**MISC/APP.10/2004**

**IN THE COURT OF APPEAL OF SIERRA LEONE**

**BETWEEN :**

**GRAHAM K. WHYTE - DEFENDANT/ APPLICANT**
**AND**
**SOLAR HOTELS CO.LTD - PLAINTIFF/ RESPONDENT**

**R. WRIGHT & Co: FOR THE PLAINTIFF**
**Dr. BU-BUAKEI JABBIE FOR THE DEFENDANT**

**RULING DELIVERED THIS 22ND DAY OF MAY, 2007**

Hon. Justice ADEMOSU J.A : This is an application by way of Notice of Motion dated 7th April 2004 brought on behalf of the Defendant/Applicant for the following orders :

1. An interim stay of proceedings in the Court of Appeal In MISC.App 22/2003 pending before a single Justice of the Court of Appeal until the hearing of the application or until further order.
2. An order reversing, discharging and/or setting aside the decision of the single justice of the Court of Appeal given on Wednesday 7th April 2004.
3. Any further or other order that may be considered fit and just.
4. Costs in the cause.

In support of this Application is the affidavit of Dr. Bu-Buakei Jabbie sworn on the 7th of April 2004 which is to the effect that without first serving the Writ of Summons upon the Defendant/Applicant, the plaintiff/respondent made an Exparte application to the High Court, sought and obtained a series of interim and interlocutory injunctions against the Defendant/Applicant on 19th June 2003 which is exhibited as BJ 16. That at around 7.45 a.m on Saturday 21st June 2003 the orders contained in BJ 16 were served on the Defendant through a Court Baliff and a team of police officers resulting in the immediate eviction of the Defendant from the premises he was occupying at the plaintiff's Company's Hotel which was part of the terms and conditions of his service as Executive Director of the Hotel and that it was at the same time that he became aware of the Writ of Simmons issued in the matter. The affidavit in support is also to the effect that upon the application of the Defendant the same High Court on 28th November 2003 set aside the orders previously made on the ground of irregularity. The Order is exhibited as Bj 17. That various attempts were made to execute the order of the Court dated 28th November 2003 but we're strongly and violently obstructed and resisted by agents of the Plaintiff's Company. It is further stated that the plaintiff sought to obtain a stay of execution of the order of 28/11/2003 and leave to appeal, and both orders were refused on 10th February 2004 and marked BJ 18. An important averment in the said affidavit says that though the substantive matter was ordered to be set down for speedy trial but the plaintiff has not made any effort to set it down for trial. That so far nothing has been done to prosecute either the appeal or prosecute their claims in the Writ of Summons and the time for appeal has since expired.

A further affidavit was filed exhibiting the ruling of the Single Justice of the Court of Appeal as Exhibit BJ 27. In exhibit BJ 27 the learned Single Justice ruled inter alia that there is nothing in Rules 10 (1) and 64 that prohibits the applicant from filing in court it's application prior to the Court below delivering it's decision refusing leave. That the only restriction is not to make an application after the

prescribed time limit unless enlargement of time is granted. Continuing the learned Single Justice said:

> *" Accepting that the applicant has put in its application :*
> *For leave to appeal before this Court before the Court*
> *Below delivered it's order refusing leave, can the applicant*
> *Still bring itself within the operation of Rules 10 (1) and 64*
> *of the Court of Appeal Rules? I think it can."*

The ruling of the learned Single Justice of Appeal clearly shows that an applicant who desires to appeal against an interlocutory order or a decision of the High Court may lawfully apply simultaneously to both the High Court and the Court of Appeal which is what the Plaintiff/Respondent has done in the instant case. We agree with Mr. Rowland Wright that what we have to decide is whether there was a breach of Rule 10 (1) but we do not agree with Justice MURIA's ruling which he adopted. In his submissions he conceded that he made his application too early but contended that he should not be punished for being too early. He argued that he would have been out of time to appeal had been under the old Rule 10 (1) and that is the calamity that they would have faced, in no interim stay had not been granted to them. He said the steps he took were were to protect the interest of his client and that was why he went to the Court of Appeal at the time he did. With respect to the Learned Counsel the law is still the law the new rule or law does not permit an applicant to have one application in two Courts at the same time unlike under the old rule. We agree with Dr. Bu-Buaker Jabbie that it is only after the decisions or ruling of the High Court in an application for leave to appeal that another application can be made to the Court of Appeal within 14 days from the date of refusal by the High Court. We are firmly of the view that the amendment in the new Rule 10(1) makes it abundantly clear that the jurisdiction of the Court of Appeal is dependent upon a prior refusal by the High Court. This jurisdiction is only available after the Court below has refused the application for leave to appeal and not before then. The condition precedent before the Court of Appeal can have jurisdiction is that it is only after the refusal by the High Court.
It is therefore mandatory that the applicant must await the outcome of its application to the High Court before he can take another step. We hold that the Learned Single Justice of Appeal lacked jurisdiction at the time he entertained the Plaintiff/Respondent's application. We do not agree with his clumsy interpretation of the new rule 10(1).

The Plaintiff/respondent having filed it's application for leave before the 10th February, 2004 we hold that the premature application robbed the Court of Appeal of jurisdiction to entertain it. The law is settled that the date of filing of motion is the date of the application. See Duvat and Haquin v Louis Orcel (1931) 1 WACA 105 where that point was taken. It was held that the first step in making an application is the filing of the motion and that was to be accepted as the date of the application.
In the circumstances and for all the foregoing reasons we set aside the decision of the Single Justice of the Court of Appeal given on Wednesday 7th April 2004 with costs to the Defendant/Applicant.