

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN

SIERRA RUTILE LTD

- APPELLANT/APPLICANT

AND

TRANSCEND INTERNATIONAL RESOURCES LTD

- RESPONDENT/RESPONDENT

CORAM:

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING)

HON. MR. JUSTICE KOMBA KAMANDA J.A.

HON. MRS. TONIA BARNETT J.A.

COUNSEL:

A.C. Thompson Esq – Appellant/Applicant

D. Beoku-Betts Esq, Tamba Kelly Esq & B. Michael Ms. – Respondent/Respondent

RULING DELIVERED THIS 24TH DAY OF FEBRUARY 2022

1. A Writ of Summons was issued by the Respondent against the Appellant/Applicant and final judgment was delivered against the Appellant/Applicant. Dissatisfied with the judgment of the Hon. Justice A. Fisher J. of 19th August 2021, the Appellant filed a Notice of Appeal against the said judgment, and its application for a stay of execution was refused by the High Court.
2. This Ruling is in respect of an application by Notice of Motion dated 27th August 2021 by the Appellant/Applicant for a stay of execution supported by three affidavits. One sworn to by Neuf Bah and two sworn to by Maurice Cole, together with the exhibits attached thereto. There is an affidavit in opposition and supplemental affidavit in opposition on behalf of the Respondent sworn to on 3rd September & 6th September 2021 respectively by Tak Lam together with the exhibits attached thereto.
3. Both Counsel's written submissions and oral addresses were consistent with their positions, Counsel for the Appellant/Applicants urging the court to grant the stay as it had good grounds of appeal and based on four special circumstances set out in the respective affidavits, and Counsel for the Respondent submitting reasons for a refusal of the application as the Respondent should not be deprived of the fruits of its judgment and will suffer hardship if a stay is granted. Some of the submissions and authorities will be reviewed and referred to.

Analysis & Decision

4. The general rule is that an application for a stay of execution will be granted upon proof of prima facie good grounds of appeal and the existence of special or exceptional

circumstances. The onus is on the applicant to show by affidavit evidence that the two requirements do exist. See *Firetex International Co. Ltd vs Sierra Leone External Communication and Sierra Leone Telecommunications Co. Ltd. Misc. App. 19/2002* and several other decided cases on the established principle that a Court must ensure that a successful litigant is not deprived of the fruits of his judgment and that it may be wrong to grant a stay of execution of a judgment pending appeal where an appeal is frivolous or which will inflict hardship on the successful party. The Court will not make a practice of depriving successful litigants of the fruits of their successes because a judgment of the Court is presumed to be correct and rightly made until the contrary is proved. (see *Sierra Leone Shipping Company v Albert Gomez and 2 others Civ. App. 63/2008* dated 30th January 2009 unreported.)

5. Subject to this however, is the principle that when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal if successful shall not be rendered nugatory, see *Wilson v. Church No.2 1879 12 Ch. D 454*.
6. The question is, has the Appellant/Applicant established prima facie good grounds of appeal? The Appellant/Applicant has filed 25 grounds of appeal which Counsel submits relate to the law and procedures adopted during the trial, relating to admissibility of hearsay evidence, granting of reliefs not prayed for, application of principles of conversion and detinue, mitigation of damages, mode of admitting evidence and the jurisdiction of a trial judge to start de novo or continue with a file after it has been assigned. It is not necessary for this Court to express a view on the merits or chances of success of the Appellant/Applicant's appeal, suffice it to state that it is arguable and not frivolous.
7. The second question is, are the special circumstances set out in paragraph 7a -f of the affidavit supporting the application and paragraphs 4, 5, & 6 in the affidavit in reply warrant a stay of execution? In summary, there are four special circumstances. The first special circumstance is the appeal if successful could be rendered nugatory as the judgment sum of over U.S.\$3,000,000 if paid to the Respondent cannot be recovered as the Respondent is a foreign company, not ordinarily resident in Sierra Leone, does not have assets or even a bank account in the jurisdiction, nor has it provided a list of assets to substantiate its assets and business interests. In addition, Counsel for the Appellant/Applicant submits that the contract between the Respondent and an American Company for services to be provided in Sierra Leone reaffirms the position that monies payable to the Respondent is at its bank account in Hong Kong and not Sierra Leone. He notes the reference to shares owned in another Company by the shareholder of the Respondent as proof of assets, and submits that in law Transcend Int. is separate and distinct person from the Respondent, and it does not mean that the assets are owned by it.
8. Counsel for the Respondent relies on the supplemental affidavit in opposition which states that the Respondent is registered in Hong Kong with operations in Sierra Leone and that Mr. Wong Tak Lam is the sole owner of the Respondent Company. It also refers to Mr. Lam's financial interest in the Lumley Atlantic Hotel, which Counsel submits is owned by Atlantic Lumley Hotel Limited incorporated in Sierra Leone and the latter company is owned by Atlantic International Investment Limited, a company registered in Hong Kong with Mr. Lam being the majority shareholder with about 70% of the shares.

9. Another issue relevant to the first special circumstance is the process of recovery and enforcement of the judgment which will be done in Hong Kong if the appeal is successful as the funds will be in Hong Kong. Counsel for the Appellant/Applicant submits that the process of recovery is not as clear and certain contrary to the submission of the Respondent. He submits that it will not be merely enforcement of judgment in Hong Kong, rather a fresh action in Hong Kong will have to be instituted with possible defences based on jurisdiction of the Hong Kong court, having regard to the fact that the contract between the parties refers to arbitration in the U.K., and this may be a defence to stifle any new action against the Respondent in Hong Kong.
10. Counsel for the Respondent submits that the judgment sum can be recovered as a debt in Hong Kong and it is in evidence that in the past Counsel for the Appellant/Applicant successfully instituted proceedings to recover funds in Hong Kong in a matter involving the parties, and the submission on jurisdiction of the court in Hong Kong should be discountenanced as both parties have surrendered to the jurisdiction of the courts of Sierra Leone.
11. The second special circumstance is that execution will lead to tremendous hardship, financial ruin and insolvency of the Appellant/Applicant's Company, having regard to a notice showing its very precarious financial position. Appellant/Applicant's Counsel further submits that if execution is levied on the assets, the Appellant company will be closed and over 2,500 employees will lose their jobs, and it will be impossible to return to the status quo if the appeal is successful. He relies on *Union Trust Bank v Mohamed Kakay Civ/App 04/2019*, *Africana Tokeh Village Ltd v John Obey* instructive to the effect that if execution will make it impossible to return the status quo or lead to financial ruin of a business, the court will be inclined to exercise its discretion in favour of the applicant.
12. Responding to Counsel for the Respondent that the Appellant /Applicant will close down and they will not get their money, Counsel for the Appellant refers to a list of assets of the Appellant Company of almost U.S. \$29,000,000, more than the judgment debt which would satisfy execution if the appeal fails. In response Counsel for the Respondent submits that the financial difficulties are a concern to his client, because if the Respondent goes out of business this will cause hardship to the Respondent and he posed the question why should the Respondent give a loan to the Applicant/Appellant. He also maintains that it will not be fair if there is no income from the Appellant/Applicant to pay the judgment sum. He states that reference to 2,500 jobs which will be lost is to evoke the sympathy of the Court and refers to authorities that *moral considerations cannot amount to special circumstances*. see *Moheir Intl v Moller & Others* and the case of *Desmond Luke v Bank of SL* both unreported.
13. The third special circumstance is that the Appellant/Applicant will lose its commercial goodwill if execution proceeds and reference is made to ongoing talks with government and potential investors. Counsel for the Appellant/Applicant relies on the principle in the unreported case of *Commercial Properties v Whitakker* that if a company is to lose its commercial goodwill it will constitute a consideration for granting a stay.
14. The fourth and final special circumstance is the appeal itself with 25 grounds of appeal based on law, procedure and legal principles which public interest dictates constitutes special circumstances. He refers to *Richard Owiredo v. Bintumani, Vitafoam v S.L. Ltd & General Construction Services Civ/App 15/17*.

15. Counsel for the Respondent submits that if the court does grant a stay of execution it should be on terms to prevent Appellant/Applicant from depleting the assets and refers to page 1077 of para 59/13/2 of the Supreme Court Practice under the rubric "when will a stay of execution be granted?" which states as follows:
".....But if such a stay is granted the court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that appellant is prevented from depleting his assets in the meantime, except for any legitimate and necessary expenditure. This approach was endorsed in Linotype-Hell Finance Ltd v. Baker (1992) 4 All E.R. 887 (Staughton L.J. sitting as a single Lord Justice). It was also endorsed in Winchester Cigarette Machinery Ltd v Payne (No.2) (1993), The Times, December 15, but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasized that indications in the past cases do not fetter the scope of the Court's discretion."
16. On the special circumstances put forward for granting a stay, the depositions about the precarious financial situation of the Appellant, the risk of losing 2,500 jobs, risk of insolvency and loss of goodwill, pending negotiations with investors and government are really considerations which are of "a moral, social and political" character and do not amount to special circumstances.
17. The Court of Appeal in *Yusufu Bundu v Mohamed Bailor Jalloh* Misc. App 23/2004, highlighted the distinction between monetary or liquidated judgments, and those of non-monetary or unliquidated judgments, and stated that in a liquidated judgment or order, if the affidavit in evidence shows that there is a real risk that damages and costs would not be refunded if the appeal succeeds, then such factors would amount to "special circumstances" justifying stay of execution.
18. The fact that the Respondent does not have a bank account in Sierra Leone is not refuted. Therefore, garnishee proceedings cannot be made in respect of any account in Sierra Leone. The Respondent bank account is in Hong Kong and payments due it under the contract with the American Company will be made in Hong Kong even though execution is in Sierra Leone. With the lack of clarity in the process of recovering the judgment sum in Hong Kong, there is a risk that if the appeal is successful, the said sum may not be recoverable or will only be recoverable with considerable delay due to proceedings which may have to be instituted in Hong Kong, either for an enforcement or on a fresh claim. These are special circumstances to justify this Court to exercise its discretion to grant a stay of execution, to ensure that if the appeal is successful, it should not be rendered nugatory.
19. On the other hand, it is of utmost importance to safeguard the judgment sum pending the hearing and determination of the appeal, so that it is readily available and payable in the event that the Respondent succeeds in obtaining judgment in its favour in this Court. The Court has to ensure that the Respondent is paid without delay if the appeal fails and the Appellant should be prevented from depleting its assets.
20. The evidence abounds that the Appellant/Applicant is facing very serious financial difficulties and is at risk of insolvency if its engagement with potential investors and government does not bear fruits. Whilst the Appellant/Applicant has pointed to assets that are almost ten times more than the judgment sum, full disclosures have not been

made regarding its financial liabilities to convince this court that they are unencumbered and in good condition, and will be immediately available for execution should the appeal become unsuccessful. This Court is equally mindful that should it exercise its discretion to grant a stay on terms, those terms should not be onerous which will amount to a mere academic pronouncement. (see Civ. App. 54/2015 *Moheir Enterprises v Mr. Adel Mullah & Others* dated 24th March 2016). I also take note of the time that has elapsed from the date of judgment in August 2021 to date which should have given the Appellant/Applicant sufficient time to take steps necessary to remain a viable concern.

Conclusion

21. Having regard to the special circumstances highlighted in the foregoing, the Appellant/Applicant's application for a stay of the judgment dated 19th August 2021 is granted pending the hearing and determination of the appeal on the following terms: 17

1. Within 10 days of this order, the Appellant/Applicant shall pay 25% of the Judgment sum and costs into an interest bearing account at a local commercial bank agreed by the parties and the signatories to that account shall be Solicitors of both parties.
2. Within 30 days of this order, the Appellant/Applicant shall pay another 25% of the Judgment sum and costs into the account in Order 1 above.
3. Within 30 days of this order, the Appellant/Applicant shall provide a bond guaranteeing the payment to the Respondent of the rest of the Judgment debt and interest thereon.
4. In view of the nature of the action, a speedy hearing of this appeal is directed and the records of appeal be settled by the Court of Appeal Registry within 21 days of this order if it has not already done so.
5. Costs of the application to the Respondent to be taxed if not agreed on.

In the Cause of

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING)

[Signature]

HON. MR. JUSTICE KOMBA KAMANDA J.A. I AGREE

[Signature]

HON. MRS. JUSTICE TONIA BARNETT J.A. I AGREE

[Signature]