MISC. APP. 6/96

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IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

KORA SESAY
ABDUL SESAY
DURA CONTEH - APPLICANTS/APPELLANTS

AND

ALLIE M. KAMARA
KONDO KAMARA
SANTIGIE KAMARA RESPONDENTS

CORAM:

HON. MR. JUSTICE D.E.F. LUKE - CHIEF JUSTICE
HON. MR. JUSTICE H.M. JOKO SMART - J.S.C.
HON. MR. JUSTICE N.D. ALHADI - J.A.

A.F. Serry Kamal Esq., for Applicants

A. Rener-Thomas Esq., & O.C. Nylander Esq., for Respondents

RULING DELIVERED ON 30TH DAY OF SEPTEMBER 1999

JOKO SMART J.S.C.

INTRODUCTION

This is an application for an enlargement of time to appeal against the judgment of the Court of Appeal dated the 2nd day of April 1996 made pursuant to Rule 26 (4) of the Supreme Court Rules (Public Notice No.1 of 1982) (the Rules).. The Notice of Motion was dated the 31st day of July 1996 and was lodged at the Registry on the 1st day of August 1996 but was listed for hearing on 22nd September 1999. No reason has been adduced for the interim between the date of lodgement and the date of hearing. It seems to me that there was a serious administrative lapse but it is my considered view that the lapse should in no way affect the computation of time in deciding whether or not the application should be granted or refused. The application is supported by two affidavits; one by Kora Sesay, the 1st Applicant dated the 31st day of July 1996, and the other by Mr. Serry Kamal solicitor for the Applicants, dated the 24th day of September 1999. At the hearing of the application on 22nd September 1999, Mr. Kamal sought the leave of the Court to file a Supplemental Affidavit and leave was granted.

THE ISSUE

The Notice of Motion was taken out over three months after the date of delivery of the judgment against which it is sought to appeal Rule 26 (1) of the Rules provides:

> "Where an appeal lies as of right the Appellant shall lodge his notice of appeal within three months from the date of the judgment appealed against unless the Supreme Court shall enlarge the time".
>
> This provision is mandatory.

However, in order to allow a concession to Appellants who do not fulfil the provisions of Rule 26 (1) but who have acceptable explanatory reasons for non-compliance, Rule 26 (4) stipulates, inter alia, that

> "No application for enlargement of time for 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 application for enlargement of time shall be by motion supported by an affidavit setting forth good and substantial reasons for the application and by Grounds of Appeal which prima facie show good cause for leave to be granted".

The application is made within the time allowed by Rule 26 (4) but compliance with the time alone is not sufficient for the application to be granted. Rule 26 (4) explicitly imposes three conditions after the fulfillment of which the Court may exercise its discretion to enlarge the time for appeal.

1. An affidavit in support of the application must be sworn.
2. The affidavit must set forth good and substantial reasons.
3. The proposed Grounds of Appeal must be good on the face of the application.

THE APPLICANTS

There are three Applicants but only one of them, the 1st Applicant, has filed an affidavit. Paragraph 3 of the said affidavit mentions one Abdul Sesay as having been taken ill some time in June and was taken up country where he died. During the hearing of the application on the 22nd September, 1999 when asked by the Court whether that Abdul Sesay was the same as the 2nd Applicant, Mr. Kamal, Counsel for the Applicants replied that he was the same person. When again Counsel was asked why he did not appeal within the time allowed by Rule 26 (1) his candid and correct reply was that he could not have done so without the authority of the Applicants. In my judgment, I find it inconceivable how then Counsel could have made an application on behalf of the 2nd Applicant who according to the affidavit of the 1st Applicant was not aware of the judgment of the Court of appeal and was dead at the time of the Notice of Motion for enlargement of time, a fact confirmed by Counsel himself. I therefore find that the application of the 2nd Applicant is not properly before the Court. Similarly, in his Supplemental Affidavit, Mr Kamal deposed that the 3rd Applicant is dead (date of death unspecified). I cannot see how this application can be made by the 3rd

Applicant too. Dead men do not tell tales. The correct procedure would have been for the personal representatives of the deceased, if any, to make an application for an order of substitution and then an application for enlargement of time provided the deceased were alive at the date of the application but died subsequently.

Rule 37 of the rules makes this provision. It stipulates:

> "An application for an Order for Rivivor or Substitution shall be accompanied by an affidavit sworn by the Applicant or where the Applicant is represented by a legal practitioner the said affidavit shall be sworn by such legal practitioner showing who is the proper person to be substituted, or entered, on the record in place of, or in addition to a party who has died or undergone a change of status".

On this ground too, I hold that the application of the 3rd Applicant is not properly before the Court.

Before I leave the issue of competence let me deal with one connected matter which in my opinion needs mention. I observe from the two affidavits filed herein that the subject matter of the dispute between the parties is land. One significant question that requires an answer is whether the 1st Applicant as survivor of the other Applicants could have made this application without the intervention of the personal representatives of the two deceased parties. As a matter of law if there are more than one party to a dispute as either Plaintiffs or Defendants and judgment is given against one side and all but one of the losers choose not to appeal against the judgment, the remainder can legitimately do so but it all depends on the interest of that person in the subject matter of the case. As I have already mentioned ownership of land is in issue in this case and the land is claimed by both the Applicants and the Respondents. It is not clear from the affidavits filed what was the interest that each of the Applicants held in the land. I can see however from Mr. Kamal's affidavit that they were claiming a freehold estate in the land, but nothing more can be gathered from it whether they were claiming as tenants-in-common or as joint-tenants. If they held as tenants-in-common each party had a distinct fixed and undivided share in it and the 1st Applicant could appeal without the intervention of the personal representatives of the deceased and would therefore correctly have made this application alone. (See R.E. Megarry: A Manual of The Law of Real Property 2nd ed. p.241). But if they held as joint-tenants he could not do so. The position with regard to joint tenancies is clearly stated in Blackstone's Commentaries Vol.2 (1766) at page 182 which I regard as the correct statement of the law; it reads. "In all actions relating to their estate, one joint-tenant cannot sue or be sued without joining the others".

AFFIDAVIT OF 1ST APPLICANT

I have already stated that one of the conditions on which the Court will exercise its discretion to enlarge the time is that the Affidavit in support of the Application must set forth good and substantial reasons for the application. I will now summarise the reasons proferred by the 1st Applicant as follows:-

1. The judgment in the Court of Appeal had been reserved for over two years and he did not think that judgment would be given at the time that it was given

2. He went up country with a sick and dying man and stayed there until after the 40th day ceremony.

3. If the 2nd Applicant had not died and the roads were safe he would not have stayed for the length of time that he took.

4. He was not aware of the date of the judgment until he went to his solicitor after he had returned from up country.

I will now dilate on these reasons to see whether they meet the requirement of good and substantial reasons. The Reader's Digest Universal Dictionary, 1987 defines "good reason" as a reason that is "genuine or real" Stroud's Judicial Dictionary Vol.4 Third Edition, states that the adjective "substantial" is "a word of no fixed meaning, it is an unsatisfactory medium for carrying the idea of some ascertainable pro-position of the whole (Terry's Motors, Ltd v. Rinder, [1984] S.A.S.R. 167)" Goodness and substantiality are words of value judgment about which much ink has been spilt by relativist philosophers throughout the ages and I am inclined to agree with Ashurst J. who in delivering the judgment of the Court in R.V. Stubbs, 2 T.R. 395, said, "The word 'substantial' is a relative term". In Palser v. Grinling [1948]1 ALL E.R. 1 Vicount Simon in the English House of Lords said" One of the primary meanings of substantial is equivalent to considerable, solid or big; it is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence" (see [1948] 1 ALL E.R. 1 at p. 11). In my judgment, for a reason to be good and substantial within the context in which I am dealing, it must not only be genuine on the face of it but it must also be reasonable and so convincing that a reasonable man can conclude that the Applicant had done all that was possible to avoid the default. Evidence of a family tie between the 1st Applicant and the deceased, the death certificate of the deceased or an acceptable explanatory statement for its non production, notification by the 1st Applicant to his solicitor of his pending departure to the provinces and of his forwarding address, the time that elapsed between the date of the delivery of the judgment and the date that he left for the provinces, and the date of his return to Freetown are factors which might be in favour of the 1st Applicant.

I will now consider whether the 1st Applicant has provided the requisite evidence for this Court to be able to exercise its discretion in his favour. He has not established any family tie between himself and the 2nd Applicant. I shall elaborate on this issue later in this ruling. He deposed that he went up country without informing his solicitor and only got to know about the judgment on his return. Obliquely, his reason for doing so was that the judgment had been reserved since "about mid 1993". While I do not approve or disapprove of delays in the delivery of judgment in these present times taking into consideration the conditions under which my brothers work, I apprehend that it is incumbent upon litigants to inform their solicitors of their movements and changes of addresses when they have cases pending in the Courts. Failure to do so is at their peril. It is only in exceptional cases like sickness and deprivation of complete freedom of movement in circumstances that they are unable to contact a relative or friend or a well-wisher to inform their solicitor of their dilemma that such failure becomes excusable.

I will now proceed to the time factor. The 1st Applicant alleges that the 2nd Applicant was taken ill some time in June (the exact date unspecified) and that the deceased died thereafter (the exact date unspecified). He stayed up country until the 40th day ceremony and thereafter returned to Freetown (against the exact date unspecified). I shall return to the ceremony later in this ruling. As time is of the essence in this application it is of the absolute necessity that the Applicant's solicitor should have ensured that he obtained from his client the dates of these events as exactly as possible. I shall nevertheless endeavour to compute the time but before I do so I will refer to another aspect of uncertainty in the time frame of events. The 1st Applicant deposed that his solicitor told him that the judgment had been reserved since about mid 1993. Here again no precise date is given. This imprecision, in my judgment, should not have occurred since the Applicant's solicitor who prepared the affidavit should have obtained the precise date from the records of the case so as to make the information available to his client. Alternatively, Counsel should have sworn an affidavit himself deposing to this fact (see Rule 36 of the Rules) I will now return to the computation of time. Judgment was delivered on 2nd April 1996 and the 1st Applicant left for up country some time in June. There is a time lapse of at least two months from the date of the judgment to the time that he left even if he left on 1st June 1996. A diligent solicitor, and I have no doubt that Mr. Kamal is one, should have informed his client of the judgment within the three months period. I also do not doubt that Mr. Kamal made the effort but his client had skedaddled before he sent to him for in paragraph 2 of his affidavit he deposed: "My solicitor informs me that he sent some one to find me but that he could not find my address". Which address he was referring to, his address in Freetown or up country, it is difficult to comprehend.

The 1st Applicant explained his over-stay up country as being due to the death of the deceased followed by the 40th day ceremony and the unsafeness of the road. He has not stated what made the road unsafe and which road it was leading from which town up country to Freetown. I am not oblivious of the war situation that prevailed in this country since 1991 and that from April 1997 to the present most of the roads linking Freetown with the provinces have been rendered unsafe. But I am also not oblivious of the fact that in June 1996 the 1st Applicant using the same roads went up country with a sick man, stayed until after the 40th day ceremonies which could not have taken place before 10 July 1996 and returned to Freetown on or before 31 July 1996, the date of his affidavit - a span of at most 20 days. Surely all of the roads in this country would not have been unsafe during that period. In fact by the 10 July 1996 the three month period within which to file an appeal had expired. The unsafeness of the roads is, in my judgment, therefore irrelevant.

I now come back to the family tie which I have mentioned earlier in the ruling. According to the customs and traditions of many ethnic communities in this country the appropriate place for a man to die and be buried is his home town or village. Migration has resulted in the exodus of many ethnic groups from rural to urban areas in quest of employment opportunities and other greener pastures. It is therefore common ground that while in Freetown and a member of a migrant ethnic group is overtaken by illness which is likely to be fatal, he is taken to his home town or village where the rest of his relatives reside. It is a common belief among these groups, a belief which I am not competent to accept, challenge or denounce, that native herbs and therapy in some cases, are more medicinal and potent than

treatment available in hospitals. Furthermore, death is not only a macabre event to the living but is also an association with the departed ancestors. The combination calls for the celebration of the life of the deceased accompanied by societal ceremonies. In appropriate cases our Courts are bound to take cognisance of these customs since customary law is part of the common law of this country. See s. 170(2) of the 1991 Constitution, Act No.6 of 1991.

The 1st Applicant has not however averred that he belongs to one such ethnic group nor has he established any relationship of consaguinity or affinity between him and the 2nd Applicant despite the similarity of their surnames.

On the whole, I find that the affidavit of the 1st Applicant is vague and inadequate and the provision of Rule 26(4) of the rules with respect to good and substantial reasons for the enlargement of time has not been complied with.

THE PROPOSED GROUNDS OF APPEAL

Exhibit "A" attached to the affidavit of Kora Sesay in support of the application contains two Grounds of Appeal. They are

1. That judgment is against the weight of evidence
2. That the judgment is unreasonable and cannot be supported having regard to the evidence.

When this Court pointed out to Mr. Kamal that the two grounds are in fact only one Ground of Appeal, one being civil and the other criminal, he conceded that there was only one ground but that he decided to put both grounds ex abundanti cautela because he alleged that there have been conflicting opinions in the Court of Appeal as to which ground was appropriate in Civil Appeals. I think that this conflict, if there is any, should now be resolved once and for all.

For criminal appeals, Rule 75(2) of the Rules provides specifically, inter alia, as follows:

> "No Ground of Appeal which is vague or general in terms of disclosing no reasonable ground shall be permitted except the general ground that the judgment is unreasonable or cannot be supported having regard to the evidence".

There is no similar provision in the Rules governing Civil Appeals and so there appears to be a vacuum in the law. Rule 5(2) of the rules states:

> "Where no provision is expressly made by these Rules regarding the practice and procedure which shall apply to any appeal or application before the Supreme Court, the Supreme Court shall prescribe by means of practice directions such practice and procedure as in the opinion of the Supreme Court the justice of the appeal or application may require".

There has been as yet no practice direction by the Supreme Court with regard to the form that a general Ground of Appeal in civil cases should take: However, it has been the perennial practice in our Courts to adopt the appropriate wording of the general ground as it appears in ground 1 of the proposed notice of appeal of the Applicants and I see no good reason to depart from it. (See the English Annual Practice 1960 Vol. 1p. 1660; Chitty & Jacobs, Queen's Bench Forms, 21st Edition Form 2000). This is the Ground of Appeal based on a melange of facts commonly resorted to by many a Counsel desperate for a ground of appeal as a last resort when they cannot pinpoint a specific misdirection in law substantial enough to make it a ground of its own. It has become the bountiful answer to fit all appeals just like the barber's chair that fits all buttocks - the pin buttock, the quatch buttock, the brown buttock, or any buttock, if I may borrow that expression from Shakespeare (See All's Well That Ends Well, Act 2 scene 2). In appropriate cases an appeal can succeed on this ground alone but the evidence against which the judgment is given must be weighty and overwhelming indeed.

It is my considered view that for a straight appeal under Rule 26(1) it is not necessary for the Court to look at the substance of any of the Grounds of Appeal until the appeal is heard. But for an application under Rule 26(4) of the Rules the Court is bound to consider whether the grounds prima facie show good cause for leave to be granted. In my judgment, this provision requires the Court to look at the face of the proposed Grounds of Appeal to see whether there is an arguable matter to be determined when the appeal is heard. This can easily be ascertained where the Ground of Appeal is against a misdirection on a point of law the particulars of which are clearly stated in the proposed grounds of appeal. But in case of a general ground of appeal being the only ground of appeal, looking at the face of the proposed ground alone will not enable the Court to ascertain whether the ground prima facie shows a good cause. It was in this vien that the Court invited Mr. Kamal to file a supplemental affidavit. The Court was mindful that the use of any additional information is not a pre-judgment of the appeal.

Having looked at the affidavit of Mr. Kamal in particular Ex "A" I find that the bone of contention of the case in both the High Court and the Court of Appeal, was the identity of the land in dispute which was purely a question of fact, the Courts finding that the land claimed by the Plaintiffs/Respondents was not the same land which the document of title of the Defendants/Applicants supported. It was not a question as to who had a better title. It is a well-settled principle that an Appellate Court will not disturb the findings of fact of a trial judge unless it is suggested that he has misdirected himself in law. (See Watt or Thomas v. Thomas. [1947] 1 ALL E.R. 582; Benmax v. Auston Motors Co. [1955] 1 ALL E.R. 326; Seynmour Wilson v. Musa Abess Civ. App. No.5/79 judgment dated 17 June 1981). I have also carefully looked at Exb "B" of Mr Kamal's affidavit which was the grounds of appeal before the Court of Appeal
They read:

1. That the judgment is against the weight of the evidence
2. That the Learned Trial Judge applied wrong principles in giving judgment for the Plaintiffs/Respondents
3. That the Learned Trial Judge applied wrong principles in granting the Plaintiffs/Respondents relief not sought in the statement of claim.

The first ground is the general ground. The other grounds complain of misdirections the details of which were not stated. It suffices to say nothing more about them but to continue with the present application.

In an application for an extension of time for appealing made to the English Court of Appeal, Griffiths L.J. opined that before the Court can allow such application;

> "All the relevant factors must be taken into account in deciding how to exercise the discretion to extend the time. Those factors include the length of delay, the reason for the delay, wether there is an arguable case on the appeal, and the degree of prejudice to the Defendant if the time is extended" (See Van Stillevoldt BV. V. El Carriers [1983] 1 ALL E.R. 699 at p. 704)

I adopt the view of Griffiths L.J. and I find it crucial to and apply it in this application to both the Applicants and the Respondents.

CONCLUSION

Counsel for the Respondents did not address the Court on the application and was indifferent rightly saying that it is left to the Court to exercise its discretion based on the application of the Applicants. At the end of his argument Counsel for the Applicants urged the Court to waive his non-compliance with the Rules in reliance on rule 103 which provides inter alia;

> "Non-compliance on the part of an Appellant with these Rules or with any rule of practice from the time being in force shall not prevent the further prosecution of the appeal, cause, matter or reference if the supreme Court considers that such non-compliance was not wilful and that it is in the interest of justice that such non-compliance be waived. The Court may in such manner as it thinks fit direct the Appellant or any party to an appeal, cause, matter or reference to remedy such non-compliance, and thereupon the appeal shall proceed".

I do not think that this Rule can be invoked in aid of the discrepancies which I have highlighted in this ruling. The application hinges on the contents of Rule 26(4) of the Rules the particulars of which have not been satisfied by the Applicants on points of law inside and outside the Rule. It is not a question of failing to comply with a procedural rule or particle which the Court can remedy by making an order to that effect.

I find that the application falls short of the provisions of Rule 26(4) and it is hereby dismissed. The cost of this application to the Respondents to be paid by the 1st Applicant assessed at Le50,000.

Misc. App. 6/96

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:-

KORA SESAY & ORS - APPELLANTS

AND

AJLIE M. KAMARA & ORS - RESPONDENTS

A.F. Serry-Kamal for Appellants

Renner Thomas & Co. for Respondents

Hon.Mr.Justice D.E.F. Luke - Chief Justice
Hon.Mr. Justice H.M. Joko-Smart - JSC
Hon.Mr. Justice N.D. Alhadi - JA

By a Notice of Motion dated the 31/7/96 the Applicants/Appellants applied for leave to appeal out of time and an enlargement of time within which to do so.

The judgment sought to appeal against was delivered on the 2/1/96 by the Court of Appeal. By Rule 26(1) of Supreme Court Rules 1982, where an appeal lies as of right the appellant shall lodge his notice of appeal within three months from the date of the judgment appealed against unless this court enlarges the time. It is clear from the application before us tha no appeal has been lodged within the stipulated time referred to above. It is this failure that has necitiated this application.

Rule 26(4) provides..... "No application for enlargement to 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 application for enlargement of time shall be by motion supported by an affidavit setting forth good and substantial 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 enlargement shall be annexed to the notice of appeal."

The first part of this sub-rule is not under consideration in this application before us, since this Notice of Motion has been filed within the one month fro the expiration of the time to appeal.

The whole issue now is what are the circumstances in which this court can exercise its discretion for an enlargement of time within which to file an appeal. The second part of the sub-rule requires that the affidavit in suppor must set forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted.

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The good and substantial reasons given for the application are those stated in the affidavit in support by Kora Sesay wherein she deposed that in June Abdul Sesay (which also I take to be the 2nd Appellant) fell ill and she took him to the provinces where he died. That she stayed on the provinces to await the 40th day Ceremony. That she did not inform her solicitor when she was leaving. That if Abdul Sesay had not died and the roads were safe she would not have stayed in the provinces for the length of period she took. That she was not expecting the judgment to be delivered at that time since the judgment had been reserved for over two years. This in my view is an indictment against the court for it is provided in Section 120(16) of the constitution following-....." Every Court established under this Constitution deliver its decision in writing not later than three months after the conclusion of the evidence and final addresses or arguments of appeal, and furnish all parties to the cause or matter determine with duly authenticated copies of the decision on the date of delivery thereof."

In my view the court should not readily refuse an application under this provision of the Rules other than good reasons for the delay not been disclosed in the supporting affidavit and or the ground or grounds of appeal do not disclose arguable issues. The fact that the only ground of appeal in this case is on the facts does not impunge its validity for consideration by this court. Otherwise a refusal on such ground would be interpreted as this court prejudging the issues to be argued on the appeal. There might be issues where it can be shown that the trial court did not take into account all the relevant facts or that the trial judge misapprehended the evidence or drawn an inference which there is no evidence to support it - See Lofthouse vs. Leicester Corporation (1948) 64 T.L.R. 604. Again it might be that the plaintiff, the respondent herein was unable to establish his claim with that degree of certainty that is required in a Civil Suit, that is with that preponderance of probability for him to succeed in his claim. In which case this court is bound to interfere with the finding of fact by the court.

The question of good reasons for not lodging the appeal within the stipulated time has to be considered not with reference to the length of time ipso facto but with reference to the circumstances of the case. The delay in this case is not unconnected with the then prevailing insecurity of the country in the provinces where the bulk of the population were held behind rebel lines and the non-availability of transportation to the capital

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city. The facts deposed to by Kojo Gessay in her affidavit, in my view are credible.

In conclusion I will say that as long as there are arguable issues disclosed on the Notice of Appeal, and sufficient and Relevant explanation given for the delay, a refusal to enlarge the time will manifestly prejudice the appellant's right to have his appeal adjudicated upon thereby cause manifest injustice to him.

In the light of all what I have said I will grant the application.

Hon. Justice M.D. Alhadi - J.A.