

49/1961

1.

IN THE PRIVY COUNCIL

No. 67 of 1960

ON APPEAL  
FROM THE WEST AFRICAN COURT OF APPEAL

UNIVERSITY OF LONDON  
V.C.1.  
10 FEB 1962  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

B E T W E E N :

BENJAMIN LEONARD MacFOY Appellant

- and -

UNITED AFRICA COMPANY LIMITED Respondent

63644

C A S E FOR THE APPELLANT

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10 1. This is an Appeal by Special Leave from the Judgment and Order of the West African Court of Appeal, dated the 5th day of June 1959, dismissing the Appellant's appeal from the Order of the Supreme Court of Sierra-Leone, dated the 9th day of January 1959, whereby the Appellant's application to set aside a Judgment, dated the 29th day of September 1958, in an Action between the Respondent and the Appellant, or to stay execution thereof, was refused.

pp.26-31

p.17 l.18

20 2. The main issue in this Appeal is whether the delivery of the Statement or Claim in the action during the long vacation was an irregularity within Order 50, rule 1 of the Supreme Court Rules 1947 giving the Court a discretion to set aside the proceedings or was null and void entitling the Appellant to have the judgment set aside ex debito justitiae as a nullity.

3. By the Writ of Summons, dated the 16th day of August 1958, the Respondent claimed the sum of £5690.15s.9d. for goods supplied to the Appellant as a dealer for sale to the public.

pp.1-2

30 4. In the Statement of Claim delivered and filed on the 5th day of September 1958, the Respondent alleged that by a written Agreement, dated the 27th day of April 1955, they had supplied the Appellant with Mobil Oil products on a current account for sale to the public as a dealer on a commission basis; that on the 1st day of September 1957 the Appellant's

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debit with the Respondent was £980.3s.0d. and from the 1st day of September 1957 to the 14th day of April 1958 the Respondent supplied oil products to the Appellant amounting to £17,536. 0s. 8d; that on the 14th day of April 1958 the Appellant's total debit was £18,516. 3s. 8d; that from the 1st day of September 1957 to the 9th day of April 1958 the Appellant made cash payments amounting to £12,825.7s.11d and that there was a debit balance of £5,690.15s.9d. They further alleged that detailed particulars of the said supplies and cash payments were contained in a statement of account handed to the Appellant by Mr. M.I. Noah, District Manager, at the Respondent's office at Water Street, Freetown in April 1958. They claimed the sum of £5,690.15s.9d. and Damages.

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p.4 11.10-13

5. Judgment in default of defence in the sum of £5,690.15s. 9d. and damages to be assessed, was signed on the 29th day of September 1958.

6. An Application by the Appellant, dated the 17th day of November 1958, to set aside the said Judgment was dismissed on the 21st day of November 1958 without prejudice to a fresh motion within eight days.

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p.6 1.28  
to  
p.7 1.9

7. On the 28th day of November 1958 a further Application to set aside the said Judgment was filed.

8. This Application, and an Application to stay execution of the said Judgment, were heard before Bairamian C.J., on the 9th day of January 1959. Before the Court were two affidavits by the Appellant, one by the Appellant's solicitor and two by the Respondent's Solicitor. In his affidavits, the Appellant admitted that he owed the Respondent the sum of £250 but denied owing the amount claimed. He denied receiving the detailed accounts from Mr.Noah as alleged in the Statement of Claim and exhibited accounts showing that at the 31st day of March 1958 his debitbalance was £720.7s.10d. He alleged discrepancies between the accounts previously sent to him and the particulars subsequently supplied.

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p.16-17

9. On the 9th day of January 1959, Bairamian C.J., dismissed both Applications with costs to the Respondent giving his reasons orally and not being required by the Appellant's Counsel to give the reasons in writing.

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pp.18-19

10. The Appellant gave notice of appeal to the West African Court of Appeal, dated the 14th day of March 1959 on the grounds:-

"That the refusal of the learned Chief Justice to set aside a judgment in default in this matter is unreasonable having regard to the fact that the Defendant disclosed a substantial defence upon his application to the Supreme Court dated 28th November 1958 to set aside the judgment by default."

11. At the hearing of the Appeal on the 1st day of June 1959 the Appellant was granted leave to add the following ground of appeal:- p.20 1.23

"That the judgment in default herein was irregular in that the Statement of Claim was delivered during the Long Vacation."

12. By a Judgment and Order, dated the 5th day of June 1959, the West African Court of Appeal dismissed the Appeal with costs. p.26to 31

13. The Judgment delivered by W.H. Hurley Ag. J.A. contained the following passages:-

20 "By Order 50, Rule 1, of the Supreme Court Rules, 1947, non-compliance with any of the Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit. By Rule 2, no application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity. Rules 1 and 2 of Order 70 in the English practice are in practically the same words. The Defendant knew when the Statement of Claim was delivered to him, and he knew it was then vacation. He made no application in the Court below to set aside the Statement of Claim as having been delivered irregularly; he did not raise the point in any way until he appeared in this Court to argue the appeal, over eight months after the Statement of Claim had been delivered. Instead of applying to have the Statement of Claim set aside, he allowed Judgment to go against him by default and then moved to have the judgment set aside. In that application, he proceeded on

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to  
p.28 1.15

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the basis that the judgment was a regular and subsisting one. In support of the application, he made an Affidavit with the object of showing that he had a defence on the merits, and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by Counsel, and the application was argued on the merits of the defence.

x                    x                    x                    x

p.29 11.27-39

In Boyle vs. Sacker, as has been seen, the Defendant did take an objection to service, but it failed because it could not be heard in the form in which it was made. Here, the Defendant on his application to set aside the judgment could have been heard on an objection that the statement of claim had not been delivered, but he did not take it. Instead, as the Defendant in Boyle vs. Sacker did, he argued the case on the merits on the footing that the statement of claim had been delivered. In our opinion, having done that, he cannot now be heard to say that the Statement of Claim was not delivered."

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Then after reviewing the facts:-

p.31 11.11-14

"We cannot say that the learned Chief Justice exercised his discretion wrongly. Indeed we do not think that he could reasonably have decided the matter in favour of the Defendant."

pp.32-33

14. Special leave to appeal to Her Majesty in Council was granted by Order in Council dated the 7th day of June, 1960.

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15. The Appellant humbly submits that this Appeal should be allowed and the said Judgment and Order of the West African Court of Appeal should be set aside, and the Judgment of the Supreme Court of Sierra-Leone, dated the 29th day of September 1958, be set aside, and that he should be granted the costs of the proceedings in the Supreme Court, the West African Court of Appeal and of this Appeal for the following among other

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R E A S O N S

(1) BECAUSE the delivery of the Statement of Claim

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during the long vacation is not an irregularity within Order 50 of the Supreme Court Rules 1947 but is null and void entitling the Appellant to have judgment obtained thereon set aside ex debito justitiae as a nullity.

- (2) BECAUSE by his affidavits the Appellant had disclosed a substantial defence and in the circumstances the said judgment should have been set aside.

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DINGLE FOOT

THOMAS O. KELLOCK.

No. 67 of 1960

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE WEST AFRICAN COURT OF APPEAL

BETWEEN:

BENJAMIN LEONARD MacFOY (Defendant)  
Appellant

- and -

UNITED AFRICA COMPANY LIMITED  
(Plaintiff) Respondent

C A S E

FOR THE APPELLANT

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