

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 94/2007

**BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.**

BETWEEN CARMEN FRASER APPELLANT

AND STENNICK BURTON RESPONDENT

**Miss Kadia Wilson instructed by Taylor, Deacon & James for the
appellant**

Lawrence Haynes for the respondent

5 July 2010

ORAL JUDGMENT

PANTON, P.

[1] This appeal is against an order of Mr Justice McIntosh made on 24 August 2007, whereby he ordered as follows:

- "1. Applicant's claim is dismissed with costs to the defendant to be agreed or taxed.
2. Leave to appeal granted."

The matter has its origin in a fixed date claim form, filed on 11 June 2007 in the Supreme Court by the appellant, wherein, she sought an order for the

respondent to be required to vacate premises registered at Volume 1325 Folio 101 within 30 days of the date of the order. At the time of filing of the fixed date claim form the appellant also filed an application for an injunction restraining the respondent from entering, residing at or constructing and/or continuing construction of any building on property located at Leeds in the parish of Saint Elizabeth being land registered at Volume 1325 Folio 101 of the Register Book of Titles.

[2] On 3 July 2007, Mrs Justice Marva McIntosh made an order granting an injunction restraining the respondent from constructing and/or continuing construction of any building on property located at Leeds in the parish of Saint Elizabeth being land registered at Volume 1325 Folio 101 of the Register Book of Titles, for 21 days from the date of the order. That order by Mrs Justice McIntosh would have expired about 24 July 2007, so on that date, Mr Justice McIntosh on hearing the attorneys involved in the matter for both parties made the following order:

- "1. Matter set for hearing on the 24th day of August 2007 at 10:00 a.m.
2. Parties to file all depositions by the 14th day of August 2007.
3. Injunction granted by Court on July 3, 2007 to remain in force.
4. Costs to be costs in the case."

[3] So we come to 24 August 2007 when the matter of the injunction was to be heard inter partes. The parties were present in terms of their attorneys.

Alas, on that day the learned judge did not hear the application. Instead he made this order:

- "1. The applicant's claim is dismissed with costs to the defendant to be agreed or taxed.
2. ..."

This means that the claim filed on 11 June 2007 was dismissed without a hearing, without it even being listed before the learned judge. What was before the learned judge was the application for injunction.

[4] We understand that there had been an application filed to dismiss the fixed date claim form. However, it had not been served.

[5] In the circumstances, the order made on 24 August 2007, dismissing the appellant's claim cannot stand. The appeal is allowed. The order of Mr Justice McIntosh made on 24 August 2007 dismissing the appellant's claim is set aside. The matter is now to proceed as if that order had not been made. Costs of the appeal to the appellant to be agreed or taxed.