King v Collier and Another (MISC.APP.2V2006) [2008] SLCA 1 (24 January 2008);

MISC.APP.2V2006

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

Mohamed Musa King - Applicant 2nd Defendant

Dr. Gershon B.O. Collier - 1st Defendant/Respondent

And

Arnold Bilson Ulyses Nylander

By His Attorney Lynton B.O. Nylander - Plaintiff/Respondent

CORAM:

Hon. Justice U.H. Tejan-Jalloh J.S.C.

Hon. Justice S. Koroma J.A. Hon. Justice A.N.B. Stronge J.A.

Hearing Date: 6th March 2007

Ruling 2007

Advocates:

N.D. Tejan-Cole Esq., For Applicant 2nd Defendant

Dr. W.S. Marcus-Jones For Plaintiff/Respondent

RULING

Ruling delivered this 24th day of January 2008

TEJAN-JALLOH JSC: By a Notice of Motion dated 1st November 2006, Mohamed Musa King, second Defendant/Applicant applied to the Court for enlargement of time for leave within which to appeal and for any other Order or Orders the Court may deem fit and just. The application is supported by the affidavit of the applicant sworn to on the lst November 2006 and together with eight (8) Exhibits. The enlargement sought is to appeal against the Judgment of the Honourable Mr. Justice S.A. Ademosu, then High Court Judge delivered on 5th March 1990.

I remind myself that pursuant to sub rule 4 of Rule 11 of the Court of Appeal Rules, 1985, Statutory Instrument 29 of 1985, the affidavit must set forth good and sufficient-reasons for the application and by grounds of appeal which prima facie show good cause. 1 am not concerned with the merit or otherwise of the appeal.

The said Judgment is Exhibit MM4 and inter alias, ordered property situate lying and being at 70c Wilkinson Road, Freetown - Exhibit MM3 - recorded in Books of Conveyance kept in the Office of the Registrar-General be expunged. Paragraphs 5 and 9 of the said affidavit state that the applicant moved into Exhibit MM3 in 1999 and has been living there since and no one has ever challenged his claim to ownership. The deponent in paragraph 6 also deposes that he had to leave the jurisdiction during the rebel incursion in Sierra Leone.

Dr. Marcus-Jones Counsel for the Plaintiff/Respondent filed an affidavit on behalf of Lynton Bankole Onesimus Nylander sworn to on the 21st day of November, 2006 in opposition to the Notice of Motion supported by 6 (six) exhibits. Exhibits LBON 1, LBON 2, and LBON 5 are letters purportedly copied to the Applicant and LBON 6, dated 17th April, 1990 deals with the removal of a wall. Juxtapose the two, the second defendant/applicant is concerned with the expunction of the Conveyance to his property at 70c Wilkinson Road, Freetown, from the books of Conveyances kept in the office of the Administrator and Registrar-General, and the Plaintiff/Respondent is concerned about a wall which according to paragraph 7 of the affidavit in opposition has been demolished. Nevertheless, Counsel for the Plaintiff/Respondent opposed the application because it was out of time. Dr. Marcus-Jones counsel for the Plaintiff/Respondent told the Court that his client is not laying any claim in respect of 70c Wilkinson Road, Freetown.

Counsel addressed the court on subrule 6 of Rule 11 of the Court of Appeal Rules 1985, whether the subrule is mandatory or directory. N.D. Tejan-Cole Esq. for the applicant submitted that no universal rule can be laid for the construction of Statutes as to whether mandatory enactments are to be considered directory only or obligatory; that in each case one must look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of the provision to the general object intended to be served by the Acts and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory. He referred us to the case of Doyle v Stephenson, 1, West Indian Law Report 296 and at p. 298, Craies on Statute Law, 4th edition at 240 and Maxwell on the interpretation of Statutes 17th edition at p. 316. He also drew the attention of the Court to the case of B v B 1941 2AER p. 396 at 397 where Scarman J., said that prior authority on other statutes is not of great assistance to the Court in determining the intention of the legislature when the section was enacted.

Mr. Tejan-Cole also referred to the case of Alhaji Bockarie Kakay v Clementina Yambasu a decision of the Court of Appeal unreported and delivered on the 9th clay of June, 1999 - Misc.App.3/98. He pointed out to the Court that enlargement of time within which to file an appeal against the judgment in the High Court was granted.

As regards the submission that applicant was kept abreast of the proceedings Mr. Tejan-Cole referred to the case of De Stempel v Dunkels 1938 A.E.R: (Anotated) Vol. 1 at P. 238 at 255G where quoting from Taylor on Evidence 12th edition, p.551, it said:

"There is in general no duty cast upon the recipient of a letter to answer and his omission to do so does not amount to any admission of the truth of the statements contained in it".

Mr. Tejan-Cole, argued that the applicant in this case does not fall within the interpretation of "Appellant" in Rule 1 of the Court of Appeal Rules. He urged that we exercise our inherent jurisdiction. He referred the Court to the case of Sierra Leone Oxygen factory Limited v P.B. Pyne-Bailey, a decision of the Supreme Court of Sierra Leone, unreported and delivered on the 10th May 1974. He made available the case of Thynne (Marchioness of Batton) v Thynne (Marquess of Bath) 1955 3 A.E.R. 129 and Attah-Quarshie v Okpote, 1977 1 Ghana Law Report p.59 at p.65.

In the case of Meier v Meier 1948 P cited in Thynne's case Lord Evershed said he would prefer not to attempt a definition of the extent of the Courts jurisdiction to vary, modify or extend its own orders if, in its view, the purpose of Justice requires that it should do so and it is my view that Rule 32 of the Court of Appeal Rules enables this Court to make an order that the lower Court ought to have made. Similar view was expressed by Lord Justice Lindley and Lord Justice Morris in the case of the Swire 30 Ch. D at pages 246 and 146 respectively.

Similarly, in the case of Attoh-Quashie v Okpote 1977 1 Ghana Law Report 57 the Court indicated that tradition has sanctioned three areas where the Court generally invokes its inherent powers. They include powers to prevent wrong or injury being inflicted by its own acts or orders or Judgment including the power of vacating Judgments entered by mistake and of reviewing Judgments procured by fraud and a power to undo what it had no authority to do originally. At page 65 of the Judgment Hayford - Benjamin J said as follows:

"Having found that the provisions of order 9 Rule 17 are mandatory it is now necessary to consider whether or not the submissions of Counsel that the Court has an inherent power to vacate its own valid orders is well founded. Inherent power is an authority not derived from any external source, possessed by a

Court. Where jurisdiction is conferred on Courts by Constitutions and statutes, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the Court and its due functioning. They spring not. from legislation but from the nature and Constitution of the law itself. They are inherent in the Court by virtue of its duty to do justice between the parties before it. The scope of inherent powers however cannot be extended beyond its legitimate circumscribed sphere. The safest guide lies in precedents ".

In reply Dr. Marcus-Jones submitted that there is no difference between Applicant and Appellant and the reason for the use of the former is because the applicant wishes to appeal to this Court and has indeed filed proposed grounds of appeal. He argued that the whole of Rule 11 of the Court of Appeal Rules applies. He cited Maxwell on the

interpretation of Statutes 10th edition at page 379 and opined that sub rule 6 of rule 11 is mandatory.

Counsel reminded the Court that it has power to correct wrongs complained of and that the applicant should go to the lower Court, where the mistake was made. He did not think that there is any room for the invocation of the doctrine of inherent jurisdiction. The Court of Appeal did not make the Order and the jurisdiction of this Court is to correct errors. He said that there are many decisions of the Court in respect of sub rule 6 of Rule 11 and one cannot come to this Court after the period prescribed and to grant the application will be opening flood gates. Even if it has been a day of noncompliance, the applicant cannot come to this Court, he concluded.

I have considered the arguments on both sides. For the Plaintiff/Respondent there has been a non-compliance with the provision of sub rule 6 of Rule 11 of the Court of Appeal Rules. Counsel for the applicant has canvassed non-compliance as well as in application of the sub rule. In the case of Re Coles and Ravershear 1907 1K.B. Lord Collins said:

"Although a Court cannot conduct its business without a Code of Procedure the relation of the Rules of Practice to the work of justice is intended to be that of a hand maid rather than mistress and the Court ought not to be so far bound and tied by rules of procedure, as to be compelled to do what will cause injustice in the particular case ".

Furthermore, it has been said that courts do not exist for the purpose of punishing bad taste, and Bowen L.J. in Copper v Smith (1844) 26 Ch.D750 at page 818, said as follows:

"Now I think it is a well established purpose that the object of Courts to decide the rights of Parties, curd not to punish them for mistakes they make in the conduct of their case...../ know of no kind of error or mistake which, if not fraudulent ..... the Court ought not to correct, if it can be done without injustice to the other party, Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy ".

I foresee no harm will be done to grant the application of the applicant to argue his appeal. Incalculable injustice may occur if the applicant is so denied that right.

It is worth noting that subsection 2 of section 23 of the Constitution of Sierra Leone 1991 Act No. 6 of 1991 encourages parties to make use of the Court for determination of the existence or extent of their civil right or obligation. And under subsection 2 of section 129 of the said Constitution that right of appeal in any cause or matter determined by the High Court of Justice is as of right to the Court of Appeal. Subsection 15 of section 171 of the Constitution provides that any law found inconsistent with the last quoted section is to the extent of the inconsistency, be void and of no effect.

We think this is a fit and proper case to exercise the inherent jurisdiction of the Court and the application for enlargement of time within which to appeal is granted. There will be no order as to costs.

Hon. Justice U.H. Tejan-Jalloh J.S.C.

I Agree

Hon. Justice S. Koroma J.A.

I Agree

Hon. Justice A.N.B. Stronge J.A.....

I Agree