

C.C 415/2020

2020

M

NO.2

IN THE HIGH COURT OF SIERRA LEONE  
( INDUSTRIAL AND SOCIAL SECURITY DIVISION)

BETWEEN:

BOCKARIE JOHN MASSAQUOI

SUGAR LAND

GODERICH

FREETOWN.

– PLAINTIFF/ RESPONDENT

AND

ELECTRICITY DISTRIBUTION

AND SUPPLY AUTHORITY (EDSA)

5A HIGH BROAD STREET

MURRAY TOWN, FREETOWN

-DEFENDANT/ APPLICANT.

COUNSEL,

Jacob J Campbell Esq. for the Applicant

Khadijatu M Bangura Esq. for the Respondent.

Ruling delivered on the 1<sup>st</sup> July, 2020 by the Hon Mr. Justice Sengu M Koroma JSC  
(President of the Industrial and Social Security Division)

1. The Applicant herein filed a Notice of Motion dated the 12<sup>th</sup> day of May, 2021 seeking the following Orders:
  - 1) That this Honourable Court sets aside the Judgment in default of pleadings dated the 10<sup>th</sup> day of March 2021 and other subsequent proceedings as the other side was not served and/or heard on the merits on the matter herein.
  - 2) That leave be granted by this Honourable Court to the Defendant herein to file a defence out of time.

- 3) Any further Order(s) that this Honourable Court may deem just.
- 4) Costs of this application be costs in the cause.
  1. At the hearing of the Application, the Applicant uses the affidavit of Jacob Jibao Campbell sworn to on the 12<sup>th</sup> May 2021 together with exhibits attached thereto which he relies on in its entirety.
  2. He submits that the application is made pursuant to Order 22 rule 11 of the High Court Rules, 2007 and relies on the case of EVANS-V-BARTLAM (1937) AC 473.
  3. Mr. Campbell in his conclusion concedes that the Judgment was regularly obtained and therefore not averse to the Judgment being set aside on terms.
  4. Khadijatu Bangura Esq., Counsel for the Respondent opposes the Application and relies on the Affidavit in Opposition sworn to by Bockarie J. Massaquoi dated the 18<sup>th</sup> day of May, 2021. Ms. Bangura refers to the various exhibits attached to the said affidavit.
  5. Ms. Bangura relies on the entirety of the affidavit in opposition more particularly paragraphs 13 – 20 and submits that the Judgment was regularly obtained. She argues that in order to set aside a regularly obtained Judgment in default of defence, the Defendant must file an affidavit on its merits. In support of this, she refers to paragraph 13/91 of the English Annual Practice, 1999 (The "WHITE BOOK"). Such an affidavit must prove that the Defendant has a good defence to the Plaintiff's claim. She also refers to Order 21 Rule 13 (3) of the High Court Rules, 2007.
  6. Ms. Bangura submits further that the Applicant have not in their affidavit contested any of the claims, which implies that they have no defence to the claims.
  7. Ms. Bangura, relies on the cases of ALPINE BALL TRANSPORT COMPANY-V- SAUDI EAGLE (1986) 2 Lloyd's Report 221 at 223, C.A and EVANS-V-BARTLAM (supra) in support of her submissions.
8. In his reply, Mr. J.J. Campbell argues that the proposed defence has merits, which can only be determined when all the facts are laid bare before the Court.
9. He submits finally that they are not averse to the default Judgement being set aside on terms.

## THE LAW

10. Order 22 Rule 2(1) of the High Court Rules, 2007 provides that:  
"where the Plaintiff's claim against the Defendant is for liquidated demand only, then, if the Defendant fails to file a defence, the Plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final Judgment against that Defendant for a sum not exceeding that claimed by to the Writ in respect of Demand and for cost, and proceed with the action against the other Defendants, if any."
11. Order 22 Rule 2(2) provides that a claim shall not be prevented from being treated as a claim for a liquidated demand by reason only that part of the claim is for interest.
12. In the case of liquidated damages only, then, if the Defendant defaults in pleading... have Judgment entered against the Defendant for damages to be assessed by the Court, and for costs, and may proceed with the action against the other Defendants, if any- Order 22 Rule 3.
13. The principle here is that if the Defendant defaults in serving a defence, all the allegations in the statement of claim are admitted – English Annual Practice, 1999 paragraph 19/2/1.
14. The Court however, may in its discretion set aside a Judgment obtained in default of defence. The Court also has power to vary the Judgment entered in default of pleadings.
15. The Court of Appeal of Sierra Leone in the case of *KAMARA V DAVIES AND ORS.* (CIV.APP) 22/2007 stated the law on the general indication of the way in which the court should exercise its discretion in setting aside a Judgment obtained in default.
16. *Bash-Taqi JSC*, delivering the Judgment of the Court had this to say:  
"These 'general indications' of the way in which the Court should exercise its discretion was derived by the Court of Appeal in *EVANS-V-BARTLAM* (supra) and discussed and approved in *ALPINE BULK TRANSPORT COMPANY-V- SAUDI EAGLE SHIPPING COMPANY INC. (THE SAUDI EAGLE)* (1986)2 Lloyds Rep. 221.
- i. That the Judgment signed in default is a regular Judgment from which, subject to (ii) below the Plaintiff derives right of property.
  - ii. That the Rules of Court give to the Judge a discretionary power to set aside the default Judgment which is in terms "unconditional" and the

Court should not “lay rigid rules which deprive it of jurisdiction” (Per Lord Atkins at page 186).

- iii. That the purpose of the discretionary power is to avoid the injustice, which might be caused if judgment followed automatically on default.
- iv. That the primary consideration is whether the Defendant “has merits to which the courts should pay heed: (per Lord Wright at page 489) not as a rule of law but as a matter of common sense since there is no point in setting aside a Judgement if the Defendant has no defence. On the other hand if he has shown “merits”, the Court will not, prima facie desire to let a judgment pass on which there has been no proper adjudication (ibid. at page 489 and per Lord Russell of Killowen at page 482)
- v. That as a matter of common sense though not making it a condition precedent, the court will take into account the explanation as to how it came about that the Defendant... found himself bound by a judgment regularly obtained to which he could have set up some serious defence(per Lord Russell of Killowen at page 482)“.

17. Justice Bash-Taqi JSC went on to say: “The standard indicated by each of their Lordships the above case clearly contemplated that a Defendant who is asking the Court to exercise is discretion in his favour should show a defence which has a real prospect of success’... put in another way, in order for them to arrive at a reasoned assessment of the justice of the case, it must form a provisional view of the outcome if judgment were to be set aside and the defence developed”.

#### APPLICATION OF THE LAW TO THE FACTS

18. It is not in dispute the defence was not served within the period provided for in the Rules, nor that the Judgment was regularly obtained. Indeed, the Applicant’s Counsel admits that the Judgment was regularly obtained and could therefore be set aside on terms. As reasoned in the in the KAMARA-V-DAVIS case (supra), “it is quite clear that when a Judgment is obtained, it is incumbent on the defaulting party applying to have a regular Judgment set aside to satisfy the Judge that they do not only have a defence on its merits, but have an explanation of how it came about that they failed to comply with the time limits. In the instant case, the Applicant only moved to be given an extension of time to file a defence after Judgment ha been entered and execution commenced.

19. Against this backdrop, what is required to be done is to determine whether this Court should exercise its discretion to set the Judgment aside. In doing so, consideration should be given the plausibility of the proposed defence.

20. I must comment that the submissions of Counsel for the Applicant are most unimpressive. Counsel merely relies on the entirety of the affidavit, refers to the exhibits and concludes by referring to Order 22 Rule 11 of the High Court Rules, 2007. There is no evidence of proper preparation depicting an almost relaxed approach to a serious issue relating to industrial justice.
21. The proposed defence is unmeritorious e.g. Paragraph 7 thereof in which it is averred that "The Defendant admits paragraph 17 of the Plaintiff's particulars of claim in so far as he was not reinstated due to his dismissal and will deny he was never given any opportunity to defend himself, as his dismissal letter makes provision for appeal which he failed and/or refused to exercise".
22. This type of defence reflects a clear misunderstanding of paragraph 17 of the particulars of claim and lack of knowledge in employment/ Labour litigation. The claim is that during the disciplinary proceedings, the Plaintiff was not given an opportunity to defend himself, which is an important aspect of procedural fairness. The existence of the right to appeal does not extinguish the strict rule regarding procedural fairness – Audi alterem Patem.
23. In addition to the observation made above, the wording of Order (1) prayed for in the Notice of Motion suggests to me that the Solicitor for the Defendant does not know what to apply for in this type of Application. This is a Judgment in default of defence and so how would the Applicant expect to be heard or served when there has been no defence filed.
24. Counsel for the Applicant relies on the case of *EVANS –V- BARTLAM* (supra). The exclusive reliance on this case in an Application to set aside a default Judgment should not be restricted to statements of general principles. The said case provides for "general indications" which the Court must take into consideration. Lord Wright in his Judgment at page 489 had this to say, "the primary consideration is whether the defence has merits which the Courts should pay heed to not as a Rule of law but as a matter of Common Sense..."
25. As I have already stated, logically, the defence must have a real prospect of success within the meaning of *SWAN-V- HILLMAN* (2001)1 ALL.E.R.91 and *E.D and F. MAN LIQUID PRODUCTS LTD V PATEL* (2003) EW CA Civ. 472.
26. In *INTERNATIONAL FINANCE CORPORATION—V-UTEXAFRICA Sprl* (2001) CLC 1361 it was stated that the test of having a real prospect of success means that the prospect must be better than merely arguable. In the *F. MAN LIQUID PRODUCTS LTD* case, the English court of Appeal confirmed this proposition and that the test is higher than it was under the English Order 14 (Summary Judgment) (Order 16 of our Rules).

27. The defence filed, does not in the least meet the standards set out in the aforementioned cases.

28. It is my conclusion therefore, that, based on the line of authorities referred to, the proposed Defence filed has no real prospect of success and therefore there is no point in settling aside a Judgment if the defendant has no defence.

29. In the circumstance, I order as follows

1. That the Application to set aside the Judgment in default of defence dated 10<sup>th</sup> day of March 2021 and all subsequent proceedings is hereby refused.
2. Cost of this application shall be costs in the cause.



Hon Mr. Justice Sengu M Koroma JSC  
President of the Industrial and Social Security Division.