JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 127/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	SUNROSE LIMITED	1ST DEFENDANT/APPELLANT
AND	OTHNIEL MARTIN	PLAINTIFF/RESPONDENT

Miss Nancy Anderson, instructed by Crafton Miller and Co., for the appellant

Ian Wilkinson for the respondent

June 15, 16 and October 22, 1998

BINGHAM, J.A.:

This matter comes before us by way of an appeal from an order of Edwards, J. in the court below on 4th November, 1997, refusing a second application by the first defendant/appellant to set aside a judgment entered in default of a defence with costs to the plaintiff/respondent. The default judgment was entered on 9th December, 1996.

The appeal sought the following reliefs:

> "1) That the Final Judgment for Possession of the land dated December 9, 1996 and all subsequent proceedings entered herein be set aside as Judgment was irregularly obtained.

2) That the 1st defendant be granted leave to file its Defence and Counterclaim within fourteen (14) days of the date of the hearing of this Summons.

3) That an Order be made for restitution and the 1st Defendant be put back into possession of the Leased premises and the green houses situated at the premises at Newport in the Parish of Manchester."

The grounds of appeal being relied on are as follows:

"1. The learned trial judge erred in law in refusing to hear the 1st Defendant's second application to set aside the judgment in default as the court has the jurisdiction to hear a second or subsequent application.

2. The learned trial judge erred in law in finding that no new material was before the Court in this second application as the Affidavit in Support of the second application contained the following new material:

(a) draft Defence and Counter claim, attached as an exhibit;

(b) an explanation of the delay in filing a defence;

(c) a submission that the judgment entered by the Plaintiff/Respondent was irregularly entered as same was not in compliance with Section 250 of the Judicature (Civil Procedure Code) Law;

(d) evidence to show the 1st Defendant/Appellant has a prima facie defence on the merits.

3. The learned trial judge erred in finding that the new material must convince him of a drastic change in the 1st Defendant/Appellant's situation.

4. The learned trial judge erred in law in holding that the application had been fully ventilated at the first application of the 18th March, 1997 as all the

material and evidence was not before him on that occasion.

5. The learned trial judge erred in treating Counsel for the 1st Defendant/Appellant's agreement on the 18th March, 1997 with Counsel for the Plaintiff/Respondent's submission that it was too late to set aside the judgment as a consent, or concession, in favour of the refusal of the order to set aside the judgment entered irregularly and in default of a defence.

6. The learned trial judge erred in making findings as to the merits of the 1st Defendant/Appellant's defence as only a prima facie defence need be produced to the Court at this stage and the trial judge should have exercised his discretion and the judgment should have been set aside.

7. The learned trial judge erred in refusing to set aside the judgment and make the consequent order sought as the principle of law is that unless and until the Court has produced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

8. The learned trial judge erred in finding that it was 'too late' to set aside the judgment and subsequent proceedings as the Bailiff had exercised his functions under a Writ of Possession as the fact that the Writ of Possession has been consummated is, in law, no bar to the setting aside of the Writ by which possession had been assumed and the court can order restitution.

9. The learned trial judge erred in law in not setting aside the judgment as irregularly entered for non-compliance with Section 250 of the Judicature (Civil Procedure Code) Law as a party has a right in law, to have a judgment irregularly obtained set aside together with all subsequent proceedings.

10. The learned trial judge erred in not setting aside the judgment as irregularly entered in contravention of the mandatory requirement of Section 250 of the Judicature (Civil Procedure Code) Law as

> the 1st Defendant/Appellant was thereby deprived of any right to claim for damages to it caused by the execution of the Writ of Possession."

It is important at this stage to set out a sequence of the events leading up to the present appeal. They are as follows:

> **1.** The lease agreement dated 21/3/88 executed between the appellant and the respondent.
>
> **2.** On 1/4/88 -- the term commenced to run for twenty-five (25) years.
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> **3.** On 7/12/95 -- letter from the respondent's attorney-at-law informing the 1st defendant/appellant of certain breaches of covenant in the lease and requesting that they be remedied within six months, failing which the lease to be determined.
>
> **4.** On 19/2/96 -- Notice of Termination of Lease to take effect on 31/6/96.
>
> **5.** On 8/3/96 -- Notice of Termination served on appellant.
>
> **6.** On 17/7/96 -- Writ of Summons and Statement of Claim for possession filed.
>
> **7.** On 2/8/96 -- Writ and Statement of Claim served on defendant/appellant.
>
> **8.** On 16/9/96 -- Appearance entered for both defendants.
>
> **9.** On 13/12/96 -- Final Judgment for possession entered.
>
> **10.** On 31/1/97 - -Writ of Possession issued.
>
> **11.** On 8/3/97 -- Writ of Possession executed.
>
> **12.** Summons dated 7/3/97 and Affidavit in Support of Summons filed to set aside judgment .
>
> **13.** On 18/3/97 -- Summons heard before Edwards, J. refused.

14. On 9/5/97 -- Summons for Declaration filed by respondents.

15. On 8/7/97 -- Notice of Change of Attorney and second Summons to Set Aside Judgment along with Affidavit in support, draft Defence and Counter-claim filed.

16. On 21/7/97 -- Summons adjourned - not reached.

17. On 21/7/97 -- Amended Summons and Affidavit in support filed.

18. On 16/10/97 -- Amended Summons to Set Aside Judgment adjourned by Langrin, J.

19. On 4/11/97 -- Amended Summons to Set Aside Judgment heard by Edwards, J. refused and leave to appeal granted.

20. On 18/11/97 -- appeal lodged.

In his determination refusing the first application to set aside the default judgment, the learned trial judge did not give written reasons for his decision. This court has not been furnished with such oral reasons as Edwards, J. may have given for his decision. He no doubt had regard to the fact that the default judgment having been entered from 13th December, 1996, a summons applying to set aside the judgment was not taken out until 16th March, 1997. This summons was heard and refused on 18th March, 1997.

There was no appeal from this order. Nevertheless, with a change of attorney a second summons seeking similar reliefs was lodged but not proceeded with until October 1997.

Given the affidavit of Alfons Klem sworn to on 7th March, 1997, in support of the first application to set aside the default judgment, there was no complaint

that having regard to the extreme delay in responding to the writ of summons filed by the respondent the entry of final judgment was improper. No objection up to then had been raised by the appellant as to the validity of the notice to quit nor was there any complaint made that the entry of final judgment was irregular. Moreover, it was never challenged at the hearing of the first application before Edwards, J. that the default judgment was wrongly entered.

In this regard, the contention of learned counsel for the respondent that what was before Edwards, J. at the hearing of the second application was that the appellants were relying not on new material but new arguments is ex facie valid.

For the appellants to succeed in a second or subsequent application to set aside a default judgment (which is the matter now being canvassed before us in this appeal), they were required to show the existence of new material supporting the justice of their claim to having the judgment set aside. As Rowe, P. said in ***Gordon et al v. Vickers et al*** S.C.C.A. 59/88 (unreported) delivered on March 8, 1990, having posited the same question now before us for our determination (p. 4):

> "Does this mean that a litigant can make repeated applications to the Court to set aside a default judgment, in the event that his first or subsequent application(s) have been refused?
>
> In principle the character of the judgment will not change simply because an application to set it aside has failed. And that application may have failed for any number of reasons. In the ***General Motors Corporation v. Canada West Indies Shipping Co. Ltd.,*** (supra) the first application failed due to the absence of an affidavit on the merits from a competent witness. It may fail because the Court is satisfied that the applicant has no arguable defence. In these two examples, <u>if a second application to set aside the default judgment was made, unless new material was available to the Court, in all likelihood, the discretion</u>

> would be exercised in exactly the same way as in the earlier applications." [Emphasis supplied]

The affidavit of Alfons Klem sworn to on 7th March, 1997, and filed in support of his first application to set aside the default judgment, apart from deposing that "the first and second defendants will say that they have not breached the terms of the lease as suggested by the plaintiff", raised no argument of substance warranting a judgment in the defendant's favour.

On an examination of the affidavit sworn to by the same deponent in support of the second application to set aside the judgment, the material raised therein is nothing new. It refers to facts which were in existence at the time of the first application which ought to have been known to the appellant but which were not advanced in support of that application. If not known to the appellant it was nevertheless material which could have been discovered if they had exercised due diligence in presenting their case.

The appellants have sought to set out the merits of their defence at paragraph 11 of the affidavit sworn to on 8th July, 1997, in which it was deponed that:

> "**11.** That I believe that the 1st Defendant has a good Defence to this action and I have been informed by its said Attorneys-at-Law and I verily believe that the 1st Defendant has a good defence in law to this action as the Default Final Judgment was irregularly obtained as same was not in compliance with Section 250 of the Civil Procedure Code and neither was the Lease Agreement between the Plaintiff and the 1st Defendant breached by the said 1st Defendant as alleged but was breached by the Plaintiff as this matter should have first been referred to a single Arbitrator prior to an action being commenced in the courts in compliance with Clause 3(e) of the said Lease Agreement."

The short answer to what is being contended for here by the appellant is:

> 1. A failure by the respondent's attorney to file a certificate as required by section 250 of the Civil Procedure Code is a mere formality and the absence of which would not be sufficient to render the notice to quit invalid. In any event, such non-compliance would have been considered waived by the failure of the appellant to raise the alleged irregularity at the hearing of the first application to set aside the judgment before Edwards, J. on 18th March, 1997.
>
> 2. As to the arbitration clause in paragraph 3(e) of the lease agreement, it is clear that since entry of appearance by the appellant several steps have been taken in the action thereby waiving any right the appellant had to invoke this clause in the lease. In order to give effect to their right to do so, the appellant following entry of appearance ought to have through their attorneys-at-law taken out proceedings to stay the action pending a referral of the matter to arbitration. Vide section 5 of the Arbitration Act and in support ***Bentley Estates Limited v. Castle Construction Limited and A. L. Richards*** S.C.C.A. 103/91 (unreported) delivered 18th December, 1992.

In exercising his discretion in refusing the application, the learned judge no doubt had regard also to the hardship likely to be suffered by the respondent who since re-taking possession of his property has sought to restore it to its former state. The appellants, on the other hand, have asserted that they have been wrongly put out of possession and in the process have suffered consequential damage of a substantial nature.

We are fully aware that, as between parties, if it is just that the appellants should obtain equitable relief a court will not withhold such relief from that party merely because they have been guilty of delay. Nevertheless, we are also mindful that:

> "A plaintiff seeking equitable relief must show himself ready, desirous, prompt and eager", per dictum of Sir

> Richard Arden, M.R. in *Milward v. Earl of Thanet* [1801] 5 Ves. 726 N.

The appellants further contend that if they are correct on the irregularity issue then as the notice to quit was ipso facto bad, not only are they entitled to have the judgment set aside, but they are entitled to be put back into possession of the demised premises. They rely in support on ***Lane Investment Limited v. United Grocery and Company Limited*** [1989] 26 J.L.R. 212 at 217-218 (F). When examined, the facts in that case are clearly distinguishable from the instant case. In the case referred to, the setting aside of the default judgment was based on facts that led the learned judge below to hold:

> "(ii) the cause of action was not explicitly stated and section 195 of the Code does not permit an inference to be drawn. While delay was long, this in itself is insufficient. It has not been shown that the defendant's position is without]' merit."

In this case, apart from the irregularity issue which has already been explored in this judgment, to grant the reliefs sought by the appellant would result in grave prejudice to the respondent. Since re-taking possession in March, 1997, in his affidavit sworn to on 17th March, 1997, in opposition to the first application to set aside the default judgment, he deponed that:

> "It would be unfair and unjust at this stage of the proceedings and serious detriment would be caused to me as the defendants have caused degradation of my property and would continue to do so if the order were granted."

The second application before Edwards, J. came almost eighteen months after the writ of summons was filed in this matter and seven months after the writ of possession was executed. Having regard to the events that have taken place

since then, it is our view that it is now too late in the day for this court to take such an extreme course as that sought by the appellant in their prayer for relief. The appellants in their draft defence have alleged that they have been gravely wronged and suffered substantial damage by being put out of possession of the demised premises. On the facts of this case, we are of the view that the justice of the case is best determined by a dismissal of the appeal while leaving the appellants to pursue their remedy at law in respect of their counter-claim in damages for being wrongly evicted.

We are fortified in taking this course by the provisions of section 679 of the Judicature (Civil Procedure Code) Law which reads as follows:

> "**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." [Emphasis supplied]

Given the long delay following the notice to quit, whatever irregularity which may have been done by the respondent in instituting these proceedings would have been waived.

Accordingly, the appeal is dismissed. The respondent is to have his costs of the appeal, such costs to be taxed if not agreed.