

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1991/H 148

BETWEEN

WILLIE ISIAH HENRY

PLAINTIFF

AND

ROGER A. DAVIS

DEFENDANT

Ransford Braham instructed by Livingston, Alexander and Levy for the Plaintiff.
Paul Beswick for the Defendant.

Heard on the 14th November, 1991 and 6th April, 1992.

PITTER, J.

The plaintiff on the 2nd August, 1991, filed a Writ of Summons with Statement of Claim endorsed thereon.

The defendant was served on the 7th August, 1991.

The plaintiff filed a motion for judgment on the 2nd September, 1991 and the defendant entered an appearance on the 30th September, 1991.

Upon this matter coming up for hearing before me, Mr. Beswick submitted in limine that the motion was filed prematurely and not in keeping with the Rules of Procedure and therefore should be dismissed. He argues that an appearance need not be entered during the legal vacation since the writ was filed immediately before the long vacation. He contends that the defendant should have the benefit of the long vacation and that time should start to run counting from the start of the Michaelmas term i.e. from the 16th September, 1991. He further submits that all subsequent proceedings to the filing of the writ and specially endorsed statement of claim are a nullity. He relies on Rules 38 and 39 of General Rules and Orders of the Supreme Court.

Mr. Braham argues that this is not a motion for judgment in 'Default of Defence' but one for 'Default of Appearance.' That 'appearance' was not entered until September 30, 1991, well after the statutory period had elapsed; that 'appearance' should have been entered on or before the 21st August, 1991.

He further argues that since the defendant failed to enter Appearance, the plaintiff is entitled to apply for judgment in accordance with Title 12 of the Civil Procedure Code.

Rules 38 and 39 of the General Rules and Orders of the Supreme Court read as follows:

38. "No pleadings shall be amended or delivered during the vacation appointed by the said order in Privy Council unless directed by the Court or a Judge."
39. "During the vacation appointed by the said order in Privy Council, the time of such vacation shall not be reckoned in the computation of the times appointed or allowed by the Civil Procedure Code for filing, amending and delivering any pleadings unless otherwise directed by the Court or a Judge."

On a close look at the above rules, one will see clearly that they refer to the filing of "pleadings" as apposed to "appearance". They forbid the serving or filing of pleadings during the vacation period unless the Court or a Judge otherwise orders. What then are pleadings? The answer to this is to be found in Section 2 of the Civil Procedure Code which gives the following interpretation:-

"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence or further defence of any defendant thereto, and of the reply or further reply of the plaintiff, whether to such statement or defence or to any counterclaim of a defendant, and of the rejoinder of the defendant to any such reply as last aforesaid."

Halsbury's Laws of England Third Edition Volume 30 at page two defines "pleadings" as follows:-

1. Meaning of pleading. "The term 'a pleading' is used in civil cases to denote (1) a document in which a party to a proceeding in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing; (2) the act of drafting or settling any such document or part of such document."

The function of pleadings is to define the issues on which the court, in order to determine the matters in dispute between the parties, will have to adjudicate.

It is here convenient to look at the definition of "appearance" which appears in Order 12/1/2 of the Supreme Court Practice.

"Enter an appearance" - Appearance is the process by which a person against whom a suit has been commenced (a) shows his intention to defend the suit and (b) submits himself to the jurisdiction of the court. An appearance duly entered, whether conditional or not, prevents a judgment in default being signed,

but until an appearance is duly entered, the defendant is not entitled to take any steps in the action or proceedings"

Section 52 of the Civil Procedure Code regulates the time for entering an appearance and reads as follows:

52. "The time for entering an appearance to a writ of summons shall be fourteen days from the service of the writ, exclusive of the day of service, unless the Court or a Judge shall otherwise direct."

Section 53 sets out the mode of entering appearance.

53. "An appearance shall be entered by a defendant, by his filing in the office of the Registrar a memorandum in writing dated on the day of its delivery, in the form given in Schedule VI, Form 3 with variations as circumstances may require."

It is patently obvious from the above, that "pleadings" are totally different from "appearance". They each attract their own set of rules. I find therefore that the rules governing the filing of pleadings during vacation are not applicable to "appearance". The defendant upon being served is obliged to enter appearance within 14 days from the service of writ in accordance with Section 52 of the Civil Procedure Code.

In the instant case the defendant was obliged to enter an appearance on or before the 21st August, 1991. He having failed so to do, the plaintiff is entitled to apply for judgment in accordance with Title 12 of the Civil Procedure Code with particular reference to section 78 which provides:-

78. "In all actions not by the sections of this Title otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and (if the writ is not specially indorsed under section 14) of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of Title 14."

In keeping with Sections 254 and 442 of the Civil Procedure Code, the plaintiff may proceed to apply for judgment in default of defence by way of motion. The preliminary points raised by the Defence therefore fails.