JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/99

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN DONALD PANTON PLAINTIFFS/APPELLANTS

A N D JANET PANTON

A N D ORRETT HUTCHINSON

A N D EDWIN DOUGLAS

A N D THE DIRECTOR OF PUBLIC PROSECUTIONS DEFENDANTS/RESPONDENTS

A N D THE ATTORNEY GENERAL

Frank Phipps, Q.C., and Abe Dabdoub	for 1st appellant Donald Panton
Ian Ramsay, Q.C., and Miss Deborah Martin	for 2nd appellant Janet Panton
Walter Scott and Mrs. Sharon Usim	for 3rd appellant Hutchinson
Mrs. Jacqueline Samuels-Brown	for 4th appellant Douglas
Miss Paula Llewellyn and Miss Gail Walters	for the Director of Public Prosecutions
Douglas Leys for the Attorney General	

October 19, 20, 21 and December 20,1999

HARRISON, J.A.:

This is an appeal from an order of Smith, J, dismissing a preliminary objection by the plaintiffs/appellants to the hearing of summonses of the defendants/respondents, which summonses sought to strike out the writ,

endorsement and statement of claim filed by each appellant. Smith, J., also reserved a point of law for the consideration of this court. The order reads:

> "1. Preliminary objection is dismissed;
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> 2. Leave to Appeal is granted;
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> 3. The Court, pursuant to Section 41 of the Judicature (Supreme Court) Act reserved the following point for the consideration of the Court of Appeal:
>
> 'Whether or not on a Writ of Summons and Statement of Claim seeking constitutional redress it is open to the Respondents on an application by Summons to seek to strike out the Writ of Summons and Statement of Claim on the grounds that there is no reasonable cause of action and/or that the action is frivolous and vexatious and/or that alternate adequate means of redress are and/or have been available.'
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> 4. Costs to the Plaintiffs to be taxed if not agreed."

The appellants had objected that the respondents had no "locus standi" to be heard on their summonses and that Smith, J., had no jurisdiction to hear the respondents because they had not entered appearances to the writs filed by the appellants.

The history of this matter is that on June 30, 1997, the appellants filed a writ of summons and endorsement, claiming declarations, orders, an injunction and damages for a breach of their constitutional rights to a fair hearing under section 20(1) of the Constitution of Jamaica. On April 27 and 28, 1998, the second respondent and the first respondent, respectively, filed summonses to strike out

the said writ, as disclosing no cause of action. On May 7, 1998, the appellants filed a notice for leave to enter judgment in default of defence. The respondents, on May 15, 1998, entered appearances. Both summonses by the respondents to strike out the writ and endorsement and the notice for leave to enter judgment were consolidated and re-listed for hearing on April 19, 1999. The preliminary objection was dismissed by Smith, J., on April 23, 1999, hence the instant appeals.

Mr. Phipps, Q.C., for the first appellant argued, before this court, that the respondents, not having entered appearances to the writ of summons within 14 days of service, were precluded from being heard by the court on the summonses to strike out the said writs. The reason being that the fact of non-entry of appearance meant that the respondents had not submitted themselves to the jurisdiction of the court and, therefore, the said summonses were nullities and not irregularities which could have been dealt with under the provisions of section 678 of the Judicature (Civil Procedure Code) Law ("the Code"). Furthermore, the power to strike out proceedings under the provisions of section 238 of the Code does not apply to a breach of constitutional rights, the Rules governing which are subsequent to the said Code. A single judge cannot strike out a writ and endorsement and any such application must be determined by a bench of "not less than three judges of the Supreme Court", at the hearing of the action, as provided by the said Rules.

Mr. Ramsay, Q.C., for the second appellant advanced an argument similar to that of the first appellant, emphasizing that the rules of the Supreme Court

Practice in England were amended, abolishing the distinction between nullities and irregularities, unlike Jamaica. The summonses to strike out were, therefore, nullities. He submitted further that, a constitutional action, being a new species of action, all aspects of it must be determined by a "panel of three (3) judges", and therefore a single judge had no power to determine the applications.

Mrs. Usim for the third appellant, and Mrs. Samuels-Brown for the fourth appellant associated themselves with the submissions of both counsel.

Mr. Leys, whose submission Miss Llewellyn for the first respondent adopted, arguing for the second respondent said that it was the acknowledgment of service by the respondent which gives the court jurisdiction and not the entry of appearance as required by section 52 of the Code, which is merely directory. Non-compliance of entry of appearance is an irregularity, a mere late appearance, permissible by section 61 of the said Code and the appellants having taken a step in the proceedings are now precluded from taking the point. He stated further, in conclusion, in exercising a constitutional jurisdiction, the judge in open court had the power under section 238 to strike out the writ for non-disclosure of any reasonable cause of action" because rule (vi) of the Redress Rules, expressly made the Code applicable to constitutional actions."

The manner of entry of appearance by a defendant to a writ of Summons filed in the Supreme Court, is by filing of a memorandum in writing - section 53 of the Judicature (Civil Procedure Code) Law, within fourteen (14) days of the service of the writ (section 52). Late entry of appearance is envisaged by the Code,

with leave, by the filing of a notice, in addition to the said memorandum. Furthermore, section 61 of the Code reads, inter alia,

"61. A defendant may appear at any time before judgment ..."

The explanatory note to Order 12 rule 1, The Annual Practice 1959 (U.K.), providing for entry of appearance after service of writ, provides:

> "Appearance is the process by which a person against whom a suit has been commenced submits himself to the jurisdiction of the Court. Until, therefore, the defendant enters his appearance he is not entitled to take any step in the action.
>
> The only exception to this rule of practice is where he desires to set aside the writ or service of the writ for irregularity for which he is specially authorised to apply without entering an appearance ."

The fact that by entry of appearance, the defendant "submits himself To the jurisdiction of the Court" does not mean that the defendant thereby **gives to the Court**, its jurisdiction.

The jurisdiction of the court over an action is conferred by operation of law. for example, in common law actions, in contract jurisdiction is conferred where the contract was made, and in tort, jurisdiction is conferred where the tort was committed, within the jurisdiction of the court. As a general rule jurisdiction does not arise by act of parties; parties cannot consent to give jurisdiction to the court; ***(Westminister Bank v. Edwards [1942] AC529).*** In this respect we agree

with Mr. Leys for the respondent that the court had jurisdiction when the appellants were served with the writ.

The argument of the appellants that failure to enter an appearance is a nullity is misconceived, because if correct, such failure would deny a plaintiff the power to enter judgment in default of appearance. The reason being, according to the appellants, that the court had no jurisdiction to so act. Under section 70 of the Code judgment entered in default of appearance is valid and effectively binds a defendant. A court is entitled thereafter to permit the enforcement of such a judgment and to make subsequent orders against the defendant. The Supreme Court Practice (U.K.) by Order 70 rule 1 (1883) made a distinction between non-compliance with the rules of procedure which were classified as nullities or mere irregularities. It is true, as argued by counsel for the appellants, that following the decision in ***Re Pritchard*** [1963] 1 Ch 503, all such instances of non-compliance are regarded as irregularities (see order 2 rule 1, Supreme Court Practice, 1970 (U.K.). This Court has been unable to find any instance prior to Re Pritchard (supra), where the failure to enter an appearance was treated as a nullity.

A nullity arose where non-compliance with the rules of procedure amounted to a fundamental breach, for example, entering judgment in default of defence before the time for the defendant to file his defence had expired ***(Anlaby vs Praetorious*** *(1888) 20 Q.B.D. 764)* or where the court made an order against a defendant on a summons which had not been served on him ***(Craig vs Kanssen*** [1943] K.B. 256.) A basic test to determine whether a nullity arises is to question

whether the act amounts to a breach of natural justice (***Marsh vs Marsh*** [1945] AC. 271).

The failure to enter an appearance in the instant case, is a mere irregularity and not a nullity. Section 678 of the Code provides:

> " **678 Non-compliance with** any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

The respondents are not challenging the fact that the court has jurisdiction in the matter. The appellants, with knowledge that the respondents had not entered an appearance, applied for judgment in default of defence. The appellants thereby took a fresh step in the proceedings, curing any irregularity in the procedure. Section 679 of the Code provides:

> " 679. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

The appellants may not now complain.

In the case of ***Warshaw vs Drew*** (1990) 38 WIR 221, the Judicial Committee of the Privy Council in dismissing an appeal against an unless order, where the appellants not having entered an appearance in the action applied to strike out

the action for want of prosecution, declared (***per Lord Brandon of Oakbrook), at page*** 227:

> "It is well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service . Modern authority for this proposition is to be found in ***Pike v Michael Naim & Co. Ltd. [1960] Ch 553***. That was a case of proceedings begun by originating summons which was not served on the respondent. Cross J said (at page 560):
>
> > 'The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him.'
>
> It appears to their Lordships that, if a defendant in an action who has not been served with the writ in it can waive such service by voluntarily entering an appearance, it must follow that he can also waive such service by voluntarily taking an even more advanced step in the action than entering an appearance, such as issuing and prosecuting a summons for an order dismissing the action for want of prosecution.
>
> In the present case the appellants would ordinarily only have been entitled to apply for dismissal of the action for want of prosecution if they had been served with the writ and entered an appearance. They elected to do so however, without either of these procedural steps having been taken. By doing so the appellants waived service of the writ on them, and

> the respondent, by taking no point on the appellants not having entered an appearance, waived the need for such entry. In their Lordships' view, therefore, on the assumption (contrary to the fact) that the writ in the present case was not served on the appellants, their conduct, in voluntarily applying for an order dismissing the action for want of prosecution, constituted a clear waiver by them of such service. The justice of this is obvious: a defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action was begun."

The fact that a defendant, if not served with a writ, may not be seen as ineligible to file subsequent process without entering appearance, a fortiori , if he is served, his further involvement by way of a summons to strike out the said writ, is not a nullity.

We find no merit in this ground as argued.

The point of law reserved for consideration by the Court of Appeal pursuant to section 41 of the Judicature (Supreme Court) Act involves the question of whether or not an application may properly be made to a judge of the Supreme Court to strike out a writ of summons and statement of claim in which the plaintiff seeks constitutional redress.

Section 41 of the Judicature (Supreme Court) Act reads:

> "41. A Judge of the Supreme Court sitting in the exercise of the civil jurisdiction of the Court may reserve any case, for the consideration of the Court of Appeal, or may direct any case or point in a case to be argued before the Court of Appeal and the Court of

> Appeal shall have power to hear and determine any such case or point: ..."

Any person who alleges that his rights existing under the provisions of sections 14 to 24 of the Constitution of Jamaica have been "is being or is likely to be" infringed, may apply to the Supreme Court for redress. This is a new cause of action conferred by section 25(1). It did not exist prior to 1962. Section 25(2) describes the method of enforcement of this right. It reads:

> "25.-(1) .....
>
> > (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
> > ..."

The Judicature (Constitutional Redress) Rules, 1963, "the Redress Rules" which came into force on 14th June, 1963 provide the procedure and power of the Supreme Court, in furtherance of the enforcement of such rights.

The said Rules require such an aggrieved person who anticipates that his rights are likely to be contravened to file a writ of summons in order to redress such breaches. Rule 3(ii) reads:

> "(ii) An application to the Court pursuant to section 25 of the Constitution for redress by any person who alleges that any of the provisions of section 14-24 inclusive, of the Constitution has been, is being or is likely to be contravened in relation to him, may be made by filing a writ of summons claiming a declaration of rights and/or praying for an injunction or other appropriate order."

However, the said Rules expressly make the provisions of the Code applicable to such proceedings. Rule 3 (vi) reads:

> "(vi) The provisions of the Judicature (Civil Procedure Code) Law shall apply to all proceedings under these rules with such variations circumstances may require."

No exception nor reservation is made in the application of the Code in this respect.

The power of a judge of the Supreme Court to strike out a pleading is conferred by section 238 of the Code. The section reads:

> "238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Consequently, there is no procedural bar nor rational basis why the striking-out provisions of the said section 238 should not apply to the cause of action in the instant case, for the reason only that it alleges a breach of constitutional rights.

The action was commenced by writ of summons filed in the Supreme Court, the court on which the Constitution of Jamaica conferred the power to determine such redress. A single judge of the Supreme Court may constitute a court. Section 39 of the Judicature (Supreme Court) Act provides:

> " 39. A single Judge of the Supreme Court may exercise, in court or in Chambers, any part of the jurisdiction of the Court which before the passing of this Act might have been exercised in the like manner, or which may be directed or authorized to be so exercised by rules of court to be made under this Act."

The Redress Rules, made by the Rules Committee of the Supreme Court empowers the Chief Justice to determine the composition of the Court in respect of a writ of summons filed seeking constitutional redress. Rule 3(v) reads:

> "(v) The Chief Justice may at any time direct that any application to the Court pursuant to section 25 of the Constitution whether commenced by motion or writ of summons, shall be heard and determined by a bench of Judges not exceeding three in number."

We do not agree with counsel for the appellants that the phrase "... a bench of Judges not exceeding three in number", interpreted means, a minimum of two Judges. The phrase merely restricts the maximum composition of the 'bench of Judges..." The greater must include the less. The appointment of a judge by the Chief Justice to hear and determine any aspect of the procedure relating to the writ of summons in the instant case is a valid one, under the provisions of the Rules. The said Rules must be read in conjunction with the statutory provisions of the

Judicature (Supreme Court) Act as complementing the said Act, and they cannot be construed as modifying the said Act.

We hereby answer the point of law in the affirmative. For the above reasons the appeal is dismissed, with costs to the respondents to be agreed or taxed.

LANGRIN,J.A.

I have read in draft, the judgment of my learned brother, Harrison, J.A. The judgment which I intended to write would have been repetitions of the views which he expressed. I would therefore dismiss the appeal.

PANTON JA.

I agree that the appeal should be dismissed.