Privy Council Appeal No. 67 *of* 1960

Benjamin Leonard MacFoy – – – – – – *Appellant*

v.

United Africa Company Limited – – – – – – *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1961

Present at the Hearing:
LORD DENNING.
LORD DEVLIN.
MR. L. M. D. DE SILVA.
[*Delivered by* LORD DENNING]

The question in this case is what is the effect of delivering a statement of claim in the long vacation?

In Sierra Leone the long vacation runs from 15th July to 15th September. On 16th August, 1958, during the long vacation, the United Africa Company Limited issued a writ in the Supreme Court of Sierra Leone against B. L. MacFoy. It was indorsed with a claim for £5,690 15s. 9d. for goods supplied. It was duly served, and on 2nd September, 1958, the defendant entered an appearance. On 5th September, 1958, still during the long vacation, the plaintiffs delivered and filed a statement of claim in which they alleged that the defendant was indebted to them in the sum of £5,690 15s. 9d. for oil products supplied to him, which he had sold to the public and had not paid for. The long vacation ended on 15th September, 1958. More than ten days elapsed thereafter and no defence was delivered by the defendant. On 29th September, 1958, the plaintiffs signed judgment against the defendant in default of defence. The judgment ran as follows:—

> "The Defendant not having delivered any defence herein it is this day adjudged that the Plaintiffs recover against the said Defendant £5,690 15s. 9d. and damages to be assessed."

In November 1958 the defendant applied to set aside the judgment. He also applied for a stay of execution. These applications were heard by Bairamian C. J. on 9th January, 1959. The defendant did not suggest that the judgment was a nullity and void. He treated it as a regular judgment but sought to set it aside because he said he had a good defence on the merits as to all but £250. He swore an affidavit setting out the reasons why he was too late to file a defence. But the Chief Justice dismissed his applications. Execution was levied and his goods sold.

On 14th March, 1959, the defendant gave notice of appeal to the West African Court of Appeal. The appeal was heard on 1st June, 1959, by Hurley and Ames, Acting Justices of Appeal, and Watkin-Williams J. On the hearing of the appeal the defendant for the first time took the point about the delivery of the statement of claim in the long vacation. He said that it was a nullity and that all subsequent proceedings were void. On 5th June, 1959, his appeal was dismissed. He now appeals, by special leave, to Her Majesty in Council.

There is no question that all the earlier steps, prior to the statement of claim, were properly taken during the long vacation. The writ was duly issued on 16th August, 1958. It was duly served. On 2nd September, 1958, the defendant duly entered an appearance. But what then was to happen about pleadings? The Supreme Court Rules provide by Order XVI Rule 1 that " Within ten days after appearance, the plaintiff shall deliver to the defendant a statement of his claim . . . and shall forthwith file a copy thereof with the court "; and by Order XVI Rule 2 that " The defendant shall within ten days of the delivery of the statement of claim deliver to the plaintiff his defence . . . and forthwith file a copy thereof with the court ". In case of default of pleading the Supreme Court Rules provide by Order XXIII Rule 1 that if the plaintiff does not deliver a statement of claim " within the time allowed for that purpose " the defendant may apply to dismiss the action for want of prosecution: and by Order XXIII Rule 2 that " If the plaintiff's claim be only for a debt or liquidated demand and the defendant does not, within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs ".

Such are the times set by the Rules for pleadings, but do those times run during the long vacation? There is no express provision in the Rules of the Supreme Court of Sierra Leone as to what can be done in vacation. Order XLIV Rule 1 simply says that " The vacations to be observed in the Supreme Court shall be three in every year, viz. the long vacation, the Christmas vacation, and the Easter vacation. The long vacation shall commence on the 15th July and terminate on the 15th September; the Christmas vacation shall commence on 23rd December and terminate on the 4th January; and the Easter vacation shall commence on the Wednesday before Easter and terminate on the Saturday after Easter ". But there is no provision as to what can or can not be done in vacation.

It was suggested to their Lordships that, as nothing was said, the times for pleading ran during the vacation: but their Lordships cannot accept this view. Their Lordships think that the position is covered by Order 52 Rule 3 which says that: " Where no other provision is made by these rules, the procedure, practice 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." Their Lordships think this Rule brings into operation in Sierra Leone the procedure and practice of the High Court in England as to pleadings during the long vacation. This is to be found in Order 64 Rules 4 and 5 of the Rules of the Supreme Court.

Order 64 Rule 4 sets out some special causes in which pleadings may be amended, delivered or filed during the last eleven days of the long vacation and then says " But pleadings shall not be amended, delivered or filed during any other part of such vacation, unless by direction of the Court or a Judge."

Order 64 Rule 5 says that " Save as in the last preceding Rule mentioned, the time of the long vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, delivering or filing any pleading unless otherwise directed by the Court or a Judge."

Applying Order 64 Rule 5 to the present case it is quite plain that, if the statement of claim was validly delivered and filed on 5th September, 1958, the time for defence would not start to run until the end of the long vacation, namely, the 15th September, 1958. The defendant would then have ten days to deliver his defence, that is, he would have until 25th September, 1958. He did not deliver it within that time and the plaintiffs were therefore entitled to bring judgment as they did on 29th September, 1958.

So the whole question is whether the statement of claim was validly delivered and filed on 5th September, 1958. There is no doubt that it was a breach of the Rules for it to be delivered in the long vacation: for it is quite well settled in England, either by the terms of Order 64 Rule 4 or by the practice of the Court (see the note in the Annual Practice to Order XX Rule 1) that in such a case as this pleadings are not to be delivered or filed during any part of the long vacation except by direction of the Court or a Judge.

The Plaintiffs did not comply with this Rule. They delivered the statement of claim in the long vacation and filed it without any direction of the Court or a Judge.

What is the effect of this non-compliance? The framers of the Rules inserted special provisions to deal with non-compliance. Order 50 Rules 1 to 4 of the Rules of the Supreme Court of Sierra Leone is in identical terms with Order 70 Rules 1 to 4 of the Rules of the Supreme Court of England. Rule 1 says that: " Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

This Rule would appear at first sight to give the Court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the Court without going under the Rule, see *Anlaby* v. *Praetorius* (1888) 20 Q.B.D.764, *Craig* v. *Kanssen* [1943] K.B.256.

The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

No Court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that *no* statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In this case, the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiffs signed judgment in default of defence, that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the Court whether it should be set aside or not.

Once this stage is reached, it becomes plain that there is no ground for interfering with a decision of the West African Court of Appeal. As they pointed out " The defendant knew when the statement of claim was delivered to him, and he knew it was then vacation. He made no application in the Court below to set aside the statement of claim as having been delivered irregularly; he did not raise the point in any way until he appeared in this Court to argue the appeal, over eight months after the statement of claim had been delivered. Instead of applying to have the statement of claim set aside, he allowed judgment to go against him by default and then moved to have the

judgment set aside. In that application, he proceeded on the basis that the judgment was a regular and subsisting one. In support of the application, he made an Affidavit with the object of showing that he had a defence on the merits, and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by Counsel, and the application was argued on the merits of the defence." In the light of the history, it is well within the discretion of the Court of Appeal to refuse to set aside the judgment.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

(84146) Wt. 8233 100 12/61 Hw.

In the Privy Council

BENJAMIN LEONARD MACFOY

v.

UNITED AFRICA COMPANY LTD.

DELIVERED BY

LORD DENNING

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