[COURT OF APPEAL]

Freetown
March 5,
1962

CHAFFIC HAROUN . . . . . *Appellant*

v.

JAMILLE AJAMI . . . . . *Respondent*

Ames Ag.P.
Benka-Coker
C.J.
Dove-Edwin
J.A.

[Civil Appeal 6/61]

Practice—Action in Supreme Court—Non-appearance of respondent—Judgment for appellant given in absence of respondent—Application to have judgment set aside—Whether judge correct in setting judgment aside—Supreme Court Rules, Ord. 25, r. 12.

Appellant brought suit against respondent for £900. When the case came on for trial, respondent did not appear. In his absence, the judge heard evidence from the appellant, for whom he gave judgment. Respondent then applied to have the judgment set aside pursuant to Order 25, r. 12, of the Supreme Court Rules, which provides: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem fit, upon an application made within six days after the trial or within such time as the court or a judge may allow."

An order was made setting aside the judgment, and from this order appellant appealed. Appellant argued that rule 12 should be given the same interpretation as that which had been given to the corresponding English rule (rule 33 of Order 36, Rules of the Supreme Court) and that the latter had been interpreted as not conferring any power to set aside a judgment obtained in default of the appearance of a party where there had been a hearing and a judgment on the merits.

Held, allowing the appeal, that where there has been a hearing on the merits in the absence of the defendant and judgment has been entered, it cannot be set aside by the court.

Cases referred to: *Rackham* v. *Tabrum* (1923) 39 T.L.R. 380; *Hession* v. *Jones* [1914] 2 K.B. 421.

Rowland E. A. Harding for the appellant.
John E. R. Candappa for the respondent.

AMES AG.P. In March, 1959, the appellant issued a writ claiming from the defendant £1,000, less £100 commission, the value of four mobile water pumps delivered to the defendant for sale on behalf of the plaintiff and converted by the defendant to his own use. The respondent entered an appearance on September 8, 1959. Presumably pleadings were filed. They are not included in the appeal record. The action was entered for trial at Freetown on October 1, 1960.

It came on for trial at Bo (although neither the notes nor the order of judgment so state) on December 20. On that day Mr. Harding appeared for the plaintiff and Mr. Macaulay for the defendant. The notes taken by the judge show that Mr. Macaulay said that he received notices of hearing on December 1, and sent notice to his client on the same day and also a telegram on the 16th, without any reply from the defendant, and that his client, the defendant, was not present. Mr. Macaulay, therefore, asked to be "excused" and he was "excused" by the judge.

Counsel for the plaintiff then put the plaintiff into the box, and evidence was given by him in support of the claim. Counsel then asked for judgment, and judgment was given for the plaintiff for £900 and costs "to be taxed if necessary." That judgment was formally drawn up and entered, as a judgment of December 20, of course, although the date on which it was drawn up is not apparent.

A notice of motion was then filed by a different solicitor for the defendant for an order "that the judgment by default of appearance at the trial" be set aside under Order 25, r. 12, of the Rules of the Supreme Court, and an affidavit of the defendant was attached. The notice was dated December 24, 1960, but the appeal record does not show the date on which it was filed.

This application came on for hearing on January 16, 1961, at Freetown, before another judge, who after hearing argument ordered it to be transferred to Bo.

It came before the court at Bo on June 20, 1961, before a third judge. This time counsel for the defendant/appellant appeared but there was no appearance of the plaintiff/respondent. There was before the court a telegram from the latter's solicitor asking for an adjournment to the 26th, or to the next session at Bo. The judge made an order as prayed.

This appeal is against that order. It was an ex parte order but special leave to appeal was obtained.

The grounds of appeal are: (1) that the learned trial judge had no jurisdiction to make the said order of June 20, 1961; alternatively, (2) the learned trial judge could not have exercised discretion in making the said order.

Rule 12 of Order 25 is as follows, and is exactly the same as the English rule 33 of Order 36:

> "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem fit, upon an application made within six days after the trial or within such time as the court or a judge may allow."

Mr. Harding's argument for the appellant is that rule 12 should be given the same interpretation as has been given to the English rule and that the latter has been interpreted as not conferring any power to set aside a judgment obtained in default of the appearance of a party where there has been a hearing and a judgment on the merits, when the only course to take is to appeal.

It is perhaps surprising that neither counsel has been able to refer us to a local decision on the point but Mr. Harding cited the decision in *Rackham* v. *Tabrum* (1923) 39 T.L.R. 380. That decision was given on appeal to the King's Bench Division (Lord Hewart C.J., Salter and Branson JJ.) on appeal from Bray J., who had dismissed a summons in chambers without a hearing in default of appearance of the plaintiff but later agreed to hear it.

> Lord Hewart said: "The principle is that where a summons or case has not been heard, but merely struck out, the court may, if it thinks fit, hear or entertain the summons or case, but if there has been a hearing on the merits though in the absence of one party, it cannot do so after the order has been perfected."

That statement of the principle was obiter in the circumstances, because in that case it was the plaintiff who did not appear, and the summons was dismissed, without a hearing. I think, with respect, that it was a correct statement. The reason for it was clearly put by Bankes J. in *Hession* v. *Jones* [1914]

2 K.B. 421, where the English rule 33 of Order 36 was discussed. That was an appeal from a county court to the Divisional Court (Bankes and Ridley JJ.). The respondent did not appear. After hearing the argument of the appellant and considering the point in dispute from the respondent's angle, the appeal was allowed. The respondent applied to the Divisional Court to have the appeal restored to the list. That was a decision on appeal, and it has been held rule 33 of Order 36 does not apply to appeals, but only to trials at first instance. However, the reasons are similar.

Bankes J. said at page 423: ". . . such an application may be either (1) to restore a case which has merely been struck out and has never been heard and decided because the appellant did not attend; or (2) to restore a case in which the appellant has appeared and argued his appeal in the absence of the respondent and the court has heard the appeal and come to a decision. In the first case, the application is to restore an appeal which has not been heard; in the second case the application is to set aside a decision after a hearing which in the respondent's view is not satisfactory because he was not present."

and at page 424:

". . . It is clear, therefore, that this is an application to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it. Has the court jurisdiction to do this?"

It was held that it had not, under any rule or statute or under its inherent jurisdiction.

I think that similar reasoning must apply to the interpretation of our rule and that where there has been a hearing on the merits, in the absence of the defendant, and judgment has been given and drawn up and entered, and so perfected, it cannot be set aside by that court so as to have the matter tried on the merits a second time, although the defendant could appeal against the judgment.

For these reasons I would allow this appeal and set aside the order appealed from and restore the judgment drawn up on December 20, 1960.

[COURT OF APPEAL]

Freetown
March 5,
1962

Ames Ag.P.
Benka-Coker
C.J.
Dove-Edwin
J.A.

UNITED AFRICA COMPANY LTD. . . . . *Appellant*

v.

JOHN COBY SAMUELS . . . . . *Respondent*

[Civil Appeals 8 and 11/61]

Tort—Malicious prosecution—Whether appellant's accountant was prosecutor—Whether appellant's accountant had authority to start criminal prosecution.

Respondent was under contract with appellant to carry kerosene from Freetown to Segbwema. After respondent received the kerosene, it was alleged that he had not delivered it but had stolen it. Respondent was prosecuted on this charge, but was discharged. He thereupon brought an action