MISC. APP. 1/2014.

IN THE SUPREME COURT OF SIERRA LEONE
(SUPERVISORY JURISDICTION)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 125 OF THE CONSTITUTION OF SIERRA LEONE ACT NO.6 OF 1991

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR CERTIORARI TO SET ASIDE A RULING DELIVERED ON THE 6TH DAY OF AUGUST 2014 BY THE HON. JUSTICE A. SHOWERS J.A. IN THE MATTER ENTITLED "CC.38/14 I. NO8

INTERNATIONAL CONSTRUCTION COMPANY -PLAINTIFF/APPLICANT
68 WILKINSON ROAD
FREETOWN

AND

ZAKHEM INTERNATIONAL CONSTRUCTION -DEFENDANT/RESPONDENT
COMPANY LTD.

CORAM:
The Hon. Mr. Justice V. V. Thomas, JSC. - Presiding
The Hon. Mr. Justice P. O. Hamilton, JSC.
The Hon. Ms. Justice V. M. Solomon, JA.

COUNSEL:
A. E. Manly-Spain Esq., and S. Katta Esq., for the Plaintiff/Applicant.

J. B. Jenkins-Johnston Esq., for the Defendant/Respondent.

RULING DELIVERED ON THE 15th DAY OF December 2014

The Applicant, by Notice of Motion dated 11 August 2014, has applied to this Court in the exercise of its supervisory jurisdiction pursuant to section 125 of the Constitution of Sierra Leone, Act No. 6 of 1991 (the 1991 Constitution) for the following reliefs:-

1. That all proceedings in the High Court matter entitled "CC:38/14 I NO.8 International Construction Company Ltd. VS Zakhem International Construction Limited" be stayed pending the hearing and determination of the application herein.

2. That this Honourable Court do issue an Order of Certiorari for the setting aside of the ruling delivered on the 6th day of August, 2014 in the aforementioned High Court matter on the following grounds:-

(a). The said decision contained in the said Ruling was per incuriam in that:

(i) The judgment in Default of Defence dated 23rd May, 2014 that was set aside in the said Ruling was a regular judgment and the Defendant failed to show in his application that he was deprived of an opportunity to put forward a defence on the merits as no such defence was exhibited in the said application.

(ii) There is no rule of law which stipulates that a money judgment must first be served on the Judgment Debtor before the Judgement/Creditor can apply for a garnishee Order Nisi to enforce the said Judgement.

(iii) The Learned Justice having cited in her Ruling the correct principle to be applied in setting aside a Judgement in Default to wit, "the primary consideration in exercising the discretion is whether the Defendant has merits to which the court should pay heed, not as a rule but as a matter of common sense, since there is no point in setting aside a judgement if the Defendant has no defence" failed to apply the same in reaching a decision in the application before her where the Applicant failed to show that it had a defence on the merits.

(b). That one of the Orders contained in the said Ruling was made in excess of the jurisdiction of the Honourable Justice who delivered the same in that the Learned Justice was wrong in law and exceeded her jurisdiction when she ordered that the Notice of Motion dated 21st March, 2014 which had been struck out by a court of competent jurisdiction for want of Prosecution should be re-listed by the Applicant within a time limited by the Court because purportedly the application which was struck out raised the issue of the jurisdiction of the court hearing the matter.

Section 125 of the 1991 Constitution under which the application is made to this Court is in the following terms:

"The Supreme court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers."

The Court has been asked to exercise its constitutional jurisdiction or duty to supervise all other courts in the country, (which obviously includes the High Court) and to issue an order of certiorari setting aside the Ruling of the High Court delivered by the Honourable Mrs. Justice A Showers J.A., (sitting as a High Court Judge) on the 6th August 2014. The Ruling and consequential orders which she made together with the drawn-up Order of the Court are exhibited as Exhibits B & C to the affidavit in support of the Motion sworn to on the 11th August 2014. In that affidavit, paragraphs 5 to 8 inclusive summarise the basis or reasons for the application filed by the Applicant for an order of certiorari to set aside the said Ruling. These paragraphs are as follows:

"5. That the application for the issue of a writ of certiorari is being made as I verily believe that the said Justice Showers acted in excess of the jurisdiction of the High Court.

6. That the learned Judge ought not to have set aside the said judgment in default in the absence of an affidavit showing a defence on the merits having held in her ruling as follows, "it is indeed settled law that if a judgment is regular, then it is an almost inflexible rule that there must be an affidavit stating facts showing a defence on the merits".

7. That the Learned Judge ought not to have ordered that "The Defendant/Respondent is to file a fresh notice of motion seeking the reliefs set out in the notice of motion dated 21st March 2014 within 7 days of the date hereof" after having found that the notice of motion dated 21st March 2014 was indeed struck out and not dismissed as alleged by the Defendant/Respondent or at all having held that the Plaintiff/Applicant Solicitor has, "correctly submitted it was for the Defendant to file a fresh, notice of motion".

8. That the Learned Judge's discretimony (discretionary) Powers do not extend to the setting aside of a regular judgment in the absence of an affidavit exhibiting a defence or even a proposed defence on the merits."

ISSUES

1. The first issue for determination is whether this Court has jurisdiction to issue an order of certiorari setting aside the Ruling and one of the orders of the High Court as requested by the Applicant. J. B. Jenkins-Johnston Esq., Counsel for the Respondent has strenuously argued (relying on English authorities) both orally before the Court and in his written submissions, that certiorari cannot issue "to the High Court which is part of the Superior Court of Judicature, and a Superior Court of Record itself". After Counsel was informed of several authorities of this Court within this jurisdiction that his position was not the law in this country, he virtually abandoned that position. On a subsequent occasion, Counsel himself referred the Court to the case of Governor Bank of Sierra Leone v The Court of Appeal of Sierra Leone and Others (Unreported) S.C. No.3/2007 (Ruling delivered on 11th July 2008). This decision of the Supreme Court was consequent on the Bank's dissatisfaction with the judgment of the Court of Appeal. That Court had affirmed the decision of the High Court in winding-up proceedings which was challenged on the ground that High Court had no jurisdiction to make the order of the 14th July 2005. The reliefs prayed for in the Originating Motion were under Section 125 of the 1991 Constitution and was essentially for an order of certiorari to quash one of the orders of the Court of Appeal on the ground that the Court did not have jurisdiction to make the particular order for the payment of US$11,304,899.79. The decision of the Court of Appeal was set aside pursuant to the supervisory powers of the Supreme Court conferred by Section 125 of the 1991 Constitution.

In the earlier case of Alhaji Abdulai Bangura v The Court of Appeal of Sierra Leone and Others (Unreported) S.C. No.4/2006 (Ruling delivered on 23rd November 2006) the Applicant had applied by Notice of Motion for an order of certiorari pursuant to section 125 of the 1991 Constitution to remove to the

Supreme Court the Order of the Court of Appeal for the same to be quashed. Counsel for one of the Respondents in that case had argued by way of a preliminary objection that the Court of Appeal is a superior court and not subject to an order of certiorari. In the Ruling by the full Court rejecting the preliminary objection that the Supreme Court does not have supervisory jurisdiction over the Court of Appeal, the Court ruled that Section 125 of the 1991 Constitution provides a further jurisdiction for the Court to supervise all other courts in the country. Warne JSC said,

> *"The Supreme Court has supervisory jurisdiction over the Court of Appeal. Section 125 is clear and unequivocal. The fact that the matter is appealable does not detract from the powers conferred on the Court."*

My understanding of what the Learned Justice was saying is that the appeal machinery open to litigants is separate and distinct from the supervisory jurisdiction of the court.

An occasion when this Court exercised its supervisory jurisdiction pursuant to Section 125 of the 1991 Constitution and quashed a ruling of the High Court (Hon Mr. Justice A. B. Halloway, presiding) and set aside an order of another High Court judge in the same case is Hussein Abess Musa v. Mohamed Abess Musa & Anor. (Unreported) S.C. Misc. App.4/2008 (Ruling delivered on 22nd May 2009).

The position in this Court is no different from that in Ghana. The supervisory jurisdiction of the Supreme Court of Ghana as provided for in the section 132 of the 1992 Constitution of the Republic of Ghana provides as follows:

> *"132. The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in exercise of that supervisory jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."*

It was held by the Ghana Supreme Court relying *(inter alia)* on the above provision in the exercise of its supervisory jurisdiction in the case of British Airways & Anor. v Attorney-General [1996-97] SCGLR 547 that the Court's supervisory jurisdiction ought to be exercised in appropriate and deserving cases in the interest of justice. The court ordered a circuit trial tribunal (a superior

court headed by a chairman of the rank of a High Court judge) sitting in Accra to discontinue the trial of the plaintiffs and struck out the case before the tribunal because it had no jurisdiction to try the case as there was no written law defining the offence charged or providing punishment for the same.

In view of the clear constitutional provision in Section 125 of the 1991 Constitution and the previous decisions of the Court, I opine that this Court has a constitutional duty to supervise all courts and adjudicating authorities in Sierra Leone and consequently, I hold that this court has supervisory jurisdiction to hear the application filed by the Applicant.

2. The next question for determination is whether the Applicant has made out a case for the Court to exercise its supervisory jurisdiction and set aside the said Ruling and Order of the learned justice sitting as a High Court judge. The first ground upon which the application is made is that the decision of the learned justice was made *per incuriam*. The particulars for this ground of complaint are as stated *supra*. Although neither Counsel for the Applicant nor that for the Respondent referred to this ground in their arguments and submissions before the Court, it is necessary to deal with this ground for the sake of completeness as it is stated in the motion filed. The expression "*per incuriam*" means "through want of care". A decision or dictum of a judge which clearly is the result of some oversight is said to have been given *per incuriam*. *Vide* Dictionary of English Law, Vol. 2 (1959 edition). In Black's Dictionary (de luxe edition) at page 1254, the learned authors quoting Cross and Harris in Precedent in English Law state as follows:

> "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must in our judgment, consistently with

the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence".

It is trite law that an order of certiorari is a discretionary remedy that is granted to applicants only in appropriate cases as the normal and usual avenue for redressing complaints by litigants who are not satisfied with decisions of adjudicating authorities, including the High Court and the Court of Appeal, is by way of appeal to the next higher level. In my judgment, certiorari is reserved for cases where there are clear errors of law on the face of the ruling of the court or an error which amounts to lack of jurisdiction in the court so as to make the decision a nullity. In the Ghana Court of Appeal case of Republic v. Accra Circuit Court ex parte Appiah [1982-83] GLR 129 at 143, C.A., Francois JA stated a useful guide for all common law jurisdictions in this area of the Law when he said:

"A court of competent jurisdiction may decide questions before it rightly or wrongly. Procedures for correcting wrong decisions exist. The procedure for appeal is one such avenue for redress. But the remedies of appeal and certiorari are different and must not be blurred. That certiorari and appeals are not alternative remedies but are mutually exclusive is stated in Obeng v. Ampofo (1958) C.A."

In Republic v. High Court, Accra ex parte Industrialization fund for Developing Countries & Anor. [2003-2004] SCGLR 348, a case in which the Supreme Court of Ghana exercised its supervisory jurisdiction over all courts in Ghana and dismissed an application for an order of certiorari, Bamford-Addo JSC in delivering the leading judgment of the Court said;

"When the High Court, a Superior Court, is acting within its jurisdiction, its erroneous decision is normally corrected on appeal whether the error is one of fact or law."

In my judgment, an order of certiorari pursuant to section 125 of the 1991 Constitution is not the appropriate remedy to correct judgments or rulings made *per incuriam*, assuming one can establish that they were so made.

What were the errors of law on the face of the record identified to the Court in the said Ruling of the learned justice which are the basis for this application? As mentioned in the motion paper and supporting affidavit, they are as follows:

1. That the decision in the Ruling was made *per incuriam* in that it set aside a regular judgment on the ground that the Defendant (Respondent herein) failed to show that it was deprived of an opportunity to put forward a defence on the merits. Further, that the learned justice failed to apply the primary consideration for a judge in an application to set aside a regular judgment which has been awarded in default of defence.
2. In the 3rd order prayed for, the complaint is that the Ruling and Order of the Court was made in excess of jurisdiction when the Court granted the order to file a fresh notice of motion seeking the reliefs in an earlier motion filed by the Respondent herein, within 7 days of the Ruling of the learned justice. The reason given for this contention is to be found in paragraph 7 of the Affidavit in support of the application quoted *supra*. Paragraph 8 of the said Affidavit contends that the learned justice's discretionary powers do not allow her to set aside a regular judgment "in the absence of an affidavit exhibiting a defence or even a purported defence on the merits."

   In oral arguments before the Court, Counsel for the Applicant submitted that the application was made bona fide and not merely to hold on to the Respondent's monies which had been withdrawn from its bank account by way of garnishee proceedings following the order to set aside the default judgment in the Ruling of the learned justice. Counsel stressed that the default judgment of the 23rd May 2014 should not have been set aside because the explanation proffered by the Defendant as to how the default occurred was inadequate and the effect of granting the application to set aside the default judgment was to strike out the earlier order of Kamara J. dated the 13th May 2014 which struck out the Respondent's application. He finally submitted that in doing so, the learned justice was "judging Kamara J."

   Counsel for the Respondent submitted that the application is unmeritorious and ought to be dismissed with costs. He argued that the orders made by the learned justice in setting aside the default judgment were clearly within her jurisdiction relying on Order 22 rule 11 of the High Court Rules, 2007 and

the well-known cases of Evans v. Bartlam [1937] 2 All E.R. 646 (H.L) and Macaulay v. Diamantopoulos [1962] 2 S.L.L.R 14. In the latter case the then Acting Chief Justice Bankole Jones at page 15 of the Report said:

> *"The motion now before the court presumes that the judgment was regularly obtained and the application is to set it aside. The law is that, apart from express rules, the court has a discretion, untrammelled in terms, in setting aside a judgment regularly obtained, although the application is made out of time, if circumstances require it to be set aside."*

The closing paragraphs of the learned justice's Ruling are instructive as to why she exercised her untrammelled discretion to set aside the judgment in default of defence and ordered a fresh notice to be filed within 7 days. I reproduce the said paragraphs hereunder for case of reference as follows:

> *"I believe in this case where the Defendant's allegation is that they have not been fairly treated, the court ought to look more closely into their explanation of how the default occurred.*
>
> *Counsel for the Defendant in his submissions to the court stated that their notice of motion dated 21st March 2014 which was struck out for want of prosecution was predicated on the jurisdiction of the court to hear the matter. He maintained that in the circumstance had they taken any step beyond that application would have meant taking a fresh step in the matter. Also in the affidavit in reply, the deponent Brima Koroma Esq. sought to explain what transpired in court on the 12th May 2014 when the notice of motion was struck out. In my view he has given a plausible explanation for his absence in court when the matter was called and his application struck out.*
>
> *Counsel for the Plaintiff has laid great emphasis on the fact that the said notice of motion was struck out and not dismissed. That is indeed the case and as* ***he correctly submitted it was for the Defendant to file a fresh notice of motion***. (emphasis added).
>
> *However the Defendants have alleged that they were never served with a copy of the judgment in default and so were unaware that such a step*

has been taken by the Plaintiff. ***The Plaintiff has not denied that allegation.*** *(emphasis added)*

It seems to me that having taken into account the explanation of the Defendant how the default occurred leading to the entering of the judgment in default of defence and also most importantly bearing in mind that the application which was struck out raised the issue of jurisdiction of the court hearing the matter at all, ***I believe it will be within the court's jurisdiction not to allow the judgment to pass where there has been no proper adjudication.*** *(emphasis added). This is a case in my view where the discretionary power ought to be applied to avoid the injustice which may be caused if judgment follows automatically on default."*

Speaking for myself, I cannot see how this line of reasoning can be faulted to the extent that it can properly be said that the learned justice did not exercise her discretion judiciously or exceeded her jurisdiction and thereby provide justification for quashing her Ruling by way of certiorari. No authority has been cited to the Court (and I do not know of any) which lays down a binding rule of law (statutory or otherwise) that in all applications to set aside a default judgment, a specific affidavit disclosing a defence must be filed and if no such affidavit is filed and the default judgment is set aside, this will amount to an error of law on the face of the record; or alternatively that this will deprive the court of jurisdiction, in all the circumstances of the particular case, to make an order to set aside the default judgment. I opine that the true test is whether the circumstances require that such a default judgment should be set aside; *vide* Bankole Jones, Acting C.J *supra*. In my judgment, the learned justice identified relevant circumstances which require that the default judgment ought to be set aside. What the learned justice said in her Ruling was that there is an almost inflexible rule that if a judgment is regular, "there must be **an affidavit stating facts showing a defence on the merits".** (emphasis added). After this statement, she went on to quote the notes in the Supreme Court Practice, (1999 edition) on the Discretionary Powers of the Court which clearly indicate that the primary consideration in exercising the discretion **is whether the defendant has merits to which the**

court should pay heed not as a rule of law but as a matter of common sense. (emphasis added). No doubt the judge read the affidavit in support of the application to set aside and was satisfied that it disclosed circumstances or merits which justify the order to set aside the default judgment. If the applicant herein is of the view that the application to set aside did not have merits, the proper avenue to challenge the judge's finding on the issue is by way of appeal and not by way of an application for an order of certiorari unless it can be established that such a remedy is the appropriate one in the circumstances.

The papers filed in this application disclose relevant factors which in my judgment indicate that the learned judge, in the exercise of her judicial discretion, did not reach a wrong decision to set aside the default judgment. These factors include the following:

1. There is no evidence which indicate that notice was in fact sent to the Respondent in compliance with the order of Kamara J. made on the 7th May 2014 in terms that "notice be sent to the other party's solicitor for them to be aware that such a line of action (to dismiss the action for want of prosecution) will be taken on the next adjourned date. Matter adjourned to the 12th May 2014 notice to Tanner Legal Advisory Services". Counsel for the Applicant was unable to confirm in Court that such notice was in fact sent and an affidavit of service filed. This is probably the basis for the Respondent's contention that the Applicant in that motion was not given an opportunity to be heard before its motion dated 21st March 2014 was struck out by the Order of the 13th May 2014.
2. There is no evidence that the Judgment in Default of Defence was served on the Respondent after it was obtained. This in my view is a relevant consideration in determining whether the Respondent was treated fairly, as this failure to inform the Respondent of the judgment in default comes shortly after the non-compliance with the Judge's order to inform the Respondent's Solicitors that an application to dismiss their client's motion for want of prosecution will be dealt with at the next adjournment.

In an application to set aside a default judgment, the judge is asked to exercise a judicial discretion in the light of all the facts that are before the

court according to that judge's sound judgment. It is the judge's own judgment as to what is best in any given case that is in issue. Of course if the judge proceeds on a wrong principle in exercising that discretion, any order flowing therefrom may be set aside by an appellate court. *Vide* Watson v. Rodwell (1876) 3 Ch. D. 380. After a thorough examination of the said Ruling and the affidavit evidence before the Court, my view is that it has not been shown that the learned justice acted on any wrong principle when she set aside the default judgment. However, assuming for one moment (without conceding) that the learned justice proceeded on some wrong principle, did this deprive her of jurisdiction in the matter or did she thereby exceed her jurisdiction? I adjudge not. I hold that the proper avenue for challenging the exercise of her discretion is by way of an appeal in the usual way and not by instituting an application for an order of certiorari in the Supreme Court pursuant to section 125 of the 1991 Constitution.

In the premises, the application for an order of certiorari to set aside the Ruling of the Hon. Mrs. Justice A. Showers J.A. (sitting as a High Court Judge) dated 6th August 2014 is refused in so far as that Ruling sets aside the Default Judgment dated 23rd May 2014. I make the following further orders:

1. The Order for the Defendant/Applicant (the Respondent herein) to file a fresh notice seeking the reliefs set out in the notice of motion dated 21st March 2014 within 7 days of the 6th August 2014 is redundant and unnecessary and not made in excess of jurisdiction, and is consequently set aside.

2. That the funds transferred out of the Respondent's account at Ecobank (SL) Ltd., and paid into the Applicant's account at Rokel Commercial Bank (SL) Ltd. namely Le.157,180,726.55 and the sum of USD.177,058.76 transferred out of the Respondent's account at Ecobank (SL) Ltd. and paid into the Applicant's account at Guaranty Trust Bank pursuant to the said Default Judgment dated 23rd May 2014 and subsequent garnishee proceedings, be refunded forthwith by the Applicant and the said total sums paid into an interest bearing Leone account (for the Leone

component of the funds) and into an interest bearing US dollar account (for the US dollar component of the funds) which accounts are to be opened in the joint names of the Solicitors for the Applicant and the Respondent at Sierra Leone Commercial Bank in Freetown.

3. Until the dispute between the parties is finally resolved, no withdrawals should be made out of the said accounts unless by a specific order of the court to that effect.

4. No order as to costs.

5. Liberty to apply.

6. The Ruling of this Court Should be Served on the Hon Mrs Justice Thomas.

HON MR. JUSTICE V. V. THOMAS

I agree _____

HON MR. JUSTICE P.O. HAMILTON, JSC.

I agree _____

HON MS. JUSTICE V. M. SOLOMON, JA.