CIV. APP.60/15

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ALIMU BARRIE - FIRST APPELLANT
28 FEMI TURNER DRIVE
GODERICH
FREETOWN

AND

SEIDYA GROUP - SECOND APPELLANT
6 MADONGO TOWN
MAIN MOTOR ROAD
FREETOWN

AND

ABDUL MALIK KOROMA - RESPONDENT
2 KALLAY DRIVE
MARJAY TOWN
GODERICH
FREETOWN

CORAM:

HON. MR. JUSTICE MONFRED MOMOH SESAY – JA
HON. MRS. JUSTICE MUSU DAMBA KAMARA - JA
HON. MR. JUSTICE JOHN BOSCO ALLIEU - JA

ADVOCATES:

Emmanuel Teddy Koroma Esq for The First & Second Appellants
Ibrahim Sorie Yillah Esq for the Respondent

JUDGMENT DELIVERED ON THE 30th DAY OF January, 2020

HON. MR. JUSTICE MONFRED MOMOH SESAY - JA

By Notice of Appeal dated the 4th November, 2015 and filed in the Registry of this Court on the 5th November, 2015, the Appellants appealed against the decision of Hon. Mr. Justice Alusine S. Sesay J (as he then was now Justice of the Supreme Court of Sierra Leone) delivered on the 7th day of July, 2015.

The grounds of appeal as appear at pages 124 – 125 of the Court Records are as follows:

i. That the Learned Judge was wrong in law in failing to appreciate the provisions set out in Order 22 Rule 11 of The High Court Rules of 2007.

ii. That the Learned Judge was also wrong in law and therefore misdirected himself in his Ruling dated the 4th November, 2015 by ignoring the arguments of Counsel for the Appellant herein which was argued in the alternative that is:

(a) The Default Judgment obtained on the 7th July, 2015 was obtained irregularly as set out on the face of the motion dated the 7th August, 2015.

(b) Secondly and in the alternative assuming without conceding that the said Default Judgment was obtained Regularly it would be set aside on terms as the Defence filed and exhibited shows triable issues which ought to be determined on its merits.

iii That the Learned Judge was wrong to have completely ignored the Defence filed on behalf of the Appellants herein on the basis that it amounts to a mere denial and misdirected himself.

PARTICULARS OF MISDIRECTION

a) "That the Defendants are not denying that they are not indebted to the Plaintiff and have paid all that which is due and owing. They have failed to show any proof of having settled the entire sum due and owing."

b) "..... the defence though arguable has not disclosed a defence on its merits and the defendant is still indebted to the Plaintiff."

iv. That from the aforesaid misdirection if the Defence is arguable then this is more the reason why an opportunity should be given to the Appellants to be heard on the strength or weakness of their case.

v. That the Judge was wrong in fact and in law that the Appellants have not shown any proof of having paid all that which is due and owing the Respondent; as a transfer to the Account of the Respondent was exhibited and letter confirming such payment of Le200,000,000.00 (Two Hundred Million Leones) and other Receipts signed by the Respondent himself acknowledging receipt of payment with an excess of US $1000 (One Thousand United States Dollars) which the Appellants never counter-claimed on.

vi. That the Judge also failed to appreciate the law of evidence, that he who asserts must prove as from all the Documents exhibited there is nothing exemplifying the fact that the Appellants are indebted to the Respondent either more or less the Principal sum as contained in the Appellants' Defence.

vii. That the Judge was also wrong in law in holding that notwithstanding the improperly published Writ of Summons on the 23rd June, 2015 that "the whole essence of publication of a Writ of Summons is to put the Defendant on Notice that an action has been instituted against the Defendant" failing to realize that the

Publication itself is pursuant to an order of the Court and based on the presumed fact that the Plaintiff is unable to serve the Defendant (s) personally, therefore the said Writ must be published in its entirety given sufficient notice to the Defendant and to enable him respond accordingly.

viii. That the Default Judgment dated the 7th day of July 2015 and the Ruling dated the 4th November, 2015 are unreasonable, unjust and could not be supported having regard to the Affidavit evidence in the lower Court.

BACKGROUND

The Respondent, Abdul Malik Koroma, was at all material times, a businessman dealing in general merchandise whilst the First Appellant, Alimu Barrie, was also a businessman and owner of the Second Appellant, Seidya Group which was a company involved in stone excavation and operated in Kono and Kabala.

In September of 2013, the First Appellant sought a loan of Seventy Thousand United States Dollars (US$70,000.00) from the Respondent to help him set up a quarry business. By an agreement between them, the said amount was granted as a loan to the First Appellant by the Respondent for the effective operations of the Second Appellant.

The loan was reportedly granted on one condition that the First Appellant would pay the sum of Ten Thousand United States Dollars (US$10,000.00) every month until the principal amount of US$70,000.00 was fully liquidated.

As at January, 2014 i.e. after a period of fifteen (15) months after the said loan agreement, the First Appellant had reportedly breached the agreement in the payment of both the principal amount and the interest.

The Respondent therefore caused to be issued a Writ of Summons dated the 13th May, 2015 claiming recovery of a total sum of US$225,000, damages for breach of contract, special damages and costs (See the Writ of Summons at pages 1-4 of the Records).

The First Appellant, on his part, admitted the loan agreement for the principal amount but disputes the claim for the interest arguing that the loan was given by the Respondent as a partner in the business for which the loan was sought. He argued that he had repaid a total of US$71,000.00 ie. US$1000.00 in excess of the principal loan initially obtained (See the Defence at pages 25 -26 of the Records).

After the issuance of the Writ, the Respondent (i.e. as Plaintiff in the Court below) sought and was granted leave to amend the Writ as it related to the address of the Second Appellant; the Respondent was also granted leave to dispense with personal service on the Appellants and do substituted service by way of publication in two consecutive issues of the Standard Times Newspaper. This was on the 11th day of June, 2015. Emmanuel T. Koroma Esq, acting as solicitor for the Appellants, filed Notice and Memorandum of Appearance both dated the 24th June, 2015 but filed in the Registry of the High Court on the 29th day of June, 2015 (See both documents at pages 17 & 18 of the Records).

On the 7th day of July, 2015, the Respondent obtained a judgment in default of defence against both Appellants. An application dated the 7th day of August, 2015 was filed on the 10th day of August in the High Court Registry on behalf of the Appellants to set aside the said judgment in default. This application was heard and on the 4th day of November, 2015, Hon. Mr. Justice Alusine S. Sesay J (as he then was now Justice of the Supreme Court of Sierra Leone) refused the application to set aside the said Judgment in Default (See p. 65 of the Records).

The Appellants filed an appeal against the said judgment in default and got a stay of execution of same on the 1st day of June, 2016 pending the hearing and determination of this said appeal.

The Notice of Appeal was then filed and whilst it was pending before this Court, the Respondent filed a Notice of Motion dated the 10th October, 2017 for the appeal to be struck out but the said Notice of Motion was struck out instead for want of prosecution.

The Court then heard the arguments on the appeal and reserved judgment on the 21s June, 2018 and whilst the Court was considering the judgment, the Respondent filed a Notice of Motion dated the 12th December, 2018 praying for the admission of new evidence i.e. a cheque in the sum of Le50,000,000 dated the 28th March, 2018 issued on behalf of the First Appellant to the Respondent and evidence/bank statement of transfer of Le50,000,000.

We heard the application and admitted not only the fresh evidence prayed for but also examined one Issa Barrie, the elder brother of the First Appellant and one who had helped his younger brother to settle the debt problem between his brother and the Respondent. We did so pursuant to Rule 27 of The Court of Appeal Rules, 1985 Public Notice No. 29 of 1985 which provides as follows:

> "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, where it thinks fit, allow or require new evidence to be adduced. Such evidence shall be either by oral examination in Court or by affidavit or by deposition taken before an examiner or commissioner as the Court may direct. A party may, by leave of the Court, allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations."
> (emphasis mine).

This was on the 18th June, 2019 after which we reserved judgment which we now deliver.

ARGUMENTS AND SUBMISSIONS BY COUNSEL

Learned Counsel for the First and Second Appellants, Emmanuel Teddy Koroma Esq in his written synopsis of Arguments dated the 13th June, 2017 made submissions which I would summarise as follows:

(i) That the Judgment in Default of defence dated the 7th July 2015 was obtained irregularly on the grounds that:

- the substituted service as ordered by the Court on the 11th June, 2015 was irregular in that the publication was defective because it only contained a Statement of Claim without the Particulars of Claim;
- the affidavit of search leading to the judgment in default has the same date as that of the judgment in default which was the 7th July, 2015.

Counsel submitted that due to the said defects or irregularities,, the Judgment in Default ought to have been set aside "ex-debito justicia that is as of right"

(ii) That even for judgments in default obtained regularly, the Court has a discretion to set them aside or vary them on terms but not to punish the defendant in default "by destroying his right to a fair and full hearing in relation to the Plaintiff's claim."

(iii) That there was no evidence to show that the Appellants were indebted to the Respondent and that the First Appellant had liquidated the loan of US$70,000 by paying him US$71,000 i.e. paid him US$1,000.00 in excess of the amount owed and due the Respondent.

Learned Counsel relied on the following authorities:

(a) Saudi Eagle Case

(b) Evans V Bartlam (1937)AC 473

(c) Order 22 Rule 11 of The High Court Rules, 2007

Learned Counsel for The Respondent, Ibrahim Sorie Yillah Esq, in his Synopsis dated the 5th June, 2018 made submissions which would be summarised as follows:

(i) That it was the right of the Plaintiff/Respondent to enter judgment in default of the Defendants/Applicants failure to file a defence long after the period fixed by the Rules.

(ii) That the irregularities/defects complained of by the Appellants including those in the publication of the writ and the same dates on the judgment in default and the affidavit of search are trivialities and therefore should be overlooked by this Court.

(iii) That setting aside default judgment regularly obtained was a discretionary relief and that the Learned Trial Judge exercised his discretion judiciously as the defence filed by the Plaintiff/Appellants in the Court below did not raise any triable issues

Learned Counsel relied on the following authorities:

(a) The "Reward" (1818);

(b) Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede (1982 – 1988) KAR page 1036;

(c) Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal (2014) e KLR CA 217/2009;

(d) Salvinder Singh v Saridner Kaur (2002) KALR 616 at page 618;

(e) Patel v EA Cargo Handling Services Ltd (1974) EA 75;

(f) National Mutual Life Association of Australia Ltd v Oasis Development Pty Ltd (1983) 2 Qd R 441;

(g) McCullough v BBC (1996) NI 580.

REVIEW OF THE LAW AND ARGUMENTS/SUBMISSIONS OF COUNSEL

I shall now proceed to review the relevant law and the arguments and submissions of Counsel and to see which way the scale swings. But before I do so, I must be clear in my mind as to what are the issues in contention which we must consider and determine. To identify the issue(s), I think I must revert my mind to the grounds of appeal which I have reproduced earlier in this judgment. In my humble opinion, there are two main issues for our consideration and determination, namely:

(i) whether the Learned Trial Judge was right in refusing to set aside the Judgment in Default of defence, as encapsulated in Grounds I,II,IV, VII & VIII; and

(ii) whether the First Appellant has fully liquidated the loan of US$70,000.00 he obtained from the Respondent as captured in Grounds III, V, VI & VIII.

On the first issue, Learned Counsel for the Appellants stoutly argued that the Judgment in Default was irregularly obtained and therefore ought to have been set aside as a matter of right. Learned Counsel, with respect, did not assist this Court with any authority for his said submission and we have not been able to find one on our own.

What are these irregularities or defects complained of?

Learned Counsel submitted that:

(i) that the Writ was not fully published in pursuance of the Order for substituted service obtained on the 11th day of June, 2015 as it was only the Statement of Claim that was published i.e. the Particulars of

Claim was omitted and that the administrative number of the case was also omitted; and

(ii) that the affidavit of search to check whether the Appellants had filed a defence is dated the 7th July, 2015 and that the Judgment in Default was granted on the said same date i.e. the 7th July, 2015.

I have checked the Records and found that the said claims are correct.

The publication as exhibited to the Affidavit in Support dated the 7th August, 2015 attached to the Notice of Motion dated the 7th August, 2015 applying for the Judgment in Default to be set aside is proof of such defect or irregularity. (See pp 20 & 21 and 27 – 33 of The Records). Also the Affidavit of Search of the High Court Registry whether a defence has been filed and the judgment in default have the same date i.e. the 7th day of July, 2015. (See pages 22 & 23 of The Records).

Could these irregularities/defects be fatal?

Learned Counsel for the Respondent, Ibrahim Sorie Yillah Esq, conceded that indeed the irregularities/defects exist but submitted that they are trivial and therefore should be disregarded by this Court. Relying on the common law principle of de minimis non curat lex as stated in the English case of The "Reward" (1818), Counsel quoted the dictum in that case that:

> "The Court is not bound to strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim De Minimis non curat lex. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked."

This de minimis rule begs the question whether the irregularities/defects complained of in this matter are mere trifles and have little or no weight on public interest and therefore should be overlooked?

To answer this question, I need to ask and answer the question (as the Learned Trial Judge asked) what is the purpose or object of service of a claim on the defendant?

Some portions of Order 10 Rule 5(3) & (4) of The High Court Rules, 2007 become relevant in answering this question. Let me say here that Order 10 deals with service of Originating Processes hence the heading "Service of Originating Process-General Provisions"

Order 10 Rule 5(3) provides that:

> "Substituted service of a document in relation to which an order is made under this rule is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served." (emphasis mine).

Order 10 Rule 5 (4) (b) provides that:

> "Without prejudice to the generality of sub rule (3), the Court may direct substituted service to be effected in any of the following ways:- ...
>
> (b) by delivery of the document to an agent of the person to be served or some other person, if there is reasonable ground to believe that the document will, through that person, come to the knowledge of the person to be served;" (emphasis mine)

Incidentally, Order 10 Rule 5 deals with substituted service, which , in my humble opinion, is permitted by the rules on the reasonable belief that the

document, through the substituted means of service (which ever form it takes including by publication, post notice, put up in the Court or some other public place, giving it to an agent, advertisement in the media within the jurisdiction of the Court) will "come to the knowledge of the person to be served" (See Order 10 Rule 5 (4)(b) (supra). (emphasis mine).

I therefore agree with the Learned Trial Judge when he held that "the whole essence of publication of a Writ of Summons is to put the Defendant on Notice that an action has been instituted against the Defendant." I would hold that the whole essence of service (personal or substituted) is to put the Defendant/Respondent on notice that an action has been instituted against him/her which would enable him/her prepare for his defence or respond to the claims against him/ her.

The next question which require my consideration is whether such defective or irregular publication (or substituted service) was sufficient to put the First Defendant/Appellant on notice that an action has been instituted against him? To answer this question, I think it would be useful to reproduce the publication as put in the Records. It is as follows:

"SIERRA LEONE NO.CC 102/15 2015 K NO

IN THE HIGH COURT OF SIERRA LEONE

(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN: ABDUL MALIK KOROMA - PLAINTIFF

2 KALLAY DRIVE

MARJAY TOWN

GODERICH

FREETOWN

AND

ALIMU BARRIE - 1ST DEFENDANT
28 FEMI TURNER DRIVE
GODERICH
FREETOWN

SEIDYA GROUP - 2ND DEFENDANT
6 MADONGO TOWN
MAIN MOTOR ROAD
FREETOWN

TAKE NOTICE that an action has been commenced against you in the High Court of Sierra Leone by ABDUL MALIK KOROMA of 2 Kallay Drive, Marjay Town, Goderich, Freetown.

IN WHICH the Plaintiff's claim is for:

1. Recovery of the sum of US$ 225,000/= (Two Hundred and Twenty Five Thousand Dollars) being an amount due and owing from the Defendants jointly and severally to the Plaintiff.
2. Damages for breach of contract.
3. Special damages.
4. Interest.
5. Any further or other order(s)
6. Cost

And that it has been ordered by the Court the 11th day of June 2015 that service on you of the Writ of Summons in the said action be effected by this advertisement. If you desire to defend the said action you must within 14 days from the date of the 2nd publication of this advertisement enter an appearance at the Master's Office High Court of Sierra Leone. In default of such appearance Judgment may be entered against you.

DATED THE 19TH DAY OF JUNE 2015

.....

MANLY-SPAIN & CO

PLAINTIFF'S SOLICITOR"

As held earlier in this judgment, the Particulars of Claim are omitted but can such omission be fatal to the service? I do not think so. Particulars of Claim give information as to how or under what circumstances the claim became due or the liabilities wee incurred which simply reinforces the claim(s). The Statement of Claim as published, in my opinion, provides sufficient information about the action, the nature or cause of action, the reliefs sought, by whom, against whom, the forum, administrative number of the action, date of the order for substituted service, when to enter appearance, the consequences of failure to enter appearance, the date when the notice was prepared and the identity of the Solicitors for the Plaintiff. I think and hold that these information are not only reasonable but sufficient to put the Defendant on notice that an action has been instituted against them.

Besides, the Defendants (particularly the First Defendant) caused appearance to be entered on their behalf by their solicitor, Emmanuel Teddy Koroma Esq. The Memorandum and Notice of Appearance were duly filed (see pages 17 & 18 of The Records)

This action of entering appearance by the Defendants undermines Learned Counsel's arguments that the irregularity/defect in the publication was fatal to the service and therefore the Learned Trial Judge ought to have set aside the Judgment in Default obtained pursuant to such irregular/defective publication/service. In my opinion, it served as a waiver of any right that may have accrued the Defendants.

Order 10 Rule 3(3) of The High Court Rules, 2007 provides on this issue as follows:

> "Subject to rule 15 of Order 12, where a writ is not duly served on a defendant but he enters appearance to the writ, the writ shall be deemed, unless the contrary is shown, to have been served on the date on which he entered appearance" (emphasis mine)

It is therefore my considered opinion that the complaint that the publication or service was irregular/defective was so trivial that it did not vitiate from the purpose of service and therefore not fatal to the proceedings in the Court below. It can therefore be properly overlooked as the Learned Trial Judge did. I so hold.

The other irregularity/ defect complained of is that both the Affidavit of Search (for defence) and the order for the judgment carry the same date which indicates that both activities occurred on the same date which was the 7th July, 2015.

As found and held earlier in this judgment, Learned Counsel for the Appellants has not assisted this Court with any authority on this issue.

The Records disclose the following:

- that the Writ was issued on the 13th day of May, 2015
- that service (by substituted service) was effected (or completed) on the 23rd day of June, 2015 (i.e. the date of the second publication in the Standard Times Newspaper – see page 21 of The Records);
- that appearance i.e. both Memorandum and Notice of Appearance dated the 24th day of June, 2015 but were filed on the 29th June, 2015 (see pages 17 & 18 of The Records);
- that the Defence was filed on the 31st July, 2015 (see page 25 of the Records)

- search of the High Court Registry to find out whether a defence has been filed was done on the 7th July, 2015 (see page 22 of the Records);
- that the Affidavit of Search was sworn to and filed on the same said 7th July, 2015, (see page 22 of the Records).
- that judgment in default of defence was granted on the said same date as the search which was on the 7th July, 2015.

Order 21 Rule 2(1) of The High Court Rules, 2007 comes into play here. It provides that:

> "Subject to sub rule(2), a defendant who appears in an action shall, unless the Court gives leave to the contrary, serve a defence on every party to the action who may be affected thereby before the expiration of 10 days after the time limited for appearance or after the statement of claim is served on him, whichever is the later."

The time limited for appearance is fourteen (14) days after service of the writ. Order 12 Rule (11)(a) provides on this issue as follows:

"In this Order, references to the time limited for appearance are references:-

(a) In case of a writ served in Sierra Leone, to 14 days after the service of the writ or where that time has been extended by the Court, within that time as extended" (emphasis mine).

It means therefore that a defendant has fourteen (14) days within which to enter appearance after service of the writ on him and ten(10)days to serve a defence after the expiration of the fourteen (14) days within which to enter appearance. The defendant therefore has a total of twenty-four (24) days

within which to enter an appearance and serve a defence after the service of the writ on him/her.

In this matter, service was effected on the defendants on the 23rd June, 2015 and they therefore had fourteen (14) days to enter appearance. That fourteen (14) days would have expired on the 7th July, 2015. But the Defendants entered appearance on the 29th June, 2015 i.e. eight (8) days before the deadline to do so. They were also entitled to ten (10) days after the 7th July, 2015 to file and serve the defence to the action. That ten (10) days would have expired on the 17th July, 2015. But they filed the Defence on the 31st July, 2015 i.e. fourteen (14) after the expiration of the deadline to do so.

It is therefore my considered opinion that both the search and the Judgment in Default were premature i.e. they were done and/or obtained before the effluction of the time granted for filing and serving the defence.

I therefore find and hold that the Judgment in Default dated the 7th July, 2015 was irregularly obtained. I note however that this issue was poorly argued by Learned Counsel for the Appellants.

But is this irregularity/defect fatal? I do not think so. This is because as disclosed by the records, the Appellants filed a defence to the action on the 31st July, 2015 (see page 25 of The Records) i.e. fourteen (14) days after the expiration of the time due for that step which was the 17th July, 2015. Incidentally the Learned Counsel for the Appellants, Emmanuel Teddy Koroma Esq wrote on page 2 of The "Synopsis of Arguments" dated the 13th June, 2017 that he filed the defence on the 10th July, 2015. He wrote that "and on the 10th July, 2015 I filed and lodged a Defence to the action." Even the endorsement on the document (i.e the Defence) stated the same fact that, "Delivered and filed on the 10th July, 2015 by EMMANUEL TEDDY KOROMA OF 'DIGITAL CHAMBERS' Regent Road, Freetown."

However, the date endorsed on the face of the said document by the High Court Registry Staff after it was filed is the 31st July, 2015. We are guided by the date endorsed by the Registry Staff because it shows the correct date when the document was actually filed.

Counsel could have drafted/prepared the document on the 10th July 2015 but actually filed it on the 31st July, 2015. This shows that even if the Counsel for the Respondent had searched the High Court Registry after the expiration of the time due to file and serve the defence which I have held was the 17th July, 2015, there would still not have been a defence and then he could have properly applied for a judgment in default.

This means therefore that the Appellants were also in default i.e. their defence was filed out of time. Their said conduct and their arguments now that the Judgment in Default was irregularly obtained reminds me of the saying that when you seek justice, you must not come with dirty hands. The hands of the Appellants are equally dirty. In view of this, the said irregularity cannot be fatal. I so hold.

The next question to be considered is whether the Learned Trial Judge was correct in refusing the application to set aside the said Judgment in Default. To answer this question properly, I would need to avert my mind to the law on setting aside a judgment in default. Both Counsel correctly referred to Order 22 Rule 2(1) of The High Court Rules, 2007, which I find useful to reproduce as follows:

> "Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the

writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any."

Whilst Learned Counsel for the Appellants stoutly argued that because the Judgment in Default was irregularly obtained and therefore it ought to have been set aside as of right, Learned Counsel for the Respondent argued that setting aside a Judgment in Default was a discretionary relief and that the Learned Trial Judge rightly exercised that discretion when he refused the application.

All the authorities relied on by both Counsel show that setting aside a Judgment in Default is a discretionary relief. For example, one of the cases relied on by Counsel for the Appellants is Evans v Bartlam (1937) 2 AER 646 a House of Lords of England decision. In this case, setting aside a judgment was not only held to be a discretionary (not as of right) relief but also that "unless it was clear that the judge's discretion was wrongly exercised, his order should be affirmed." Learned Counsel for the Appellants' main contention is that the Judgment in Default was irregularly obtained but I have found and held that those irregularities are not fatal to the Learned Trial Judges exercise of his discretion. That Judgment in Default did not result to any injustice and therefore I do not think we can properly interfere with the Learned Trial Judge's exercise of his discretion by refusing to set it aside.

In view of the premises as relates to the first issue identified earlier in this judgment, I hold the considered view that Grounds I,II, IV,VII & VIII would therefore fail.

The second issue as identified earlier in this judgment is whether the Appellants have fully liquidated the loan of US$70,000.00 they obtained from the Respondent as captured in Grounds III, V,VI & VIII.

Learned Counsel for the Appellants strenuously argued that the Appellants have not only liquidated the said money but that they did so in excess by US$1,000.00.

This sounds strange to my ears considering the fact that the basis of the loan in the first place was that the First Appellant did not have sufficient money to fund the operations of his business for which the Second Appellant came into existence. All of a sudden, the First Appellant has ammassed so much money that he can conveniently pay the outstanding loan and unconsciously (or consciously) add US$1,000.00. I do not find evidence in the Records to explain the basis of the payment of the excess money.

What I can reasonably gather from these arguments and the evidence put before the Learned Trial Judge is that the Appellants did not deny that they owe the Respondent loan and that they did not prove their averment that they have liquidated the said loan in full and in excess by US$1,000.00.

I therefore agree with the Learned Trial Judge's finding of fact when he said in his Ruling on the 4th November 2015 as set out on page 113 – 114 of the Records that:

> "The defendants have argued in the alternative that there is a good triable defence on its merits. I have carefully perused the averments in the affidavit in support more especially Paragraphs 8 through paragraph 15. The plaintiff has stated in short that the Defendants are indebted to him to the tune of &70,000/00 US Dollars as per an agreement . The Plaintiff has been bearing the brunt of paying the sum of $18,600 every month as interest to the bank. The defence filed though out of time is mere denial .... They, have failed to show any proof having settled the entire sum due and owing ... The defence though arguable does not disclose a defence on its merit. The defendant is still undebted to the plaintiff."

I must say here and now that as a matter of law, a case (be it for the defence or plaintiff) can be arguable but not necessarily meritorious. To be meritorious is to be true and correct as to the issue(s) in dispute. That is to say, the evidence must support the claim (or counter-claim) to the required standard of proof.

As held earlier in this judgment, in the course of hearing this appeal, we admitted new evidence pursuant to Rule 27 of The Court of Appeal Rules, 1985 and one Mr. Issa Barrie, the elder brother of the First Appellant told this Court under oath that himself and the family engaged the Respondent to settle the matter as the Respondent, according to him, was a close family member so as to salvage his (i.e. the Respondent's) wife's property which he said he had pledged to repay the loan he had taken to assist the First Appellant. This is what the witness said:

> "I know Abdul Malik Koroma commonly called V.I.P. whilst growing up. I live in the USA and when I came in 2016, he VIP told me he had some transaction with my brother. He complained that Alimu owed him US$70,000.00 and I contacted my elder brother and we asked Alimu and he said he indeed owed him but that he had already cleared that liability. But by then the matter was in Court. VIP was a close family member and he continued to nag at our Dad and it was like a scandal. So me and M.B. agreed to talk to VIP as he had pledged his wife's property.
>
> We however decided to talk to him as a close family member. We asked what to do to salvage his property and we found that VIP was going through tough time and he came to me to borrow some money.

My brother MB advised that we do something. We offered to pay Le300,000,000 to Le400,000,000 but VIP did not accept. Alimu was always saying we should not talk to him. We later negotiated and agreed on Le525,000,000.00 but to be paid in instalments. I paid him at my house the first instalment of Le125,000,000.00. Subsequently, I gave him in instalments of Le50,000,000.00 two or three times by cheque. There was a balance of Le250,000,000 to be paid and we have still not paid I as I speak.

The purpose of the payment was to clear his property at HFS .... The cheques I issued were the cheques of my company i.e Hadissa SL Ltd. Exhibit AMK 1 dated the 28th March, 2018 in the sum of Le50,000,000 was issued to Abdul Malik Koroma by me and I can identify my signature on the cheque."

This witness confirmed to the Court that the First Appellant did not only owe the Respondent but that he has not fully liquidated the said loan and that the family intervened to assist him to fully liquidate the said loan which they have still not done.

The witness further clarified the source and purpose of Exhibit AMK1 which was a subject of an application by the Respondent before the Court to be admitted as new evidence. He further confirmed to the Court that the First Appellant proved ungrateful to the Respondent who had once come to his rescue to assist him with a loan of US$70,000.00. I also note that this evidence was not controverted.

I therefore have no doubt in my mind that the First Appellant still owes the Respondent and that all he has been doing as to avoid paying back a legitimate loan he had secured from a good Samaritan family friend in the person of the Respondent. I cannot therefore agree more with the Learned Trial Judge when he

said in his Ruling refusing to set aside the Judgment in Default that "The defence though arguable does not disclose a defence on is merits. The defendant is still indebted to the plaintiff."

In view of the above Grounds III, V, VI & VIII also fail.

Consequently, I dismiss the appeal on all eight grounds.

I order that the First Appellant, Alimu Barrie, pays the Respondent, Abdul Malik Koroma, the balance sum of le250,000,000 with immediate effect.

I also order costs of the proceedings including this appeal assessed as Le75,000,000.00

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Hon. Mr. Justice Monfred Momoh Sesay

Justice of the Court of Appeal.

I AGREE.....

Hon. Mrs. Justice Musu Damba Kamara

Justice of the Court of Appeal

I AGREE.....

Hon. Mr. Justice John Bosco Allieu

Justice of the Court of Appeal