

IN THE SUPREME COURT OF SIERRA LEONE

SC. MISC. APP. 8/99

KORA SESAY

ABDUL SESAY

DURA CONTEH

- APPLICANTS

Vs.

ALLIE M. KAMARA

KONDA KAMARA

SANTIGIE KAMARA

- RESPONDENTS

CORAM:

HON. MR. JUSTICE D.E.F. LUKE

- C.J.

HON. MR. JUSTICE H.M. JOKO-SMART

- J.S.C.

HON. MR. JUSTICE S.C.E. WARNE

- J.S.C.

HON. MR. JUSTICE E.C. THOMPSON-DAVIS

- J.S.C.

HON. MR. JUSTICE M.E. TOLLA-THOMPSON

- J.A.

A.F. Serry-Kamal Esq., for Applicants

Dr. Ade Renner-Thomas for Respondents

R U L I N G

RULING DELIVERED ON THE 28TH DAY OF MARCH 2000

WARNE, JSC: This is an application by way of a motion for an enlargement of time within which to appeal to the Supreme Court pursuant to Rule 26(4) of the Rules of the Supreme Court PN. NO.1 of 1982 (hereafter referred to as the Rule)

This is a matter which has a long history. The application was first heard by a Court of three Justices of the Supreme Court. Submissions were made before that Court and the Court refused the application by a majority of two and there was a dissenting Ruling by one Justice.

Being dissatisfied, Counsel for the applicants renewed the application before the full court of five Justices pursuant to section 126(b) of the Constitution of Sierra Leone Act No.6 of 1991 (hereafter referred to as the Constitution). There were several adjournments at the instance of the applicants. On the 14th December 1999, the matter was struck out for want of prosecution of the action. On that date Counsel was absent without any reason given to the Court. Be that as it may, the first applicant, Kora Sesay, being present, was invited to prosecute the motion but indicated that he could not because he was unwell and cannot speak out for himself.

It is pertinent that I relate the proceedings before the Court of five Justices on the 14th December 1999. Among the Justices there was Mr. Justice N.D. Alhadi JA; who gave the dissenting Ruling in the Court of three Justices herein before mentioned.

These are the notes in the proceedings:-

"Serry-Kamal for the Applicant absent
 Dr. Ade Renner-Thomas for Respondent
 Kora Sesay applicant present informs
 court two of the applicants are dead.
 Kora Sesay applicant was invited by the
 Court to proceed with the motion, this
 he failed to do. The matter was therefore
 struck out. Costs awarded to Respondent
 assessed at Le100.,000."

In spite of this decision, Counsel for applicant renewed his application before the full court of five Justices.

On the 20th January, 2000 the matter came up before the full Court. Mr. Serry-Kamal for applicants was again absent, Kora Sesay 1st applicant was present. It is reported that two of the applicants were dead.

Dr. Ade Renner-Thomas, with him was Miss U. Kamara, ~~was~~ ^{was} present for the Respondents. At that hearing, Kora Sesay stated his lawyer was absent.

The Court indicated that it was minded to grant a further adjournment on condition the applicant pays the costs of Le100.,000 to be paid by the firm of Serry-Kamal and Co, Solicitors.

On the 9th February 2000 the matter came up again for hearing. Mr. Serry-Kamal for applicants was present and Dr. Ade Renner-Thomas for the Respondents was also present. There was a full blown hearing. Counsel on both sides made their submissions with conviction. I will later refer to the various submissions. The matter was adjourned to 15th February 2000. At the hearing on the 15th February 2000, Mr. Serry-Kamal was reminded that this application had been struck out on 14th December, 1999 for want of prosecution. On that same date Mr. Serry-Kamal submitted that section 126(b) of the Constitution gave him a right to ^a hearing, and argued that the Court is not properly constituted because the application is a review not an appeal.

The Court ruled that it is properly constituted and adjourned the matter to 17th February, 2000.

In spite of the fact that there is no provision in the Constitution and the Rules that when a Court of five Justices had struck out an application, the application can be heard again by a full court, the Court invoked its inherent jurisdiction to continue the hearing of the application in the interest of justice and furthermore that litigation must have an end.

Having said that, I will now consider the arguments put forward by both Counsel.

The motion filed is clear and unequivocal. It states, inter alia:

"an application on behalf of the aforesaid Kora Sesay for an order that the Order of this Honourable Court dated the 30th day of September 1999 be varied, discharged or reversed by a full court pursuant to Section 126(b) of the Constitution of Sierra Leone 1999 Act Number 6 of 1991 on the grounds that:....."

The grounds were numbered 1 - 5 inclusive. Counsel applied for leave to abandon grounds 1- 4 . Counsel for respondent did not object. The Court granted the leave accordingly, whereupon Counsel proceeded to argue ground 5 which reads "that the applicant Kora Sesay be granted an enlargement of time within which to file his appeal to the Supreme Court."

This application as I have stated is made pursuant to rule 26(4) of P.N. No.1 of 1982.

Rule 26(4) provides that:

"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 sought. 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 be granted. - (Emphasis mine) - when time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

The rule is clear and unequivocal. Counsel for the applicants proceeded with his submission and was granted leave to use a supplemental affidavit sworn on 29th December, 1999. Counsel further submitted that all the documents/exhibits filed are in support of the motion.

The documents/exhibits are the following:-

The affidavit of Kora Sesay the 1st applicant herein sworn to on 20th December 1999. Exhibit "A" is the Writ of Summons filed on 4th July, 1987. Exhibit "B" is the drawn up Order of the Court of Appeal dated 2nd April, 1996.

Exhibit "C" is the Notice of Motion to the Supreme Court for an enlargement of time in which to appeal to the Supreme Court dated 31st July, 1996.

Exhibit "D" is the Intended Notice of Appeal.

There is also a supplemental affidavit sworn to by Abdul Franklyn Serry-Kamal on ²⁹25th December 1999 and filed herein with certain exhibits in support of the affidavit.

Exhibit "A" is the Ruling of the Supreme Court delivered on the 30th September 1999 refusing the application for enlargement of time within which to appeal.

Dr. Renner-Thomas argued forcefully that the application should be refused.

He made the following submissions:-

"(1) That the oral application is a departure from the reliefs sought in the body of the motion. He submitted that the Court has power to vary, discharge or reverse order of the Court of three Justices. He argued that Mr. Serry-Kamal has not shown why the Order of the Court of three should be varied, discharged or reversed.

(2) Counsel submitted further that Mr. Serry-Kamal having abandoned Grounds 1 - 4 of the reliefs sought, what purports to be the ground 5 is not a ground.

Counsel submitted that he relies on the Ruling of Juko-Smart JSC. in the Ruling of the 30th September 1999 as regards the Locus Standi of the applicants. He added that the title states three applicants and in the body of the motion there is only one applicant and there is no evidence why the two other applicants are not applying and he referred to Rule 37 of the Rules of the Supreme Court. Counsel has referred to Paragraph 6 of Exhibit "D" that there are prospective appellants including the two dead ones. Counsel referred to

paragraph 9 of the affidavit of Kora Sesay where he deposed that that he is the owner of the Land.

- (3) Counsel further submitted that the said Paragraph 9 of the affidavit of Kora Sesay when juxtaposed with the prospective grounds of appeal in the Exhibit, there is not any good cause why leave should be granted. Counsel argued that Paragraph 9 disclosed a new cause of action and since there is no evidence that the Court of three Justices made an error the Court of five Justices ought not to depart from that Ruling, he concluded.

Mr. Serry-Kamal in reply, conceded that he ought to have amended his notice of motion. He thereby sought leave to make such an amendment, to which Dr. Renner-Thomas objected.

Mr. Serry-Kamal submitted that the application is not too late and will not embarrass the Respondents.

Rule 26(4) is clear and unequivocal as I have already stated. I have underlined the clauses that are relevant to the application. I will now consider the motion in the sequence in which it is presented and prosecuted. I will begin with the title. In the title, there are three applicants but the motion is made in the name of 1st Applicant, Kora Sesay. In the affidavit Kora Sesay deposed that Abdul Sesay and Dura Conteh the 2nd and 3rd applicants are dead. No steps have been taken to replace them in the application since their claim does not abate by death. It is not enough to make the application in the name of the surviving applicant vide Rule 37 of the Rules which provides the following:-

"An application for an Order for Rivivor or Substitution shall be accompanied by an affidavit sworn by the applicant (emphasis mine) or where the applicant is represented by 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."

I opine that Rule 37 is deliberately enacted to protect the estate or interest of a deceased person or one who has undergone a change of status.

Counsel for applicants has failed to invoke the provision of Rule 37 even though he was reminded of its existence by the Court.

Be that as it may, what the motion is seeking to achieve is an order that the Order of this Honourable Court dated the 30th day of September, 1999 by varied, discharged or reversed by the full Court pursuant to Section 126(b) of the Constitution.....

The words used in the motion are the same as those provided in Section 126(b) aforesaid, that is to say "varied, discharged or reversed."

In order to apply any of these terms, the grounds for the relief sought must be "good and substantial reasons." These good and substantial reasons must be set forth in the affidavit of the applicant.

What is the Order to be varied discharged or reversed?

This is contained in Exhibit "A" annexed to the affidavit of Abdul Franklyn Serry-Kamal sworn to on 29th December, 1999.

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

Having stated the Order of the Court of three Justices, I will consider the affidavit of Kora Sesay in its entirety. There are sixteen paragraphs in the affidavit.

In my view the several paragraphs do not set forth good and substantial reasons for the application to be considered favourably.

Perhaps it is necessary to reiterate paragraph 9 of the affidavit which deposed the following:-

"I am the fee simple owner of the property in dispute.
I vested parts of it to Abdul Sesay and Dura Conteh
both deceased....."

It must be stated that there is no counterclaim to the Writ of Summons which is Exhibited "A". In my view, this paragraph 9 raises a new cause of action, which does not help the Court to consider the credulity of the affidavit. However, the affidavit is evidence before this Court for what it is worth.

There is nothing in the Notice of Motion to indicate that the applicant is aggrieved with the order made by the Court of three Justices.

In order to invoke the provisions of Section 126(b) of the Constitution, the applicant ought to show that he is aggrieved by the order made by the

Court of three Justices and must give grounds for being so aggrieved.

Paragraph 5 of the grounds before the Court is of no moment.

It states:

"that the applicant Kora Sesay be granted an enlargement of time within which to file his Appeal to the Supreme Court."

In my view this is no ground on which to base the application.

This is only begging the issue.

Again In my view, the motion has no merit and as a matter of law the documents filed lack substance. I opine, that the whole conduct of the cause is dilatory.

In my opinion. This is one notice of motion that ought not to have been argued because the papers fall far short of what is required by Rule 26(4) of the Rules. The application is refused and the motion is dismissed with costs.

Costs assessed at \$250,000

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SYDNEY WARNE J.S.C.

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