

CIV. APP 13/2017

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

FATME MOURTADA - PLAINTIFF/APPLICANT
(ADMINISTRATRIX OF THE ESTATE OF
FATHAL ABESS MOURTADA (DECEASED) INTESTATE
SUNG BY HER ATTORNEY NASSER BITTAR)
158^A WILKINSON ROAD
FREETOWN.

AND

FADEL ABASS MOURTADA - 1ST DEFENDANT/RESPONDENT
63 HANGHA ROAD
KENEMA

DAYOUB TRADING - 2ND DEFENDANT/RESPONDENT
(SIERRA LEONE LIMITED)
65 HANGHA ROAD
KENEMA.

CORAM:

HON. MR. JUSTICE J. B. ALLIEU, J. A. - PRESIDING
HON. JUSTICE M. M. SAMBA J. A.
HON. MR. JUSTICE S. A. BAH, J. A.

RULING DELIVERED THIS 11TH DAY OF SEPTEMBER 2020

BY THE HON. MR. JUSTICE J. B. ALLIEU – J.A.

COUNSEL:

JABBI & ASSOCIATES FOR THE PLAINTIFF/APPLICANT
FORNAH-SESAY, CUMMINGS, SHOWERS & CO FOR THE DEFENDANTS/
RESPONDENTS

RULING

1. By Notice of Motion dated 25th March 2019, Counsel for the Plaintiff/Applicant, I.F. Sawaneh Esq. applied to this Honourable Court, chiefly, as contained in paragraph 1 thereof:

“that this Honourable Court vacates the Ruling dated the
26th day of October 2017, in this action on the grounds of

Non-compliance with Rule 10(5) of the Court of Appeal
Rules 1985”

2. In support of the Application is his Affidavit deposed to on the 25th day of March 2019 to which 10(ten) Exhibits are attached.
3. The paragraphs contained in the Affidavit of Support of the Notice of Motion which I find very relevant to this Application are 10,12 and 13.
4. Paragraph 10 states as follows:

“That by an Affidavit dated the 18th day of May 2017 this Honourable Court on the 26th day of October 2017 granted leave to the Respondent to Appeal against the Orders of the High Court dated the 15th day of February 2017, and also granted an Interim Stay of Execution of the Judgment dated the 16th day of June 2016”

5. Paragraph 12 states as follows;

“That on the 13th day of February 2019, I did search the proper Books kept in the office of the Registrar of the Court of Appeal to determine whether the Defendants/ Respondents have complied with the Order dated the 26th day of October 2017; my search revealed that no Appeal had been filed on behalf of the Respondent”

6. Paragraph 13 states as follows:

“That since such leave was granted over a year ago to Appeal the ruling dated the 15th day of February 2017, and an Interim Stay of the Judgment dated the 6th day of June 2016, amongst other things, the Respondents have not complied with the said Order.

7. The Exhibits attached to the Affidavit in Support of the Notice of Motion dated 25th March 2019 which I consider germane to the Application are:

“ Ex I.F.S. 4” – Order of the High Court dated
6th June 2016

“Ex I.F.S. 9” – ruling of the Court of Appeal
Dated 26th October 2017.

“Ex. I.F.S. 10” – Affidavit of Search of the record Books

of the Registry of the Court of Appeal with the relevant search receipts attached.”

8. Counsel for the Plaintiff/Applicant also filed a Supplemental Affidavit deposed to on the 8th day of July 2019 to which two (2) Exhibits are attached. “Exs I.F.S. 11 and I.F.S. 12”.

9. He averred in paragraphs 23-26 as follows:

“Paragraph 23 – that it took me over two weeks searching the record Books kept at the Registry of the Court of Appeal to ascertain whether a Notice of Appeal was filed by the Defendants/Respondents, but for all these times the Registrar indicated to me that no such Notice of Appeal was filed by the said parties.

Paragraph 24 – That I went further to enquire from the Registrar, Mr. Fayia, who was with the Panel of Justices that presided and delivered the Ruling dated 26th October 2017; my enquiry revealed that no such Notice of Appeal was filed by the Defendants/Respondents herein.

Paragraph 25 – That it was about three weeks after I had filed the Notice of Motion herein that the Registrar of the Appeal Court indicated to me that a Notice of Appeal was filed by the Defendants/Respondents herein.

Paragraph 26 – That I was in a state of shock and disbelief to have heard the Registrar saying a Notice of Appeal was filed after I had searched the records and found no evidence of same.”

10. I note that the Ruling of the High Court dated 15th February 2017 which could have been important to this Application by Counsel for the Plaintiff/Applicant was not exhibited but I am comforted in that the same was determined by the Court of Appeal, albeit a different panel, which resulted to its Ruling dated 26th October 2017 and which is Exhibited as “IFS9”.

11. In his arguments, Counsel for the Plaintiff/Applicant submitted that the Respondents herein are in breach of Rule 10(5) of the Court of Appeal Rules 1985 and that such breach is so fundamental that it renders the Ruling dated 26th October 2017 a nullity.

12. He further submitted that the Respondents herein did not file the Notice of Appeal for which leave was granted in the Ruling of 26th October 2017 and that such non-compliance on the part of the Respondents deprive this Honourable Court Jurisdiction to adjudicate on any Appeal.
13. Even if the Notice of Appeal was filed in accordance with the Ruling dated 26th October 2017, yet, according to him, the same was filed out of time without the Respondents having recourse to Rules 11 (1) (2) and (3) of the Court of Appeal Rules 1985.
14. He submitted that the Ruling of 26th October 2017 which granted leave to the Respondent to file a Notice of Appeal was an Interlocutory Ruling and that the Respondent should have filed the said Notice of Appeal within 14 (fourteen) days from the date of the said Order as required in the relevant provisions of the Court of Appeal Rules 1985.
15. He pointed out that according to "Ex IFS9" attached to the Affidavit in Support of the Notice of Motion dated 25th March 2019, leave was granted to the Respondents to file their Notice of Appeal within a period of 14 (fourteen) days from the date of the Ruling on 26th October 2017.
16. Rather, according to "Ex JG1" attached to the Affidavit in Opposition of the said Notice of Motion, the Notice of Appeal was filed on 16th November 2017.
17. Referring to his Supplemental Affidavit deposed to on 8th July 2019, Counsel for the Plaintiff/Applicant submitted that as at the time he searched the records on 13th February 2019, the Notice of Appeal filed in this matter was not found in the Register of the Court of Appeal
18. He maintained that he was informed by one of the Registrars in the Court of Appeal that a Notice of Appeal had been filed in respect of this matter.
19. According to him, the Notice of Appeal filed on 16th November 2017 exhibited as "JG1" attached to the Affidavit in Opposition is at variance with his Affidavit of Search conducted on 13th February 2019 exhibited as "IFS10" attached to the Affidavit in Support.
20. He submitted that the acts of the Respondents in the instant case are very grave to render the ruling dated 26th October 2017 a nullity.
21. The acts of the Respondents, he further submitted, are attempts to deny the Plaintiff/Applicant the rights to enjoy the fruits of his Judgment.
22. Counsel for the Plaintiff/Applicant, in support of his submissions quoted and relied upon the following cases:
 - (a) Re Pritchard (1963) 1 All ER 873
 - (b) Bin Rafaah Vs Precious Minerals Marketing Company (Sierra Leone Limited [Civ. App.1/99] {1998} SLCA 2 (23rd October 1998) – a Sierra Lii Publication
 - (c) Andrew Mitchell MP Vs. News Group Newspapers Limited {2013} EWCA Civ. 1537

23. Counsel for the Respondents, A Showers Esq, is opposed to the Application dated 25th March 2019 to which he filed an Affidavit in Opposition deposed to by one Joseph Grant, Barrister and Solicitor, on the 19th day of June 2019.
24. He relied on the entirety of the contents of the said Affidavit to which two (2) exhibits are attached:
“Ex JG1 “ – Notice of Appeal dated 15th November 2017
“Ex JG2” – Receipt of payment for the said Notice of Motion dated 16th November 2017.
25. Although Counsel for the Respondents relied on the entirety of the contents of the Affidavit in Opposition which he filed, I found out that paragraphs 4 and 5 thereof are relevant to this Application. Paragraph 4 states as follows:
“that contrary to paragraphs 12-15 of the Affidavit of one Ibrahim Fayia Sawaneh, , the Defendants/Respondents fully complied with the Orders of the Court of Appeal Dated 26th October 2017 (photostat copies of the Notice of Appeal and the receipt of payment thereof are now Shown to me exhibited and marked Exhibit JG1 and JG2 respectively)

Paragraph 5 states as follows:
“that I am duly informed by the 1st and 2nd Defendants and verily believe that they are ready, willing and able to proceed with their Appeal.”
26. Counsel for the Respondents pointed out that the crux of the Application is that the Respondents failed to comply with the Order of the Court dated 26th October 2017 which said Order is exhibited as “Ex IFS9:.
27. The said Order granted leave to the Respondents to Appeal against the Order of the High Court dated 15th February 2017.
28. Counsel for the Respondents submitted that there was compliance with the said Order as evidenced in “Ex JG1” – the Notice of Appeal and “Ex JG2” – the receipt of payment of the said Notice of Appeal.
29. He invited this Honourable Court to peruse “Ex JG1” – the Notice of Appeal which has the stamp of the Court of Appeal indicating when the Appeal was received by the Registrar of the Court of Appeal.

30. With regards to the timeline, Counsel for the Respondents submitted that the Notice of Appeal is a few days short as to the time of filing the Appeal.
31. He indicated that according to the provisions of Rule 10(1) of the Court of Appeal Rules 1985, amended by Constitutional Instrument No. 1 of 2003, Leave was granted by the Court of Appeal on 26th October 2017 and the Notice of Appeal being filed on 15th November 2017 is not fatal.
32. In his reply, Counsel for the Plaintiff/Applicant, I.F. Sawaneh Esq, reiterated that the Respondents are in breach of Rule 10(5) of the Court of Appeal Rules 1985 in that leave was granted to the Respondents to file the Appeal within a specified period of time which is 14 (fourteen) days.
33. The Respondents sought leave and they were granted leave, but they did not file their Notice of Appeal within the prescribed Provisions of the Law.
34. According to him, the Notice of Appeal was filed after 21 (twenty-one) days of the Order.
35. The Order, according to him, was not granted within the long vacation and that from 26th October 2017 to 16th November 2017, there were no Public Holidays.
36. Counsel for the Respondents, he submitted, cannot now be heard to say that the time lapse was reasonable.
37. Counsel for the Respondents provided the following authorities to this Honourable Court for consideration:
 - (a) Constitutional Instrument No. 1 of 2003
 - (b) Precious Minerals Marketing Co (SL) Ltd
In the matter of Companies Act Cap 249
(Ruling) (Civ.App No.1/99) {2000} SLCA 20 [08 March 2000] – a Sierra Lii Publication.
38. I have tried to set out the respective contentions in a detailed but concise form. I hope by doing so I will be able to bring out the issues for a clear determination.
39. The points in the Application before us concerns Rule 10(5) of the Court of Appeal Rules 1985 which states as follows:

“Where leave to Appeal is granted under this Rule the Appellant shall file a Notice of Appeal as provided by Rule 9 within Fourteen (14) days from the grant of leave.”
40. Rule 9 of the Court of Appeal Rules 1985 merely sets out how Notice and Grounds of Appeal should be contained in accordance with Civil Form 1 in Appendix A.
41. In its Ruling dated 26th October 2017, the Court of Appeal granted leave to the Respondents herein to Appeal to the Court against the Order of the High Court dated the 15th day of February 2016.

42. The Respondents filed their Notice of Appeal on the 16th day of November 2017.
43. It is obvious to me that the Notice of Appeal filed on the 16th day of November 2017 is caught by Rule 10(5) of the Court of Appeal Rules 1985 and it is clearly out of time in that there is a time lapse of 20 (twenty) days.
44. Counsel for the Respondents conceded that the Notice of Appeal is a few days short as to the time of filing the Appeal but that the same is not fatal taking into consideration Constitutional Instrument No. 1 of 2003.
45. I have properly perused the said Constitutional instrument which to my mind sets out the mode of Application when an Appeal lies by leave only, the mode of Application when such leave is refused and the provision for an enlargement of time.
46. With the greatest respect to Counsel for the Respondents, I am of the humble opinion that Constitutional Instrument No. 1 of 2003 is irrelevant to the Application pending before this Honourable Court.
47. I will now advert my mind to the 2 (two) cases quoted and relied upon by the respective Counsel in their submissions, that is, Bin Rafaah Vs. Precious Mineral Marketing Company (Sierra Leone) Limited (Civ. App 1/99) [1998] SLCA 2 {23RD October 1998}; and Precious Minerals Marketing Co (SL) Ltd.
In the matter of Companies Act Cap 249 (Ruling) (Civ. App No. 1/99) [2000] SLCA 20 {08 March 2000}; both of which are Sierra Lii Publications.
48. In both cases referred to, the Court of Appeal had to consider the effect of an Appeal filed by the Appellant in breach of Rule 11(1) of the Court of Appeal Rules 1985.
49. The reasons canvassed by Counsel for the Appellant in these cases for failing to comply with the timelines was that there was a rebel incursion in Freetown on the 6th January 1999 wherein there was a complete standstill in the city and the Registry of the Court of Appeal was closed.
50. Whereas the Court of Appeal in the Bin Refaah case adopted a tougher and less forgiving approach in the Application of Rule 11(1) of its Rules, 1985, in that the Appellant therein should have applied for an enlargement of time within which to file their Appeal, yet, In the matter of the Companies Act Cap 249, the Court of Appeal took into consideration that there was an abnormal situation and the omission by Counsel for the Appellant to file his Appeal within the timelines as contained in Rule 11(1) of its Rule, 1985 was not wilful on his part. The Court of Appeal therefore invoked Rule 66 of its rule, 1985, and in the interest of Justice waived the non-compliance with rule 11 (1).
51. In the matter pending before us, according to the 2017 almanac, there were no supervening circumstances between **Thursday 26th October 2017**, the date the ruling was delivered granting the


Respondent herein leave to file their Notice of Appeal and **Thursday 16th November 2017**, the date on which they filed their Notice of Appeal.

52. As stated earlier in this Ruling, there has been a time lapse of 20 (twenty) days on the part of the Respondents with Rule 10 (5) of the Court of Appeal Rules 1985 making it mandatory for them to have complied with the Order within 14 (fourteen) days thereof.
53. In effect, I am of the firm belief, notwithstanding that the Notice of Appeal was out of time, it would not have prejudiced the Respondents case if he had applied for an enlargement of time with the Affidavit in support indicating that the omission to comply with Rule 10(5) of the Court of Appeal Rules 1985 was not wilful on his part and that it will be in the interest of Justice if the non-compliance is waived in line with Rule 66 of the Court of Appeal Rules 1985.
54. As a result, I therefore hold that the Notice of Appeal dated 15th November 2017 and filed on the 16th November 2017 is not properly before this Court.
55. I am persuaded by the decision in the case of *Elija J. Speck Vs. Gbessay Keister* (1962) 2 SLLR 126 in which Dove Edwin J.A. said that:

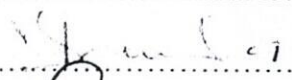
“.....the omission to follow the rule is fatal.....”.

56. In another aspect of this Ruling, it is observed that there is an error in Order 2 of the Court's Ruling dated 26th October 2017. The judgment referred to in the said Order should be dated 6th DAY OF JUNE 2016 AND NOT 6TH DAY OF JUNE 2017 as contained therein.
57. I considered the above to be typographical error and this Honourable Court will use its General Powers conferred by Rule 31 to amend the said error to read “6TH DAY OF JUNE 2016”.
58. Based on all the forgoing this Honourable Court hereby:
- (a) Vacates the Ruling dated 26th day of October 2017 in this action on the grounds of non-compliance with Rule 10(5) of the Court of Appeal Rules 1985.
 - (b) That the Order of the High Court dated the 15th day of February 2016 still stands.
 - (c) That the Notice of Appeal dated 15th November 2017 and filed on 16th November 2017, not properly before this Honourable Court is struck out.
 - (d) Orders costs against the Respondents in the sum of Le10,000,000/00 (Ten Million Leones).

HON. MR. JUSTICE J. B. ALLIEU, J.A.

 PRESIDING

HON. JUSTICE M. M. SAMBA, J.A (I AGREE)



HON. MR. JUSTICE S.A. BAH, J.A. (I AGREE)

