

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S.030 OF 1986

BETWEEN

ERIC SMITH

PLAINTIFF

A N D

JOHN SHAW

DEFENDANT

A. Wood instructed by Livingston, Alexander and Levy for the Plaintiff.

A. A. Hines on the record for the Defendant - Both absent.

8th and 19th December, 1986.

CLARKE, J: (AG.)

This is a summons seeking summary judgment under Section 86A of the Civil Procedure Code in a purchaser's action for specific performance. The plaintiff, the purchaser, is Mr. Eric Smith and the vendor is the defendant, Mr. John Shaw. The Writ of summons in the action was indorsed with a claim for specific performance of a written agreement for the sale of land part of Patrick City in the parish of St. Andrew.

It is convenient to mention at this stage that the only evidence before me on this summons is an affidavit by the plaintiff. It is true that Mr. Wood in his submissions adverted to a copy affidavit served on his firm of attorneys by Mr. A. A. Hines attorney-at-law then acting for the defendant. Yet there is no affidavit on the record before me from the defendant and he was absent at the hearing of the summons. The summons was duly served on Mr. Hines but he has since obtained an Order from the Master to have his name removed from the record.

Nevertheless it is to be observed that a condition precedent to the application for summary judgment has not been complied with: the affidavit verifying the cause of action is incomplete in that there is a failure by the plaintiff to state that in his belief there is no defence to the action.

Section 86A (1) of the Code provides:

" In an action commenced by Writ of summons indorsed with a claim for specific performance of an agreement... for the sale or purchase of property... the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action, apply to the court or a judge for judgment..."

As a rule trial precedes judgment. Section 86A (1) like section 79 (1) of the Code provides for an extraordinary procedure in certain cases. By this procedure the proverbial cart is put before the horse which is then discarded, for instead of trial first and then judgment, there is judgment and never any trial unless, of course, the judgment is set aside. In principle, therefore, this procedure must be strictly confined to the conditions set out in section 86A (1). The first condition has been satisfied, for the action was commenced by Writ indorsed with a claim for specific performance of an agreement for the sale of land. There is a second condition which is expressed thus: "the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action (my emphasis) apply to the court or a judge for judgment". It is only on these conditions that I may give judgment for the plaintiff without any trial. As the plaintiff failed to depose as required by this section that in his belief there is no defence to the action the affidavit is insufficient. The second condition has therefore not been satisfied.

In my opinion that requirement is mandatory and not merely directory. I am fortified in this view by the case of Symon and Co. v. Palmer's Stores (1903) Limited [1912] 1 K.B. 259 where the Court of Appeal of England held by majority (Vaughan Williams and Buckley L.JJ., Kennedy L.J. dissenting) that where on an application for summary judgment under Order 14 of the Rules of the Supreme Court the affidavit made for the purpose of verifying the cause of action is insufficient as on the facts of that case being made by a person other than the plaintiff who cannot swear positively to the facts, there is no jurisdiction to make an Order for judgment under Order 14.

As Buckley L.J. said at page 267:

" If there is no such affidavit as is required by Order xiv r.1 there is I think, no jurisdiction under that Order to give judgment. The judge is bound to leave the action to proceed to trial in the usual way. He can only give judgment without a trial if the conditions mentioned in the rule are satisfied. The question of the sufficiency of the affidavit is in my opinion one which goes to jurisdiction".

Vaughan Williams L.J. succinctly gave the basis for the need for the affidavit to satisfy the requirements for the Order when he said this at page 265:

" It may be that it might have been more conducive to the interests of justice if the Order had given a discretion... to the Master or judge in cases where he thinks that, though the affidavit filed by the plaintiff does not altogether satisfy the requirements of the Order, it nevertheless suggests the probability of the plaintiff's claim being well founded, but we have nothing to do but to give effect to the Order as it stands, and must be strictly governed by its terms. That is a rule applicable to all enactments and Orders, but it is pre-eminently applicable in the case of an Order which gives such a stringent remedy as judgment without a trial".

Since the plaintiff's affidavit is insufficient, not on the ground that a person other than the plaintiff cannot swear positively to the facts - see Symon and Co. v. Palmer's Stores (1903) Limited (supra) - but on the ground that the plaintiff in the case before me failed to depose that in his belief there is no defence to the action, the application must fail.

Mr. Wood who made no submissions on this aspect of the matter focussed his submissions on the special condition of the agreement for sale which is in this wise:

" Subject to the vendor granting a loan of Ninety Thousand Dollars (\$90,000.00) to the purchaser to complete. The said loan shall be secured by a first mortgage over the said land and shall be repaid in twenty-five years (25) with interest at the rate of twelve per cent per annum by equal monthly instalments".

Mr. Wood urged me to say that in the face of the words used the parties have come to a final and binding agreement and that there is no indication that that condition was a conditional undertaking.

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The defendant has declined to effect the sale by transferring the land to the plaintiff and accepting a mortgage over the said land by the purchaser to secure repayment of \$90,000.00.

In view of the decision I have come to that the procedural requirements of section 86A (1) must be satisfied before I can be invested with jurisdiction to grant specific performance without trial it is not necessary for me to decide whether or not the special condition in the agreement amounts to a condition precedent which has not been fulfilled or, in other words, whether or not a complete and definite contract has been made by the parties.

In the result the Order for specific performance asked for in paragraph 1 of the Summons is refused.