IN THE SUPREME COURT OF SIERRA LEONE

SC.CIV.APP.4/2004

AMINATA CONTEH - APPELLANT

AND

ALL PEOPLES CONGRESS PARTY -RESPONDENT

CORAM: -

The Honourable Justice Dr A. Renner-Thomas Chief Justice
The Honourable Mr. Justice S.C.E. Warne - JSC
The Honourable Mrs. Justice V.A. Wright - JSC
The Honourable Mr. Justice Tolla-Thompson - JSC
The Honourable Mr. Justice A.N.B. Stronge - J.A.

C.F Margai Esq. and E.E.C. Shears-Moses Esq. for the Appellant

A.F. Serry-Kamal Esq. for the Respondent

JUDGMENT DELIVERED THIS 27th DAY OF OCTOBER 2005

WRIGHT J.S.C. - This is an appeal from the judgment of the Court of Appeal dated the 29th day of June 2004. The respondent had issued a writ claiming possession for the recovery of the premises situate at 27 Pultney Street, Freetown on the 7th August 2002. during the long vacation, An appearance was entered but no defence was filed. The respondent then applied for leave to enter a summary judgment in the High Court.

There was an appeal to the Court of Appeal that the High Court Judge was wrong in granting leave to sign summary judgment based on the ground that the appellant had a good defence and that there were triable issues.

There were several grounds of appeal as to whether summary judgment can be entered by the court when several triable issues have been raised before the Court and the appellant had a good defence.

The Court of Appeal based their judgment on the merits of the case and not on whether it was a case for leave to grant a summary judgment. As a result the Court of Appeal dismissed the Appeal

E..E. Shears-Moses Esq. Counsel for the appellant argued all seven grounds of appeal together. He stated that the appeal was not about the substance of the action but that it was not a proper case for summary judgment pursuant to Order XI of the High Court Rules. He pointed out the triable issues in this matter Charles Margai Esq. also Counsel for the appellant stated that the identity of the property was not in dispute but that in the affidavit in opposition the appellant said that she had paid rent in full but that the receipts were burnt.

A.F. Serry-Kamal Esq. Counsel for the respondent stated that the property in dispute is 27 Pultney Street and not 26 Pultney Street Freetown. Therefore the answer must be that they are not one and the same property. He said that the court of Appeal rightly exercised its discretion in granting the judgment since there was no triable defence.

What are the issues involved in this case? The property in dispute is 27 Pultney Street, but the letter exhibited as AC2 to the affidavit is for 26 Pultney Street. Counsel for the appellant contended that the property was not in dispute since both sides knew the property, but Counsel for the respondent said that they were not the same property. There was no evidence to show that rent was paid to Alhaji S.A. Koroma or that the purported document was signed by him.

From the documents tendered the premises were let by Alhaji S.A. Koroma as Chairman/Leader of the A.P.C. According to the respondent the tenancy expired on the 31st August 2001, and the appellant continued to live on the premises after the expiry of the aforesaid agreement. The proceedings to evict the appellant were commenced against her because she did not vacate 27 Pultney Street despite several demands on the 31st August 2001.

Does the appellant have any triable defence? The respondent was asking for possession of the premises at 27 Pultney Street, Freetown. The appellant in her affidavit sworn on the 21st August 2002 exhibited a letter marked AC2 by the then A.P.C. Chairman Alhaji S.A.T. Koroma stating that her tenancy was to be until the 31st December 2003. The notice given to her to vacate within 21 days from the 24th July 2002 was to the contrary. There was thus a triable issue if the tenancy was still subsisting. Alhaji S.A.T. Koroma never swore to an affidavit denying that he wrote Exhibit AC2.

Further to this, the notice to quit stated that the appellant was in breach of clause 6 of of the agreement. The breach was that she was putting up a permanent structure which she denied and is shown in her proposed defence which is Exhibit AC3 at page 32.

Over and above that the appellant denied signing the purported lease agreement Exhibit A FSK3 in her paragraphs 3-7. I hold that that these are all triabe issues including her putting up any structure as is even provided for in the lease agreement in paragraph 2 at page 40 of the records .

Further to that, the agreement in dispute exhibited by the Respondent agrees with the

250

letter of the 8th October 1998 in Exhibit ASK9 at page, 37 written by Alhaji F.B. Turay acknowledging the good work the Appellant was doing on the property. These are all triable issues that vitiate against a summary judgment pursuant to Order 11 of the High Court Rules 1960. Further evidence in support of the arguments that there are triable issues in this matter is the letter of the 24th July 2002 marked as Exhibit AC1 at page 27. The Respondents were saying that the tenancy was to expire on the 31st January 2003 which follows that at the time a notice to quit was served her term had not expired.

Let me now turn to Order 11 Rule 1 as amended by Public Notice No 24 of 1964 which states as follows –

"(a) Where The Defendant appears to a Writ of Summons specially indorsed with or accompanied by a statement of claim of the remedy or relief to which the plaintiff claims to be entitled under Order iii Rule 6, the Plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the Plaintiff may be entitled to. The Judge thereupon, unless the Defendant by affidavit, by his own viva voce evidence or otherwise shall satisfy him that he has a good defence to the action on the merit, or shall disclose such facts as may be deemed sufficient to entitled him to defend the action generally, may make an order empowering the Plaintiff to enter such judgment as m ay be just, having regard to the nature of the remedy or relief claimed." The power of the court to grant leave to enter summary judgment is given by order 11 Rule 1 of the High Court Rules 1960 as amended.

The object of the order is to ensure a speedy conclusion of the matters or cases where the Plaintiff can establish clearly that the defendant has no defence or triable issues.This draconian power of the court in preventing the defendant from putting his case before the court must be used judiciously. A judge must be satisfied that there are no triable issues before exercising his discretion to grant leave to enter a summary judgment. The judge is also obliged to examine the defence in detail to ensure that there are no triable issues..

This remedy given by this order is a stringent one which is a judgment given without a trial. It was the intention when the order was framed that the affidavit so required must be a condition precedent to the exercise of the power conferred by the order to give Judgment without a trial. Therefore if an affidavit fails to satisfy the requirement of that order because the deponent cannot swear positively to the facts thereon stated may produce on the minds of the judge, who hears the matter a strong impression that though the affidavit is not one which satisfies the terms of the order, it nevertheless indicates a strong probability that the Plaintiff has a good cause.

However recently the English Courts have gone one step futher in their endeavour to ensure a speedy conclusion of matters under this order in the spirit of what it is now

commonly known as the Woolf Reform. The test is not that there should only be a triable issue but that the defence should have a real prospect of success as distinct from a fanciful prospect of success (See Swain vs Hillman and another reported in 1 All England Reports 2001 Page 91 at Page 95 paragraph J)

It is therefore the duty of the judge to examine the issues of Law and of facts raised and determine whether the defendant has a good chance of success.

The Digest 37 (3) para 3103 referred to the judgment of Vaughan Williams L.J. in Symon & Co VS Palmer's Stores (1903) Ltd (1912 IKB 439,106 LT176, C A) A condition to be satisfied in the granting of a summary judgment is that there must be an affidavit by the Plaintiff himself or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed if any, and stating that in his belief there is no defence to the action".

The position in Law has been well settled. As a general rule where a defendant shows by his affidavit that he has a reasonable ground for setting up a defence he ought to have leave to defend the claim brought by him. The court has to take into account all the circumstances of the case including triable issues in deciding whether leave to defend ought to be given (See Saw vs. Hakim 5 T L R P 72 and Jones vs Stone (1894) AC 122). The case of Jones vs Stone see above laid down the rule that where there are questions of facts in disputes. summary judgment ought not to be given under order 14 equivalent to Order 11 of the High Court Rules. See also Ofodofe vs Central Insurance Co.((1997) 2 G L R 207.)

.See also the case of Sheppards & Co vs. Wilkinson and Jarvis (1889) 6 T L R 13 C.A in which it laid down that "Summary Judgment conferred by this order must be used with care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion. Thus where a defendant has filed a defence which discloses a triable defence, it will be a travesty of justice for a court to refuse him leave to defend simply because he had not filed an affidavit in opposition responding to the fact set out already in his defence. In Jacobs vs. Booths Distillers Co.(1901) 85 LT262)
it was stated that judgment should only be ordered under summary judgment where assuming all the facts are in favour of the defendants, they do not amount to a defence in law.

In Wellington V Mutual Society ((1880) 5AC 685 at page 690.) A defendant who raises a triable defence shall have a right to have his case tried. The Justices of the Court of Appeal with respect should not have gone into the substance of the action but as to whether or not it was a proper case for summary judgment to be granted pursuant to Order XI of the High Court Rules. It appears that the learned Justices of Appeal acknowledged that there was a defence in their judgment even though later they said there was no defence.

352

Let me emphasize that summary judgment under Order 11 of the High Court Rules 1960 should not be given during the vacation unless both parties consent to the order see Macfoy vs. United Africa Co. Ltd. (1960 A.C. House of Lords page 157) where Lord Denning dealt with the effect of delivering a statement of claim in the long vacation.

The learned Justices of the Court of Appeal should not have gone into the substantive matter and also not to have upheld the judgment since there were triable issues.

Order 11 Rule 6 of the High Court Rules 1960 states "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the court may think fit".

In determining whether leave is unconditional or conditional the judge could examine other features surrounding the case such as good or bad faith of the parties, whether the conduct of any of the parties is questionable, whether the imposition of a condition could be oppressive which could result in shutting out the defendant's ability to defend or proceed with the action. The foregoing examples are not exhaustive since circumstances may differ from case to case.

For the reasons given above the judgment of the Court of Appeal dated 7th April 2004 and the judgment of the High Court dated 12th September 2002 are hereby set aside. The matter is remitted to the High Court and the appellant is given leave to defend the matter in the High Court.

In this case I do not see any need for conditions to be imposed.

The respondent is to pay the taxed costs of this appeal and those of the Court below.

Mrs. Justice V.A.D.Wright

I agree.....
Hon Justice Dr. A. Renner-Thomas C.J.

I agree.....
Hon Mr. Justice S.C.E. Warne J.S.C.

I agree.....
Hon Mr. Justice M.E. Tolla-Thompson JSC

I agree.....
Hon Mr. Justice A.N.B. Stronge J.A.

CERTIFIED TRUE COPY

REGISTRAR, SUPREME COURT