Privy Council Appeal No. 22 of 1966

Mustapha Conteh – – – – – – – – *Appellant*

v.

A. Kabia – – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR SIERRA LEONE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1969

Present at the Hearing:
LORD GUEST
LORD DONOVAN
LORD WILBERFORCE
[*Delivered by* LORD GUEST]

The Writ in this action was served on 10th February 1965 and if the judgment of the Court of Appeal is right the case will start *de novo* after a delay of 4 years. The course of the proceedings discloses a degree of dilatoriness which, though not unusual, is certainly not to be commended and some pleading which might be described as inelegant if it does not merit a harsher criticism.

The appeal is against an order of the Court of Appeal of Sierra Leone allowing an appeal from an order of Luke J. sitting in the Supreme Court of Sierra Leone. By this latter order Luke J. refused to set aside a judgment in default obtained by the appellant/plaintiff against the respondent/defendant. In order to avoid confusion the parties will be referred to as plaintiff and defendant respectively. The action was directed against two defendants; the first defendant and a second defendant. The latter filed defences and the action proceeded normally so far as is known against them. The first defendant failed to appear and judgment in default dated 25th May 1965 was obtained against him in the following terms:

> " 25th day of May 1965
>
> 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."

This was followed by a Writ of *fieri facias* and execution was duly levied. The defendant on 18th June 1965 filed Notice of Motion to set aside the default judgment accompanied by an affidavit in which it was alleged that the reason for failing to defend was the defendant's belief that the parties were negotiating a settlement. The plaintiff's affidavit denied these allegations. Nothing was said at that stage by the defendant as to irregularity of the default judgment. On 23rd June 1965 Luke J. refused to exercise his discretion to set aside the default judgment. Leave to appeal to the Court of Appeal was granted on 7th July 1965 and also a stay of execution. This being an interlocutory judgment, under Rule 14(1) of the Court of Appeal Rules the period within which the right to appeal expired was 14 days from 7th July, that is 21st July. No appeal was lodged by that date. But the parties are agreed that although the document is missing from the Record, a notice of motion for enlargement of time

was filed by the defendant on 23rd July 1965 accompanied by the relevant affidavit. So far as time is concerned this would appear to comply with Rule 14 (4) which provides that " 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 ". The affidavit which accompanied this notice is absent from the Record.

No hearing before Luke J. took place until 4th November 1965 when the judge refused the defendant's motion for enlargement of time purporting to act under Rule 14 (4). His ruling erroneously refers to his previous judgment as 21st June while in fact it was dated 23rd June. This was followed on the same day by an appeal by the defendant against the original judgment of Luke J. dated 23rd June 1965 refusing to set aside the default judgment. In the Grounds of Appeal there appeared for the first time a contention by the defendant that the default judgment was irregular under the Rules of the Supreme Court and that the Statement of Claim disclosed no ground of action against the defendant. On 11th November the defendant lodged an affidavit asking for an enlargement of time in which to appeal against the order of 23rd June 1965.

The Court of Appeal on 29th November 1965 after ruling that the order of 23rd June 1965 was an interlocutory judgment which appeared self-evident, granted the defendant an enlargement of time within which to file his notice of appeal. Thereafter proceedings took place before the Court of Appeal on 21st January, 2nd, 7th and 24th February 1966. On the latter date the appeal was allowed and the judgment in default was set aside and liberty to appear and defend the action was granted to the defendant.

The appellant relied upon two separate grounds of appeal. It was argued in the first place that the appeal to the Court of Appeal against the order of Luke J. dated 23rd June 1965 was incompetent by reason of Rule 14 (4). Before an amendment was made to the Rules in 1961 this paragraph contained a provision at the end that the decision of the Court on an application for enlargement of time was final. This provision has disappeared from the Rule and although Rule 32 contains the proviso that it is " subject to the provisions of Rule 14 (4) " this Rule (Rule 32) clearly provides for an appeal to the Court of Appeal against a refusal by the Supreme Court to grant an enlargement of time. The application for enlargement of time within which to appeal against the order of 23rd June was made on 23rd July, just within the one month prescribed by Rule 14 (4). A separate point was made that the application was not accompanied 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 ". But this affidavit is not in the Record and as this point was not previously taken by the plaintiff their Lordships cannot deal with it. There is no substance in the plaintiff's argument that the appeal was incompetent. There was in any case an affidavit before the Court of Appeal which complied with this provision in Rule 14 (4).

The second ground is that the Court of Appeal ought not to have interfered with the discretion of the trial judge in refusing to set aside the default judgment. In *Evans v. Bartlam* [1937] A.C. 473 Lord Atkin at p. 480 said " But while the judge has such a discretion as I have mentioned I conceive it to be a mistake to hold, as Greer L.J. seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that, as the Lord Justice said, the Court of Appeal ' have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law '. Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

In their Lordships' opinion the Court of Appeal was entitled to reverse the exercise of the judge's discretion. It is necessary at this stage to quote the terms of the Writ which were 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."

The meaning of this is far from plain but when the Statement of Claim is considered confusion becomes more confounded. It is in the following terms:

> " The second defendant contracted with the first defendant for the supply of tipper lorries to transport iron ore within the mining site at Marampa, and the plaintiff under a sub-contract with the first defendant, supplied a tipper lorry N.742 on the 19th January, 1964, and transported iron ore for the defendant.
>
> On the 22nd March 1964, whilst loading the plaintiff's tipper lorry N.742, the second defendant's servant so negligently operated the loading vehicle that the No. 12 Bucket of the Dumper Shovel of the loading vehicle hit the plaintiff's tipper lorry with great force, causing serious damage to the plaintiff's tipper lorry and put it out of service, thereby causing injury damage and loss to the plaintiff.
>
> 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."

" Particulars of Negligence " follow which are solely directed against the second defendant's driver. Particulars of injury to the tipper follow and also particulars of special damage, being loss of use of the lorry.

The pleadings do not disclose what ground of action is alleged against the first defendant, whether in contract or in tort. The statement of claim does however disclose a defence on the merits to the action.

Whether Luke J. when he refused to set aside the default judgment had the pleadings before him is not known. He certainly does not mention them in his ruling. But if he did not have them before him then he exercised his discretion in ignorance of the fact which disclosed a defence on the merits. If on the other hand he did have the pleadings before him and disregarded them, then in their Lordships' view he exercised his discretion upon a wrong principle. In either case his discretion is open to review.

Their Lordships agree with the approach of the majority of the Court of Appeal. They were in their Lordships' view entitled to set aside the default judgment.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

MUSTAPHA CONTEH

v.

A. KABIA

DELIVERED BY
LORD GUEST

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