of the plaintiff and it will cause him inconvenience to be turned out, there will be a stay of execution for 10 days as from the present date.

Order accordingly.

RADAR *v.* JABER

SUPREME COURT (Beoku-Betts, J.): March 20th, 1951
(Civil Case No. 75/50)

[1] **Civil Procedure—execution—stay—stay granted only on proof of exceptional circumstances—court's discretion to be exercised only after consideration of all facts:** The granting of a stay of execution is based on proof by the applicant of exceptional or special circumstances, and the court should consider all the facts of the case before deciding to exercise its discretion in the matter (page 116, lines 27–32).

[2] **Civil Procedure—execution—stay—stay not to be granted merely because delay between judgment and appeal substantial—applicant can be compensated by damages if appeal successful:** The fact that there will be a substantial delay between the giving of a judgment and the hearing of the appeal from that judgment is not of itself a circumstance which will cause the court to grant a stay of execution; if the appeal is successful, the applicant may be compensated by damages (page 116, line 35—page 117, line 33).

[3] **Evidence—burden of proof—stay of execution—burden on applicant to show exceptional circumstances justifying stay:** See [1] above.

The plaintiff (now the respondent) brought an action against the defendant (now the applicant) to recover possession of certain premises.

The defendant was the tenant of a portion of premises which the owners sold to the plaintiff, who had previously been the defendant's sub-tenant. The plaintiff alleged breaches of covenants in the lease by the defendant, and instituted the present proceedings for possession of the premises. The Supreme Court (Beoku-Betts, J.) held that the defendant had broken certain covenants in the lease, refused to grant him relief from forfeiture of the lease and gave judgment for the plaintiff. Execution was stayed for several days. These proceedings are reported in 1950–56 ALR S.L. 97. The defendant then applied for the stay of execution to be extended until the hearing of the appeal.

The Supreme Court considered the nature of the circumstances

in which a stay of execution will be granted, and whether they pertained to the present case.

Cases referred to:

(1) *Farmer* v. *Labi* (1945), 3 S.L. Law Rec. 66, *dicta* of Graham Paul, C.J. applied.

(2) *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch.D. 471; 61 L.T. 348, applied.

R.B. Marke for the defendant-applicant;
Betts for the plaintiff-respondent.

BEOKU-BETTS, J.:

This is an application by the defendant for a stay of execution of a judgment in favour of the plaintiff. When judgment was given ordering recovery of possession, an application was made for stay of execution on the ground that, as the effect of the judgment was immediate, recovery of possession would follow unless a stay was granted and the defendant would be immediately turned out of the premises. I considered the application and decided that a fortnight stay of execution was desirable. This is an application that the stay of execution should be extended until the hearing of the appeal.

In the affidavit filed in support of the application it is stated that the appeal is not likely to be heard before November next, unless a special sitting of the court is held, and by that time the lease under which the defendant holds would have expired. The granting of a stay of execution is based on proof of exceptional or special circumstances. In *Tuck* v. *Southern Counties Deposit Bank* (2), it was held that the court should consider all the facts before deciding whether they constitute proper facts for its discretion to be exercised. In the case of *Farmer* v. *Labi* (1), decided by the Supreme Court on May 25th, 1945, Graham Paul, C.J. said, *inter alia* (3 S.L. Law Rec. at 67):

> "It is common ground that the appeal is not likely to be heard before March, 1946, *i.e.* nearly a year after the date of the judgment. It is stated that to refuse the stay of execution would render the appeal nugatory and that therefore I should not refuse the stay. Wilson vs. Church L.R. 12 Chancery 454 was quoted in support of that proposition. I am unable to find that Wilson vs. Church or similar cases have any application

here. The reason the stay of execution was granted in Wilson vs. Church was that the judgment under appeal was for distribution of a fund among a very large number of persons who were not parties to the suit and there would obviously be very great difficulty in getting back the money parted with if the House of Lords be of opinion that the money ought to have been so divided. That was a very special case and has no direct application to the present case which deals with the possession of solid premises which cannot disappear or be dissipated. It would be quite open to the Appeal Court to order that the judgment be reversed and that if possession had been obtained by the plaintiff under the judgment it was to be given up to the defendant, and that order could be carried out with no difficulty whatever.

The only question before me is whether a case has been made out for depriving the plaintiff of the benefit of the judgment which he has obtained. It is for the applicant for a stay of proceedings to make that case before the court, and in my opinion, he has failed to show any special reason why the court should do so. If this application were granted it would be a precedent which would have the effect of making every appeal against a judgment for possession in this class of case ipso facto a stay of execution."

The grounds for the application are that judgment was delivered after the March appeal sessions had been cancelled. That is not a ground for stay of proceedings. I could not have delivered judgment before as I had several cases to deal with, the nature of the matter involved required such careful consideration and I would have been wrong to rush my judgment to make it possible for either party to appeal. I do not share the view that if the would-be appellant succeeds he could not be compensated by damages. The principles stated by Graham Paul, C.J. show clearly that damages can compensate a party if he subsequently succeeds in the appeal.

In this case I have to consider not only the defendant's side but the plaintiff's as well. In this case the defendant committed breaches of tenancy of such a nature that I did not feel disposed to relieve him from forfeiture. The breach continued even during the action. The defendant also impugned the title of the plaintiff. I do not think in all the circumstances the stay of execution should now be extended. I therefore refuse the application for stay of execution with costs.

Application dismissed.

CHARAF (trading as C. J. CHARAF) *v.* MICHELL

SUPREME COURT (Beoku-Betts, J.): April 2nd, 1951
(Civil Case No. 184/48)

[1] **Contract—specific performance—defences—impossibility of performance—impossibility judged at proper time of performance not date of contract:** In an action for specific performance of a contract, the court will not make an order which cannot be carried out, and the time at which such impossibility is to be judged is the proper time of performance not the date of the contract (page 122, lines 9–13).

[2] **Contract—specific performance—matters to be proved—contract must be concluded, complete and certain:** Where it is sought to enforce specific performance of a contract, the court must be satisfied that there is a concluded contract in fact; that the contract so concluded is not incomplete by reason that the parties have failed to agree, expressly or by implication, on some essential matter; and that the contract is so precise and certain that exact performance can be ordered (page 120, lines 13–33).

[3] **Equity—notice—constructive notice—notice by tenancy—notice of possession other than vendor's shows interest in land about which purchaser must enquire:** Notice to a purchaser of land that it is in the occupation of someone other than the vendor is notice that the person in possession has some interest in the land, and the purchaser must enquire as to what that interest is or give effect to it (page 122, lines 32–37).

[4] **Land Law—conveyancing—notice—constructive notice—notice by tenancy—notice of possession other than vendor's shows interest in land about which purchaser must enquire:** See [3] above.

The plaintiff brought an action against the defendant for specific performance of a lease, repayment of money due to him and such other relief as to the court may seem fit.

The plaintiff was the tenant of certain premises owned by the defendant for a number of years at a fixed rent. The defendant proposed an increase in the rent and that the plaintiff should pay the rates, and the parties negotiated on the terms of a new lease. The plaintiff alleged that they agreed on the terms of the lease and that an agreement was drawn up which the defendant did not sign; but the plaintiff did not produce the agreement in evidence, only a copy of a telegram which asked the defendant to confirm that agreement had been reached. The defendant continued to occupy the premises and paid rent, rates and taxes in respect of them. The property was then sold to a third party and the deed

registered under s.4 of the Registration of Instruments Ordinance (*cap.* 200). The plaintiff instituted the present proceedings for specific performance of the alleged agreement, repayment of money due to him from the defendant and any other appropriate relief.

The Supreme Court considered whether, on the facts of the case, any agreement between the plaintiff and defendant existed at all and, if so, whether it could be specifically enforced against the defendant.

Cases referred to:

(1) *Kabba* v. *Young* (1944), 10 W.A.C.A. 135, distinguished.

(2) *Winn* v. *Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139.

(3) *Wood* v. *Midgley* (1854), 5 De G.M. & G. 41; 43 E.R. 784.

Legislation construed:

Registration of Instruments Ordinance (Laws of Sierra Leone, 1946, *cap.* 200), s.4:

The relevant terms of this section are set out at page 122, lines 22–26,

R.B. Marke and *Miss Wright* for the plaintiff;
O.I.E. During and *Betts* for the defendant.

BEOKU-BETTS, J.:

The relief claimed by the plaintiff in this action is the following:

1. Specific performance of the agreement mentioned in the statement of claim, that is, as regards No. 5 Westmoreland Street in Freetown.

2. Payment of the sum of £272. 18s. 4d.

3. Such other relief as to the court may seem fit.

On the claim for specific performance, the plaintiff's case is that by an agreement, partly oral and partly in writing, made between January and May 1946, and made between the plaintiff and the defendant, the defendant agreed to demise the premises above referred to for a term of 10 years at the rate of £200 per annum with an option to renew for another 10 years on certain conditions mentioned in the alleged agreement. The plaintiff relies principally upon certain documents to prove the agreement. The defence is that although there were negotiations between the parties for a lease of the premises, there was no completed contract or any agreement for the grant of the lease of the premises as alleged. The defendant further states that specific performance cannot be

ordered in this case as the property is not his at this date, having been sold to a third party, Milhem Brothers. Evidence was given that the sale was completed on April 10th, 1949. The plaintiff in cross-examination stated that he received a letter from the defendant saying that he had sold the premises to Milhem Brothers and he received a notice from Milhem Brothers that they had bought the property. The plaintiff, I should say, when recalled, denied these statements and stated that he was not told of the sale.

What I have to consider first of all, in an action for specific performance, is whether this is a case on all the facts in which an order for specific performance should be made, and the defendant ordered to execute a proper lease of the premises to the plaintiff. Before such an order can be made there should be proof of a completed contract between the parties, and there should be no uncertainty as to the agreement or to any material part of the alleged contract. If the alleged contract is subject to any approval or the terms are to be embodied in a formal contract, and from the facts there is no certainty that both parties have come to a definite contract, the court will not enforce specific performance. An agreement may be inferred and need not be based on direct evidence, but there should still be no uncertainty that the parties intended or had agreed to the agreement: see *Winn* v. *Bull* (2) and *Wood* v. *Midgley* (3). In 31 *Halsbury's Laws of England*, 2nd ed., at 345, para. 382, the principles are stated as follows:

> "Where it is sought to enforce specific performance of a contract, the Court must be satisfied that there is a concluded contract in fact; that the contract so concluded is not incomplete by reason that the parties have failed to agree, expressly or by implication, on some essential matter; that the contract is precise and certain, or, in other words, that, although all essential matters have been dealt with, there is not such uncertainty or vagueness that exact performance cannot be ordered."

In this case, the plaintiff's case is that he was the tenant of the defendant of the premises in question from 1937 and paid rent of £100 a year. He said that in 1947 the defendant sent him a cable to meet him in the airport at Dakar where it was proposed that the rent should be increased from £100 to £200 per annum, and that the plaintiff should pay the rates and city rates. He said that the defendant suggested an agreement should be made between them and sent to him. The plaintiff stated that he agreed to this

and saw Mr. Claude Wright, who prepared the agreement and sent it to the defendant, but the defendant did not sign it. The plaintiff sought to prove the agreement by certain copies of telegrams. The most important document relied upon by the plaintiff is Exhibit E, a copy of a cablegram. The plaintiff could not produce the original of Exhibit E or any receipt to show that the cable was sent to the defendant. Evidence was given that it was drafted by Mr. Wright when he was acting as solicitor for the plaintiff between 1945 and 1946. Mr. Wright stated that he saw a reply to this draft telegram, and that the reply was left with him but he cannot find it. He said that he later prepared a lease to be sent to the defendant and handed copies to the plaintiff. The plaintiff's second witness (Davies), when recalled, stated he saw a cable drafted by Mr. Wright which he sent to the defendant. The witness then produced Exhibit E as the copy he had sent. I admitted Exhibit E in evidence, with the clear understanding that I would consider its weight in the whole circumstances of the case. Having considered the facts, I am very doubtful whether Exhibit E was an exact copy of the cable sent by or on behalf of the plaintiff. In any case, when all the circumstances are considered, it is not sufficient evidence on which I can safely act and make an order for specific performance. The very nature of the document is not conclusive enough to support the claim. It is as follows:

> "Please confirm agreement I take 5 Westmoreland Street for 10 years from March 1st, 1945 at net rental of £200 annually and notify John Aboud that arrangements for lease concluded. Lawyer Wright promises send you lease early. Please deduct £400 being 2 years' rent from your debt to me and remit balance."

That was an offer by the plaintiff to the defendant at the most. It was a suggestion by him for an agreement for a lease and a statement that there should be an agreement in writing to be prepared by Mr. Wright, and of course signed by the defendant, agreeing to the terms before it could be regarded as concluded.

From the evidence in this case all the requirements were not completed. I agree with the suggestion on behalf of the defendant, and I find that there may have been negotiations for a lease but no completed agreement was reached between the parties. There is nothing in writing or anything on which I can rely, even orally, to the effect that the defendant agreed to the proposals in Exhibit E. The agreement to be prepared by Mr. Wright and executed by the

defendant was not produced, and there is no evidence it was executed or agreed to by the defendant. The evidence convinces me that if ever there was an agreement for a contract it was so uncertain that I cannot act upon it; nor can I make an order for specific performance.

This should dispose of the claim for specific performance. But in addition to the uncertainty of the agreement as to the alleged contract, there is the defence that the property has now been sold to Milhem Brothers who are not parties to the action. In an action for specific performance the court will not make an order which cannot be carried out. "The time at which such impossibility is to be judged is the proper time for performance, not the date of the contract": 31 *Halsbury's Laws of England*, 2nd ed., at 396. At this time it is impossible to order the defendant to carry out the alleged contract where there are third parties, Milhem Brothers, who would be affected by such an order and who have not been made parties. As it is a lease the plaintiff seeks to have enforced, where there is a third party who is not a party to the action and there is no proof the third party knew of the alleged contract, the question of priority of interests would arise. By s.4 of the Registration of Instruments Ordinance (*cap.* 200), it is provided:

> "Every deed, contract or conveyance, executed after the ninth day of February, eighteen hundred and fifty seven, so far as regards any land to be thereby affected, shall take effect, as regards other deeds affecting the same land, from the date of its registration . . . ."

The deed of Milhem Brothers is registered. It would take priority over any agreement for a lease or any lease. Learned counsel for the plaintiff referred to the case of *Kabba* v. *Young* (1), where Kingdon, C.J., quoting from *Dart on the Law of Vendors and Purchasers*, 6th ed., at 975 (1888), said (10 W.A.C.A. at 139):

> " 'Notice of the land, being in the occupation of a person other than the vendor, is notice to a purchaser that the person in possession has some interest in the land, for possession is *prima facie* evidence of seisin, and a purchaser having notice of that fact is bound to enquire what that interest is, or to give effect to it whatever it may be.' "

These principles do not apply to the facts of this case. *Kabba* v. *Young* dealt with the question that the purchaser is affected by notice of the occupation by some other person. In this case, what I have to consider is whether specific performance can be granted

of a lease for 10 years with an option for another 10 years. The purchaser would not be affected by notice that such a lease existed when in fact from the evidence such a lease has not been proved. Where the law requires registration of title, a person who fails to register cannot get rights to the property as against third persons: see *Cheshire on Real Property*, 5th ed., at 146 (1944). Even if this was a case in which ordinarily the principles of *Kabba* v. *Young* would apply, the fact must not be forgotten that the action is a claim for specific performance. From the facts I do not consider such an order can be made. As regards the question of the payment of rates and taxes to support a claim of part performance, the payment of rates and taxes would arise ordinarily in any tenancy. In any case there are no facts to suggest a case for specific performance. The evidence about repairs is, as far as reliability can be given, about two men making estimates. No witness was called that the repairs were actually done. I am not satisfied that there was evidence of part performance to support a claim for specific performance.

I have next to consider whether the plaintiff is entitled to any other relief and what it is. I consider the only claim of the plaintiff is on the sale of the kola nuts. I am not satisfied that there was a concluded contract to support a case of damages in lieu of specific performance. The plaintiff claims a balance of £272. 18s. 0d. including a deduction of £150 for rent. The defendant admits the sum of £150. The claim of the plaintiff includes a deduction of rent for one year at £200 a year. As a result of my finding that there was no agreement about the alleged lease, then the rent allowable should be £100 per annum and not £200. The plaintiff will therefore be given further credit of £100, and the balance due to the plaintiff will be £372. 18s. 0d. instead of £272. 18s. 0d. This is on the evidence as disclosed in the pleadings.

In the result the claim of the plaintiff for specific performance is dismissed. The plaintiff is entitled to recover the sum of £372. 18s. 0d. from the defendant. As regards costs, the plaintiff is to have costs on the claim for £272. 18s. 0d. and the defendant to have costs on the claim for specific performance.

Suit dismissed.