I do not agree that he was bound to have stated the special circumstances which made it necessary for him to make the order. He had all the facts before him and he chose to exercise his discretion in the manner he did. I find that such discretion was in the circumstances not exercised wantonly or capriciously.

Counsel further submitted that in a charge of dangerous driving, evidence of speed should have been led. He said that the magistrate relied on the facts as stated by the prosecuting officer who himself was not at the scene and did not witness the accident. This, to my mind, is a novel proposition. The record shows that the charges were read to the accused and that he pleaded guilty to each. After statement of the facts constituting the offences, the accused stated that he had driven slowly and asked to be shown leniency. He made no attempt to withdraw his pleas after hearing the facts so that the case could be tried on its merits. The magistrate elected to accept the prosecuting officer's statement, who obviously spoke from his instructions, and, therefore, there was no necessity for him to have taken evidence on speed or for that matter on any other matter.

I find there is no substance in this appeal and I accordingly dismiss it.

Freetown
May 1,
1962
Bankole Jones
Ag.C.J.

[SUPREME COURT]

BERTHAN MACAULAY . . . . . *Plaintiff/Respondent*

v.

JIM DIAMANTOPOULOS . . . . . *Defendant/Applicant*

[C.C. 2/62]

Practice and Procedure—Judgment by default—Motion to set aside judgment—Discretion of judge.

Plaintiff's writ of summons against defendant was issued on December 10, 1961, and was served on defendant on December 21, 1961. On January 22, plaintiff wrote defendant that he would sign judgment in seven days, and on February 6, 1962, the plaintiff signed judgment in default of appearance. On February 19, he filed a notice of motion to assess damages. On March 1, defendant made a motion for an order "setting aside the writ and service thereof and all subsequent proceedings . . . for grave irregularities on the grounds that the service was irregular and that the judgment was irregularly signed." This motion was denied on the ground that defendant had delayed making it for an unreasonable length of time after he had knowledge of the alleged irregularities. Defendant then moved that the judgment be set aside on the ground that it had not been obtained on the merits and that defendant's supporting affidavit disclosed a substantial ground of defence.

Held, granting the motion, that, even though "defendant treated the court with contempt by not appearing to the writ even when the plaintiff wrote to tell him that he would sign judgment within a certain time, yet . . . this is not necessarily good ground for refusing to set aside the judgment if there is disclosed a defence on the merits and the circumstances warrant it."

Cases referred to: *Leggo* v. *Young and Another* (1856) 25 L.J.C.P. 176, 139 E.R. 1190; *Ilderton* v. *Burt* (1848) 136 E.R. 1317; *Macfoy* v. *U.A.C.* [1961] 3 All E.R. 1169; *Evans* v. *Bartlam* [1937] 2 All E.R. 646.

Rowland E. A. Harding for the defendant/applicant.
Berthan Macaulay pro se.

BANKOLE JONES AG.C.J. This is a motion by the defendant/applicant for an order that the judgment signed on February 6, 1962, and all subsequent proceedings thereon be set aside and that the appearance already entered by the defendant stand, and that the defendant be at liberty to defend the action.

The writ of summons in this action was issued on December 18, 1961. No appearance having been entered judgment in default was signed on February 6, 1962. However, before judgment was so signed the plaintiff wrote a letter dated January 22, 1962, to the defendant which will be found exhibited as "BM2" attached to the plaintiff's affidavit in opposition dated April 19, 1962. This letter ended with the following words: "Unless we hear from you within the next seven days we shall proceed to sign judgment against you in default of appearance."

As no reply was received to this letter the plaintiff accordingly signed judgment as has been said on February 6, 1962. On February 19, 1962, the plaintiff filed a motion for an order for the assessment of damages. This motion was fixed for hearing on February 28, but was later adjourned to March 9, 1962. On March 1, 1962, the defendant, by his solicitor, filed a notice of appointment and entered an appearance and also filed a motion for an order to set aside the writ and service thereof and all subsequent proceedings including the judgment for grave irregularities. This motion was dismissed with costs on April 9, 1962. Also on the same April 9, 1962, the motion to assess damages was allowed with costs and an order was made that the Master and Registrar do assess damages.

The plaintiff contends that the present motion is misconceived in that it is substantially the same as the previous motion of March 1, which also prayed, among other things, for an order to set aside the same judgment. In the affidavit supporting that motion, the defendant did not suggest that he had any defence on the merits nor was any reason given why he failed to enter appearance within time. The plaintiff says that with full knowledge of the facts and with all the materials at his disposition, the defendant abstained from stating them in his affidavit and he now seeks to vex the plaintiff with a second application. He submitted that the court cannot go into the matter again and that, therefore, the motion should be dismissed. He cited the cases of *Leggo* v. *Young and another* (1856) 25 L.J.C.P. 176; 139 E.R. 1190 and *Ilderton* v. *Burt* (1848) 136 E.R. 1317 as well as the case of *Macfoy* v. *U.A.C.* [1961] 3 All E.R. 1169.

Counsel for the defendant drew a distinction between his first motion of March 1, 1962, and the present one. Whereas the former, he says, prayed for an order to set aside the writ and service thereof and all subsequent proceedings for *irregularity*, the latter now prays the court to set aside the judgment because it was not obtained on the merits and also because there is disclosed in his supporting affidavit a substantial ground of defence.

In my opinion, I think the present motion is different from the first and is maintainable in this court. The first motion was dismissed because, among other things, it was not made within a reasonable time. See Order 50, r. 2. The motion now before the court presumes that the judgment was regularly obtained and the application is to set it aside. The law is that, apart from express rules, the court has a discretion, untrammelled in terms, in setting aside

a judgment regularly obtained, although the application is made out of time, if circumstances require it to be so set aside. The first two cases cited by Mr. Berthan Macaulay, with respect, do not, in my view, go any distance whatever in assisting the court. In the recent case of *Macfoy* v. *United Africa Co. Ltd.*, also cited by him, the question there, as Lord Denning put it, was what is the effect of delivering a statement of claim in the long vacation, was it to be regarded as a nullity or an irregularity. The court held, among other things, that it was within the discretion of the Court of Appeal after considering all the circumstances to have refused to set aside the judgment obtained in default of defence.

I find in the case of *Evans* v. *Bartlam* [1937] 2 All E.R. 646 (H.L.), cited by Mr. Harding, a helpful passage. I quote from Lord Atkin at p. 650:

> "It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

Whilst it is true that the defendant treated the court with contempt by not appearing to the writ even when the plaintiff wrote to tell him that he would sign judgment within a certain time, yet, I opine, this is not necessarily a good ground for refusing to set aside the judgment, if there is disclosed a defence on the merits and the circumstances warrant it. It is rather a ground for imposing terms.

I have come to the conclusion that the defendant/applicant's affidavit shows a substantial ground of defence and taken together with the affidavit of the plaintiff/respondent there is clearly a triable issue. I will, therefore, grant the order sought on the motion on terms, namely, that the defendant/applicant pay the costs of the motion to assess damages as well as the costs of this application.

Freetown
May 7,
1962
Bankole Jones
Ag.C.J.

[SUPREME COURT]

ELIAS MUSA ZACHARIAH . . . . . *Appellant*

v.

G. N. JOHNSON . . . . . *Respondent*

[R.A.C. 2/62]

Rent assessment—Appeal from decision of Rent Assessment Committee—Whether Committee obligated to obtain legal assistance in arriving at decision—Whether evidence to support Committee's decision—"After having taken into account the