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49/1961

IN THE PRIVY COUNCIL

No.67 of 1960

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N BENJAMIN LEONARD MacFOY
.. .. (Defendant)
Appellant

- and -

UNITED AFRICA COMPANY LIMITED
.. .. (Plaintiff)
Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by special leave from a Judgment of the Western African Court of Appeal at Freetown (Hurley Ag. J.A. Ames Ag. J.A., and Watkin-Williams J.) delivered on the 5th June, 1959, affirming a judgment of the Supreme Court of Sierra Leone (Bairamian C.J. in chambers) dated the 9th January 1959 whereby it was ordered that an application by the Appellant to set aside a judgment of the Supreme Court of Sierra Leone whereby in default of any defence in this action it was adjudged that the Respondent should recover against the Appellant £5,690.15. 9 and damages to be assessed or to stay all further execution thereof be dismissed and the Appellant pay to the Respondent the costs of the application to be taxed.

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2. The main questions which arise for consideration in this Appeal are :-

(1) Whether a Defendant against whom a judgment has been entered in default of Defence and who has

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applied to set aside the judgment on the basis that it was regularly obtained, can, on the hearing of an Appeal from the refusal of such an application and after execution has been levied, argue that the judgment was irregularly obtained on account of the Statement of Claim having been delivered during the long vacation.

(2) Whether there is any rule of law which prevents a statement of claim being delivered duringthe long vacation in Sierra Leone.

(3) Whether Her Majesty in Council should reverse an order made by the Chief Justice and upheld by the West African Court of Appeal acting within the exercise of their discretion.

3. The action was brought by the Respondent as Plaintiffs on the 16th August 1958 in the Supreme Court of Sierra Leone against the Appellant as Defendant for £5,690.15. 9 for goods supplied and damages. The Appellant entered an appearance on the 2nd September, 1958 and on the 5th September 1958 (which was agreed to be within the time limited for

pp.2.3 delivering a Statement of Claim after appearance) the Respondent delivered and filed a Statement of Claim. The Appellant failed to deliver any Defence within the period of 10 days provided by the Rules and accordingly on the 29th September 1958 the

p.4 Respondent obtained judgment against the Appellant

in default of Defence for £5,690.15. 9.and damages to be assessed. The Appellant moved on the 17th November, 1958 to set aside the judgment, and the motion was dismissed on the 21st November 1958 (Jones Ag.J.) without prejudice to a fresh motion within 8 days. By notice of motion dated the 28th November, 1958 the Appellant applied to set aside the judgment and all subsequent proceedings thereon. On the 22nd December 1958 the Appellant's application for a stay of execution was dismissed (Marks J.). On the 9th January 1959 the Appellant's further applications, to set aside the judgment and for a stay of execution, were dismissed with costs (Bairamian C.J.). Execution was levied and the property of the Appellant taken in execution was sold to a bona fide purchaser. On the 14th March 1959 the Application gave Notice of Appeal against the judgment of the Chief Justice and such appeal was dismissed by the West African Court of Appeal on the 5th June, 1959.

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4. The evidence filed on affidavits on the 27th November, 1958 and 5th January 1959 by the Appellant was to the following effect :-

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p.p.10-11

(1) He had not been allowed to examine the ledger kept by the Respondent showing the monthly state of his accounts with it.

(2) His previous solicitors, according to his information, had been in the Provinces for a consid-

erable period of the time between filing and delivering of the statement of claim and the signing of judgment in default of defence.

(3) He had in his possession the Respondent's statements of accounts numbered 2452 and 1619. The debit balance shown in No. 2452 at the 31st March 1958 was £720. 7.10. The debit balance brought forward at 25th April 1958 in No. 1619 was £6,703.19.9 The Respondent had not supplied to the Appellant between those two dates supplies of oils on credit to the value of £5,383.16.11. the difference between the debit balance shown at the two dates.

(4) He had not received the statement of account alleged in the Statement of Claim to have been handed to him.

(5) He had been asked in March 1958 by the Respondent to return his Statements of Account and did so. The balance showing on the last statement was £650., and he had subsequently paid £400 to the Respondents.

5. The evidence filed on affidavit on behalf of the Respondents was to the following effect :-

(1) That the Statements No. 2652 and 1619 to the Appellant's knowledge did not contain all the relevant credits and debits.

(2) That a correct statement of the account was handed to the Appellant dated the 15th April,

1958 and was handed to him in April 1958 and that he was asked by letter dated the 8th May, 1958, to which he did not reply, to settle the said account. p.p.14-15

(3) That the said account was a copy of a ledger compiled from copy receipts of which the Appellant retains the originals and copy delivery notes signed by the Appellant and his agents.

(4) That the previous solicitors for the Appellant were not appointed until 20 days after the date of signing judgment.

6. Before the Chief Justice the Appellant did not dispute that the judgment obtained had been a regular one but contended that the matters raised in evidence showed a triable issue on the merits and that the Court ought therefore at its discretion to set aside the judgment in default.

7. Before the Chief Justice the Respondent contended:-

(1) That the Appellant had not given any satisfactory explanation of why he had not delivered a Defence but had allowed judgment to go against him.

(2) That the matters raised by the Appellant in evidence did not disclose a bona fide defence on the merits.

(3) That the only proper inference from the evidence was that the appellant knew perfectly well that he had no defence.

8. The Chief Justice on the 9th January 1959 p.17

dismissed the Appellant's application to set the judgment aside and for a stay of execution. He did not give any written reason for his judgment as he was not asked by the Appellant's solicitors so to do.

9. The Appellant appealed to the West African Court
pp.18-19. of Appeal. In his Notice of Appeal dated the 14th March 1959 the Appellant did not challenge the regularity of the default judgment but set out his grounds of appeal as follows:-

That the refusal of the learned Chief Justice to set aside a judgment in default in this matter is unreasonable having regard to the fact that the Defendant disclosed a substantial defence upon his application to the Supreme Court dated 28th November,
p.p.6.7. 1958 to set aside the judgment by default.

10. On the hearing of the Appeal (Hurley Ag. J.A., Ames Ag. J.A. and Watkin-Williams J.) on the 1st June 1959 the Appellant sought and obtained leave to amend the said notice of appeal to add an additional ground of appeal so as to allege for the first time that the default judgment had been irregularly obtained upon the ground that the Statement of Claim had been wrongly delivered during the long vacation.

11. The Appellant accordingly repeated before the Court of Appeal his contentions made before the Chief Justice and further contended that the delivery and filing of the Statement of Claim on the 5th September

1953 was contrary to the rules of procedure and that the judgment consequent thereon was accordingly irregular. It was contended on his behalf that, although there was no specific provision in the Rules of the Supreme Court of Sierra Leone expressly providing that pleadings shall not be delivered in the long vacation, the effect of Order 52 Rule 3 of such Rules was to bring about that result. Order 52, Rule 3 as amended provides that "where no other provision is made by these rules, the procedure, practise and forms in force in the High Court of Justice in England on the 1st day of January 1957 so far as they can be conveniently applied shall be in force in the Supreme Court". The Appellant contended that the effect of this rule was to incorporate as part of the procedure of the Supreme Court of Sierre Leone the provisions of Order 64 Rule 4 of the Rules of the Supreme Court in England.

12. The Court of Appeal did not call upon the Respondent to argue upon the new ground of appeal and did not express any view upon the Appellant's contention that the provisions of Order 64 Rule 4 of the Rules of the Supreme Court in England formed part of the law of Sierra Leone. They held, however, that it was not now open to the Appellant to challenge the validity of the judgment since he had hitherto treated the judgment as a valid and subsisting

judgment and had made applications to the Court upon that basis and that accordingly it was too late for him now to take the point since the Respondent had already executed upon the judgment.

13. With regard to the original ground of appeal the Respondent repeated its submissions made before the Chief Justice. With regard to such grounds the Court of Appeal held that the defence put up was "extremely nebulous"; that the Appellant had made no response to a demand for over £5,000; that he had allowed judgment to go by default and it was only when execution was to be levied that he took steps to have the judgment set aside. The Court of Appeal accordingly expressed the view that in these circumstances, much doubt was thrown on the validity of the defence raised. The Court's judgment concluded with the words "We cannot say that the learned Chief
p.31 Justice exercised his discretion wrongly. Indeed we do not think that he could reasonably have decided the matter in favour of the Defendant".

14. It is humbly submitted on behalf of the Respondent that the judgment of the West African Court of Appeal was right and should be upheld and that this Appeal should be dismissed for the following

Reasons

1. Because in all the circumstances it is not open to the Appellant to contend that the judgment was

irregularly obtained.

2. Because the said Judgment was a regular judgment, the English rules providing for pleadings not to be delivered during the Long Vacation in England not being part of the law of Sierra Leone.

3. Because the Appellant has shown no reason for failing to deliver or file a defence in due time.

4. Because the Appellant has shown no defence to the action.

10 5. Because the learned Chief Justice and the Court of Appeal exercised their discretion correctly and based such exercise of discretion upon correct principles.

6. Because the judgment of the West African Court of Appeal was correct and should be affirmed.

MARK LITTMAN.

No. 67 of 1960

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BETWEEN :

B.L. MacFOY (Defendant)
Appellant

- and -

UNITED AFRICA COMPANY LIMITED (Plaintiff)
Respondent

CASE FOR THE RESPONDENT

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