CC: 404/2019 2019 L. N0.6

In the High Court of Sierra Leone

(Land and Property Division)

Between:

Fatmata Nancy Lewally - Plaintiff/Respondent

(Suing Through Her Lawful

Attorney Alphonso King)

119A Wilkinson Road

Freetown

And

Stephen Emeka Oji - 1st Defendant/Applicant

The Chief Executive Officer

Patek Construction International

119A Wilkinson Road, Freetown

Patek Construction International - 2nd Defendant/Applicant

(SL) Limited

119A Wilkinson Road

Freetown

Counsel:

C. Bah Esq. for the Plaintiff/Respondent

F. Fofanah Esq. for the Defendant/Applicant

Ruling on an Application for a Stay of Execution of the Judgment of this Honourable Court, dated 7th October 2020 and for Same to be Set Aside, Consonant with the Constitutional Principle of Audi Alteram Partem etc.; Delivered by The Hon. Justice Abou B.M. Binneh-Kamara, J. on Tuesday 18th October 2022.

1.1 The Application's Background and Context

The Law Firm, KMK Solicitors, on the 24th of February 2020, pursuant to a Judge's Summons, bolstered by an eight (8) paragraph affidavit, sworn to by one Alphonso King of 23 Falcon Street, kissy, Freetown, in the Western Area of the Republic of Sierra Leone, craved this Honourable Court's indulgence, for the award of certain specific orders, including a summary judgment, consonant with Rules 1 and 3 of Order 16 of the High Court Rules 2007, Constitutional Instrument N0.8 of 2007 (hereinafter referred to as The HCR, 2007), arrears of rent for the period 1st June 2019 - 31st May 2020 and cost. The Court's records, depict that the apposite processes were accordingly served on the Defendant/Applicant before the aforementioned application was made. Thus, the writ of summons was issued and served; appearance was entered and a defence and counterclaim lodged in the

Master and Registrar's Office, on behalf of the Defendant/Applicant. Further, the clarity and exactitude of the processes as filed, complied with the requisite provisions of The HCR, 2007.

Therefore, it is conscionable to pinpoint that the interlocutory processes, preceding this Honourable Court's orders of 7th October 2020, were procedurally watertight, and thus dovetailed with the rules. Nevertheless, on the 24th of February 2020, the Plaintiff/Respondent's Counsel, filed the Judge's summons in respect of the foregoing orders, which was granted several weeks after this Honourable Court had been moved on the application; and had made orders for notices of hearing to be sent to Counsel for the Defendant/Respondent, who did not come to respond to the application. On the 26th of January 2021, Counsel for the Defendant/Applicant, moved the Court on the contents of a notice of motion dated 21st October 2020, strengthened by the affidavit of one Patrick Fofanah, a solicitor of the Law Firm, Lambert and Partners, of 40 Pademba Road, Freetown, in the Western Area of the Republic of Sierra Leone.

The notice of motion is framed to get this Honourable Court to grant an order of stay of execution of the Judgment, dated 7th October 2020 and for Same to be set aside, consonant with the constitutional principle of audi alteram partem; and alternatively for the said judgment to be set aside on the ground that the Defendant/Applicant has a very good defence on the merit. Counsel thus rationalised the application in the provision of Order 16 Rule 11 of The HCR, 2007. An affidavit in opposition to this application was thus filed by Yada Williams and Associates, after solicitors of that Law Firm had filed a memorandum of change and

a notice of change of solicitor, pursuant to Rules 1 and 2 of Order 59 of The HCR, 2007.

1.2 <u>The Application's Building Blocks</u>

Counsel for the Defendant/Applicant canvassed this argument to convince the Court to grant the orders as prayed in the motion of 26th of January 2021: When the Plaintiff commenced this action on the 22nd of November 2022; an appearance was entered and a notice of change of solicitor was also filed. Subsequently, a defence and counterclaim was lodged; the Plaintiff went ahead and filed an application for a summary judgment, to which the Defendant/Applicant filed an affidavit in opposition; which is exhibited and marked Exhibit PF9. The defence is valid and raises very serious contentious issues, which can only be determined, should this matter proceed to a full-blown trial.

1.3 <u>The Oppositions to the Application</u>

Alhaji Sanusi Bah Esq. sworn to an affidavit in opposition on 15th January 2021, in response to the supporting affidavit of the motion to be determined in this ruling. Counsel relied on the entirety of the opposing affidavit, with a specific emphasis on paragraphs 5 and 6. He reiterated the point that he was not the solicitor on records, but there is evidence that the Defendants/Applicants, breached the very lease agreement, establishing their legal relations with the Plaintiff/Respondent. Counsel alluded to the Judge's summons of 3rd March 2020 and a correspondence of 17th July 2019, which the previous solicitor for the Plaintiff/Applicant (James Momodu Fornah-Sesay Esq.) sent to the Defendants/Applicants. Nevertheless, on the issue of stay of execution, Counsel contended that the application's supporting affidavit, is entirely devoid of the basic facts of special circumstances, underpinning every

potent application on stay, noting the significance and influence of the authority of Africana Tokeh Village **v.** John Obey Development Co. Ltd. (Misc. App. 2 of 1994 (1992) SLCA) in our jurisdiction. On the need to grant or refuse the application to set aside this Honourable Court's Judgment of 7th October 2020, Counsel argued that it is for the Defendants/Applicants to establish that they do have a meritorious defence, noting that Exhibit PF6, paragraphs 2, 3 and 6 of the defence and counterclaim to the plaintiff's writ of summons, marked PF1 and paragraphs 4, 5 and 6 of the affidavit in support of the application, do not point to any defence on the merit. He emphasized the point that the respective paragraphs in the pieces of evidence alluded to above, clearly depict that the Defendants/Applicants have not denied their indebtedness to the Plaintiff/Respondent; adding that this situation nullifies any argumentation that the Defendants/Respondents, do have any meritorious defence.

1.4 <u>The Reply to the Application's Oppositions</u>

To say the action is in court principally because of arrears or recovery of rent is misleading. The main purport of this action swirls around the forfeiture of a lease which both parties consented to, but was never regularized. The submission that the Defendants/Applicants do not have a meritorious defence is problematic, because the Plaintiff/Respondent's, claim in paragraph 3 of the writ of summons, touches and concerns the lease, which the former in their defence said the later refused to sign, but is now claiming the sum that is owed.

1.5 <u>The Analysis</u>

The very first order which this Honourable Court is requested to grant in the application of 21st October 2020, purls around stay of execution. Civil practitioners

in Sierra Leone are always inclined to making applications for this order to be granted when they think that irregular or even regular judgments, should not be executed in the interest of justice. Again, they have been applying for it, even in the most remote, grotesque and clumsy circumstances that should not warrant its award. The complexities of the somewhat unreasonable circumstances that have culminated in the High Court of Justice being inundated with applications on stay of execution, have again warranted this Bench to critically analyse the jurisprudence on stay of execution, for practitioners to come to grips with the circumstances, pursuant to which such orders should or should not be granted.

1.5.1 The Jurisprudence of Stay of Execution

Analytically, the large swathe of literature on stay of execution in the commonwealth jurisdiction is quite intriguing and straightforward. Thus, a stay of execution is an immediate act, ordered by a court of competent jurisdiction, because of some just, fair and reasonable considerations, to prevent the enforcement of a judgment, which it has already delivered. This procedural ideal is held sacrosanct even in circumstances, wherein that judgment, is based on either procedural or substantive justice. Circumspectly, in a situation wherein a court, refuses to grant an order of stay of execution, it behooves a higher or another court of competent and concurrent jurisdiction, to grant it, should it consider it just, fair and reasonable to do so.

Thus, an application for a stay of execution, must be contingent on the determination of the appeal of the very judgment, which enforcement is to be stayed. This presupposes that the execution of a judgment, cannot be stayed by any reasonable and credible tribunal of facts, in circumstances wherein, there are

no available records, that the apposite notices of appeal and requisite bolstering affidavits have not been filed; for that tribunal to unpick and consequently determine whether the application, should or should not be granted. Catalytically, a stay of execution is granted between the inter-procedural periods after a judgment has been delivered and that leading to the hearing and determination of an appeal. Essentially, the court is obliged to be quite meticulous when making an order for a stay of execution. Thus, such an order must not be equivocal and ambiguous; it must be clearly understandable. Further, the court must ensure that the usual undertaking condition precedent, must be fulfilled by the applicant, requesting for a stay of execution.

Again, in circumstances of monetary judgments, wherein monies are ordered to be paid to the other side, based on the undertaking, such sums must be refunded, should the appeal succeed. This principle was well articulated in James International **v.** Seaboard West` Africa (Misc. App. 19/97), Firetex International Co. Ltd. and Sierra Leone External Telecommunications **v.** Sierra Leone Telecommunications Co. Ltd. (Misc. App. 19,2002) and Basita Mackie Dahklallah **v.** The Horse Import and Export Co. Ltd. (Misc. App. 21/2005). Nonetheless, in circumstances that do not resonate with monetary judgments, no amount of money, can be ordered to be paid, on an undertaking that, if the appeal succeeds the payment, should be accordingly refunded (see Patrick Koroma **v.** Sierra Leone Housing Corporation).

Meanwhile, in our jurisdiction, an application for a stay of execution is made, pursuant to Rules 28 and 64 of the Court of Appeal Rules of 1985. Thus, it is clear in Rule 28 that an appeal to the Court of Appeal does not amount to a stay of

execution of a judgment, order, ruling or decision; and that an order for a stay is specifically obtained from the Court of Appeal. Essentially, it is Rule 64 that contains the procedure, pursuant to which an application for a stay of execution can be made. That is, the applicant files the application to the High Court of Justice; and should that court refuse, the applicant is at liberty to apply to the Court of Appeal for it. However, it should be noted that page 35 of the Third Edition of Halsbury's Laws of England (Volume Sixteen), is very much instructive on the salient issues on stay of execution. Paragraph 51 thus states:

> 'The court has an absolute and unfettered discretion as to the granting or refusing of a stay. So also, as to terms upon which it will grant it, and will as a rule, if there are special circumstances, which must be deposed to in an affidavit, unless the application is made at the hearing'.

Thus, in so many instances the Court of Appeal of Sierra Leone in advancing the frontiers of the jurisprudence in this area of the law, have refused to make orders for stay of executions, because the parties requesting for them were unable to convince Judges about the peculiarities of the circumstances, pursuant to which such orders should have been granted; bearing in mind the peculiar fact that, it is very unfair for successful litigants, to be deprived of the fruits of their judgments. {see Annot Lyle (1886) 11 P.D. 114 at page 116}. Significantly, neither the High Court of Justice, nor the Court of Appeal, can make an order for a stay of execution, unless there is a good reason for doing so.

However, some of the notable instances in which the Court of Appeal has refused applications for stay of executions include, S. M Saccoh **v.** Ibrahim A. Dahklallah and Sons (Misc App. 16/93), Reverend Archibald Gambala John (Executor of the Estate

of Gustavus John) and others **v.** Lamin Denkeh (1994) Misc. App. 26/93, Desmond Luke **v.** Bank of Sierra Leone (Civ. App. 22/2004), Ernest Farmer and Another **v.** Mohamed Lahai {SLLR Vol. 3 Page 66 (1945)} etc. Conversely, there are also a plethora of instances, in which the Court of Appeal in its wisdom, has handed down several landmark decisions, in favour of applicants that showed, pursuant to their requisite supporting affidavits' evidence, special circumstances, that warranted the Hon. Justices of that court to make numerous orders on stay of execution. Thus, some of the most prominent and salient Court of Appeal decisions, that are quite instructive on this point, are found in the cases of Africana Tokeh Village Co. Ltd **v.** John Obay Development Investment Co. Ltd. [SLCA Misc. App. 2/94], Firetex International Co. Ltd. and Sierra Leone External Telecommunications **v.** Sierra Leone Telecommunications Co. Ltd. (Misc. App. 19/2002), Lucy Decker **v.** Goldstone Dicker (Misc. App. 13/2002) etc.

Meanwhile, the reasonable inferences that can be drawn from the above cases, are rationalised in the following considerations:

1. The jurisdiction to grant or refuse an application for a stay of execution is subject to the discretion of the court.
2. The Court's discretion must be justly, fairly and reasonably exercised in accordance with established principles.
3. In every circumstance wherein a stay of execution is granted on terms, such terms must never be onerous
4. The applicant must show a special (peculiar) circumstance, concerning the reason why the stay should be granted.
5. The applicant must also show a good ground of appeal.

However, the most immediate question that is to be addressed at this stage is what really constitute a special circumstance that should be established by the applicant for a stay of execution, to deprive the other side of the fruits of their judgments? This question certainly depends on the specificities of the facts of each case. Thus, what may constitute a special circumstance in one case, may not amount to a special circumstance in another case. This Honourable Court considers the Hon. Justice George Gelaga King's description of special circumstance, as one that generically guides and guards, any reasonable tribunal of facts, to clarify situations, that can be said to be special circumstances. The Hon. Justice thus pontificates:

> 'A special circumstance is a circumstance beyond the usual; a situation that is uncommon and distinct from the general run of things'

Moreover, the foregoing description of a special circumstance is inextricably linked to the obita dictum of Esther M. R. in Monk **v.** Bartram (1891) 1 AB 346:

> 'It is impossible to enumerate all the matters that might be considered to constitute special circumstances, but it may certainly be said that the allegation that there had been a misdirection or that the verdict was against the weight of the evidence or that there was no evidence to support it are not special circumstances, on which the court will grant a stay of execution'.

Furthermore, in TC Trustees Limited **v.** J. S. Darwen (Successors) Co. Ltd. 2 Q. B 259, the Court of Appeal while establishing the special circumstances, underpinning the granting of stay of executions, affirmed that such circumstances must be relevant to the stay, and not to a defense in law, or belief in equity, which might have been raised during the trial. The special circumstances must be relevant to the enforcement of the judgment; it must be totally unconnected with its content.

Thus, as it stands, there is absolutely nothing in the affidavit supporting the application that the Defendants/Applicants have established any special circumstance that should compel this Honourable Court to make an order for a stay of execution. What is clear in the numerous paragraphs of that affidavit is that they have a meritorious defence, which they belief should be heard by this Honourable Court. In effect, their defence is cognate with a defence in law or equity; it does not strike a chord with the enforcement of the judgment, that they say should be stayed. Further, it is clear from the documents filed and exhibited, that the application is devoid of any ground of appeal; let alone a good ground of appeal. Significantly, an application for a stay of execution must be contingent on an appeal and that a notice of appeal must have been filed, pursuant to Rules 28 and 64 of the Court of Appeal Rules 1985.

Thus, for purposes of reiteration, an application for a stay of execution, must be contingent on the determination of the appeal of the very judgment, which enforcement is to be stayed. This presupposes that the execution of a judgment, cannot be stayed by any reasonable and credible tribunal of facts, in circumstances wherein, there are no available records, that the apposite notices of appeal and requisite bolstering affidavits have not been filed; for that tribunal to unpick and consequently determine whether the application, should or should not be granted. Therefore, this Bench sees no reason why the first order for a stay of execution of the Judgment of 7th October 2020, should be granted. The order is denied and a cost of two million leones (Le 2,000,000) is imposed on the solicitor for the Defendants/Applicants, in his somewhat unconscionable, clumsy and grotesque attempt, to lure this Honourable Court to grant an order that is unsupported by an application, characterised by very serious inexactitudes.

1.5.2 The Setting Aside of Judgments Contingent on the Audi Alteram Partem Rule

The second order as prayed is for this Honourable Court to set aside the same judgment, based on the principle of audi alteram partem. The Defendants/Applicants' contention is that, when the Judgment was delivered there was already a defence and a counter claim and an affidavit in opposition to the application for a summary judgment, was already in the Court's records. There are a number of issues germane to this order as prayed that should first be unpicked, before examining whether it can or cannot be granted in the present circumstance. The first concerns the rationales for setting aside judgments. One of the instances in which Judgments are set aside, depicts the situation in which a judgment, based on procedural (not substantive) justice, is granted in the absence of the other side, that now insists on their constitutional right to be heard.

This in effect, is the essence of the audi alteram partem principle, which unfolds as the analysis progresses. However, Judgments granted in the absence of the other sides are defaults judgments. Thus, nothing precludes a court of competent jurisdiction from setting defaults judgments aside. This is possible even in the most remote circumstances wherein processes are served on defendants, who have neither entered appearances, nor filed defences and counterclaims, pursuant to the apposite orders of the High Court Rules 2007. The general rule is that any default judgment whether it is regularly or irregularly obtained can be set aside either as of right (exdebitio justicae) or on terms. The former is cognate with circumstances in which default judgments are awarded in contravention of the rules; and the latter encapsulates circumstances in which there is no evidence of any contradistinction of the rules. Constitutionally, courts are bound to give effect

to rules of law that are sanctioned by a state's legal system; irrespective of whether such rules are embedded in the adjectival or substantive law. Thus, procedurally proceedings that are gone through by default, must have been strictly conducted in accordance with the rules of evidence and procedure. This principle of adjectival law is strengthened by Buckley L. J. in Hamp-Adams **v.** Hall (1911) 2 K.B 94., when he said: where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules; that is a matter of strictissima juris'. The cases of SLOF **v.** P.B. Pyne-Bailey (10th May 1974), Yemen Co. Ltd. **v.** Wilkins (1950- 1956) ALR S.L Series (Civ. APP. N0. 193/54) etc. are also very instructive on this rule. Thus, even regular judgments can be deemed irregular, should the parties that have obtained them, consciously or unconsciously, fail to strictly comply, with the procedures as prescribed in the rules.

Meanwhile, the audi alteram partem rule, is a principle of natural justice. This is simply because it avails the courts the opportunity to hear the other side, to guide and guard it to make decisions that are just, fair and reasonable. No reasonable tribunal of facts or court of competent jurisdiction can be seen to be dispensing justice with fairness, if the principle is not accorded the utmost recognition, preservation and sanctity its deserves, in handing down its decisions on decided cases. In the instant case, the judgment that is contended is merely procedural. It is not based on substantive justice, because the action was not even set down for trial when the application for a summary judgment was made and granted. There is every need for the Defendants/Applicants to contend that they must be heard. But there is need to ask the question whether this Honourable Court denied them the opportunity to be heard. Prima facie, it seems so, when one looks at the papers as filed and the arguments which their counsel has adduced in contravention of the

application. But the fact remains that when the application for a summary judgment was made on the 24th of March 2020, there was no affidavit in opposition on file. And when the matter was adjourned, this Honourable Court made an order for them to file an affidavit in opposition on the next adjourned date; and for a notices of hearing to be sent to them. Again, when the matter subsequently came up for hearing on 31st March 2020, neither the Defendants/Applicants, nor their solicitors were in court. They jeered (flouted) this Honourable Court's order by not filing any affidavit in opposition; even though there is evidence on file that the notices of hearing of 24th March 2020, had been served on them. It was on 31st March 2020, that the matter was withdrawn for judgment.

Thus, in oblivious of any affidavit in opposition to the application for a summary judgment, the order was punctilious granted on 7th October 2020. The order was made on the basic fact that there was no affidavit in opposition on file when the file was withdrawn for a ruling. Surprisingly, this Honourable came to known that an affidavit in opposition, dated 21st April 2020, was filed several weeks after the file had been withdrawn for judgment and had been withdrawn for judgment. This Bench cannot impute professional impropriety on the Defendants/Applicants' Counsel, the Filing Office or this Honourable Court's registrar, but the evidence is overwhelming that, there was no affidavit in opposition, up to when the file was withdrawn for Judgment. Factually speaking, to say that the Defendants/Applicants were not given the opportunity to be hard is a misnomer. They were given the opportunity to be heard, but they chose not to do so on time; they only filed the affidavit in opposition after the horse had bolted. Therefore, it will be foolhardy of this Bench to set its order of 7th October 2020 aside on the somewhat unrealistic plea of audi alteram partem.

1.5.3 <u>The Issue of Setting Aside a Judgment on the Ground of a Meritorious Defence</u>

The final order as prayed is for a judgment of 8th November 2020, to be set aside because the Defendants/Applicants are convinced that they do have a defence on the merit. Nonetheless, let it be known that there is no subsisting judgment of this Honourable Court, dated 8th November 2020. Thus, for this incongruity, this Bench would have stuck out this application. Civil practitioners must be meticulous and conscientious when they draft and file their papers. And there is no room for lethargy in civil practice. Nevertheless, in the interest of justice, based on the fact that this Bench is convinced that indeed there are contentious issues, surrounding this matter that can only be determined, pursuant to the conduct of a full-blown trial, the last order is hereby granted and the order of 7th October 2020, is thus set aside; and considering the fact that they have wasted this Honourable Court and Counsel for the Plaintiff/Respondent's time, an additional cost of two million leones (Le 2,000, 000) is imposed on Counsel for the Defendants/Applicant, to be paid to Counsel for the Plaintiff/Respondent. The total cost being four million leones (Le 4, 000,000) to be immediately paid to the said Counsel. I speedy trial is as well ordered. I so order.

The Hon. Justice Dr. Abou B.M. Binneh-Kamara, J.

Justice of Sierra Leone's Superior Court of Judicature.