Civ. App. No. 3/88

IN THE SUPREME COURT OF SIERRA LEONE

CORAM:-

Hon. Mr. Justice S.M.F. Kutubu, C.J. - Presiding
Hon. Mr. Justice C.A. Harding, J.S.C.
Hon. Mrs. Justice A.V.A. Awunor-Renner, J.S.C.
Hon. Mr. Justice S.C.E. Warne, J.S.C.
Hon. Mr. Justice E.C. Thompson-Davis, J.A.

BETWEEN:-

NIGERIAN NATIONAL SHIPPING LINES LTD. - APPELLANTS

vs.

ABDUL AHMED (TRADING AS ABDUL AZIZ ENTERPRISES) - RESPONDENT

Garvas J. Betts Esq. and Yasmin Jusu-Sheriff for Appellants
A.J. Bishop Gooding Esq. for Respondent

JUDGMENT DELIVERED THIS 17th DAY OF February, 1989.

KUTUBU, C.J.:- This is an appeal against the Ruling and Order of the Court of Appeal for Sierra Leone, delivered on the 18th day of November, 1986 by Williams J.A., upholding a preliminary objection by counsel for Respondent, on a Motion brought by counsel for Appellants, herein, the Applicant/Defendants in the court below, seeking leave to appeal against the Ruling of the High Court, delivered on the 16th day of June, 1986 by Adophy J. (as he then was).

It is, I think, necessary at the outset, that the facts of this case be ascertained, and the dates of the various steps taken in the proceedings be kept in mind, before considering the grounds of appeal. In order to avoid confusion in the course of this judgment, and for purposes of easy reference, I may hereafter refer to the Respondent as "plaintiff" and Appellants as "defendants," as they are one and the same persons.

By a writ of summons dated 10th December, 1985, the plaintiff claimed from the defendants the value of certain missing/damaged goods, duty, loss of profits and interest. No appearance having been entered within the prescribed time, fifty days in the instant case, interlocutory judgment in default of appearance dated 18th February, 1986 was obtained against the defendants. An Order for Assessment Proceedings was made on 6th March, 1986.

On 21st April, 1986 defendants entered appearance under protest and filed a Notice of Motion dated 21st April, 1986 seeking to set aside the Judgment in Default of Appearance dated 18th February, 1986 This was struck out with costs on 27th May, 1986.

Another Notice of Motion which was filed, dated 29th May, 1986 seeking the same remedy was dismissed with costs on the 16th June, 1986 by Adophy J. (as he then was).

On 21st June, 1986 the defendants applied to the High Court for leave to appeal against the said decision. On the 11th day of July, 1986 the application for leave to appeal was refused.

Consequent upon the aforesaid refusal, the defendants on the 23rd July, 1986 applied to the Court of Appeal for leave to appeal against the decision of the High Court dated 16th June, 1986.

When the application came up for hearing on 29th October, 1986 counsel for plaintiff raised a preliminary objection, by submitting that the Court of Appeal lacked jurisdiction to entertain the said application, which in his submission was out of time, thus depriving that Court of jurisdiction. Counsel for plaintiff grounded his submission on Rules 10 (1) and 10 (4) of the Court of Appeal Rules 1985 Public Notice No. 29 of 1985.

Defendants' application was dismissed by the Court of Appeal on 28th day of November, 1986. In delivering the Ruling of the Court of Appeal, Williams J.A. had this to say:-

> "The application before this court was dated 23rd July, 1986. It is for leave to appeal against the decision of the High Court delivered on the 16th day of June, 1986. Clearly such an application is out of time in that it was made 36 days after the date on which the decision of the High Court was delivered. There is no application before this Court for enlargement of time within which to apply for leave to appeal."

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Williams J.A. concluded by saying:-

> "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".

It is against that Ruling that defendants have appealed to this court on the following grounds, which I find somehow tedious to set out in full, but for a clear understanding of defendants' complaints in this appeal, I am constrained to set them out in extenso. The following constitute defendants' grounds of Appeal.

1. That when the learned judge said, "The application before this court was dated 23rd July, 1986 it is for leave to appeal against the decision of the High Court delivered on the 16th June, 1986 clearly such an application is out of time in that it was made some 36 days after the date on which the decision of the High Court was delivered," the court thereby misconstrued the provision of Rule 10 (1) and 10 (4) of the Court of Appeal Rules, Public Notice No. 29 of 1985 in treating the said sub-rules cumulatively as requiring that after four weeks after the date of the decision in respect of which leave to appeal is sought, an applicant who has applied for leave to appeal in the court below within the two weeks stipulated in Rule 10 (1), would necessarily first have to apply for enlargement of time, for leave to appeal, where the court below has refused the application for leave to appeal, and such a ruling refusing leave fell outside a fourteen days after the delivery of the decision in respect of which leave to appeal is sought.

2. In holding aforesaid, that the "Applicant is out of time in that it was made some 36 days after the date on which the decision of the Court below was delivered," the Court failed to construe properly or at all Rule 10(1) of the said Court of Appeal Rules, in relation to sub-rule 10 (4) and Rule 64. The misconstruction or failure to construe properly is that by its ruling the Court below failed to hold, as in law it should that where the Applicant in the High Court had filed his Notice for leave to appeal within time such an Applicant had complied with the requirement of Rule 10 (1) and the requirement for enlargement of time in the said sub-rule would no longer apply to such an Applicant and that further, such an Applicant to whom leave is denied would be entitled to have his application determined by the Court.

3. That when the Court of Appeal held that it could "not agree more," that in law, an affidavit in opposition which was filed could not act as a waiver, the court misdirected itself in law in that such a step, with full knowledge of non-compliance with the Rules is a fresh step and so a waiver.

4. That in holding that, "the failure of the Applicant to comply with the statutory requirements and to fulfil the statutory conditions required for the purposes of the intended appeal," the Court erred in law in treating an act of non-compliance, as having the effect in law in making an application void rather than merely irregular, and in doing so depriving itself of the capacity to grant consequential relief to Applicants, or wrongly putting it beyond itself to consider granting such relief.

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The reliefs sought by defendants in this Court are:-

1. Reversal of the Order of the Court of Appeal; and,
2. remission of defendants' application to the Court of Appeal for hearing and determination.

From the substance of the Court of Appeal's Ruling, the grounds o appeal in this case and arguments of counsel before this Court, essentially, this appeal turns on the construction of Rules 10 (1), 10 (4) and Rule 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 1985. I therefore find it necessary and appropriate at this juncture to set out these Rules in extenso:-

Rule 10 (1) states:-

> "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 fourteen days from the date of the decision against which leave to appeal is sought unless the Court below or the Court enlarges the time."

Rule 10 (4) states:-

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

Rule 64 states:-

> "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 the application determined by the Court."

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The issues raised in this appeal may be summarised as follows:

1. Did the Court of Appeal misconstrue the provisions of Rules 10(1), 10(4) and 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 1985?
2. Was the Court of Appeal right in treating Rules 10(1) and 10(4) cumulatively as requiring that after four weeks after the date of the decision in respect of which leave to appeal was sought, the defendants who had applied for leave to appeal in the court below within the statutory period of fourteen days (Rule 10(1), would necessarily have to apply for enlargement of time for leave to appeal to the Court of Appeal, where the court below had refused the application for leave to appeal after fourteen days?
3. Was the Court of Appeal right in holding that the requirements for enlargement of time in Rule 10(4) applied to defendants, even where they in the court below had filed their Notice of Motion for leave to appeal within time, as stipulated in Rule 10(1)?
4. Was the Court of Appeal right in holding that in law an affidavit in opposition which was filed by plaintiff with full knowledge of non-compliance by defendants, could not act as a waiver? Did the affidavit in opposition constitute a fresh step in the proceedings and therefore a waiver?
5. Did the Court of Appeal err in law in treating an act of non-compliance as having the effect in law in making the defendants' application for leave to appeal

void rather than merely irregular, thereby ousting the jurisdiction of the Court of Appeal to grant consequential relief to defendants?

6. Was the Court of Appeal right in its construction of Rule 10(1), thereby resulting in manifest absurdity and inconvenience to defendants?

I now consider the first three issues outlined above. The decision of the High Court dated 16th June, 1986 was an interlocutory decision, and so statutorily, defendants were obliged to appl to that court by Notice of Motion for leave to appeal against the said decision to the Court of Appeal. By virtue of Rule 10(1) bot the High Court and the Court of Appeal have concurrent jurisdictio in the matter of application to these Courts for leave to appeal a for enlargement of time. Application for leave to appeal must be made within fourteen days of the date of the decision of the High Court.

Rule 64, however, provides that the application must first be made to the High Court and on refusal, to the Court of Appeal for determination. Rule 64 which in my opinion is merely procedural, is silent on the question of time since it does not stipulate time within which an applicant may apply to either the High Court or the Court of Appeal for leave to appeal. To all intents and purposes, an applicant must look to the provisions of Rules 10(1) and 10(4) for time construction.

An applicant under Rule 10(1) has to comply with the provisior of Rule 10(2) which states as follows:

> "Any application for leave to appeal or for enlargement of time within which an application for leave to appeal may be made, shall be supported by an affidavit setting forth good and sufficient reasons for the application and by proposed grounds of appeal which prima facie show good cause for leave to appeal or enlargement of time within which to apply for such leave should be granted".

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As already stated, application for leave to appeal under Rule 10(1) must be made within fourteen days of the date of the decision, unless the Court below or the Court of Appeal enlarges time. Time therefore starts to run from the date of the decision. Where the fourteen days stipulated under Rule 10(1) have not yet expired, an applicant can apply for enlargement of time to the High Court, which that Court may grant, but not when time has expired, as by then the jurisdiction of the High Court would have closed.

Under Rule 10(3), where time is enlarged, a copy of the order granting enlargement shall be annexed to the application.

There appears to be no problem where the application for leave to appeal is granted within time. In my opinion, where the application is refused within the prescribed fourteen days, the applicant will have to make a fresh application for leave to appea to the Court of Appeal. Where the application is refused after the fourteen days period specified in Rule 10(1), an applicant must apply for enlargement of time together with an application to the Court of Appeal for leave to appeal, in view of the provisions of Rule 10(4), which taken together with Rule 10(1) gives the applicant twentyeight days for time to run out.

Now how do the facts of this case reflect the observance by defendants of the statutory requirements, if at all?

On the 21st June, 1986, that is, five days after the date of the decision in the High Court dated 16th June, 1986, defendants applied to the High Court for leave to appeal to the Court of Appeal. This application fell within the statutory period of fourteen days prescribed by Rule 10(1). On the 11th July, 1986 that is, nineteen days after the application to the High Court for leave to appeal, and twenty four days from the date of the decisio in the High Court, the application was refused by the High Court. On the 23rd July, 1986, that is twelve days after the date of refusal, the defendants without more, applied to the Court of Appeal for leave to appeal against the decision of the High Court dated 16th June, 1986; in all, thirtysix days from the date of that decision.

The Court of Appeal took the view that time having run out by virtue of Rules 10(1) and 10(4) of the Court of Appeal Rules, which cumulatively comes up to twentyeight days within which to appeal, and there being no prior application before them by defendants for enlargement of time to appeal, which would have clothed them with jurisdiction, refused to entertain the applica tion. On this reckoning, at the time of the refusal of the High Court to grant defendants' application for leave to appeal, that is, 11th July, 1986 defendants still had four days within which to apply for enlargement of time, which the Court has power to grant even after the expiration of the time allowed or appointed

I do not support the submission of defendants, which was argued strenuously before this Court, that once an applicant has complied with the provisions of Rule 10(1), by applying to the High Court within the statutory period of fourteen days, he ther and then has no further obligation to seek enlargement of time t appeal to the Court of Appeal, on refusal by the High Court to grant leave to appeal.

In my opinion, where an applicant's application under Rule 10(1) has been refused and time has already expired for making such application, it will be futile to take solace in the assumption that he can proceed to the Court of Appeal on the bas of his original application to the High Court, be it within time. The proper thing to do in the circumstances, knowing that the jurisdiction of the High Court has closed after its refusal to grant application for leave to appeal, is to apply to the Court of Appeal, which by virtue of Rule 10(1), has concurrent juris- diction with the High Court. The applicant would therefore have to proceed to the Court of Appeal by fresh application to the concurrent jurisdiction of that court and not on the basis of the original application to the High Court for leave to appeal. Suffice it to say that after refusal by the High Court no further application for enlargement of time should be made to that Court, if only for want of jurisdiction.

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As I see it, the provisions of the old Court of Appeal Rules 1973 Public Notice No. 28 of 1973, that is Rules 10(1) (2) and 11(4) which I need not spell out, are similar to the present Rule Rules 10(1), 10(4) and 64 Public Notice No. 29 of 1985, except th under the old Rules the applicant has fourteen days plus one mont to have his application determined by the Court of Appeal. Under these Rules, where time has expired, an application for enlargeme of time must be made to the Court of Appeal.

In respect of issues 1, 2 and 3 above, I hold as follows:

1. That the Court of Appeal properly construed the provisions of Rules 10(1) 10(4) and 64 of the Court of Appeal Rules 1985, Public Notice No. 29 of 1985.
2. That the Court of Appeal was right in treating Rules 10(1) and 10(4) cumulatively.
3. That the requirements for enlargement of time applied to defendants irrespective of their earlier application to the High Court for leave to appeal within time.

In arguing Ground 3 of the Grounds of Appeal, defendants submitted that the affidavit in opposition filed by plaintiff with full knowledge of the alleged irregularity, that is, defendants' failure to apply to the Court of Appeal for enlargemen of time to appeal to the Court of Appeal after refusal by the High Court, was a fresh step in the proceedings, which constituted a waiver of any irregularity on the part of defendants.

Plaintiff in his reply contended that an affidavit in opposition to an affidavit in support of an application for leave to appeal to the Court of Appeal cannot be deemed to be a waiver of jurisdiction. He submitted that failure to comply with a statutory requirement is not a mere irregularity which may be waived by the plaintiff, since it deprived the Court of Appeal of jurisdiction to hear the application. He submitted further that what constitutes a waiver depends upon the nature of

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irregularity; this, being so fundamental and therefore incurable. Plaintiff further argued that in taking the steps he took in filing the affidavit in opposition, he was acting ex abundanti cautela, since a preliminary objection was only being taken by him at the time, which might prove unsuccessful.

The Court of Appeal held that Plaintiff's affidavit in opposition did not constitute a waiver. I agree. Indeed, I find no merit in defendants' submission, as in my opinion the irregularity in this case is not a mere irregularity which can be waived by the plaintiff where there is jurisdiction, but an irregularity which calls into question the very jurisdiction of the Court of Appeal.

In determining the fourth issue outlined above, I hold that plaintiff's affidavit in opposition did not constitute a fresh step in the proceedings, nor did it amount to a waiver.

The fifth issue posed, is, whether the Court of Appeal erred in law in treating an act of non-compliance, (that is, failure by defendants to apply to the Court for enlargement of time) as havir the effect in law in making defendants' application for leave to appeal void rather than merely irregular.

In arguing this issue, defendants submitted that the act of non-compliance in the instant case, was a mere irregularity which did not go to jurisdiction and therefore it was wrong in law for the Court of Appeal to have deprived itself of jurisdiction.

Plaintiff maintained that the act of non-compliance was fundamental, being in contravention of statutory requirements, thereby depriving the Court of Appeal of jurisdiction. Plaintiff referred us to two authorities in support of his arguments which I consider relevant to the point - Oranye vs. Jibowu 13 W.A.C.A. (Selected Judgments of the West African Court of Appeal) p. 41 at 42 and Ohene Moore vs. Akesseh Tayee, 2 W.A.C.A. 43.

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In Oranye vs. Jibowu, the issue turned on an appeal from the Magistrate's Court where Appellants appealed out of time and had taken no step to have the time extended in accordance with the provisions of the Rules. The defects escaped the notice of everybody concerned, with the result that the judge of the Supreme Court proceeded to hear the appeal.

It was held that the irregularity could not be regarded as a mere technicality, but constituted an incurable defect. The failu to comply with the statutory requirements deprived the Supreme Cou of any jurisdiction to hear the appeal.

In Ohene Moore vs. Akesseh Tayee which turned, not on extenti of time but failure to fulfil certain statutory requirements requisite for the purposes of an appeal, Lord Atkin in delivering the opinion of the Privy Council observed as follows:

> "It is quite true that their Lordships as every other Court attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other Court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event and that event has occurred then it is impossible for their Lordships or for any other Court to have jurisdiction".

In my opinion these authorities reflect the correct position of the law with which I have no reason to differ. In the circumstances I find no substance in defendants submission which must fail.

The answer to the fifth issue herein is that the Court of Appeal was right in holding that they had no jurisdiction to entertain defendants' application.

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The last and final issue for consideration, is whether the Court of Appeal was right in its construction of Rule 10(1) of the Court of Appeal Rules, Public Notice No. 29 of 1985.

In their arguments, defendants submitted that the Court of Appeal wrongly construed Rule 10(1), thereby resulting in manifest absurdity and inconvenience. That on a proper construction the Court of Appeal would have arrived at a different conclusion.

Plaintiff on the other hand, submitted that the words of the said Rule 10(1) are plain and unambiguous, and as a result, they must be given their plain and ordinary meaning, irrespective of consequences. He further submitted that where the language of an Act or Rule is explicit, its consequences are for Parliament and the Rules of Court Committee, and not for the Courts to consider.

The whole arguments therefore turn on the canons of interpretation for which there are many authoritative decisions. IN SUSSEX PEERAGE CLAIMS (1844) 11 Cl. & F.85 Tindale C.J. said:-

> "If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the lawgiver".

Cotton L.J. in Reid v. Reid (1886) 31 Ch. D. 402, 407 had this to say:-

> "In considering the true construction of an Act, I am not so much affected as some judges are by consequences which may arise from different constructions. Of course if the words are ambiguous and one construction leads to enormous inconvenience, and another construction does not, the one which leads to least inconvenience is to be preferred".

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Lord Esher M.R. in R v. JUDGE OF CITY OF LONDON COURT (1892 1 Q.B. 273 said:

> "If the words of an Act are clear you must follow them even though they may lead to manifest absurdity. The Court has nothing to do with the question of whether the legislature has committed an absurdity."

Lord Simons in the House of Lords - 1952 A.C. 189 said:

> "The duty of the Court is to interpret the words the legislature has used; these may be ambiguous but even if they are, the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited."

Continuing his Lordship said:

> "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is less justifiable when it is guess-work with what material the legislature would, if it had discovered the gap, would have filled it. If a gap is discovered the remedy lies in an amending Act."

The Court of Appeal held, and rightly so, that the words of Rule 10(1) are plain and unambiguous, and so gave those words their plain and ordinary meaning. The language of the Rule quoted above is quite clear and unambiguous. If the strict application of that rule would lead to manifest absurdity, inconvenience, hardship or financial loss to the defendants, as admittedly it appears in the instant case, the remedy lies in the hands of the Rules Committee to make the necessary amendment.

Having considered the various grounds of appeal in this case, and the arguments of counsel, I have come to the inevitable conclusion that these grounds are untenable and must fail. I agree with ruling of the Court of Appeal and I see no reason to disturb it. This appeal must fail.

The appeal is accordingly dismissed with costs to Plaintiff/ Respondent.

S.M.F. Kutubu

Chief Justice.