

S. C. CIV. APP NO. 1/2012

IN THE SUPREME OF SIERRA LEONE

(CIVIL JURISDICTION)

CORAM:

HON. MRS JUSTICE S. BASH-TAQI-JSC

HON.MR. JUSTICE P. O.HAMILTON-JSC

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

BETWEEN:

OKEKEY FISHING COMPANY LTD - APPELLANTS/APPLICANTS

AND

HAMID MOJOE KAMARA - RESPONDENT

BARRISTERS

C. F. EDWARDS, ESQ., FOR THE APPELLANTS/APPLICANTS

E. A. HALLOWAY ESQ. FOR THE RESPONDENT

RULING DELIVERED ON THE 27th DAY OF September, 2012

HON. JUSTICE S. BASH-TAQI, JSC

This is an application by the Appellants/Applicants by Motion dated 3rd May 2012 for: - (1) an Order for extension of time within which to serve a copy of the Notice of Appeal in this action on the Respondent and to file the Certificate of Service out of time pursuant to Rule 35 (1) and (2) of the Supreme Court Rules (Constitutional Instrument No.1 of 1982); (2) Any further or other orders that the Court may deem just and (3) Cost of this application to be borne by the Appellants/Applicants.

The application is supported by the Affidavit of Chrispin Fieo Edwards sworn on the 3rd day of May 2012 together with the exhibits attached thereto which are

namely: - Exhibit "CFE 1" the Notice of Appeal, and Exhibit "CFE 2", the letter dated 16th April 2012 from the Registrar of the Supreme Court to C. F. Edwards of Counsel for the Appellants informing him of his failure to comply with Rules 35 (1) and (2) of the Supreme Court Rules.

In addition to the Affidavit in Support above, Mr. C. F. Edwards filed two supplemental Affidavits, one sworn to on 11th June 2012 annexed to which is a Medical Certificate marked Exhibit "CFE 3" relating to Counsel's personal health problems which he alleged accounted for his failure to file and serve the Notice of Appeal in accordance with the Rules of the Supreme Court (See Paragraph 5 of the Affidavit in Support). The second Supplemental Affidavit also sworn to by C. F. Edwards on the 21st day of June 2012 also exhibited a medical Certificate marked "CFE 4", evidencing his Client's medical health. Mr. Edwards applied for leave to use the two Supplemental Affidavits in further support of his application. As Counsel for the Respondent had no objection to the application, this Court granted the Appellant/Applicants the leave sought.

FACTS

On the 22nd day of February 2011 the Court of Appeal dismissed the Appellant/Applicants' appeal. The Applicants thereafter filed a Notice of Appeal to this Court dated 13th February 2012 against the said Judgment. The copy of the Notice of Appeal was not served on the Respondent. Counsel for the Appellants/Applicants alleged that he fell ill after filling the Notice of Appeal and was admitted into Hospital. He produced the Medical Certificate, (Exhibit CFE 3), evidencing his state of health at the time. As a result of this lapse, the Respondent was not served with the Copy Notice of Appeal and consequently, the Certificate of Service of the copy Notice of Appeal was not filed resulting in an infringement of Rules 35(1) and 35(2) of the Rules of the Supreme Court. Apart from his personal indisposition, Mr. Edwards deposed in his second Supplemental Affidavit of 21st June 2012, that his client had been seriously ill and had gone to Accra Ghana for medical treatment. She had been unable to travel after surgery and has only just returned. As a result of her absence he encountered some difficulties in obtaining instructions from her in the matter.

He therefore submitted that the failure to serve the Copy of the Notice of Appeal on the Respondent and to file the necessary Certificate of Service was not wilful. He further submitted that the grounds of Appeal are prima facie good grounds of appeal and in the interest of Justice, this Court should grant him an extension of time within which to serve a Copy of the Notice of Appeal on the Respondent and to file the Certificate of Service pursuant to Rules 35(1) & 35(2) of the Supreme Court Rules 1982. He submitted that he was making the application pursuant to Rule 103 of the Supreme Court Rules. The present application was filed as I have already stated on 3rd May 2012 seeking the Orders I have quoted above.

Mr. Halloway did not file an Affidavit in Opposition but opposed the application orally in Court before us. He submitted that this being a simple matter of non-compliance with Rule 35(1), Counsel for the Applicant should not seek refuge under Rule 103; that service of a copy of the Notice of Appeal on the Respondent should not have taken several months to do, since filing and service are procedural issues. He submitted therefore that the reasons given by the Counsel for failure to serve the copy of the Notice of Appeal are not good reasons for granting an enlargement of time; further that Exhibits CFE "3" and CFE "4" have no merits in relation to Rule 35; in other words, he said that Counsel for the Applicant was not admitted into hospital but was at home, in short the application does not qualify under Rule 103. He relied on the previous Ruling of this Court in the matter **S.C. Civ. App. No. 2/2012** in the matter of: - **Sierra Leone Peoples Party vs. Dr. Christiana Thorpe and others (unreported)** delivered on 25th May 2012 and also the case of: - **Civ. App. 4/2006** between **Okekey Fishing Co. Ltd vs. Hamid Mojo Kamara, (Court of Appeal decision) (unreported)**.

Rule 35(1) of the Supreme Court Rules Constitutional Instrument No. 1 of 1982 provides:

'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.....and shall before service endorse such copy with a certificate of the date of the lodgement of the Notice of Appeal.'

From the wording of the above provision, it is mandatory and obligatory on the applicant to file and serve the copy of the Notice of Appeal on the Respondent within the time specified by the rules, and the time specified by the Rule 35 is seven (7) days after lodging the Notice of Appeal. It follows therefore that there must be effective service of the Notice of Appeal before the appeal is heard.

The above rule also provides that service of the Notice of Appeal could also be effected within such other time as the Supreme Court may order, giving the Court a discretion to extend the time, presumably, if such service is not or cannot be done with the seven days specified by the Rules, in which case, in my view, a reasonable time after the specified time stated in the Rules will suffice for such service to be effected on the Respondent.

It is because of this failure to comply with the specified time frame that the Appellant/Applicants herein have invoked the provisions of Rules 103 of the Supreme Court Rules i.e. by applying for leave of this Court to comply with Rule 35(1).

Rule 103 provides as follows:

'Non-compliance on the part of an appellant with 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 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 or matter or reference, to remedy such non-compliance and thereupon the appeal shall proceed.....'

The above rule enables an Applicant/Appellant to comply with the relevant provisions and, as stated earlier, calls for the exercise of the court's discretion in this regard in the interest of the proper administration of justice. The Rule, it seems, will only apply if the non-compliance is not wilful, and if the waiver is in the interest of justice. Evidence that a non compliance is not wilful will be discerned from the facts supporting the application and the circumstances responsible for the lapse. In this present application, the reasons given for the non-compliance are contained in the Affidavit in Support of the application.

Mr. Edwards, for the Appellants/Applicants, has deposed in his supporting Affidavit that he was taken ill and was hospitalised immediately after filing his Notice of Appeal. He produced a Medical Report as proof of his medical condition at the time. Moreover, he deposed that his client was also out of the jurisdiction for medical reasons and was not available to give him further instructions on the matter. He exhibited a medical certificate Exh. "CFE4" from his client's doctor in Ghana the contents of which speak for themselves. There is no evidence to contradict these assertions. These circumstances made it extremely difficult for him to comply with the required provisions of the Rules. He relied on the contents of his three Affidavits and submitted that the lapse was not wilful.

Mr. Halloway, as I have already stated, opposed the application calling in aid a previous decision of this Court in the matter of **Sierra Leone Peoples Party & 2 others vs. Dr. Christiana Thorpe and other**, supra. He submitted that the application and the reasons proffered have not merits and this Court should dismiss it with costs.

It is obvious that the circumstances of this application are different from those in the case of **The Sierra Leone Peoples Party vs. Dr. Christiana Thorpe & Others**, supra. In that case the reasons given by the applicants' Counsel was that he was responsible for the delay in serving the Notice of Appeal, in that he and his clients "**were deeply and simultaneously engaged in sustained series of high level constitutional litigation, national party conference, preparation, nationwide executive and presidential flag bearer electoral exercise and running mate selection which stretched over some nine months.....**"

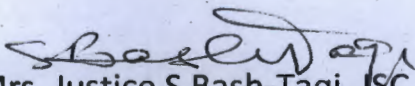
This Court found that service of the Notice of Appeal on the Respondents in that case was stalled for over seven months during which period the applicants therein and their Counsel were involved in activities pertaining to their political party; furthermore, the Court found that Counsel for the Applicants was also involved in constitutional litigation in which he was personally involved as Plaintiff. This Court was of the view that the Applicants in that case were content to put their appeal on hold while they carried on with their constitutional litigation, since they were very much aware that they had a matter in Court when they embarked on their political activities. Taking the above circumstances of that case, this Court found that compliance with 35(1)

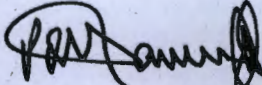
of the Supreme Court Rules would not in any way have prevented, affected or obstructed the applicants' political activities. The Court therefore held that the delay in serving the Notice of Appeal earlier or within a reasonable time, was deliberate and wilful having been caused by the Applicants and their Counsel and therefore refused to exercise its discretion in their favour.

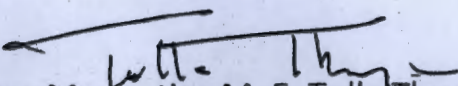
In the instant application, it is our view that taking the circumstances deposed to in the Affidavits sworn to and filed in support of the Appellants/Applicants herein, failure to comply with the provisions of Rule 35(1) was not wilful or deliberate.

In the result the application is hereby granted, and we make the following Orders: -

1. The Appellants/Applicants are hereby granted an extension of time within which to serve a copy of the Notice of Appeal on the Respondent and to file the Certificate of Service out of time.
2. Such service of the Notice of appeal is to be effected within four (4) days of this Order;
3. The Certificate of Service is to be filed within three days of Service of the Notice of Appeal on the Respondent.
4. The Appellants/Applicants are to pay the costs of this application such costs to be taxed if not agreed.


Hon. Mrs. Justice S Bash-Taqi, JSC


Hon. Mr. Justice P. O. Hamilton, JSC


Hon. Mr. Justice M. E. Tolla Thompson, JSC