

S.C. CIV. APP. NO. 2/2011

IN THE SUPREME COURT OF SIERRA LEONE

(CIVIL JURISDICTION)

FRIDAY 25TH MAY, 2012

CORAM:

HON. JUSTICE S. BASII-TAQI - JSC

HON. JUSTICE P.O. HAMILTON - JSC

HON. JUSTICE M.E.T. THOMPSON - JSC

BETWEEN:

THE SIERRA LEONE PEOPLES PARTY
& 2 OTHERS - APPELLANTS/APPLICANTS

AND

DR. CHRISTIANA THORPE
CHIEF ELECTORAL COMMISSIONER
& ANOTHER - RESPONDENTS

DR. BU-BUAKIE JABBIE FOR APPLICANTS

MR. L. M. FARMAH FOR RESPONDENTS

RULING DELIVERED ON 25TH MAY 2012
HON. JUSTICE TOLLA THOMPSON, JSC.

My Lords,

This is an application for an Order for leave for an enlargement of time within which to serve a copy of the Notice of Civil Appeal S.C. Civ. No. 2/2011 on each of the respondents herein (2) Any or other relief or Orders this Honourable Court may deem fit, (3) Cost of this application to be cost in the course.

FACTS

On the 2nd May 2011 pursuant to Sec. 126 of the Constitution this panel of Justices of the Supreme Court granted, leave for an enlargement of time within which to appeal to the Supreme Court from a decision of the Court of Appeal in the action entitled - The Sierra Leone Peoples Party and others Appellant vs. Dr. Christiana Thorpe, Chief Electoral Commissioner and others – Respondents.

The Notice of Appeal was filed at the Supreme Court Registry on the 3rd May 2011. The copy of the said Notice of Appeal was not served on the respondents. As a result of this lapse the applicants came to the Supreme Court on 17th November 2011 seeking the Orders referred to above.

THE RULES

The Supreme Court Rules which are pertinent to this application are rules 5(1) 35 (1) and 103.

Rule 5(1) states:

“All appeals from the Court of Appeal to the Supreme Court and any application to the Supreme Court shall be governed by the rules and any other rule relating thereto.”

This rule merely means that all appeals from the Court of Appeal and application should fall within the four corners of the Supreme Court rule or any other rule akin to it.

Rule 35 (1) states:

“Every appellant shall within seven days after lodging his Notice of Appeal or within such time as the Supreme Court may order serve a copy thereof on the respondent.....or on each respondent.....and shall before service endorse such

copies with a certificate of the date of the lodgment of the Notice of Appeal."

Loosely put, the above rule operates in conjunction or almost simultaneously with the filing of the Notice of Appeal. It is incumbent on the applicant to file and serve the Notice of Appeal on the respondent. In my opinion service of the Notice of Appeal is a matter of substance not of form. There must be effective service before the appeal is heard.

The above rule also specified the time within which to serve. Such time appears to me to be mandatory and obligatory i.e. the existence of a compelling duty to serve the Notice of Appeal on the respondent within a specific time frame. However in my view reasonable time after seven days time frame will suffice. What is reasonable will depend on the circumstances of the particular case. To this end the applicant has taken refuge from rule 103 of the Supreme Court rule applying for leave to comply with rule 35 (1) i.e. serving copies of the Notice of Appeal on the respondent.

Rule 103 states:

"Non compliance on the part of an appellant within this rule or with any rule of practice for the time being in force shall not prevent the further prosecution of the appeal cause or matter or reference of the Supreme Court considers that such non compliance was not willful 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 or matter or reference to remedy such non compliance and there on the appeal shall proceed."

This rule in my view contains a rather complicated phraseology which can be simplified and described as a rule of procedure which makes allowance for any lapse by an appellant and or applicant of the Supreme Court rules. It

enables the applicant to comply with the relevant provision of the rule; subject to any male fides on the part of the applicant.

The application before us calls for the exercise of the court discretion, I mean judicial discretion. There is no binding precedent for its exercise, and each case must turn on its own fact and dealt with on its merit. The Judge or court must make orders, give decisions without being obligated to follow precedent or rule established by Statute.

In my view the characteristics of such exercise is that it must be just, fair, equitable, and reasonable in the circumstances see Yahaya Karisa v. Attorney General and M.K. Rodia No. 7 1994 H.B. P. 29, a Ugandan case on this point. The court will also do so if it exercises its discretion in the interest, of the proper administration of justice. However the applicant will not benefit from the discretion of the court if the non compliance was willful, which will be discerned from the evidence presented, in support of the application, and the prevailing circumstances responsible for the lapse.

ARGUMENT

Dr. Jabbie learned counsel for the applicant submitted that by this application the applicant is seeking the discretionary power of the court since he has not complied with the seven days provision of the rule. He submitted further that the willfulness in rule 103 is incompatible with justice. To support his application he refers to Paragraph 3 - 7 of his affidavit in support of the application and submitted that the matters deposed to are beyond the control of the applicant. The engagement with the conference and the circumstances were more or less forced on the applicant as far back as February to early November 2011. It makes it extremely difficult to comply with the process. The factors only subsided in early November 2011. He refers to paragraph of

his affidavit and submitted that the action is not only important to Sierra Leone Peoples Party but to Sierra Leone.

Mr. Farmah learned counsel for the respondent opposed the application and submitted that the applicant has not shown good and sufficient reason why the court should exercise its discretion. They have not complied with rule 35(1) after the lodgment of the appeal. He further submitted that the court can only use its discretion provided there is a good reason for doing so in the affidavit. He submitted that rule 103 leans against an applicant who is willful and has deliberately not complied with the rule of the Supreme Court.

Finally Mr. Farmah submitted that the exercise of the court discretion is based on the justice of the case. He urged the court to refuse the application.

Dr Jabbie in reply submitted that the willfulness is deliberate and does not exclude consciousness. As to time, he said the court has a wide discretion not restricted to time. Finally he said what is contained in paragraph 4 is not willful. It is a compelling nature and does not amount to willfulness.

THE ISSUE

Simply and effectively put, the gravamen of this application is the exercise of the court discretion to grant the order sought having failed to comply with rule 35 (1).

I seem to remember that it was this same court which granted the applicant leave to file the Notice of Appeal with regard to the substantive matter after the applicant had failed to comply with rule 26 (1) of the Supreme Court rule

In this application before me the applicant rely on the affidavit of Dr. Jabbie who incidentally doubles as counsel representing the applicant. His affidavit proffered the non compliance with rule 35 (1). I shall now examine

the reason. The reason in the main is contained in paragraph 4 of the affidavit.

It states:

The appellants/applicants were deeply and simultaneously played in a sustained series of high level of constitutional litigation national party conference preparation nation wide executive and presidential flag bearer electoral exercises and a running mate selection which in all stretched over some nine months from end of February 2011 to early November 2011. That it was considered highly advisable for the Sierra Leone Peoples Party as a whole to completely resolve these transitional processes before ~~engaging in full scale and momentous politico constitutional~~ impart as that in the aforesaid Notice of Civil Appeal S.C. Civ. App. No. 2/2011. That it was only on the 11th November 2011 that the climax event in the series the running mate selection was finally affected or executed."

My immediate reaction to the application is that it is stale. It is about seven months out of time. Indeed from the content of paragraph 4 the applicant virtually conceded that he was responsible for the delay of the application.

It should also be borne in mind that by the order of this court of the 2nd May 2011, the applicant was given an opportunity to file and serve, with due diligence and responsibility the Notice of Appeal as the court was aware that the action, to quote from Dr. Jabbie's submission "was not only important to the Sierra Leone Peoples Party but to Sierra Leone as a whole" and yet this application only came before us on the 17th November 2011.

Dr. Jabbie in his submission urged the court to grant the application as the appeal is so important to Sierra Leone as a whole....." emphasis mine. While I agree with Dr. Jabbie on this point I would nevertheless counter~~ed~~ by saying, it is all the more reason why the applicant should have acted promptly and serves immediately after filing the Notice of Appeal. The service of the copies was stalled for about seven months and during this period the applicant was involved with activities described in paragraph 4 one of such matters was a constitutional litigation which as counsel for the applicant was personally involved as plaintiff. The applicant was the defendant. It seems to me they were content to put the present matter on hold or shift it to the back burner while they carried on with the constitutional litigation.

It is obvious that the applicant and/or Dr. Jabbie knew that the matter was in court when they embarked on the activities deposed to in paragraph 4. In any case I cannot fathom how the matters deposed to in paragraph 4 should prevent the applicant from complying with rule 35 (1) having already filed the Notice of Appeal the day after leave was granted. I dare say it is normal practice in our court particularly the Supreme Court that the filing of the Notice of Appeal and service thereof go hand in hand.

In my judgment I do not think that compliance with rule 35 (1) of the Supreme Court Rules will in any way affect or obstruct the matters deposed to by the applicant in paragraph 4 of the affidavit at all, It is merely service of a process; i.e. copies of the Notice of Appeal on the respondent which as a matter of fact is unconnected with the matters described in paragraph 4. With respect I think the applicant went too far in saying that the contents of paragraph 4 prevented him from service of the copies within time.

It is plain enough that the applicant failed to comply with rule 35 (1) he should now regard himself as being at the discretion and mercy of the court. The application can no longer be granted as of right.

Having considered the circumstances and evidence in this matter it is clear to me that the delay in coming earlier or within time or reasonable time is deliberate and it is caused by the applicant and his counsel. I have therefore come to the conclusion that this case is one where the discretion of the court ought not to be exercise in favour of the applicant.

In the result the application is refused. Notwithstanding the refusal, this application being a novel application in this court, the applicant is at liberty to apply to the full court.

I AGREE.....
HON. JUSTICE S. BASH-TAQI - JSC

I AGREE.....
HON. JUSTICE P.O. HAMILTON - JSC

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HON. JUSTICE M.E.T. THOMPSON - JSC