

CIV.APP. 16/2017

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

BETWEEN:

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION -
PLAINTIFF/RESPONDENT

OF WORLD CHRISTIANITY OF SIERRA LEONE

120 BAI BUREH ROAD, KOREA COMPOUND

ALLEN TOWN

FREETOWN

AND

ABU KANNEH -
DEFENDANT/APPLICANT

120 BAI BUREH ROAD

KOREA COMPOUND

ALLEN TOWN

FREETOWN

COUNSELS:

- **A.K. MUSA ESQ.**, OF MUSA & FORNA, DIVINE CHAMBERS, 49 VICTORIA STREET, FREETOWN
- **BANGALY MONORMA BAH ESQ.**, OF MONORMA, FYNN & CO. 24 ECOMWAS STREET, FREETOWN.

**RULING DELIVERED BY THE HON. MR. JUSTICE M.F. DEEN-
TARAWALLY, JA**

DATED FRIDAY THE 1ST DAY OF JUNE, 2018

RULING

The matter before this Court is a Notice of Motion dated 3rd day of April, 2017. The Notice of Motion was filed by the Defendant/Applicant for a stay of execution of the Judgment of the High Court delivered by the Hon. Mr. Justice M. J. Stevens dated the 10th day of February, 2017 pending the hearing and determination of an appeal before this honourable Court.

The application is supported by the Affidavit of **ABU KANNEH** the Defendant/applicant herein. According to the said Affidavit, a Writ of Summons dated 9th day of September, 2016 was issued against him by the Plaintiff/Respondent seeking inter alia a declaration of title, recovery of possession etc. a memorandum and notice of appearance was filed and entered by on his behalf by his solicitor A.K. Musa, dated the 19th day of September, 2016. After that a defence and counter claim was filed on the 3rd day of October, 2016.

Then by way of Judges summons dated 25th day of November, 2016.

The Plaintiff applied for summary judgment. The Application according to the Defendant was then heard without service of any hearing on him or his solicitor A.K. Musa, who had done all the filings on his behalf. To cut long matter short, judgment was then reserved and delivered against him by the High Court on the 10th day of February, 2017.

His solicitor then filed a notice of appeal to this court which was exhibited and marked AK6. Now in compliance with rules 64 of the court of appeal rules 1985, his solicitor AK Musa applied for a stay of execution before the high court which was refused. He has now applied for the same stay before this Honourable Court pending the hearing and determination of the Applicants appeal.

Now solicitor for Plaintiff/Respondent Bangaly Monorma Bah filed in an affidavit in opposition. The government of his affidavit is that the Applicant and solicitor A.K. Musa were served with the judges summons by their clerk ABU BAKARR BAH solicitor's clerk attached to their chambers. A copy of his affidavit and exhibited way book was marked BMB10. According to the Affidavit of solicitor for Plaintiff/Respondent Manoma Bah the matter came up for hearing on diverse dates and the matter adjourned several times. Solicitor for the Defendant/Applicant was to reply to the said judges' summons by an affidavit in opposition but of no avail. They as Plaintiff solicitors are pretty sure that the Defendant/Applicant solicitor were served with a notice of the hearing. According to the affidavit of the Plaintiff's solicitor they were reliably informed by the bailiffs that the solicitor for the Defendant/applicant A.K. Musa was served with a notice and processes of the hearings. This motion application then came up for hearing on the 11th day of February, 2017. A.K. Musa, counsel for the Defendant/applicant applied for an interim stay of execution pending the hearing and determination of his application. The said application was then granted by this honourable court. The court then ordered for notices of the hearing be served on the Plaintiff/Respondent or his solicitor Bangaly Monorma Bah esq of Harmony chambers, No.24 Ecowas Street, Freetown, service was then effected by the bailiff of the court as ordered.

The motion application was then heard on its merits of detailed arguments on both sides. Counsel for the Defendant/Applicant A.K. Musa argued that they were not given the opportunity to defend the matter which was a dispute over land. That they too were title owners to the said land in dispute now claimed by Plaintiff/Respondent, Holy Spirit Association for the unification of World Christianity of Sierra Leone. That a Writ of summons dated the 9th day of September, 2016 was served on the Defendant/Applicant by solicitor for plaintiff/Respondent. The said writ was exhibited and marked exhibit A.K.1. on the 19th day of September, 2016. A memorandum and notice of appearance was filed by him on behalf of the Defendant/applicant. On the 3rd day of October, 2016, he filed in a defence and counter claim on behalf of the Defendant/applicants solicitor for the Plaintiff/Respondent then

filed a judge's summons dated 26th day of November, 2016 exhibited and marked Exh.AK4. A.K. Musa contended that he was not served with any notice by the court or solicitor of the hearing. That they were not able to argue their case before the High Court and that by their affidavit in support they have shown special circumstances for the court to grant them a stay of judgment. The circumstances he referred to were that the Defendant/Applicant had made huge investments on the land in dispute. He referred to paragraph 13 of the Affidavit of Applicant of the said investment. Where he exhibited photographs of the said compound of the Defendant/applicant. That if the said stay is not granted his client would suffer gravely which would be tantamount to injustice. He relied on the cases of Africana Tokeh village Limited v- John obey development investment company Ltd. (26th April, 1994) **Mrs. Lucy Decker -v- Gladstone Decker** Misc.App. 13/2002. He also submitted that the Affidavit of Service relied on by the solicitor for Respondent B.M. Bah Esq., is incomplete, in that it is unsworn. As such defective, counsel for the Plaintiff/Respondent then replied to the application before the court. In his reply he submitted that they are opposed to the application for a stay and have filed an affidavit in opposition sworn to on the 19th day of April, 2017. The said affidavit exhibited certain documents as exhibits. These are the judges summons, the memorandum and notice of appearance. The defence and counter claim of the Defendant/applicant. A copy of the notice of motion filed before the High Court for stay which was refused. A copy of the High Court Order of Stevens J, a copy of an affidavit of service and way book of ABU BAKARR BAH, solicitor's clerk attached to the chambers of solicitor for the Plaintiff/Respondent Bangaly Monorma Bah. A copy of two affidavits of service of one MALIKIE SORIE KAMARA, a bailiff attach to the Courts of the Undersheriffs office. The said affidavits were in respect of service of notice of hearing the proceeding before the High Court at the instance of Justice Stevens.

Counsel went on to submit that the Defendant/applicant has not shown special circumstances as per paragraph 13 of the supporting affidavit of the Defendant/Applicant. That the said reasons cannot amount to special

circumstances. Counsel then relied on the case of WILSON -v- CHURCH L R 12 Chancery reports. The test is that you have to go beyond hardship for it to amount to special circumstances. He also relied on the case of PATRICK KOROMA -v- SIERRA LEONE HOUSEING COOPERATION, where it was held that shortage of accommodation can't be a reason for special circumstances. That they were served and did not file any affidavit in opposition to the said proceedings. The matter came up on several occasions, but the defendant/Applicant and solicitor had failed to contest the matter. That by rule 28 of the High Court rules 2007. The matter was then ruled upon by the High Court in favour of the Plaintiff/Respondent. In this matter, counsel then urged this court to dismiss the application for stay with cost.

Now it is an established principle of case law both within and out of our jurisdiction that for the court to grant a stay. It must be satisfied that the applicant has shown good cause or reasons for a stay to be granted. This was established by justice Gelaga King JA in the land mark case of **AFRICANA TOKEH VILLAGE LTD -V- JOHN OBEY DEVELOPMENT CO. LTD** Misc.App. 2/94 Gelaga JA then reaffirmed it again, in the local case of **MRS. LUCY DECKER -V- GLADSTONE DECKER** Misc.App.13/2002. "As I said in the Africana Tokeh case supra, it is for the Applicant to bring before the court facts on which he relies for the court to decide whether the constitute special circumstances and of course each case will depend on its merits".

However it is now settled law by judicial presidents that the courts have discretionary powers to grant a stay of execution. But such powers must be based extensively on legal grounds not on moral, economic, political or other considerations. See the local case of **DESMOND LUKE -V- BANK OF SIERRA LEONE.** Misc.App.22/2004. The rationale behind the principle of special and exceptional circumstances is that a successful party must not be deprived from the fruits of his judgment. See **Firetax international Ltd -v-**

Sierra Leone external Telecommunications Company Ltd.

Misc.App.19/02 (unreported). The onus is on the Applicant to show or demonstrate to the court that special and exceptional circumstances do exist for him or her be granted a stay.

This also depends on the circumstances of each case. In the instant case the Applicant has deposed in his affidavit, that he has made some huge investments in the compound of the disputed property. To all intents and purposes the said fact at best amounts to economic consideration. Which does not amount to special and exceptional circumstances. What may amount to special and exceptional circumstances is what is unusual or uncommon.

Now going back to the facts of this case. It has been deposed in the Affidavit of the Applicant that he was served with a writ of summons for; a declaration that the Plaintiff is the fee simple owner of both pieces and parcels of land at new Freetown, Waterloo Road, Allen Town, Freetown. Recovery of possession of same etc. his solicitor filed in an appearance and defence to the said Writ within the stipulated time. The solicitor then took out judges summons which was never served in his solicitor according to him. The matter was heard by the High Court after some adjournments. Judgment was then delivered against him in his absence. As such he was not given an opportunity to defend the matter. Technically a one sided judgment. Solicitor for Plaintiff/Respondent vehemently opposed the Application for stay on the grounds that, solicitor of Applicant was served with all processes including the Judge's summons. But what seem uncommon here is that the affidavit of service of the judges summons. Which is exhibit BMB10 of the affidavit in opposition is unsworn. Now counsel for Applicant has urged this court not to countenance the said affidavit as it is unsworn.

Now any affidavit which is unsworn and uncommissioned by a justice of the peace or Commissioner for Oaths cannot be received by the courts, in contravention of Order 31 of the High Court Rules 2007. The court can only receive a sworn affidavit and not otherwise. See order 31 rule 4 which reads

“The court may receive an affidavit sworn for the purpose of being used in a cause or matter notwithstanding any defect by misdescription of parties or otherwise in title or that or any other irregularity in its form etc”.

This rule of the High is made applicable to this court by virtue of the provisions of rule 38 of the Court of Appeal rules of 1985 which read as follows. **“Where no other provision is made by these rules the practice and procedure immediately before etc. shall apply in so far as it is not inconsistent with these rules”.**

Now for this court to refuse the application for stay it must ensure that the special circumstances relied on are common and not common as in the instant case of non compliance with the rules. It is my opinion that to prove service of process reliance cannot be made on an unsworn affidavit more especially when the matter was undefended and was not decided on merits. This is an exceptional circumstance as this court cannot act on an unsworn affidavit which is irregular. Therefore since the affidavit of service of the judges summons is fatally defective. I therefore hold that this predicament amounts to a special and exceptional circumstance for me to exercise the prerogatives of this court to award a stay. For these reasons I have decided to allow the application for a stay to succeed. I now make the following orders:

1. A stay of execution is hereby granted in this matter pending the hearing and determination of the appeal herein.
2. That the appeal be heard not later than 21 days from the date of this order.
3. That the records of Appeal be settled not later than 14 days from the date of this order by the Appellant.
4. That the Applicant fulfills the conditions of appeal within 21 days from the date of this order.
5. That the cost of this application be cost in the cause.
6. Liberty to apply.

