An appellant whose appeal has been dismissed under this Rule may apply by Notice of Motion that the Order of dismissal be set aside, and the appeal restored; and the Court may in its discretion, for good and sufficient cause, order that the appeal be restored upon such terms as it may deem fit”.
27. I hold that based on the very different types of relief sought, this authority cannot render any help to the Applicant.
28. In the case of WESTMINSTER AVIATION SERVICES –V- DAUDA BANGURA (2016) SLCA 14, delivered on the 6th May, 2015 which the

Applicant also relies on was a case of an application for a stay of proceedings. This case again has no relevance to this application.

29. The Applicant also cites the case of DEVENEUX –V- KAMARA & ANOR. (SC. VIV.APP. 2012 (2014) SLSC 03/10. (Unreported) In this case, the Appellant/Applicant applied to the Supreme Court that the appeal which was dismissed by the Honourable Court on the 9th January, 2014 be restored pursuant to Rule 103 of the Supreme Court Rules, 1982 (Public Notice No.1 of 1982). The Respondent opposed the application on the ground that the Plaintiff/Applicant did not show sufficient reason why the application should be granted. The reason given that the Plaintiff/Applicant did not have sufficient funds to file his case at the relevant time is not sufficient. He also argued that the Plaintiff/Applicant's affidavit was defective.
30. In his Ruling, Hamilton JSC cited the dictum of Tolla-Thompson JSC in the case of IBRAHIM A.N. BASMA –V- ADNAN YOUSEF WANZA, Civ.App. 4/2002 (Unreported) that “Procedural Rules are intended to serve as handmaiden of justice and not to defeat it, and invoke the Court's discretionary power to waive strict application of the Rules, in order to ensure that the parties have fair opportunity to argue their case in the Supreme Court”. The application was granted under Rule 103 of the Supreme Court Rules, 1982 in the interest of justice.
31. I note that in this case, the Application was made to the Supreme Court and the Orders given were within the remit of Rule 103 of the Supreme Court Rules, 1982 which deals with non-compliance with the Rules. The “Rules” referred to here; in my reasoning are the Rules of the Supreme Court. There is nothing in the ruling to indicate that the application was an appeal against the refusal of the Court of appeal nor does it say that a prior application had been made to the Supreme Court (which is unlikely as a panel of only three judges presided in the matter). What may be likely (which is not conclusive) is that the application was granted in the interest

of justice as there, was the need to give the parties “ a fair opportunity to argue their case”.

32. His Lordship Hamilton JSC in his conclusion stated that the Application was granted under Section 103 of the Supreme Court Rules, 1982. Does it mean that the ratio decidendi of the Ruling is limited to an application under Rule 103 or is general application to all courts by virtue of the doctrine of Stare Decisis?

33. To my mind, the ratio decidendi here relates more to an application to the Supreme Court in a specific sense but when it comes to providing a guide line as to what a judge should do when called upon to exercise his discretion in an application for relisting of an appeal, that aspect should guide all courts inferior to the Supreme Court.

It is my conclusion that this authority cannot help the Applicant as the requirements set therein have not been met by the Applicant. I shall return to this point shortly.

34. Ms. Serry-Kamal did not cite any case law but rather relied on the Rules of the Court of Appeal, 1985. This may have been, probably because of her submission that the authorities cited by her colleague were irrelevant to the case. I partly agree with her on this point.

35. Counsel for the Respondent comments on the import of Rule 16(3) of the Court of Appeal Rules, 1985 which provides as follows:-

“An Appellant whose appeal has been dismissal under this rule may apply by Notice of Motion that the Order of dismissal be set aside and the appeal restored; and the Court may in its discretion for good and sufficient cause order that the appeal be restored upon such terms as it may deem fit.”

36. This Rule 16 (3) gives a discretionary power to the Court to decide whether to grant an application for relisting.

37. This rule has, however not set any standard as to the requirements of an application for a relisting. However, if we are to apply the principle laid

down by the Supreme Court in the DEVENUEUX CASE, based on section 103 of the Supreme Court Rules, 1982, on a general basis, the exercise of discretion should be based on the following:-

- i. Non-compliance on the part of the Appellant was not due to willful conduct, and
- ii. Interest of justice

38. These principles also apply to Rule 66 of the Court of Appeal Rules referred to by both Counsel.

39. In all of these, the fundamental question is; who benefits from the delay? The exercise of discretionary power is rooted in equity and equity aids the vigilant and not the indolent. In the same vein, he who seeks equity must do so with clean hands.

40. I have already mentioned the two grounds to be taken into consideration while exercising discretionary power. I hold the view that the non-compliance was wilful. In the submission of Counsel for the Respondent to this Court, which was not controverted, the Applicant herein has been the sole beneficiary of the Estate enjoying the rents derived from the disputed property. Discretion must be based on good conscience and fairness.

ISSUE FOR DETERMINATION

41. The main issue for determination is whether the Applicant has established by her affidavit and submissions of Counsel that there is sufficient evidence to warrant this Court to relist the matter.

CONCLUSION

42. The Court finds as a fact that various steps were taken by the Respondent herein to get the Applicant to pursue her original appeal. The appellant did not and the appeal was dismissed by the Court of Appeal for failure to give security for costs and pay fees. In the affidavit of BEATRICE AWOONER-RENNER, she swears that she was out of the jurisdiction and therefore unaware of any notice that the payment of sum fixed for estimated expenses under Rule 13(4) of the Court of Appeal Rules, 1985

and security for costs under Rule 14 of the Court of Appeal Rules, 1985 had been demanded. She further avers in paragraph 17 of her affidavit that the non-payment of fees was inadvertent and directly due to the fact she believed the case file had been lost and did not reflect at anytime her desire to abandon the case. I do not accept this argument. The Deponent, an experienced Barrister and Solicitor ought to have known or had the means of knowing that fees had to be paid and/or security given for costs. Appellants are expected to vigorous by pursue their appeal. It is my conclusion that in the light of the affidavit evidence and submission of Counsel, this Court cannot and to my mind, must not grant the orders prayed for.

43. The application is therefore dismissed with costs, such costs to be taxed.



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Hon. Mr. Justice Sengu Koroma J.A.