

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION

BETWEEN

HARRY'S (SL) LIMITED

-PLAINTIFF

AND

MR. MOHIT RAMCHANDANI & ANO

-DEFENDANT

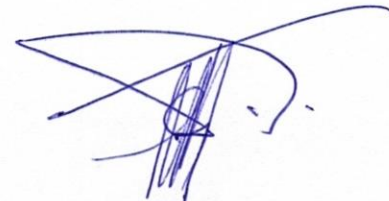
RULING DELIVERED BY THE HONORABLE JUSTICE LORNARD TAYLOR
ON THE 16th NOVEMBER 2022

F. GARBER**-COUNSEL FOR THE DEFENDANTS/APPLICANT****A. K. KOROMA****-COUNSEL FOR THE PLAINTIFF/RESPONDENT**

The defendants have approached this court by Notice of Motion dated 18th July 2022 praying inter alia for the following orders;

1. That this court sets aside its judgment of 12th May 2022 as same was irregularly obtained on the following grounds;
 - a. without the defendant being heard,
 - b. this action was instituted in the wrong division of the High Court
 - c. the 2nd defendant was improperly made a party
2. That this court sets aside the said judgment on terms
3. That this court grants the defendants leave to file their defence and counter-claim out of time.

The Plaintiff had commenced these proceedings by writ of summons dated 28th March 2022. The said writ of summons was served on the defendants to this action as required by the rules and the defendants have not denied this. On the 21st April 2022 Brewah & Co. Solicitors entered and appearance for the defendants. On the 21st April 2022, the Plaintiff approached this court on a application for summary judgment. The application was heard and determined in the absence of the defendants and their solicitors who were notified of the hearing of the application. Judgment was entered for the Plaintiff on the 12th May 2022. It is this judgment that the defendants now seek to have set aside by the present application.



As cited above, the Defendant's first complaint is that the Judgment of 12th May 2022 was obtained irregularly and therefore ought to be set aside ex debitojusticia. The defendants laid out this prayer on the face of this application on the basis that they were not heard when the application for judgment was made, the action is in the wrong division of the high court and that the 2nd defendant was improperly made a party to the action.

It is trite law and practice that an irregularly obtained judgment is one that was obtained by a party who in the process of proceeding to judgment breached the rules of procedure and obtained the judgment in spite of such breach. However, where the rules of procedure were complied with, the judgment obtained in that circumstance cannot in all intent and purposes be labelled an irregular judgment.

This begs the question, is the judgment irregular because the defendants were not heard? It is a principle of law and practice that both sides must be heard before a tribunal can deliver a judgment in a matter. This principle of audi alteram partem forms the basis and foundation of fair hearing in our jurisdiction. It is indeed a sacred one. However, this principle as stated above is only the general rule. Where a defendant who enjoys this right, neglects, fails and or refused to exercise same, he cannot in fairness complain that he has been refused the right to be heard. He was not refused the right. He rejected it.

In the present matter, the Plaintiff approached this court for summary judgment pursuant to **Order 16 rule 1 of the High Court Rules 2007**. It reads;

"Where in an action to which this rule applies a defendant has been served with a statement of claim and has entered appearance, the plaintiff may, on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of the claim except as to the amount of any damages claimed"

Notice of the hearing of the application was served on solicitors for the defendants. The defendants failed to appear for the hearing and make their case. The Plaintiff as it were moved the application and made the case from its perspective in the absence of the defendants and judgment was given in its favour. This judgment is accordingly a regular judgment.

The defendants also apply that this court sets aside the judgment in this matter on the basis that the action was instituted in the wrong division of the High Court. Their argument is that the present action is an industrial matter between employer and employee and should therefore have been filed



in the Industrial Division of the High Court and not the Commercial and Admiralty Division as is presently the case. For this reliance is placed on Section 3 of The High Court (Divisions) Order 2019, Constitutional Instrument No. 4 of 2019. This section lists the type of matters to be assigned to the Industrial Division of the High Court among which are matters relating to the relationship between employers and employees as well as industrial disputes.

Sound as this argument may seem, it does not fit the facts of the present matter. The Plaintiff's claim is for damages for breach of contract. It maintains that the defendants are in breach of their contract with it by doing what was prohibited by the contract after the employment had been terminated. The 2nd paragraph in the Plaintiff's particulars of claim is clear on this issue. The Plaintiffs are suing the defendants as former employees. Granted that terms sought to be enforced are contained in a contract of employment, this court however have not lost sight of the fact that the defendants are not brought before this court in their capacity as employees of the Plaintiff considering that the contract of employment between the Plaintiff and the defendants had come to an end and the defendants were no longer working for the Plaintiff. It is also not a case of enforcement of matters arising during the course of the employment or at its end such as end of service benefits. The claim of the Plaintiff relates wholly to acts of the defendants that occur after the contract of employment had ceased to between the parties. The claim of the plaintiff is not in the nature of enforcement of terms related to the employment itself, but rather it is based on issues emanating subsequent to the employer/employee relationship between the parties. This is therefore not an industrial matter as the case before this court is not between an employer and employee but rather considering that the contract of employment had lapsed, it is for the enforcement of those terms relating to issues that arose outside the scope of the employer/ employee relationship between the parties. I therefore would hold that this matter is not one for the industrial division of the High Court but rather one that falls squarely within the ambit of the commercial and admiralty division.

The defendants also maintain that the judgment in this matter ought to be set aside as of right considering that the 2nd defendant was improperly made a party to the proceedings. When a defendant is improperly made a party to an action, the proceedings are governed by Order 18 rule 6 of the High Court Rules 2007. By the said provision, where a person is improperly or unnecessarily made a party, the remedy is an order for such a party to cease to be a party in the action. In the present matter, judgment has already been given against the defendants. The fact of whether or not they are

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improper parties before this court in this matter is not an issue this court can consider as a ground for setting aside this judgment unless same is contained in the proposed defence exhibited to the application. For this, I took the liberty to examine Exhibit MR6 attached to the affidavit in support of the application herein which is the proposed defence and counter-claim of the defendants. I must say that upon proper examination of same, this is not a defence the defendant have shown an intention to raise. This court cannot in the circumstances consider this as a ground based on which a judgment can be set aside ex debitojusticia. Must the judgment be set aside, the court can then by procedure entertain an application in which the issue is raised but definitely not at this stage of the proceedings. The remedy for being wrongly added as a party to an action is a dismissal of the case against the wrongly added party and not the setting aside of a judgment.

The Defendants have also approached praying that the Judgment be set aside on terms. I understand this to mean that they are asking that this court sets aside the judgment on the grounds that they have a good defence to the action and that they be given leave to file their defence and counter-claim out of time.

In addressing this issue, I must first highlight that the judgment in this matter is not a judgment in default of defence. It is a judgment of the court on an application for summary judgment pursuant to **Order 16 of the High Court Rules 2007**. As such the only consideration in setting same aside is as is contained in Order 16 rule 11 of same. Its states;

"Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just".


Based on the above, a party who is did not appear at the hearing of the application for summary judgment could ask that the judgment be set aside for him/her to be given an opportunity to be heard on same. This must be distinguished from the situation where the judgment is set aside and leave granted for the defence to be filed out of time. Must this court acquiesce to the latter scenario which is what the defendants have applied for, i.e. that the judgment be set aside and that the defendants be granted leave to file their defence out of time, the Plaintiff would have been disadvantaged by the fact that its application for summary judgment would in effect have been determined against him by this singular application when in fact this should not be the case. At this stage, this court should only consider the issue of whether there is cause for the defendants to be granted leave to defend the application for summary judgment. That is the procedure.



However, in making this decision, this court took the liberty to examine the proposed defence exhibited to the present application by the defendants. Having gone examined the said document and the case of the Defendants as raised therein, it is my considered view that it would be a waste of time and resources for this court to in determining this application limit itself to the issue of whether or not to set aside the judgment herein and the defendants granted leave to defend the application for summary judgment. In my view the defence proposed defence exhibited by the defendants do raise triable issues which would warrant a detailed inquiry into the matter.

In the circumstances, I would therefore make the following orders;

1. The judgment of this court dated 12th May 2022 is accordingly set aside.
2. The defendants are at liberty to file their defence to this action within 7 days from the date of this order.
3. Cost of this application is assessed at Le 15,000 to be paid by both defendants jointly and severally to solicitors for the Plaintiff.



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HONORABLE JUSTICE LORNARD TAYLOR