FTC 254/18 2018 Z NO.12

AMINATA KALLAY & ANO -PLAINTIFF

AND

MICHAEL COLLIER & ANO -DEFENDANTS

RULING OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 9th MARCH 2022.

F. SEISAY -COUNSEL FOR THE PLAINTIFF

E.T. KOROMA -COUNSEL FOR THE 2nd DEFENDANT

On the 20th January 2022, this court on an application made by the Plaintiffs herein made the following orders;

1. Zenith Bank shall forthwith be removed and cease to be Plaintiff in his matter.
2. AminataKallay and Fifi International and Construction shall forthwith be made 1st and 2nd Plaintiffs in this action.
3. The writ of summons shall be amended to reflect the claims of the 1st and 2nd Plaintiffs and such writ shall be filed and served on Solicitors for the defendants within 7 days from the date of this order.
4. Solicitors for the 1st and 2nd Defendant shall file and serve their amended writ of summons within 10 days after the service of the writ of summons.
5. Cost of this application is assessed at Le 15 million

On the 31st January 2022, Solicitors for the Plaintiffs filed the amended writ of summons. This document is exhibited before this court and marked Exhibit ETK1.

Counsel for the 2nd have come before this court by notice of motion dated 1st February 2022 praying inter alia that the said amended writ of summons be struck out for non-compliance with the 3rd Order cited above. The 2nd Defendant/Applicant's complaint is that when this court delivered its ruling on the 20th January 2022, it granted the Plaintiff 7 days within which the writ of summons herein was to have been amended and served on solicitors for the defendants. The writ of summons according to him, neither was nor served within this period. The Plaintiff therefore was in breach of the order

of 20th January 2022 and therefore proceedings taken in breach of the said order was accordingly a nullity unless an extension of time is sought and should therefore be struck out. The orders of the court he maintains are sacred and a breach of same must not be without consequences. Counsel cited and relied on **Order 3 rule 2(2) and (3) of the High Court Rules 2007.**The provisions read thus;

> *(2)Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.*
> *(3) Where the act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.*

This provision as I understand it is concerned with the manner in which periods in judgments, rulings, orders or legal provisions should be calculated. It mandates at what pointthe numberingof days should commence and where it should end. Applying these provisions in the present matter,counsel argues that the time for filing and service of the amended writ as ordered by this court should run from the start of business on the 21st January 2022 which is the date after the date of the order, and should end before the close of business on the 27th January 2022.

I would presume that since the order was dated 20th January 2022, counsel was expecting that the amended writ of summons would in the least have been issued and served on him before the close of business on the 27th January 2022 at the latest. The fact that the amended writ was issued on the 31st January 2022 is itself prima facie proof that the Plaintiff was in breach of the orders of the court.

In response, counsel for the Plaintiffs cited and relied **on Order 3 rule 2(5) of the High Court Rules 2007.** This provision reads thus;

> *(5) Where apart from this sub-rule, the period in question, being a period of 7 days or less would include Saturday, Sunday or public holiday, that day shall be excluded.*

Pursuant to this rule, where the order mandating performance is for a period of 7 days or less, Saturdays, Sundays and public holidays should be excluded. In addressing the court, counsel for the Plaintiffs pointed out that since the 20th January 2022 was a Thursday, the 22nd, 23rd, 29th and 30th of January 2022 all being Saturdays and Sundays respectively ought to be excluded in calculating the period within which the Plaintiff was to comply with the 3rd order in the ruling of 20th January 2022.

I do agree with the provisions cited by both counsel and must make haste to state that this court does not have to choose between the provisions. They are not in conflict with each other. Rather their relationship is complementary. They are both rules that the court must follow in calculating the period for compliance with the high court rules, judgments, orders or directions for doing an act. This is clearly spelt out in **Order 3 rule 2(1) of the High Court Rules 2007**which states;

> *"Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule."*

The rule cited by counsel for the 2nd Defendant/Applicant states at what point the calculation must commence and when it must terminate respectively, while the rule cited by counsel for the Plaintiff states the days that must be excluded in during the application of Order 3 rules 2(2) and (3) of the High Court Rules 2007.

In this regard calculation for the application of the 3rd order in the ruling of 20th January 2022 must commence on the 21st January 2022, must exclude 22nd, 23rd, 29th and 30th of January 2022 all being Saturdays and Sundays respectively and would therefore conclude on the 31st January 2022. The plaintiffs therefore were within the period ordered and on this basis, this court will not strike out the amended writ of summons as prayed for by the 2nd Defendant/Applicant.

In the present application, counsel for the 2nd defendant approached the court for and alternative order in event this court refuses the application to strike out the amended writ of summons.

Counsel applies that this court grants leave to the 2nd Defendant/Applicant to appeal against the ruling of 20th January 2022. To understand the nature of the application, it is quite necessary for me to bring the history of the matter into perspective.

When this matter commenced, the plaintiff named on the face of the writ of summons was Zenith Bank (SL) Limited. The 2nd defendant approached this court by notice of motion praying that the writ of summons be dismissed/struck out on the grounds that it discloses no reasonable cause of action. This was based on the fact that solicitors for the 2nd defendant had in their custody a letter from Zenith Bank (SL) Limited to the effect that they did not instruct the institution of the matter against the 2nd defendant and in fact do not have a claim against the 2nd defendant.

The application was refused chiefly on the grounds that the 2nd defendant was not the proper personality to make such an application before the court

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and that if Zenith Bank (SL) Limited who were named as Plaintiff on the face of the writ of summons had no claims against the 2nd defendant, it lay within their authority to file a notice of discontinuance as per the rules of the High Court.

Subsequently, solicitors for the Plaintiff Zenith Bank (SL) Limited filed an application, to replace Zenith Bank (SL) Limited as Plaintiff with the current plaintiffs and for the writ of summons to be amended accordingly. This application was heard, determined and orders were given for the amendment of the writ and future conduct of the matter. It is this ruling that the 2nd defendant wishes to appeal against and have approached this court seeking leave to do so.

In deciding on an application for leave to appeal against an interlocutory ruling or judgment, this court must first be clear in its mind that the proposed appeal makes a prima facie case to be heard by the Court of Appeal. I have taken the liberty to peruse the proposed Notice of Appeal, particularly the reliefs prayed for therein. Aside from the fact that I see no merit or prima facie good case on the grounds as presented, my attention was pugnaciously pulled to the reliefs prayed for in the said proposed notice of appeal. Paragraph A thereof states as follows;

> *"That the ruling of the Honorable Justice Lornard Taylor J. dated 20th January 2022 be set aside and or dismissed".*

By this relief the 2nd Defendant/Applicant is seeking a return to the status quo ante. Assuming without conceding for any reason he is successful in the Court of Appeal and the relief cited above is granted, this would mean that the matter would have to be labelled again as between **Zenith Bank (SL) Limited v Michael Collier and Evelyn Lewis**.

This would in itself certainly create an anomaly and present several difficulties and ultimately result in injustice considering that it is Solicitors for Zenith Bank (SL) Limited the then Plaintiff who approached this court on an application to change the Plaintiff made the case that the claim would be better prosecuted by the present Plaintiffs Madam Aminata Kallay and Fifi International and Construction.

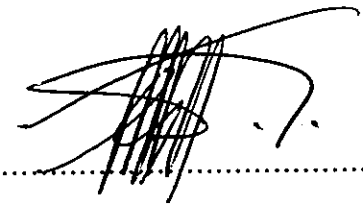
To set aside or dismiss the order of court dated 20th January 2022, will be to compel Zenith Bank (SL) Limited to prosecute a claim which they have made categorically clear that they do not wish to prosecute. It is also to remove from the action, a plaintiff who has a genuine claim and has been granted leave to prosecute same. If this is not injustice, I cannot see what is. I am therefore on this basis quite confident that the Court of Appeal as I know it will not in its wisdom participate in meting out injustice to litigant.

This makes me confident that the proposed Notice of Appeal does not make a prima facie case for the court of appeal to hear.

There is therefore no reason to grant the 2nd Defendant/Applicant leave to appeal against the ruling of this court dated 20th January 2022. By this token, there is no need for me to consider the prayers with respect to a stay of these proceedings pending the hearing and determination of the appeal.

I make the following orders;

1. This application dated 1st February 2022 is dismissed.
2. Costs in the cause.



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HONORABLE JUSTICE LORNARD TAYLOR

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