CV. APP 37/12

2012

C.NO.

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN

YONGA CONTEH

DEFENDANT/APPELLANT

AND

REGINA MAINLEY(AS ADMINISTRATIX OF THE ESTATE OF ISSAC THEOPHILUS AKUNA WALLACE-JOHNSON-

PLAINTIFF/RESPONDENT

CORAM:

Hon. Mr. Justice Abdulai M. Bangurah JSC (Presiding)

Hon. Mr. Justice M.P. Mami JA

Hon Mr. Justice Aiah S. Allieu JA

COURT OF APPEAL REGISTRY SIGN DATE 18/6/26

COUNSEL

A.Z Kanu Esq. for the Appellant

B.M. Bah Esq. for the Respondent

JUDGMENT DELIVERED BY THE HON. MR. JUSTICE ABDULAI M. BANGURAH JSC DATED THE 18th DAY OF June 2026

This Appeal was filed in this Court on the 5th of June 2012, by the 1st of three defendants in the lower Court Pa Yonga Conteh, against the Judgement of His Lordship St George Ade Joiner J, delivered on the 28th May 2012. The grounds as contained in the Notice of Appeal dated the 4th June 2012 are as follows:

a). That the Learned Trial Judge (hereafter "the LTJ") erred in law in proceeding with the Trial of the matter in the absence of the Defendant/Appellant and his Counsel.

b). That the LTJ misdirected himself in using a principle of law that does not support the facts of the case before him.

c). That the LTJ erred in law and fact in coming to the conclusions that the property at Lumley Road Lumley Freetown described in survey plan numbered LS803/07 forms part of the estate of ISAAC THEOPHILUS AKUNA WALLACE-JOHNSON, who died in Ghana on the 9th May 1965.

d). That the LTJ's award to the Respondent in the sum Le550,000,000/00 as damages for trespass is inordinate.

e). That the Appellant has a good and Triable defence.(seemingly questioning that very assertion by making it a ground of appeal)

The reliefs sought from this Court are that:

The judgement of the lower Court dated the 28th May 2012, be set aside and the Defendant/Appellant be given an opportunity to prove his case in the Court below.

It must be noted from the onset that, there are no particulars of the errors of law and misdirections alluded to in the 1st to 3rd grounds of Appeal, an omission that offends Rule 9(2) of the Court of Appeal Rules 1985 and thus susceptible to the powers conferred on this Court by Rule 9(4) supra.

BRIEF FACTS

The Respondent herein Regina Manley(hereafter "the Respondent"), on the 7th April 2008 took out a Writ of summons in the lower Court, against the Appellant herein and a Josephus Comm who later identified himself as Joseph Kong, in her capacity as Administratrix of the estate of her deceased father, Isaac Theophilus Akuna Walace-Johnson.

By an Order dated the 22nd October 2008, a certain Hamon Kis-Kamara was added as a 3rd Defendant to the action.

The claims set out in the said Writs of summons are as follows:

i). A declaration that property situate at Lumley Road Lumley Freetown described in survey plan numbered LS803/07 (hereafter "the res" or "the disputed land"), forms part of the estate of Isaac Theophilus Akuna Wallace-Johnson who died in Ghana on the 9th May 1965.

ii). That by a judgement of the lower Court dated the 14th July 1992, Sally Ann Wallace Johnson the lawful widow of Isaac Theophilus Akuna Walace-Johnson (hereafter ITA Walace-Johnson), up to her death on the 9th January 2008, was the person entitled to administer the estate of her deceased husband and entitled to one third of same by the provisions of the Second Schedule to cap 45 of the laws of Sierra Leone 1960.

iii). Damages for trespass

iv). Perpetual injunction restraining the Defendants and their privies from entering or remaining upon the said land or from interfering with the peaceable enjoyment of same by the plaintiff.

v).Costs

vi). Any other further reliefs as the Court deems fit.

The Defendants by their Counsel (Manly spaine esq for the 1st and 3rd Defendants and Oliver O. Nylander for the 2nd defendant), entered Appearance and gave Notice of such Appearance, on the 7th May 2008 for the 1st defendant, 8th July 2008 for the 3rd Defendant and 30th April 2008 for the 2nd defendant respectively

On the 18th day of June 2008, a defence was filed for the 1st Defendant therein and the Appellant herein. The 2nd and 3rd Defendants therein as admitted by their Counsel in subsequent Applications to the lower Court, did not file any defence to the claim against them.

The matter was assigned to the Hon Mrs Taylor J, albeit directions as to its conduct were issued by the Hon A.B.Halloway J, as he then was, on the 6th July 2008.

By the contents of the Judgement of the LTJ, the Hon Mrs Taylor J commenced hearings and took two witnesses, who were cross examined by the erstwhile Counsel for the Appellant herein. For some reason that is not in the Records of appeal, the matter was reassigned to the Hon St George Ade Joiner J., the LTJ herein.

It was at this stage that, the Appellant, his Co-Defendants in the lower Court and their Counsel, were said to have neglected the proceedings in that Court and stopped attending same. The judge then proceeded to hear and eventually determine the matter in pursuance of Order 41 Rule 1(2)(a) of the High Court Rules 2007, which states:

"Where an action is called for trial and a Party fails to attend the trial, a judge may:

a). Where the plaintiff attends and the defendant fails to attend, dismiss the Counterclaim if any, and allows the plaintiff to prove the claim"

On the 28th May 2012, His Lordship delivered a judgement in favour of the Respondent herein.

On the 30th May 2012, the Appellant rightly applied to set aside the Judgement aforementioned apparently invoking the provisions of Order 41 Rule 2 of the High Court Rules 2007 that says:
"Any verdict or judgement obtained where one Party does not appear at the trial may be set aside by the Court upon such terms as it thinks fit upon an application made within 6 days after the trial or within such time as the Court or judge may allow"
There is however absolutely nothing in the Records of appeal that speaks to the status and/or outcome of that Application. All we have is learned Counsel for the Appellant's word for it in his synopsis that, His Lordship the LTJ refused the Application, on the basis that, his judgement is one on the merits and can only be upturned on appeal. How and when that prouncement was made by the LTJ is not stated by Counsel.
On the 5th June 2012, the Appellant as 1st Defendant in the lower Court, filed an Appeal to this Court against the judgement of 28th May 2012 aforesaid, on the grounds as stated above.
On the 12th June 2012 , the 2nd Defendant Josephus Comm now identified as Joseph Kong, filed an Application to the Court below, again seeking to set aside the judgement and praying for an enlargement of time within which to file his defence. That Application was refused by the Hon. Mrs. A. Showers JA, in her Ruling of the 9th October 2012.
On the 13th November 2012, the Appellant herein as 1st Defendant in the lower Court and the 3rd Defendant Hamon Kis-Kamara applied to that Court, for a stay of execution of the Judgement of the 28th May 2012 pending the hearing and determination of the said Application and the Appeal filed to this Court by the 1st Defendant and Appellant herein and for an enlargement of time within which the 3rd Defendant is to appeal against the said judgement.
As with the Application of the 30th May 2012, nothing could be found on the Records of Appeal respecting the status or outcome of that Application. And there is no mention of same in the synopsis of both Counsel. This was how the Parties came to this point.
I note with abhorence that, the Records of proceedings in the lower Court are not in the Records of Appeal of this Court. This could presents undue hardship to this Court, where it is to determine an appeal on the merit. It will lead to placing dangerous reliance on processes filed in the lower Court and excerpts of what obtained in that Court cited by their Counsel, which are more often than not, slanted in support of their case. It is safer when happenings in the lower Court are read first hand from the Judge's notes.
SUBMISSIONS BY BOTH COUNSEL.
Both Counsel made very instructive and thought provoking arguments in their synopsis, that I would have loved to dilate and make definitive pronouncements on. I am however constrained by the technical tenure of this judgement. To delve into those submissions now, is in my view acquiescence of the irregularities that will inform my conclusions hereunder..
FINDINGS.
The LTJ's judgement of the 28th May 2012, is entered in pursuance of Order 41 Rule 1(2)(a) of the High Court Rules 2007 qouted pro rata.
It is obvious that, a judgement obtained under Order 41 Rule 1(2)(a), is a judgement in default of Appearance at the trial and like all default judgements, it can not be the subject matter of a substantive appeal to this Court in any event. Our rules of Court from Orders 13 Rule 9, 22 Rule 11 and 41 Rule 2 of the High Court Rules 2007 to Rule 26 of the Court of Appeal Rules 1985 and Rule 66 Subrule 2 of the Supreme Court Rules 1982, do not contemplate Appeals against the

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default Judgments. The remedy provided by the above Rules in all the layers of the Superior Court of Judicature is an Application to set aside.

An Application to set aside a default judgement is for all intent and purposes an interlocutory Application, as it does not go into the substance of the matter at that stage. All the Applicant needs do at this stage, is to establish the arguability of his defence and the reasons for his slumber.

What is appellable therefore with the leave of the lower Court or this Court, is an Order refusing to set aside the default judgment and not the default judgment itself. Where such leave is refused by the lower Court, the first recourse to this Court is a renewal of the Application for leave to Appeal against the Order refusing to set aside. (See Rule 10 subrule 1 of the Court of Appeal Rules 1985 as amended by the Court of Appeal(Amendment) Rules 2003, Constitutional Instrument No. 1 of 2003.

Where the leave is granted by the lower Court, then the recourse to this Court is an interlocutory Appeal against the Order refusing to set aside the default judgment and not a substantive Appeal against the default judgment itself.

In the instant case i hold that, the Application of the 30th May 2012, was the appropriate procedural course taken by the defendant, as it was both within the provision of Order 41 Rule 2 and the time prescribed therein. The status and/or outcome of that Application is therefore pivotal in determining the next step. However, the filing of this Appeal on the 5th June 2012, renders that Application and those of the 12th June 2012 and 13th November 2012 nugatory and obsolete. An appeal filed in this Court operates to rid the lower Court of all jurisdiction over the matter, save issues relating to stay of execution. Therefore, all Applications to the lower Court subsequent to the filing of the appeal to this Court that do not relate to stay of execution, are procedurally ineffectual, the High Court having been rendered functus.

Consequently and with every respect, the Ruling of the 9th October 2012 was made per incuriam and thus a nullity ab initio, as her Ladyship was now devoid of any Jurisdiction to have entertained that Application, with an appeal pending in this Court.

Taking Learned Counsel for the Appellant's assertion in his synopsis that His Lordship refused the Application to set aside for granted, the proper course ought to have been for Counsel to Apply for leave to file an interlocutory appeal to this Court against that Ruling and not a substantive Appeal against the default Judgement. See Rule 10(1) of the Court of Appeal Rules 1985 supra.

This was also the position of the Supreme Court in its recent judgement of the 4th June 2025, in the case of MISC.APP NO.4/2015 OJ AND JB INVESTMENT LIMITED Vs.THE HIGH COURT, ALBERT WOODE, ZAC DAINKEH AND Attoney General and Minister of Justice.

In that case, an earlier Order of the High Court had refused to set aside a judgement in default, on both the two limbs laid out in Berthan Macualey Vs Jim Diamantopolous (1962) SLLR 14 ie for irregularity and on the merits of the defence. Instead of seeking leave to appeal against the said Ruling, the defendant file another Application to set aside on the merits of the defence, which had already been considered in the earlier Ruling. The second judge set aside the judgement on the merit of the defence. A third judge endorsed the Second Ruling.

In quashing the 2nd and 3rd Rulings and/or Orders, the Supreme Court had this to say:

"The only recourse open to the 3rd defendant after the first Ruling, was to have Applied to the lower Court for leave to appeal against the said Ruling pursuant to Rule 10(1) of the Court of Appeal Rules 1985 as amended by Constitutional Instrument No.1 of 2003"

An Appeal does not lie against a default judgement What is appealable with leave of the lower Court or this Court, is an Order refusing to set aside.

In the instant case therefore, the remedy open to the Appellant and his Co-Defendants, was to have Applied to the lower Court for leave to appeal against the Ruling refusing to set aside the default Judgement. If the lower Court refuses such Leave, then the Application can be made to this Court for the said leave.

As to why learned Counsel for the Respondent was seemingly oblivious of this anomaly and failed to avail himself of Rule 19 of the Court of Appeal Rules 1985, is beyond me. A preliminary objection under the said Rule, would have saved this oversubscribed Court the 15 year bother.

In the circumstances, coupled with the absence of the Order refusing to set aside and in which the LTJ is also alledged to have pronounced his judgement as one on the merits in the Records of Appeal, i hold that, the Appeal filed in this Court on the 5th June 2012 by the Appellant herein, against the default Judgement of the 28th May 2012, is irregular and of no effect. There is therefore no appeal before us.

In the Result, I make the following Orders:

a). That the said purported Appeal herein filed on the 5th June 2012 against the judgment of the lower Court delivered by the LTJ on the 28th May 2012 is hereby dismissed.

b). That the said default judgement of the lower Court dated the 28th May 2012 and delivered by the LTJ the Hon St. George Ade Joiner J, remains extant and/or subsisting.

c). Cost of this Appeal assessed at Sle100,000/00 is awarded the Respondent herein, to be paid by the estate of the purported Appellant herein Pa Yonga Conteh or his estate if deceased.

Hon Abdulai M. Bangurah JSC. (Presiding)




Hon. M.P. Mami JA

I agree

Hon A.S. Allieu JA

I agree