


CIV. APP. 71/2020

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

IVAN DAVIES & 5 ORS - APPLICANTS/APELLANTS

AND

MS OLABISI BARBER - RESPONDENT

CORAM:

HON. MRS. JUSTICE MUSU.D. KAMARA – JA (PRESIDNG)

HON. MRS. JUSTICE JAMESINA.E.L. KING – JA

HON. MR. JUSTICE SULAIMAN A. BAH – JA

COUNSEL:

S.M. Sesay for the Applicants/Appellants.

F.A.M. Carlton-Hanciles for the Respondent.

RULING DELIVERED ON THE 26th DAY OF JANUARY 2021.

The Application

1. By a Notice of Motion dated the 17th April 2020, the Applicants/Appellants are seeking for four Orders, stated thereon as follows:

“ 1. THAT AN INTERIM STAY of Execution of the Judgment of the High Court presided over by the Honourable Mr. Justice Komba Kamanda, J. dated the 16th day of December 2019 and all subsequent proceedings BE GRANTED pending the hearing and determination of this APPLICATION.

2. THAT A STAY of Execution of the Judgment of the High Court presided over by the Honourable Mr. Justice Komba Kamanda, J the same dated the 16th day of December 2019 and all subsequent proceedings BE GRANTED pending the hearing and determination of the Appellants’ appeal to the Court of Appeal for Sierra Leone.

3. THAT Leave BE GRANTED to the Appellants herein to Amend their Notice of Appeal filed in these proceedings the same dated the 17th day of January 2020 in the manner underlined **Red** in their proposed Notice of Appeal to this application.

4. That the Costs of and incidental to this application BE Costs in the Cause.”

2. The Motion is supported by the Affidavits of Ivan Davies the 1st Applicant/Appellant herein and S.M. Sesay Esq, both sworn on the 17th April 2020, and together with the exhibits referred to in both Affidavits, filed herein.

Submissions of Counsel for the Applicants/Appellants

3. Counsel for the Applicants/Appellants, Sahid Mohamed Sesay Esq., commenced by submitting that he relied on the entirety of both Affidavits. He further submitted that the current application for a stay of execution is to strengthen the Restraining Order – that the Respondent should not sell the *Res* pending the outcome of the Appeal – made by the Trial Judge on the 21st February 2020. He urged the Court to consider the fact that since the *Res* is not perishable in nature, its preservation would be best consolidated with a grant of stay of execution in addition to the Restraining Order. He went on to submit that the grounds of appeal filed raises triable or good grounds of appeal, notwithstanding the apparent defect in the Notice of Motion already filed – the non-compliance with Rule 9(2) of the Court of Appeal Rules 1985, Statutory Instrument 29 of 1985, (hereinafter referred to as ‘CAR 1985’). Further, Counsel submitted that the Court is vested with the unfettered discretion and power as if it were a court of 1st instance, in granting leave to the Applicants/Appellants to amend the Original Notice of Appeal filed in this matter.

Submissions of Counsel for the Respondents/Respondents

4. In opposing the application, Counsel for the Respondent, F. A. M. Carlton-Hanciles Esq., filed an Affidavit in Opposition sworn to on the 6th day of May 2020. He relied on the entirety of the affidavit and more particularly on paragraphs 2, 6, 7, 9, 12 and 13.

Counsel referred to Exhibits OB 6, OB 13¹⁻² and OB 14 and submitted that the Judgment of the High Court in favour of the Respondent herein, has been executed and perfected. He also submitted that on the 2nd of January 2020, the Under Sheriff certified that he levied execution against the Applicants/Appellants herein and vacant possession was handed over to the Respondent’s representative. He then went on to state that the Court should not entertain an application to set aside an Order which has been perfected.

Further, he submitted that there are no special circumstances being deposed to by the Applicants/Appellants. He concluded by submitting that the Respondent has no intention of selling the *Res* as it is intended to be passed on to her off-springs.

Issues and Findings

6. The questions or issues for determination in this application are:
 - (i) Have the Applicants/Appellants shown special circumstances to warrant the grant of a stay of execution?

(ii) Is the Court of Appeal vested with an unfettered discretion and power pursuant to Rule 31 of the CAR 1985, in granting the Applicants/Appellants leave to amend the grounds in a Notice of Appeal?

In addressing these issues, the Court will deal with them seriatim.

7. Have the applicants/appellants shown special circumstances to warrant the grant of a stay of execution?

It is worth noting that “[t]he principles applicable in determining whether a stay should be granted or not are well known and have been applied in numerous cases by the Courts in this jurisdiction” (per Muria JA in **Patrick Koroma Vs Sierra Leone Housing Corporation and Dolcis Beckley Misc App 9/2004**). Fortunately, both Counsel for the Applicants/Appellants and the Respondent, are alive to these principles having referred this Court to the authorities establishing same. The authorities mentioned are *inter alia*: Rule 28 of the CAR 1985; Halsbury Laws of England Vol 16; Civ App 59/2006 Marco and Others Vs Alhaji Baba Allie & Others; Misc App 1/96 Betsy Rogers Parkinson and Others Vs Clarence Robinson and Others; Misc App 9/2004 Patrick Koroma Vs Sierra Leone Housing Corporation and Dolcis Beckley; Misc App 2/94 Africana Tokeh Village Limited Vs John Obey Development Investment Co. Ltd; and, Misc App 13/2002 Mrs Lucy Decker and Others Vs Goldstone Decker. Consequently, this Court would not venture into a “determining” excursion; but would rather adopt and affirm the existing principles regarding “stay of execution”. That said, this Court will now consider the issue raised in this application - whether the Applicants/Appellants have in their Affidavit shown or established special circumstances.

8. This application is praying for the staying of the execution of the Judgment of Komba Kamanda J (now JA) of the 16th December 2019 - a ‘non-monetary judgment for the recovery of immediate possession’ of land. To that end, the case of Boblyn Augustine Vs Abdul Koroma (Misc App 38/2004 – hereinafter referred to as “The Boblyn Case”), is very instructive, where Muria JA., *inter alia* stated:

“ ... [I]n a non-monetary judgment, as that of a judgment for delivery of possession, of a land, the ‘special circumstances’ that the applicant for a stay has to establish are those factors which make out a strong case for depriving the respondent of the benefit of the judgment obtained in his favour. A further consideration which the court will take into account in an application for a stay especially in cases concerning land, is that of the non-perishable nature of the property. The cases of Ernest Farmer and Another (1945) Vol. 3 Sierra Leone Recorder 66, Bank of Sierra Leone v. Desmond Luke (14th July 2004) CA, Misc App 22/2004; Yusuf Bundu v. Mohamed Bailor Jalloh (23rd July 2004) CA Misc App 23/2004 have clearly established the principle that in cases where the judgments sought to be stayed are for recovery of possession of land, the Court of Appeal will refuse a stay unless the applicant can

establish a strong case for depriving the respondent of the fruit of the judgment obtained in his favour."

11. Counsel for the Applicants/Appellants relied on the Affidavit of Ivan Davies to show special circumstances. Paragraphs 7 - 9 are most germane and are set out as follows:

" 7. That the Land the subject-matter of the action in the high court has been in the possession of our predecessors-in-title for well over 50 (fifty) years. The DW 1 (our vendor) in the High Court Mr Ina Ethelbert Wray led evidence to the effect that he alone had been in possession of the Land for well over 40 (forty) years. That piece of evidence was before the Court. He also led evidence to the effect that his own Piece of Land is distinct and separate from that claimed by the plaintiff in this action when it was before the Court below.

8. That the said Ina Ethelbert Wray became seised in possession of the said Land by virtue of a Statutory Declaration, a copy of which was tendered in Court and copy whereof is now produced and shown to me marked exhibit "F¹⁻³.

9. That the said Land have been part of the WRAY'S FAMILY Heritage. Their late Father and Mother together with their relatives I have been reliably told and verily believe were carrying on FARMING work and other activities on the said Land. In fact, proceeds from the sale of fruits harvested from crops on the said Land have been used to educate some of their children. Their deceased parents were Farmers of Crops and Vegetables in the Area. There are facts I gathered from Old people living in the area together with our Vendor hereof."

12. Garnering from the above quoted paragraphs of the said Affidavit of Ivan Davies, it is appropriate to hold that the said Affidavit expressed **an emotional attachment to the said property** – in highlighting the long possession of the Deponent's predecessors-in-title of well over 50 years; and, the property being 'part of the WRAY'S FAMILY HERITAGE'.
13. It should be noted that this Court of Appeal has in an earlier decision - in the Boblyn Case - rejected a stay where '[t]he grounds advanced on behalf of the appellant/applicant range from saying the property was a family home and that he [the Applicant/Appellant] was sentimentally and emotionally attached to [the property]'. (Per Muria JA)
14. It is on record that this Court refused a stay of execution in respect of a house claimed as an ancestral home in Evelyn Ayo Pratt Administratrix of the Estate of Betsy Rogers Parkinson (Deceased) Intestate Vs Jacqueline Carew and Others - Misc App 7/05.

15. Considering the authorities mentioned and having regard to paragraphs 7 – 9 of the Affidavit of Ivan Davies (as quoted above), this Court is of the view that there is no evidence of a strong case being established ‘... *for depriving the respondent of the fruit of the judgment obtained in his favour*’; and, to that end, no special circumstances have been shown or established.
16. It should be recalled that in opposing the prayer for a stay of execution, Counsel for the Respondent, particularly referred to and relied on Exhibits OB 6, OB 13¹⁻² and OB 14, the Drawn up Judgment in favour of the Respondent, the Writ of Possession, *Fieri Facias* and Assistance combined and Praecipe, respectively, all attached to the affidavit of Olabisi W M Barber. Further, Counsel submitted that the Judgment of the High Court in favour of the Respondent herein, has been executed and perfected. He also submitted that on the 2nd of January 2020, the Under Sheriff certified that he levied execution against the Appellants herein and vacant possession was handed over to the Respondent’s representative. These submissions are rooted on Exhibits OB 13¹⁻² and OB 14. And, based on the said exhibits OB 13¹⁻² and OB 14, Counsel had urged this Court not to entertain the application to set aside an order granting the recovery of immediate possession of the land which has been perfected; because, by so doing, grave injustice would be caused to the successful litigant. And for that, he relied on *Marsden vs Marsden* [1972] 2 All E R 116.
17. This Court has considered the case of *Marsden vs Marsden* and would wish to state that it is unhelpful having regard to the case of **Africana Tokeh Village Limited vs John Obey Development Ltd**, where this Court ordered that, the applicants therein should regain possession of the land and premises after an execution of the judgment. The Order to regain possession was as a result of a stay of execution being granted on the basis that “... *the applicants have shown special circumstances which merit the exercise of th[e] Court’s discretion*” (Per Hon Mr Justice G Gelaga-King J.A in *Africana Tokeh Village Ltd Case*). In this instant case, the situation is however different from that in the *Africana Tokeh* case, as this Court maintains that no special circumstances have been shown to merit the exercise of its discretion in favour of the Applicants/Appellants.
19. Amongst the submissions made by Counsel for the Applicants/Appellants praying for a stay of execution, was a submission to the effect that that ‘*[a]ll this application is seeking is to strengthen the Restraining Order*’ against the Respondent herein. It should be noted that on the 21st February 2020, the High Court presided over by the Hon. Mr. Justice Komba Kamanda J (now JA), in refusing the application for a Stay of Execution of the Judgment in favour of the Respondent, did order “*[t]hat the Plaintiff/Respondent should not sell the Res pending the outcome of the Appeal.*”
21. Though it is the view of the Court that no special circumstances have been shown or established and for that reason the application for stay should be refused, and it is hereby refused; yet, it would be appropriate to order that the Respondent must not dispose of the property to another by whatever means while the appeal is pending in

the Court of Appeal. This position is reinforced by the Boblyn case, where the Court of Appeal, ordered that the '*respondent [be] restrained from selling or otherwise disposing of the property ... until the appeal ... is determined*', after refusing an application for a stay of execution.

22. This Court will now seek to address the second issue raised in this application. Is the Court of Appeal, pursuant to Rule 31 of the CAR 1985, vested with the unfettered discretion and power in granting the Applicants/Appellants leave to amend the grounds in a Notice of Appeal?

In support of the application for leave to amend the grounds in the notice of appeal, Counsel did submit that this Court has unfettered discretion and power, pursuant to Rule 31 of the CAR 1985, to grant such leave. This Court is in agreement with Counsel in part, in so far as it concerns or relates to the fact that it is vested with the discretion in granting leave to amend the grounds of appeal upon such terms it may deem just; but not pursuant to Rule 31 of the CAR 1985.

The said Rule 31 of CAR 1985 deals with the general powers of the Court which provides:

*"**The Court** may from time to time make any order necessary for determining the real question in controversy in the appeal and **may amend any defect or error in the record of the appeal**, and may direct the Court below to enquire into and certify its finding on any question which the Court thinks fit to determine before final judgment in the appeal, and may make any interim order or grant any injunction which the Court below is authorized to make or grant and may direct any necessary enquiries or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may rehear the whole case, or may remit it to the Court below to be reheard, or to be otherwise dealt with as the Court may direct."*

Emphasis ours.

23. Indeed, Rule 31 of the CAR 1985 vests this Court with *inter alia* the discretion and power to "... ***amend any defect or error in the record of the appeal*** ..." But, does this 'discretion and power' include the discretion to amend the grounds in a notice of appeal? It is worthy to note that exhibits **OB2¹⁻⁴** and **SMS1¹⁻³** are one and the same – **the Notice of Appeal**, which is ^{the} instrument or act or mechanism that triggers an appeal – culminating in the compilation of record of appeal - and the appeal proceedings. There is no 'record of appeal' before this Court; and therefore, the notice of appeal that is sought to be amended could not be described as such - the record of appeal - in this application. In that vein, the said Rule 31 of CAR 1985 is unhelpful to the Applicants/Appellants.
25. The appropriate provision to be invoked in an application for leave to amend the grounds in a notice of appeal, is **Rule 9(5) of the CAR 1985** which states:

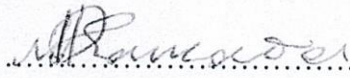
"The appellant shall not, without the leave of the Court, urge or be heard in support of any ground of objections not mentioned in the notice of appeal, or cross appeal, but the Court may in its discretion allow the appellant or cross-appellant to amend the grounds of appeal upon such terms as the Court may deem just."

26. This Court is aware that Counsel for the Respondent did not oppose the application for amending the notice of appeal.
27. Having considered Exhibits SMS1¹⁻³ and SMS2¹⁻⁴, the notice of appeal and the proposed amended notice of appeal, respectively, this Court will exercise its discretion in allowing the Applicants/Appellants to amend the grounds of appeal as prayed for.
28. In the circumstances therefore, it is ordered that:
- (a) The application for a stay of execution is refused;
 - (b) The Respondent herein is hereby restrained from selling or otherwise disposing of the piece or parcel of land situate lying and being at New Freetown Waterloo Road, Allen Town in the Western Area of the Republic of Sierra Leone enclosing an area of 0.7632 acre more particularly delineated on the Survey Plan numbered L.S 2361/16 dated the 14th day of October 2016;
 - (c) Leave is hereby granted to the Applicants/Appellants to amend the grounds of appeal in the Notice of Appeal and file the amended Notice of Appeal within fourteen (14) days from the date of this order; and,
 - (d) the costs of this application shall be costs in the cause.

Signed: 

HON. MR. JUSTICE SULAIMAN A. BAH, JA

I AGREE:

Signed: 

HON. MRS. JUSTICE MUSU D. KAMARA, JA (Presiding)

I AGREE:

Signed: 

HON. MRS. JUSTICE JAMESINA E.L. KING, JA;