

MISC. APP. 2/2014.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

ARTHUR EBUN AGBAJE

AND

CHRISTIAN EBUN AGBAJE

-APPELLANTS/APPLICANTS

AND

HASSIATU GBASSA AGBAJE

-RESPONDENT

CORAM:

The Hon. Mr. Justice V. V. Thomas, JSC. - Presiding

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

The Hon. Ms. Justice E. E. Roberts, JSC.

COUNSEL:

J. B. Jenkins-Johnston Esq., for the Applicants.

Miss Wara Serry-Kamal for the Respondent.

RULING DELIVERED ON THE 24<sup>th</sup> DAY OF FEBRUARY 2015

The Applicants, by Notice of Motion dated 4th November 2014, have applied to this Court pursuant to Rule 26 (1) of the Supreme Court Rules, 1982, Public Notice No. 1 of 1982 (the Rules) for the following orders:-

1. That this Honourable Court grants to the Appellants/Applicants herein enlargement of time within which to appeal to this court from the judgement of the Court of Appeal dated 11<sup>th</sup> March 2014.
2. That this Court grants a stay of all proceedings flowing from the judgements of the Court of Appeal dated 11<sup>th</sup> March 2014 and the High Court dated 13<sup>th</sup> July 2011, pending the hearing and determination of this application if granted, pending the ensuing appeal in this Court.
3. Any further and/or other reliefs as this Honourable Court may deem just.

4. That the costs of this application be costs in the Cause.

For ease of reference, it is helpful to set out *in extenso* the whole of Rule 26 of the Rules so as to appreciate the context in which the application is made pursuant to Rule 26 (1):

*"26. (1) Where an appeal lies as of right the appellant shall lodge his notice of appeal within three months from the date of the judgment appealed against unless the Supreme Court shall enlarge the time."*

*(2) Where there is no appeal as of right the appellant shall lodge his notice of appeal within three months from the date on which leave to appeal or special to appeal is granted.*

*(3) An application for special leave to appeal shall be filed within one month from the date of the decision of the Court of Appeal.*

*(4) 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 brought. 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 to be granted. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."*

The facts are that judgment was delivered in the High Court on the 13<sup>th</sup> July 2011 in favour of the Respondent and the Applicant being dissatisfied with that judgment appealed to the Court of Appeal. On the 11<sup>th</sup> March 2014, the Court of Appeal dismissed the said appeal and upheld the judgment of the High Court. In paragraph 6 of the affidavit sworn to on the 4<sup>th</sup> November 2014 by the 1<sup>st</sup> Applicant in support of the motion herein for enlargement of time within which to appeal to this Court from the judgment of the Court of Appeal, the said Applicant has stated the reason why it has taken 8 months to file his application for enlargement of time within which to file an appeal in this Court as follows:

"6. That due to some personal constraints, including but not limited to financial constraints, I was unable to instruct my Solicitor to file an appeal to the Supreme Court within the time limited by the Supreme Court Rules 1982. I have only just returned to the Jurisdiction after travelling to the U.K. for medical treatment".

### ISSUES

1. Rule 26 (1) and (4) of the Rules are the relevant provisions of the Rules which must be construed in determining the fate of this application. Rule 26 (1) states that where an appeal lies as of right a party aggrieved with the judgment of the Court of Appeal has 3 months from the date the judgment was delivered, to file his appeal to this Court unless this Court enlarges the said time. Rule 26 (4) imposes a time limit of one month within which an application for enlargement of time can be made. Once that period of one month for making such an application for enlargement of time has expired, no such application can be made. This is a statutory provision by way of subsidiary legislation which must be complied with strictly. This Court had the opportunity of considering similar provisions in the Court of Appeal Rules 1985 P.N. No.29 of 1985 (the Court of Appeal Rules) in the leading case of Nigerian National Shipping Lines Ltd. v. Abdul Ahmed Trading as Abdul Aziz Enterprises (Unreported) S.C. No.3/88 (Ruling delivered on 17<sup>th</sup> February 1989). The Court was called upon to construe *inter alia* Rules 10 (1), 10 (4) of the Court of Appeal Rules which are largely in *pari materia* with Rules 26 (1) and 26 (4) of the Rules. A difference is that Rule 10 (1) of the Court of Appeal Rules deals with situations where leave to appeal is necessary but Rule 26 (4) deals with appeals as of right. The majority decision (Kutubu, C.J., Warne, JSC and Thompson-Davis, JA) was to the effect that the rules were cumulative

S.L. 277 and submitted that in the interest of justice the application ought to be granted. Firstly, I would say that it is in the interest of justice that the clear statutory rule imposing a time limit for applications for enlargement of time (which is mandatory) should be enforced to ensure certainty in the law. Secondly, there is an important difference between the situation that was before the Court of Appeal in that case when compared with the situation in this application. When the Court of Appeal decided that case in December 1965, there was no express provision limiting the time within which an application for enlargement of time should be filed. It was agreed on all sides in that case that there was no provision in the Court of Appeal Rules under which applications for enlargement of time could be made. The Court had to rely on the Supreme Court Rules in England on April 27, 1961 to find authority for such applications. But it must be noted (and I think this is the important difference between the two situations), that the English Rules did not have any time limit within which an application for enlargement of time could be made. I opine that it is in this context of the absence of any mandatory time limit for applications for enlargement of time that one must read and appreciate the dicta of the then Acting Chief Justice, C.O.E Cole. It must also be noted that after stating the dicta of the learned Acting Chief Justice which was cited by Counsel for the Applicant, the Acting Chief Justice went on to dismiss the application for enlargement of time and concluded:

*"Taking all the circumstances into consideration, I do not think the justice of this case requires that the application should be granted. I would therefore refuse it."*

2. The next question for determination is whether Rule 103 is applicable in this situation as submitted by Counsel for the Applicant. I think not. Rule 103 of the Rules cannot be used to remedy the situation. The opening words of that rule are as follows:

"103. Non-compliance on the part of **an appellant** with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of **the appeal**, cause, matter or reference if 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." (emphasis added)

In my judgment for this Rule to be applicable, there must be a subsisting appeal. At this stage, what we have is simply an application to enlarge time for filing an appeal since the time within which to do so, has expired. At this stage, there is no appeal in this matter to the Court and consequently **the Applicant herein is not an Appellant** (emphasis added) and cannot be described as such. If there is no appeal in place, Rule 103 does not apply. Rule 1 of the Rules which is the definition section of the Rules define "appeal" and "appellant" as follows:

*"appeal" means an appeal to the Supreme Court;*

*"Appellant" includes the party appealing from a judgment, order or decree and his counsel.*

Since the application that is before the Court is not an appeal, it is incorrect to refer to the applicant in the title to this application as "APPELLANTS/APPLICANTS". They are simply applicants as stated in this Ruling. A similar issue came up for determination in the case of Savage v. Brewo Motors Ltd. [1972-73] ALR S.L. 426 in the Court of Appeal when the Court decided that the powers conferred on the Court in Rules 31 and 32 of the Court of Appeal Rules do not apply in the case of an application. Headnote 2 states that:

*"An application by motion for an order of the court does not constitute an appeal for the purpose of making orders under rr.31 and 32 of the Sierra Leone Court Rules, 1973, and so on such an application no order may be made under these rules."*

At page 433 of the report, Tejan, J.A. delivering the judgment of the Court had this to say:

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"Rule 32 in my view, refers to appeals brought before the court, and when such appeals are brought before the court, then the court can exercise the powers conferred upon it by the rule. I have said earlier that the notice of motion presented to the court was in no circumstances an appeal. It was a motion praying for a particular order, and as such the court could not have made the order sought under r.32".

I adopt the reasoning in the above case and hold that in this application, Rule 103 is predicated on a subsisting appeal and it is only when there is such an appeal in place that the court can exercise the power conferred upon it by Rule 103.

3. Assuming that Rule 103 was applicable (and I have held that it is not) in this situation, the reasons advanced by the Applicant for the Court to waive the non-compliance with this mandatory Rule are inadequate and it is my opinion that if the Court were to start granting waivers for such non-compliance for the reasons advanced in this application, it will open the floodgates. In his affidavit, the Applicant stated that he had "personal constraints including but not limited to financial constraints" and so was unable to instruct his Solicitor to file an appeal to this Court. It is a notorious fact that most people in Sierra Leone today have financial constraints and if the Court were to allow this reason as justification or excuse for enlargement of time outside the period permitted by the Rules, our courts will be inundated with such applications and it may be difficult to refuse them once a precedent has been set. The Applicant has not stated what the other personal constraints were and so one cannot speculate. He has however stated that he has just returned to the jurisdiction after travelling to the UK for medical treatment. He has not stated when he left the jurisdiction or when he returned which might indicate that he was out of the country during the period of one month when he could have applied for enlargement of time within the statutory period permitted by the Rules.

In my view, one telephone call to his Solicitors who had represented him so far in the case, instructing them to file an appeal on his behalf would have been sufficient to comply with the Rules.

When this application came up for hearing on the 20<sup>th</sup> November 2014, there was no representation on behalf of the Respondent and the Court was informed by the Registrar that notice of the hearing was sent to the Respondent's Solicitor, namely E.E.C. Shears-Moses Esq. and an affidavit filed. That was the basis upon which the Court proceeded to hear the application. Subsequently to that hearing of the application by the Court, Miss Wara Serry-Kamal filed an affidavit in opposition sworn to on the 1<sup>st</sup> December 2014 in which she averred that the Solicitors for the Respondent throughout the case have been Serry-Kamal & Co and not Mr. Shears-Moses. An affidavit in reply sworn to on the 4<sup>th</sup> December 2014 was filed by Solicitors for the Applicant in which the deponent, Mr. J. B. Jenkins-Johnston challenged the aforesaid averment of Miss Serry-Kamal. The records in this case disclose that the original writ was issued by Serry-Kamal & Co and that there has not been a change of Solicitors for the Respondent.

Miss Serry-Kamal for the Respondent opposed the application for enlargement of time within which to file an appeal to this Court and informed the Court that the Respondent has nothing to do with the property at 1A Babadorie Hill, Lumley, Freetown and that her client is not in receipt of any rent accruing therefrom. She further stated that her client is willing to convey her share in that property to the Applicant as adjudged in the High Court decision which was upheld in the Court of Appeal subject to her receipt of her 50% share in rents collected therefrom up to the time her share is conveyed. It appears that there is no agreement between both Counsel as to which of their clients have been in receipt of rents for the said property up to the present. Once this matter as to which of the parties have been

collecting rents is resolved between them with the assistance of their legal representatives, the share of the Respondent in the said property is to be conveyed to the Applicant.

In the circumstances, I will dismiss this application for the enlargement of time within which to file a notice of appeal to this Court and make the following further orders:

- 1. That the Respondent conveys her 50% share in the property situated at 1A Babadorie Hill, Lumley, Freetown to the Applicant Arthur Eburn Agbaje once the issue of the party who has been in receipt of rents in respect of the said property is resolved and any payment of her share made to the Respondent, if necessary.
- 2. Liberty to apply.
- 3. No order as to costs.

*[Handwritten signature]*

HON MR. JUSTICE V. V. THOMAS, Ag. C.J.

I agree *[Handwritten signature]*

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

I agree *[Handwritten signature]*

HON MR. JUSTICE E. E. ROBERTS, JSC.

*Certified True Copy*

*Registrar*

