CC. 33/21 2021 L. NO. 1

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION

BETWEEN

SULAIMAN DAUDA LUMEH -PLAINTIFF

AND

STANDARD CHARTERED BANK -1ST DEFENDANT

STANDARD CHARTERED PLC (THE GROUP) -2ND DEFENDANT

RULING OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 3RD FEBRUARY 2023

O. JALLOH **-COUNSEL FOR THE PLAINTIFF**

R. JOHNSON **-COUNSEL FOR THE DEFENDANTS**

The Plaintiff have approached this court by Notice of Motion dated 29th April 2022 praying for inter alia an Interlocutory Injunction restraining the defendants whether by themselves, their shareholders, directors, managers, servants, privies attorneys or agents howsoever otherwise and any person or authority who shall possess direct or indirect right, power or authority to proceed to give authorisation, from taking continuing, proceeding within and or any steps or further action which would result or culminate in the sale, alienation, disposal, transfer or howsoever otherwise parting with possession of any part of or the entirety of their business undertaking in Sierra Leone, the 1st Defendant's shares and liquid assets or any other assets owned in Sierra Leone and any new owner be or being recognised by the Central Bank of Sierra Leone without providing security for the Plaintiff's claim in the sum of US$ 8,384,284.75 and such costs as shall be fixed by the court pending the hearing and determination of the matter or until the court shall otherwise order.

In the alternative, that the defendants be ordered to pay the sum of US$ 8,384,284.75 and such costs as the court shall direct to be paid into an account to be managed and controlled by solicitors for the parties in this matter until the court shall otherwise order prior to the completion of any sale of the 1st Defendant and/or the recognition by the Central Bank of Sierra Leone of any new owners of the 1st Defendant.

In other words, the Plaintiff seeks and order that the defendants be prevented from transferring their shares in their business in Sierra Leone as well as the assets (liquid or otherwise) of their business in Sierra Leone without providing security for the claim of the plaintiff in this action. In the alternative, that this court makes and order for the defendant to pay a sum equivalent to the plaintiff's claim into an account to be managed by solicitors for the parties, pending the hearing and determination of this action.

The Plaintiff instituted legal proceedings against the defendant by writ of summons dated 31st May 2021 which said writ contained in full the Plaintiff's claim against the defendant. This writ is before this court marked Exhibit D. Solicitors entered an appearance for the defendants on the 5th July 2021 and filed a defence on behalf of the 1st Defendant on the 4th of August 2021. With respect to the 2nd Defendant, solicitors for the defendants approached the court by Notice of motion dated 15th July 2021 seeking orders from the court inter alia that the name of the 2nd defendant be struck out from the originating process and all subsequent proceedings on the ground that the 2nd defendant had been improperly or unnecessarily been made a party to the matter. The application was refused by a ruling of the court dated 9th March 2022. By that same ruling, the Plaintiff was granted liberty to amend the title of the 2nd defendant and further directions with respect to the exchange of pleadings were also ordered by the court. This decision of the court was appealed against but suffice to say, that appealed was not proceeded with and subsequently withdrawn.

The Plaintiff have now approached this court with a complaint that it is afraid that the defendants are in the process of transferring shares and or assets of their business in Sierra Leone which said action of the defendants if allowed to proceed unchecked by this court would cause irreparable damage to the plaintiff's claim and would inevitably defeat the ends of justice. The complaint of the Plaintiff as contained in the several affidavits in support of the application is based on information that the 1st Defendant was wrapping up its business in Sierra Leone and consequently selling off its shares and assets, both liquid and tangible.

Several exhibits ranging from news flashes to a press release by the Central Bank of Sierra Leone are alleged to confirm the concerns of the Plaintiff. He is worried that executing any judgment that may be given in his favour will become impossible considering that the Defendants are actually exiting their business in Sierra Leone and that there is no reciprocal enforcement of judgment agreement between Sierra Leone and the United Kingdom where the 2nd Defendant is ordinarily resident. This they argue will create an impossible situation for the Plaintiff and that his judgment would be rendered useless.

The application was made pursuant to Order 35 rule 2 of the High Court Rules 2007 and reliance was placed on a 2007 construction law journal, excerpts from the Supreme Court Annual Practice 1999 and a number of case law authorities including but not limited to the cases of ***Derby & Co, v Wheldon & Others Nos. 3&4 (1990) Ch. D pg. 65,*** and ***Allen v Jambo (1980) 2 AER pg 502.***

The defendants opposed the application. They filed affidavits in opposition stating the facts on which their opposition is based and counsel addressed the court on the law supporting those facts. The defendants submit that in view of the fact that the relief sought by the Plaintiff is equitable in nature, the Plaintiff is by equity bound to have approached this court with clean hands. The defendants maintain that what the Plaintiff seeks to do is take advantage of his own wrong doing to which he has admitted and that based on this fact, there is no serious wrong doing to be tried. They maintain that the claims made by the Plaintiff are fanciful and farfetched. Granting the application of the Plaintiff will also result in hardship not only for the Defendants but for third parties as well who hold shares in the respective defendants and who could not transact on their shares based on the orders sought by the Plaintiff. As far as the defendants were concerned, the plaintiff has no reason to fear the departure of the defendants from Sierra Leone as the sense of urgency has dissipated over the period from the commencement of this action to date.

The Plaintiff makes this application pursuant to Order 35 rule 2 (1) of the High Court Rules 2007. For a clear understanding of the provision, I will reproduce same verbatim. It states;

> ***"On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise in the action or for the inspection of such property in the possession of a party to the cause or matter."***

It is clear from this provision and I have no doubt in my mind that this court is cloaked with authority to make orders for the detention, custody and preservation of property pending the hearing and determination of the matter. However, I must hasten to note that that this provision does not and cannot apply in the present case. The authority cited above empowers this court for the detention, custody and preservation of any property which is the subject-matter of the action itself or as to which any question may arise in the action. The prayers of the plaintiff in this application is for the defendant to be prevented from dealing with its personal properties which invariably are not the subject-matter of this action nor is it anticipated that any question may arise with respect to them during the course of the matter. They are properties which the plaintiff seeks to be preserved solely

for the purpose of execution in the event he is successful. The Plaintiff's prayers in this application are in the nature of a Mareva injunction, and security for appearance.

The Plaintiff's application is for this court to make an order that would prevent the defendants from dealing with their properties which are not the subject-matter of this action. The application seeks an injunction to prevent a man who is alleged to be a debtor from parting with his own property prior to the conclusion of the matter. If this statement sounds familiar, it is because in the practice of the law, an injunction of this nature became known as Mareva Injunction, named after the case of ***Mareva Compania Naviera SA v International Bulk carriers (1980) 1 AER pg. 213.***In England, this type of a Mareva Injunction is referred to as a freezing injunction and is provided for by Part 25.1.1.f. i and ii. of the Civil Procedure Rules. It provides clearly thus;

The Court may grant the following interim remedies;

> "***(f) an order (referred to as a 'freezing injunction) –***
> ***(i) restraining a party from removing from the jurisdiction assets located there; or***
> ***(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;"***

In India, the Civil Procedure Code, 1908, provides the jurisdiction to the Courts via Order XXXVIII, Rule 5 to grant such remedy. It states that:

'if, at any stage of a suit, the court is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of, or remove from the Court's jurisdiction, the whole or any part of his property, the court may direct the defendant... to furnish security in a specified sum, and place at the court's disposal the property or equivalent value...as may be sufficient to satisfy the decree'.

In both the above cited situations, the law is quite explicit with respect to the nature of the injunction to be granted on an application such as the present one. But this is not the case with respect to the High Court Rules 2007.

It is clear from Order 35 rule 2 (1) of the High Court Rules 2007, that the drafters of the rules had absolutely no intention of giving a Mareva effect to this rule. The rule itself is quite clear and unambiguous. It applies only to;

> ***"the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise in the action or for the inspection of such property in the possession of a party to the cause or matter."***

Clearly, in the present application, the Plaintiff's aim is to get this court to prevent the defendants from dealing in their shares and or other property, tangible or not which said shares and or property is/are not the subject-matter of this action. The authority relied on is lacking in that respect.

However, I took the liberty to read and understand the case of ***Mareva Compania Naviera SA v International Bulkcarriers (1980) 1 AER pg. 213*** itself and it became apparent that even though the matter itself was decided in 1980 which takes it completely outside the scope of section 74 of the Courts Act 1965, the decision itself was based on an interpretation of **Section 45 of the Supreme Court Judicature (Consolidation) Act 1925** which repeats verbatim **Section 25 (8) of the Judicature Act 1873.** This provision states thus;

> ***"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court may think just and if the injunction is asked either before or at or after the hearing of the cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the court shall think fit whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession), does or does not claim a right to do the act sought to be restrained under any colour of the title; and whether the estates claimed by both or by either of the parties are legal and equitable."***

For the avoidance of any doubt that may have been created, this court makes bold to say that it will apply this provision of the Judicature Act 1873 pursuant to **section 74 of the Courts' Act No. 31 of the Laws of Sierra Leone 1965.** This provision brings in force to Sierra Leone inter alia, statutes of general application in England as at the 1st January 1880. As such it can only be held that the provisions of the **Judicature Act of 1873** is law in Sierra Leone.

In **Beddow v Beddow (1879) 9 Ch D 89 at pg 93,** Jessel MR had interpreted **Section 25 (8) of the Judicature Act 1873** to mean that he had unlimited power to grant an injunction in any case where it would be right or just to do so.

In the Mareva case cited above, Lord Denning MR in his application of **Section 45 of the Supreme Court Judicature (Consolidation) Act 1925** which repeats verbatim **Section 25 (8) of the Judicature Act 1873** had this to say;

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction".

Having established the authority by which this court may grant or refuse the application of the Plaintiff/Applicant in this matter, I must now consider whether the Plaintiff has sufficiently made a case for the exercise of the court's discretion in its favour.

In addressing this court on the application, Counsel for the Plaintiff set out four parameters, the proof of which he maintains are necessary for the grant of the application.

1. That the Plaintiff has a good cause of action against the defendant.
2. That the Plaintiff has a good and arguable case against the defendant.
3. That the defendant has assets within the jurisdiction of the court.
4. There is a real risk of the dissipation of the assets which will render the plaintiff's reliefs nugatory.

However, in the dictum of Lord Denning cited above, this can be summarized into two broad categories.

1. That there is a debt due and owing to the applicant.
2. There is the danger that the debtor may dispose of his assets so as to defeat the satisfaction of the judgment.

A summary of the affidavits in support of the application is to the effect that there is a debt due and owing the Plaintiff by the defendants and that this runs the risk of being rendered nugatory as the defendants are on the verge of selling their assets and closing shop in Sierra Leone. The Plaintiff is afraid that if this happens, and he is successful in the matter, executing the judgment of this court would be practically impossible.

The defendants opposed the application. They maintain firstly that the Plaintiff's case lacks merit and there is no serious question to be tried. As a matter of fact, the plaintiff has not come to the court with clean hands are there is evidence that the Plaintiff himself admitted to wrong doing thereby lending credence to the actions of the defendant which culminated in the present matter. Further, the claims of the plaintiff in their estimation are fanciful and farfetched. The defendant submitted that the court has to consider the hardship which an injunctive order in the nature of the present application will bring to bear on not only the defendants but on third parties as well. Counsel assured that court that the defendants were not being

liquidated but rather, were going through a process of share disinvestification.

This court had the privilege of hearing the submissions of the parties based on the facts deposed to. It is clear that the Plaintiff has made claims against the defendant. The veracity of the claims clearly cannot at this stage be established. The fact that the plaintiff has not taken the bold step of applying for summary judgment speaks volumes to this fact.

However, this must not be taken to mean that the plaintiff's case stands little or no prospect of success. The 2nd defendant applied to be removed as a defendant to the action and the application was refused. The 1st defendant like the plaintiff does not think it has a clear cut case and have not approached the court on an application for the matter to be dismissed for being frivolous. At the same time, the defendants have not out rightly denied that they intend to pass property in their assets in Sierra Leone to third parties. Counsel calls it a shares disinvestification. I understand this to mean that by the end of the process, the defendants herein will no longer have a say in the assets of the 1st defendant.

The balance seems to be equally held by both parties. What then must the court do in this instance? Must it run the risk of its judgment being rendered nugatory by refusing the application? Must it grant the application for injunction and risk causing hardship to the defendants and or third parties?

The rule laid down in the Mareva case is quite simple.

> ***"If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets".***

There only needs to exist an appearance that the debt is due and owing coupled with a danger that the debtor may dispose of his assets. In that circumstance, the case for the granting of the injunction would have been made and the court must grant it.

Where the court decides that it must grant and injunction, consideration must also be given to the damages likely to be suffered by the respondent should the injunction not have been granted. The Plaintiff argued that the undertaking in damages be a mere undertaking signed by him. He argues that he lacks the financial capacity to make a guarantee deposit and that this was due to the actions of the defendants which have in effect rendered him unable to secure employment. The defendant opposes this understandably. If the Plaintiff is adamant that he lacks the financial capacity to deposit a guarantee, what assurances does the defendant have that the Plaintiff would be in position to satisfy an undertaking in the event

it turns out that injunction ought not to be granted? As it stands, should this court consider granting the application, the defendant runs the risk of not being able recover damages should the injunction not have been granted.

But should this be a condition pursuant to which an injunction should be granted? Certainly not. The purpose of the remedy would be defeated if applicants are to be made to pay a deposit for the remedy failing which they cannot enjoy it. Where is the equity in that? There is a reason it is termed an "undertaking in damages". It is an undertaking to pay and simply that. Where it turns out that the injunction ought not to have been granted, the undertaking is assessed and it becomes a debt on the applicant, recoverable like every other debt.

In the present matter, it is undoubtedly clear that the parties had an employer/employee relationship which has come to an end it seems in acrimonious circumstances. The Plaintiff is making a claim for end of service benefits as well as for damages suffered allegedly based on the actions of the defendants. The defendants have not complained that the claim frivolous and vexatious but have filed a defence to same. This in my considered opinion is fact sufficient for this court to conclude that there exists an appearance of a debt due and owing.

Further, the defendants' admission that they are in the process of shares disinvestification confirms the fear of the Plaintiff that the defendants are in the process of dissipating their assets. This singular act of the defendant by itself creates the danger and likelihood that should the Plaintiff be successful, the defendants will not be available for execution. Meanwhile, consideration is also taken of the fact that transactions such as the one anticipated by the defendants are quite complex and to completely sanction same will certainly create extreme hardship and probably cause irreparable damage to a good deal. However, assuming without conceding that there exists no such danger and the defendants have no intention of transferring their assets to defeat the ends of justice, it is but logical that granting an injunction would have no meaningful effect on them. So when the case for the parties seem so evenly balanced as is in the present application. It is on that side of caution that this court must err.

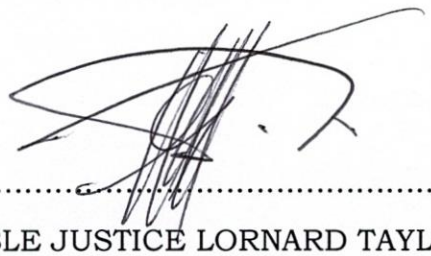
In the circumstances, I make the following orders;

1. This court grants an interlocutory Injunction restraining the defendants whether by themselves, their shareholders, directors, managers, servants, privies, attorneys or agents or howsoever called including but not limited to any person or authority who shall possess direct or indirect right, power or authority to act on behalf of the defendants whether jointly or severally, to proceed to give authorisation, which would result or culminate in the sale, alienation, disposal, transfer parting or howsoever called with possession of any

part of or the entirety of the business undertakings of the defendants in Sierra Leone, the 2nd Defendant's beneficial interests whether direct or indirect in the 1st defendant and liquid assets or any other assets owned by the defendants in Sierra Leone without the leave of the court pending the hearing and determination of this matter.

2. The Plaintiff shall execute and file an undertaking in damages within 3 days from the date of this order.

3. Costs in the cause.



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HONORABLE JUSTICE LORNARD TAYLOR