

C.C. 23/08 2008 K. NO. 35
IN THE HIGH COURT OF SIERRA LEONE
(GENERAL CIVIL JURISDICTION)

BETWEEN: -

BAI KABIA **- PLAINTIFF**
(For and on behalf of the Officers and Members
Of JAMIATU IBAADU RAHMAN MOSQUE)

AND
THE CITY MAYOR, ALDERMEN AND COUNCILLORS
OF THE COUNCIL OF FREETOWN AND THE
CITIZENS OF FREETOWN -1ST DEFENDANT

AND
MRS.MABINTY KOROMA -2ND DEFENDANT
(By an Order dated 12th August 2009)

J. B. Jenkins Johnston Esq. for the Plaintiff
D. Beoku Betts Esq. for the 1st Defendant
S. M. Sesay Esq. for the 2nd Defendant

RULING DELIVERED THE 11th DAY OF July 2016.

The 1st Defendant in this matter filed a Judges Summons dated 25th November 2015 in which he seeks the following Orders

1. That leave be granted the 1st Defendant to re-open its case.
2. That this Hon. Court grants an extension of time for the 1st Defendant to make the within application.
3. That an extension of time be granted by this Hon. Court within which to file the documents contained in the schedule attached hereto.

4. That leave be granted by this Hon. Court to include in the court bundle the documents contained in the schedule attached hereto.
5. Leave to tender the said documents as evidence during the trial.
6. Leave to adduce oral evidence
7. All necessary and consequential directions
8. Any further or other relief
9. Costs

In support of the application is the affidavit of Derek Beoku Betts Esq. Solicitor sworn to on 25th November 2015. He deposed that directions for the conduct of the trial of this matter were given on 21st May 2010 wherein it was ordered inter alia that the parties herein exchange copies of all documents in their possession intended to be used at the trial within 14 days of the date of the said Order. That the 1st Defendant wishes to submit as its trial bundle and tender before the court as part of its evidence in chief all the documents listed in the schedule and marked as Exh DBB1. That the 1st Defendant therefore seeks an extension of time within which to file and serve the aforementioned documents.

He went on to depose that the documents give a background to this case to include events that have transpired between and among the parties to the action and that the majority of them form part of the Plaintiff's court bundle already before the court and that it is only eight of them that are new. That the court had ordered the 1st Defendant to file its defence within a short period of time and it would be appropriate for the 1st Defendant having complied with that Order to be allowed to substantiate its case. That the records will show that neither the 1st Defendant nor its counsel participated in the proceedings since August 2009 and the records show that notices of hearing were not sent to the 1st Defendant or its solicitors until February 2015. That since February 2015 proceedings in the matter were geared towards accommodating the 2nd Defendant who had to leave the jurisdiction in order to receive medical treatment. That the Plaintiff and 2nd Defendant are fully aware of the 1st Defendant's defence and will not be taken by surprise by evidence tendered to support its case. That it is essential that the court has sight of these documents in order to justly dispose of the case.

Furthermore, that the 1st Defendant wishes to adduce oral testimony from certain key witnesses, namely the City Surveyor and also to recall the Plaintiff. That the testimony of these witnesses is essential for the just determination of the matter. The 1st Defendant is claiming the land, the subject matter of this action and will suffer loss and damage if not allowed to properly participate in the action by adducing documentary and oral testimony before the court. That it will be unfair and unjust and against the interest of justice if the court does not give the 1st Defendant an opportunity to rebut evidence adduced by the 2nd Defendant and also put evidence of the ownership of the land before the court.

Counsel for the 1st Defendant relied on the case of **Schafer vs. Blyth** {1920} 3 K.B 140 and the **Supreme Court Practice 1999** paragraph 1 at page 18 thereof and also the case of **Finnegan vs. Parkside** {1998} 1 All E. R. 595 where it was stated that the overriding principle in granting extension of time is that justice had to be done.

For all these reasons he urged the court to grant the application.

Counsel for the Plaintiff did not have any objection to the application.

Counsel for the 2nd Defendant however strongly opposed the application. He contended that if the application is granted it would have the tendency to defeat the object and purpose of the High Court Rules 2007 which are to prevent the other party being taken by surprise at the trial. He further submitted that pursuant to the Order of Court herein dated 25th March 2015, the 1st Defendant filed a defence to the action to which a reply and defence to the counterclaim was filed by the 2nd Defendant after which the case proceeded. That the 1st Defendant had heard the witnesses for the 2nd Defendant and cross-examined them in extenso before the case for the 2nd Defendant was closed.

He submitted that a party's pleading serves as notice to the other party of the issues which that party would be relying on and to which that other party is expected to react in order not to take that other party by surprise. He referred to the defence and counterclaim filed by the 1st Defendant herein and submitted that there is no reference to the documents intended to be tendered by the 1st Defendant therein

which would have put the 2nd Defendant on notice. He opined that this application is an attempt to close the gaps of the 1st Defendant's case.

Counsel relied on the unreported case of the High Court, namely **Percy Bunting Waters Bright vs. S.L. Brewery Ltd.** He urged that in the present case the Plaintiff case has closed and so has the 2nd Defendant. The 1st Defendant who was granted leave to file his defence out of time had the documents in his possession at the material time he was settling his defence but made no reference to them then. He submitted that granting the application will have the effect of rendering the provisions of Order 28 of the High Court Rules 2007 and all its attendant procedures of discovery and interrogatories redundant. He therefore invited the court not to grant the application as its prejudicial effect far outweighs the probative value the contents of the documents may have. He referred to counsel for the 1st Defendant's reliance on the case of **Schafer vs. Blyth** (supra) and submitted that that case did not apply to the circumstances of this case.

Counsel for the 2nd Defendant stressed that all counsel for the 1st Defendant wishes to do is to throw these documents at the court. He contended that there are no witness statements to which these documents are tied and that the practice is for counsel to lead evidence connecting the documents to the witnesses.

He further submitted that the principles of equity should only be invoked in aid of a party who had acted vigilantly and not the other way round. That this case would occasion injustice not only to the 2nd Defendant but to all other litigants who would wish to rely on the outcome of this application as a justification for not complying with the principle of due diligence.

He urged that counsel has failed to make out a case for the court to grant the application as the scale of the consequent injustice to the 2nd Defendant at this stage of the proceedings far outweigh the scale of justice to the 1st Defendant.

Now the application before the court is for leave for the 1st Defendant to re-open its case and for an extension of time within which the 1st Defendant is to file certain documents and for those documents to be included in the court bundle. The application is made pursuant to Order 28 rule 6 (3) and Order 3 rule 5 respectively of the High Court Rules 2007.

The principal Order to be considered here is Order 3 rule 5 of the said High Court Rules 2007 which relates to extension of time. Order 3 rule 5(1) provides as follows

“ The court may on such terms as it thinks just by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction to do any act in any proceedings ”.

Counsel for the 1st Defendant has referred the court to the notes found in the **Supreme Court Practice 1999**. In those notes at paragraph 3/5/3 at page 18 reference is made to the case of **Schafer vs. Blyth** {1920} 3 KB 140 where it was held that the object of the rule is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties.

In the case of **Finnegan vs. Parkside Health Authority** {1998} 1 All E. R. 595, the Court of Appeal held that

“ when considering an application for extension of time for complying with procedural requirements, the court had, under Order 3 rule 5, the widest measures of discretion. Accordingly, the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognise the overriding principle that justice had to be done.”

It is therefore necessary to look at all the circumstances of this case particularly as counsel for the 2nd Defendant has so strenuously argued that the scale of the consequent injustice to the 2nd Defendant at this stage of the proceedings far outweighs the scale of justice to the 1st Defendant. The court therefore has to consider the quantum of prejudice that the 2nd Defendant would suffer if the extension of time prayed for is granted.

The facts leading to the application before the court as set out in the 1st Defendant's affidavit in support of the application have already been set out above. The circumstances of this case are rather peculiar. The original writ was issued on 8th May 2008 by the Plaintiff against the 1st Defendant only who entered appearance and filed a defence. The 2nd Defendant was made a party to the action by Order of Court dated 12th August 2009. Directions for the conduct of the trial were subsequently given on 24th May 2010 and those directions were complied with by Solicitors for the Plaintiff and the 2nd Defendant.

The proceedings continued thereafter with only solicitors for those two parties participating. The trial commenced on 16th June 2014 and there is no record that the solicitors for the 1st Defendant were notified.

The records also show that it was only when the Plaintiff had closed his case that notices of hearing were sent to solicitors for the 1st Defendant. Counsel for the 1st Defendant thereafter appeared at the hearing and the court ordered that the 1st Defendant files a defence to the counterclaim of the 2nd Defendant within 7 days of the Court Order dated 16th March 2015. Directions were also given on 25th March 2015 for the 1st Defendant to file and serve its witness statements and any other documents to be used at the trial. The matter was adjourned to 13th April, 2015.

When the matter next come up for hearing, counsel for the 1st Defendant was still not ready to proceed with his case, counsel for the 2nd Defendant then applied for the case for the 1st Defendant to be deemed close.

The court then ordered that the case for the 1st Defendant is deemed closed and that the 2nd Defendant is at liberty to open the case for the 2nd Defendant on the understanding that the 1st Defendant is at liberty to apply to re-open its case at a later stage.

The 2nd Defendant then proceeded with her case to its conclusion with counsel for the 1st Defendant fully participating in the proceedings. It is at this stage of the proceedings that counsel for the 1st Defendant has made the present application. These are then the circumstances of this case.

The question now is would justice be done if the court refuses to allow the 1st Defendant to file the documents he intends to use to substantiate his case? Counsel for the 2nd Defendant has stressed that the prejudice his client would suffer far outweigh the probative value of the documents intended to be tendered. But that in my view is to be left to the court. The weight to be placed on those evidence is for the court to decide.

I have set out the circumstances of this case. Let me refer to case of **The Mortgage Corporation Ltd vs. Sanders (an unlimited company) and others** {1996} The Times December 27 which also dealt with extension of time where it was stated as follows

“ At the end of the day it must be for the court, upon the individual facts of the case and having regard to all the circumstances, to weigh the competing considerations and decide where the justice of the case lies. Crucially it will ask how serious was the breach, how explicable, and how far it has affected the proceedings or disrupted the administration of justice generally.”

In this case a crucial issue to be determined is the competing interest in the land subject matter herein of the 1st Defendant and the 2nd Defendant. It would therefore assist the court in determining this issue if all documents necessary for its proof is put in evidence before the court.

The court therefore has to balance the consequences of failing to consider all the facts relating to ownership of/title to the property in issue with the consequences to the 2nd Defendant of being taken by surprise, as alleged, by the 1st Defendant's application to produce evidence in support of its case, or the 1st Defendant closing the gaps in his case as alleged.

In my judgment the circumstances of this case justify the court exercising its discretion in favour of the 1st Defendant and I would allow it to put in all such evidence that would assist the court in disposing of this case fairly for all the parties. The application is accordingly granted. The following Orders are made.

1. Leave is hereby granted the 1st Defendant to re-open its case and adduce oral testimony.
2. Leave is hereby granted the 1st Defendant to include in the court bundle the documents listed in the schedule attached to the affidavit in support of the application herein exhibited thereto as Exh DBB1. The documents to be filed within 10 days of the date of the start of the next term on 16th September, 2016.
3. Leave is also granted for the 1st Defendant to use the said documents as evidence at the trial herein.

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4. The matter to be relisted for hearing within 14 days of the re-opening of the next term on 16th September, 2016.
5. Costs in the cause.

A. Showers
SIGNED: - A. SHOWERS *11/7/2016*
JUSTICE OF THE SUPREME COURT