

CRIM. MISC.APP 6/2020

IN THE COURT OF APPEAL OF SIERRA LEONE
NOTICE OF APPLICATION FOR EXTENSION OF TIME WITHIN
WHICH TO APPEAL

BETWEEN

KADIJA OLAMATU SESAY -

APPELLANT/APPLICANT

AND

THE STATE -

RESPONDENT/RESPONDENTS

CORAM

HON MR JUSTICE MONFRED MOMOH SESAY - JA

HON MRS JUSTICE MUSU DAMBA KAMARA - JA

HON MR JUSTICE JOHN BOSCO ALLIEU - JA

COUNSEL

D.E TAYLOR ESQ for the Appellant/Applicant

O.V. ROBIN-MASON (SNR) Esq. for the Respondent/Respondent

RULING DELIVERED ON 24th DAY OF NOVEMBER, 2020

HON. MR. JUSTICE MONFRED MOMOH SESAY – JA

INTRODUCTION

By Notice of Application for Extension of Time within which to Appeal addressed to the Registrar of this Court and dated the 9th September, 2020 and filed in the Registry of the Court on the said date, the Appellant/Applicant applied to this court for extension of time within which to Appeal.

The Appellant/Applicant was convicted on the 13th day of August, 2020 by Hon. Justice Fatmatta Bintu Alhadi JA of the offence of misappropriation of public property contrary to Section 36 (1) of The Anti-Corruption Act, 2008, Act No 12 of 2008 and sentenced.

The Appellant/Appellant failed to appeal against her conviction within the time required by law i.e. within twenty-one (21) days after the date of her conviction. The 21st day after the said conviction was on 3rd September, 2020. The Appellant/Applicant therefore missed out the time within which to appeal by six (6) days i.e. as at the date of the present application.

THE LAW

The relevant law on enlargement of time can be found in Section 64 of The Courts Act, 1965, Act No.31 of 1965 and Rule 39 of The Court of Appeal Rules, 1985, Public Notice No. 29 of 1985. By these provisions of the above mentioned law, a twenty-one (21) - day time limit is imposed within which convicts of certain offences including the one for which the Appellant/Applicant was convicted can appeal or seek leave to appeal same if that time limit is extended where a convict misses out on the time.

Section 64 of The Courts Act, 1965 provides as follows:

"Where a person convicted desires to appeal to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by Rules of Court within twenty-one days of the date of his conviction: Provided that, except in the case of a conviction involving sentence to death, or corporal punishment the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court or by the Court below, before whom the appellant was convicted". (emphasis added).

Rule 39 of The Court of Appeal Rules (which provisions are similar to those of Section 64 of The Courts Act, 1965) provides as follows:

"Where any person aggrieved desires to appeal to the Court or to obtain leave of the Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by these Rules within twenty-one days after the date of conviction or acquittal or discharge as the case may be:

***Provided that except in the case of conviction involving sentence of death or corporal punishment, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court or by the Court below**"* (emphasis added)

These two provisions are applicable to criminal appeals from the High Court as Section 64 of The Courts Act, 1965 appear in Part IV of Chapter II of the Act under the rubric **"APPEALS IN CRIMINAL CASES TRIED IN THE SUPREME COURT (I.E. THE HIGH COURT) AT FIRST INSTANCE AND CERTAIN OTHER MATTERS RIGHT OF APPEAL AND DETERMINATION OF APPEAL"**. The Sections include Sections 57-69 inclusive.

Rule 39 of The Court of Appeal Rules, 1985, on its part appears in Part IV under the rubric "CRIMINAL APPEALS" and it includes Rules 39-63.

My reading of both Section 64 and Rule 39 informs me as follows:

- i. that the twenty-one (21)-day time limit imposed is for two reliefs, namely:
 - a. to give notice of appeal; and
 - b. to give notice of an application for leave to appeal;
- ii. that the twenty-one day time limit imposed may be extended for either or both reliefs by this Court or by the trial Court below if for good reason the convict fails to file the appeal or apply for leave to appeal within the said twenty-one-day time limit.
- iii. that both reliefs are discretionary for both this Court and the trial Court below which discretion must be exercised judiciously.

The present application before this court and which was moved by Learned Counsel, D. E. Taylor Esq. for the Appellant/Applicant is for extension of time within which to appeal as the time limited for such conviction had lapsed since the 3rd September, 2020. Attached to the said application is another application for leave to appeal against conviction by the said same Appellant/Applicant.

I think I need to confine myself to the application for extension of time as prayed and to consider and determine whether the Appellant/Applicant is in the correct forum.

As held earlier in this Ruling, both Section 64 and Rule 39 (supra) give this Court and the trial Court below the jurisdiction and, I dare say, the concurrent jurisdiction to hear and determine such applications.

The question then arises that where two courts are given concurrent jurisdiction to hear and determine such an application, what would be the correct procedure to take by an Appellant/Applicant.

Incidentally, Learned Counsel D. E. Taylor Esq. did not avert his mind to this question when he moved the court on Tuesday, the 13th day of October, 2020. He simply focused on the method or form of application and referred the Court to Rule 40 (1), (2), (3) and (4) of The Rules of this Court, 1985. Forms 1, 2, 3 or 4 are found in Appendix C to the said Rules.

I find and hold that the application before this Court as drafted and filed is in compliance with the prescribed forms i.e. Criminal Forms 4 and 2.

Both Section 64 and Rule 39 (supra), however, do not make provisions on the question I have raised.

This lacuna then brings into play Rule 64 of The Court of Appeal Rules, 1985 which (as Rules 65, 66 and 67) appear in a separate part i.e. Part V and under the rubric "MISCELLANEOUS" and it provides as follows:

"Except where otherwise provided in these rules or by other enactment, where any application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below, but if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court" (emphasis added).

My eyes caught the proviso in Rule 64 i.e. *"Except where otherwise provided in these rules or by any other enactment...."* and both the parent Act i.e. Section 64 (supra) and Rule 39 (supra) do not make any provisions "otherwise" as to the course of action an Appellant/Applicant should take when two forums are made available to him for such

relief as enlargement of time which I note is available in both criminal and civil appeals.

What then have the Courts, including this Court, said on this issue, particularly the prescription given in Rule 64 (supra)? This Court has made binding pronouncements on this issue on several occasions. One such occasion that caught my eyes and attention was in the matter of Firetex International Co. Ltd (Plaintiff)/Respondent v Sierra Leone External Telecommunications and Sierra Leone Telecommunications Co. Ltd (Defendant/Applicants) Misc. App 19/2002 (unreported) when Honourable Mr. Justice Tolla Thompson JA (as he then was now deceased) in delivering the unanimous decision of the Court which comprised his very Honourable self, Honourable Mr. Justice Abel N.B. Stronge (JA as he then was) and Honourable Mrs. Patricia Macauley (JA as she then was) said on the 26th June, 2003 as follows:

“As regards rule 64, it is plain and clear to me that this rule is a procedural rule. It illustrates the normal manner in which proceedings under the rule should be conducted. The applicant must first apply to the Court below i.e. the High Court and if the application is refused, he can then apply to this Court if he so desires” (emphasis added).

In that case, the Court was considering an application for stay of execution of judgment pending the hearing and determination of the application for stay and the appeal. It was a civil action for damages for breach of contract before Hon. Mr. Justice J.E. Macauley J (now deceased).

The Court of Appeal considered Rules 28 and 64 of its Rules, 1985. I think it would be useful to reproduce Rule 28 which provides as follows:

“An appeal shall not operate as a stay of execution of proceedings under the judgment or decision appealed from except so far as the Court below or the Court may order and no intermediate act or

proceedings shall be invalidated, except so far as the Court below or the Court may direct (emphasis added).

Rule 28 also in two instances as emphasized above, gives the Court below (i.e. the High Court) and the Court (i.e. the Court of Appeal as defined in Rule I of the said Court of Appeal Rules, 1985) concurrent jurisdictions to hear and determine an application for the relief for stay of execution just as section 64 of the Courts Act 1965 (supra) and Rule 39 of The Court of Appeal Rules, 1985 (supra) give concurrent jurisdiction to the Court below and this Court to hear and determine an application for enlargement of time within which to appeal.

Honourable Mr. Justice Tolla Thompson JA stressed (obiter) that:

"In dealing with these points let me here stress that the procedure under rule 64 of the Court of Appeal rules, must be given considerable weight as the trial court knows all about the case and can deal promptly with the application and the Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the trial Court in which case the Court of Appeal will at least have known how the trial Court dealt with the application" (emphasis added).

In a later case before this Court i.e. the matter between Solar Hotels Co Ltd (Appellant/Applicant) v Graham K. White (Respondent/Respondents) Misc. App. No 22 of 2003 (unreported). Honourable Mr. Justice Muria JA who heard the application alone made the same point on the proper construction of Rule 64 as it relates to reliefs for which the trial Court below and this Court are given concurrent jurisdiction to hear and determine applications for such reliefs.

That matter dealt with the relief for leave to appeal as provided for in Rule 10 (1) of The Court of Appeal Rules, 1985 as repealed and replaced by The Court of Appeal

(Amendment) Rules, 2003, Constitutional Instrument No.1. of 2003 which provides as follows:

“Where an appeal lies by leave only, any person desiring to appeal shall apply to the Court below or to the Court by notice of motion within fourteen days from the date of the decision against which leave to appeal is sought unless the court below or the court enlarges time”. (emphasis added)

In this Rule for both the reliefs for leave to appeal and enlargement of time within which to appeal, both the trial Court below and this Court are given concurrent jurisdictions to hear and determine the application. The Learned Honourable Mr. Justice Muria JA quoted with approval the position of this Court on the procedure to follow in such a situation as prescribed in the Rule 64 and as was pronounced by Tolla Thompson JA in Firetex International Co. Ltd v Sierra Leone External Communication and Sierra Leone Telecommunication Co Ltd (supra). Muria JA further quoted with approval the position of the Supreme Court of Sierra Leone in the matter of Nigeria National Shipping Lines v Abdul Ahmed (Trading as Abdul Aziz Enterprises (Supreme Court Civ. App No.3 of 1988) (unreported) in which judgment was delivered on the 17th February, 1989. He said:

“The Supreme Court had clearly laid down in that case the principle that after the High Court makes an order refusing leave pursuant to rules 10(1) and 64, and the 14 days period mentioned in rule 10 (1) has expired, that court becomes functus officio in the matter. Thereafter an application for enlargement of time together with a fresh application for leave must be made to the Court of Appeal which by virtue of rule 10 (1) has concurrent jurisdiction” (emphasis added)

The Learned Honourable Mr. Justice Muria JA further said that:

"There is nothing in rules 10(1) and 64 that prohibits the applicant from filing in court its application prior to the court below delivering its decision refusing leave"

It is interesting to note the Learned Justice Muria JA seemed to suggest that where such concurrent jurisdiction is granted to the two courts (i.e. the trial Court below and this Court), the aggrieved party need not only approach the Court below first but is at liberty to come to this Court even before the Court below had determined the application. I think that in such a situation, the applicant is only at liberty to approach this Court where there is evidence that the Court below inordinately and unreasonably delayed the hearing and determination of the application which may appear to amount to refusal.

The review of the authorities above show that the Courts have strongly prescribed that in any situation where the law gives the trial court and appellate court concurrent jurisdiction to hear and determine an application, the Rule 64 prescription must be followed. This Court is not only persuaded by these principles or construction as pronounced by this Court and the Supreme Court but bound by them pursuant to subsection (3) of Section 128 and subsection (2) of Section 122 respectively of The Constitution of Sierra Leone, 1991, Act No. 6 of 1991.

The authorities reviewed considered the reliefs for stay of execution of judgment pending the hearing and determination of appeal, leave to appeal and enlargement of time.

Another relief for which the law gives concurrent jurisdictions to the trial Court and the Court of Appeal is bail pending the determination of an appeal. This is provided by subsection (2) of Section 67 of The Courts Act, 1965, which provides as follows:

"The Court Of Appeal or the Court below before whom he was convicted may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal" (emphasis added).

Like stay, leave to appeal, enlargement of time within which to appeal, bail of the convict after trial by the trial Court is also an intermediate act ordered by the appropriate Court between judgement and the hearing of the appeal and it is my considered view that the prescription contained in Rule 64 must apply. That is to say, the aggrieved party must first approach the trial Court below failing which this Court would not have jurisdiction as the condition precedent before approaching this Court would not have been fulfilled.

I am also of the considered opinion that Rule 64 applies to reliefs available in both the civil and criminal courts because even by its place in the structure of The Court of Appeal Rules, 1985, it is neither under Part III for Civil Appeals nor under Part IV for Criminal Appeals but under Part V labelled "Miscellaneous" provisions. It can therefore not properly be held to apply to only reliefs available in the civil courts on one hand or criminal courts on the other. It applies to reliefs available in both the civil and criminal courts i.e. as long as the trial Court below and this Court are given concurrent jurisdiction to determine any matter or issue.

THE EVIDENCE

Both by the papers filed and the submissions of Counsel for the Appellant/Applicant, there is no evidence before this Court to show that the Appellant/Applicant complied with the provisions of Rule 64 of The Court of Appeal Rules. All that is before this Court is an application for extension of time within which to appeal in Form 4 of Appendix C to the said Rules and attached is a Notice of an Application for Leave to Appeal Against Conviction as in Form 2 of Appendix C.

There is nothing whatsoever to inform this Court that the Appellant/Applicant approached the trial Court below before coming before us. Even in his submissions to the Court when he moved the Court on the application for enlargement of time, Learned Counsel for the Appellant/Applicant did not avert his mind to the provisions of Section 64 of The Courts Act, 1965 and/or Rules 39 & 64 of The Court of Appeal

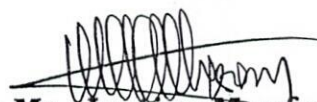
Rules which deal with the procedure to follow in such situations. He simply dealt with the form in which the application should be made.

CONCLUSION

In view of the above, I hold that the Appellant/Applicant has failed to follow the procedure to apply for enlargement of time. The law provides that an aggrieved party applying for such relief must first go to the trial Court below and if the trial court refuses or fails to grant the relief, then and only then can the aggrieved party make a fresh application for the same relief to this Court. In the fresh application to this Court, the Appellant/Applicant must put before this Court evidence of his/her such travel to the Court below. There is no evidence before us of such travel to the Court below.

Consequently, I hold that this Court does not have jurisdiction to hear this application and I accordingly strike out the application.

I make no Order as to costs


Honourable Mr. Justice Monfred Momoh Sesay

JUSTICE OF THE COURT OF APPEAL

24/11/2020

I AGREE


Honourable Mrs. Justice Musu Damba Kamara

JUSTICE OF THE COURT OF APPEAL

I AGREE


Honourable Mr. Justice John Bosco Allieu

JUSTICE OF THE COURT OF APPEAL