JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 39 OF 1983

BEFORE: THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (A.G.)

BETWEEN	KENNETH MORRIS	DEFENDANT/APPELLANT
AND	OWEN TAYLOR	PLAINTIFF/RESPONDENT

H. Edwards, Q.C., and A. Rose for the appellant.
John Graham for the respondent.

October 31; November 22, 1984

CAMPBELL, J.A. (A.G.):

The respondent by writ issued in Suit C.L. 1974/T007 claimed damages from the appellant for an assault constituted by the latter throwing acid on the former on April 16, 1973. The incident which took place in the appellant's jewellery shop situated at 136¼ Orange Street in the parish of Kingston was the subject of a criminal prosecution against the respondent for robbery with aggravation. He was acquitted of the charge in the Home Circuit Court on February 12, 1974, a few days after issuing his writ.

The appellant entered appearance to the writ through his Attorney-at-Law, Mr. Cruickshank, on February 19, 1974. Thereafter no further step was taken by the respondent to prosecute his claim until May 9, 1975, when his Attorneys-at-Law filed and served a notice of intention to proceed. Nothing was however done pursuant to this notice. Prior to the filing of this notice, another writ of summons in Suit No. C.L. 1975/T033 was issued by the respondent on April 22, 1975, claiming against the appellant damages for malicious prosecution consequent on the respondent's acquittal of the criminal charge. To this writ the appellant entered appearance through

Mr. Cruickshank on April 28, 1975. Nothing further was done by the respondent in relation to this writ until March 12, 1976, when notice of intention to proceed was filed and served. At the same time a second notice of intention to proceed was also filed and served on the same date in respect to Suit C.L. 1974/T007.

Following on the service of these notices of intention to proceed, the respondent on March 24, 1976, sought and obtained the consent of the appellant to file and serve statements of claim out of time. The statements of claim in both suits were filed on April 20, 1976 and duly served on Mr. Cruickshank on behalf of the appellant.

On 23rd June, 1976, interlocutory judgments in default of defence were entered in both suits and thereafter summons to proceed to assessment of damage in both suits was taken out on July 28, 1976, for hearing on October 11, 1976. This summons was served by registered post on Mr. Cruickshank. The formal order filed recited the non-appearance at the hearing of the defendant or his attorney-at-law. The notice of assessment of damage dated 21st October for hearing on 4th March, 1977, was similarly served on Mr. Cruickshank by registered post on February 24, 1977. But on this occasion a notice was also served personally on the appellant on Slipe Road on 24th January, 1977.

The appellant in all likelihood contacted Mr. Cruickshank and gave him instructions to apply to have the default judgment vacated. In his affidavit in support of this summons, the appellant deponed to the following facts in summary:

1. He is a jewellery shop proprietor operating at Orange Street, Kingston.
2. On 16th April, 1973, in the course of being robbed he threw acid on one of the robbers and made a report to the Fletcher's Land Police.

3. The respondent was arrested and charged with robbery with aggravation but was acquitted in the Home Circuit Court.

4. Before the criminal trial ended he was served with a writ of summons but he left for the United States of America and did not finally return to Jamaica until November 1976.

5. He has a good defence to both suits and has given instructions to his attorney to file a defence on being served with the notice of assessment of damages.

Mr. Cruickshank's affidavit in support of the summons to set aside the judgment in default deponed to the fact that after the appellant had instructed him to enter appearance in the writ in Suit C.L. 1974/T007, which he did, the appellant left the island and he Mr. Cruickshank lost contact with his client and so was, on being served with the statement of claim, unable to file a defence as he was without instructions.

The default judgment was set aside on May 2, 1977, and defences were duly filed on May 24, 1977. Summons for direction was taken out by the respondent on July 27, 1977, for hearing on October 31, 1977, on which date it was heard.

The suits did not come on for hearing until February 8, 1979. On this date it was taken out the list because notice of trial had not been served on Mr. Cruickshank for the appellant. The suit was subsequently fixed for hearing on 30th and 31st July, 1979. On this occasion, the respondent's attorneys-at-law by registered letter dated 15th June, 1979, addressed to Mr. Glen Cruickshank at 53 Church Street, Kingston, advised him of the dates fixed as per notice from the Supreme Court copy of which they enclosed. The trial did not in fact commence on July 30, 1979, as Mr. Cruickshank who was apparently engaged elsewhere in a criminal trial requested through Mr. Carlton Williams, a fellow attorney, an adjournment on the ground that appellant could not be contacted. An adjournment was granted

to the 31st July for Mr. Cruickshank to be contacted. On the adjourned date, Mr. Cruickshank appeared on behalf of but without the appellant. The respondent and his witnesses testified, were cross-examined and thereafter the suits were adjourned sine die as part-heard.

The suits came on for continuation on December 7, 1979. On this date, neither Mr. Cruickshank nor the appellant appeared. The learned trial judge's record of the day's proceedings read thus:

> "Mr. Goffe:
>
> "We are ready and anxious to go on. Delay in operating on plaintiff can affect his chance of good recovery. See evidence of Dr. Williams. We want to go on.
>
> Mr. Cruickshank - not present in Court. Message received from Mr. McFarlane that he is coming to Court but unable to say when.
>
> At 10:20 a.m. no sign of Mr. Cruickshank.
>
> Coram (after discussion)
>
> In view of failure of Mr. Cruickshank to appear and in absence of any reasonable rational excuse for his absence Coram will treat case as one in which the Defence has been abandoned. Will hear plaintiff on question of damages.
>
> 12 Noon: Mr. Cruickshank still absent.
>
> Order:
>
> Defendant not appearing or not being represented - case treated as one in which Defence has been abandoned and having heard Mr. Goffe for plaintiff on assessment of damages the Court orders:
>
> On Suit No. C.L. T007 of 1974 for assault
>
> Judgment for plaintiff in the sum of $5,325 by way of special damages with interest at 3% from 16th April 1973 to date; and in the sum of $30,000 by way of General Damages - with costs to be agreed or taxed.
>
> On Suit No. C.L. T003 of 1975 for False Imprisonment
>
> Judgment for plaintiff in the sum of $1,000 with costs to be agreed or taxed."

The Supreme Court file in relation to these suits reveal the following subsequent acts and proceedings:

1. The respondent's attorney-at-law filed formal judgment in terms of the learned judge's order on December 12, 1979.
2. A summons for the sale of the appellant's land was taken out on December 12, 1979 and another summons for a similar purpose was taken out on January 22, 1980. They were both addressed for service to the defendant c/o his attorney-at-law 39½ Johns Lane, Kingston. Neither the appellant nor Mr. Cruickshank appeared at the hearing.
3. A notice of taxation dated 19th February, 1980, was similarly addressed to "Kenneth Morris c/o his Attorney-at-Law, A. G. Cruickshank, Esq., 39½ Johns Lane, Kingston." There was no appearance by the appellant or by his attorney-at-law at the taxation.
4. A notice of enquiry dated 3rd March, 1980, for hearing on 15th July, 1980, was similarly addressed to "the Defendant c/o his Attorney-at-Law, A. G. Cruickshank, esq. 53 Church Street, Kingston." There was no proof of service on the defendant. On the 29th July, 1980, an Enquiry was conducted by the Acting Deputy Registrar. Her report recorded the appellant as not appearing or represented.

It should here be stated that on the hearing subsequently of a motion to set aside the judgment dated 7th December, 1979, Mr. Cruickshank under cross-examination by Mr. Graham for the respondent in relation to the above matters answered thus:

> "So you recall receiving trial notice from Registrar?
>
> I cannot recall but I would not say that I did not. In 1980 W. Griffiths was my employee.
>
> On 28th January, 1980, did summons for sale of land come to your attention?
>
> It might have.

"Do you recall having been served with Order made on that summons late in 1980?

Yes.

Did Order come to your attention?

I do not recall seeing this order.

(Order of Master made on summons for sale of land on 4th February, 1980)

Notice of Taxation - Did it come to your attention on 27th February, 1980?

It was served on me.

Notice of Enquiry point to Order on sale of land - Did you know?

Yes. A copy was served on me.

Notice dated 2nd March, 1980 returnable 29th July, 1980. Service was acknowledged by employee on 24th July, 1980.

Summons for confirmation of Registrar's Report - pursuant to holding of Enquiry - Did you receive it?

Yes."

It must be noted that nowhere in this cross-examination was Mr. Cruickshank asked whether the notices which were actually addressed to the appellant c/o his attorney were ever passed on or the contents made known to the appellant. It should also be noted that whereas in relation to the notice of assessment of damage dated 21st October, 1976, which was addressed in similar manner as the notices before mentioned, it was deemed prudent by the respondent's attorneys-at-law to serve the appellant personally at his Slipe Road address in addition to serving Mr. Cruickshank by registered post, similar steps were not taken in relation to these notices even though service on Mr. Cruickshank did not appear to have been evoking any positive response.

On the 7th of November, 1980, a praecipe for Writ of Seizure and sale was filed by the respondent against the appellant whose address was stated in the praecipe as 23 Giltress Street in the parish of Kingston. This writ was issued on January 21, 1981. The response of the appellant was as prompt as it was when he was personally served with the

notice of assessment of damages on January 24, 1977.

The appellant immediately changed his attorney-at-law and instructed Mr. Alvin Mundell to apply to have the judgment dated 7th December, 1979, set aside.

In the circumstances of the above recited facts, it is reasonable to infer that the appellant has truthfully deponed in his affidavit sworn on 17th March, 1981, in his application to set aside the judgment, when he said he had no knowledge of what had transpired in the suit since the filing of his defences on May 24, 1977, until the bailiff acting under the writ of seizure and sale seized his car sometime in or about February/ March 1981. Mr. Cruickshank in his affidavit dated 25th March, 1981, admitted that he never informed the appellant of the date of hearing on 7th December, 1979. Though Mr. Cruickshank resiled from this, under cross-examination on the hearing of the motion, it is more than probable that he was not speaking the truth and that he resiled because the reason given in his affidavit for not informing the appellant had been proved to be untrue. He had to admit that he had notice of the adjourned hearing on 7th December, 1979. Therefore, to avoid any charge of negligence he had to say he served the appellant. His ambivalence does create serious doubt whether it was true as he said in court that he had informed the appellant.

Mr. Mundell filed notice of change of attorney on 17th March, 1981, and on the same date he also filed a notice of motion for leave to apply out of time for the judgment to be set aside and for the appellant to be given leave to defend on the merit and for all executions and further proceedings to be stayed until determination of the case on the merit.

The motion was fixed for hearing on March 27, 1981, on which date after hearing submissions from the attorneys-at-law for the parties the learned trial judge expressed himself thus:

"Coram

Concerned about laches and affidavits so far filed. More affidavits necessary in order to properly adjudicate upon matter.

Order

Application part-heard and adjourned sine die to allow further affidavits to be filed. The sum of $3,500 (inclusive of interest) representing agreed costs to be plaintiff's in any event and to be paid within fourteen days hereof."

The motion came on for continuation of hearing on 25th January, 1982. In the meantime the retainer of Mr. Mundell had been determined and Mr. Eli Hanna was the new attorney-at-law for the appellant. He submitted that the appellant had not been informed of the date of proceedings. The learned trial judge adjourned the proceedings and in doing so he stated thus:

"Coram

Issue is whether Coram has power in the particular circumstances of this case to treat case as a default judgment pursuant to Order 36 rule 33 (1965). Adjourned to allow counsel for the appellant to research question whether Coram is competent to make an order under Order 36 Rule 33 of the 1965 'White Book.' Costs of today to be Plaintiff/Respondent."

On 6th April, 1983, hearing of the motion continued. Mr. H. Edwards, Q.C., submitted that the judgment dated 7th December, 1979, was a default judgment and under section 258 of the Judicature (Civil Procedure Code) Law, there was jurisdiction in the learned trial judge to set it aside on terms. He relied on Evans v. Bartlam [1937] 2 All E.R. 646 for a definition of "default judgment."

To the contrary, Mr. Goffe for the respondent asserted that it was not a default judgment since the appellant appeared by his attorney on 31st July, 1979, and cross-examined the respondent and his witnesses. Since it was not a default judgment, the learned trial judge had no jurisdiction to set it aside. The remedy of the appellant, if such was available, was by way of appeal. He submitted that Evans v. Bartlam (supra), did not define the nature of default judgment.

With regard to the merits of the case, he submitted that

> "the knife to my side and the other man with the gun pointed at me, carried on a Robbery at the store, acid was thrown on the Plaintiff who was subsequently charged with the offence of Robbery with Aggrevation.
>
> "6. That after giving instruction to Mr. Cruickshank I have never heard from him about when the case was to be tried and I therefore assumed that the Plaintiff faced with my defence had abandoned and or was not pursuing the case against me.
>
> "7. That I had no knowledge that the case came before the Court for trial untill Bailiff came to my house at 23 Giltress Street in the parish of Kingston to seize my car."

The affidavit of Mr. Cruickshank sworn on 25th March, 1981, after his retainer had been determined so far as is relevant was to the following effect:

> "3. That on instructions from the defendant I filed a defence on his behalf stating that the Plaintiff was in the process of robbing the defendant when the alleged assault took place and that by reason of this robbery the Plaintiff was prosecuted by the Defendant.
>
> "4. That when the case was set down for trial I tried to inform the Defendant of the date for trial but I was informed and verily believed that the Defendant was not in Jamaica.
>
> "5. That I did so inform the Honourable Judge of the Court at the trial but the case was part-heard and postponed on the 30th and 31st July, 1979 to a date to be fixed.
>
> "6. That when the case came before the Court on the 7th December, 1979 for continuation I was unable to inform the Defendant as I was not aware of the date for trial as I was not notified."

The hearing on 6th April, 1983, was further adjourned to April 22, 1983, on which date Mr. Cruickshank under cross-examination on behalf of the respondent made the responses as earlier stated. With regard to the assertion by the appellant that he never heard from Mr. Cruickshank about the dates for trial which was confirmed by Mr. Cruickshank in paragraph 6 of his above-mentioned affidavit, he resiled from his position by saying:

> "I now say - I think I was informed of the date for continuation of the trial and on the date scheduled for the case to continue Counsel (either Mr. Lloyd McFarlane or Mr. C. Williams) was briefed to appear on my behalf and on this occasion a letter was

Mr. Cruickshank had notice of the hearing on 7th December, 1979. He had notice of the sale of land proceedings. He had notice of the taxation of costs. He thus knew of the steps which had been taken to execute the judgment. He was thus guilty of inexcusable delay in applying to set aside the judgment. A vital witness for the respondent, namely, Dr. Williams, he submitted, is now dead and the respondent's injury was suffered some ten years ago. He further submitted that the conduct of the appellant was blameworthy in that he was wrong in assuming that the respondent had abandoned his case and he showed nonchalance in monitoring progress of the case and as to the result of the action.

The appellant in his affidavit sworn on 17th March, 1981, had deponed as follows:

> "3. That my defence was based on the fact that Plaintiff came into my Jewellery store at Orange Street with another man and that while the Plaintiff and the other man who had a gun were carrying on a robbery at the shop, acid was thrown on the Plaintiff who was subsequently charged with offence of Robbery with Aggravation.
>
> "4. That after giving instruction to Mr. Cruickshank I never heard from him about when the case was to be tried and I therefore assumed that the Plaintiff faced with my defence had not pursued the case against me.
>
> "5. That I had no knowledge that the case came before the court for trial until the Bailiff came to my home and seized my car.
>
> "6. That I immediately contacted Mr. Cruickshank who told me that the case was part-heard in June or July 1979 but he was not notified of the date for continuation."

In a further affidavit sworn to by him on 29th May, 1981, he deponed to substantially the same facts as in his affidavit of 17th March, 1981, but in greater detail as hereunder:

> "4. That after I was sued by Plaintiff I gave instructions to Mr. Cruickshank, Attorney-at-Law to defend me in this matter as I believed I had a good defence to the claim of the Plaintiff.
>
> "5. That my defence was based on the fact that the Plaintiff with a knife and another man with a gun came into my jewellery store on Orange Street and while the Plaintiff with

"sent to the Defendant at the address I had for him. I did not attend Court on 7th December, 1979. I was engaged in Circuit Court Criminal Trial."

"To Coram

"Paragraph 6 of Affidavit of Defendant Morris in which he says he was never informed of the date of the trial - put.

Answer - That is not correct I did inform him of the Trial."

The hearing concluded with the dismissal of the motion. In doing so the learned judge's ruling is as hereunder:

"Ruling

"Coram not satisfied that either the rules of court or the interests of justice requires it to exercise its discretion in favour of the Defendant who is, in the particular circumstances of this case, to be treated as a Defendant who has voluntarily abandoned his defence since both he and his counsel were aware of the date of the resumed hearing of the action and failed to attend or offer any reasonable or rational excuse for such failure.

"Order

"Motion dismissed with costs to be agreed or taxed. Stay of execution to be granted for six weeks on terms that total amount of the sum outstanding of the amount awarded by the court be paid into court."

Against this judgment and Order the appellant appeals on the following grounds:

"1. The learned trial judge wrongly exercised his discretion not to set aside the judgment in these suits as

(a) the said judgments delivered in these suits were not judgments on the merits;

(b) the primary consideration which should have been considered and was not, was whether the case for the appellant had merits to which Court should pay heed. If merits are shown the Court will not prima facie desire to let pass judgment on which there has been no proper adjudication."

The arguments advanced before us by counsel on both sides are substantially the same as were advanced before the learned trial judge.

The learned trial judge, despite adverting to the issue as being "whether Coram has power in the particular circumstances

of this case to treat case as a default judgment pursuant to Order 36 Rule 33 (1965) (which is section 354 of the Judicature (Civil Procedure Code) Law), did not in his ruling dismissing the motion, expressly resolve this issue within the context of the aforesaid Order 36 Rule 33.

In the circumstances which presented itself, to the learned trial judge on 7th December, 1979, he had only two alternatives open to him. One was to treat the appellant as having closed his case without adducing evidence or alternatively, treating the matter as coming within sections 352 and 354 of the Judicature (Civil Procedure Code) Law which read thus:

> "352 - If when a trial is called on the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies on him."
>
> "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."

On either alternative it was incumbent on the learned trial judge either to give judgment for the respondent on the basis of the facts adduced by him in evidence with a right of recourse by the appellant to section 354 above, or to dismiss his claim as not established on the evidence. It was not open to him to treat the appellant's defence as abandoned except where the same has been voluntarily withdrawn. A fortiori there was no power or authority in the learned trial judge to treat the defence of the appellant as having been abandoned merely because of his absence from court on December 7, 1979.

The learned trial judge stated that the court was not satisfied that either the rules of court or the interest of justice required it to exercise its discretion in favour of the appellant because both he and his counsel though aware of the date had failed to attend the resumed hearing without offering any reasonable or rational excuse for their failure. In my view, had the learned trial judge proceeded to give judgment

for the respondent as provided for under section 352 of the Judicature (Civil Procedure Code) Law, the appellant in the circumstances which obtained, would have had the right to apply to have the judgment set aside under section 354 of the aforesaid Law. Learned counsel for the respondent disputes this because of the fact that the appellant appeared by counsel on July 31, 1979. In my view he would be without the right of recourse to section 354 only if the words "where any party does not appear at the trial" in section 354 are construed restrictively as limited to the first day when the case commences. If this interpretation is correct, a defendant who appears only on the opening day of a trial on which date the plaintiff's opening exhausts the total day's proceedings, would nonetheless be held to have appeared when "the trial is called on" or "to have appeared at the trial" and would not be able to invoke section 354 even though he was not heard at all in his defence and was absent for some eminently excusable reason. In my view, so restricted an interpretation is wholly unwarranted. What section 352 and section 354 contemplate is a case in which the defendant has had a judgment of the court given at a trial against him at which trial he was not heard wholly or partially in his defence, had not participated fully in the trial and had not waived his right so to do. In this regard the right of a party to full participation in his trial before condemnation is succinctly expressed thus by Jenkins, L.J., in Grimshaw v. Dunbar [1953] 1 All E.R. p. 350 at p. 355:

> "A party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to, without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs."

The above cited dicta, in my view, supports a liberal interpretation of section 352 and section 354 so to effect the purpose thereof namely to facilitate review by the same trial judge of a judgment given

by him where a defendant had not fully participated, in consequence of which, the judgment was not one wholly on the merits.

At the hearing of the application to have the judgment set aside, the judge will no doubt consider as material among other considerations the explanation for the absence of the defendant. In this regard, I accept with Mr. Edwards the view expressed by Lord Wright, in Evans v. Bartlam (supra), as to the approach which should be adopted by a trial judge on a motion to set aside a judgment not given wholly on the merits. Evans v. Bartlam (supra), involved the exercise of discretionary powers of a judge to set aside a default judgment. Lord Wright at p. 656 said thus:

> "A discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment which though by default, is a regular judgment and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed. If merits are shown the court will not prima facie desire to let pass a judgment on which there has been no proper adjudication."

In Maxwell v. Keun [1928] 1 K.B. 645 which was an appeal from the refusal of the application of a plaintiff to have his case postponed to enable him to attend and give evidence crucial to the success of his case, Atkin, L.J. (as he then was) speaking of the exercise of a proper judicial discretion said thus at p. 657:

> "In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion."

Applying the principles enshrined in the above cases, together with that in Grimshaw v. Dunbar, earlier mentioned,

the learned trial judge regrettably did not advert to the appellant's defence which undoubtedly had merit. He expressed concern about laches but the facts disclosed no laches on the part of the appellant. In fact, the respondent himself delayed for more than two years the filing of his statement of claim. He entered judgment in default in June 1976, and within four months of the appellant becoming aware of this, he had it set aside on 2nd May, 1977. By 24th May, 1977, he had filed his defence. Any delay between October 31, 1977, when the summons for direction was heard and July 30, 1979, when the case eventually came on for trial cannot be attributed to the appellant. The appellant did not appear in person or by his attorney-at-law on 30th July, 1979, but on the uncontroverted evidence he had not been informed of the date for trial. His attorney-at-law appeared on July 31, 1979, when evidence was led and the case was adjourned part-heard. On this date the appellant did not appear, but he had not been served with notice. This was implied in the statement of his attorney to the court and was asserted by the appellant in his affidavit and not denied by Mr. Cruickshank. Thus on 7th December, when his defence was treated as abandoned due to his, and his attorney's absence, it could never be said that his past performance showed any pattern of indifference to the case as to be tantamount to an abandonment of the defence. The learned trial judge found against the appellant that he was aware of the date of the adjourned hearing. This finding was no doubt based on the evidence given under cross-examination and in answer to the learned trial judge by Mr. Cruickshank. However, as earlier said, Mr. Cruickshank's answer was in direct conflict to what he had deponed in his affidavit of March 25, 1981. His evidence also did not disclose the address to which he said he sent the letter informing the appellant of the adjourned trial date. He merely said "a letter was sent to the defendant at the address I had for him." Was this the

correct address? Thus, Mr. Cruickshank's evidence, even if true, could well be consistent with the appellant's assertion that he never received any notice of the adjourned hearing. He ought not to have been disbelieved. In this regard I endorse the view expressed by Lord Wright in Evans v. Bartlam (supra), where in dealing with the manner in which a trial judge should treat explanation given for absence at a trial, said thus at p. 656:

> "The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose. The applicant here has an explanation the truth of which is indeed denied by the respondent but at this stage I see no reason why he should be disbelieved on what appears to be a mere conflict of affidavits."

In my view, on the pleadings, the appellant had a defence of merit; he was guilty of no laches in bringing the motion to set aside the judgment of December 7, 1979, since on the uncontroverted facts he had no knowledge of previous trial dates nor of the proceedings for the sale of his land. It does not appear that in the circumstances of this case he ought to have been disbelieved when he asserted that with regard to the hearing on 7th December, 1979, he had no information, or that he first knew of the judgment against him only when the bailiff came to his home and seized his car. In considering whether the discretion of the learned trial judge ought to be interfered with I am mindful of the words of Lord Atkin in Evans v. Bartlam (supra), in which at p. 650 he said:

> "Appellate jurisdiction is always statutory. There is in the statute no restriction upon the jurisdiction of the Court of Appeal and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that on other grounds the discretion will result in injustice being done, it has both the power and the duty to remedy it."

In my view, the learned trial judge ought to have set aside the judgment on the merits as otherwise a substantial injustice could be done to the appellant by shutting him out from his right to call his witnesses and give his own evidence where, as here, it has not been shown that an injustice would be done to the respondent which could not be compensated for by suitable terms as to costs.

I would accordingly allow the appeal, vacate the order made in the court below and order that the judgment given on December 7, 1979, be set aside and there be a new trial on terms that all costs thrown away inclusive of costs of sale of land proceedings be paid by the appellant. Costs of the appeal to be the appellant's.

ROSS, J.A.:

I agree.

ROWE, J.A.:

I agree.