FTCC 081/22 2022 C NO.5

IN THE HIGH COURT OF SIERRA LEONE

(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN:

CAMServ (SL) LIMITED -PLAINTIFF

AND

SUNBIRD BIOENERGY (SL) LIMITED - DEFENDANT

A. B. MOISIA **-COUNSEL FOR THE PLAINTIFF**

A. B. BANGURA **-COUNSEL FOR THE DEFENDANT**

RULING DELIVERED BY THE HONORABLE JUSTICE LORNARD TAYLOR ON THE 19TH APRIL 2023.

The Plaintiff commenced this action by writ of summons dated 25th July 2022. As deposed to in the affidavit of service dated 1st August 2022, the writ of summons was served on the defendant by delivering same to one Desmond Kabia on the 28th July 2022. On the 17th October 2022, the Plaintiff conducted a search of the registry which said search revealed that no process had been filed for and on behalf of the defendant. An affidavit of search was filed to this effect on the 18th October 2022. On the 2nd November 2022, the Plaintiff proceeded by default and obtained judgment in default of appearance. It is this judgment and the writ of summons in this action that the defendant now seeks to have set aside by the present application.

The defendant approached this court by notice of motion dated 30th November 2022 praying for inter alia, an order that this court *"...grants a stay of execution of the judgment in default of appearance dated 2nd November 2022 as the writ of summons commencing this action violates clause 15 of the Service Agreement dated 5th January 2015 touching and concerning dispute resolution between the parties"*. For this, counsel relied on **Section 9 of the Arbitration Act 2022** which mandates this court to stay proceedings with respect to the enforcement of contracts that have a mandatory arbitration clause and refer same for arbitration. I must reproduce the said clause15 of the Service agreement dated 5th January 2015 for a clear understanding of same. It states;

> *"If any dispute arises between the Parties hereto during the subsistence of this agreement or thereafter in connection with the validity,*

interpretation, implementation, or alleged breach of any provision of this agreement, the parties shall try and resolve the dispute amicably within a period of 90 days from the time of notice of such dispute being received by one party from the other. It is further provided that in the event that no solution is arrived at, within such time, the dispute and difference shall be determined by a single arbitrator or in default of agreement, by two arbitrators, one to be appointed by each party in accordance with the Arbitration Act Chapter 25 of the laws of Sierra Leone or any statutory enactment in that behalf for the time being in force. Alternatively, there is the option of resolving this in the courts of Sierra Leone".

The role of the court is to interpret the terms of a contract as they are written, rather than to modify or create new terms for the parties. This principle is known as the "doctrine of freedom of contract" and reflects the idea that parties should have the freedom to negotiate and agree on the terms of their contract without interference from the court. In **Bank of New South Wales v. O'Connor [1938] AC 34**, it was the decision of the court that its role was to give effect to the intentions of the parties as expressed in the contract. In the circumstances, this court can only apply what was agreed between the parties.

It is quite clear from the above clause in the aforesaid Service Agreement, that the parties intended to address two states of affairs that may be considered alternatively in the event there was a dispute between the parties. The first is the procedure to be followed should any party prefer the dispute to be resolved by arbitration. In that event, a 90 days' notice must be given after which the matter is referred to arbitration by a single arbitrator or by two arbitrators appointed by each party. The alternative scenario is one in which the aggrieved party approaches the court directly for a determination of the dispute. As is clear from the said clause, these two positions are in the alternative. Arbitration as per the said clause is therefore not mandatory. An aggrieved party has the option of arbitration or litigation in the alternative. That is clearly the intention of the parties when they signed up to the contract. The Plaintiff chose litigation. It cannot be said to have offended clause 15 of the Service agreement as the intention of the parties with respect to that clause is clearly to give an aggrieved party the option between arbitration and litigation.

The Defendant have also prayed that this court sets aside the Writ of summonsin this matter on the grounds that *"The witness statement of the Plaintiff does not sufficiently identify any invoices to which it refers given that the substances of the Plaintiff's claim is based on alleged unpaid invoices, pursuant to Rule 8 sub-rule 2(d) of the Commercial and Admiralty Court Rules 2020"*. For a clear understanding of the defendant's prayer, I will take the liberty to reproduce *Rule 8 sub-rule 2(d) of the Commercial and Admiralty Court Rules 2020*. It states;

"A witness statement shall sufficiently identify any documents to which the statement refers without repeating its content unless it is necessary in order to identify the document".

I make haste to say that the primary purpose of the said provision is for the witness to identify the document referred to in the statement without having to repeat what is contained in it. This can definitely not be a ground to set aside the writ of summons. It is not the writ of summons that is alleged to have violated the provision and I therefore see no reason to strike out same. Where a document by its form or otherwise does not conform with the rules, then by **Order 2 rule 1 (1) of the High Court Rules 2007** the remedy does not lie in nullifying the proceedings where the irregularity is curable. The provision is quite clear. It states thus;

> *"Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order in therein."*

Secondly, the Plaintiff proceeded by default. At that stage of the proceedings, the contents of a witness statement are not grounds pursuant to which the judgment is granted or refused. It can therefore not be a ground for setting aside of the action itself.

Assuming without conceding that the said witness statement violates the said provision, I see no reason why this court would strike out the whole writ of summons. I see no authority in law that mandates the striking out of an action because the witness statement does not conform with procedure. There is no nexus between the writ and the witness statement in that regard. The witness statement whatever it may be is only a fraction of the evidence intended to be presented to the court and subject to cross examination. It therefore has no relevance when a party is proceeding by default. Judgment was taken pursuant to Order 13 rule 2 of the High Court Rules 2007 and the contents of the witness statement is not a requirement pursuant to which judgment could be taken or refused.

The defendant also prayed that this court strikes out the writ of summons on the ground that *".....the purported twelve-month duration of the said writ from the date of its issue contravenes Rule 10 (1) of the Commercial and Admiralty Court Rules 2020 which goes to the issue of jurisdiction"*. This provision states thus;

"Notwithstanding Rules 5, 6, 7, 8, 9, and 10 of the High Court Rules 2007, an originating process shall expire within 3 months from the date it was issued".

In this prayer, the defendant is asking this court to strike out the writ of summons because the endorsement of the validity on the face of the writ of summons is for 12 months instead of 3 months. He is alleging that a content in the writ of summons does not comply with the rules. For this, I will again refer to **Order 2 rule 1 (1) of the High Court Rules 2007**and state that this error is not sufficient to nullify the proceedings and certainly not a valid ground pursuant to which the writ of summons in this action can be set aside.

In the case of **Swain v Hillman [2001] 1 All ER 91**, the court held that where an error was a mistake and had not caused any prejudice to the defendant, the court can use its power to correct the error and allow the claim to proceed. Clearly the defendant was not disadvantaged in any way by this error in the form of the document.

The defendant has also prayed for the service of the writ of summons in this action to be set aside on the grounds that the defendant was not served with the writ of summons. For this, counsel for the Defendant relied on provisions of section 514 of the Companies Act 2009 which states thus;

"A document may be served on a company by leaving it or by sending it by post to the registered office of the Company in Sierra Leone".

Based on the defendant's reliance of this provision, I understand the argument to be that the writ of summons was not served on the registered office of the defendant and therefore the Plaintiff's service was not on the defendant. In paragraph 10 of the affidavit in support of the application, the defendant made the following averment;

"That the defendant is further surprised because it has not been served with nor does it have any knowledge of any court process in this action against it apart from Exhibit B herein, even though the Plaintiff knows the Defendant's registered office and place for service of documents. The writ of summons in this action, the contract dated 5th January and some previous paid invoices from the Plaintiff disclose the Plaintiff's knowledge of the defendant's registered office and place for service of documents".

I have read and understood the averments contained in the said deposition. Firstly, the deponent does not deny that the address on which the originating process was served was not the registered address of the defendant. Secondly, the deponent does not state what the registered address of the defendant was and whether same is different from the address on which the process was served. Thirdly, in challenging service on

the basis that the document was not served on the defendant at the registered address, it would be most prudent that a certified copy of the notice of registered address of the defendant be exhibited to show that same is different from the address contained in the affidavit of service. This was not done. Exhibit I on which the defendant relies in this regard is only the form of the Corporate Affairs Commission which is to be downloaded, completed and submitted for the change of Director/Secretary/Registered office address to be effected. There is no evidence that this process has been completed and change effected at the Corporate Affairs Commission.

In further argument that the originating process was not served on the defendant, it is also deposed in paragraph 14 of the affidavit in support that

> *"...the said Desmond Kabia is not a designated official of the defendant for receipt of documents and did not act did not act or could not have acted on the defendant's instructions".*

This court notes also that the deponent is not denying that Desmond Kabia is not an official of the defendant. Only that he is not designated to receive documents on its behalf. The process server would not know that. It is for the defendant's establishment to have had proper systems in place for the receipt of documents. It cannot benefit from its inefficiency. I cannot in the circumstances hold that the service of the originating process on the defendant was flawed and therefore ought to be set aside.

The Defendant have also asked that this court sets aside the judgement in default of appearance on the ground that the defendant has a good defence to the claims of the Plaintiff. For this the defendant relies on the proposed defence referred to as Exhibit G in the affidavit in support of this application. Pursuant to Order 13 rule 9 of the High Court Rules 2007, this court has authority to set aside a judgment taken in default of appearance. However,this authority is not without borders. The court will only grant the application if the defendant has a realistic prospect of successfully defending the claim if the judgment is set aside.

In the case of **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden& Johnson [2002] EWCA Civ 879**, the Court of Appeal held that the defendant must show both a good reason for not attending the hearing and a real prospect of success on the merits of the case, and that the court should consider the merits of the case when deciding whether to set aside the default judgment.

This principle dates as far back as the decision of**Henderson v Henderson (1843) 3 Hare 100**, which established that a party must present all of its arguments and evidence in one hearing and cannot bring multiple proceedings on the same issue. In the development of the law, this principle has been cited in many subsequent cases involving default judgments and their setting aside.

Where a defendant does not have a defense that raises triable issues, the court is unlikely to set aside the default judgment. This is because there is no realistic prospect of successfully defending the claim and to set aside the judgment will only serve to delay justice.

The Plaintiff's claim as contained in the writ of summons is for the sum of US$ 4,150,764 (Four Million, One Hundred and fifty Thousand, Seven Hundred and Sixty-Four United States Dollars). The Plaintiff's claim is that pursuant to agreement dated 5th January 2015, it was to provide a minimum of 5 (five) buses per month for the period of 60 (sixty) months for the defendant to be used for transportation services for employees of the defendant. This the defendant admitted in its proposed defence. The defendant was to pay the sum of US$ 4,800 per bus for 30 days and the total sum was to be paid within 30 days upon receipt of the Plaintiff's invoice. This was also admitted by the defendant in its proposed defence. Invoices that were not honoured within the 30 days' period attracted interest at the rate of 5 % of the unpaid value per month. This was also not denied by the defendant in its proposed defence. The defendant's contention in this regard however is that some of the invoices of the Plaintiff were not properly raised or earned and that a thorough verification was necessary.

The Plaintiff's further claim is that the defendant requested a waiver due to the effects to Covid – 19 to which the Plaintiff agreed. The defendant also admitted this fact in its proposed defence. Pursuant to paragraph 13 of the of the particulars of claim in the writ of summons, the Plaintiff requested that the defendant write a letter to its bankers Rokel Commercial Bank confirming that the defendant has a running contract with the Plaintiff and that the defendant was in fact indebted to the Plaintiff in the sum of US$ 1,116,131.28 (One Million, One hundred and sixteen thousand, one hundred and thirty-one United States Dollars and twenty-eight cents) as at the 9th December 2020. This the defendant also did and have not denied same in their proposed defence. The defendant's only contention in this regard is that the letter was sent as a comfort at the request of the Plaintiff but that it did not reflect the reality of the situation.

Rule 14 (1) of the Commercial and Admiralty Court Rules states;

> ***"Without prejudice to Rule 2 of Order 21 of the High Court Rules, 2007, where a defendant is served with a writ of summons and wishes to defend the suit, he shall, within 10 days from the date of service of the summons, file to the Court a written statement of defence and counter-claim which shall be accompanied by a-***
>
> ***(a) list of witnesses to be called by the defendant;***
>
> ***(b) written witness statements of the defendant on oath as set out in sub-rules (2) and (3) of Rule 9;***
>
> ***(c) brief submission of law;***

(d) set of copies of every document to be relied on by the defendant; and

(e) full address, including e-mail, fax and telephone number of the defendant and his solicitor"

By this rule, a defendant filing a defence ought to have it accompanied by the documents listed above. I see no reason why the proposed defence exhibited should not have been accompanied by the aforementioned documents. They would have had an effect on the defendant's attempt to satisfy the court that there were triable issues. Exhibiting the documents to be relied on at trial would have shown that the Plaintiff was notified that the invoices alleged were not properly raised and would have narrowed down the issue of what is owed to the Plaintiff as opposed to what is contested. As it stands, there is no substance to the allegation that the Plaintiff submitted erroneous invoices and the quantum of same. It is only a statement by the defendant. This court cannot ascertain that this is not an afterthought by the defendant and a ploy to delay proceedings. This assertion certainly as it stands does not raise triable issues and I cannot accordingly consider it of such weight that it would compel the hand of this court to set aside the default judgment.

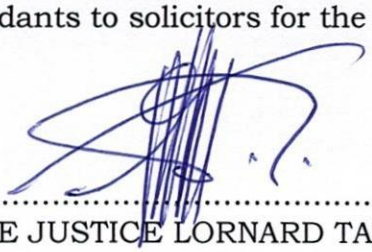
By the same token is the defendant's assertion that the letter to the Plaintiff's bankers by which it admitted liability to the Plaintiff does not reflect the true state of affairs. Where there is admission of there being in existence a letter confirming the relationship between the parties and the existent liability, it will take more than a paragraph of simple denial in the proposed defence to rebut the presumption already created. The court must be shown that there is sufficient reason to ignore that glaring reality, set aside the judgment and order a full blown trial.

It is clear from the above that the defendant's only contention to the claims of the Plaintiff are that the invoices were not properly raised and the letter to the Plaintiff's bankers did not reflect the true status of the defendant's indebtedness to the Plaintiff. These two positions by themselves I must say do not amount to triable issues the basis of which this court should set aside its judgment and order a full blown trial.

This court must be satisfied that setting aside the judgment and ordering a trial would on a balance of probabilities not result in the same outcome already contained in the default judgment. The defence I must state have not provided this court with that comfort. I cannot in the circumstances set aside the judgment on this basis.

In the circumstances, I make the following orders;

1. The application by notice of motion dated 30th November 2022 is accordingly dismissed.
2. Cost of the application is assessed at NLe 250,000 to be paid by the Defendants to solicitors for the Plaintiff.



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HONORABLE JUSTICE LORNARD TAYLOR