**[2020] JMCA Civ 59**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 105/2016**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MR JUSTICE PUSEY JA (AG)**

| | | |
|---|---|---|
| **BETWEEN** | **KENNETH BOSWELL** | **APPELLANT** |
| **AND** | **SELNOR DEVELOPMENTS LIMITED** | **RESPONDENT** |

**Miss Karen O Russell for the appellant**

**Seyon Hanson instructed by Seyon T Hanson & Co for the respondent**

**24, 26 April 2018 and 20 November 2020**

**MORRISON P**

[1] I have read in draft the judgment of Pusey JA (Ag). I agree with his reasoning and conclusions and have nothing to add.

**F WILLIAMS JA**

[2] I, too, have read in draft the judgment of Pusey JA (Ag) and agree with his reasoning and conclusion.

**PUSEY JA (AG)**

**Background**

[3] The appellant, Kenneth Boswell, is the registered proprietor of all those parcels of land part of Spring Valley in the parish of Saint Mary, registered at Volume 972 Folio 488 of the Register Book of Titles.

[4] The respondent, Selnor Developments Limited ('Selnor'), brought a claim against Mr Boswell on 8 May 2015, seeking, among other things, a declaration that Selnor had acquired title by adverse possession in respect of certain lots ('the disputed lots') which form part of the lands comprised in Mr Boswell's title. In its fixed date claim form, Selnor also sought several consequential orders to enable it to obtain a registered title to the disputed lots.

[5] In addition, also on 8 May 2015, Selnor applied for injunctive relief against Mr Boswell seeking to restrain him, whether by himself or his servants and/or agents, from interfering with the disputed lots. This injunction was granted on 15 May 2015, to remain in effect until 10 June 2015.

[6] On 26 June 2015, Mr Boswell made his own application for an injunction seeking to restrain Selnor from taking any or any further steps to register any legal interest or proprietorship in the disputed lots. This application was supported by an affidavit from Mr Boswell sworn to on 25 June 2015 and filed on 26 June 2015.

[7] On 26 June 2015, by consent, G Brown J granted the order sought in Mr Boswell's application. He also extended the injunction that was granted to Selnor on 15 May 2015, to remain in place until the determination of the matter.

[8] The fixed date claim form came up for first hearing on 14 March 2016 before Straw J (as she then was). At that first hearing, neither Mr Boswell nor his attorney was present. The court made the relevant orders and instructed that a notice of adjourned hearing should be served on Mr Boswell's attorney. These orders included that the affiants be present for cross-examination and that any further affidavits should be filed by 17 June 2016.

[9] The claim came before K Anderson J ('the learned trial judge') for hearing on 3 November 2016. Mr Boswell and his attorney were both absent. However, Mr Gilroy English, who was instructed to "hold" for the attorney, appeared on behalf of Mr Boswell and indicated that Mr Boswell's attorney was before the Circuit Court in Saint Ann in a murder trial that was continuing. Mr English therefore sought an adjournment of the matter, but his application was unsuccessful.

[10] The court then determined that the claim was undefended. The learned trial judge opined that, although rule 10.2 of the Civil Procedure Rules 2002 ('CPR') provides that an affidavit in response was sufficient to disclose a defence, there was no such affidavit in this matter. He pointed out that the affidavit filed on 26 June 2015 was headed "Affidavit of Kenneth Boswell in support of Notice of Application for Interim Injunction", and that no such application was made.

[11] The learned trial judge reasoned that he could not deem that affidavit a defence to the claim. The learned trial judge also denied Mr English's further application for an adjournment to remedy the defects. The court pointed out that Mr English made no application for the affidavit of Mr Boswell to be deemed the defence. The court having found that there was no defence to the claim concluded that there was no other evidence besides that of the claimant. As the learned trial judge phrased it, in paragraphs [56] and [57] of his judgment handed down on 18 January 2017 (**Selnor Developments Ltd v Kenneth Boswell** [2017] JMSC Civ 23):

> **"[56]** The evidence that was considered by this court, at trial, was the evidence of Messrs Jason Smith and Dunstan Simmonds. That was the extent of the claimant's evidence led in support of their claim. There was no other evidence to be considered, as the claim was an undefended one.
>
> **[57]** That unchallenged evidence was given based on first-hand knowledge and not hearsay as was submitted in oral submissions made before me, by counsel for the applicant, in specific reference to the evidence of Jason Smith."

[12] The court having made all the orders asked for by Selnor in the fixed date claim form, Mr Boswell appealed to this court. Mr Boswell also sought a stay of execution of the judgment pending the determination of the appeal. That application was first made to the learned trial judge, who refused same. Mr Boswell renewed his application for a stay before Phillips JA, sitting as a single judge of this court. On 19 October 2017, Phillips JA granted Mr Boswell a stay of execution pending the determination of the appeal, in respect of several of the orders made by the learned trial judge (**Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30).

[13] This court heard Mr Boswell's appeal against the learned trial judge's judgment on 24 April 2018, when we reserved judgment until 26 April 2018. On that date, the appeal was allowed and the judgment entered against Mr Boswell was set aside. The matter was returned to the Supreme Court for case management and the parties undertook to be bound by the terms of the interlocutory orders made by G Brown J on 26 June 2015, until the determination of the matter or further order. It was indicated that our reasons would be put in writing and, with profuse apologies for the delay, this we now do.

## The grounds of appeal

[14] The grounds of appeal were as follows:

> "a) The Learned Judge in arriving at his decision did not consider or take judicial notice all [sic] the relevant facts and evidence from the pleadings and material placed before him;
>
> b) The Learned Judge refused [Mr Boswell] a 'right of audience' as he failed to filed [sic] a Defence in the time stipulated by the Rules and proceeded only on the unchallenged recited evidence of [Selnor].
>
> c) The Learned Judge has failed to recognise that by his action in (b) he is overtly or implicitly in breach of Rule 12.2(a) of the CPR.
>
> d) The Learned Judge was unfair and unreasonable in dealing with [Mr Boswell's] case and failed to properly consider and or treat with the balancing of the effects and prejudice of such draconian and drastic decision to enter Judgment.
>
> e) The Learned Judge did not consider, even cursory [sic], the merit of [Mr Boswell's] case;
>
> f) The Learned Judge failed to treat adequately, fairly and with great appreciation the damage or likely damage caused to [Mr Boswell] a registered proprietor of the subject lands of the claim.

> g) The Learned Judge has failed to accept that [Mr Boswell] should not be caused to suffer perhaps irreparable damage on the mistake, inadvertence or failings of his counsel.
>
> h) The Learned Judge has failed to appreciate that disposal of [Mr Boswell's] case was not the only and best sanction provided the [sic] CPR.
>
> i) The Learned Judge failed to balance the interests impact and consequences of his decision on each party and if he did he was unfair and unjust in his conclusions the Court's and [Selnor's] interest exceeded that of [Mr Boswell's] given the circumstances of the case."

**Discussion and analysis**

[15] It is easy to understand the judge's frustration and the principles that he was attempting to uphold. The court endorses his statement in paragraph [41] of his judgment that:

> **"[41]** Trial dates, in reality, ought only to be adjourned in the rarest of circumstances and certainly not simply because counsel is not in attendance at the trial hearing. In any event, attorneys who hold brief, are expected to be in a proper position to take the place of the counsel on whose behalf, that brief is being held."

[16] The circumstances of the application for an adjournment in this case were not unusual. Counsel for Mr Boswell was engaged in a murder trial in the Circuit Court in Saint Ann and indicated that the judge in that case – no doubt acting quite appropriately in the circumstances - refused to release her.

[17] As the learned trial judge pointed out, parties and counsel have a duty to prepare for these eventualities. Circuit Court schedules are set at the beginning of each calendar

year. This trial date was set in March 2016. Counsel for Mr Boswell, therefore, had all the information which she needed to identify a potential clash between the Supreme Court civil hearing and trials during the sitting of the Circuit Court.

[18] Counsel for Mr Boswell had a duty to ensure that properly instructed counsel would be in court to represent him in the event of a likely scheduling conflict. Sending Mr English into the lion's den unarmed and unprepared, so to speak, was to act below the standards expected of counsel. This was compounded by the absence of Mr Boswell himself, who, in his affidavit filed on 17 February 2017 in support of his application for a stay of execution, said that having been told that the matter was to be adjourned, he held the view that it was unnecessary for him to attend court.

[19] The question of whether or not to grant an adjournment in these circumstances was one for the discretion of the court. As is well established by the jurisprudence of this court, the court will only interfere with the exercise of a discretion by a judge on the ground that it was based on a misunderstanding by the judge of the law, or of the evidence before him, or on an inference which can be shown to be demonstrably wrong or otherwise aberrant (**Attorney General v John MacKay** [2012] JMCA App 1, paragraph [20]). In this case, it is my view that the fault lies squarely on the shoulders of Mr Boswell and his attorney and that, in these circumstances, the refusal of an adjournment was not an improper exercise of the discretion of the learned trial judge.

[20] However, having said that, I was unfortunately not able to agree with the learned trial judge in relation to the matter being undefended. Firstly, the affidavit filed by Mr

Boswell on 26 June 2015 set out the facts that he asserted in opposition to the claim. Straw J at the first hearing ordered the affiants to be present for cross-examination, which indicates that she considered that issues were joined between the parties on disputed questions of fact and there was sufficient evidence for the matter to be set down for trial. Therefore, it does follow, in my view, that the learned trial judge could not merely disregard the evidence in the affidavit of Mr Boswell filed on 26 June 2015. By doing so, he was implicitly overruling the judge at first hearing without having given any consideration to the evidence proffered by Mr Boswell.

[21] Secondly, when the learned trial judge decided that the matter was undefended, in my view, he was acting purely under his own initiative, since no application was made on behalf of Selnor for the matter to proceed as though it was undefended. In these circumstances, it seems to me, that the learned trial judge would have had to apply the principles set out in rule 26.2(2) of the CPR, which requires a judge who proposes to make an order of his or her own initiative to give the party likely to be affected a reasonable opportunity to make representations. That opportunity must be given at a hearing specifically set for the purpose, with sufficient notice to the party likely to be affected (CPR rule 26.2(4)(b)). None of this was done in this case.

[22] In light of the foregoing, I came to the view that the appeal should be allowed, the judgment entered by the learned trial judge set aside, and the matter returned to the case management stage.

[23] For these reasons, the court made the orders set out below

"1. The appeal is allowed.

2. The judgment entered by K. Anderson J is set aside.

3. The court orders that the matter be set for case management at the earliest convenient date.

4. Both counsel undertake to be bound by the terms of the consent order made by Brown J on the 26th June, 2015 until the determination of the matter or further order.

5. The court makes no order as to costs."