8 1969

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

CASE FOR THE RESPONDENT

---

1. This is an Appeal from an order of the Court of Appeal for Sierra Leone (S.B. Jones P. and C.O.E. Cole Ag. C.J., R.B. Marke P.J. dissenting) delivered on the 24th February 1966 whereby the said Court of Appeal allowed an appeal by the Respondent from an order of the Supreme Court of Sierra Leone (Luke Ag. P.J.) dated the 23rd June 1965 refusing an application by the Respondent to set aside a judgment dated the 25th May 1965, obtained against him by the Appellant in default of his appearance to a Writ dated the 10th February 1965.

2. By a Writ dated the 10th February 1965 and served on the 3rd March 1965 the Appellant instituted proceedings against the Respondent who is the first Defendant and against the Sierra Leone Development Company Limited which is the second Defendant. The said Writ was 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".

Further, the said Writ required both Defendants to cause an appearance to be entered for them in the Supreme Court of Sierra Leone within 8 days after the service of the said Writ upon them inclusive of the day of such service.

3. By a Statement of Claim delivered and filed

on the 10th February 1965 and served on the 3rd March 1965 the Appellant appears to allege that by an agreement between the Respondent and second Defendant the Respondent agreed to supply tipper lorries to and transport ore for the second Defendant and that by an agreement between the Appellant and the Respondent the Appellant supplied a tipper lorry N.742 for the transport of iron ore for the Defendant (sic).

4. The said Statement of Claim further alleges that by reason of the negligence of a servant of the second Defendant the said tipper lorry N.742 was damaged thereby causing loss and damage to the Appellant namely actual damage to the said tipper lorry and loss of the use thereof.

5. Clause 4 of the said Statement of Claim reads as follows:

> "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 Connections with the plaintiff. The plaintiff brings this action against both defendants for the Court's determination of liability".

6. Part of the Appellant's alleged damage is pleaded under the heading "Particulars of Special Damages" namely £1400.0.0. as damages for loss of use of the said tipper and partly as general damages under the heading "Particulars of Injury" namely the actual damage to the said tipper. The said Statement of Claim concludes as follows:

> "AND the plaintiff claims Damages and a tipper lorry".

7. The Respondent having failed to enter an appearance to the said Writ the Appellant on the 25th May 1965 obtained judgment against the Respondent in default of the Respondent's appearance in "the sum of Le.2800/00 (i.e. of £1400.0.0) for the loss of use of Tipper Lorry No.742 damages to be assessed and costs to be taxed".

8. The following rules (inter alia) of the Sierra Leone Supreme Court Rules are concerned with entering an appearance and obtaining judgment in default of appearance:

Order X

Rule 2:

"Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the rules of this Order, or under any other Order, he shall, before taking such proceedings on default, file an affidavit of service, or notice in lieu of service, as the case may be".

Rule 3:

"Where the writ of summons is endorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the Writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of 5 per cent. per annum, to the date of the judgment and costs:

Provided ....."

Rule 4:

"Where the writ of summons is endorsed for a liquidated demand, whether specially or otherwise, and there are several defendants of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may enter final judgment as in the preceding rule against such as have not appeared and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared".

Rule 5:

"Where the writ is indorsed with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all the defendants, if more than one, fail to appear, the plaintiff may enter interlocutory judgment and a writ of inquiry shall issue to assess the value of the goods and the damages or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the court may order a statement

of claim or particulars to be filed before any assessment of damages and may order that instead of a writ of inquiry the value and amount of damages or either of them shall be ascertained in any way which the court may direct".

Rule 6:

"Where the writ is indorsed as in the last preceding rule mentioned, and there are several defendants of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may sign interlocutory judgment against the defendant or defendants so failing to appear, and the value of the goods and the damages or either of them, as the case may be, may be assessed, as against the defendant or defendants suffering judgment by default at the same time as the trial of the action or issue therein against the other defendant or defendants unless the court shall otherwise direct:

Provided that the court may order that instead of a writ of inquiry or trial, the value and amount of damages, or either of them, shall be ascertained in any way which the court may direct".

Rule 7:

"Where the writ is indorsed with a claim for damages only or for detention of goods with or without a claim for pecuniary damages and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing to appear and interlocutory judgment for the value of the goods and damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules of this Order as may be applicable".

Rule 10:

"Where judgment is entered pursuant to any of the preceding rules of this Order it shall be lawful for the court to set aside or vary such

judgment upon such terms as may be just".

9. Having obtained judgment as aforesaid the Appellant sought to execute the same and on the 29th May 1965 a Writ of fieri facias was on the application of the Appellant issued by the Supreme Court of Sierra Leone. On the 18th June 1965 an appearance was entered on behalf of the Respondent.

10. On the 23rd June 1965 pursuant to a Notice of Motion dated the 18th June 1965 the Respondent moved in the Supreme Court of Sierra Leone for an order that the said Judgment and the said execution issued thereon be set aside and that the Respondent be at liberty to defend the action. The said application was made pursuant to Order X rule 10 of the Supreme Court Rules. In his affidavit sworn the 18th June 1965 the Respondent explained that no appearance had been entered by or on his behalf because negotiations were in progress between the parties in relation to the Appellant's claim. In his affidavit sworn the 21st June 1965 the Appellant while disputing some of the Respondent's contentions admitted that negotiations had been taking place. The said Motion was heard by Luke Ag. P.J. and the learned Judge after reading the said Notice of Motion and the several affidavits filed therein and hearing Counsel thereon ordered that the said Motion be dismissed with costs.

11. On the 7th July 1965 Luke Ag. P.J. after reading a Notice of Motion dated the 24th June 1965 and affidavits filed therein and after hearing Counsel for the Respondent granted leave to the Respondent to appeal against the said Order dated the 23rd June 1965 and ordered that execution of the said judgment be stayed pending the determination of the said appeal.

12. The following rules (inter alia) of the Sierra Leone Court of Appeal Rules are concerned with the time and method of appealing from a decision of the Supreme Court of Sierra Leone:

14. (1) Subject to any provision which may be made by the legislature of any Territory no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory

decision or of three months in the case of an appeal against a final decision, unless the Court below or the Court shall enlarge the time.

(2) The prescribed period for appeal shall be calculated from the date of the decision appealed against:

Provided 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.

(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. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.

32. Whenever under these rules an application may be made either to the Court below or to the Court 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.

34. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may be just.

42. Where no other provision is made by these

rules the procedure and practice for the time being in force in the Supreme Court of England shall apply in so far as it is not inconsistent with these rules and the forms in use therein may be used with such adaptations as are necessary.

13. By Notice of Motion dated the 23rd July 1965 the Respondent by his Solicitor gave notice that the Supreme Court of Sierra Leone would be moved on the 30th July 1965 for an order that the Respondent's time for appealing against the Order dated the 23rd June 1965 be enlarged. This said Motion was heard by Luke Ag. P.J. on the 4th November 1965 who dismissed the same with costs.

14. By filing in the Registry of the Supreme Court of Sierra Leone a Notice of Appeal dated the 4th November 1965 the Respondent (pursuant to the leave obtained on the 7th July 1965) appealed against the Order of Luke Ag. P.J. dated the 23rd June 1965.

15. By Notice of Motion dated the 11th November 1965 the Respondent by his Solicitor gave notice that the Court of Appeal for Sierra Leone would be moved on the 29th November 1965 for an order that the Respondent's time for filing a Notice of Appeal be extended. This said application was heard and granted by the said Court of Appeal on the 29th November 1965 when the said Court held that the said judgment was an interlocutory judgment and that the Respondent had shewn good and substantial reasons why his application for enlargement of time within which to file his notice of appeal should be granted. The said Court further ordered that a notice of appeal be filed by the Respondent within 7 days.

16. On the 11th December 1965 the Appellant gave notice of his intention to appeal to Her Majesty's Privy Council against the decision of the Sierra Leone Court of Appeal delivered on the 29th November 1965 and by Notice of Motion dated the 17th December 1965 he gave notice that on the 21st January 1966 the Sierra Leone Court of Appeal would be moved for an Order granting leave to the Appellant to appeal against the said decision.

17. On the 21st January 1966 the Sierra Leone Court of Appeal refused an application by the Appellant for an extension of time within which to appeal as aforesaid and the Appellant thereupon withdrew his said Motion. The said Court then heard argument upon the Respondent's Appeal and having adjourned the same until the 2nd February 1966 ordered that the Respondent should file and serve on the Appellant's Solicitor an affidavit exhibiting a certified true copy of the Statement of Claim. The said Court also granted leave to the Appellant to file a further affidavit if so desired.

18. On the 2nd February 1966 the said appeal was further adjourned until the 7th February 1966 when further argument was heard thereon and when judgment was reserved until the 24th February 1966.

19. On the 24th February 1966 the said Court of Appeal delivered judgment allowing the said appeal and ordered that the said judgment in default be set aside.

20. Jones P., delivering the leading judgment, held that the sole question was whether the Court below had exercised discretion rightly or wrongly and relying upon Ward v. James (1965) 1 All E.R. 563 at 568/9 and Evans v. Bartlam (1937) 2 All E.R. 646 said that if the Statement of Claim had been before the Court below it would have been 'palpably clear' that "if injustice was not to be done, the orders sought in the Motion should have been granted". Referring to the "Particulars of Special Damages" the learned President said that without enquiring into the terms of the contract between the Appellant and Respondent it was not quite clear whether, in law, such damages were special damage and that it seemed rather likely that those damages flowed from the negligence of the second Defendants servants for which the Respondent's liability was debatable. The learned President also drew attention to paragraph 4 of the Statement of Claim which itself disclosed a Defence by the Respondent and which might excuse the Respondent's failure to accompany the Notice of Motion with an affidavit on the merits.

21. Agreeing with the judgment of the learned

President, Cole Ag. C.J. said that after a careful perusal of the Statement of Claim he was of the opinion that justice would be done if the action went to trial.

22. Dissenting Marke J. said that in his opinion it would be setting a dangerous precedent if a litigant defeated in the Supreme Court could come to the Court of Appeal and adduce fresh evidence without having first obtained leave of the Court of Appeal to do so and for this reason would dismiss the appeal.

23. By order of the Court of Appeal of Sierra Leone dated the 8th September 1966 the Appellant was granted final leave to appeal from the said order of the said Court of Appeal to Her Majesty in Council. The Respondent will contend that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the Court of Appeal for Sierra Leone was right in enlarging the Respondent's time in which to appeal from the decision of Luke Ag. P.J. dated the 23rd June 1965 in which the learned Judge dismissed the Respondent's application to set aside the said judgment dated the 25th May 1965.

(2) BECAUSE the said Court of Appeal was right in exercising its discretion to allow the Respondent's appeal from the decision of the learned Judge for the following among other reasons:

(a) the Statement of Claim discloses no cause of action against the Respondent in that it does not allege against the Respondent any breach of any contractual or other obligation or any damage flowing therefrom;

(b) neither the said Writ nor the said Statement of Claim makes any liquidated claim against the Respondent;

(c) the Judgment dated the 25th May 1965 of the learned Judge is not a regular

judgment in that an order should have been but was not made pursuant to Order X rule 6 of the Sierra Leone Supreme Court for a writ of inquiry as to damages or that damages be ascertained in some way directed by the Court;

(d) by paragraph 4 of the said Statement of Claim a Defence by the Respondent is disclosed;

(e) that in view of the circumstances disclosed by the evidence justice requires that the said judgment dated the 25th May 1965 be set aside.

B. HOLROYD-PEARCE

For the Respondent.

22 OF 1966

IN THE PRIVY COUNCIL

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

CASE FOR THE RESPONDENT

CARTWRIGHT, CUNNINGHAM,
Eldon Street House,
Eldon Street,
E. C. 2.