

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 37/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN ARNOLD MARSHALL PLAINTIFFS/APPELLANTS
 FELECEDA MARSHALL

A N D CONTEMPORARY HOMES DEFENDANT/RESPONDENT
 LIMITED

Norman Wright and Mrs. M. Moncrieffe for appellants

Respondent not represented

January 29 and February 12, 1990

ROWE P.:

A document may be served on a limited liability company by sending it by post to the registered office of the company vide - Section 370 of the Companies Act. Unless the contrary intention appears, service of the document is deemed to be effected, at the time at which the letter containing the document would be delivered in the ordinary course of post, if it was properly addressed, properly stamped and posted - vide Section 52 (1) of the Interpretation Act.

The appellants by writ dated June 16, 1987 and Statement of Claim dated October 23, 1987 claimed that they are owners of land registered at Vol. 1093 Fol. 237 in the name of Contemporary Homes Limited by virtue of adverse possession under the provisions of Sections 3 and 30 of the Limitation of Actions Act and sought the following remedies.

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(a) A declaration that they are the owners of the land comprised in Certificate of Title registered at vol. 1093 F. 237.

(b) An Order directing the Registrar of Titles to cancel Certificate of Title registered at Vol. 1093 F. 237 in the name of the respondent and issue a new Certificate of Title in the names of the appellants.

(c) An injunction restraining the respondent from selling, disposing of, or otherwise dealing with the said land.

(d) Further or other relief.

(e) Costs.

Service of the writ and Statement of Claim were effected by sending the documents by registered post to the registered office of the Company - 72-74 Harbour Street, Kingston, on October 30, 1987 - vide registered slip 0332 exhibited in Maureen Moncrieffe's Affidavit of Service of January 18, 1988. No appearance was entered. The appellants applied by Notice of Motion for final judgment due to the non-appearance of the respondent. McKain J. denied the motion on April 28, 1988. Arising from this denial the appellants filed Notice of Appeal on the ground that the learned trial judge failed to properly adjudicate or to adjudicate at all on the motion.

Section 254 of the Civil Procedure Code empowers a plaintiff to apply for judgment on motion or summons in default of defence in all actions for which specific provision is not made in Title 26 - Default of Pleading. Under this section would fall claims for declarations. Order 13 r. 6 of the Supreme Court Practice 1983, is similar in scope to Section 254 of the Civil Procedure Code. Order 13/6/1 indicates that the rule relates to a claim for a declaration

and precludes a plaintiff in such a case from proceeding to interlocutory judgment on a failure by the defendant to file an appearance to a writ alone. In giving the effect of the rule it is stated in part:

"If the statement of claim is not already indorsed on or served with the writ, the plaintiff must serve a statement of claim upon the defendant and if the defendant does not serve his defence within the time limited he will be in default of pleading under O. 19, and the plaintiff may then proceed by summons or motion for judgment under O. 19, r. 7."

Mr. Wright correctly submitted that Section 254 of the Civil Procedure Code is a combination of O. 13 r. 6 and O. 19 r. 7 of the Supreme Court Practice. It is unnecessary for me to quote the text of the two latter Orders. In Order 19/7/10 - Proof of Plaintiff's Case - it is stated authoritatively that on a motion for judgment the Court cannot receive evidence but must give judgment according to the pleadings alone. On reflection this must be so as there is no challenge to the allegations of fact made by the plaintiff.

Bowen L.J. in Young v. Thomas (1892) 2 Ch. D. 134 expressed the rule thus at p. 137:

"There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and as has been decided by Lord Justice Kay in Smith v. Buchan (1882) 58 L.T. 710, no evidence can be admitted as to those facts."

Another example of how this principle is applied is to be found in Webster and Co. Ltd v. Vincent (1897) 77 L.T. 107. This was a motion on behalf of plaintiffs in an action that the plaintiffs were entitled to a declaration that an

allotment of thirty fully paid up 10 shares in the plaintiff company to the defendant while he was a director of the company was invalid and of no effect and that the plaintiffs were entitled to have those shares cancelled.

There was no appearance and after the Statement of Claim, asking for relief in the same terms as the Notice of Motion had been filed and served, no defence was put on the record.

The point that arose was whether any evidence need be filed on behalf of the plaintiffs. Reference was made to Order XIX r. 10 and Order XXVII r. 11 which are similar in terms to Section 254 of the Civil Procedure Code and Lawrence J. laconically pronounced:

"You can have your judgment,
evidence is not required."

In paragraph 3 of the Statement of Claim the appellants alleged that from about November 1972 to October 1987 they had exclusively occupied the land at Vol. 1093 Fol. 237 openly, free from disturbance by anyone, and had been paying property taxes therefor in their own names. They further alleged that an attempt by the respondent to transfer the land in December 1986 was thwarted when the appellants obtained an injunction to prevent the transfer. This latter incident encouraged Mr. Wright to submit that beyond a peradventure the respondent knew of the claim by the appellants of ownership based on adverse possession and consequently their inactivity was not due to ignorance.

It appears from the submission of counsel that the learned trial judge was concerned about the question of the adequacy of evidence as to service of the writ and Statement of Claim. There are no recorded reasons for the denial of the motion, therefore we can do no more than speculate that therein lay the reason for the decision. In answer to

queries from the Court, counsel assured us that the appellants' files do not disclose that any of the letters sent to the respondent were returned unclaimed. Letters posted in Kingston to an address in Harbour Street would in the ordinary course of post be delivered within two or three days. There is no indication that the letter from the appellants containing the writ and Statement of Claim which was properly addressed, stamped and posted was not delivered to the respondent and in our view there was no material before the learned trial judge on which she could deny the motion on the ground of non-service.

The allegations in the Statement of Claim which must be taken to be admitted by the respondent were sufficient to satisfy the evidential burden on the appellants. In all the circumstances the appeal must be allowed and the appellants are entitled to the declaration, order and injunction sought. This is especially so as by Section 30 of the Limitation of Actions Act, the right and title of the registered owner will be extinguished by adverse possession lasting for twelve years or more.

In the light of the fact that the respondent had never taken any part in these proceedings, we made no order as to costs.

At the end of the hearing we allowed the appeal and made orders in the terms indicated above. Herein we have set out our reasons therefor.

WRIGHT, J.A.:

I agree.

MORGAN, J.A.:

I agree.