NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 81/2000

SUIT. NO: C. L. E-024 of 1998

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**THELMA EDWARDS**	**PLAINTIFF/ APPELLANT**
A N D	**ROBINSON'S CAR MART LTD.**	**DEFENDANT/ RESPONDENT**
A N D	**LORENZO ARCHER**	**2ND DEFENDANT**

Christopher Samuda and **David Johnson** instructed by Piper & Samuda for the appellants

Gordon Steer instructed by Chambers, Bunny & Steer for the defendant/respondent

January 22 and March 19, 2001

FORTE, P:

Having read in draft the judgment of Langrin J.A., I am in full agreement and have nothing further to add.

WALKER, J.A:

As I understand this appeal it was taken against a judgment of Reckord J, given on June 29,2000 whereby he set aside an assessment of damages and an

order for costs previously made by him on February 5, 1999 in favour of the appellant (then the plaintiff) against the respondent (then the defendant). So taken the appeal is clearly governed by section 354 of the Civil Procedure Code which provides as follows:

> **"354.** Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial".

The factual situation is that the respondent, although duly notified, did not appear and was not represented on the hearing of the appellant's summons for assessment of damages. Subsequently, by letter dated February 16, 1999 the appellant's attorneys-at-law notified the respondent's attorney-at-law of the assessment and requested payment of the sum assessed and costs. It will become immediately apparent that at the date of that letter the time limit of 10 days prescribed by section 354 had already expired. So on June 29, 2000 when the respondent's summons came on for hearing, unless there was an application to extend time, and as to that there was none, the respondent was clearly left high and dry and without an arguable case for setting aside the order of February 5, 1999 (see ***Mills v Lawson and Skyers*** [1990] 27 JLR 196). Given these circumstances Reckord J's judgment of June 29,2000 was plainly wrong and must be reversed. It is on this basis that I am content to allow the present appeal with costs to the appellant to be agreed or taxed.

LANGRIN, J.A. :

This is an appeal against the decision of Reckord J, made on June 29, 2000 whereby he granted a motion to set aside a final judgment made by himself on the

5th February, 1999. On January 22, 2001, we allowed the appeal and set aside the order of the Court below and restored the final judgment. These are our reasons in writing. The judgment which was set aside and filed February 12, 1999 is set out below:

> **"UPON THE NOTICE OF ASSESSMENT OF DAMAGES** dated the 21st day of October, 1998 coming on for hearing these days and upon hearing Mr.Christopher L. Samuda, Attorney-at-Law instructed by Messrs. Piper & Samuda, Attorneys-at-Law on the record for the Plaintiff and the First Defendant not appearing or being represented **IT IS HEREBY THIS DAY ADJUDGED AS FOLLOWS:**
>
> (1) Special Damages assessed $75,610.00 with interest at 3% per annum from the 20th March, 1997 to today.
>
> (2) General Damages assessed $230,000.00 with interest at 3% per annum from 9th April, 1998 to today.
>
> (3) Costs to the Plaintiff against the First Defendant".

The issue of law before the Court is whether the order made by the judge in the Supreme court setting aside the assessment of damages against the respondents is erroneous and should be set aside on appeal.

I will now set out the relevant background that has given rise to this appeal. The appellant's claim was in negligence for personal injuries arising out of a motor vehicle collision on 20th March, 1997. A Writ of Summons and Statement of Claim were filed on the 3rd April, 1998 and served on the defendant on April 8, 1998. An appearance was entered on the 8th May, 1998 but no defence was filed.

On June 9, 1998 interlocutory judgment in default of defence was entered. A summons to proceed to assessment of damages was granted.

On July 22, 1998 a summons to file defence out of time was served on the plaintiff for hearing on the 20th October, 1998 and thereafter a summons to proceed to assessment of damages for hearing on the 20TH October, 1998 was served on the defendant. When the application to file defence out of time came on for hearing, counsel for the said defendant was absent and the Court taking cognizance of her absence adjourned the matter sine die and made the order on the plaintiff's summons to proceed to Assessment of Damages.

On the 21st May, 1999 a Writ of Seizure and Sale was filed and on the 8th February, 2000 an attested copy was sent to the bailiff for execution. The insurers forwarded to the Plaintiff's attorney a cheque for the sum of $250,000.00 being the policy limit and in partial satisfaction of the final judgment. The bailiff has since partially executed the Writ of Seizure and Sale by collecting and paying into the Treasury the sum of $88,500.00.

Let me now turn to the consideration of whether or not the learned judge was wrong in law. It is therefore useful to examine his reasons for judgment which are stated as follows:

> "I am not with Mr. Johnson and my point has been that although we are required to stick by the rules of court, we must at all times never forget that justice should be done.
>
> The First Defendant's defence is that 'I am not legally the owner of this motor vehicle as I sold it under certain terms to Mr. Archer who, went on a spree of his own, got into an accident and the injured party is now asking me to pay for what Mr. Archer did'. The car was not being used on the First Defendant's behalf but he is left with the burden of a judgment of over $300,000.00. Why should the First Defendant bear this burden.

> The Plaintiff came before the Court and in the absence of the First Defendant stated the circumstances of the accident and for reasons known to the First Defendant's Attorneys, the necessary steps were not taken, or were not taken, or not taken within the required time.
>
> The Plaintiff has recovered almost all of the judgment sum awarded to her. What wrong did the First Defendant do that he should suffer.
>
> I am grateful to Mr. Johnson for his excellent presentation as he brought all the relevant cases to the Court's attention. But I am still asking the question 'what wrong did the First Defendant do'. It did not send Mr. Archer out to do anything.
>
> The Law is not one way for the rich man and another way for the poor man. We have one law."

The grounds of appeal are:

(1) The Learned Judge erred in law in granting the Notice of Motion to set aside judgment filed on behalf of the First Defendant/Respondent;

(2) The Learned Judge failed to evaluate or to properly evaluate the Affidavit evidence before him particularly the Affidavit filed on behalf of the Plaintiff/Appellant.

Mr. David Johnson, on behalf of the appellant, submitted that the predominant consideration facing the court in the exercise of its discretion to grant or refuse an application to set aside a Final Judgment entered in the absence of a party, was the reason why that party absented himself from the trial. In considering the justice between the parties , the conduct of the party applying to set aside the judgment had to be considered.

A material consideration in the exercise of the Court's discretion is whether the successful party would be prejudiced in the judgment being set aside especially if he could not be protected against the financial consequences.

The section which governs the situation where only one party appears at trial is section 354 of the Judicature (Civil Procedure) Code Law which provides:

> "**354.** Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial". (emphasis supplied).

In ***Mills v Lawson*** [1990] 27 JLR 196 the Court of Appeal held that a hearing for an assessment of damages by a judge is a trial and results in a verdict or judgment which cannot be regarded as a default judgment.

Since the defendant did not apply to set aside the judgment within the ten day period then there was no discretion on the part of the judge to set aside the judgment. On that basis alone the appeal should be allowed.

The predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation (emphasis supplied).

These principles are clearly stated in the case of ***Shocked and Another v Goldschmidt and Others*** (CA) The Times Law Reports, November 14, 1994 at p. 550. This Court has approved these principles and apply them from time to time.

In the instant case, the learned judge in approaching the exercise of his discretion as he did, erred in principle.

Although the defendant knew of the trial date, the defendant did not appear and was not represented at the trial. Great care must have been taken by the judge to ensure that the defendant knew of the trial date and he being satisfied as to this, exercised his discretion to proceed with the trial in the absence of the defendant. There is not a shred of evidence in the affidavit supporting the motion to set aside the Final Judgment as to the reason for the defendant's absence. It is passing strange that it was the same judge who heard and granted the application.

The judge does not appear to give any weight to the significant distinction between a default judgment and a judgment made after a trial at which the applicant has not appeared. There is indeed a material difference between the two situations. Naturally there is a much greater reluctance to set aside a judgment after trial as opposed to one where there has been no adjudication at all.

Mr. Steer, on behalf of the respondent, submitted that substantial injustice was done to the defendant by shutting him out of the trial and moreso when the plaintiff could be compensated by the award of costs.

In our view where a party has been clearly notified of a date for trial and has deliberately chosen to absent himself it is a real consideration to be taken into account in assessing where the interests of justice lie. The interests of justice require that a man should at least have the opportunity of a trial but when he chooses to ignore the opportunity given to him without even the minimum of

explanation, we can see no manifest injustice in not offering him a second opportunity.

In any event, the judge wrongly exercised his discretion to set aside the judgment because he did not properly consider whether the defendant's conduct was such as to disentitle him to a new trial. His sole consideration appears to be whether the defendant had a defence. He failed to give due weight to the relevant principle, which is, the reason why the defendant absented himself and to the injustice caused to the plaintiff in undergoing the strain of preparing for and participating in a second trial. Regard must also be had to the public interest in there being finality to litigation.

In addition this court has taken into consideration that the judgment has been partially executed.

Accordingly, we allowed the appeal, set aside the order of the court below made on June 29, 2000 and restored the Final Judgment made on February 5, 1999 and filed on February 12, 1999. Costs were awarded to the appellant to be taxed if not agreed.