

## MENDS v. ABSI

West African Court of Appeal (Macquarrie, J. (Sierra Leone),  
Strother Stewart, J. (G.C.) and Brooke, J. (Nig.)):  
April 15th, 1935

- [1] Civil Procedure — appeals — time for appeal — leave to appeal out of time — application for extension of time to be made only on notice to other party, not *ex parte*: An application for extension of time in which to appeal to the West African Court of Appeal, if made after the statutory period has expired, and an order granting the extension, cannot be made *ex parte*, but must be made on notice to the other party so as to give him an opportunity of objecting (page 386, lines 23—26; lines 34—38). 5  
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- [2] Civil Procedure — judgments and orders — *ex parte* orders — *ex parte* order granting extension of time for appeal ineffective — notice to other party essential: See [1] above.
- [3] Civil Procedure — judgments and orders — *ex parte* orders — order made in presence of other party who declines to argue still *ex parte*: An *ex parte* order includes one made in the presence of the other party who declines to argue on the ground that he received inadequate notice of the hearing (page 387, lines 11—25). 15
- [4] Courts — Supreme Court — appeals — leave to appeal out of time — order for extension of time to be granted only on notice, not *ex parte*: See [1] above. 20
- [5] Time — time for appeal — leave to appeal out of time — application for extension of time to be made only on notice to other party, not *ex parte*: See [1] above. 25

The respondent brought a successful action in the Supreme Court against the appellant.

Later, after the time for appeal had expired, the appellant sought an extension of time in which to apply for leave to appeal. An order was allegedly granted, then cancelled, and another order granting time made at a hearing nine days later. This was objected to by the respondent on the ground that he had not had sufficient notice of the hearing; so that, although he was present, he declined to take part in the hearing. The judge then made an order — in the form of an order on an *ex parte* motion — granting 14 days' extension of time to the appellant. 30  
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On appeal to the West African Court of Appeal, the respondent raised a preliminary objection that the court had no jurisdiction to hear the appeal because (a) the court below had no power to grant an extension of time to the appellant; and (b) even if it had such 40

power, the application for the extension of time and the order granting it were made *ex parte* and were therefore of no effect.

The appeal was dismissed.

Case referred to:

(1) *Evennett v. Lawrence* (1876), 4 Ch. D. 139; 46 L.J. Ch. 119.

Legislation construed:

Supreme Court Rules (Laws of Sierra Leone, 1925, *cap.* 205), O.XLIX, r.3:

"Except where according to the practice existing at the time of the passing of the Principal Act any Order or Rule might be made absolute *ex parte* in the first instance, and except where notwithstanding Rule 2 a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. . . ."

*C.D.H. During* for the appellant;  
*Beoku-Betts* for the respondent.

MACQUARRIE, J. (Sierra Leone):

On this appeal coming on for hearing, Mr. Betts raised a preliminary objection that this court had no jurisdiction to hear the appeal, firstly, on the ground that the court below had no power to grant an extension of time to the appellant to apply for final leave to appeal after the time limited by the rules had expired as it had done; and secondly, that, even if it had such power, the application by the appellant for the extension of time and the order granting the extension were made *ex parte* and were therefore of no effect.

In my opinion the objection succeeds on the second ground. After considerable discussion it was agreed that the order granting time of December 12th which was alleged to have been made *and cancelled* (which does not appear on the record) was to be ignored and the matter to be treated as though the order granting time made on December 21st was the order under discussion. Mr. Betts argued that this order, having been made *ex parte*, was ineffective.

In my opinion, such an order affecting both parties could only be made on notice to the respondent so as to give him an opportunity of objecting: see O.XLIX, r.3 of the Supreme Court Rules (*cap.* 205) as applied by r.30 of the West African Court of Appeal Rules, and *Evennett v. Lawrence* (1).

The question which remains to be decided, therefore, is whether the order was made *ex parte* or on notice. Such a question would appear to be one which should be easily answered, but the

circumstances here are a little peculiar. The court below having cancelled the order of December 12th and ordered notice to be given to Mr. Betts, Mr. During served a notice upon Mr. Betts dated December 19th, of hearing on the 20th, on which day the respondent's solicitor, Mr. Betts, attended for the purpose of objecting that the notice was irregular as not being long enough. The matter was adjourned to the following day when Mr. During object to Mr. Betts' right to be heard, whereupon the latter asked that this be noted and that he would take no part in the hearing.

The judge then made an order on the appellant's affidavits granting 14 days' time. This order — p. 40 of the record — is in form an order on an *ex parte* motion and, in view of this fact, confirmed by the judgment of the same judge on an application made later on to set aside the order, when he says: "It is true that the order was made *ex parte*," I find myself bound to hold that the order was made *ex parte*, in spite of the argument of Mr. During to this court that Mr. Betts appeared and chose to decline to take part in the hearing. It has to be borne in mind that Mr. During himself adopted the attitude of one moving *ex parte* and obtained an order as above stated. It is, I think, not possible to hold, as he strenuously argued, that the respondent's solicitor was in the position of one to whom due notice of a motion had been given for the purpose of enabling him to make any objection to the application — the subject of the motion which he might wish to make.

This being so, the motion was one made in effect without notice to the respondent and therefore for the reason above stated, ineffective. It follows that the order made is equally ineffective and that the appellant has failed to comply with the rules as to obtaining formal leave to appeal. It is unnecessary therefore to consider the first ground.

In my opinion the appeal should therefore be dismissed with costs.

STROTHER STEWART, J. (G.C.) concurred.

BROOKE, J. (Nig.):

I adopt the view that the order granting extension of time was made *ex parte* and for this reason was ineffective. *Evennett v. Lawrence* (1) is clear on the point that no such application can be entertained *ex parte*. The order would affect both parties and the other side must be given an opportunity of objecting which in this

case was not afforded to the respondent. The rules of court governing appeals must be strictly observed.

*Appeal dismissed.*

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JOHNSON v. WILLIAMS

West African Court of Appeal (Macquarrie, J. (Sierra Leone),  
Strother Stewart, J. (G.C.) and Brooke, J. (Nig.)):

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April 16th, 1935

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[1] Civil Procedure — appeals — matters of fact — trial by judge alone — appellate court to be guided by trial judge's opinion as to credibility of witnesses but also to consider other facts that may justify different conclusion: Where the question of the credibility of witnesses arises an appeal court always is, and must be, guided by the impression made on the judge who saw and heard the witnesses, though there may be circumstances other than manner and demeanour which may show whether a statement is credible and may justify the appeal court in differing from the trial judge (*per* Brooke, J. at page 394, line 28—page 395, line 3).

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[2] Civil Procedure — appeals — matters of fact — trial by judge alone — appellate court to presume judge's decision on facts right — duty to rehear case, reconsider evidence and overrule judge if necessary: Where a case has been tried by a judge without a jury the appeal court is less bound by the decision of the court below on questions of fact than it is on hearing applications for a new trial after a trial and verdict by a jury, but the presumption is that the decision appealed against is right. As, however, it is the appeal court's duty to rehear the case, it must reconsider the evidence carefully and not shrink from overruling the judgment if on full consideration it concludes that the judgment was wrong (*per* Brooke, J. at page 394, line 7—page 395, line 10).

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[3] Contract — duress and undue influence — undue influence — burden of proof — burden on doctor to disprove undue influence in dispute over transaction with patient: Where it has been established that a doctor-patient relationship exists, it is presumed that the doctor unduly influences the patient in any transaction between them and the onus is on him to rebut such a presumption (page 392, lines 10—11, lines 37—40; page 393, lines 4—8).

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[4] Evidence — functions of court — appellate court — matters of fact — trial by judge alone — appellate court to be guided by trial judge's opinion as to credibility of witnesses but also to consider other facts that may justify different conclusion: See [1] above.

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[5] Evidence — functions of court — appellate court — matters of fact — trial by judge alone — appellate court to presume judge's decision on facts right — duty to rehear case, reconsider evidence and overrule judge if necessary: See [2] above.