[2011] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 101/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MRS JUSTICE HARRIS JA
THE HON. MRS JUSTICE MCINTOSH JA

BETWEEN	**DOROTHY VENDRYES**	**APPELLANT**
AND	**DR RICHARD KEANE**	**1ST RESPONDENT**
AND	**KARENE KEANE**	**2ND RESPONDENT**

Andre Earle and Miss Anna Gracie instructed by Rattray Patterson Rattray for the appellant

Nigel Jones instructed by Nigel Jones & Co. for the respondents

26, 27 October; 20 December 2010 and 15 April 2011

HARRIS JA

[1] This is an appeal against the decision of Sykes J contained in an order made on 17 July 2009, where he ordered as follows:

> "Default judgment is set aside;
>
> 1. In exercise of the Case Management Conference powers, Judgment entered on Claim Form filed on July 16, 2007.

2. Leave to Appeal granted;

3. Costs of the applications to the Claimants;

4. Application for a Stay of Proceedings denied."

[2] On 20 December 2011 we made the following order:

> "Appeal allowed. The decision of the Honourable Mr Justice Sykes on 17 July 2009 is set aside. The counter notice of appeal is dismissed. Costs below and here to the appellant."

It is further ordered that the counter notice to the counter notice of appeal is allowed. We promised to put our reasons in writing. This obligation we now honour.

[3] On 26 September 2003, the appellant and the respondents entered into a lease agreement in respect of land part of Unity Hall in the parish of Saint James, comprised in Certificate of Title registered at Volume 1056 Folio 390 of the Register Book of Titles. With the respondents still in possession as tenants, on 31 December 2004 the parties executed two agreements, one for the sale of chattels and the other for the sale of the property, to the respondents, for the sum of US$300,000.00. It was agreed that both agreements should be read and construed as one. The respondents were required to pay a deposit of US$30,000.00 and a further payment of US$95,000.00 upon execution of the agreement and the balance payable on completion. The time for completion was stated to be as follows:

> "On or before the expiry of Ninety (90) days from the date of execution hereof and upon payment of the Purchase Price and all fees and costs, in exchange for the Duplicate Certificate of Title in registerable form subject to the provisions of Special Condition 7 hereof."

[4] It was also a term of the agreement that possession would be subject to the existing tenancy. Completion was subject to the respondents obtaining a mortgage. Clause 6 of the special conditions of the agreement was expressed to be as follows:

> "This Agreement is subject to the Purchasers obtaining a loan to be secured by a legal mortgage over the said property for an amount of not less than **TWO HUNDRED AND SIXTY THOUSAND DOLLARS UNITED STATES CURRENCY (US$260,000.00) OR THE** Jamaican dollar equivalent thereof from a recognized financial institution and shall be on such terms and conditions as are usually granted by that institution. The Purchasers shall deliver to the Vendor's Attorneys-at-Law a letter of commitment for such loan within forty-five (45) days of the date hereof; in the event of the Purchasers failing so to do the Vendor shall be entitled to rescind this Agreement within fourteen (14) days thereof and deposit shall be refunded to the Purchaser free of interest and free from deductions."

[5] At the time the parties entered into the agreement for sale, the property was subject to a mortgage to the Jamaica Redevelopment Foundation. There was no evidence that the mortgagees had consented to the sale to the respondents. Significantly, on 8 September 2004 a

Receiver was appointed in respect of the property and the respondents ceased to pay rent after that time.

[6] By letter dated 9 March 2005, the respondents' attorneys-at-law wrote the appellant's attorneys-at-law advising them that there were defects in the title. On 22 April 2005, Messrs Livingston Alexander and Levy, acting on behalf of Scotia Building Society from which the respondents had secured a mortgage undertaking, wrote to the appellant's attorneys-at-law informing them that it required a perfect title prior to releasing the balance of the purchase money. The appellant was unable to complete the transaction for two reasons, namely, a defect in the title and the acquisition of the land by the government for the building of a highway.

[7] A notice to complete was served on the appellant on 4 May 2007. The appellant being unable to effect transfer of the said lands by producing the document of title, impelled the respondents, on 17 July 2007, to bring an action against her by way of a claim form accompanied by particulars of claim, claiming specific performance of the contract. There was also a claim for damages "in excess of JA$4,368,338.85" as well as the sum of US$110,000.00 being the fees and expenses incurred by them because of the appellant's breach of the contract. The appellant was served with the claim form and the particulars of claim. However, the

prescribed notes for defendants (form 1A), the form of acknowledgement of service (form 3) and the form of defence (form 5) were not served. The appellant did not file an acknowledgement of service.

[8] On 18 October 2007, the respondents filed a request for judgment in default of acknowledgment of service. On 29 October 2007, the respondents filed an amended claim form and particulars of claim, adding Jamaica Redevelopment Foundation as a defendant. Included in the amended pleadings were additional averments as well as a claim for an injunction. The amended documents were served on the Jamaica Redevelopment Foundation but not on the appellant. The claim against the Jamaica Redevelopment Foundation was discontinued on 20 November 2007. On 26 November 2007 the appellant was served with a copy of the default judgment. The Jamaica Redevelopment Foundation, in the exercise of its power of sale as a mortgagee, sold the property to Postroad Ltd to which it was transferred on 3 December 2008.

[9] The appellant, on 30 November 2007, filed a notice of application for court orders with an affidavit in support thereof seeking to have the default judgment obtained by the respondents set aside and to have an extension of time to file her defence. The appellant sought to have the default judgment set aside on the ground that the judgment was wrongly

entered due to the respondents' failure to comply with rule 8.16 (1) of the Civil Procedure Rules ("CPR").

[10] In dealing with the question of the setting aside of the judgment in default, the learned judge took into consideration rule 8.16 (1) which prescribes as follows:

> "8.16 (1) When a claim form is served on a defendant, it must be accompanied by –
>
> a. a form of acknowledgement of service (form 3 or 4);
>
> b. a form of defence (form 5);
>
> c. the prescribed notes for defendants (form 1A or 2A);
>
> d. a copy of any order made under rules 8.2 or 13; and
>
> e. if the claim is for money and the defendant is an individual, a form of application to pay by installments (form 6);
>
> (2) There must be inserted on each form –
>
> a. the address of the registry to which the defendant is to return the forms;
>
> b. the title of the claim; and
>
> c. the reference number of the claim.
>
> (3) Where there is a standard defence form appropriate to the particular case set out in a practice direction, the form sent to the defendant must be in a standard form of

that type."

[11] He noted that the forms to which reference is made under (a), (b) and (c) of the rule were not served on the appellant. He then went on to examine and analyze the contents of the relevant forms. He did not fail to acknowledge that their contents comprise important information which makes service of these forms mandatory. Thereafter, he, concluding that service of the documents was a mandatory requirement, set aside the default judgment on the ground that it had been irregularly entered.

[12] Rule 8.16 (1) expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word "must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2, the default judgment must be set aside. The learned judge was correct in so doing.

[13] The learned judge, having set aside the judgment, heard further submissions, then proceeded to conduct a case management conference and entered summary judgment on the ground that the appellant did not have any real prospect of successfully defending the claim.

[14] The appellant filed nine grounds of appeal. Eight of these grounds can be considered simultaneously. They are as follows:

> "(a) That the Learned Judge erred as a matter of law, In that, he failed to apply and/or misapplied the correct principles of law and the proper considerations relevant to the effects of an amendment on the statement of case as originally filed (see **Warner v Sampson (1959) 1 All ER 120);**
>
> (b) That the Learned Judge failed to appreciate that there was no or no valid claim before the Court owing to the Respondents/Claimant's failure to serve the amended Claim Form filed on the 29th October 2007 on the Appellant/Defendant (see: **CPR 8.14**).
>
> (c) That the Learned Judge erred when he failed to consider on the evidence before him that the Appellant/Defendant had established a real prospect of successfully defending the claim based on the existence of the mortgage (i.e. encumberance) which was registered on the property and known to all parties;
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> (d) That the Learned Judge erred in fact when he found that the Respondents/Claimants had discontinued the amended claim against the Appellant/Defendant as the same was only discontinued against the 2nd Defendant, Jamaica Redevelopment Foundation Inc. on the 20th day of November 2007;
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> (e) That the Learned Judge erred when he failed to consider on the evidence that the Respondents' (sic) Claimants were unable to purchase the property from the Mortgagee, Jamaica Redevelopment Foundation Inc., due to its lack of consent and the effect of that failure on the Respondents/Claimants' ability to conclude the Agreement for Sale due to the continued existence of the encumberance;

(f) The Learned Judge erred when he failed to consider that there was no obligation on the Appellant/Defendant to file a Defence as the amended claim had not been served as at 17th day of July 2009;

(g) …

(h) That the Learned Judge erred when he failed to afford the Appellant/Defendant the opportunity to produce evidence of a Defence as the Judgment in Default having been set aside as of right (due to irregularity) was reinstated immediately; and

(i) The Learned Judge erred when he failed to appreciate that there was no application before the Court for Summary Judgment or to Strike out the Defence as disclosing no reasonable prospect of succeeding."

[15] The following counter notice of appeal was filed by the respondents:

"(a) That the Learned Judge in Chambers erred when he failed to consider the fact that the categories of irregularities warranting the automatic setting aside of a Default Judgment has been significantly narrowed by the new Civil Procedure Rules

(b) That the learned judge erred in finding that the failure to file the prescribed notes etc. was amongst the categories of items listed at Rule 12.4 of the CPR, which were prerequisites for the entry of a valid judgment

(c) That the learned judge erred in failing to have regard to the fact that the consequence of the failure to comply with a rule requiring service of a prescribed notes, etc, was not specified

(d) That the learned judge erred in failing to consider and give effect to **CPR r. 26.9(2)** and the overriding objectives by refusing to recognize that the failure to comply with a rule, practice direction or court order does not automatically invalidate any step taken in the proceedings.

(e) That the learned judge erred in failing to give effect to **CPR r. 26.9(3)** and the overriding objectives which empowered the court in the circumstances outlined at (c) above to make an order to put matters right.

(f) That the learned judge failed to recognize that in circumstances where the Appellant/Defendant had admitted in Affidavit evidence that she has not been prejudiced by the omission of the prescribed notes, etc., this was an appropriate case to give effect to CPR r. 26.9 and the Court's case Management powers generally

(g) That the effect of the Learned Judge's ruling is to equate the failure to serve Prescribed Notes, etc with the failure to file a Claim Form.

(h) That the learned judge erred in not finding that the regularly entered default judgment should stand in circumstances where he was of the view that the Defendant has no real prospect of successfully defending the claim."

[16] The appellant filed a counter notice to the counter notice of appeal which was couched in the following terms:

"(a) The Learned (sic) was correct in finding that the Judgement in Default entered on the 20th day of October 2007 in favour of the Respondents (hereafter referred to as "the Keanes") was irregular as the usual undertaking given upon obtaining an injunction is to file pleadings, in this case amended pleadings.

(b) The Learned (sic) was correct in finding that the Judgment in Default entered on the 29th day of October 2007 was irregular in light of the fact that on or around 18th October 2007, the Keanes filed for interlocutory Judgement in Default of an Acknowledgement of Service in circumstances where they were going to amend their pleadings.

(c) The Learned Judge was correct in finding that the Judgement in Default entered on the 29th October 2007 was irregular as on the 29th October 2007, the Keanes filed an Amended Claim Form and Particulars of claim, wherein they sought to add Jamaica Redevelopment Foundation Inc. as the 2nd Defendant to the proceedings and include a prayer for injunctive relief and that the said claim was filed on the same day the Judgement in Default was entered against Dorothy Vendryes.

(d) That the Learned Judge was correct in finding that the Judgement in Default entered on the 29th October 2007 was irregular as the principles of law establish that the effects of an amendment on the statement of case is that the amendment replaces the claim as originally filed and relates back to the date of filing (see ***Warner v Sampson*** [1959] 1 All ER 120). Accordingly the Judgement in Default entered on the 29th October 2007 was premature, as the amended claim had not been served."

[17] Mr Earle argued that the judgment in default is a nullity, as, at the time of the entry of the judgment, the original claim had ceased to exist. The original claim, he submitted, being not in existence would no longer define the issues between the parties to be resolved at a trial and as a consequence, it could not have properly formed the foundation upon

which a default judgment could have been entered. The amended claim related back to the date of the filing of the original claim and this, the learned judge failed to appreciate, he argued. He cited the case of ***Warner v Sampson & Anor*** [1959] 1 All ER 120 in support of these submissions. The learned judge, he argued, erred when he determined that the respondents had discontinued the amended claim and that the appellant had no real prospect of successfully defending the claim. He further submitted that the learned judge failed to give consideration to the evidence that the appellant was unable to purchase the property from the mortgagee due to lack of consent which effectively affected the respondents' ability to complete the contract of sale. In any event, he argued, on the date of hearing of the application the appellant having not been served with the amended claim form and particulars of claim was under no obligation to file an acknowledgement of service or defence.

[18] It was Mr Jones' submission that the case of ***Warner v Sampson*** is inapplicable, in that the amendment to the claim was made after the entry of the default judgment and the amended particulars of claim was irrelevant so far as the appellant was concerned. The learned judge, having determined that the default judgment had been irregularly entered was not obliged to hold a case management conference as

there was no filed defence before him and the respondents' amended claim had not been served, he argued. Accordingly, the learned judge recognized the necessity of applying rule 1.2 of the C.P.R. and correctly proceeded to utilize his powers under rule 15.2, he submitted. He further submitted that the defence is unsound, legally and factually. He argued that the fact that the property was sold by the mortgagee does not mean that there was no consent and there was no condition in the agreement that the sale should be made subject to the mortgagee's consent as the matter of the consent was never an issue. He argued, however, that the evidence before the learned judge suggested that there was consent. The appellant placed reliance on a breach of the rental contract as a reason for not proceeding with the agreement when there is nothing in the agreement supporting this contention, he argued. There was no duty on the part of the respondents to have inquired into the title prior to the contract and the deficiencies in the title were not caused by any intervening circumstances as alleged by the appellant.

[19] Before embarking upon a review of the appeal and counter notices of appeal, it is necessary to address an issue as to whether the default judgment was extracted prior to or after the filing of the amended pleadings. Mr Earle submitted that on 29 October 2007 the respondents sought an injunction and in paragraph 9 of the affidavit in support of their application they stated that they "were on the verge of obtaining a

default judgment" against the appellant. This, he argued, shows that the judgment was extracted after the filing of the amended pleadings. We are in agreement with Mr Earle that at the time of entry of the default judgment the amended pleadings had already been filed.

[20] The appellant had not denied that she was served with a copy of the claim form and the particulars of claim filed on 17 July 2010. Her complaint, however, was that she had not been served with a copy of the prescribed notes for defendants, and the requisite documents which ought to have accompanied the claim form. As the learned judge rightly appreciated, these were essential documents of which the appellant ought to have notice.

[21] It is perfectly true, as submitted by Mr Earle, that the application to set aside the judgment was under rule 13.2. The application was not under rule 13.2(3) which provides for the setting aside of a regularly entered judgment. Rule 13.3(6) permits a judge to embark upon a case management conference where a judgment has been regularly entered. The setting aside in this case would be confined to rule 13.2(2) which reads:

> "13 (1) …
>
> (2) The court may set aside judgment under this rule on or without an application."

Having set aside the judgment, the critical question is whether the learned judge was empowered to have conducted a case management conference and to have granted summary judgment in favour of the respondent.

[22] Before entering summary judgment, the learned judge recounted the allegations as disclosed in the original claim. He went on to state at paragraphs 22, 23, 24, 25, 26, 27, 28, 29 and 30, the following:

> "22. At the time of the agreement, it was common ground that the property was encumbered and Mrs. Vendryes was seeking to realize the property so that she could pay off the mortgage.
>
> 23. It turned out that Mrs. Vendryes was not able to pass good title to Dr. and Mrs. Keane. Also the mortgagee eventually sold the property to a third party. The claimants have sued Mrs. Vendryes for breach of contract.
>
> 24. Mrs. Vendryes's defence, reduced to its core, is that it was a condition precedent to completion of the sale agreement that the Keanes were to honour their lease agreement by making payment as and when the rent became due and that failure by them meant that the sale agreement could not be completed.
>
> 25. She also adds that she could not complete the sale because of supervening activities by the Government. By this she was referring to the compulsory acquisition of the property by the Government of Jamaica for the North Coast Highway Project.
>
> 26. For good measure, Mrs. Vendryes counter claims for what she alleges is the outstanding rent. This counter claim is not part of my deliberation.

27. The claimant's response was direct. They say that there is no such term in the sale agreement and there was no such understanding between the parties.

28. It is common ground that none of the sale agreements reflect such an understanding.

29. The crucial paragraph on the completion point in the proposed defence reads:

> *Paragraph 11 of the Particulars of Claim is denied. The Defendant avers and states that there are two concurrent agreements which governed the parties. The Claimants have failed to perform the terms of the lease agreement which is a condition precedent to the completion of the Agreement for sale.*

30. The proposed defence at paragraph 13, refers to supervening events over which she had no control."

[23] Then, at paragraphs 41 and 42, he arrived at the following conclusion:

> "41 … It is my view that the defendant does not have any real prospect of successfully defending the claim. It is simply incredible to believe that through all this negotiation, if the parties really intended to make payment of rent a condition of completion of the sale, they would have failed to make provision for it or even mention before now.
>
> 42 There is no substance to the defendant's case. The reference to supervening events which prevented the defendant from acting in accordance with the terms of the contract may be a reference to the doctrine of frustration. I am not saying that it is, but simply to say that supervening events prevented completion of the

> contract, in the context of this case, cannot avail the defendant. The Government acquiring the land is not an extraordinary or unusual event. The vendor could have managed this risk by including an appropriately drafted term of the contract. She decided not to do so and so must live with the consequences."

[24] It was his view that he was permitted to exercise case management powers and to enter summary judgment against the appellant under rule 15.2 of the CPR. He declared that at any stage of the proceedings, a judge is not precluded from exercising case management powers and award summary judgment, if, at the time of setting aside a default judgment and after being acquainted with the contents of a defence, the question as to a reasonable prospect of success arises.

[25] The amended claim form and amended particulars of claim were not served on the appellant. These pleadings formed part and parcel of the court's record and were before the learned judge. He erroneously found that the amended claim form was discontinued against the appellant. Obviously, in so doing, he failed to recognize that the amended claim form was discontinued against the Jamaica Redevelopment Foundation only. Surprisingly, he ignored the fact that the amended claim form and amended particulars of claim were the effective pleadings before him.

[26] In ***Warner v Sampson and Anor*** [1959] 2 WLR 128 an action was brought by the landlord for possession of demised property, specifying breaches of certain covenants in a lease. The defendant Sampson allowed a judgment to proceed by default but a defence was filed by the other defendant, a Miss Gandy. The judgment was set aside and an amended defence was delivered by Miss Gandy admitting the lease and the landlord's title but counter claiming for relief from forfeiture. Hodson LJ in speaking to the effect of the amended defence said at page 128:

> "The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended it takes the place on record as part of the pleadings setting out the issues upon which the action will be tried."

[27] The claim form upon which the learned judge proceeded lacked validity, in that it was not in compliance with rule 8.16(1). It would have been a nullity and ought not to have been acted upon. The averments in the amended claim form and the particulars of claim related back to the date of the filing of the original claim. They raised issues which had not been pleaded in the original claim and most importantly they were not served on the appellant. These pleadings, not having been served, the leaned judge would not have been in a position to have conducted a case management conference or even to have considered the efficacy of the proposed defence and counter claim.

[28] The respondents raise a number of issues in the amended pleadings which had not been included in the original claim as well as a claim for an injunction. These amended documents stood as substitutes for the invalid original pleadings. The appellant would not have been required to defend the averments outlined in the amended pleadings until she was served. Accordingly, the application for an extension of time by the appellant to file a defence was premature. In the circumstances, no leave would have been required by her to file a defence as the time for so doing would not have expired.

[29] The learned judge having set aside the judgment could not have invoked rule 13.3(6). He had an obligation to have taken into account the non service of the respondents' amended pleadings. The appellant's right to defend would only arise after service. Consequently, subsequent to the service of these pleadings, the appellant would, then and only then, be required to file a defence. She may do so within 42 days after the date of service as prescribed by rule 10.3 (1) of the CPR.

[30] It follows therefore, that the learned judge would not have been entitled to embark upon any assessment of the proposed defence nor a case management conference at the time he set aside the default judgment.

[31] Although a judge, under rule 26. 2, is clothed with authority to make orders on his own initiative, the procedure adopted by the leaned judge would not have accorded him a right to have proceeded as he had done. He would not have been authorized to employ case management powers at the time. It cannot be denied that rule 15.2 of the CPR empowers the court to award summary judgment where a defendant has no real prospect of successfully defending a claim. However, the circumstances of this case did not allow the learned judge to have invoked his powers under that rule. He properly set aside the irregularly entered default judgment and having done so ought not to have proceeded along the path which he pursued. There is clearly want of jurisdiction, on his part, in granting summary judgment to the respondents.

[32] The counter notice of appeal is clearly without merit. The learned judge applied the correct rule in setting aside the judgment. Compliance with rule 8.16 (1) was mandatory. The default judgment was set aside under rule 13. 2 (1) which compelled the learned judge to do so, it being wrongly entered.

[33] Rule 26. 9(1), (2) and (3) is inapplicable to this case. The rule reads:

> "(1) This rule applies only where the consequence of failure to comply with a rule practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

3) Where there has been an error of procedure or failure to comply with a rule or practice direction the court may make an order to put matters right."

[34] The general words of rule 26.9 cannot be extended to allow the learned judge to do that which would not have been possible. A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement. The amended pleadings must be served before any further steps can be taken in the proceedings.

[35] The irregularly entered default judgment is defective and no order could have been made to rectify it. Curiously, the claim is for specific performance as well as for damages. The claim for damages, obviously, would be a claim in lieu of specific performance. The request for judgment was couched in the following terms: "The claim is for an unspecified sum of money and there should be judgment for the payment of an amount to be decided by the court". The judgment states "Judgment to be assessed by the court". The claim for specific performance was not sought as an alternative to damages. The judgment therefore would be of no effect and being a matter of substance could

not have been rectified by any order of the learned judge. Neither could the defects in the procedure be cured by the making of any order by applying rule 26. 9.

Ground (g)

> "The Learned Judge erred when having found that the Judgment in Default was irregular failed to award the costs of the application to the Appellant/Defendant."

[36] Under rule 64.6(1) of the CPR a court may order costs. The rule reads:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the unsuccessful party.
> (Rule 65.8(3) (a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)"

[37] Mr Earle argued that the appellant succeeded on her application to set aside the irregularly entered default judgment. Accordingly she ought properly to have been awarded costs. Although an order of costs is discretionary, where the judge wrongly exercises his or her discretion this court will intervene. The appellant succeeded on her application touching the irregularity of the entry of the default judgment and we are in agreement with Mr Earle that she should be awarded her costs.

[38] For the foregoing reasons we allowed the appeal and counter notice to counter notice of appeal and dismissed the counter notice of appeal.