Civ. App. 4/2007

BETWEEN: **IN THE SUPREME COURT OF SIERRA LEONE**

IBRAHIM A.H. BASMA - APPLICANT
AND
ADNAN YOUSSEF WANZA - RESPONDENT/
AND
BASSAM IBRAHIM BASMA - APPLICANT

AND
ADNAN YOUSSEF WANZA - RESPONDENT

CORAM: HON. MR. JUSTICE M.E.TOLLA THOMPSON, JSC(PRESIDING)
HON. MR. JUSTICE G. SEMEGA-JANNEH, JSC.
HON. MR. JUSTICE N.C. BROWNE-MARKE, JA.

Mr. S. Sesay for the Applicant
Mr. Yada H. Williams and Mr. O. Jalloh for the Respondent

RULING

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

My Lords the applicant by motion applies for the following Orders:

1. Leave to deposit title deeds pursuant to the Orders of the Court of Appeal dated 7th March 2008 and an extension of time within which to deposit same.

2. Applicant be allowed to file certified true copies thereof and in the alternative.

3. That this court grants a stay of execution of the Court of Appeal judgment dated the 7th day of March 2008 and all subsequent proceedings thereto pending the hearing and determination of the appellant appeal to the Supreme Court.

4. Such further or other Order as the Court shall deem fit.

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The application for the above orders is supported by the affidavit of Bassam Ibrahim Basma:- the application sworn to on the 27th October 2008 with several Exhibits annexed.

BACKGROUND

A short history of this case as far as it is relevant to this application is that on the 24th May 2007 the Court of Appeal gave judgment for the respondent and sometime thereafter the appellant moved the Court of Appeal for a stay of execution of the judgment. The stay of execution was granted in the following terms:

> *"The stay of execution of the judgment of the Court of Appeal dated 24th May 2007 is granted. It is further ordered that because of the special circumstances of this matter the applicant/respondent deposit the title Deeds to the properties listed in the affidavit of Ibrahim Abdul Hussen Basma sworn to on 21st June 2007 to the Registrar of the Court of Appeal until final determination of the appeal. The title deed to be deposited within 30 days of this Order."*

It is the non compliance of the above order which has precipitated this application to this Court.

THE ARGUMENT

When the motion came up for hearing Mr. Williams learned counsel for the respondent raised the issue of the courts jurisdiction to entertain the Motion in view of rule 60(2) of the Supreme Court Rules. We overruled his objection and allowed learned counsel for the applicant Mr. Sesay to move his Motion. In moving the motion Mr. Sesay referred us to the affidavit in support of the motion and the various exhibits annexed thereto and submitted that he relied on the affidavits in its entirety.

He also referred us to rule 34 of the Supreme Court Rules and submitted that he is invoking the said rule to support his application. He urged the court to grant the application, and submitted that if the application is not granted, it will render the appeal which is now before the Supreme Court nugatory. It will be of little value. Mr. Williams in reply said that he does not wish to go into the merit of the application, but to repeat and rely on his earlier submission, that the court lacks jurisdiction to entertain the application, he said that there is no basis in law for the application. An application for stay can only be made pursuant to rule 60(2) of the Supreme Court Rules.

Continuing he submitted that it is quite clear that a stay of execution was granted by the Court of Appeal and therefore an application for a stay in the Supreme Court can only be made, after a refusal by the Court of Appeal. Therefore he argued the court is not competent to grant the application. In support of this submission, he cites the Supreme Court case Aiah Momoh v Sahr Samuel Nyandemore Civ.App.6/2006 unreported: in particular the dictum of Rhodes Vivour JSC.

Also submitted that the court is not competent to grant the 1st and 2nd Orders.

Finally he said if there is a failure to comply with the terms of the stay the applicants should apply to the Court of Appeal.

Presumably the lack of jurisdiction raised here by Mr. Williams relates to the absence, of the practice and procedure adopted by the applicant, and not one which relates to the status of the application. In order words this court has no power to grant the orders prayed for, because the applicant has not followed the practice and procedure laid down by the rules, to bring such a matter before the Supreme Court.

Mr. Williams refers to rule 60(2) of the Supreme Court Rules – r.60 (2) states:

> *subject to the provision of these Rules and to any other enactment governing the same an application for stay of execution or proceedings shall first be made to the Court of Appeal and if that court refuses to grant the application the applicant shall be entitled to renew the application to the Supreme Court for determination.*

This rule is identical to rule 64 of the Court of Appeal rules which is also a procedural rule.

PROCEDURAL RULE

The Court of Appeal granted a stay of execution of the judgment on terms, which, obviously the applicant was unable to fulfill and misguidedly came to this court asking for a variation of the terms of the stay or a stay of execution of the judgment by this court; presumably with modify condition.

It is the usual practice that in seeking a variation of any order, the application must first be made to the court which granted the original order, in this instant the Court of Appeal, if the application fails, then to a higher court – Supreme Court.

In the case of an application for a stay of execution of a judgment, in the Supreme Court, such application is made pursuant to rule 60 (2) of the Supreme Court Rules, supra. It is a procedural rule which illustrates the manner in which proceedings for a stay of execution of a judgment under the rule should be conducted. Thus the applicant must first apply to the Court of Appeal and if refused the applicant "*shall be entitled to renew the application*" to this court.

When I perused the application, my initial thought was that the applicant is desperate, and eager to fulfill the condition of the stay, not because he was keen to prosecute the appeal but merely to forestall the writ of fifa and prevent the sale of the applicant's property.

JURISDICTION

Mr. Williams sole ground of objection to the application is the courts lack of jurisdiction to entertain the application, and if the objection is upheld it is enough to put an end to the application.

I agree with Mr. Williams, this court cannot entertain this application as it is. However this is not always the case. There is a settled principle of law that a court ought not to decline jurisdiction if it can assume discretionary powers which will not amount to a violation or usurpation of the courts jurisdiction. Such power is usually described as an adjunct or incidental to the courts jurisdiction under which it operates. I am persuaded by the above principle, and it is worth considering in this application.

During the argument and submission certain issues emerged which though unconnected with the application proper, are germane and incidental to it, which, in my considered opinion, this court ought to deal with under its discretionary powers.

It is a known fact that the substantive appeal is before the Supreme Court. Indeed the Supreme Court, sometime ago granted an order for substitution of the deceased appellant by the applicant herein.

Again, it is well known that there are legal moves by the respondent for the sale of the properties of the applicant to satisfy the judgment debt. It is my view that any sale of the properties, when the Supreme Court is already seised of the appeal will destroy the substratum of the appeal and render it nugatory.

Therefore, in my judgment, I shall rely on the principle that *"there must be an end to litigation"* coupled with the axiom that *"procedural rules are intended to serve as hand maiden of justice and not to defeat it,"* and invoke the court's discretionary power to waive the strict application of the rules, in order to ensure that the parties herein have a fair opportunity to argue their respective case in the Supreme Court.

CONCLUSION

In all the circumstances I think this is a case in which the respondent can be adequately compensated with cost, for the tardiness on the part of the applicant. Accordingly I order that the appeal in the Supreme Court be heard, within 4 weeks from today 11/12/08. In the meantime the sale of the applicant's property by both parties is put on hold, subject to further orders of the court.

I assess cost at to the respondent.

M. E. Thompson

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Hon. Justice M. E. Tolla Thompson, JSC. (Presiding)

G. Semega-Janneh

.....I agree

Hon. Justice G. Semega-Janneh, JSC

.....I agree

Hon. Justice N. C. Browne-Marke, J.A.

CERTIFIED TRUE COPY

REGISTRAR

(SUPREME COURT)