

SPECIAL COURT FOR SIERRA LEONE
CASE NO. SCSL-2004-16-T

Before: Justice Theresa Doherty, Presiding
Justice Julia Sebutinde
Justice Richard Lussick

Registrar: Mr Robin Vincent

Date Filed: 22 July 2005

THE PROSECUTOR AGAINST Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor- Kanu

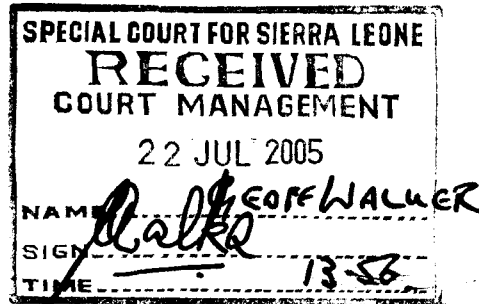
THE PRINCIPAL DEFENDER'S RESPONSE TO THE BRIMA-KAMARA DEFENCE APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON THE EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA AND DECISION ON CROSS MOTION BY DEPUTY PRINCIPAL DEFENDER TO TRIAL CHAMBER II FOR CLARIFICATION OF ITS ORAL ORDER OF 12 MAY 2005

First Respondent
The Registrar

Defence Counsel For Brima
Kojo Graham & Glenna Thompson

Second Respondent
Acting Principal Defender

Defence Counsel For Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah



I. INTRODUCTION

1. On 9 June 2005, Trial Chamber II rendered its majority decision “Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and the Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for clarification of its oral Order of 12th May 2005,” which will be referred to as ‘the impugned decision.’
2. On 11 July 2005 Justice Sebutinde issued her dissenting opinion to the impugned decision (“Dissenting Opinion”).
3. On 14 July 2005, the Defence, on behalf of Accused Alex Tamba Brima and Brima Bazzy Kamara, filed an Application seeking Leave to make an interlocutory appeal against the impugned decision. The Application, which had omitted the Principal Defender as one of the parties, was rectified on 15 July 2005, when the Defence filed its corrigendum to their Application.
4. Whereas in the Defence motion of 24 May 2005, for the Re-appointment of Kevin Metzger and Wilbert Harris, the Acting Principal Defender was named as the Second Respondent due to the absence of a substantive Principal Defender, there exists now a Principal Defender, who was appointed with effect from 30 May 2005.

II. PROCEDURAL HISTORY

5. The motion itemises the Summary of Proceedings relevant to the Application in paragraphs 4-12, which the Principal Defender hereby incorporates with all attachments.

III APPLICABLE LAW

6. As the Second Respondent, the Principal Defender hereby files a response, pursuant to Article 8 of the Practice Direction For Certain Appeals before the Special Court dated 30 September 2004; in Part II dealing with ‘Appeals from Decisions Where Appeal Lies Only with Leave,’ where it is stipulated that:

The opposite party shall file a response within ten days of the filing of the application for leave to appeal. Such a response shall clearly state whether or not the application for leave to appeal is opposed and the grounds therefore. It shall indicate any objection to the applicability of the provision of the Rules relied upon by the appellant as the basis for application for leave to appeal.

7. The Principal Defender does not oppose the Application filed on behalf of the Accused persons as it is the mandate of the Office of the Principal Defender (hereinafter the Defence Office), to ensure the rights of the Accused, pursuant to Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. The Principal Defender has no objections to the applicability of Rule 73(B) of the Rules and joins issues with the Defence. However, the Principal Defender wishes to elaborate upon a

few of the issues to bring them in conformity with the role of the Defence Office as it pertains to the rights of an accused person before the Special Court.

8. Rule 73(B) of the Rules, which precedes Rule 73(A) on motions, provides, *inter alia*, that ‘decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.’

IV. EXCEPTIONAL CIRCUMSTANCES AND IRREPARABLE PREJUDICE

9. Rule 73(B) of the Rules sets out a two-pronged test to be fulfilled by the applicant before leave to Appeal is granted. The Principal Defender concurs with the Defence’s statement in paragraph 13 of their Application that both “irreparable prejudice” and “exceptional circumstances” must be established. In the *Prosecutor v. Sesay et al*, Trial Chamber I interpreted the test to be a conjunctive one meaning that both have to be established.¹

Exceptional Circumstances

10. Concerning “exceptional Circumstances,” Trial Chamber I in *Sesay et al* opined that these

“[-]may exist depending upon the particular facts and circumstances, where, for instance the first time, or is a question of public international law importance upon which further argument or decision at appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.”²

11. The Principal Defender submits that the impugned decision, which considered a motion filed by Accused Alex Tamba Brima and Brima Bazzy Kamara relates to extraordinary crucial issues on the rights of an accused person to a fair trial. Specifically, the accused persons’ motion hinged upon Article 17 of the Statute of the Special Court, particularly Article 17(4) (c) and (d) which provide as follows:

Article 17: Rights of the Accused

[--] In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[--]

- (c) To be tried without undue delay;

¹ The Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-2004-15-PT, Decision on The Defence Application for Leave To Appeal Ruling of the 3rd of February ,2005 On The Exclusion of Statements of Witness TF1-141, dated 28 April 2005, para. 17, p.6

² *ibid*, Para 26, p. 10

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

[--]

- 12. The assignment has a bearing on the work of the Defence Office, headed by the Principal Defender, as created by the Management Committee and the Plenary of Judges, which culminated in the promulgation of Rule 45 of the Rules.³
- 13. The majority decision endorsed a view propagated by the Registrar that he has power to remove Counsel from the List.⁴ By virtue of Rule 45 and Article 13 (A), (B), (E) & (F) of the Directive on the Assignment of Defence Counsel, this power is vested into the Principal Defender, to compile, maintain ,place Counsel on the List of Qualified Counsel, and to remove Counsel, who do not qualify and it is not the Registrar who has such power. If this trend is left unchallenged, it would undermine the mandate of the Defence Office, which would in turn cause irreparable prejudice to the rights of the accused.
- 14. In opposition to the accused persons' motion, the Registrar submitted that the position of the Principal Defender has no statutory authority and that the title comes under the authority of the Registrar and staff are subject to his administrative direction including ensuring that court orders are implemented.⁵ With all due respects, this interpretation does not represent the position of the Rules, particularly in relation to matters that are covered under Article 17 of the Statute. The Principal Defender's mandate under Rule 45 of the Rules, which stems from Article 17 of the Statute of the Special Court, vests legal duties upon him. In exercising his power, the Principal Defender's discretion is not to be subjected to the Registrar's administrative power. Any misinterpretation of the Rules is like likely to cause irreparable prejudice to the accused and falls within "exceptional circumstances because pursuant to Article 16 of the Statute of the Special Court, it is expected that the Registry, which is headed by the Registrar and has the responsibility for the administration and servicing of the Special Court, should also to adhere to the Rules of Procedure and Evidence.
- 15. Furthermore, the Principal Defender opines that by endorsing the views of the Registrar, the Trial Chamber permitted him to usurp the powers vested into the Defence Office. This would inevitably cause irreparable prejudice to the accused in that, the Defence Office, which is headed by the Principal Defender and which is better positioned to deal with matters pertaining to the rights of the accused, would be hampered in the fulfilment of its role. In addition, 'exceptional circumstances' exist in that the Registrar, who is mandated under Rule 45 of the Rules to maintain the Defence Office and whose cooperation was envisaged is at variance with the Office in the administration of the rights of the accused.

³ Dissenting Opinion of Justice Sebutinde, Para 52-53, pp. 31-32
⁴ paras. 12 &13 of the Impugned Decision, p.4
⁵ para. 14 of Impugned Decision, p. 4

16. While technically, the Office of the Principal Defender Office is currently part of the Registry, in the performance of its Rule 45 mandate in furtherance of Article 17 of the Statute of the Special Court, the Office of Principal Defender is independent in carrying out the legal duties provided for in the Rules. There is no doubt that the Registrar currently has administrative oversight of the Defence Office, but the assignment of counsel, withdrawal of counsel and striking off of counsel's name off the list maintained by the Principal Defender are not mere administrative functions, but legal ones that affect the fundamental rights of accused persons and as such, should be exercised independently of the Registrar. Any attempt to interfere with these functions would raise exceptional circumstances and, in this instance, "exceptional circumstances" exist to warrant a grant of leave to appeal. On the other hand, if leave was not granted irreparable damage will also ensue.
17. The Registry failed to differentiate between the motion to withdraw by Counsel and the Accused's request to have their choice of Counsel, pursuant to Article 17 of the Statute, by re-instating the withdrawn Counsel.⁶ Nonetheless, the Trial Chamber has implicitly endorsed the Registrar's position. If leave to Appeal is not granted, these issues that are pivotal to the operation of the Defence Office in ensuring the rights of the accused persons and which pertain to the status of the Office of the Principal Defender as intended under the Rules, would be left undetermined. This would also cause irreparable damage to the accused persons in that the very office established to ensure their rights would be hampered and sidelined in its operations.
18. Additionally, the issues raised clearly impinge upon the overall rights of the accused persons in the Special Court and raises serious questions of fundamental legal importance not only to the Special Court but to International jurisprudence and academic purposes in so far as the Defence Office, usually referred to as the "Fourth Pillar," is concerned. As the Defence Office is a new innovation and is not found within the jurisdiction of other International Tribunals and Courts as well as national jurisdictions, the relationship between the Defence Office vis-à-vis the Registrar is a matter that has not been determined at the appellate level although it had been enunciated upon by Trial Chamber I in *The Prosecutor vs. Alex Tamba Brima*.⁷ Currently, two parallel decisions of the Special Court exist on the same matter. Therefore, since these matters are novel, it would be in the interests of justice to have the Appeals Chamber articulate them and to review the Trial Chamber decision to provide a sense of direction and finality.
19. The motion also raised new aspects to the issue of assignment of Counsel, namely the re-appointment of withdrawn Counsel to the same accused persons and the removal of Counsel's name from the List of Qualified Counsel for security concerns, which are not listed as part of the requisite qualifications, under Rule 45(C) of the Rules or Article 13 of the Directive on the Assignment of Defence Counsel, for either withdrawal or removal of Counsel's name from the List of Qualified Counsel. The procedure adopted in the removal of Kevin Metzger and Wilbert Harris was not known. It was neither publicized nor was there a Court Order. These are matters that warrant a review of the majority decision by the Appeals Chamber. The Appeal is, therefore a matter of interest not only to the Special Court for Sierra Leone but also to those interested in its jurisprudence on International Criminal Law as well as for academic purposes. This

⁶ paras 16,18 of the Impugned Decision; *contra* See paras 50-51 of the Dissenting opinion of Justice Sebutinde
⁷ *The Prosecutor vs. Alex Tamba Brima et al, Case No. SCSL-2004-16-T*, Brima Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Services Contract for The Assignment of Counsel, 6 May 2004

would inevitably cause irreparable prejudice to the accused in that, the Defence Office, headed by the Principal Defender and which is better positioned to deal with matters pertaining to the rights of the accused, would be hampered in the fulfilment of its role. Additionally, 'exceptional circumstances' exist in that the Registrar, who is mandated under Rule 45 of the Rules to maintain the Defence Office, instead disregards the rights of the accused.

20. The Defence Office joins issues on all the other aspects of the Defence concerning "exceptional circumstances."

Irreparable prejudice

21. The Defence Office joins issues with the Defence in their submissions on "irreparable prejudice" but adds the following statements.
22. The Principal Defender submits that the Trial Chamber erroneously interpreted the joint motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, filed pursuant to Article 17 (4) (d) of the Statute of the Special Court and Rule 54 as a Request for review of an earlier motion for withdrawal by the former Counsel. In taking this position, the Trial Chamber throughout the impugned decision points out deficiencies of not adhering to their Order to appoint Counsel after the withdrawal of Mr. Kevin Metzger and Wilbert Harris oblivious of another aspect to the issue, namely the accused person's request to have the withdrawn Counsel re-assignment. To this end, the Trial Chamber found fault with the Accused for not reciting the 12 May 2005 Ruling, which permitted Counsel to withdraw.⁸
23. Similarly, the Trial Chamber noted that the submission made on behalf of the accused failed to recite that the Court had on 16 May 2005 "recorded that its order had been made and letters, correspondence and documents that sought to go behind the order would not be countenanced."⁹ Furthermore, the honourable Justices stated in the impugned Decision "it appears that this application in reality is simply an application to revise a majority decision given by the Trial Chamber on 12 May 2005 because in that decision all relief prayed for was granted to Counsel. A decision upholding the submission made and granting the relief prayed for could hardly be appealed."¹⁰
24. The Principal Defender submits that the Honourable Justices misdirected themselves in holding that the new Application before the Trial Chamber, which was filed on behalf of the Accused persons, was the same as the withdrawal motion, which the Chamber earlier dealt with. The Accused persons in their application state clearly that their application is filed pursuant to Article 17 (4)(C) of the Statute, Rule 54 and the inherent Jurisdiction of the Court but the Trial Chamber stated "further, its unclear on what legal grounds this application is made." It is the Principal Defender's submission that the accused could not have sought to re-litigate a matter which the Trial Chamber had not disposed of.
25. Furthermore, the Trial Chamber in its impugned decision stated that it agreed with the Registrar's submissions on the law. The submissions were in respect of striking off

⁸ paras. 26, 47, 48, 50 of the Impugned Decision

⁹ para 27 ibid

¹⁰ para 50 ibid

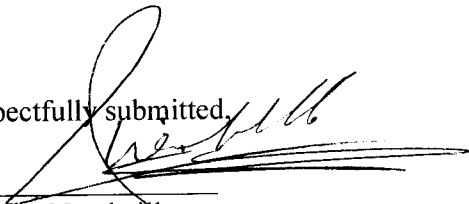
Counsel from the List of Qualified Counsel on 25 May 2005,¹¹ without the Principal Defender's consent and despite the Principal Defender's warning to him not to strike them off as the matter was *sub judice* as well as *ultra vires*. With all due respect, the Principal Defender submits that it is not within the powers of the Registrar to remove names of Counsel from the list, *ultra vires* Rule 45 of the Rules and more so, without an established just cause.

26. The Registrar also argued that Mr. Metzger and Mr. Harris had not unequivocally indicated their willingness and availability to serve as Lead Counsel, if re-assigned. The Trial Chamber made this statement in spite of several e-mails which were made available to the Acting Registrar by the Defence Office. Additionally, the Registrar stated that he was obligated to give effect to the Trial Chamber's earlier decision that permitted Mr. Metzger and Mr. Harris to withdraw from the AFRC trial and ordered that "other Counsel" be assigned to replace them as well as their subsequent advice, pursuant to Rule 33 (B) of the Rules.
27. Thus, considering the totality of circumstances, where there is interference with the functions of the Defence Office and the mandate of the Principal Defender, it is tantamount to an infringement on the rights of the Accused persons, particularly their right to choose Counsel or be assigned one, and would indeed amount to irreparable prejudice.
28. In the interests of justice, the Appeals Chamber needs to review the decision to reinstate the Accuseds' rights and to curb any future interference with the rights of the accused and the Office administering those rights, irrespective of the fact that the factual circumstances have changed in that the Defence Office has assigned new Lead Counsel to the said accused persons. The point, however, remains that there are legal issues that impact upon the fundamental rights of the accused persons and the functions of the Principal Defender.

CONCLUSION

29. For the foregoing reasons, the Principal Defender respectfully submits that the Application filed by the Defence on behalf of the Accused persons for leave to Appeal should be allowed as it meets the two-pronged test of the existence of both the "exceptional circumstances and irreparable damage."

Respectfully submitted,


 Vincent Nmeheille
 The Principal Defender

¹¹ Attachment: Dissenting Opinion of Justice Sebutinde, para 44, p.25