
O N A P P E A L
FROM THE COURT OF APPEAL FOR SIERRA LEONE

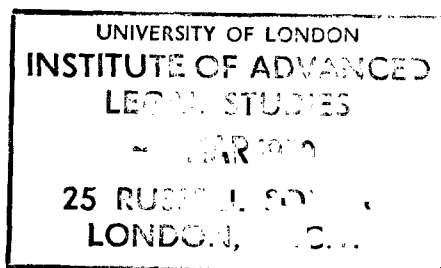
B E T W E E N :-

MUSTAPHA CONTEH (Plaintiff) Appellant

- and -

A. KABIA (First Defendant) Respondent

R E C O R D O F P R O C E E D I N G S



T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.

CARTWRIGHT, CUNNINGHAM,
Eldon Street House,
Eldon Street,
London, E.C.2.

Solicitors for the Appellant.

Solicitors for the Respondent.

(1)

IN THE PRIVY COUNCIL

No. 22 of 1966

O N A P P E A L
FROM THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH (Plaintiff) Appellant

- and -

A. KABIA (First Defendant) Respondent

R E C O R D O F P R O C E E D I N G S
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No. 1

STATEMENT OF CLAIM

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT COMPANY LTD.

Defendant

10

STATEMENT OF CLAIM

In the Supreme
Court of Sierra
Leone

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.

No. 1
Statement of
Claim.
10th February
1965.

20

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

30

3. On the 22nd March, 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

In the Supreme Court of Sierra Leone

No. 1
Statement of Claim.
10th February 1965.

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

- (Contd.)
1. The driver of the second defendant's vehicle did not exercise care. 10
 2. He did not keep a look out to see that the defendant's lorry was at a safe distance when he lowered No.12 bucket of 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. 20

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 No. 742. 30

From 23/3/64 to 31/3/64 9 days

1/4/64 to 30/4/64 30 days

1/5/64 to 31/5/64 31 days

Total 70 days

3.

70 days at 20 hours working per day 1,400 hours.

1,400 hours at £1 per hour equal
£1,400. 0. 0.

AND the Plaintiff claims damages and a tipper lorry.

In the Supreme
Court of Sierra
Leone

No. 1
Statement of
Claim.
10th February
1965.
(Contd.)

10

(Sgd.) Rowland E.A. Harding.

Delivered and filed this 10th day of February,
1965 by Rowland E.A. Harding of 7, Pultney Street,
Freetown, Plaintiff Solicitor.

DEFENCE OF SECOND DEFENDANTS

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

In the Supreme
Court of
Sierra Leone

DEFENCE

10

No. 2
Defence of
Second
Defendants.
20th April
1965.

1. The second defendants admit the allegations in paragraph 1 of the Statement of Claim regarding themselves and the first defendant.

2. The second defendants deny any liability whatsoever to the Plaintiff in respect of the said tipper lorry N742.

3. The second defendants say that the plaintiff contracted to hire 3 lorries to them to be used on their concession at Marampa. 20

4. It was a term of the said Contract that the plaintiff shall "Insure the three lorries and keep them insured so as to keep the Company (the second defendants) indemnified in the event of any and all actions, claims, damages and demands whatsoever arising from the use of these lorries upon the Company's (second defendant's) premises".

5. The said tipper lorry N742 was on the second defendants' premises under the said contract. 30

6. The second defendants do not admit that any damage to the said tipper lorry N742 was caused by the negligence of their servant.

5.

Save as in therein-above specifically admitted the second defendant deny each and every allegation in the plaintiff's Statement of Claim.

In the Supreme
Court of
Sierra Leone

Filed and delivered this 20th day of April 1965.

No. 2
Defence of
Second
Defendants.
20th April
1965.
(Contd.)

10

(Sgd.) A.H.C. Barlatt

Solicitor for 2nd Defendant.

6.

No. 3

JUDGMENT IN DEFAULT AGAINST FIRST DEFENDANT

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA
SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

In the Supreme
Court of
Sierra Leone

TUESDAY THE 25TH DAY OF MAY 1965

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No. 3
Judgment in
default
against first
Defendant.
25th May
1965.

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 Le.2800/00 for the loss of use of tipper lorry No.742 damages to be assessed and costs to be taxed.

20

(Sgd) A. Nithianandan

Master and Registrar.

7.

No. 4

WRIT OF FIERI FACIAS

C.C. 33/65

1965, C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA
SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

Seal a Writ of fieri facias directed to the Sheriff of Sierra Leone against A. Kabia Transport Contractor of Bai Rampa Road Lunda upon a judgment dated the 25th day of May, 1965 for the sum of Le.2800/00 debt and Le.96.93 costs and interest etc.

In the Supreme Court of Sierra Leone

Indorsed to levy Le.2896.93 and interest thereon at Le.8 per centum per annum from the 25th day of May, 1965 and costs of execution.

No. 4
Writ of fieri facias.
29th May 1965.

20

Dated the 29th day of May, 1965.

(Sgd) John H. Smythe

Solicitor for the Plaintiff

WRIT FOR LEVYING OF EXECUTION

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

- and -

THE SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

ELIZABETH THE SECOND QUEEN OF SIERRA LEONE AND OF
HER OTHER REALMS AND TERRITORIES, HEAD OF THE
COMMONWEALTH

10

In the Supreme
Court of
Sierra Leone

TO THE SHERIFF OF SIERRA LEONE GREETINGS:

No. 5
Writ for levy-
ing Execution.
29th May 1965.

We command you that of the goods and chattels of A. Kabia 1st defendant in your bailiwick you cause to be made the sum of Le.2800/00 and also interest thereon at the rate of Le.8 per centum from the 25th May, 1965 which said sum of money and interest were lately before us in our Supreme Court in a certain action wherein Mustapha Conteh is plaintiff and A. Kabia 1st defendant by a Judgment of our said Court bearing the date the 25th day of May, 1965 adjudged to be paid by the said A. Kabia to the said Mustapha Conteh together with certain costs in the said judgment mentioned and which costs have been taxed and allowed by one of the taxing Officers of our said Court at the sum of Le.96.93 as appears by the Certificate of the said taxing officer dated the 28th day of May, 1965 AND THAT of the goods and chattels of the said A. Kabia in your bailiwick you further cause to be made the said sum of Le.96.93 together with interest thereon at the rate of Le.8 per centum per annum from the

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30

25th day of May, 1965 and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said Mustapha Conteh in pursuance of the said judgment AND in what manner you shall have executed this our Writ make appear to in our said Court immediately after the execution thereof AND have there then this Writ.

In the Supreme
Court of
Sierra Leone

No. 5
Writ for levy-
ing Execution.
29th May 1965.
(Contd.)

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Witness The Honourable Christopher Okoro
Elnathan Cole the Acting Chief Justice of Sierra
Leone on the 29th day of May 1965.

(Sgd) A. Nithianandan

Master and Registrar.

Levy Le.2896.93 and Le.4.20 for costs of execution etc. and also interest on Le.2896.93 at Le.8 per centum per annum from the 25th day of May, 1965 until payment besides Sheriff's poundage, Officers' fees, costs of levying etc. etc.

20

This Writ was issued by John Henry Smythe of Greenville Chambers 22 Westmoreland Street Freetown for the Plaintiff who resides at No. 6 King Edward Street Lunsar.

The Defendant carries on business as a Contractor at Sierra Leone Development Company Limited in Lunsar in the Northern Province of Sierra Leone in your bailiwick.

No. 6

AFFIDAVIT OF E.T. DAVIES, SOLICITOR
FOR FIRST DEFENDANT

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

In the Supreme Court of Sierra Leone

I, Emile Thompson Davies of No. 6 Kissy Road Freetown in the State of Sierra Leone Barrister-at-Law and Solicitor of the Supreme Court of Sierra Leone aforesaid make oath and say as follows:-

10

No. 6 Affidavit of E.T. Davies, Solicitor for First Defendant. 18th June, 1965.

1. I am Solicitor for the 1st defendant herein.
2. I have today entered an appearance for the first defendant to the Writ of Summons herein.
3. I have searched the records in this case and have discovered that judgment in default of appearance was signed against the 1st defendant on the 25th day of May, 1965, and a Writ of Fieri Facias issued on the 29th day of May, 1965.

20

(Sgd) E.C. Thompson-Davies

Sworn at Freetown this 18th day of June, 1965 at 4.32 o'clock in the afternoon.

Before me,

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths.

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This affidavit is filed on behalf of the first defendant.

No. 7

NOTICE OF MOTION TO SET ASIDE
DEFAULT JUDGMENT

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

TAKE NOTICE that this Honourable Court will be moved on Monday the 21st day of June, 1965, at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Emile Thompson Davis of Counsel for A. Kabia the first defendant herein for an order that the judgment signed herein in default of appearance on the 25th day of May, 1965 and the execution issued thereon be set aside and that the first defendant be at liberty to defend this action.

In the Supreme Court of Sierra Leone

No. 7
Notice of
Motion to set
aside default
judgment.
18th June,
1965.

20

TAKE NOTICE that at the hearing of the application the applicant will use the affidavits of Aluseni Kabia and Emile Thompson Davis sworn to the 18th day of June, 1965 and filed herein.

DATED the 18th day of June, 1965.

(Sgd) E. Thompson-Davis

Solicitor for the first Defendant

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To:- The Master and Registrar,
Supreme Court, Freetown,
and
John H. Smythe, Esq.,
22 Westmoreland Street,
Freetown.
Solicitor for the Plaintiff.

12.

No. 8

AFFIDAVIT IN SUPPORT OF No. 7
WITH ANNEXURE

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

In the Supreme
Court of
Sierra Leone

I, Alusani Kabia of Bai Rampa Road, Lunsar in
the Port Loko District of the State of Sierra
Leone make oath and say as follows:-

No. 8
Affidavit in
support of No.7
with annexure.
18th June 1965.

1. I am the first defendant in this action.
2. That on the 3rd day of March, 1965 I was served with a copy of the Writ of Summons in this action bearing date the 10th day of February, 1965.
3. That after the Writ of Summons was served the Plaintiff approached me and suggested a compromise and accordingly an arrangement was made whereby the plaintiff and I were to meet and agree on the terms of settlement. 20
4. That I accepted the plaintiff's offer and in consequence of the arrangement I did not appear to the said Writ of Summons.
5. That I was not aware of any judgment in default signed against me until I was confronted with a Writ of Fieri facias on the 1st day of June, 1965. 30
6. That on the 9th day of June, 1965 as a result of the writ of Fieri facias I paid the sum of

Le.1400 to the Bailiff at Port Loko who issued me with a receipt a copy of which is attached hereto and marked "A".

In the Supreme Court of Sierra Leone

No. 8
Affidavit in support of No.7 with annexure.
18th June 1965.
(Contd.)

- 10 7. That my Vauxhall car and two tippers bearing registration numbers N.1368 and N.1468 have not been seized by the Bailiff in consequence of the said Writ of Fieri Facias and I am informed and verily believe that the said vehicles will be sold at 10 a.m. on Monday the 21st day of June, 1965 in satisfaction of the judgment debt.
8. That I am advised and verily believe that I have a defence to the action upon the merits.
9. That I make this affidavit in support of my application to set aside the judgment in default of appearance signed on the 25th day of May, 1965 and the execution issued thereon.

(Sgd) A. Kabia.

20 Sworn at Freetown this 18th day of June, 1965 at 4.30 o'clock in the afternoon.

Before me

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths.

This affidavit is filed on behalf of the First Defendant.

14.

"A"

MUSTAPHA CONTEH vs. A. KABIA

Received from Mr. A. Kabia the sum of Seven hundred pounds - that is Le.1400 as part payment the above case.

(Sgd) D.W. Douglas

Bailiff

Port Loko.

9.6.65.

10

This is the copy receipt referred to and Marked "A" in the affidavit of Alusani Kabia sworn the 18th day of June, 1965.

Before me,

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths.

15.

No. 9

AFFIDAVIT OF PLAINTIFF

C.C. 33/65

1965. C. No. 9

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10 I, MUSTAPHA CONTEH the Plaintiff in the above
case of 6 King Edward Street, Lunsar, in the
Marampa Masimera Chiefdom, Northern Province make
Oath and say as follows:-

In the Supreme
Court of
Sierra Leone

1. That I am the Plaintiff in the action herein.
2. That at no time whatsoever did I approach the
1st defendant and suggested a compromise.

No. 9
Affidavit of
Plaintiff.
21st June,
1965.

3. Sometime about April 1965 I was approached by
a Mr. Abdul Kabia not the 1st defendant to
20 settle the matter herein out of Court. I said
if my claim is settled I have no objection but
that they should see my Solicitor. They
promise to pay part of the money and the
balance by instalment. This they failed to
do, neither did they see my Solicitor.

4. That I at no time whatsoever in any way or
manner whatsoever said or do anything which
could have led the said 1st defendant to
presume that the case has been withdrawn from
Court.

5. That in April, 1965 the 1st defendant purchased
30 a new Bedford Tipper Lorry.

In the Supreme
Court of
Sierra Leone

No. 9
Affidavit of
Plaintiff.
21st June,
1965.
(Contd.)

6. That I make this affidavit in opposition to
the Application of the 1st defendant herein.

(Sgd) M. Conteh

SWORN AT FREETOWN on Monday the 21st day of June,
1965 at 3 o'clock in the afternoon.

Before me

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths

10

This Affidavit is filed by John Henry Smythe,
Solicitor, of Grenville Chambers, of 22 Westmore-
land Street, Freetown on behalf of the Plaintiff.

17.

No. 10

PROCEEDINGS

IN THE SUPREME COURT OF SIERRA LEONE

Monday, 21st June, 1965.

Before the Hon.
Mr. Justice
E.F. Luke Ag.P.J.

In the Supreme
Court of
Sierra Leone

J.H. Smythe for the Plaintiff absent

E. Thompson Davies for Defendant

No.10
Proceedings
21st June,
1965.

10

Thompson-Davies - I am asking for an adjournment as notice was short served hence my learned friend has not appeared. If Wednesday is convenient to the Court I shall ask for that day.

Adjourned to 23/6/65.

(Sgd) E.F. Luke

Ag. J.

AFFIDAVIT OF J.H. SMYTHE WITH ANNEXURE

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA
SIERRA LEONE DEVELOPMENT CO. LTD.

Defendant

In the Supreme Court of Sierra Leone

I, JOHN HENRY SMYTHE, Solicitor of the Supreme Court of Sierra Leone and Solicitor of the plaintiff herein of Grenville Chambers 22 Westmoreland Street, Freetown make oath and say as follows:-

10

No. 11
Affidavit of J.H. Smythe with annexure. 22nd June, 1965.

1. That I am the Solicitor acting for and on behalf of the plaintiff herein.
2. That on the 2nd of June, 1965, following a conversation between myself and Mr. Aaron Cole, Solicitor of the Supreme Court of Sierra Leone and at the time acting as Solicitor for the 1st defendant herein, the 1st defendant called at my Chambers and delivered a letter from the said Mr. Aaron Cole. The letter is annexed and marked "A".
3. That the 1st defendant admitted the claim against him and suggested paying by instalments. I refused Le.8 which was tendered to me as I felt it would be improper for me to do so without my client's approval.
4. That the 1st defendant requested me to accept a brief to institute legal proceedings against the 2nd defendant to recuperate what he was

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going to pay to the 1st defendant. I declined
the brief until the matter herein is finally
determined.

In the Supreme
Court of
Sierra Leone

(Sgd) John H. Smythe

SWORN AT FREETOWN on Tuesday the 22nd day of June,
1965, at 10 o'clock in the forenoon.

Before me,

No. 11
Affidavit of
J.H. Smythe
with annexure.
22nd June,
1965.
(Contd.)

10

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths.

This affidavit is filed by John Henry Smythe
Solicitor of Grenville Chambers, of 22 Westmore-
land Street, Freetown on behalf of the Plaintiff.

20.

Adelocum Chambers
Tel. Freetown 3581 Ext. 53.

Conveyancer Etc.

Aaron Cole
Barrister & Solicitor
36 Pademba Road
Freetown
Keister's Robgane Road
Makeni
3 Wharf Road
Port Loko

2nd June, 1965

Mr. J.H. Smythe
Solicitor
Westmoreland Street,
Freetown.

10

Dear Mr. Smythe,

The bearer Mr. Kabia is the defendant against whom the fi-fa is issued at Lunsar.

As I told you in his presence he will concede to your suggestion only to give him some peace of mind and return of his property.

Yours faithfully,

20

(Sgd) Aaron Cole.

This is the letter referred to and marked "A" in the Affidavit of John Henry Smythe sworn the 22nd of June 1965.

(Sgd) B.M.A. Sawyerr

A Commissioner for Oaths.

PROCEEDINGS

Wednesday, 23rd June, 1965. Before the Hon. Mr. Justice E.F. Luke, Ag. P.J.

In the Supreme Court of Sierra Leone

J.H. Smythe for Plaintiff

E. Thompson Davies for Defendant

No. 12 Proceedings. 23rd June, 1965.

10

Thompson Davies - This is a motion for stay of execution of judgment signed against 1st defendant on 25/5/65. The facts of case are set out in my affidavit and my application is under O.10 rule 10 I wish to refer to the case Evans vs. Bartham rep. in 53 T.L.R. at p.689. I shall refer to judgment of Russel J. where he said "for myself I find no justification for the view that defence should be displayed and there should be sufficient or just cause showed for failing to put in a defence". On the affidavit already sworn and this authority I am asking that judgment and consequential acts be set aside and defendant be allowed to put in a defence. Dealing with affidavit in opposition I say case just quoted took that into consideration. I also refer to judgment of Lord Justice Aikin at p. . In this case defendant was allowed time to put in his defence as the Judges held the rule was discretionary.

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Smythe - I submit that as a matter of law this application cannot be granted. This judgment is a regular judgment which is right and proper. I am referring to 1963 White Book O.27 rule 15 at p. 615 the last note - regular judgment.

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The only case it can be granted is where there is obvious injustice on the records before the Court. In all other cases there must be an affidavit instituting the facts. I shall refer to case quoted by my learned friend and what were said by the Judges. I refer to judgment of Lord Aitkin. There is disclosed in Chittys 19th Ed. on Queen's Bench from p. 62 No. 74 where the specimen affidavit is shown.

In the Supreme Court of Sierra Leone I am opposing this application most strenuously as such an application is too late and makes nonsense of the Rules of this Court.

No. 12
Proceedings.
23rd June,
1965.
(Contd.)

Thompson-Davies - What my learned friend is referring to is not correct in that an affidavit should be filed disclosing the nature of the defence. I respectfully refer to the case which I cited before which states Court has a discretion. I wish to refer to case of Evans and Bartham at p. 694.

10

Ruling

Having listened to all what have been said by Solicitors on both sides the Court is of opinion that this is not a case it can exercise its discretion to set aside the judgment filed in this Court and the Motion is therefore dismissed with costs.

(Sgd) Emile F. Luke

Ag. J.

23.

No. 13

ORDER OF DISMISSAL OF MOTION
TO SET ASIDE JUDGMENT

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

Before the Hon. Mr. Justice Emile F. Luke
Ag. Puisne Judge

In the Supreme
Court of
Sierra Leone

Wednesday the 23rd day of June 1965.

20 UPON READING the Notice of Motion dated the
18th day of June, 1965 on behalf of the first
defendant to set aside the judgment signed against
him on the 25th day of May, 1965 in default of
appearance and the several affidavits filed herein
AND UPON HEARING Mr. Emile C. Thompson Davies of
Counsel for the first defendant and Mr. John Henry
Smythe of Counsel for the Plaintiff IT IS ORDERED
that the Motion be dismissed with costs.

No. 13
Order of
dismissal of
Motion to set
aside judgment.
23rd June,
1965.

BY THE COURT:

(Sgd) A. Nithianandan

Master and Registrar.

NOTICE OF MOTION FOR LEAVE
TO APPEAL AND STAY OF EXECUTION

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

In the Supreme
Court of
Sierra Leone

TAKE NOTICE that this Honourable Court will be moved on Tuesday the 29th day of June, 1965 at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Emile C. Thompson Davies of Counsel for the first defendant for an Order

No. 14
Notice of
Motion for
leave to Appeal
and stay of
Execution.
24th June,
1965.

- (a) granting leave to the first defendant to appeal against the order of the Honourable Mr. Justice Emile F. Luke dated the 23rd day of June, 1965 dismissing the first defendant's application to set aside the judgment signed against him on the 25th day of May, 1965 in default of appearance and
- (b) that execution on the judgment herein dated the 25th day of June, 1965 and all subsequent proceedings be stayed pending the determination of the appeal for which leave is now sought.

20

ALSO TAKE NOTICE that at the hearing of the application the first defendant will use the affidavit of Emile C. Thompson Davies sworn the 24th day of June 1965 filed herein.

30

DATED the 24th day of June, 1965.

(Sgd) E. Thompson-Davies

Solicitor for the 1st Defendant

To:
John Henry Smythe Esq.,
22 Westmoreland Street,
Freetown. Solicitor for the Plaintiff.

No. 15

AFFIDAVIT OF E.T. DAVIES
IN SUPPORT OF No.14

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

10

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

I, Emile C. Thompson Davies of 6 Kissy Road Freetown in the State of Sierra Leone Barrister and Solicitor of the Supreme Court of Sierra Leone make oath and say as follows:-

In the Supreme Court of Sierra Leone

1. I am Solicitor for the first defendant herein.
2. That on the 25th day of May, 1965 judgment in default of appearance was signed against the first defendant herein, and a Writ of Fieri Facias issued on the 29th day of May, 1965.
3. That I am informed and verily believe that as a result of the execution of the said Writ of Fieri Facias the first defendant paid to the Bailiff at Port Loko the sum of Le.1400.
4. That the first defendant's Vauxhall car and two tippers have to the best of my knowledge and belief been seized in consequence of the said writ of fieri facias, and are likely to be put up for sale.
5. That on the 23rd day of June, 1965 the first defendant's application to set aside the judgment in default of appearance was dismissed by the Honourable Mr. Justice Emile F. Luke. A copy of the said order is hereunto attached and marked "A".

No. 15
Affidavit of
E.T. Davies in
support of
No. 14.
24th June,
1965.

20

30

In the Supreme
Court of
Sierra Leone

No. 15
Affidavit of
E.T. Davies
in support
of No. 13.
24th June,
1965.
(Contd.)

6. The first defendant is dissatisfied with the said order of the Honourable Mr. Justice Emile F. Luke and is applying for leave to appeal therefrom.
7. I am reliably informed and verily believe that the plaintiff is a man of straw and if the amount of judgment debt is paid to him there is no reasonable probability of getting it back if the appeal succeeds.
8. This affidavit is made in support of the application for leave to appeal and for stay of execution.

10

(Sgd) E.C. Thompson Davies

SWORN at Freetown this 24th day of June, 1965 at
2.30 o'clock in the afternoon.

Before me,

(Sgd) B.M.A. Sawyerr.

A Commissioner for Oaths.

This affidavit is filed on behalf of the first
defendant.

20

Annexure "A" is document No. 13 in this Record.

PLAINTIFF'S AFFIDAVIT OPPOSING APPLICATION
FOR STAY OF EXECUTION

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

10

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

I, MUSTAPHA CONTEH the plaintiff in the above case of 6 King Edward Street, Lunsar, in the Marampa Masimera Chiefdom, Northern Province make Oath and say as follows:-

In the Supreme Court of Sierra Leone

No. 16
Plaintiff's
Affidavit
opposing
application
for stay of
Execution.
29th June,
1965.

1. That I am the plaintiff in the action herein.
- 20 2. That I have read the affidavit of Emile C. Thompson Davies sworn on the 24th day of June 1965, and filed herein.
3. That I have read paragraph 7 of the said affidavit.
4. That the statement made in the 6th paragraph is false to the knowledge of the defendant A. KABIA.
5. That I own a concrete building at No. 6 King Edward Street which was built by myself and which is fully furnished.
- 30 6. That the value of the house and furniture exceed Le.800.
7. That I also own two lorries, tippers, which are used for a business as contractor.

In the Supreme
Court of
Sierra Leone

8. This affidavit is made in opposition to the application for a stay of execution by the Defendant.

No. 16
Plaintiff's
Affidavit
opposing
application
for stay of
Execution.
29th June,
1965.
(Contd.)

(Sgd) M. Conteh

SWORN AT FREETOWN on Tuesday the 29th day of June,
1965 at 1.10 o'clock in the afternoon.

Before me,

(Sgd) B.M.A. Sawyerr.

A Commissioner for Oaths.

10

This Affidavit is filed by John Henry Smythe,
Solicitor of Grenville Chambers of 22 Westmore-
land Street, Freetown on behalf of the Plaintiff.

29.

No. 17

PROCEEDINGS

Tuesday 29th June, 1965. Before the Hon. Mr.
Justice E.F. Luke
Ag. P.J.

In the Supreme
Court of
Sierra Leone

E.C. Thompson Davies for Applicant

J.H. Smythe for Respondent absent

No. 17
Proceedings.
29th June,
1965, & 1st
November,
1965.

10 Thompson Davies - My learned friend told me
he was only served yesterday and so he was unable
to be present in Court. We both have agreed
subject to Court's convenience for Wednesday 7th
July.

No appearance for the Plaintiff/Respondent.

Marcus Jones - I ask for an adjournment.

Adjourned to 4/11/65 before Luke Ag.J.

(Sgd) C.O.E. Cole

Ag. C.J.

1/11/65

20

No. 18

AFFIDAVIT OF FIRST DEFENDANT
IN REPLY TO No. 16

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

10

In the Supreme Court of Sierra Leone

I, Alusine Kabia of Bai Rampa Road, Lunsar in the Port Loko District of the State of Sierra Leone make oath and say as follows:-

No. 18
Affidavit of First Defendant in reply to No. 16.
6th July, 1965.

1. I am the first defendant in this action.
2. I have read the affidavit of Mustapha Conteh sworn on the 29th day of June 1965, and filed herein.
3. The value of the Plaintiff's house and furniture does not exceed Le.2000.00.
4. The plaintiff owns one tipper No. 742 which is the subject matter in dispute.
5. This affidavit is made in opposition to the affidavit of Mustapha Conteh mentioned above in paragraph 2.

20

(Sgd) A. Kabia.

SWORN at Freetown this 6th day of July, 1965 at 5.30 o'clock in the afternoon.

Before me

(Sgd) B.M.A. Sawyerr.

30

A Commissioner for Oaths.

This Affidavit is filed on behalf of the 1st Defendant.

No. 19

ORDER GRANTING LEAVE TO APPEAL
AND STAY OF EXECUTION

C.C. 33/65

1965 C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendant

10

Wednesday the 7th day of July, 1965.

Before the Honourable Mr. Justice E.F. Luke,
C.B.E. Ag. Judge.

In the Supreme
Court of
Sierra Leone

20

UPON READING the Notice of Motion dated the 24th day of June, 1965 and the Affidavit in support thereof sworn to by Emile C. Thompson-Davies the 24th day of June, 1965 and filed herein AND UPON HEARING Emile C. Thompson Davies of Counsel for the Applicant there being no opposition to the application by John Henry Smythe of Counsel for the Respondent IT IS THIS DAY ORDERED as follows:-

No. 19
Order granting
leave to
appeal and stay
of Execution.
7th July,
1965.

30

- (a) That Leave be granted to the Applicant to appeal against the Order dated 23rd June, 1965 refusing the applicant's application to set aside the judgment in default of Appearance signed on the 25th May, 1965;
- (b) That execution of the said judgment dated the 25th May, 1965 be stayed pending the determination of the said appeal;

In the Supreme (c) That the applicant do deposit £5 to meet
Court of the cost of record and either deposit
Sierra Leone £30 or enter into sufficient security by
bond in the same amount with one surety.

No. 19
Order granting
leave to
appeal and
stay of
Execution.
7th July,
1965.
(Contd.)

By the Court
(Sgd) O.M. Golley
Ag. Master and Registrar.

AFFIDAVIT OF W.S. MARCUS JONES
WITH GROUNDS OF APPEAL ANNEXED

C.C. 33/65

1965. C. No. 9

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA & AN.

Defendants

10	I WALTER SYDNEY MARCUS JONES of 3 Trelawney Street, Freetown, Barrister and Solicitor, make oath and say as follows:-	In the Supreme Court of Sierra Leone
----	---	--------------------------------------

- | | | |
|----|--|---|
| 1. | That I hold the Brief of Mr. E.C. Thompson-Davies, Solicitor for the first defendant Mr. A. Kabia in this action. | <hr/> No. 20
Affidavit of
W.S. Marcus
Jones with
Grounds of
Appeal
annexed.
3rd November,
1965. |
| 2. | That I am informed and verily believe that leave to Appeal has already been granted Honourable Mr. Justice E.F. Luke as appears by the Order dated 7th July, 1965 and filed in this action. | |
| 20 | 3. That I verily believe that the intended Appellant the defendant A. Kabia herein had good and substantial grounds of appeal and that a copy of the proposed grounds of appeal is hereto attached and marked "A". | |

(Sgd) W.S. Marcus-Jones.

30	SWORN at Freetown this 3rd day of November, 1965 at 12.48 o'clock in the afternoon, before me,
----	--

(Sgd) O.M. Golley

A Commissioner for Oaths

This Affidavit is filed on behalf of the first defendant.

"A"

In the
Supreme Court
of Sierra
Leone

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

No.20
Affidavit of
W.S. Marcus-
Jones with
Grounds of
Appeal
annexed
3rd
November
1965
(Contd.)

MUSTAPHA CONTEH - Plaintiff/Respondent

- and -

A. KABIA - Defendant/Appellant

GROUND'S OF APPEAL

1. That the Judgment in Default of appearance obtained by the Plaintiff/Respondent on the 25th May, 1965 and enforced as a Final Judgment was irregularly obtained in that contrary to the Rules of the Supreme Court the Plaintiff/Respondent neither sought nor obtained an assessment of the amount for which final Judgment should be signed the amount claimed being unliquidated damages.

10

2. That the learned trial Judge was wrong in law in refusing leave to the defendant/appellant to defend the action and to set aside the Judgment obtained in default.

3. That the Statement of Claim disclosed no cause of action against the defendant/appellant.

20

This is the paper writing referred to as marked "A" in the Affidavit of Walter Sydney Marcus Jones sworn before me this 3rd day of November, 1965.

(Sgd) O.M. Golley

A Commissioner for Oaths

PROCEEDINGS

Thursday, 4th November,
1965.

Before the Hon. Mr.
Justice E.F. Luke
Ag. P.J.

In the Supreme
Court of
Sierra Leone

Marcus-Jones for applicant

J.H. Smythe for Respondent

No. 21
Proceedings.
4th November,
1965.

10 Smythe - I wish to take a re-objection. This
is a motion by the applicant for an order for
extension of time under O XIV r. 1 of the Court of
Appeal Rules within which the first defendant shall
file his notice of appeal against the Interlocu-
tory Order of Honourable Mr. E.F. Luke dated
23/6/65.

20 Rule 4 states no application for enlargement
of time can be made after the expiration of one
month from the expiration of the time prescribed
within which an appeal may be brought.

In this matter not only has the 14th day
expired but also the 3 months time from that date
and during which an appeal can be made has passed.

30 Marcus-Jones - In first place this applica-
tion is by motion for an extension of time under
r. 14 (1) of Sierra Leone Court of Appeal Rules.
I have filed an affidavit in support. My learned
friend has not filed one in opposition. I respect-
fully submit that this is a case where Court can
exercise its discretion.

Smythe- This application is made after 4
months from the date this appeal should have been
made. There is a difference between extension of
time and the granting of leave to appeal. This is
an interlocutory application for which there is a
time limit of 14 days within which to appeal.
Application did not comply with the provisions
complicated with 14(4) which said he could come within
1 month for an enlargement of the time.

In the Supreme
Court of
Sierra Leone

Ruling

No. 21
Proceedings.
4th November,
1965.
(Contd.)

This is an application by Motion for enlargement of time within which applicant can appeal. Before the motion was proceeded with Solicitor for Respondent raised a preliminary objection that application was out of time. This was an interlocutory matter for which application for leave is governed by r. 13(1) and (2) of W.A.C.A. Rules. This was not complied with. Rule 14 deals with time for appealing and S (4) states:-

10

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of time prescribed within which an appeal may be brought."

This matter was disposed of on the 21st June 1965 and appellant had 14 days from which he could have appealed. On the 7th of July 1965 leave was granted him to appeal and he had 14 days from that date or provided by rule 13(2) to file his notice of appeal but he failed to comply with it. He has now come before this Court more than 1 month from that date to ask for an enlargement of time as required by Rule 14(4) of the said rules. I cannot see my way to grant this application and the notice of motion is dismissed with costs.

20

(Sgd) Emile F. Luke

Ag. J.

GROUNDS OF APPEAL

CIV.APP.No /65

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Appellant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

1. TAKE NOTICE that the defendant/appellant
 10 being dissatisfied with the decision of the
 Supreme Court of Sierra Leone contained in the
 Order of the Honourable Mr. Justice Emile F.
 Luke, C.B.E. dated the 23rd day of June, 1965
 doth hereby appeal to the Court of Appeal for
 Sierra Leone (leave having been obtained so to
 do on the 7th day of July, 1965) upon the grounds
 set out in paragraph 3 and will at the hearing of
 the Appeal seek the relief set out in paragraph 4.

In the Court of
 Appeal for
 Sierra Leone

No. 22
 Grounds of
 Appeal.
 4th November,
 1965.

20 AND the appellant further states that the
 names and addresses of the persons directly
 affected by the appeal are those set out in
 paragraph 5.

2. Part of the decision of the Lower Court com-
 plained of:-

The whole

3. GROUNDS OF APPEAL

30 1. That the Judgment in default of Appearance
 obtained by the plaintiff/respondent on
 the 25th May 1965 and enforced as a Final
 Judgment was irregularly obtained in that
 contrary to the Rules of the Supreme Court
 the plaintiff/respondent neither sought nor
 obtained an assessment of the amount for
 which final judgment should be signed.

In the Court
of Appeal for
Sierra Leone

No. 22
Grounds of
Appeal.
4th November,
1965.
(Contd.)

2. That the learned trial Judge was wrong in law in refusing leave to the defendant/appellant to defend the action and to set aside the judgment obtained in default.

3. That the Statement of Claim disclosed no cause of action against the defendant/appellant.

4. Relief sought from the Court of Appeal

That the Order be set aside and the Appellant be granted leave to appear and defend the Action and that the Action be tried by the Supreme Court of Sierra Leone on its merits.

5. Persons directly affected by the appeal

<u>Name</u>	<u>Address</u>
A. Kabia	65 Bai Rompa Road, Lunsar.
Mustapha Conteh	6 King Edward Street, Lunsar.

DATED this 4th day of November, 1965.

(Sgd) A. Kabia

Appellant.

No. 23

AFFIDAVIT OF W.S. MARCUS-JONES
WITH ANNEXURE "B" THERETO

CIV.APP. 16/65.

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Appellant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

- 10 I, Walter Sydney Marcus Jones of 3, Trelawney Street, Freetown, Barrister and Solicitor, make oath and say as follows:-
1. That I hold the Brief of Mr. E.C. Thompson-Davies Solicitor for the Defendant/Appellant herein.
2. That on the 7th day of July, 1965, leave was granted by the Hon. Mr. Justice E.F. Luke to appeal from his Order dated 23rd June, 1965. A true copy of the Order granting leave is hereto attached and marked "A".
- 20 3. That I verily believe the Defendant/Appellant herein has a good defence to the action on its merits. A copy of the defence intended to be filed herein is hereto attached and marked "B".
4. That I represented the Defendant/Appellant herein at the hearing of the Motion dated the 23rd day of July, 1965 and which was originally made returnable on the 30th July, 1965 but was finally heard on Thursday the 4th
- 30 November, 1965, when the Honourable Mr. Justice Luke refused leave for an extension of time within which to appeal.
- In the Court of Appeal for Sierra Leone
-
- No. 23
Affidavit of
W.S. Marcus-
Jones with
Annexure "B"
thereto.
11th November,
1965.

In the Court
of Appeal for
Sierra Leone

5. That it is desired that the Court may be pleased to grant the Appellant an extension of time within which to appeal and the matter in issue between the parties to be tried on its merits.

No. 23
Affidavit of
W.S. Marcus-
Jones with
Annexure "B"
thereto.
11th November,
1965.
(Contd.)

(Sgd.) W.S. Marcus-Jones

SWORN at Freetown this 11th day of November, 1965
at 11.45 o'clock in the forenoon.

Before me,

(Sgd.) R.A. Woode.

A Commissioner for Oaths.

This Affidavit is filed on behalf of the Appellant.

41.

"B"

C.C. 33/65

1965. C. No. 9

In the
Court of
Appeal for
Sierra
Leone

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

- and -

S.L. DEVELOPMENT CO. LTD.

Defendants

No.23
Affidavit
of W.S.
Marcus-
Jones with
Annexure
"B" hereto
11th
November
1965
(Contd.)

STATEMENT OF DEFENCE

10

1. The first defendant makes no admissions of any of the allegations contained in paragraphs 1, 2 and 3 of the Statement of Claim. If, which is not admitted, there was any such sub-contract as referred to in paragraph 2, it was not a part of the contract that the first defendant should assume any liability whatsoever for any damage howsoever caused to the plaintiff's vehicle.

20

2. The first defendant will object in point of law that paragraph 4 of the Statement of Claim is speculative and scandalous and contrary to the Rules of pleading, and does not disclose any reasonable or probable cause of action against the first defendant. Subject thereto, the first defendant denies each and every of the allegations contained in paragraph 4 of the Statement of Claim.

(Sgd.) ?

Solicitor for the first
Defendant

30

Delivered and filed this day of 1965 by
Walter Sydney Marcus Jones Esquire of 3, Trelawney Street,
Freetown, Solicitor of the Supreme Court, pursuant to the
Rules of the Supreme Court.

This is the paper writing referred to as marked "B"
in the Affidavit of W.S. Marcus Jones sworn before me
this 11th day of November, 1965.

(Sgd.) R.A. Woode.
A Commissioner for Oaths.

42.

No. 24

AFFIDAVIT OF E.C. THOMPSON
DAVIES

CIV.APP.16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Appellant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

In the Court
of Appeal for
Sierra Leone

I, Emile Columbus Thompson-Davies of 6, Kissy
Road, Freetown, Barrister and Solicitor, make oath
and say as follows:-

10

No. 24
Affidavit of
E.C. Thompson
Davies.
11th November,
1965.

1. That I was Solicitor for the defendant/
appellant in respect of an action instituted
against him in the Supreme Court of Sierra
Leone at which a Judgment in default was
obtained by the plaintiff/respondent.
2. That I am informed by the defendant/appellant
and verily believe that in his anxiety to
preserve his good business relations with the
S.L. Development Co. Ltd. one of the parties to
the action, he had accepted from the plaintiff/
respondent an offer to negotiate his claim.
During the progress of these arrangements, with-
out intimating that such was his intention, the
plaintiff/respondent obtained a Judgment in
default of Appearance. 20
3. That as Solicitor for the defendant/appellant
I brought these facts to the notice of the
Court and sought leave to have the default
judgment set aside. My application to do so
was refused by the Court. 30
4. That in the circumstances I sought and obtained
leave from the Court for the defendant/
appellant to appeal against the decision of the

learned Judge refusing the application to set aside the Judgment.

In the Court
of Appeal for
Sierra Leone

5. After obtaining the leave and before filing the grounds of appeal I discovered that leave was obtained out of time.
6. Ultimately, the time within which to file the grounds of Appeal having been expired, I took out a Notice of Motion dated 23rd July, 1965 for an Order for enlargement of time to enable me to file the said Grounds.
7. The motion was returnable on the 30th July, 1965 on which date Counsel for the plaintiff/respondent and I appeared before the Hon. Mr. Justice Luke for hearing the motion. Counsel (Mr. J.H. Smythe) then said that he would not oppose the application but did not wish the matter to be dealt with during the vacation. In the circumstance the matter was adjourned sine die for a date to be fixed between the parties.
8. Relying upon the undertaking given by Counsel, I did not in the meantime take any steps to file the said grounds of appeal until the Order had been made.
9. In the meantime I have been temporarily appointed to the Magisterial Bench and I instructed a colleague to arrange with Mr. Smythe for a date to be fixed for the Order to be made. The Motion came up for hearing on Monday the 1st of November and was adjourned to Thursday the 4th November.
10. To my utter astonishment and surprise I have been informed by Dr. W.S. Marcus Jones to whom I handed my brief and verily believe that Mr. J.H. Smythe opposed the application for enlargement of time on the ground, among others, that I had done nothing since leave was granted on 7th July last.
11. That for the reasons and facts disclosed in this Affidavit I respectfully ask that the Court may grant leave to the defendant/appellant

No. 24
Affidavit of
E.C. Thompson
Davies.
11th November,
1965.
(Contd.)

In the Court
of Appeal for
Sierra Leone

to file his grounds of appeal out of time and
for the appeal to be heard on its merits.

(Sgd.) E.C. Thompson-Davies.

No. 24
Affidavit of
E.C. Thompson
Davies.
11th November,
1965.
(Contd.)

SWORN at Freetown this 11th day of November, 1965
at 11.55 o'clock in the forenoon.

10

Before me,

(Sgd.) B.M.A. Sawyerr.

A Commissioner for Oaths.

This Affidavit is filed on behalf of the defendant/
appellant.

No. 25

AFFIDAVIT OF W.S. MARCUS-JONES
WITH ANNEXURE "A" THERETO

CIV.APP. No. 16/16/1965

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Applicant

- and -

MUSTAPHA CONTEH - Plaintiff/ Respondent

10 I, Walter Sydney Marcus Jones of 3, Trelawney Street, Freetown, Barrister and Solicitor, make oath and say as follows:-

In the Court of Appeal for Sierra Leone

1. That I am Solicitor for the Applicant herein.

20 2. That a true copy of the Writ of Summons commencing proceedings before the Supreme Court by the Respondent against the applicant and dated 10th February 1965 is hereto exhibited by me and marked "A".

3. That a true copy of the Statement of Claim accompanying the Writ of Summons hereinbefore referred to is hereto exhibited by me and marked "B".

4. That a true copy of the Judgment in default of Appearance obtained by the Respondent against the Applicant dated the 25th day of May, 1965 is hereto exhibited by me and marked "C".

30 5. That I did on the 4th day of November file a Notice of Appeal on behalf of the Applicant herein against the Order of the Hon. Mr. Justice E.F. Luke, C.B.E. dated the 23rd day of June, 1965. The grounds of Appeal contained in the said Notice are hereby exhibited by me and marked "D".

No. 25
Affidavit of
W.S. Marcus
Jones with
Annexure "A"
thereto.
22nd November,
1965.

In the Court
of Appeal for
Sierra Leone

No. 25
Affidavit of
W.S. Marcus
Jones with
Annexure "A"
thereto.
22nd November,
1965.
(Contd.)

6. That I am informed by the Applicant and verily believe that the Respondent levied execution upon him on a Writ of Fieri Facias issued on or about the 29th May, 1965 to recover the sum of Le.2800 and costs of Le.96.93. The Applicant has paid to the Deputy Sheriff the sum of Le.1400 on the 9th June 1965 and the sum of Le.1506 on the 24th June, 1965.

(Sgd.) W.S. Marcus-Jones.

SWORN at Freetown this 22nd day of November, 1965
at 9.30 o'clock in the forenoon.

Before me,

(Sgd.) Ralph A. Woode.

A Commissioner for Oaths.

This Affidavit is filed on behalf of the
Applicant.

47.

"A"

SIERRA LEONE
(To Wit)

C.C. 33/1965

1965. C. No. 9

In the
Court of
Appeal
for Sierra
Leone

IN THE SUPREME COURT OF SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH

Plaintiff

- and -

A. KABIA

SIERRA LEONE DEVELOPMENT CO. LTD.

Defendants

No.25
Affidavit
of W.S.
Marcus-
Jones with
Annexed
"A"
thereto
22nd
November
1965
(Contd.)

10

ELIZABETH THE SECOND QUEEN OF SIERRA LEONE
AND OF HER OTHER REALMS AND TERRITORIES,
HEAD OF THE COMMONWEALTH

A. Kabia, Transporter of Bai Rampa Road, Lunsar, Sierra
Leone.

To Sierra Leone Development Company Ltd., Delco House,
Oxford Street, Freetown

20

WE command you that within 8 days after the Service of this
Writ on you, inclusive of the day of such service, you do
cause an appearance to be entered for you in the Supreme
Court of Sierra Leone in an Action at the Suit of

A. KABIA

and take notice that in default of your so doing the
Plaintiff may proceed therein, and judgment may be given
in your absence.

WITNESS the Honourable Samuel Bankole Jones Chief Justice
of Sierra Leone at Freetown, the 10th day of February, in
the year of our Lord 1965.

(Sgd.) A. Nithianandan.

Master and Registrar.

30

N.B. This writ is to be served within twelve calendar
months from the date thereof, or if renewed, within six
calendar months from the date of the last renewal, includ-
ing the day of such date, and not afterwards.

The Defendant, may appear hereto by entering an Appearance
either personally or by Solicitor at the Master's Office
Supreme Court of Sierra Leone.

The defendant appearing personally may, if he desire enter
his Appearance by post and the appropriate forms may be
obtained by sending a postal order for 2/6 with an addres-
sed envelope foolscap size to the Master and Registrar,
Law Courts, Freetown.

In the
Court of
Appeal for
Sierra
Leone

"A" (Contd.)

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.

No.25
Affidavit
of W.S.
Marcus-
Jones
with
Annexure
"A" thereto
22nd
November
1965
(Contd.)

This Writ was issued by Rowland E.A. Harding of 7, Pultney Street, Freetown, Sierra Leone whose address for service is the same.
Solicitor for the Plaintiff who resides at 6, King Edward Street, Lunsar, Sierra Leone.

(Sgd.) Rowland E.A. Harding.

10

This is the copy of Writ of Summons referred to as marked "A" in the Affidavit of Walter Sydney Marcus-Jones sworn before me this 22nd day of November, 1965.

(Sgd.) Ralph A. Woode

A Commissioner for Oaths.

Annexure "B" is document No. 1 in this Record.

Annexure "C" is document No. 3 in this Record.

Annexure "D" is document No.22 in this Record.

PROCEEDINGS

CIV.APP.16/65 (Monday 29th November, 1965)

IN THE COURT OF APPEAL FOR SIERRA LEONE

Coram: Hon. Sir Samuel Bankole Jones - President
 Hon. Mr. Justice C.O.E. Cole - Ag. Chief Justice
 Hon. Mr. Justice G.F. Dove-Edwin - Justice of Appeal

10

A. Kabia - Defendant/Appellant

- and -

Mustapha Conteh - Plaintiff/Respondent

Dr. Marcus Jones for defendant/Appellant

In the Court of
Appeal for
Sierra Leone

Smythe for Plaintiff/Respondent

Smythe - I take a preliminary objection

No. 26
Proceedings.
29th November,
1965.

(1) An appeal has been filed by
Applicant

20

(2) Court has no jurisdiction to
enlarge time.

30

As regards (1) Refers paragraph 4 of affidavit of Counsel dated 22.11.65. On 4.11.65 appeal was filed and served on me. On 11.11.65 a Motion was filed applying for an extension of time within which to file Notice of Appeal. (2) There was judgment in default on 25.5.65. On 23.6.65 a Motion dismissed an application to set aside judgment in default. On 7th July, 1965 leave was granted to the applicant to appeal against Order dated 23.6.65. Leave was not necessary. The judgment which was obtained by default was a final judgment and leave was not necessary. This being so applicant had three months within which to appeal as from the 23rd of June. The appeal was filed on 4.11.65.

In the Court of
Appeal for
Sierra Leone

No. 26
Proceedings.
29th November,
1965.

(Contd.)

Dr. Marcus Jones - Judgment obtained in default was not a final judgment. Plaintiff should have gone by Motion to apply for assessment of damages. He took interlocutory proceedings to obtain judgment. Court has to consider whether lorry was working 20 hours a day and whether it was £1 per day. Though headed "Special Damages" they are in fact not "Special". They are damages which need to be proved. Plaintiff should have gone under Order 40 Rule 1 for Master to have assessed damages.

See Order 3 Rule 6. "Debt" or "Liquidated" amount.

The claim is for an unliquidated amount - See Writ and it was accompanied by a Statement of Claim.

We are asking for enlargement of time. See affidavit of Thompson Davies dated 11.11.65 paragraph 6. On 23.7.65 application for enlargement of time was made. This was heard on 4.11.65. The grounds of appeal were filed on 4.11.65 immediately after the application was refused.

Was judgment obtained by default final or interlocutory.

Dr. Marcus Jones -

(1) See endorsement on Writ - (a) damages etc.

(2) Statement of Claim alleges a contract. There is nothing to allege terms of contract. See Order 16 Rule 20 same as Order 19 Rule 24 White Book. The plaintiff should have set out the terms to show agreement between the parties. See Clydebank Engineering and Shipbuilding Co. Ltd. v. Don Jose Ramus etc. 1905 A.C. 6 at p.10. Here the parties agreed before hand that such and such an amount is to be paid under terms of contract and if there is a breach or damage flowing from that contract, then the amount so agreed upon are liquidated. All that was pleaded as special damages was never part of the contract contained in Statement of Claim. The special damage is not shown to have flowed from the contract alleged in paragraph 2 of Statement of Claim.

The default judgment should have been obtained by notice of Motion under Order 40 Rule 1 of White Book 1957 p. 695.

Refers Dunlop Pneumatic v. New Garage 1915
A.C.79. Commissioner of Public Works v. Hills
1906 A.C.368.

In the Court of
Appeal for
Sierra Leone

Smythe - Counsel's argument should not be directed against defects of pleadings. This Court should only look at the Order made on 25.5.65. One part of Order deals with a liquidated amount and the other part deals with damages to be assessed.

No. 26
Proceedings.
29th November,
1965.
(Contd.)

10 Judgment of 25.5.65 finally disposes of the rights of the parties. See Order 58 Rule 4 White Book. The judgment decided the right of the parties and as such it is final. The judgment should be looked at and not the form of the pleadings.

Test to be applied as to whether judgment is final or interlocutory - Order 58 Rule 4. See Laws of England Hailsham Halsburys Vol.18. p.184.
Refers

- 20 (a) Salaman v. Warner and others 1.L.R.Q.B.D.
1891 734.
- (b) Bozson v. Altrincham Urban District
Council L.R.K.B.D. 1 1903 p.547.

Ruling

30 The question as to whether the judgment obtained in default of appearance was a final judgment or an interlocutory one has been argued before us by Counsel as a result of a preliminary objection taken by Mr. Smythe Counsel for the plaintiff/respondent. Looking at the drawn up judgment by itself we are of the opinion that the judgment was an interlocutory one as it did not finally dispose of all the rights of the parties concerned. In the circumstances the objection as to want of jurisdiction is overruled.

Dr. Marcus Jones speaks to his motion -

40 Leave was granted on 7.7.65 to appeal against Order of 23.6.65 refusing the application to set aside the judgment obtained in default. We had 14 days and the time we should have filed a Notice of

In the Court of Appeal for Sierra Leone
 Appeal expired on 21.7.65. A Notice of Motion was taken out on 23.7.65 2 days after time had expired applying for enlargement of time. It was made returnable on 30.7.65 but was in fact heard and refused on 4.11.65. The Trial Judge - Luke J. acted on wrong principles. See his judgment at p.33.

No. 26
 Proceedings.
 29th November,
 1965.

(Contd.)

I have brought application under Rules 14(1) and 32. An appeal was filed on 4.11.65.

10

We have a good defence. Refusal to enlarge time will defeat the rights of the parties. See Atwood v. Chichester 3 Q.B.D. 723(2) Evans v. Bartlam 1937 A.C. 473 - discretionary power is unconditional - p.479. 480.

Mr. Smythe - I object to application because of the long delay in hearing the motion.

Ruling

We are of the view that the defendant applicant has shown good and substantial reasons why his application for the enlargement of time within which to file his notice of appeal should be granted and we so grant it. We order that he does so within 7 days as from today and pay the costs which we assess at Le.21.

20

(Sgd) S.B. Jones President

(Sgd) C.O.E. Cole Ag. Chief
 Justice

(Sgd) G.F. Dove-Edwin.

53.

No. 27

ORDER

CIV.APP.No. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Applicant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

Monday the 29th day of November, 1965

10 B E F O R E :-

The Hon. Sir Samuel Bankole Jones - President

The Hon. Mr. Justice C.O.E. Cole - Ag. C.J.

The Hon. Mr. Justice Dove-Edwin - J.A.

20 UPON READING the Notice of Motion dated the 11th day of November, 1965 and the Affidavits of Walter Sydney Marcus Jones dated the 11th and 22nd days of November, 1965, of Emile Thompson-Davies dated the 11th day of November, 1965 and of John Henry Smythe dated the 23rd day of November, 1965 and filed herein and UPON HEARING what was argued by Walter Sydney Marcus Jones on behalf of the Defendant/Applicant and by John Henry Smythe on behalf of the Plaintiff/Respondent IT IS THIS DAY ORDERED that leave be granted to the Defendant/Applicant for an extension of time within which to file his grounds of appeal herein and that he does so within seven days from the date hereof and that the defendant/applicant do pay to the plaintiff/respondent his costs assessed at Twenty-one Leones.

In the Court of
Appeal for
Sierra Leone

No. 27
Order.
29th November,
1965.

30

By the Court,

(Sgd.) O.M. Golley.

AG. REGISTRAR.

54.

No. 28

PROCEEDINGS

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Tuesday 18th January, 1966)

Coram:- Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice C.O.E. Cole - Ag. Chief
Justice
Hon. Mr. Justice R.B. Marke - Puisne Judge

A.Kabia vs. Mustapha Conteh

10

In the Court
of Appeal for
Sierra Leone

Marcus-Jones for Appellant
Johnny Smythe for Respondent

No. 28
Proceedings.
18th January,
1966.

Johnny Smythe - I applied for the records only this morning. I did not realise that case was coming up so soon. I have not received a copy of the filed Order nor the grounds of appeal. I have filed a notice of Motion coming up on Friday next.

Marcus Jones - I will not oppose the application for adjournment in the circumstances. 20

Adjourned to 21.1.66.

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Friday 21st January, 1966)

Coram:- Hon. Sir Samuel Bankole Jones - President
 Hon. Mr. Justice C.O.E. Cole - Ag.Chief Justice
 Hon. Mr. Justice R.B. Marke - Puisne Judge

Mustapha Conteh vs. A. Kabia

10 Mr. J.H. Smythe & Francis Minah for Appellant
 W.S. Marcus Jones for Respondent

In the Court of
 Appeal for
 Sierra Leone

Smythe - An application for leave to appeal to the Privy Council against a decision of this Court. Notice of intention to apply for leave to appeal was filed and served - dated 11.12.65. This application is brought under section 70(2)(a) of Courts Act No. 31 of 1965 and section 3 P.N. 79 of 1961.

No. 28
 Proceedings.
 21st January,
 1966.

20 I concede that the 42 days limit within which to make this application has expired. I apply for an extension of time. See paragraph 2 of my affidavit recently filed by me on 20.1.66. The fault was entirely mine. The Court has inherent jurisdiction to extend time with formal application made to it. The Privy Council has endorsed this in a recent case from Ceylon. See Order 64 Rule 7 - Notes - English Rules.

30 Marcus-Jones - Refers to Order 64 Rule 7. Application made ought to have been made by motion order 64 does not apply because it is not incorporated under P.N. 79. Where an applicant is asking for something on discretionary grounds he should show sufficient and substantial grounds. This has not been done.

Smythe - I have not come under any rule of practice.

In the Court
of Appeal for
Sierra Leone

Court - Application for leave to extend time
within which to apply for leave to appeal refused
as it is not properly before us.

No. 28
Proceedings.
21st January,
1966.
(Contd.)

Smythe - In view of Court's ruling, it will be
futile to proceed with motion. I apply for leave
to withdraw it.

Marcus Jones - No objection. I ask for costs.
I now withdraw the application for costs.

Court - Application to withdraw Motion
granted.

10

Order - Motion withdrawn.

A. Kabia vs. Mustapha Conteh

Marcus Jones for appellant

Smythe & Minah for Respondent

Marcus Jones - I ask leave to argue all my
three grounds of appeal together.

Argument - Paragraph 2 discloses a contract
between plaintiff and appellant. The terms of
contract not given e.g. payment per trip etc.
Paragraph 3 alleges negligence on part of 2nd
defendant A(S.L.D.C.Ltd.). In paragraph 4 there is
no allegation of negligence on the part of the
appellant.

20

In the particulars - Special damages are
claimed. Judgment obtained in default against
Appellant in a case in which there is no negligence
alleged against him. No nexus between Appellant
and the negligence alleged for which judgment was
signed against him.

30

If it is argued judgment was entered under
paragraph 2 Statement of Claim then it would be a
claim for pecuniary damages for which the Court
should have ordered an inquiry.

N.B. The writ was generally indorsed and
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 Learned Judge was wrong in law in refusing to set aside the judgment obtained in default and leave to Appellant to appear and defend the action. See Ward v. James 1965 1A.E.R. 563. This Court can review the exercise of the discretion of the Judge. Even if Judge gave no reason for the way he exercised his discretion, the Court can infer that he has gone wrong in one way or the other. The amount of £1,400 or Le.2,800 for which he obtained judgment was not liquidated but pecuniary damages and therefore the proper procedure should have been to proceed under Order 13 Rule 5 of the English Rules or Order X Rule 5 (local Rules) See Clyde Bank Engineering and Shipbuilding Co. v. Don Jose Ramos 1905 A.C.6. See also Public Works Commissioner v. Hills 1906 A.C. 368. What is styled "Special Damages" is in fact a penalty which should have been assessed.

In the Court of
Appeal for
Sierra Leone

No. 28
Proceedings.
21st January,
1966.

(Contd.)

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Mr. Smythe - This Court should not look at the Statement of Claim and the decision should not be influenced by this document. The Court should look at what was before the Judge. No defence was exhibited when the Motion was made before Luke J. The Statement of Claim was not before Luke J.

30

Court - (Marke J Dissenting) It is ordered that the appellant do file and serve on the Respondent's Solicitor an affidavit exhibiting a certified true copy of the Statement of Claim in the action and leave is granted to Respondent to file a counter affidavit if necessary (Rule 30 Court of Appeal Rules) within 7 clear days.

Adjourned to 2.2.66.

(Sgd.) S.B. Jones
President.

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Wednesday 2nd February, 1966)

Coram:- Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice C.O.E. Cole - Ag. Chief
Justice
Hon. Mr. Justice R.B. Marke - Puisne Judge

Mustapha Conteh
v
A. Kabia

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In the Court
of Appeal for
Sierra Leone

F.M. Minah, Esq. holding Mr. Smythe's brief for
plaintiff/respondent.

Marcus Jones for Defendant/Appellant.

No. 28
Proceedings.
2nd February,
1966.

Minah - I apply for an adjournment on behalf
of Mr. J.H. Smythe who is out of Freetown appearing
in a criminal case at Bo. I apply for hearing on
the 7.2.66.

Marcus Jones - I do not oppose the application.

Court - Adjourned to 7.2.66.

20

(Sgd.) S.B. Jones.

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Monday the 7th day of February,
1966)

Coram: Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice C.O.E. Cole - Ag. Chief
Justice
Hon. Mr. Justice R.B. Marke - Puisne Judge

A. Kabia

v

Mustapha Conteh

10

Smythe - In civil practice fresh evidence must be by consent of both parties. Refers sec.30 Court of Appeal Rules gives Court power to call fresh evidence but the procedure is that this should be done with consent of both parties. I did not consent to use of the fresh evidence.

In the Court of
Appeal for
Sierra Leone

No. 28
Proceedings.
7th February,
1966.

20 The judgment has been met in full in June, 1965. The motion to set aside judgment was filed 7 days after execution. Evans v. Bartlam 1937 2 A.E.R. 646.

30 If Judge had looked at Statement of Claim in the absence of a defence on the merits, this would not have made any difference to the Judge's exercise of his discretion. Once a Statement of Claim has been filed and served, if there is any defect it can only be dealt with by issuing a summons to strike it out or plead the error in Statement of Defence.

Marcus-Jones - Refers judge of Lord Russell in Evans v. Bartlam p. 651 A.E.R. Judgment reserved - Notices will be sent out.

(Sgd.) S.B. JONES

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Thursday 24th February, 1966)

Coram: Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice J.O.E. Cole - Ag. Chief
Justice
Hon. Mr. Justice R.B. Marke - Puisne Judge

Mustapha Conteh

v.

A. Kabia

10

In the Court of Same Counsel as before.

Appeal for
Sierra Leone

A majority decision Marke J. dissenting -
Appeal allowed with costs in this Court and the
Court below to the Respondent as well as all costs
thrown away.

No. 28
Proceedings.
24th February,
1966.

Order - Judgment in default set aside.
Defendant/Appellant be at liberty to appear and
defend the action.

20

(Sgd.) S.B. Jones.

JUDGMENT OF JONES P.

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

Coram:- Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice C.O.E. Cole - Ag. C.J.,
Sierra Leone
Hon. Mr. Justice R.B. Marke - Puisne Judge
Sierra Leone

10 B E T W E E N :- A. KABIA - Defendant/Appellant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

Dr. W. Marcus-Jones for Defendant/Appellant

In the Court of
Appeal for
Sierra Leone

J.H. Smythe, Esq. for Plaintiff/Respondent

JUDGMENT delivered on the 24th day of February,
1966.

No. 29
Judgment of
Jones P.
24th February,
1966.

20 Sir Samuel Bankole Jones P.:- This is an
appeal from an order of the Supreme Court - (Luke,
A.G.J.) - dated the 23rd day of June, 1965 refus-
ing an application by the Appellant, who was the
first defendant in the Court below to set aside a
judgment dated the 25th day of May, 1965 obtained
against him in default of appearance.

30 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 the
10th day of February, 1965 and the indorsement
reads:-

"The Plaintiff's claim is for damages and a
tipper lorry for damages 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

In the Court of
Appeal for
Sierra Leone

STATEMENT OF CLAIM

No. 29
Judgment of
Jones P.
24th February,
1966.
(Contd.)

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 No. 742 on the 19th January, 1964, and transported iron ore for the defendant. 10

3. On the 22nd March, 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. 20

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. 30

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 defendant's lorry was at a safe distance when he lowered No. 12 bucket of Dumper Shovel with great speed. 40
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.

In the Court of Appeal for Sierra Leone

PARTICULARS OF INJURY

The tipper lorry Chassis bent.

The steel body of the tipper lorry damaged.

The tipping machinery of the lorry damaged.

10 The front and back springs of the lorry broken.

No. 29
Judgment of Jones P.
24th February, 1966.
(Contd.)

PARTICULARS OF SPECIAL DAMAGES

Loss of use of tipper lorry N. 742

from 23/3/64 to 31/3/64 9 days

1/4/64 to 30/4/64 30 days

1/5/64 to 31/5/64 31 days

total 70 days

70 days at 20 hours working per day 1,400 hours. 1,400 hours at £1 per hour equal £1,400. 0. 0.

20

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 the 25th May, 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 Le.2800/00 for the loss of use of tipper lorry No. N.742 damages to be assessed and costs to be taxed".

30

A writ of Fieri Facias was issued on the 29th May, 1965 against the Appellant for the recovery of the sum of £1,400 (Le.2,800) the amount claimed under "Particulars of Special Damages" in the Statement of

In the Court
of Appeal for
Sierra Leone

No. 29
Judgment of
Jones P.
24th February,
1966.
(Contd.)

Claim. I understand that the whole of this amount has been recovered and paid over to the Respondent. On the 18th June, 1965, the appellant took out a motion praying for "an order that the judgment signed herein in default of appearance on the 25th day of May, 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 the 23rd June, 1965. On 7th July, 1965, the Court granted leave to appeal to this Court against the order of dismissal.

There are three grounds of appeal namely:-

- (1) That the Judgment in Default of Appearance obtained by the Plaintiff/Respondent on the 25th May, 1965 was irregularly obtained in that contrary to the Rules of the Supreme Court the Court was not moved for Judgment nor was there any assessment of the damages for which final Judgment was to be signed. 20
- (2) That the Statement of Claim disclosed no cause of action against the defendant/appellant.
- (3) That the learned trial Judge was wrong in law in refusing leave to the defendant/appellant to set aside the Judgment in default and to defend the action. 30

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 that in the first place there is no allegation of negligence against the Appellant in the Statement of Claim. Also in paragraph 4 of the claim the Respondent himself averred that the Appellant denied liability. Therefore if the damages claimed under "Particulars of Special Damages", for 40

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which judgment was obtained in default, flowed from the negligence alleged, then the statement of claim clearly discloses no cause of action against the Appellant.

In the Court of
Appeal for
Sierra Leone

No. 29
Judgment of
Jones P.
24th February,
1966.

(Contd.)

10 Secondly if it is stated that judgment was obtained by virtue of paragraph 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 Order X Rule 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.

20 Counsel for the Respondent in reply, objected to this 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.

30 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 urged 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. This 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 Rule 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
40 had been drawn to it by Counsel, on the grounds, 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.

In the Court
of Appeal for
Sierra Leone

No. 29
Judgment of
Jones P.
24th February,
1966.
(Contd.)

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 1965 1 A.E.R., 563 at pages 568 and 569

(1) "In what circumstances will the Court of Appeal interfere with the discretion of a 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 therefore reverse his decision." 10 20

(2) "When 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. 30

Shortly stated, Evans v. Bartlam 1937 2 A.E.R. 646 decided that the Court of Appeal was 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 no other grounds the Judge's decision will result in injustice. Lord Atkin in his Judgment said inter alia at p. 650 - 40

"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".

In the Court of
Appeal for
Sierra Leone

10 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 (le.2,800). 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 2nd defendant's servant.

No. 29
Judgment of
Jones P.
24th February,
1966.
(Contd.)

20 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 paragraph 4 (see above). 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.

30 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.

JUDGMENT OF MARKE P.J.

S.L.C.A. - CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

A. KABIA - Defendant/Appellant

- and -

MUSTAPHA CONTEH - Plaintiff/Respondent

Coram:- S.B. Jones President

C.O.E. Cole Acting Chief Justice

R.B. Marke Puisne Judge.

10

In the Court
of Appeal for
Sierra Leone

Dr. W.S. Marcus-Jones for Defendant/Appellant

J.H. Smythe Esq. for Plaintiff/Respondent

JUDGMENT - 24.2.66

No. 30
Judgment of
Marke P.J.
24th February,
1966.

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 the 25th day of May, 1965 and the execution issued thereby be set aside and that the first defendant be at liberty to defend this action.

20

The judgment in default dated the 25th day of May, 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.

30

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."

In the Court
of Appeal for
Sierra Leone

10 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 applica-
tion 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 were 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.

No. 70
Judgment of
Marke P.J.
24th February,
1966.
(Contd.)

20 Having been granted leave by Luke, Ag. J to appeal from his order the Defendant/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 Defendant/Appellant has now come to this Court with these grounds of appeal which I set out -

- 30 1. That the Judgment in default of appearance obtained by the Plaintiff/Respondent on the 25th May, 1965 and enforced as a final Judgment was irregularly obtained in that contrary to the Rules of the Supreme Court the Plaintiff/Respondent neither sought nor obtained an assessment of the amount for which final judgment should be signed the amount claimed being unliquidated damages.
- 40 2. That the learned trial Judge was wrong in law in refusing leave to the Defendant/Appellant to defend the action and to set aside the judgment obtained in default.
3. That the Statement of Claim disclosed no cause of action against the Defendant/Appellant.

In the Court
of Appeal for
Sierra Leone

No. 30
Judgment of
Marke P.J.
24th February,
1966.
(Contd.)

This third ground of appeal was not one of the grounds, if there were any grounds, on which the defaulting defendant - now the defendant/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 Defendant/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 Defendant/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 vs. Rochford Rural Council* (1917) 1 K.B. 384 at page 393 10 20

"..... 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. 30

For these reasons I would dismiss the appeal.

(Sgd) R.B. Marke, J.

24/2/66.

JUDGMENT OF COLE A.C.J.

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

General Sittings of the Court of Appeal holden
at Freetown in the Western Area of the State of
Sierra Leone

Coram:- Hon. Sir Samuel Bankole Jones - President

10

Hon. Mr. Justice C.O.E. Cole - Ag Chief
Justice

Hon. Mr. Justice R.B. Marke - Puisne Judge

B E T W E E N :-

MUSTAPHA CONTEH - Plaintiff/Respondent

- and -

A. KABIA - Defendant/Appellant

JUDGMENT delivered on the 24th day of February,
1966.

In the Court of
Appeal for
Sierra Leone

20

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 further-
ance of justice an Affidavit exhibiting the State-
ment 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 con-
tents of the Statement of Claim without any objec-
tion being raised by either Counsel for the
Respondent. The only time any objection was
raised was when Mr. Smythe, leading Counsel for
Respondent, rose to reply. In my view the objec-
tion was belated and the damage had been done.

30

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.

No. 31
Judgment of
Cole A.C.J.
24th February,
1966.

(Sgd) C.O.E. Cole.
Acting Chief Justice

72.

No. 32

ORDER

IN THE COURT OF APPEAL FOR SIERRA LEONE

APPEAL FROM THE ORDER OF THE HONOURABLE
MR. JUSTICE E.F. LUKE - DATED THE 23RD
DAY OF JUNE, 1965.

C.C. 33/65 - Motion

CIV.APP. 16/65 - Appeal No.

A. KABIA - Defendant/Appellant

MUSTAPHA CONTEH - Plaintiff/Respondent 10

In the Court
of Appeal for
Sierra Leone

THURSDAY THE 24th DAY OF FEBRUARY, 1966.

No. 32
Order
24th February,
1966.

THIS APPEAL coming on for hearing on the 29th day of November, 1965, the 18th and the 21st days of January, 1966 the 2nd, 7th and 24th days of February, 1966 before the Honourable Sir Samuel Bankole Jones, President, the Honourable Mr. Justice C.O.E. Cole Acting Chief Justice and the Honourable Mr. Justice R.H. Marke Puisne Judge in the presence of Dr. W.S. Marcus Jones for the Appellant and Mr. J.H. Smythe for the Respondent IT IS ORDERED that Judgment in Default of Appearance entered the 25th day of May, 1965 be set aside and that the Defendant/Appellant be at liberty to appear and defend the action. Costs before this Court and the Court below and all costs thrown away to the Respondent.

20

(Sgd.) A. Nithianandan.

Registrar.

AFFIDAVIT OF THE DEFENDANT

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH - Plaintiff/Appellant

- and -

A. KABIA - Defendant/Respondent

10 I, ALUSINE KABIA of 56 Bai Rampa Road, Lunsar, In the Court of
Trader, make oath and say as follows:- Appeal for
Sierra Leone

1. That I am the Respondent to the application
by Mustapha Conteh for leave to appeal and a
stay of all further proceedings.

2. That I have seen the Notice of Motion dated
the 30th day of March and the Affidavit of Mr.
John Henry Smythe in support thereof.

No. 33
Affidavit of
the Defendant.
6th April,
1966.

20 3. That following the decision of the Sierra
Leone Court of Appeal in this matter on the
24th February last, my Solicitor on the 26th
day of February, 1966 filed and delivered a
Defence to the action No. C.C.33/65 now
pending before the Supreme Court.

30 4. That I am a trader and when my lorries N.
1368 and N. 1468 and my motor car C. 8205 were
seized by the Sheriff under the authority of
a Writ of Fieri Facias I had to obtain a loan
to pay to the Sheriff in two instalments the
sum of Two thousand nine hundred and six
Leones due under the Writ.

5. That I am informed by my Solicitor and verily
believe that he inadvertently omitted to ask
the Court for an Order that the amount
recovered under the said Writ which was issued
following the default proceedings should be
repaid to me pending the outcome of the action.

In the Court
of Appeal for
Sierra Leone

No. 33
Affidavit of
the Defendant.
6th April,
1966.
(Contd.)

6. That my Solicitor has, on my instructions requested both the plaintiff/applicant and his Solicitor to repay this amount to me but I am informed by my Solicitor and verily believe that no replies have been received from either of them.

7. That I verily believe this matter will take some time to be disposed of and I am suffering financially in the meantime as I have very limited funds for my business and in making repayments of the loan.

10

8. That on the 30th day of March when this Motion was issued there was pending before the Supreme Court an application by me for the money to be repaid to me. The application came up for hearing on Monday the 4th April, 1966 but it was then withdrawn by my Solicitor.

9. That I respectfully pray that this Honourable Court may order the said amount to be repaid to me in the meantime. In the alternative, that the Court may refuse the application for a stay of proceedings in so far as the same relates to the repayment of the said money.

20

SWORN at Freetown this 6th day of
April, 1966 at the hour of 10.2 (Sgd.) A. Kabia
o'clock in the forenoon.

Before me

(Sgd) B.M.A. Sawyerr.

A Commissioner for Oaths.

30

This Affidavit is filed on behalf of the Defendant/
Respondent.

No. 34

ORDER GRANTING FINAL LEAVE TO
APPEAL TO HER MAJESTY IN COUNCIL

CIV.APP. 16/65

IN THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

A. KABIA - Defendant/Respondent

- and -

MUSTAPHA CONTEH - Plaintiff/Applicant

10 Coram:- Hon. Sir Samuel Bankole Jones - President
Hon. Mr. Justice J.B. Marcus-Jones - Puisne Judge
Hon. Mr. Justice S.J. Forster - Ag. Puisne Judge

Thursday the 8th day of September, 1966.

20 UPON MOTION this day made to the Court UPON
READING the Affidavits of John Henry Smythe sworn
the 12th and 18th July, 1966 and the Affidavit of
Ulric William Coker sworn the 6th day of August,
1966 all filed herein AND UPON HEARING the said
Ulric William Coker of Counsel for the Plaintiff/
Applicant and James Ernest Mackay of Counsel for
the Defendant/Respondent IT IS ORDERED that final
leave be granted to the Plaintiff/Applicant to
appeal to Her Majesty in Council.

In the Court of
Appeal for
Sierra Leone

No. 34
Order granting
final leave to
appeal to Her
Majesty in
Council.
8th September,
1966.

BY THE COURT

(Sgd) A. Nithianandan

Registrar.

O N A P P E A L
FROM THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :-

MUSTAPHA CONTEH (Plaintiff) Appellant

- and -

A. KABIA (First Defendant) Respondent

R E C O R D O F P R O C E E D I N G S

T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.

CARTWRIGHT, CUNNINGHAM,
Eldon Street House,
Eldon Street,
London, E.C.2.

Solicitors for the Respondent.