

JAMAICA**IN THE COURT OF APPEAL****RESIDENT MAGISTRATES' CIVIL APPEAL NO: 29/05**

**BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (AG.)**

BETWEEN	DAVE DUNKLEY	APPELLANT
AND	JENNIFER TAYLOR	RESPONDENT

Mr Leroy Equiano for the appellant

**Mr. Akin Adaramaja, instructed by Keith Smith, & Co.,
for the respondent**

10th May 2006

HARRISON, P. (Oral Judgment)

This is an appeal from the refusal on 20th July 2004 by His Hon. Mr. O. Burcheson, Resident Magistrate of an application to set aside a default judgment entered on 7th August 2001.

The Complaint and the Statement of Claim in this matter were filed on the 26th of March 1999. The respondent was claiming \$100,000.00 for trespass and damages in respect of the respondent's land at Meadsfield, Knockpatrick in Manchester. The respondent claimed that the appellant had trespassed on her land and as a result she suffered damages.

Several trial dates were fixed between the 18th of May 1999 and the 18th of July 2000. The appellant states that he was in the hospital from June of 2000 and released on the 17th of July 2000. He was unaware of the court date of the 18th of July 2000. He went to the court's office several times and was told that he would be told when the case was to be heard.

Court dates had been fixed from 17th April 2001 for default, 19th June 2001 for default and 7th August 2001 for default. Judgment was entered by default on the 7th of August 2001 for \$100,000.00 damages and \$5000.00 costs.

This court is of the view that it does not seem that any evidence was taken by the learned Resident Magistrate in proof of possession or in proof of damages to enable him to enter a default judgment in that amount of \$100,000.00. He awarded the sum of \$5,800.00 as liquidated damages and the balance was general damages. It is a rule of practice and procedure that liquidated damages must be specifically proved. The general damages claimed was in the sum of \$94,200.00. In the case of SCCA 31/97 **DeLisser v Moncure** SCCA No. 31/97 delivered 31st July 1997 this Court of Appeal, stated that it will not likely allow a default judgment to stand and, in addition, that in such cases proof of special and of unliquidated damages is required, when claimed in a default judgment.

Before this Court Mr. Equiano stated that the appellant was in possession of the land for twelve years and for that matter his defence should have been considered by the Court.

This Court is of the view that a sufficient defence was stated in the appellant's affidavit as filed.

Mr. Adaramaja argued that the appeal before the Court should be struck out for various reasons. First, he stated that the appeal filed was in breach of section 25(6) in that the grounds of appeal were not filed and responded to within 14 days. The Court notes that the notice and grounds of appeal were filed on the 28th of July 2004, i.e. within 14 days of the judgment of the 20th of July 2004, the refusal of the application to set the default judgment aside. The Court referred counsel to section 12 of the Judicature (Appellate Jurisdiction) Act, which empowers the Court of Appeal in respect of appeals from the Resident Magistrates' Courts to extend time at anytime in respect of notice given or grounds served. The section reads:

"12 – (2) Notwithstanding anything to the contrary the time within which –

- (a) notice of appeal may be given, or served;
- (b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;
- (c) grounds of appeal may be filed or served, in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time." (Emphasis added)

Mr. Adaramaja noted also that the ground did not set out concisely what was sought and what was to be argued. The Court referred Counsel to section 266 of the Judicature (Resident Magistrates') Act which gives the Court power even if the formalities are not followed to consider an appeal. Section 266 reads:

"266. The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

The third point argued was that no skeleton arguments were filed. The Court pointed out that the Resident Magistrates' Act itself does not specifically require such filing. The rules which stipulate that the skeleton arguments should be filed cannot, in our view supercede the statute but are for guidance and must be read along with the statute. Non-filing of the skeleton arguments will not vitiate an appeal. Rule 3.2(1) of the Court of Appeal Rules deals with non-compliance with the rules. It reads:

"3.2(1) Where –

- (a) an appellant fails to comply with these Rules; and
- (b) the court considers that such non-compliance was not willful,

the court may -

- (i) waive such non-compliance if it considers that it is just so to do; and
- (ii) give such directions requiring the appellant to remedy the non-compliance as it thinks fit."

We do not find that there were arguable points in these matters put forward by counsel for the respondent.

The fourth point argued was that the Court should not consider the merit in respect of, for example, a good defence but only the application in respect of the order made by the learned judge. The court referred counsel to the fact that rule 13 of the Civil Procedure Rules 2003 does not apply to Resident Magistrates' Court but to the Supreme Court. However, even in respect of rule 13, if a good defence is put forward to the Court, the Court may be inclined to set aside the judgment if other conditions are satisfied. The Court pointed out that under the old law even if the reason given for the delay was insufficient but a good defence is shown, the court would be inclined to set aside the judgment.

For those reasons we found that the appeal should be allowed. The appeal is allowed. The default judgment is hereby set aside and this matter is returned to the Resident Magistrates' Court for a new trial to be held before a different Resident Magistrate. Costs to the respondent \$15,000.00.