CIV.APP 29/2021

IN THE COURT OF APPPEAL OF SIERRA LEONE
(CIVIL DIVISION)

BETWEEN:

ALIEU THORLU BANGURA - 1ST APPELLANT

NO. 8 THOMPSON BAY ROAD

OFF CHARLOTTE SCHOOL ROAD

FREETOWN

UNION FISHING COMPANY 2007 - 2ND APPELLANT

RAMATOULAYE DIALLO - 1ST RESPONDENT

ZENITH COMPANY - 2ND RESPONDENT

C/O 27 OFF CIRCULAR LANE

FREETOWN

CORAM: - HON. JUSTICE ALUSINE SESAY JSC
HON. JUSTICE M.M. SESAY JA
HON. JUSTICE S.A. BAH JA

REPRESENTATION: -

DEXTER BANGURA ESQ. FOR APPELLANT

F. MANSARAY ESQ FOR RESPONDENT

JUDGMENT DELIVERED ON THE DAY OF JULY, 2025

This is an appeal that arose from a judgment in default of Defence dated 23rd day February, 2018 against the Appellants in the court below in respect of the Respondents' claim in the Writ of Summons dated the 2nd August, 2017. The grounds of appeal are set out at page 255 of the Records and it states thus:

1. The Learned Trial Judge was wrong to hold that the judgement in default entered against the Defendants cannot be set aside.
2. The Learned Trial Judge was wrong in law to hold that the objection to the Writ of Summons dated 2nd August 2017 cannot be sustained because of the duration of service of the said Writ of Summons.
3. That the judgment is against the weight of the evidence.

The Appellants are asking this Honourable Court to set aside the Ruling of the Learned Trial Judge, Amy Wright J dated 20th March, 2020 and replace it with such orders that will enhance the justice of the case.

BACKGROUND

By a Writ of Summons, the Plaintiff, then Respondent now in this appeal claim against the Defendant now appellant in this appeal

1. Immediate recovery of the sum of $ 373,968.52 (Three Hundred and Seventy-Three Thousand, Nine Hundred and Sixty-Eight Fifty-Two cents) being money owed the Plaintiff by the 1st and 2nd Defendants now 1st and 2nd Respondents in this appeal. An appearance was entered by Tejan-Cole, Yillah and Bangura, solicitors for the Defendants. Following an application by Notice of Motion dated 5th day of March, 2019 filed on behalf of the Defendants herein and the supporting affidavit and also having read the affidavit in opposition sworn to by Lansana Dumbuya Esq for and on behalf of the Plaintiff, the Hon. Justice Amy Wright having heard the submissions of counsel ordered the following: -

1. Order 2 in the application dated 5th of March 2019 is hereby refused, the Writ of Summons dated 2nd day of August 2017 shall not be struck out.
2. Order 1 in the application dated 5th day of March 2019 is refused, the judgment dated 23rd day of February 2018 is upheld.

Counsel also submits it is in-controvertible that a contractual relationship exists between the parties. It is evidence of Sales Agreement and an undertaking which 1st appellant was constrained to do owing to improper pressure. Counsel argued extensively on the distinction between an undertaking and an agreement and submits that the undertaking referred to in the action was not secured through the Defendant's free will. The undertaking according to counsel was secured after 1st appellant had been incarcerated at the Criminal Investigations Department for several days and was subsequently released on the condition that he undertook to defray the debt of the 2nd Appellant. Reference is made to Clause 2 (viii) and 3 of the agreement. It submits that where a person is induced to enter into a conduct by means of pressure brought to bear upon him so as to influence his own independent judgment and thus put that person in a manifest disadvantage position, subject to that influence the Court, he contends will refuse to enforce such agreement. He again made reference and relied on the authority of LLOYDS BANK V BUNDY (1974) 3 ALL ER 757, Similarly according to Counsel Dexter Bangura Esq. in NATIONAL WESTMINSTER BANK PLC MOTORS V MORGAN (1985) 1 ALL ER 821 held that such an agreement can only be set aside on grounds of undue influence with evidence of "manifest disadvantage" of the person subjected thereto.

Counsel also draw the attention of the court to the Writ of Summons where on the face of the Writ of Summons both the Company and the Director are sued by the Respondent. He submits that a company is a separate legal entity distinct from its shareholders. The case of SALOMON & SALOMON (1887 AC 22 HC is the Locus Classicus to the effect that a Company is a separate and distinct legal person from its shareholders. On the issue of the Company separate and distinct from its shareholders, he further submits referring to the case of LEE v LEE'S AIR FARMING (1960) 3 ALL ER 420 P.C, that a Company is a legal person can sue and be sued and refers the court to Section 2 (2) (b) of The Companies Act No. 5 2009.

Counsel however agreed that there are exceptions and one of such exception to the several principle is where fraud is alleged and in that case the veil can be lifted and an action can be instituted against a shareholder.

In conclusion he submits that the Sales Agreement contained in pages 50-51 of the Records discloses that the parties had agreed to seek recourse to arbitration process in the event of dispute arising therefrom which is contained at Clause 11 of the Agreement. Counsel is contending that validity of the arbitration clause should be given efficacy by the Respondent as prescribed by the agreement especially when it provides that the parties are to resort to arbitration before going to Court. The action of the Respondent's going to Court instead of exhausting arbitration is contrary to the spirit and intent of the contract.

ISSUES FOR DETERMINATION

The first issue for determination is whether the now Appellant has a Defence on its merit that would warrant the Appellate Court to set aside the Judgment in default of Defence and the Orders of the Hon. Justice Amy Wright. Rule 31 of The Court of Appeal Rules P.N. 29 of 1985 provides that 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 interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made and generally shall have jurisdiction over the whole proceedings.

Counsel for the Appellant has admitted durng the course of his submission that in support of the application dated the 5th day of March, 2019, he failed to exhibit any proposed Defence for the court to set aside the

judgment in default and to order the matter to proceed on its merit. There was nothing before the Learned Trial Judge to consider on its merit.

The second issue for determination is the question relates to the arbitration clause in the Sale Agreement which had an exclusive arbitration clause. In order words, was the Respondent to have instituted the action without recourse to Arbitration in this matter. With respect to counsel for the Appellant, this Court will not attach any efficacy to the Arbitration Clause in the agreement. Going back to the fact of this matter, it is uncontroverted that after the agreement, the Appellant paid the sum of $ 25,000/00 (Twenty-Five Thousand United States Dollars) out of the sum of $ 373,968.52 due and owing to the Respondents. The Appellant undertook to pay by instalment the amount due to the Respondent. The Appellant has admitted liability by paying a portion of the amount due and owing. In fact, the Appellant has no defence to the action.

Counsel has urged this court to consider the justice of the case. If this court were to apply the justice of this case, it should weigh heavily in favour of the Respondent who has been deprived of the fruit of her judgment for almost 8 (eight) years with a substantial sum of money owed to her.

We agree with the submissions of counsel for the Respondent as in the synopsis of the arguments for the Respondent.

In the light of the foregoing there is nothing to remit to the High Court for trial. There is no defence to the action and the Appellant has started complying with the agreement and therefore should contimue to pay the remaining amount owing to the Respondent.

The appeal lacks merit and is hereby dismissed accordingly with the cost to the Respondent to be taxed if not agreed.

Hon. Justice Alusine Sesay JSC (Presiding)

Hon. Justice M.M. Sesay JA — I Agree — 4/7/2025

Hon. Justice S.A. Bah JA — I Agree