FTCC 234/16

IN THE HIGH COURT OF SIERRA LEONE

(COMMERCIAL AND ADMIRALTY DIVISION)

FAST TRACK COMMERCIAL COURT.

BETWEEN:

MR. ALPHONSO A. YARJAH - PLAINTIFF/RESPONDENT

(Suing as Director and shareholder of the following companies:

i) Transcend International Resources(SL) Ltd
ii) West Africa Zircon Mining (SL) Ltd
iii) SHK Services Limited
iv) Atlantic Hotel Limited
v) West African Foods Company Ltd

AND

I) Transcend International Resources (SL) Ltd - DEFENDANTS/APPLICANTS

& 4 others.

COUNSEL:

BASITA MICHAEL ESQ- FOR THE APPLICANTS/ DEFENDANTS

LANSANA DUMBUYA ESQ- FOR THE RESPONDENTS/ PLAINTIFFS,

RULING DELIVERED ON THE [illegible] JANUARY, 2021.

1. The Defendants/Applicant herein filed a Notice of Motion dated the 2nd day of December, 2019 seeking the following orders:

1) That this matter be struck out by this Honourable Court for want of prosecution
2) Any further or other Order(s) that this Honourable Court may deem fit and just.
3) That the costs of this Application be costs in the cause.

2. As the hearing of this Application, the Applicants used and relied on the affidavit of BASITA MICHAEL ESQ sworn to on the 2nd day of December, 2019 together with the exhibits attached thereto.

3. The relevant paris of this affidavit for our present purpose are to be found in paragraphs 7, 8 and 9 thereof.

Paragraph 7: "That the Plaintiff/Respondent filed Summons for Directions dated the 23rd day of May, 2018"- Exhibit "BM8"

Paragraph 8: "That this Honourable court subsequently gave directions dated 23rd July, 2018" - Exhibit "BM9"

Paragraph 9: "That since this Honourable court gave the said Directions, no step was taken by the Plaintiff. However we were shocked to receive another Summons for Directions dated 18th day of November, 2019 filed by the Plaintiff/Respondent and served on us".

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4. In the other paragraphs of the affidavit, the deponent averred that the delay in prosecuting the matter was unreasonable and any attempt to do so now amounts to an abuse of process. She concluded by averring that if this matter was not struck out by this court, the Defendant/Applicants will be prejudiced and will not have a fair trial.

5. In her oral submission, BASITA MICHAEL ESQ, for the Applicants submitted that it was an abuse of process of the court for the Respondent to take out a fresh Summons for Directions dated 18th December, 2019 after failing to comply with the Directions given by the Court dated 23rd July, 2018 in respect of an earlier Summons filed by the said Plaintiff/Respondent.

6. She submitted further that a period of 12 months had elapsed since the last step was taken in the matter - that is 12months had elapsed between the time the Original Summons for Directions was taken out and the filing of the current Summons. This was in violation of Order 41 Rule 9 of the High Court Rules, 2007.

7. In her final submission, B. Michael Esq. argued that due to the delay and procedural violation, this court has the inherent power and powers by virtue by virtue of the High Court Rules, 2007 to strike out the current Summons for Directions.

8. In his submission, Lansana Dumbuya Esq., for the Defendant argued that the Applicant has not proved either by affidavit or oral submission that the 28 days notice had not been given and so Order 41 Rule 9 and Order 41 Rule 10 do not apply. Even if she had made out the argument that Order 41 Rule 9, had not been complied with, there is a precondition under Order 41 Rule (10) (2) - which provides that Notice shall be served on all parties within 14 days - has not been complied with.

9. L. Dumbuya Esq. referred to certain portions of his affidavit in opposition regarding the need to take certain other things into consideration. He intimated the court that the Respondent had been thrown out of his office and could not access his belongings. He therefore had to conduct wide searches for the documents needed to prepare the court bundle.

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10. L. Dumbuya argued further that the Directions, which are the subject of this Application, were not directed to the Plaintiff alone.

11. In reply, B. Michael Esq. submitted that it has always been the practice for the Plaintiff to trigger the exchange of documents. In support of this, she referred the court to the English Annual Practice, page 504. She finally submitted that the Respondent ought to have exhibited his court bundle.

ISSUES FOR DETERMINATION:

12. There are two main issues for determination in this matter to wit:

a. Whether the court has the power to strike out the Summons for Directions on the ground that the Plaintiff failed to comply with Directions given on 23rd July, 2018 and instead filed and fresh summons for Directions dated 18th November, 2019.

b. Whether the Summons for Directions dated 13th day of November, 2019 can be struck out on the ground that 12 months had elapsed between the date the Directions were given on the 23rd July, 2018 and the date the Plaintiff/Respondent took out this summons. I shall deal with these issues together as they are closely related.

THE LAW

13. Order 41 Rule 9 of the High Court Rules, 2007 provides as follows:-

> "Where twelve months had elapsed since the last steps taken in any cause or matter, the party who wishes to proceed shall give every other party not less than 28 days Notice of intention to proceed".

14. Though it is clear from the foregoing Rule that the Plaintiff has not given the necessary notice, there are however other Rules that should be considered before arriving at a conclusion on this point.

15. Order 41 Rule 10(1) provides as follows:-

> "Where in any cause or matter no step has been taken for 12 months from the date of the last proceedings and no notice has been given under Rule 9, the Master or any party to the cause or matter may apply to the court for an Order that the cause or matter be struck out for want of prosecution" Rule 10 (2).

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"Notice of the application shall be served on all parties concerned, at least 14 days before the date stated for the hearing of the Application."
Rules 10(3) - 10(4) of the Order states the procedural steps to be taken in pursuance of the objective in Order 10."

16. As I reasoned in the matter of MISC.APP.007/15 ROKEL COMMERCIAL BANK (SL) LIMITED -V- ALIEU THORLU BANGURA & ORS in these words, "From the foregoing provision, it could be discerned that both parties had obligations to fulfil: the Plaintiff to give notice of intention to proceed; the Defendant to make an application to strike out the action for delay". The Defendant in this case after being served with the fresh summons for Directions filed a Notice of Motion dated 2nd December, 2019 to strike out the action for want of prosecution. This to my mind satisfies the requirements of Order 41 Rule 10(2). The substantive application to strike out was heard on the 21st January, 2020.

16. I am strengthened in this conclusion by a passage in the ENGLISH ANNUAL PRACTICE, 1999 Paragraph 25/L/1 at page 500 which states that "...but in addition to these express provisions, the court has an inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the Rules or excessive delay in the prosecution of the action".

17. In my view, there has been an inordinate and inexcusable delay on the part of the Plaintiff or his lawyer and that this delay has given rise to a substantial risk that it will not be possible to have a fair trial of the issues in the action".

18. As regards the non-compliance by the Plaintiff with Order of this Court dated 23rd July, 2018, this court will rely on Order 28 Rule 5 which provides that:-

"If either party fails to comply with the Order as required by the sub-rule 4 the court may make such order as it thinks just including, in particular an Order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment entered accordingly".

19. In the instant case, the Applicant has prayed for the Summons to be struck out and not dismissed.

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20. In the circumstance, I order as follows:-

1. That the summons for Directions dated 18th day of November, 2019 is hereby struck out
2. That the cost of this Application be costs in the cause.



HONOURABLE MR JUSTICE SENGU KOROMA JSC,

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