KABIA *v.* CONTEH

COURT OF APPEAL (Bankole Jones, P., Cole, Ag. C.J. and Marke, J.): January 24th and February 24th, 1966
(Civil App. No. 16/65)

[1] **Civil Procedure—appeals—appeal against decision on setting aside default judgment—appeal court may infer decision wrong from its nature where no reasons for it are given:** An appeal court, in considering a judge's exercise of his discretion to set aside a default judgment, may infer that he has decided wrongly from the way he has decided even if he has given no reasons (page 360, lines 1–6).

[2] **Civil Procedure — appeals — appeal against decision on setting aside default judgment—appeal court will interfere if decision given on wrong principle or results in injustice or wrongly arrived at:** An appeal court will interfere with a judge's exercise of his discretion to set aside a default judgment not only if he has acted on some wrong principle of law but also if his decision would result in injustice on other grounds or has been wrongly arrived at (page 359, line 37—page 360, line 7; lines 14–18).

[3] **Civil Procedure—appeals—appeal against exercise of judicial discretion—decision on setting aside default judgment—appeal court may infer decision wrong from reasons given for it or from its nature:** See [1] above.

[4] **Civil Procedure—appeals—appeal against exercise of judicial discretion—decision on setting aside default judgment—appeal court will interfere if decision given on wrong principle or results in injustice or wrongly arrived at:** See [2] above.

[5] **Civil Procedure — appeals — procedure — fresh evidence — Court of Appeal may order of its own motion:** An order to adduce new evidence may be made by the Court of Appeal of its own motion (page 359, lines 20–24).

[6] **Civil Procedure—judgments and orders—default judgment—may be set aside without affidavit showing defence on merits if to obviate clear injustice:** An application to set aside a judgment obtained in default of appearance, though not supported by an affidavit showing a defence upon the merits, may nevertheless be granted if for other reasons it is clear that it ought to be granted if injustice is not to be done (page 361, lines 3–11).

[7] **Civil Procedure—judgments and orders—default judgment—on application to set aside, affidavit should exhibit draft defence:** Upon an application to set aside a judgment obtained in default of appearance, it is the practice to show a defence upon the merits by exhibiting a draft defence to the affidavit in support of the application (page 361, lines 36–40).

[8] **Civil Procedure—judgments and orders—default judgment—on application to set aside, defence on merits not disclosed by applicant's affidavit of belief:** Upon an application to set aside a judgment obtained in default of appearance, a defence on the merits is not disclosed by an affidavit of the applicant averring that he is advised and believes that he has such a defence (page 358, lines 17–21).

[9] **Civil Procedure—judgments and orders—default judgment—setting aside requires affidavit showing defence on merits:** Upon an application to set aside a judgment obtained in default of appearance, it is an almost inflexible rule that there must be an affidavit showing a defence upon the merits (page 360, lines 10–12; page 361, lines 36–38).

[10] **Courts—Court of Appeal—procedure—fresh evidence—court may order of its own motion:** See [5] above.

The appellant applied to the Supreme Court to set aside a judgment in default of appearance obtained against him by the respondent.

The respondent brought an action against the appellant and a mining company claiming special damages for loss of use of a lorry. In his statement of claim he alleged that the respondent had contracted with the company to supply tipper lorries for use at their mining site; that he, the appellant, had supplied a lorry under a sub-contract with the respondent; that this lorry had been damaged by the negligent operation of a loading vehicle by one of the company's servants; and that the appellant denied liability on the ground that the damage had been caused by the company's loading vehicle. The appellant did not enter an appearance and judgment in default was entered against him for the amount claimed as special damages. He applied to the Supreme Court to set aside the judgment and supported the application by an affidavit in which he averred that he was advised and believed that he had a defence upon the merits. The application was refused.

On appeal, the appellant contended that the refusal was wrong in law. He based his argument on the statement of claim. This was not before the court, but the respondent raised no objection. During his reply, but not before, the respondent objected that the statement of claim had not been in the motion papers in the court below. The court ordered the appellant to put it in evidence.

Cases referred to:

(1) *Evans* v. *Bartlam,* [1937] A.C. 473; [1937] 2 All E.R. 646, followed.

(2) *Nash* v. *Rochford R.D.C.,* [1917] 1 K.B. 384; (1916), 116 L.T. 129.

(3) *Ward* v. *James*, [1966] 1 Q.B. 273; [1965] 1 All E.R. 563, followed.

Rules construed:

Supreme Court Rules (Laws of Sierra Leone, 1960, *cap.* 7), O.X, r.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 . . . 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."

Court of Appeal Rules (Laws of Sierra Leone, 1960, *cap.* 7, as amended), r.30:

> "It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but, for the furtherance of justice, the Court may, if it thinks fit allow or require new evidence to be adduced. Such evidence to be either by oral examination in Court by affidavit or by deposition. . . ."

Marcus-Jones for the appellant;
Smythe for the respondent.

BANKOLE JONES, P.:

This is an appeal from an order of the Supreme Court (Luke, J.) dated June 23rd, 1965, refusing an application by the appellant, who was the first defendant in the court below, to set aside a judgment dated May 25th, 1965 obtained against him in default of appearance.

The matter arose in this way: The writ of summons, which for one reason or other was not included in the record before us but which we saw during the course of argument, is dated February 10th, 1965 and the indorsement reads: "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 statement of claim was delivered on the same day and I set it out *in extenso*:

"Statement of Claim

1. The plaintiff is a transporter. The first defendant is a transporter and the second defendant is a limited liability company with registered office at Delco House, Oxford Street, Freetown and mines iron ore at Marampa.

2. 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 January 19th, 1964 and transported iron ore for the defendant.

3. On March 22nd, 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.

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.

Particulars of Negligence

1. The driver of the second defendant's vehicle did not exercise care.

2. He did not keep a look-out to see that the plaintiff's lorry was at a safe distance when he lowered No. 12 bucket of the dumper shovel with great speed.

3. The speed with which he lowered the bucket was so high that he was unable to stop it hitting the plaintiff's lorry with great force.

4. He lost control of the dumper shovel and allowed its bucket to hit the tipper lorry with great force.

Particulars of Injury

The tipper lorry chassis bent.
The steel body of the tipper lorry damaged.
The tipping machinery of the lorry damaged.
The front and back springs of the lorry broken.

Particulars of Special Damages.

Loss of use of tipper lorry N 742
from 23rd March 1964 to 31st March 1964, 9 days
1st April 1964 to 30th April 1964, 30 days
1st May 1964 to 31st May 1964, 31 days
total 70 days

70 days at 20 hours' working per day 1,400 hours, 1,400 hours at £1 per hour equals £1,400. 0. 0 and the plaintiff claims damages and a tipper lorry."

The appellant did not enter an appearance and judgment in

default was entered against him on May 25th, 1965 in the following terms:

> "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 Le2800.00 for the loss of use of tipper lorry No. N 742 damages to be assessed and costs to be taxed."

A writ of *fieri facias* was issued on May 29th, 1965 against the appellant for the recovery of the sum of £1,400 (Le2,800) the amount claimed under "Particulars of Special Damages" in the statement of claim. I understand that the whole of this amount has been recovered and paid over to the respondent.

On June 18th, 1965, the appellant took out a motion praying for "an order that the judgment signed herein in default of appearance on May 25th, 1965 and the execution issued therein be set aside and that the first defendant be at liberty to defend this action." Affidavits in support of the motion were filed but there was none showing a defence upon the merits. There was a paragraph in the appellant's affidavit which merely stated as follows: "I am advised and verily believe that I have a defence to the action upon the merits." The motion was dismissed on June 23rd, 1965. On July 7th, 1965, the court granted leave to appeal to this court against the order of dismissal.

There are three grounds of appeal: that the judgment in default of appearance obtained by the respondent on May 25th, 1965 was irregularly obtained in that contrary to the Supreme Court Rules the court was not moved for judgment nor was there any assessment of the damages for which final judgment was to be signed; that the statement of claim disclosed no cause of action against the appellant; and that the learned trial judge was wrong in law in refusing leave to the appellant to set aside the judgment in default and to defend the action. 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. He argued in the first place that since there is no allegation of negligence against the appellant in the statement of claim and in para. 4 of the statement of claim the respondent himself averred that the appellant denied liability, therefore if the damages claimed under "Particulars of Special Damages," for which judgment was obtained in default, flowed from the negligence alleged, the statement of claim clearly discloses no cause of action against the appellant. Secondly, he

argued that if it is stated that judgment was obtained by virtue of para. 2 of the statement of claim because that paragraph discloses a contract between the respondent and the appellant, then the claim under the heading "Particulars of Special Damages" should be regarded not as "liquidated" but "pecuniary" damages for which the court should have been asked to order an inquiry under O.X, r.5 of our Supreme Court Rules. In the circumstances he submitted that the judge was wrong in exercising his discretion in refusing leave to the appellant to set aside the judgment in default and to defend the action.

Counsel for the respondent in reply objected to the court paying any regard whatever to the statement of claim because this pleading did not form part of the motion papers before the court below. No objection to this point had been taken whilst counsel for the appellant was arguing. Mr. Smythe submitted that the learned trial judge was right in exercising his undoubted unconditional discretion in dismissing the motion solely on the affidavits before him and what was argued by counsel on both sides. He said the judge had no authority to take into consideration anything else other than those matters which were before him. The court, by a majority ruling and of its own motion "for the furtherance of justice" ordered the appellant to file for use of all parties and the court an affidavit exhibiting a certified true copy of the statement of claim, in pursuance of r.30 of our Court of Appeal Rules. Speaking for myself, I do not think that this is an admission on our part that the learned trial judge was precluded in law from looking at this document if his attention had been drawn to it by counsel, on the ground rightly or wrongly that this would have assisted him in the proper exercise of his discretion regarding the issue before him.

We have now looked at the statement of claim and counsel for the appellant has asked us to adopt his previous arguments relating to it. The sole question before the court is whether or not the court below exercised its discretion rightly or wrongly. Two illuminating passages occur in the judgment of Lord Denning, M.R. in the case of *Ward* v. *James* (3) ([1966] 1 Q.B. at 293 and 294; [1965] 1 All E.R. at 570 and 571):

> ". . . [I]n what circumstances will the Court of Appeal interfere with the discretion of the judge? At one time it was said it would interfere only if he had gone wrong in principle; but since *Evans* v. *Bartlam*, that idea has been exploded. . . . This Court can, and will, interfere, if it is satisfied that the judge

was wrong. . . . It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision."

". . . [W]hen a judgment by default is obtained regularly, the court or a judge has a discretion to set it aside upon such terms as it 'may think fit.' The discretion is in terms unconditional. Yet the courts have laid it down as an almost inflexible rule that there must be an affidavit showing a defence upon the merits, and this rule received the approval of Lord Atkin in *Evans* v. *Bartlam*."

Shortly stated, *Evans* v. *Bartlam* (1) decided that the Court of Appeal is not limited to interfering with a judge's exercise of discretion only if of opinion that he acted on some wrong principle of law, but has the power and indeed the duty to interfere if of opinion that on other grounds the judge's decision will result in injustice. Lord Atkin in his speech said, *inter alia* ([1937] A.C. at 480; [1937] 2 All E.R. at 650):

"The principle obviously is that unless and until the Court has pronounced a judgment on the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

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 (Le2,800). 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 debatable whether the appellant could be mulcted in damages for the wrongful act of the second defendant's servant.

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 para. 4. 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.

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.

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

COLE, Ag. C.J.:

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

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.

MARKE, J.:

This is an appeal from an order by Luke, Ag. J. dismissing a motion for an order that the judgment signed in this action in default of appearance on May 25th, 1965 and the execution issued thereon be set aside and that the first defendant be at liberty to defend this action.

The judgment in default dated May 25th, 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.

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 had been 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.

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

The appellant has now come to this court with these grounds of appeal which I set out:

(a) That the judgment in default of appearance obtained by the respondent on May 25th, 1965 and enforced as a final judgment was irregularly obtained in that contrary to the Supreme Court Rules the respondent neither sought nor obtained an assessment of the amount for which final judgment should be signed, the amount claimed being unliquidated damages.

(b) That the learned trial judge was wrong in law in refusing leave to the appellant to defend the action and to set aside the judgment obtained in default.

(c) That the statement of claim disclosed no cause of action against the appellant.

This third ground of appeal was not one of the grounds, if there were any grounds, on which the defaulting defendant, now the 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 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 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* v. *Rochford R.D.C.* (2) ([1917] 1 K.B. at 393; 116 L.T. at 132)—

> ". . . 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 these reasons I would dismiss the appeal.

Appeal allowed.

TAYLOR *v.* WHITE CROSS INSURANCE COMPANY LIMITED

SUPREME COURT (Cole, Ag. C.J.): January 25th, 1966
(Civil Case No. 300/62)

[1] **Insurance — property insurance — partial loss — insurers of building liable for cost of making it as good as before:** The true measure of damages in an action against insurers for the cost of reinstating a building which has been damaged but not destroyed is the cost of effecting the repairs necessary to make the building as good as it was before (page 366, lines 5–8).

The plaintiff brought an action against the defendant company claiming special and general damages.

The plaintiff insured a building with the defendant company. The roof was blown off and some damage was done to other parts of the building. A dispute having arisen as to the payment of the plaintiff's claim under the policy, the plaintiff brought this action claiming the expenses of reinstating the building as special damages. He also claimed general damages. In the present proceedings the court was concerned only with the assessment of damages.