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CIV. APP. 9/2012

IN THE SUPREME COURT OF SIERRA LEONE
(CIVIL DIVISION)

BETWEEN:

OSMAN SULAIMAN MANSARAY - APPELLANT

AND

ALICE FATMATA KENNY - RESPONDENTS
ISATU BANGURA
ELIZABETH BANGURA

CORAM:

HON. JUSTICE U.H. TEJAN-JALLOH	–	CJ
HON. JUSTICE V.V. THOMAS	–	JSC
HON. JUSTICE V.A.D. WRIGHT	–	JSC
HON. JUSTICE E.E. ROBERTS	–	JA
HON. JUSTICE N.F. MATTURI-JONES	–	JA

COUNSEL:

S.M. SESAY ESQ. for the Appellant

M.P. FOFANAH ESQ. for the Respondents

JUDGMENT DELIVERED ON THE 15th DAY OF MAY, 2014

This is an appeal from the judgment of the Court of Appeal dated 8th July, 2009, allowing the appeal against the Ruling of the High Court (Hon. Mr. Justice L.B.O. Nylander) dated the 26th May, 2007. This appeal came up before the Court on the 16th December, 2013 when Counsel on both sides stated that they were relying on the case that they have respectively filed for the parties herein and that they have nothing further to say by way of arguments before the Court. The Court ordered that the appeal succeeds, that the reasons for that decision will be given later and that notices will be sent to the parties.

Certified true and correct copy of the original

SUPREME COURT SIGN DATE SIERRA LEONE

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BACKGROUND

Two appeals were filed in the Court of appeal in respect of the dispute between the parties herein with regard to property situated at By-Pass Road, Granville Brook, Kissy in Freetown following the High Court Judgment dated 11th July, 2002 of the late Mr. Justice L.B.O. Nylander (the Trial Judge). The action was instituted by the Respondents as Plaintiffs against the Appellant as Defendant. The drawn up judgment states in its opening paragraph that the judgment was delivered in circumstances where the Defendant was "absent and unrepresented throughout the trial". Subsequent to the said Judgment, appearance was entered for the Appellant on the 18th July, 2002 and a motion was filed on his behalf supported by an affidavit which averred that he was never served with the writ of summons in the action and only came to know of the action against him when a copy of the Judgment was served on him. Unfortunately from that stage, the Solicitors and Counsel who represented him did not pursue his case in a timely manner. The said motion that was filed on his behalf to set aside the default judgment was struck out on the 17th January, 2003 for want of prosecution as the Solicitor and Counsel who originally represented him, the Appellant, in the High Court withdrew his representation. The records do not indicate whether any notice of this fact was sent to the Appellant. On an application dated the 20th October, 2003, the Appellant by his new Solicitor applied for an extension of time within which to file an appeal in the Court of Appeal against the said judgment dated the 11th July, 2002 and for leave to file that appeal. The application was heard by the Trial Judge who granted the said orders on the 26th May, 2004. It is this Order of the High Court granting extension of time and leave to appeal which is the basis for the two appeals that were filed in the Court of Appeal numbered Civ. App. 18/2004 and Civ. App. 19/2004 respectively. In the appeal numbered Civ. App. 18/2004, the Respondents

who were the Appellants contend that the Trial Judge acted on wrong principles of law in granting an extension of time within which to appeal the High Court Judgment of 11th July, 2002 and prayed for the Order of the 26th May, 2004 to be set aside. In the appeal numbered Civ. App. 19/2004, the Appellant herein, relying on the Order of the 26th May, 2004, appealed the judgment of the Trial Judge of the 18th July, 2002, contending that he failed to properly evaluate the evidence that was before him and prayed for his judgment to be set aside and a retrial ordered.

It is against the aforesaid background that the appeal numbered Civ. App. 18/2004 was heard by the Court of Appeal which allowed the appeal of the Respondent herein and adjudged that Civ. App. 19/2004 would not have been filed "if the Order granting the extension of time to appeal was refused". Consequently the Court did not hear the latter appeal. The grounds of appeal in this Court challenging that decision are as follows:

1. *The Learned Justices of Appeal acted on wrong principles of Law in holding that the High Court had no jurisdiction in granting leave to the Appellant to appeal against the Judgment of the Honourable Mr. Justice L.B.O. Nylander, Judge dated 11th July, 2002 by the Order of 26th May, 2004.*

2. *That the Learned Justices of Appeal misdirected themselves in holding that the leave granted to the Appellant by the High Court on the 26th May, 2004 renders nugatory a mandatory rule of the Court of Appeal 1985 (Public Notice No.29 of 1985).*

PARTICULARS OF MISDIRECTION

"The High Court is only empowered to grant leave within the statutory time period allowed for Appeals. Both the Application for leave to Appeal and the granting of leave must be within the statutory period but not otherwise. Now there can be no question that when time to appeal has been fixed by statute and leave to appeal is required the intending Appellant ought to file his appeal within such a period fixed, unless of course he obtains an appropriate order for an extension of time at the proper forum".

3. *That the 3rd Justice of Appeal did not sign the Judgment of the Court of Appeal of 8th July, 2009 as required by Law and or Practice of the Court of Appeal.*

4. *That the Learned 2 (two) Justices of Appeal erred in Law in holding that the ruling of the High Court dated 26th May, 2004 granting the Respondent/Appellant leave to appeal out of time is a nullity and is given without jurisdiction.*

PARTICULARS OF ERROR

"Where for any reasons a person is desirous to appeal to the Court of Appeal runs out of the statutory period of doing so, only the Court of Appeal can extend the time and grant leave to do so. The High Court is only empowered to grant leave to appeal within the statutory period allowed for appealing and no more".

5. *That the judgment is against the weight of the evidence.*

Two of the reliefs prayed for by the Appellant are firstly, an order that the default judgment dated 11th July, 2002 be set aside and the matter remitted to the High Court for a full trial; and secondly, an order to allow the Defendant to file his Defence to the Respondents' claim.

ISSUES

1. The central issue that was before the Court of Appeal was whether the Order of the Trial Judge dated 26th May, 2004 granting extension of time within which to appeal and leave to appeal was sound in Law. It was about 15 (Fifteen) months between the date of the Judgment (11th July, 2002) and that of the application (28th October, 2003) for extension of time and leave to appeal. In my judgment, although the judgment of the 11th July, 2002 was a final judgment which did not require leave to appeal, yet the orders made by the Trial Judge were made ex parte and thus fall under the proviso to Section 56(1) of the Courts Act, Act No:31 of 1965. This section provides in part as follows:

> *"56(1) Subject to the provisions of this section, an appeal shall lie to the Court of Appeal –*
>
> *(a) from any final judgment, order or other decision of the High Court given or made in the exercise of its original, prerogative or supervisory jurisdiction in any suit or matter; and*
>
> *(b) by leave of the Judge making the order or of the Court of Appeal from any interlocutory judgment, order or other decision, given or made in the exercise of any other jurisdiction as aforesaid:*
>
> *Provided that no appeal shall lie, except by leave of the Court or Judge making the order or of the Court of Appeal –*

(i) *from an order made ex-parte; or*

(ii) *from an order as to costs only: or*

....."

It is to the *Court of Appeal Rules of 1985* that one must go in order to determine whether there are time limits for appealing judgments and decisions of the High Court. In this regard, *Rule 11 of the Court of Appeal Rules, 1985(Public Notice No.29 of 1985)* provides in part as follows:

> *"11. (1) No appeal shall be brought after expiration of fourteen days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final judgment unless the Court enlarges the time.*
>
> *(2) The prescribed period for appeal shall be calculated from the date of the decision appealed against.*
>
> *(3) An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court.*
>
> *(4) Any application for enlargement of time within which an appeal may be brought shall be supported by an affidavit setting forth good and sufficient reasons for the application and by grounds of appeal which prima facie show good cause for the enlargement of time to be granted".*

Clearly an application for extension of time within which to appeal to the Court of Appeal made to the Trial Judge 15 months after the decision to appeal was both out of time and made in the wrong forum. It is the Court of Appeal which has jurisdiction to enlarge the time as provided for in Rule 11(1) of the Court of Appeal Rules 1985. In my judgment therefore the Court of Appeal was right when it held that "only the Court of Appeal can extend the time and grant leave to do so. The High Court is only empowered to grant leave to appeal within the statutory period allowed for appealing and no more". While leave to appeal the decision of the Trial Judge was necessary in view of the fact that the orders in the judgment were made *ex parte*, the High Court had no jurisdiction to entertain an application

to grant such leave when the time within which to appeal such decision had expired. Again the decision of the Court of Appeal on this point was correct.

2. The Appellant has complained that the Court of Appeal judgment was signed by two justices although the appeal was heard by the full panel of the three justices. The records do not indicate why this was so, but it is clear that the justices who signed the judgment were in the majority of the full panel of three justices which heard the appeal. Even assuming that the other justice did not agree with that majority decision, it is still a valid decision of the Court. In these circumstances there is no merit in ground 3 of the Notice of Appeal. It would have been a different matter if the Court which heard the appeal was only made up of 2 justices and not a full panel of 3 justices.

3. Notwithstanding that the decision of the Court of Appeal is the right one in view of the appeal that was before that Court, it is pertinent to determine whether the Appellant is entitled to any relief in the light of the circumstances of the particular case. The relevant factors to consider are as follows:

(a) There is no evidence that the Appellant was served with the writ of summons before the default judgment dated the 11th July, 2002 was delivered by the Trial Judge. In these circumstances, the judgment ought to have been set aside *ex debito justicia.*

(b) In his application to set aside the judgment which was struck out when his counsel withdrew his representation, the Appellant averred that he had a good defence to the claim and exhibited a proposed defence.

(c) The quality of the legal representation on behalf of the Appellant was less than satisfactory and is partly to blame for his current predicament. His first Solicitor withdrew his representation viva voce in Court and there is no evidence that any attempt was made to inform the appellant of this fact before his application to set aside the default judgment was struck out. His second Solicitor failed to renew the application to set aside the judgment and instead of doing so, he filed an application for extension of time within which to appeal and leave to appeal in the wrong forum.

(d) The dispute between the parties involve title to a piece of land in Kissy based on Conveyances which were executed by the same vendor. The Appellant has deposed to affidavits in which he stated that he had built a two-storey building on the said land from which he was evicted based on the default judgment. The judgment against the Appellant was delivered in circumstances where he had "failed" to file an appearance within the time stipulated by the relevant rule of procedure. *In Evans v Bartlam [1937] 2 ALL E.R. 646 at 650, Lord Atkin in his oft-quoted dictum said:*

> *"The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure".*

In my judgment, this well established principle is applicable in this case and a new trial ordered either because the judgment ought to be set aside because it was irregularly obtained or because the Appellant has a good defence on the merits to the action. In *Hayman v. Rowlands [1957] 1 ALL E.R. 321 C.A.* a new trial was ordered by the Court of Appeal in England where judgment was given in the defendant's absence and the Court held that he ought to have an opportunity of giving evidence and of cross-examining the Plaintiff on his evidence. In this case the Defendant failed to appear in Court when the Plaintiffs and their witnesses testified and judgment delivered. Not only is there no affidavit of service of the writ of summons on the defendant (the Appellant herein), during the trial there is no evidence in the Records that notices were ordered to be sent to him and appropriate affidavit/s of such services filed. In the Hayman case, Lord Denning said that:

> *"I have always understood that, if by some oversight or mistake a party does not appear at the Court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but so long as he does so, the strength or weakness of it does not matter".*

In this case the Appellant had filed a proposed defence in support of his application dated 28th August, 2002 which was struck out for want of prosecution. That proposed defence discloses some defence on the merits and it is not for this Court to determine its strength or weakness.

In the earlier case of Grimshaw v. Dunbar *[1953] 1 ALL E.R. 350 C.A. at 355 Jenkins L.J.* made a similar point in a case in which a new trial was ordered when he said:

> *"Be that as it may, a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the Court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, then that litigant who is accidentally absent should be allowed to come to the Court and present his case, no doubt on suitable terms as to costs ....."*

In our view, "common justice" demands that the appellant be given an opportunity to present his case.

(e) In his Case filed in this appeal, the Respondents contend in paragraph 8 thereof that since the eviction of the appellant from the property in dispute pursuant to the said judgment, the property has been sold to one Alhaji Umaru Kamara. Counsel has inter alia stated in his Case as follows:

"On another note, the respondents hereby indicate for the attention of the Court that even if the Appellant was to apply to the lower Court (High Court) to set aside the judgment of Justice L.B.O. Nylander, third party rights and interests now prevail in the matter as the Respondents have since October, 2011, legitimately sold out the disputed land to a certain Alhaji Umaru Kamara. He is now fully seised of the property by virtue of a Deed of Conveyance between him and the Respondents herein registered at page 56 in volume 679 in the Book of Conveyances kept with the Registrar-General in Freetown".

This is a valid point which ought to be considered in dispensing justice in this case. Such third party allegedly has an interest in the property which cannot be ignored. He ought to be given an opportunity as well to protect his interest, if any.

In the premises, the appeal succeeds and the Court makes the following orders:

1. That a re-trial of the action between the Respondent and the Appellant is hereby ordered and the judgment dated the 11th July, 2002 is hereby set aside. The Appellant is to file and serve his Defence to the said action instituted by the Respondent within 7 days of this order.

2. That this judgment of the Court should be served by the Appellant on Alhaji Umaru Kamara and/or the current owner of the property (the third party) situated at Bye-Pass Road, Granville Brook, Kissy, Freetown which was sold and conveyed by Conveyance dated 11th November, 1991 to the Appellant.

3. That the third party is at liberty to apply to the High Court to be joined as an interested third party in the re-trial of the action between the Respondents and the Appellant 7 days after the appellant has filed his defence to the action.

4. That the assessed costs of Le1,000,000.00 ordered by the Court of Appeal to be paid by the Appellant to the Respondents.

5. Each party to bear his own costs in this appeal.

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HON. JUSTICE U. H. TEJAN-JALLOH
CHIEF JUSTICE

I AGREE:.....

HON. JUSTICE V. V. THOMAS – JSC

I AGREE:.....

HON. JUSTICE V.A.D. WRIGHT – JSC

I AGREE:.....

HON. JUSTICE E.E. ROBERTS – JA

I AGREE:.....

HON. JUSTICE N.F. MATTURI-JONES – JA

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SUPREME COURT SIGN DATE SIERRA LEONE

Ref: CJ/HJ