

FTTC: 211/18

2018

G.

NO.8

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN:

GEOTECH DEVELOPMENT LTD
(SUING BY THEIR ATTORNEY
OSMAN SOURA KAMARA ESQ)
4 SANDERS STREET
FREETOWN

PLAINTIFF

AND

ZEPHYR RESOURCES (SL) LTD
18 ADELAIDE STREET
FREETOWN

DEFENDANT

BEFORE THE HONOURABLE JUSTICE MIATTA M. SAMBA, J
DATED THE 12TH DAY OF MARCH 2019

Counsel:

A.S. Marrah Esq for the Defendant/Applicant
O.S. Kamara Esq for the Plaintiff/Respondent

Ruling

On file is an application my way of Notice of Motion dated the 23rd day of January 2019 for and on behalf of the Defendant/Applicant the following Orders:

- i. That this Honourable Court grants leave to the Defendant/Applicant to appeal to the Court of Appeal, the ruling of this Honourable Court dated the 10th day of January 2019.
- ii. That this Honourable Court varies paragraph 3 of the Order of the 10th January 2019 for the personal undertaking by Counsel for the Plaintiff to be supported by a Bank Guarantee issued in favour of the Defendant/Applicant.
- iii. That the Plaintiff/Respondent be ordered to immediately return the unimog vehicle, the keys of the drilling rig and the registration documents of all vehicles unlawfully removed from the camp site of the Defendant/Applicant.
- ~~iv. That this Honourable Court grants a Stay of Proceedings of this matter pending the hearing and determination of the proposed appeal.~~
- v. Any further or other Order(s) that this honourable Court may deem fit and just.
- vi. That costs remains in the cause.

The application is supported by the Affidavit of Zènzem Ali sworn to on the 23rd day of January 2019 with the following Exhibits attached:

- vii. Exhibit ZA1 is a copy of a Writ of Summons which commenced this action dated the 12th day of October 2018.
- viii. Exhibits ZA2 and ZA3 are copies of Memorandum and Notice of Appearance filed for and on behalf of the Defendant.

- ix. Exhibit ZA4 is a copy of a Notice of Motion filed for and on behalf of the Defendant asking this Court to strike out the action begun by Writ of Summons by the Plaintiff against the Defendant.
- x. Exhibit ZA5 is a copy of the Order of this court dated the 10th day of January 2019.
- xi. Exhibit ZA6 is a copy of a personal undertaking filed by Solicitor for the Plaintiff.
- xii. Exhibit ZA7 is a draft copy of a Proposed Notice of Appeal.

Referring to Rule 10(1) of the Court of Appeal Rules, 1985 and to Exhibit ZA7, Counsel asks that leave be granted the Defendant/Applicant to appeal the ruling of this Court dated 10th day of January 2019. He submits that the proposed grounds of appeal in Exhibit ZA7 are not frivolous or vexatious and are rather good grounds of appeal with merits.

Referring to the second Order sought, Counsel refers to Exhibit ZA4, a Notice of Motion dated 5th day of November 2018 the 3rd Order sought thereunder in the alternative, which was a relief of \$250,000 as security for costs. Counsel asks that this Court varies paragraph 3 of the Orders of this Court dated the 10th day of January 2019 where Counsel for the Plaintiff/Respondent herein was asked to make a personal undertaking to pay legal costs of Le. 1,000,000,000/00 (One Billion Leones) within a week of the Order of the 10th day of January 2019 because according to Counsel, the Order granted of a personal undertaking, which he referred to as a 'piece of paper' does not satisfy the alternative relief sought in paragraph 3 of the Notice of Motion of 5th November 2018 and that that Order could not have been the intention of this Court. It is Counsel's submission that there is no security in the personal undertaking filed by Counsel as in Exhibit ZA6. Counsel would rather have the relief of a Bank Guarantee to satisfy the 3rd Order sought in the Motion papers of 5th November 2018.

In support of his submission, Counsel refers to the 3rd Edition of Halsburys Laws of England, Volume 22 on page 784 paragraphs 1664 and 1665 and submits that the Court has powers to vary its own Orders before or after such Orders would have been granted.

Counsel refers to Exhibit ZA5 in respect of the 3rd Order sought for transfer of certain specialized mining equipment in the Plaintiff's possession, to the Defendant. He argued that the Plaintiff did not disclose, that the said properties were in their possession when they applied for an injunctive relief which was granted by this Court. He argues that the Defendant is a company registered in Sierra Leone and that granting the 3rd Order sought for return of the properties will enhance the Orders of this Court of 10th January 2019. He argues that there are serious issues to be tried and that if the 3rd Order sought is refused, damages will not be a sufficient remedy especially if the Plaintiff which, according to Counsel, is not a company registered in Sierra Leone should not succeed. He refers to Order 35 Rule 1 of the High Court Rules, 2007 and submits that transfer to the Defendant of the items listed in Order 3 sought will be just and convenient.

Counsel refers to paragraphs 13 and 14 of the Defendant/Applicant's Supporting Affidavit and to Order 28 of the Court of Appeal Rules, 1985 and asks by his 4th Order ought that the Court grants a stay of the proceedings of this Court at this stage pending the hearing and determination of the appeals against the ruling of this Court of 10th January 2019. He submits that the appeal filed goes to the substance of the matter in so far as it relates to the striking out of this action in the High Court, which if the Court of Appeal does, will mean an end of the proceedings in the High Court and all exercise at this level will be an exercise in futility. In support of his submission, Counsel refers to the Nigerian case of *Inspector General V Dr. Ayodele Fayose* 14th February 2007 C.A/8/377M/06 and to the case of *United Spinners Nigeria Limited V Chartered Bank Limited* 2001 LPELR 34/10 and argues that the test was laid down that the power to grant a stay of further proceedings is discretionary which said discretion must be exercised judicially and judiciously. Counsel also refers to the case of He submits, in sum, that if the Court of Appeal grants the Defendant's application, it will affect the proceedings before this Court.

On file is an Affidavit in Opposition sworn to be Osman Surah Kamara Esq on the 4th day of March 2019 with Exhibits attached. Counsel submits that the Grounds of appeal contained in the Proposed Notice of Appeal has no chance of success at appeals.

He refers to the 2nd prayer sought in the Notice of Motion dated the 5th day of November 2018 and submits that the relief sought by Counsel for the Defendant was in the alternative to wit: that the Plaintiff pays security for costs in the sum of \$250,000 or that a Bank Guarantee be issued by a Commercial Bank of international repute. Counsel submits that the Order of the 10th January 2019 that Counsel makes a personal undertaking in the sum of Le. 1,000,000/00 (with which the Counsel complied) was in line with the first leg of the 2nd order sought and that there was no error on the part of the Court as the Order was as intended. He refers to the case of *Femi Hebron V White Lion Co & 2 Oths Civ. 50/17* which referenced the Tanzanian case of *Karim V Kiara & The Republic* and submits that there must be certainty of judgments and that the Court has no jurisdiction to vary its own decision. Well, Counsel must know that in certain circumstances, the Court can vary its own decision.

Counsel argues that return of the unimog vehicle, keys of the drilling rig and registration documents of all the vehicles, which is the subject matter of this litigation will in no way enhance the Order of the 10th day of January 2019, pronounced by this Court. Counsel submits that the unimog vehicle, a subject matter of this litigation, is in the hands of a 3rd party, Fadnan Saad and that therefore, the 3rd Order sought by the Defendant will not enhance the Order of this Court of 10th January 2019 in any way.

Counsel submits that if proceedings before this Court are stayed, this will occasion hardship and injustice on the Plaintiff especially that all the properties, the subject matter of this litigation, which are subject to depreciation when in constant use by the Defendant, are under the control of the Defendant. He

submits that the Defendant will suffer no harm in respect of those properties even if the Court of Appeal rules in the Defendant's favour.

By way of final reply, Counsel for the Defendant submits that the requirement for the grant of an order to appeal, he is required merely to show a proposed Notice of Appeal which is not frivolous or vexatious and that there is no requirement to show that the appeal must show some chance of success. I disagree with Counsel reasoning; there must be shown, in a Proposed Notice of Appeal, prima facie chance of success for the grant of an Order of leave to appeal a Court's decision.

Counsel reiterates that what was prayed for by the Defendant was that the Plaintiff gives security in the sum of \$250,000 or submit a Bank Guarantee; the Defendant did not ask for an undertaking as ordered, Counsel submits. He refers to the *Femi Hebron* case aforementioned and submits that the Court has inherent jurisdiction to recall its judgment to give effect to its judgment.

I have read the Notice of Motion dated the 23rd day of January 2019 together with its supporting Affidavits and attached Exhibits. I have also read the Affidavit in Opposition to the application and listened to and considered the arguments and submissions made by both Counsel and authorities referred to by both Counsel.

I have looked at Exhibit ZA7, the Proposed Notice of Appeal. I will refrain from commenting on whether or not it stands a chance of success at appeals. I will leave its determination to my brothers on the Upper Bench. The determination by the Court of Appeal should make interesting read by which this Court will remain bound. I will grant leave to the Defendant/Applicant to appeal the Ruling of this Court dated the 10th day of January 2019. In light of my just concluded sentence, I am minded to grant a stay of the proceedings of the matter before this Court.

In respect for the order sought for immediate return of the unimog vehicle, the keys of the drilling rig and the registration documents of all vehicles removed from the camp site of the Defendant/Applicant, I refer to the Plaintiff's Statement of Claim and state that these items now sought to be returned are the subject matter to this litigation. The Court in its Orders of 10th January 2019 ordered that those items and other items, the subject matter of the litigation herein must not be transferred to any 3rd party or taken out of the jurisdiction without an Order from this Court or from the Court of Appeal. That specific Order shall remain the Court's position.

Order 23 Rule 10 of the HCR, 2007 and Order 20 of the Annual Practice of 1999 provide for amendment of judgments or orders. Order 23 Rule 10 reads: *Clerical mistakes in judgments or orders, or errors arising in the judgments or orders from any accidental slip or omission, may at anytime be corrected by the Court by motion or summons without an appeal.*

I have also read the provisions in Volume 22 of Halsburys Laws of England, 3rd Edition especially paragraph 1665 referred which reads "As a general rule, except

by way of appeal, no Court, Judge or Master has power to rehear, review, alter or vary any judgment or order after it has been entered or drawn up respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order". It is noted that the Order of this Court is drawn up and filed as Exhibit ZA5 attached to the Supporting Affidavit of the application herein.

The general rule is however not without exceptions. As per paragraph 1666 of Halsburys hereinbefore referred, after the judgment or order has been drawn up or entered, the Judge who made the order has inherent power to correct any error arising from any omission to give effect to his meaning and intention.

The Court took certain things into consideration in granting 'some amount of security for costs' in its Orders of 10th January 2019. It is the evidence on file before this Court that the transfers of cash and shipment of equipment were made directly by the Plaintiff to the Defendant following an Agreement and that the vehicles, the subject matter herein, were shipped for facilitation of the project in Sierra Leone by the Plaintiff directly to the Defendant. The Court did say at paragraphs 4 and 6 of its Ruling of 10th January 2019 that the draft Formation Agreement is between the Plaintiff and Zephyr Resources (UK) Ltd and that it is clear from the pleadings and the draft Formation Agreement that the Defendant is a subsidiary to Zephyr Resources. It is the Court's understanding that though a foreign registered company, the Plaintiff operated in Sierra Leone through the Defendant Company.

It must be clear to Counsel that not all prayers sought are granted by a Court. Considering the evidence before the Court in its entirety, the Court was not bound to grant \$250,000 or a Bank Guarantee as security hence the reason why at paragraph 8 of its Ruling of 10th January 2019, the Court said "The Court is minded to consider 'some form of security' against the Plaintiff/Respondent in the event that he should be unsuccessful with the action against the Defendant/Applicant". Suffice it to say that the Court made no error and that the Orders were intentional, very clear and unambiguous.

In light of the above,

IT IS ORDERED AS FOLLOWS:

- A. That leave is granted to the Defendants/Applicants to appeal to the Court of Appeal against the Ruling of this Court dated the 10th day of January 2019 delivered in the matter herein.
- B. That the 2nd and 3rd Orders sought are refused.
- C. That the proceedings in the matter herein is stayed pending the hearing and determination of the appeal at the Court of Appeal.
- D. That costs shall remain in the cause.


Hon. Jst. Miatta M. Samba, J