IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

NIGERIA NATIONAL SHIPPING LINES LTS - APPELLANTS

AND

ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES) - RESPONDENT

APPELLANT'S SOLICITOR - MISS FRANCES WRIGHT

RESPONDENT'S SOLICITOR - JOHN E. BANKOLE JONES

JUDGEMENT DELIVERED ON THE DAY OF 1989

A. AWUNOR-RENNER J.S.C.

This is an appeal against an order and unanimous judgement of the Sierra Leone Court of Appeal made and pronouced on the 18th day of November 1986 by the Honourable Mr Justice S.T. Navo presiding, Justice D.E.M. Williams and Justice M.S. Turay dismissing on a preliminary objection by counsel for the respondent a motion by the appellant herein the Applicant/Defendant in the Court below seeking leave to appeal against a ruling of the High Court delivered on the 16th June 1986 by the Honourable Mr Justice M.A. Adophy.

This appeal raises questions on the construction of Rules 10(1), 10(4) & 64 of the Court of Appeal Rules P.N. Number 29 of 1985 together with sec. 108 of the Constitution Act No.12 of 1978 & Sec.56 (1)(d)(b) of the Courts Act No.31 of 1965. Before I refer to their provisions I will briefly state the relevant facts.

The respondent herein the plaintiff in the High Court obtained an interlocutory judgment in default of appearance against the appellant herein on the 18th February 1986. On the 6th day of March 1986 the respondent obtained an order from Mrs Justice V.A.D. Wright in the High Court for assessment of general and special damages and a date was then fixed for assessment on the 14th March 1986. On the 21st day of April 1986 the defendant entered an appearance and filed a motion seeking inter alia that the judgment in default of Appearance dated 18th day of February 1986 be set aside and that the defendant/applicant be at liberty to defend the action.

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This motion was withdrawn and another one filed on the 29th day of May 1986. On the 16th day of June 1986 Mr Justice Adophy gave a ruling dismissing the defendant's motion. On the 21st day of June 1986 the defendants filed a motion seeking inter alia leave to appeal to the Sierra Leone Court of Appeal against the decision of the Honourable Mr Justice M.O. Adophy, sitting as a High Court Judge on the 16th day of June 1986. On the 11th day of July 1986 the Honourable Mr Justice M.O. Adophy refused the defendants' motion for leave to appeal against his order of the 16th June 1986. Again on the 23rd day of July 1986 the defendant filed a Notice of Motion for leave to appeal to the Court of Appeal and certain interlocutory orders were made by Justice C.A. Harding sitting as a Single Judge on the 19th day of August 1986. The Court of Appeal on the 18th day of November 1986 dismissed the Defendant/Applicant's Motion to the Court of Appeal for leave to appeal against Mr. Justice Adophy's order of the 16th June 1986 on a preliminary objection taken by Plaintiffs/Respondents counsel on the grounds that it quoted from the order made by that Court:

> "In view of the authorities on the matter, the failure of the applicants to comply with the statutory requirements and to fulfil the statutory conditions requisite for the purposes of the intended appeal, deprived this Court of any jurisdiction to hear the application."

Later on the 17th December 1986 the Defendant/Applicant sought leave from the Court of Appeal to appeal to the Supreme Court against the Court of Appeal's refusal of the application for leave to appeal to it. This application together with the application for a Stay of execution were also refused. The Hon. Mr Justice Gelaga-King dissenting. The Supreme Court finally granted Special Leave to appeal and a Stay of execution on the 18th February 1988. I think that it is now necessary for me to refer to all the relevant rules referred to by counsel for the appellants and respondents respectively. As I said before in my opinion the main issues to be determined in this appeal are the construction of rules 10(1), 10(4)

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& 64 of the Court of Appeal Rules P.N. Number 29 of 1985 that is to say whether an applicant who has to obtain leave to appeal to the Court of Appeal and who has made his application for such leave to the High Court within the prescribed time that is 14 days as stipulated by rule 10(1) of the said rule has to ask for an enlargement of time if such leave is not granted within the said period or until after the expiry of the extra period of 14 days as provided for in rule 10(4) of the afore-mentioned rules.

Rule 10(1) states the procedure to apply for leave to appeal from the High Court to the Court of Appeal and is as follows:

> "Where an appeal lies by leave only, any person desiring to appeal shall apply to the court below or to the Court by notice of motion within 14 days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges time".

Rule 10(4) of the Court of appeal Rules supra provides as follows:

> "No application for enlargement of time within which to apply for leave to appeal shall be made after the expiration of 14 days from the expiration of the time prescribed within which an application for leave to appeal may be made."

Another rule urged for construction is rule 64 of the same rules and this is couched in the following terms:

> "Except where otherwise provided in these rules or by any other enactment; where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but if the Court below refuses the application, the applicant shall be entitled to have his application determined by the Court."

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Various arguments have been urged by counsel on both sides. I propose to refer to them briefly. Counsel for appellants contended that the principle issue has to do with the construction of P.N. number 29 of 1985, Court of Appeal Rules particularly the construction of rules 10(1), 10(4) and rule 64. He posed the question that where an applicant has sought leave in the High Court to appeal within the stipulated time of 14 days whether he ought to seek an enlargement of time to make an application to the Court of Appeal for leave to appeal to the Court if the High Court makes an order after 14 days refusing him leave to appeal. He contended that there was no further obligation to seek leave for enlargement to the Court, or to the Court of appeal once you have already applied for leave to appeal within the stitulated time. The three rules he said must be looked at together and compared with the old rules. Time he added further ceases to run when an applicant has filed his applicatic for leave to appeal under 10(1) of the said rules. Mr. A. Gooding on the other hand contended that the Court of Appeal had no jurisdiction to entertain an application for leave when the intending applicant had failed to apply to the Court of Appeal within the time prescribed by rule 10(1) when a previous enlargement of time had not been asked for. The applicant he stated was clearly out of time. Rule 19(1) is unambigous he stated and needs no extraneous aids of construction. He referred this Court to the case of OHENE MOORE V TAYEE reported in - 2 WACA at page 43. He further suggested that rules 11(1) and 11(6) have a hearing on the construction of rule 10(1) and this governs the time for appealing in an interlocutory matter and in a final decision. Rule 11(1) states as follows:

> "No appeal shall be brought after the expiration of 14 days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision unless the court enlarges the time."

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"Rule 11(6) also, states that no application for enlargement of time within which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought."

Let me at once say at this stage that these last two rules deal only with the time limit for appealing.

Mr. Gooding also claimed that an appeal against an interlocutory decision is an appeal as of right and referred to sec.108 (2) of the Constitution and the Courts Act Sec.56 (1) a & b. Section 108(2) of the Constitution provides as follows:

> "Save as otherwise provided in this Constitution or any other law an appeal shall lie as of right from a judgement, decree or order of the High Court of Justice to the Court of Appeal in any cause or matter determined by the High Court of Justice."

In my opinion, an interpretation of this Section of the Constitution was given by this Court - In Misc.App.No.31/81 in the case of James Allie & Others V The State in which the Court construed the said phrase "or any other law" to include the provisions of the Courts Act No.31 of 1965 with particular regard to section 57. Although two of the questions posed in that reference dealt specifically with Sec.56. The Court declined to make any pronouncement on section 56 for the reason that the reference deals with a criminal matter and that section 56 concerns civil matters. It is my understanding that though section 56 was not specifically dealt with, the reasoning and consideration of the phrase "or any other law" should also be applied in this case. Section 56 (1) a & b of the Courts Act states as follows:

> "56 (1) Subject to the provisions of this section an appeal shall lie to the court of appeal:-
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> (a) from any final judgment, Order or other decision of the High Court given or made in the exercise of its

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original, prerogative or supervisory jurisdiction in any suit or matter.

(b) By leave of the Judge making the order or of the Court of appeal, from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid."

It is my opinion therefore, that the expression "or any other law" also applies to Sec.56 of the Courts Act and that an appeal against an interlocutory order of the High Court is by way of leave and not as of right as contended by Mr Arnold Gooding.

One point which has to be considered at this stage was whether the application for leave to appeal was made within the prescribed period of 14 days as required by Rule 10(1) of the Court of Appeal Rules number 29 of 1985 supra. The answer to that is yes on the facts as stated above.

Another point which also has to be considered are the provisions dealing with which Court an application should be made, whether to the Court below or to the Court of Appeal. This is clearly dealt with in Rule 64 of the above rules. It is my opinion that Rule 64 deals with two matters; firstly, it states that where an application may be made to the Court below or to the Court of Appeal it should be made in the first instance to the Court below. Secondly, it goes on to provide that where an application is refused by the Court below then the applicant is entitled to have his application determined by the Court of Appeal. In Maxwell on Interpretation of Statutes 19th Edition at pages 2 & 5 I refer to the following phrases and I quote:

(1) "If the words of a ~~statute~~ statute are in themselves precise and unambigous no more is necessary than to expound these words in their natural or ~~oridinary~~ ordinary sense. The words themselves in such cases declaring the intention of the legislat~~ion~~ure."

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(2) "If there is one rule of constructions for statutes and other documents it is that you must not imply anything in them which is inconsistent with the words expressly used."

(3) "Where, by the use of clear and unequivocal language capable of only one meaning anything is enacted by the legislature, it must be enforced, even though it be absurd or mischevous, the underlying principle is that the meaning and intention of a statute must be collected from the plain and unambigeous words used therein rather than from any notion, which may be entertained by the Court as to what is just or expedient."

Reading Rules 10 & Rule 64 together, they deal with the following situations:

(a) Where an applicant applies to the Court below for leave to appeal within the prescribed 14 day period.

(b) Where an applicant applies to the High Court for enlargement of time for leave to appeal to the Court of Appeal.

(c) When an applicant applies to the Court of Appeal for enlargement of time such application having been rufused by the Court below.

(d) Where an application for leave to appeal to the Court of Appeal where such an application has been refused by the High Court.

Reading Rules 10 & 64 it is clear from rule 10(1) that the situation referred to under (a) is that the application for leave shall be made within 14 days. Reading Rule 10(4) it is also clear that the time limit

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within which an application for enlargement of time within which to apply for leave is 14 days from the expiration of the 14 days period within which an application for leave to appeal may be made. Whereas there is a statutory time limit for the situation referred to in (a) & (b) above there is no such time limit so far as (c) & (d) are concerned; all that rule 64 has done is to put a restraint on the exercise of the right by the applicant to go to the Court of Appeal by first going to the Lower Court and if leave is refused then he is entitled to apply to the Court of Appeal to have his application heard and that restraint cannot be removed.

Furthermore, Rule 64 does not state the time within which the application for Leave to Appeal is to be made to the Court of Appeal where there has been a refusal by the High Court for Leave to Appeal to the Court of Appeal and the argument that the time limit is implied by reference to Rule 10(1) which deals with Applications for Leave to Appeal in the first instance is completely unfounded. This doctrine finds no support in any authority and it is in my opinion entirely alien as to how it is alleged it is to be applied. It is my opinion also that the absence of a time limit within which such an application should be made to the Court of Appeal has not nullified the right which has been given to the applicant by virtue of the Constitution Sec.108(2) and by virtue of Sec.64 itself. The Interpretation Act Sec.39(1)d of Act number 8 of 1971 also provides that "where no time is prescribed or allowed within which anything shall be done, such thing shall be done, without unreasonable delay and as often as due occasion arises."

Rule 10 - deals with the time limit within which leave to appeal and enlargement of time etc can be made, Rule 64 deals with the application for leave to appeal/enlargement of time where there has been a refusal. It is my opinion that rule 10(1) & (2) in so far as they deal with enlargement of time could not be called upon by the so called prudent Solicitor for the following reasons:

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An application for enlargement of time under Rule 10 is to enable the applicant to apply for leave to appeal (vide Rule 10). Rule 10 does not provide for an applicant to simply file his motion papers and await the outcome of the application for leave to appeal which he has already made. What would "the Prudent Soliciter" do if his application for enlargement of time is refused and the ruling is delivered some two months after it had been made? Would he whilst awaiting the said ruling on his application for enlargement of time file another Motion addressed to the Court of Appeal asking, for enlargement of time. The position at that point in time would be as follows:

1. A pending application before the High Court for leave to the Court of Appeal.

2. A pending application in the High Court for enlargement of time within which to apply for leave to appeal notwithstanding (1) above.

3. An application to the Court of Appeal for enlargement of time within which to appeal notwithstanding (1) and (2) above.
   Surely that could not be the intention of Parliament.

If one were to accede to the argument of "the Prudent Soliciter" the Court below or the Court of Appeal would grant an application for enlargement of time to do that which he has already done.

In the present case the applicant had done all that he had to do. He had filed his application for leave to appeal to the Court of Appeal within the time prescribed by rule 10(1) of the Court of Appeal rules number 29 of 1985. See the case of Waterton v Baker reported in (1868) Law Reports Q.B. Volume 3 at page 173. In that case By 13 & 14 Vict C.61 S. 14, ~~County Court Rules of 1857 rule 134.~~ On appeal

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from the Country Court, the party appealing, shall, within 10 days after the determination appealed against, give notice of appeal to the other party, and also give security to be approved by the registrar for the costs of the Appeal. By County Court Rules 134, of 1857 rule where a party proposes to give a bond by way of security, he shall give to the opposite party and the Registrar Notice of the proposed Sureties and the Registrar shall fix a day for the bond to be executed and for the other party to make any objection he may have to the Sureties. An Interpleader Summons in a County Court having been dertermined against the claimant on the 16th November, he on the same day gave notice of appeal and tendered a bond with sureties to the Registrar. On the 19th day of December he gave notice of the proposed sureties to the plaintiff. The Plaintiff required further information as to the sufficiency of the sureties and the claimant having been unable to obtain a definite answer as to whether or not he object to the sureties, the Registrar on the 17th day of January fixed the 21st of January for the execution of the Bond and gave notice to the Plaintiff to make his objection if any, on that day. The Plaintiff did not appear and the bond was then executed with the original sureties: - Held that although the security had not been completed until after the 10 days yet as the appellant had done all he could to perfect it within that time and the delay was caused by the Plaintiff, the appellant had complied with the requirement of Sec.14 & Rule 134 and was entitled to have his appeal heard.

Corkburn C.J. had this to say in his judgment

> "It would be exceedingly hard and unjust upon a party that he should be debarred from appealing because the Registrar for some cause or other, such as sickness or requiring further information is unable to complete the matter in due time and a portion of the delay occurs because the other party wants to make further enquiries; I think it would be monstrous to say in such a case that a man is to be ousted of his right to appeal which the Legislature intended him to have. I think the fair construction of the statute is that a party so far as it

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him lies must within the prescribed time offer the security and be ready to make it effectual. If he does that and afterwards complete the security he has done all that he is bound to do and he is entitled to his appeal."

Shee J: also - in the same case had this to say and I quote:

"The object of the enactment is to secure to the unsuccessful suiter an appeal but the appeal is to be allowed only on his giving security to the successful party for costs of the appeal, in order that the proceedings may not be unduly delayed he is bound to give notice of appeal within 10 days and rule 134 provides that notice of the sureties is to be given to the successful party and to the registrar of the Court. This is all that the appellant ought to do. If he gives notice of appeal within 10 days and gives notice to the successful party and to the Registrar who his sureties are, and if the Registrar approves of them and they ultimately execute the bond, then he does all that he is called upon by sec. 14 & the rule to do."

I have cited the above case for the principles contained therein regarding the construction and interpretation to be given where an applicant or party has done all that he could do, Assuming that I am wrong in ~~any~~ construction of Rules 10 and 64 as set out supra, I would therefore hold on this alternate ground that the appellant herein had done all that he could do.

In the present case the applicant had applied to the Lower Court within 14 days as prescribed by rule 10(1). He had also complied with rule 64 which states that he must first make his application to the Lower Court and if leave is refused then to the Court of Appeal. I am therefore of the view that there was nothing more he could have done. By way of contrast, let me finally refer to the previous rules of the Court of Appeal - P.N. number 28 of 1973 which states as follows

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"10(2) Whenever an application may be made either to the Court below or to the Court it shall be made in the first instance to the Court below but if the Court below refuses the application the applicant shall subject to the provisions of rule 11(4) be entitled to have the application determined by the Court."

Rule 11(4) states as follows:-

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every such application shall be supported by an affidavit setting forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When time is so enlarged a copy of the order granting such an enlargement shall be annexed to the Notice of Appeal."

The words subject to the provisions of 11(4) have been rejected by the subsidiary legislation. All Appellate Courts in the Commonwealth are established by Statutes including Sierra Leone. As such their jurisdiction and powers are statutory and they cannot act ~~within~~ without the statute or subsidiary legislation thereunder. See Moore V Tayee 2 W.A.C.A. at page 43.

Finally, the question now is whether the Court of Appeal had power to deprive a party of rights acquired by it under Rules 10(1) & Rules 64, of the above rules. I have not heard of any specific authority on these points. For the reasons which I have given above, I am of the view that the Court of Appeal was wrong when it stated tha it had no jurisdiction to hear the application. Rule 10 deals with the High Courts jurisdiction and that of the Court of Appeal for leave to appeal and for enlargement of time. It does not deal with the exercise of the jurisdiction of the Court of Appeal where leave to appeal or an enlargement of time is refused.

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The Court of Appeal's exercise of jurisdiction is dealt with in rule 64.

Although most of your Lordships are of a contrary opinion, for the reasons given above I would allow the appeal. Appeal allowed; in favour of the appellant and order that the appellants' motion dated 23rd July 1986 be remitted to the Court of Appeal for a hearing.

Costs to be taxed in favour of the appellant.

A. AWUNOR-RENNER.