



[2013] JMSC Civ 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV04288

BETWEEN	WAKAKO YONEYAMA McGEE	1ST CLAIMANT
	MIWA ENTERPRISE USA	2ND CLAIMANT
A N D	NORRIS WEBB	DEFENDANT

Ms. Martina. Edwards instructed by Shellards & Co. for the Claimant/Applicant
Mr. Paul Beswick, Ms. C. Bryan and Mr. K. Smith instructed by Ballentyne,
Beswick & Co. for the 1st Defendant/Respondent

July 11 and 29, 2013

**RULING ON NOTICE OF APPLICATION FOR COURT ORDERS
FILED JUNE 13, 2012**

D. FRASER J

THE APPLICATION

[1] By Notice of Application for Court Orders dated and filed June 13, 2012
the defendant sought the following orders:

- (a) A declaration that the Supreme Court of Jamaica has no jurisdiction to try the claim herein;
- (b) That the Claim Form and Particulars of Claim herein be struck out;
- (c) Costs and Attorneys'-at-law costs
- (d) Such further and other relief as to this Honourable Court may seem just

[2] This application was supported by the affidavit of Norris Webb dated the February 26, 2013 and filed February 28, 2013. Pursuant to the Civil Procedure Rules (CPR) r 9.6 (1) the challenge is mounted on three main grounds:

- (a) The defendant is not domiciled in Jamaica.
- (b) The alleged contract or agreement was not made subject to the jurisdiction of the Supreme Court of Jamaica.
- (c) The work done in relation to the contract was done mostly outside of Jamaica

THE SUBMISSIONS

[3] I have summarised the submissions made on either side. However though I will not set out all the submissions in detail, I have taken all the facts, submissions, authorities and rules cited into full consideration in coming to my decision.

Counsel for the Defendant

A. The Defendant is not domiciled in Jamaica

[4] Counsel submitted that the defendant has rescinded his domicile of origin and made the United States of America (USA) his domicile of choice. He has lived and worked in the USA and been domiciled in that jurisdiction for over 10 years. The defendant has satisfied both the requirements of actual presence as well as having displayed a clear intention to settle in the USA. He cited in support **Halsbury's Laws of England** Vol. 19 (2011) 5th Edition paras 645 and 339 - 342; **Collier, J.G. 2001, 40. Conflict of Laws. 3rd Edition. Cambridge: Cambridge University Press** and **Bell v Kennedy** (1868) LR 1 SC & Div 307.

B. The Defendant was not properly served with the claim

[5] Counsel also submitted that the defendant was not properly served with the claim on the basis that the order obtained from the Master for service on his Attorney of Law was bad. This was so as Mr. Stanbury Attorney at law was not retained to accept service on the Defendant's behalf in this present litigation and because the Defendant himself physically received the documents out of the jurisdiction, in a context where the court had not given permission for documents to be served out of the jurisdiction pursuant to CPR rule 7.

C. Work done in relation to the contract was done mostly outside of Jamaica

[6] Counsel submitted the court had no jurisdiction to hear the claim based on the fact that the work done in relation to the contract was done mostly outside of Jamaica and also it related to a defendant who had a foreign domicile.

D. The alleged contract or agreement was not made subject to the Supreme Court of Jamaica

[7] Counsel submitted that the claimant has to establish the existence of an agreement and if such an agreement was established that it was to be governed by Jamaica law. Counsel maintained that the claimant has not sufficiently established the existence of an agreement.

Counsel for the Claimant

[8] The Claimant did not file an affidavit in response due to certain difficulties she experienced. Counsel on her behalf in resisting the application relied on portions of the defendant's affidavit and on the Particulars of Claim and documents annexed thereto. Counsel submitted that the defendant's application should be refused as:

- a. There is no doubt that this court has personal jurisdiction
- b. The defendant was properly served; and
- c. The court has subject matter jurisdiction

A. There is no doubt that this court has personal jurisdiction

[9] Counsel submitted that the defendant was sufficiently present in Jamaica at the date of commencement of proceedings. Relying on the affidavit of the defendant she pointed out that the defendant indicated that he visited Jamaica regularly to visit family and perform. Further, counsel maintained that the defendant was habitually resident in Jamaica and that it was possible for a person to be resident in two or more countries. See **Halsbury's Laws of England** 5th Ed., Vol. 19 paras. 358 and 360.

B. The Defendant was properly served

[10] Counsel indicated that an application for substituted and alternative service was heard by the Master in Chambers December 1, 2011 and permission was granted to serve the claim on the defendant's attorney – at - law and the defendant was served in accordance with that order. Counsel thereafter however seemed to “change horses” and submitted that Mr. Lloyd Stanbury was not served in his capacity as an attorney-at-law but as somebody who could bring the claim to the attention of the defendant. She pointed out that at no time in the application for substituted service did the claimant say or allege that Mr. Stanbury was retained to accept service. It was pointed out that in the affidavit filed in support of that application, Mr. Stanbury was not being said to be the attorney-at-law for the defendant. The affidavit evidence indicated that the email correspondence showed that Mr. Stanbury knew the defendant and about the matter and would be able to make him aware of it. She relied on CPR r. 5.14 (2) (b) which she submitted permitted the claimants to select a method of service which would enable the defendant to be made aware of

the claim. Counsel further submitted that it was procedurally irregular for counsel to seek to challenge an *ex parte* application, (the application for substituted or alternative service), that was not before the court. It would at this point have to be appealed.

C. The Court has subject matter jurisdiction

[11] Counsel submitted it was clear that the court had subject matter jurisdiction as the song in dispute was written and produced in Kingston, recorded by 12 Jamaican artistes, mixed at Jamaican studios, the defendant was ordinarily resident in Jamaica during the recording and hence Jamaica was the natural forum. Further counsel advanced that it would be costly to carry all the necessary witnesses in this matter to a foreign jurisdiction. Consequently counsel submitted the application should be refused.

Submissions of Defendant in reply

[12] Not having had the opportunity or the benefit of hearing or viewing the submissions of counsel for the claimant before they were made, counsel for the defendant Mr. Beswick sought and obtained permission to file written submissions in reply to the submissions of counsel for the claimant.

A. Concerning personal jurisdiction

[13] Counsel for the defendant submitted that the claimants had not offered a “jot or a whit of evidence” to prove to the court that the defendant’s residence in Jamaica had been adopted voluntarily and for settled purposes as part of the regular order of life for the time being. Of importance counsel advanced was the fact that the above requirement was not either or but the two items must be proved. Nor had it been established that the defendant had a physical presence and an intention to remain in Jamaica; again the requirements were conjunctive not in the

alternative — both physical presence and an intention were necessary to establish residence.

[14] Counsel submitted those factors had not been established by the claimant. The defendant's visits to the island as outlined in his affidavit to maintain family ties were unremarkable and could not be relied on to establish habitual or ordinary residence or domicile in Jamaica. The defendant was merely doing what countless other Jamaicans who have migrated to the United States of America (USA) would do to naturally maintain ties with family members in Jamaica. Further counsel submitted that when someone migrated to the USA with the intention of making that jurisdiction their domicile of choice that person was not required to forgo contact with family and friends in their domicile of origin.

B. Concerning whether or not the defendant was properly served

[15] It was submitted that this court was not *functus officio* and could rule against the learned Master Lindo's decision. Counsel disagreed that the proper procedure was for the order of Master Lindo granting substituted service to be appealed. As the application for substituted/alternative service was made *ex parte* and as such the court would not have been privy to all counsel relied on CPR r. 11.16 (1) which states: "*A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*" The section continues at 11.16(2) "*A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*" Finally rule 11.16 (3) states, "*An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.*"

[16] Counsel submitted that the proper procedure in these circumstances is to have Master Lindo's order set aside having been made in the absence of the defendant. Further that the time stipulation in 11.16 (2) would not

apply as the defendant had not been properly served and could not be expected to comply with that rule.

C. Concerning whether this court also has “subject-matter” jurisdiction

[17] Finally in respect of the question of subject matter jurisdiction, counsel submitted that the exhibits relied on by the claimant in particular, the letters of agreement signed by six artistes and annexed to the particulars of claim did not prove that the work done in Jamaica was in any way connected to the defendant. He submitted that there was nothing in the documents put forward that could link the defendant in a fashion that would allow the court to find it had subject matter jurisdiction and in fact that there was nothing in the evidence to tie the defendant to a contract much less to link him to a breach of a copyright interest resident in the claimant.

ANALYSIS

[18] It is important to start with the issue of service. The Acknowledgment of Service filed on May 30, 2012 indicated that service was effected on May 16, 2012. An examination of the Acknowledgment of Service filed discloses that nowhere does it indicate that any issue is being taken with service or with jurisdiction for that matter. On June 13, 2012 this application was filed which sought a declaration that this court does not have jurisdiction to hear the claim and also the striking out of the Claim and the Particulars of Claim.

[19] It was not until the filing of the defendant’s affidavit on Feb 28, 2013 that there was any indication that the defendant was taking issue not just with the jurisdiction of the court to hear the matter but that the matter was not properly before the court even in respect of that limited point, as it was being alleged that service was not properly effected.

[20] In response to the submission by counsel for the claimant that this court was unable to look behind the order of the master, counsel for the defendant cited CPR rule 11.16 which permits a party against whom an order has been made without notice to apply within 14 days of the order being served on him. Counsel for the defendant submitted that the 14 day time frame should not apply to the defendant as he has not been served. This court doubts however whether such an approach is cogent. If the defendant is challenging an order for service that has come to his notice and he maintains that he is not served even for the limited purpose of challenging the propriety of that service, then the 14 day period would never begin to run and the claim would forever be in a state of suspended animation.

[21] But in any event while in his response counsel for the applicant invited this court to set aside the order of Master Lindo, the fact is there is still no application before this court to set aside the Master's Order. That was not a part of the application. The court is being asked to set aside the order of Master Lindo without a formal application by a "sidewind" one year and two months after the service complained of was effected. Having considered the matter I agree with counsel for the claimant that this court does not have the jurisdiction to review the order of the Master with a view to setting it aside. For the court to have that jurisdiction the procedure set out in CPR r. 11.16 would have had to have been followed. An application to set aside should have been made within 14 days of the order having been served on the defendant or such longer time as the court might have allowed. I note that the documents were all served on Mr. Stanbury by email on May 2, 2012 and the defendant acknowledged service of the claim on May 16, 2012 as indicated in the acknowledgment of service filed.

[22] The defendant however did not chose the approach of seeking to have the order for substituted/alternative service set aside. Instead he sought the declaration earlier referred to, which if granted would be in the nature of a

final order which would have had the effect of determining the claim. Based on the submissions made by counsel for the defendant however, the question of the adequacy of the service is intricately and inextricably linked to the question of jurisdiction; and the adequacy of the Master's order and the service purportedly effected pursuant to that order is an issue which I hold is not within the jurisdiction of this court, but now would have to be addressed in the Court of Appeal.

[23] The issue of service it appears to me in the circumstances of how this matter has been argued will need to be settled before the issue of jurisdiction can be addressed. Consequently I refuse the orders sought on the defendant's Notice of Application for court orders. Leave to appeal granted. Time to file Notice of Appeal is extended to October 31, 2013. Time to file Counter Notice of Appeal is extended to November 29, 2013. Costs to the claimant to be agreed or taxed.