IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CL 1999 OF M 188

BETWEEN	**TARZAN MIGHTY**	**CLAIMANT**
AND	**MICHAEL WILSON**	**FIRST DEFENDANT**
AND	**ONEIL MARSHALL**	**SECOND DEFENDANT**

IN CHAMBERS

Miss Carol Sewell for the claimant

Miss Catherine Minto instructed by Nunes, Scholefield, Deleon and Company for the first defendant

February 4, 11, 17 and 23, 2005

APPLICATION TO SET ASIDE JUDGMENT

Sykes J

1. The first defendant, Mr. Michael Wilson, has applied to set aside the judgment against him on the basis that Mr. Lawson, the process server, did not serve him with the writ of summons and statement of claim. He says that it was the arrival of the bailiff, who came to enforce the judgment, that alerted him to the fact that judgment was entered against him and that damages were assessed. Mr. Tarzan Mighty, the claimant resists this application on the basis that Mr. Wilson was properly served. Both sides called witnesses. Mr. Wilson testified and was cross-examined. The claimant relied on the process server, Mr. Delroy Lawson, a former police

officer. The resolution of this case depends upon the credibility of these two witnesses and applying the law to the facts as found by me.

Mr. Wilson's testimony

2. Mr. Wilson says that he is a businessman who lives in Above Rocks, St. Catherine. He swore that he has been living at the same address since 1992. It is accepted that Mr. Wilson is well known in his community and easy to find. However, he says that he leaves home as early as 3:00am to ply his wares as far a field as Falmouth, Trelawny. This he does every day except Mondays when he is usually at home. He testified that he could not recall whether he was at home on September 17, 1999, when the process server allegedly came to his house, but he implied that it would have been extremely unlikely that he was at home because that day was Friday, one of the days on which he would have left home early. Mr. Wilson is adamant that he did not receive any documents in this matter.

Mr. Delroy Lawson's evidence

3. Mr. Lawson said that he served Mr. Wilson on September 17, 1999. He said that he went to Above Rocks on the date in question and made enquiries for Mr. Wilson. He added that he received information from citizens that directed him to Mr. Wilson's house. This evidence, without more, sounds reasonable having regard to Mr. Wilson's testimony that he is well known and easily found. Mr. Lawson has also said that he served Mr. Oneil Marshall, the second defendant, on the same day. The service of Mr. Marshall allegedly took place at a house less than one mile from Mr. Wilson's. It is significant to note that during cross-examination, Mr. Lawson

testified that he could not recall where in Above Rocks Mr. Wilson's house was. He could not recall the day of the week he served Mr. Wilson. He was unable to describe the house at which he said he saw Mr. Wilson. To put it mildly, Mr. Lawson was unable to say anything further than that he served Mr. Wilson and Mr. Marshall.

Analysis of the evidence

4. I take into account that Mr. Lawson was being asked about events that took place five years ago. It would be difficult for him to recall, with clarity, minute details of the service on Mr. Wilson. In this case, Miss Pinto launched a collateral attack on Mr. Lawson's credibility. She did this by exploring his evidence of service of Mr. Marshall. It will be recalled that Mr. Lawson had said that Mr. Marshall at his (Marshall's) place of residence, on the same day, in Above Rocks, St. Catherine. The evidence of Mr. Lawson is that Mr. Marshall identified himself to Mr. Lawson at this house.

5. Mr. Lawson's account of his service on Mr. Marshall is unlikely to have occurred at the place described by him. This is so I accept that Mr. Marshall has never lived or stayed in Above Rocks at any time. The evidence is that Mr. Marshall lived and has always lived in Orange Field District, which is said to be near Ewarton District, St. Catherine. Any one familiar with the parish of St. Catherine would realise that there is some distance between Ewarton and Above Rocks.

6. This conclusion is supported by the affidavits of Mr. Tyrol Howell and Mr. Dennis Wright, which were filed by the claimant. Both men say that they know Mr. Marshall and he lived in Orange Field District. Mr. Howell lives in Orange Field District and he says that he has known Mr. Marshall all

his (Howell's) life. They played football together and grew up together. Mr. Wright swore that he knew Mr. Marshall for over twenty five years and that Mr. Marshall lived in Orange Field. It does seem remarkable that the claimant has produced a process server who says that Mr. Marshall lived in Above Rocks at the material time while at the same time producing two affidavits to say that Mr. Marshall has always lived in Orange Field District. These two persons have known Mr. Marshall for many, many years. It seems to be that they are better able to say where Mr. Marshall lived in 1999.

7. On this evidence, it is reasonable to say that Mr. Marshall has always lived in Orange Field and has never lived in Above Rocks. This does not mean that it was impossible for him to have been served in Above Rocks but the impression given by Mr. Lawson was that when he went to serve Mr. Marshall he was asking for the house in which Mr. Marshall lived and he was directed to a house where he said Mr. Marshall lived and that was where he served him. If this is correct, then this testimony is inconsistent with the preponderance of evidence that Mr. Marshall did not live in Above Rocks.

8. In the case before me, Mr. Wilson has gone beyond simply asserting that he was not served. He has established, on a balance of probabilities, that he was not served. He has indicated the circumstances of his work and work habits that would make service on him in the manner indicated by Mr. Lawson improbable. His attorney, Miss Pinto, effectively eroded the credibility of Mr. Lawson by demonstrating his unreliability in relation to service on Mr. Marshall, which was purportedly done on the same day, in the same district. The combined effect of a strong affirmative case and an

effective undermining of Mr. Lawson's testimony can only lead to the conclusion that Mr. Wilson was not served.

The relevant legal principle

9. Miss Minto relied on two pillars to support her application. The first was that the judgment should be set aside ex debito justitiae. She submitted that since Mr. Wilson was not served then he did not have the opportunity to meet the claim made against him. Second, she also submitted that should she fail on her first point she could succeed on her second point, which was that the judgment should be set aside under rule 13.3 of the Civil Procedure Rules (CPR) 2002. I decided to set aside the judgment on the first ground relied on by Miss Pinto.

10. In support of her submission on the first ground, she relied on the case of ***Barrington Frankson v Monica Longmore*** SSCA No 13/99 (unreported) (delivered July 31, 2000). In that case, Downer J.A. discussed the difference between a nullity and an irregularity in the context of an allegation of non-service. The court accepted that the defendant was not served with originating process. The Justice of Appeal concluded, after an examination of the cases, that non-service was a nullity and not an irregularity and therefore the learned judge was correct to set aside the judgment. This case was decided before the CPR. His Lordship posed the question in this way at page 9

> *Was the alleged failure to serve process on the respondent Longmore a nullity or an irregularity which could be set aside ex debito justitiae? The issue is of importance because if there was no service, the proceedings which followed would be a nullity and the default judgment must be set aside. If there is an irregularity which can be set aside ex*

debito justitiae, then in this instance the judgment must also be set aside.

11. Neither counsel in this case referred to rule 13.2 of the CPR. That rule deals with judgments that must be set aside because they were wrongly entered in breach of rule 12.4 and rule 12.5. Since I was not addressed on rule 13.2 I shall not take it into account in deciding this case. If the judgment is not set aside under rules 13.2 or 13.3, on what basis can this court set aside the judgment obtained in the circumstances of this case?

12. While it is true that we are under a new code and as such, the old case law should be viewed with great suspicion, it is my view that there are certain fundamental concepts that must apply, unless restricted by statute or rules of court, to the new rules. One of the fundamental ideas is that, in appropriate circumstances, a superior court of record has the inherent power to set aside a judgment ex debito justitiae. One appropriate circumstance is where a party has not been served with documents notifying him that a suit has been filed against him. I ignore for this formulation the instances where substituted service is permissible. There is nothing in the CPR to indicate any restriction or modification of the inherent power of this court to set aside a judgment obtained where the affected party has not been served. This power has long existed. This is how Lord Green MR puts the matter in ***Craig v Kanssen*** [1943] K.B. 256, 262 – 263:

> ***Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it.*** *I say nothing on the question whether or not an appeal from the order, assuming it to be*

made in proper time, would be competent. The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. ***In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice.*** *The affidavit of service in the present case was on the face of it insufficient, and no order should have been completed on the strength of it.* (my emphasis)

13. I also adopt the words of Russell LJ (as he was at the time) in ***White v Weston*** [1968] 2 Q.B. 647, at 660 when he said:

It follows that only an explicit and clear provision in a statute, or in rules having statutory force, can operate to deprive a citizen of his right to receive notice of the commencement of process against him...

14. Like Russell LJ, on the facts as I have found them, "*[i] do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as "irregular" or "a nullity." The defect is in my judgment so fundamental as to entitle the defendant as of right ex debito justitiae to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment, "in accordance with settled practice, the court can only exercise its discretion in one way, namely, by granting the order sought," to quote Upjohn L.J. in In re Pritchard, decd."* (see page 659 in ***White's*** case)

15. Regardless of the ultimate classification, Downer J.A., Lord Greene MR and Russell LJ all agree that, on application to set aside a judgment or an order, non-service of either originating process or notice of a hearing is such a fundamental defect that any judgment or order made in such circumstances will be set aside. Setting aside a judgment obtained in breach of such a fundamental rule of natural justice does not depend, only, if at all, on establishing any breach of a particular rule in the CPR. Non-service goes to the root of any judgment or order obtained. Like Lord Greene MR, I need not decide whether the judgment obtained in this case could also have been challenged on appeal. The evidence has established that Mr. Wilson was not served. The only remaining question is what should be done having regard to this conclusion that I have made.

Conclusion

16. The rules of service in the CPR contemplate, in respect of natural persons, that service of originating process is to be personal service unless there is some good reason not to do so (see rule 5). The purpose of requiring, as a general rule, service on the defendant (ignoring for the moment instances where service other than personal service is permitted) is to give him an opportunity to defend the action if he wishes. Where he has not been served, how can it be said that he has been given this opportunity? This is nothing more than the application of the elementary principle of natural justice, namely, a person should be given the opportunity to be heard before action is taken against him. Embodied in this principle is proper notice of the case against the defendant. The non-service of the writ of summons and the statement of claim deprived the

defendant of his right to challenge the claim made against him. If it was an irregularity amounting to a nullity then the judgment is set aside as of right. If it was an irregularity not amounting to a nullity and therefore I have a discretion to set aside the judgment, then the justice of this case demands that the court's discretion be exercised in only one way, namely, setting aside the judgment. The judgment against Mr. Wilson is set aside. Costs to Mr. Wilson to be agreed or taxed.