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UNIVERSITY OF LONDON
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25 RUSSELL SQUARE
LONDON, W.C.1.

IN THE PRIVY COUNCIL

No. 22 of 1966

ON APPEAL
FROM THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N:

MUSTAPHA CONTEH (Plaintiff) Appellant

- and -

A. KABIA (First Defendant) Respondent

C A S E FOR THE APPELLANT

Record

10 1. This is an appeal from the Judgment and Order of the Court of Appeal for Sierra Leone, dated the 24th day of February 1966, which by a majority allowed the Respondent's appeal from the Ruling and Order of the Hon. Mr. Justice Luke in the Supreme Court of Sierra Leone, dated the 23rd day of June 1965, whereby the learned Judge dismissed a Motion on behalf of the Respondent to set aside the Judgment signed against the Respondent on the 25th day of May 1965 in default of his appearance in an action brought against him by the Appellant. By 20 the said Judgment and Order of the Court of Appeal, it was ordered that the Judgment in default of appearance be set aside and that the Respondent be at liberty to appear and defend the action, and further ordered that the Appellant pay the Respondent's costs before the Court of Appeal and in the Supreme Court and all costs thrown away.

pp.60-72
pp. 22-23
p.6
p.72

2. The principal questions that arise for determination upon this appeal are:-

30 (a) Whether it was open to the Court of Appeal, under the relevant Rules, to entertain the appeal and reverse the said Ruling and Order, or whether (as the Appellant submits) the said appeal was improperly constituted and a nullity.

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(b) Whether (if it was open to the Court of Appeal to entertain the appeal) any sufficient reason was disclosed why that Court should interfere with a proper exercise of discretion by the Supreme Court in refusing to set aside the default Judgment.

(c) Whether the default Judgment ought to have been set aside, in the absence of any affidavit of facts showing a defence on the merits.

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3. The Appellant is hereinafter referred to as "the Plaintiff" and the Respondent as "the first Defendant".

p.47

4. By a Writ of Summons dated the 10th day of February 1965 the Plaintiff instituted an action against the first Defendant and the Sierra Leone Development Company Limited (the second Defendant) the said Writ being endorsed as follows:-

"The Plaintiff's Claim is for damages and a tipper lorry for damage caused to the lorry due to negligence of the second defendant's servant."

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pp.1-3

5. By his Statement of Claim delivered and filed the 10th day of February 1965, the Plaintiff alleged that the first Defendant had contracted with the second Defendant to supply tipper lorries to transport iron ore within the second Defendant's mining site at Tampa, and that the Plaintiff had sub-contracted with the first Defendant to supply a tipper lorry for this purpose. The Plaintiff further alleged that on the 22nd March 1964, the tipper lorry he had thus supplied had been severely damaged whilst at the second Defendant's site by the negligent operation of a loading vehicle by a servant of the second Defendant, in consequence of which the Plaintiff's tipper lorry was put out of service, causing injury damage and loss to the Plaintiff. In paragraph 4 of the Statement of Claim the Plaintiff averred:-

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p.1 1.34

"4. The First Defendant denies liability and says that it was the second Defendant's

loading vehicle that caused the injury, whilst the second Defendant denies liability and says that the Plaintiff is a sub-contractor of the second Defendant and that he had no contractual connection with the Plaintiff. The Plaintiff brings this action against both Defendants for the Court's determination of liability."

10 The Statement of Claim contained particulars of the negligence alleged against the second Defendant's driver, particulars of the damage caused to the Plaintiff's tipper lorry, and particulars of the manner in which damages for loss of use of the tipper lorry were calculated at £1400. The Statement of Claim concluded "And the Plaintiff claims damages and a tipper lorry."

6. The second Defendants duly appeared to the Writ and on the 20th April 1965 filed and delivered their Defence.

pp. 4-5

20 7. The first Defendant failed to appear within the time limited by the Writ for appearance, and on the 25th May 1965 Judgment in default of appearance was entered against the first Defendant in the following terms:-

p. 6

"The first Defendant A. Kabia not having appeared to the Writ of Summons herein IT IS THIS DAY ADJUDGED that the Plaintiff recover against the said first Defendant the sum of Le.2800/00 for the loss of use of tipper lorry No. 742 damages to be assessed and costs to be taxed.

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(Sgd.) A. Nithianandan
Master and Registrar."

8. On the 29th May 1965 the Plaintiff sued out a Writ of Fieri Facias against the first Defendant which was issued out of the Supreme Court on the same date in the sum of Le.2800.00 plus costs, interest, and execution costs. Execution was levied under this writ on or about the 9th June 1965.

p.7
pp.8-7

40 9. By a Notice of Motion, dated the 18th June 1965, the first Defendant applied to the Supreme Court for an order that the judgment in default of

p.11

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pp.12-13

appearance and the execution issued thereon be set aside and that the first Defendant be at liberty to defend the action. In support of his Notice of Motion the first Defendant filed an affidavit sworn by him on the 18th June 1965. The first Defendant alleged therein that after service of the Writ the Plaintiff had approached him and suggested a compromise, and accordingly a meeting was to be arranged to agree on terms of settlement, and that in consequence of this arrangement he (the first Defendant) had not entered an appearance. The first Defendant further alleged that he was unaware of judgment having been signed against him until he was confronted with the writ of fieri facias on the 1st June 1965. In paragraph 8 of his said affidavit the first Defendant stated "That I am advised and verily believe that I have a defence to the action upon the merits", but his affidavit contained no indication of any grounds of defence. 10 20

pp.15-16

10. On the 21st June 1965 the Plaintiff filed an affidavit in opposition to the first Defendant's application. In this affidavit the Plaintiff denied that he had approached the first Defendant to suggest a compromise; that he had himself been approached by another person on behalf of the first Defendant with an offer to pay part of the money and the balance by instalments; that he had referred the first Defendant to his solicitor; and that he had said or done nothing to lead the first Defendant to believe that the action was not proceeding. 30

pp.18-19

11. Further evidence in opposition to the first Defendant's application was filed in the form of an affidavit by the Plaintiff's solicitor sworn on the 22nd June 1965, the substance of which was that on the 2nd June 1965 the first Defendant had called at the deponent's office, bearing a letter from his solicitor (which was exhibited) and there and then admitted the claim against him and offered to pay by instalments. 40

p.20

pp.21-22

12. The first Defendant's motion came before Luke J. on the 23rd June 1965, when counsel for the first Defendant relied for support on the case of Evans v. Bartlam (1937) A.C. 473. It was

contended for the Plaintiff that the judgment in default was a regular judgment, which could not or should not be set aside in the absence of an affidavit showing a defence in the merits. The learned Judge ruled as follows:-

Ruling:

10 "Having listened to all that has been said by solicitors on both sides the Court is of opinion that this is not a case it can exercise its discretion to set aside the judgment filed in this Court and the Motion is therefore dismissed with costs."

13. On the 24th June 1965 the first Defendant filed a Notice of Motion in the Supreme Court for an order granting leave to appeal from the order of Luke J. and staying execution on the judgment in default. This Motion was heard by Luke J. on the 7th July 1965 when an order was made in the terms asked for. No application was made for enlargement of the time within which to appeal.

p.24
pp.31-32

14. On the 4th November 1965 an application by the first Defendant for an enlargement of the time limited for appeal was made to Luke, J. This application was supported by an affidavit of the first Defendant's solicitor sworn on the 3rd November 1965, in which the deponent stated his belief that there were good and substantial grounds of appeal and exhibited proposed Grounds of Appeal. The affidavit did not however, set forth any reasons for the application.

p.35
pp.33-34
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15. Upon the hearing of this application, the Plaintiff took the preliminary objection that the first Defendant was so far out of time that the Court had no power within the terms of Rule 14 of the Court of Appeal Rules to grant the application. Luke J. ruled as follows:-

pp.36-36

Ruling

p.36

40 This is an application by Motion for enlargement of time within which applicant can appeal. Before the motion was proceeded

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with Solicitor for Respondent raised a preliminary objection that application was out of time. This was an interlocutory matter for which application for leave is governed by r. 13(1) and (2) of W.A.C.A. Rules. This was not complied with. Rule 14 deals with time for appealing and s.(4) states:-

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of time prescribed within which an appeal may be brought." 10

sic

This matter was disposed of on the 21st June 1965 and appellant had 14 days from which he could have appealed. On the 7th July 1965 leave was granted him to appeal and he had 14 days from that date or provided by rule 13(2) to file his notice of appeal but he failed to comply with it. He has now come before this Court more than 1 month from that date to ask for an enlargement of time as required by Rule 14(4) of the said rules. I cannot see my way to grant this application and the notice of motion is dismissed with costs. 20

16. It is submitted that this ruling of the learned Judge was correct and final and binding on the parties, in conformity with the Court of Appeal Rules, which, so far as material hereto, provide as follows:- 30

Rule 13 (1). Where an appeal lies by special leave only any person desiring to appeal shall apply to the Court by notice on motion for special leave within 14 days from the date of the decision against which leave to appeal is sought. 40

(2) If special leave is granted the appellant shall file a notice of appeal as provided by Rule 12 within 14 days from the grant of special leave.

Rule 14 (1) ...no appeal shall be brought after the expiration of 14 days in the case of an .. interlocutory decision or of 3 months in the case of a final decision, unless the Court below or the Court (of Appeal) shall enlarge the time.

10 (2) The prescribed period for appeal shall be calculated from the date of the decision appealed against: Pro-
vided that where there is no appeal as of right the prescribed period shall be calculated from the date upon which special leave to appeal is granted.

(3) An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below.

20 (4) No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every such application shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. Any such appli-
30 cation may be made to the Court (of Appeal) or to the Court below (in which case the decision of the Court below shall be final)
....

Rule 32 Whenever under these Rules an application may be made either to the Court below or to the Court (of Appeal) it shall be made in the first instance to the Court below, but if the Court below refuses the application the applicant shall subject to the provisions of Rule 14(4) be entitled to have the application determined by the Court
40 (of Appeal).

Rule 33 Whenever any doubt arises as to whether any judgment or order is final or interlocutory, the question may be determined

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summarily by the Court below or by the Court (of Appeal) and any such determination by the Court below shall, notwithstanding the provisions of Rule 32 be deemed to be final and binding on all parties for the purpose of determining the time within which an appeal may be brought

pp. 37-38

p. 23

pp. 39-44

p. 41

17. By a Notice dated and filed the 4th November 1965, the first Defendant purported to appeal to the Court of Appeal from the Order dated the 23rd June 1965 whereby Luke J. had dismissed the application to set aside the judgment in default of appearance. The said purported Notice of Appeal set out grounds of appeal from that order and sought that the order be set aside and that leave be granted to appear and defend the action. The notice was accompanied by affidavit evidence in support of an application for enlargement of time in which to appeal, and exhibiting a proposed Defence. It is respectfully submitted that the said purported Notice did not and could not comply with the Rules cited in the preceding paragraph and was a nullity and of no effect for the purpose of instituting an appeal to the Court of Appeal. 10 20

pp. 49-53

p. 51

18. On the 29th November, 1965, the first Defendant applied by motion to the Court of Appeal (Sir Samuel B. Jones P., Cole Ag. C.J., Dove-Edwin J.A.) for an enlargement of time within which to file the Notice of Appeal referred to in the preceding paragraph. Preliminary objection to this application was taken on behalf of the Plaintiff on the ground that the Court of Appeal had no jurisdiction to enlarge the time. After hearing argument the Court of Appeal overruled the preliminary objection by the following:- 30

Ruling

The question as to whether the judgment obtained in default of appearance was a final judgment or an interlocutory one has been argued before us by Counsel as a result of preliminary objection taken by Mr. Smythe Counsel for the Plaintiff. Looking at the drawn-up judgment by itself 40

we are of the opinion that the judgment was an interlocutory one as it did not finally dispose of all the rights of the parties concerned. In the circumstances the objection as to want of jurisdiction is overruled.

10 It is respectfully submitted that this ruling of the Court of Appeal was in error and did not dispose of the preliminary objection raised, in that the Court failed to have regard to the effect of Rule 14(4) of its Rules, which provides that no application for enlargement of time may be made after the time therein prescribed, and also that a decision of the Court below on such an application shall be final.

19. The Court of Appeal then heard the first Defendant's application for enlargement of time within which to appeal and, after argument, gave the following:-

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Ruling

p.52

We are of the view that the defendant applicant has shown good and substantial reasons why his application for the enlargement of time within which to file his notice of appeal should be granted and we so grant it. We order that he does so within 7 days as from today and pay the costs which we assess at Le. 21.

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For the reasons stated in the preceding paragraph, it is respectfully submitted that the Court of Appeal had no power under its Rules so to enlarge the time for appealing.

20. The first Defendant's appeal so constituted was heard before the Court of Appeal (Sir Samuel Bankole Jones P., Cole Ag. C.J., Marke J.) on the 21st January, and 7th February, 1966. The first Defendant took the following grounds of appeal set out in his Notice of Appeal:-

pp.55-60

pp.37-38

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(1) That the judgment in default of appearance obtained on the 25th May 1965 was irregularly obtained in that contrary to

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the Rules of the Supreme Court the Court was not moved for judgment nor was there any assessment of the damages for which final judgment was to be signed.

- (2) That the Statement of Claim disclosed no cause of action against the first Defendant.
- (3) That the learned trial Judge was wrong in law in refusing leave to set aside the judgment in default and to defend the action. 10

pp.61-71

21. In judgments delivered on the 24th February 1966, the Court of Appeal allowed the said appeal by a majority (Marke J. dissenting). The Court ordered that the judgment in default of appearance be set aside and that the first Defendant be at liberty to appear and to defend the action. The Plaintiff was ordered to pay the first Defendant's costs in the Court of Appeal and the Court below as well as all costs thrown away.

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p.72

pp.61-67

22. The judgment of Sir Samuel Bankole Jones P. after reciting the relief claimed in the Writ and reading the Statement of Claim in extenso, referred to the signing of judgment in default of appearance and the subsequent proceedings. His Lordship then set out the grounds of appeal referred to in paragraph 20 (supra) and observed:-

p.64, 1.34

"Counsel for the Appellant obtained leave to argue all three grounds together. The first two grounds appear to be the reasons he relied upon to support his third ground.

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His Lordship then reviewed the arguments advanced in the appeal and stated the circumstances in which the Statement of Claim was introduced before the Court of Appeal, and continued:-

p. 66 1.1

"The sole question before the Court is whether or not the Court below exercised its discretion rightly or wrongly."

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Thereafter his Lordship cited passages from the

judgment of Lord Denning M.R., in Ward v. James (1965) 1 All E.R. 563 at pages 568 and 569, and from the speech of Lord Atkin in Evans v. Bartlam (1937) 2 All E.R. 646 at page 650, and continued:-

p. 67 1.3

10 "Now, the Judgment obtained in default was the amount claimed in the Statement of Claim under the heading "Particulars of Special Damages" namely the sum of £1,400 (ie.2,800). Looking at the entire Statement of Claim, it is not quite clear whether this amount can properly be described in law as "Special Damages" without inquiring into the terms of the contract existing between the Appellant and the Respondent. Also, it may well be, and it seems rather likely, that these very damages flowed from the negligence alleged, in which case it is debateable whether the Appellant could be mulcted in damages for the wrongful act of the 2nd Defendant's servant.

20 One striking feature of this case is that the Statement of Claim, in the manner in which it was drawn up, actually disclosed the appellant's defence in its paragraph 4 (see above). This is not of course to say, that an affidavit showing a defence upon the merits ought not to have accompanied the appellant's motion in the Court below, but this fact seems to have provided some excuse for the Appellant's deviation from this "almost inflexible" rule.

30 These are considerations which, had the Statement of Claim been brought to the notice of the Judge, would in my view, have weighed with him in favour of the Appellant because it would have been palpably clear to him that if injustice was not to be done, the orders sought in the motion should have been granted.

40 In the circumstances, and in spite of the fact that no affidavit showing a defence upon the merits accompanies the motion in the Court below, yet for the reasons stated above I would allow the appeal and grant the relief sought.

23. In his dissenting judgment, Marke J. said:-

pp.68-70

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p.68, 1.22

"The judgment in default dated the 25th day of May, 1965 was regularly signed according to our Rules. That made it incumbent on the defaulting defendant in applying to have that regular judgment set aside, to satisfy the Judge that he had a good defence on the merits. The usual way to do this has always been to exhibit a draft statement of defence to the affidavit in support of the application.

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This apparently was not done in that application. All that appears from the affidavits filed in support of the application was a paragraph in the affidavit of the defaulting defendant. It reads:-

"8. That I am advised and verily believe that I have a defence to this action on the merits."

Considering that this was an application for an order which was in the discretion of the Court, it might have been expected that some care would have been taken in preparing such an affidavit so as to disclose the source of the information and belief referred to. Nor does the affidavit of the applicant's solicitor in support of the application state any fact as to there being any defence on the merits or exhibit a draft statement of defence. Anyway those were the facts presented to Luke, Ag. J. when he dismissed the motion for leave to defend. If at this stage a draft statement of defence were exhibited, the learned Judge could not have failed to consider if any useful purpose could be served by setting aside the judgment and if there were a possible defence to the action.

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Having been granted leave by Luke, Ag. J. to appeal from his order the Defendant/Appellant delayed in doing so and Luke, Ag. J. having refused to enlarge time within which to appeal this Court (of which I was not then a member) enlarged the time within which to appeal."

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The learned Judge then referred to the first Defendant's grounds of appeal and continued:-

p.70 l.1

10 "This third ground of appeal was not one of the grounds, if there were any grounds, on which the defaulting defendant - now the defendant/appellant - sought to have the Judgment set aside on motion before Luke, Ag. J. though the fact of the Statement of Claim not disclosing any cause of action against the Defendant/Appellant must have been known to him at the very outset. Though this Court would in a proper case allow further evidence, such evidence is usually allowed on leave to do so after notice to the other side. In this appeal as far as I am aware, no such application was made to this Court and the Defendant/Appellant was allowed by a majority order after he had concluded his argument on the third ground and after Counsel on the other side had objected to that procedure, to serve on the other side an affidavit exhibiting the Writ of Summons and the Statement of Claim. To put it shortly as Scrutton L.J. said in *Nash vs. Rochford Rural Council* (1917) 1 K.B. 384 at page 393

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30 ".if you are to allow parties who have been beaten in a case to come to the Court and say "Now let us have another try we have found some more evidence" you will never finish litigation."

This Court by its decisions acts as a guide to the Supreme Court and the members of the bar, and it would in my opinion be setting a dangerous precedent if a litigant defeated in the Supreme Court could come to this Court and adduce fresh evidence without having first obtained the leave of this Court to do so.

For those reasons I would dismiss the appeal".

40 24. Cole Ag.C.J. concurred with the learned President in allowing the appeal and said:-

p.17

"On the evidence before the Judge below, I think he was right in refusing to grant an

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Order setting aside the Judgment obtained in default of appearance. This Court, however, by majority ruling ordered that for the furtherance of justice an Affidavit exhibiting the Statement of Claim should be filed which was done. This ruling was made after learned Counsel for the Appellant had addressed us at length on the contents of the Statement of Claim without any objection being raised by either Counsel for the Respondent. The only time any objection was raised was when Mr. Smythe, leading Counsel for the Respondent, rose to reply. In my view the objection was belated and the damage had been done.

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After a careful perusal of the Statement of Claim, I am of the opinion that justice would be done if the action went to trial. I am in the circumstances disposed to allow the appeal and I so do."

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p.75

25. Final leave to appeal to Her Majesty in Council was granted to the Plaintiff by order of the Court of Appeal dated the 8th September 1966.

26. The Plaintiff humbly submits that this Appeal should be allowed with costs throughout and the Judgment in default of appearance restored for the following, amongst other

R E A S O N S

(1) BECAUSE the Ruling and Order of the Supreme Court dated 23rd June 1965 were given and made in the exercise of a discretion and there is nothing in the material before that Court, or on the face of the said Ruling and Order, or at all, to justify a reversal of the Order;

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(2) BECAUSE the exercise of the discretion of the Supreme Court was in the circumstances a proper exercise of that discretion, and the said Order is right;

(3) BECAUSE there was no affidavit stating facts to show a defence on the merits, notwithstanding that the first Defendant sought

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to set aside a regular Judgment;

- (4) BECAUSE the first Defendant was out of time to appeal;
- (5) BECAUSE the Ruling and Order of the Supreme Court dated 4th November 1965 refusing to enlarge the time for appeal was correct in that the Court then had no power to enlarge the time;
- 10 (6) BECAUSE alternatively the said Ruling and Order of 4th November 1965, if made in the exercise of the Court's discretion, was a correct and proper exercise of that discretion;
- (7) BECAUSE in any event the said Ruling and Order of 4th November 1965 was final and binding on the parties;
- 20 (8) BECAUSE the two Rulings of the Court of Appeal dated the 29th November, 1965, whereby time was enlarged, were wrong because by that date and in the events that had occurred the Court of Appeal had no power under the Rules to enlarge time.
- (9) BECAUSE alternatively, if the Court of Appeal had power to enlarge time, and if the decision of the Supreme Court of the 4th November, 1965, was an exercise of discretion, no good grounds were disclosed for interfering with the said exercise of discretion.
- 30 (10) BECAUSE the first Defendant's appeal to the Court of Appeal was not properly constituted and was a nullity, which the Court of Appeal ought not to have entertained.
- (11) BECAUSE in any event, in the absence of any affidavit showing a defence on the merits, there is no reason or no reason sufficient in law, disclosed in either of the two

majority Judgments in the Court of Appeal,
to justify any interference with the exer-
cise of the discretion of the Supreme Court;

(12) BECAUSE the reasons given by the two majority
Judgments in the Court of Appeal why the
exercise of the Supreme Court's discretion
should be reversed, are wrong;

(13) BECAUSE the reasons given in the dissenting
Judgment of Marke J. in the Court of Appeal,
for not interfering with the exercise of the
Supreme Court's discretion, and for dismiss-
ing the appeal, are right.

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RALPH MILLNER

BERNARD MARDER

No. 22 of 1966

IN THE PRIVY COUNCIL

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FROM THE COURT OF APPEAL FOR SIERRA
LEONE

B E T W E E N:
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- and -
A. KABIA (First Defendant) Respondent

C A S E F O R T H E A P P E L L A N T

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