

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT N.E. 97/87

November 16, 1989

BETWEEN

ORRIN TONSINGH

PLAINTIFF

A N D

JOSEPH WILSON

DEFENDANT

Mr. Orrin Tonsingh appears in person on his own behalf.

Dr. Bernard Marshall instructed by Messrs B. Frankson & Co. for the Plaintiff.

PITTER, J.

This is an application made on behalf of the Defendant for an Order that "The Order of the Master dated the 6th day of October, 1987, be set aside and that all further proceedings be stayed."

At the hearing Mr. Tonsingh took a preliminary objection to the matter being heard in Chambers. He submitted that the application must be made on motion in open Court. In support of this he referred to Section 484 of the Judicature (Civil Procedure Code) Act which reads:-

" where by this Act any application is authorised to be made to the Court or to a judge such application if made to the Court or to a Judge in Court shall be made by motion."

Dr. Marshall in response argued that the usual practice and procedure for the setting aside of a judgment in this Court is on application by summons or motion. This view is supported by Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition at page 57:-

" A Judgment in default of notice of intention to defend or defence may be set aside or varied unconditionally or upon terms. (Order 13&9; Order 19 & 9; "The principle obviously is that unless and until the Court has pronounced 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".) Where a judgment is irregularly obtained, the Defendant is entitled as of right to have it set aside upon application by summons or by motion (under Order 2rr.1,2)"

As to whether a Judge in Chambers has power to set aside a judgment, the answer is to be found in the construction of Sections 354 and 484 of the Judicature (Civil Procedure Code) Act.

In section 354 of the Act, regarding proceedings at trial, reference is made to "the court" or a "Judge". This is also to be found in Section 484 of the said Act which provides for the mode of application when made, to "the Court" or to "a Judge in Court." The meaning of the expressions "the Court" and "a Judge in Chambers" must be explored if a solution is to be found. Odgers (supra) at page 9 defines the expressions as follows:-

" In the rules before they were revised, the expression "the court or a judge" constantly occurred and "the court" meant one or more judges sitting upon the bench in open Court, and a "judge" meant a judge sitting in chambers."

In my view, the phrase "by the Court or a Judge" as appears in Section 354 of the said Act must be construed to mean that the application may be made either in open Court or by a judge sitting in Chambers. Section 484 of the said Act would therefore not be applicable to the instant case. It is only when the application is made before the "Court" or to a "Judge in Court" that it should be done by motion. The Defendants has opted to make ^{his} application to "a Judge."

Mr. Tonsingh further objected to the application being heard on the grounds that the application was not made within 10 days after trial, nor was an application for extension of time made as required by Section 354 which reads:-

" Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."

Dr. Marshall in response relied on the provisions of Section 676 of the said Act and asked that the court exercises its discretion in the Defendant's favour.

Section 676 reads:-

" The Court shall have power to enlarge or abridge the time appointed by this Act, or fixed by any order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."