

*Judgment Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G.027/2002

BETWEEN	HUGH GRAHAM	1 <sup>ST</sup> CLAIMANT
A N D	KAREN ROSS	2 <sup>ND</sup> CLAIMANT
A N D	CECIL DILLON	1 <sup>ST</sup> DEFENDANT
A N D	JIMMY WALSH	2 <sup>ND</sup> DEFENDANT

Mrs. Suzette Campbell instructed by Campbell & Campbell for the 1st Claimant

Miss Andrea Walters instructed by Palmer & Walters for the 2<sup>nd</sup> Defendant.

**HEARD:** 27<sup>th</sup> October & 18<sup>th</sup> December, 2003  
& 12<sup>th</sup> January, 2004

**SINCLAIR-HAYNES, J. (Ag.)**

Hugh Graham claimed that on the 19<sup>th</sup> day of April 2000 whilst he was a passenger in a bus owned by Jimmy Walsh, the bus collided with a bus owned by Cecil Dillon and as a consequence he suffered personal injuries, loss and damage.

On the 25<sup>th</sup> day of March 2002 he and Karen Ross brought an action against Cecil Dillon and Jimmy Walsh for negligence. Karen Ross discontinued her action on the 2<sup>nd</sup> April 2003. On the 9<sup>th</sup> May 2002 an Interlocutory Judgment in default of an appearance was entered against the Second defendant. Damages were assessed and final judgment entered against the defendants on the 16<sup>th</sup> April 2003.

On the 21<sup>st</sup> August 2003 Jimmy Walsh applied to the Court for the following orders:

- (1) A stay of execution of the judgment.
- (2) That the judgment be set aside.

The applications were made on the ground that he was never served with the Writ of Summons, Statement of Claim or any other legal document in relation to the suit. He attached a defence in which he disclaimed liability and alleged that Cecil Dillon was solely responsible for the accident.

On the 27<sup>th</sup> October 2002 the application was heard and the following orders made.

- (1) Robert Young, the process server was required to attend for Cross-examination.
- (2) Supplementary Affidavit of Jimmy Walsh was requested.

On the 16<sup>th</sup> day of December 2003 Jimmy Walsh's supplementary affidavit was filed. In his supplementary affidavit he averred that he became aware of the suit in June 2003 when a representative from United General Insurance Company contacted him concerning the judgment which was entered against him. He denied receiving any registered mail.

On the 18<sup>th</sup> day of December 2003 the matter was continued and Robert Young was cross-examined. He was found not to be a credible and reliable witness because his affidavit evidence was at variance with his viva voce evidence.

In his Affidavit of Service he deponed that Jimmy Walsh admitted he was the second defendant named in the Statement of Claim and accepted service. However, under Cross-examination he testified that the person refused to take the document and threw it on the ground before he (Robert Young) completed explaining what he was there for. He also testified that he knew the person was Jimmy Walsh because he called the name and the person responded. He was unable to recall;

- (a) where service was effected; whether at the defendant's home or at the post office
- (b) the person upon whom it was effected.

It is therefore my finding on a balance of probabilities that Jimmy Walsh was not served.

**Submissions made by Mrs. Suzette Campbell**

The relevant submissions made by Mrs. Suzette Campbell are that final judgment was entered, therefore Part 13 of the Civil Procedure Rule was irrelevant. She further submitted that Jimmy Walsh was indeed aware of the matter for the following reasons:

- (1) it was served on his insurers
- (2) on a balance of probabilities he must have received registered mail notifying him of the following:
  - (a) Interlocutory Judgment in Default of Appearance
  - (b) Copies of Interlocutory Judgment in Default of Appearance and Summons to Proceed to Assessment of Damages.
  - (c) Order on Summons to Proceed to Assessment of Damages and
  - (d) Notice of Intention to tender into Evidence Hearsay Statement.

She relied on the principles enunciated in Shocked and Anor. v Goldschmidt and Anor. 1994 The Times Law Reports 550 and Leroy Mills v Lawson and Skyers (1990) 27 JLR 196.

### Submissions made by Miss Andrea Walters

Miss Andrea Walters, however, responded that the interlocutory judgment was wrongly entered and hence the entire proceedings must be set aside as having been irregularly obtained.

The first issue: Should the final judgment stand notwithstanding the absence of service?

Shocked v Goldschmidt and Anor. and Leroy Mills v Lawson and Anor (supra) were matters that were brought under the Civil Procedure Code. In deciding the instant matter, the decision must be made by applying the principles of the Civil Procedure Rules 2002. In as much as the thought processes that informed those judgments are of assistance references to authorities under the former rules are now otiose.

(See Biguzzi v Rank Leisure (1999) 4 ALLER 34)3

The correct approach is that adumbrated by Judge Kennedy Q.C. in Biguzzi (supra) when he said:

“... The new order will look after itself and develop its own ethos and ... references to old decisions and rules are a distraction”.

Brooke LJ in the case of Walsh v Misseldine 2000 unreported 29 February

CA had this to say on the matter:

“... still further difficulties arose when pre – Civil Procedures Rule decisions of the Court started creeping back into the case law, despite a number of authoritative dicta in this Court to the effect that recourse should not be had to them for the purposes of interpreting a quite new procedural regime”.

In any event Shocked and Leroy Mills (supra) are distinguishable from this case as in those cases there was evidence that the parties were notified of the proceedings but chose to disregard the opportunity of appearing at and participating in the trial. In this case the evidence that Jimmy Walsh was served is rejected. Even if letters were indeed received, they cannot substitute for personal service of the writ (claim form) and therefore cannot cure the fundamental irregularity.

**Second issue: Whether Section 13 of the Civil Procedures Rule is relevant**

I hold that section 13 is relevant.

Section 12: 4 of the Civil Procedure Rules state as follows:

“The registry at the request of the Claimant must enter judgment against a defendant for failure to file an acknowledgement of service, if -

- (a) The Claimant proves service of the claim form and Particulars of Claim on that defendant.”

By virtue of Robert Young's Affidavit of Service, the claimant would have ostensibly satisfied the Registrar that the claim form and particulars of claim were served when in fact they were not. The Court having determined on a balance of probabilities that Robert Young was not a credible and reliable witness when he deponed in his Affidavit of Service that he served the claim form and particulars on the defendant, it follows that the Registrar was misled into believing that Section 12: 4(a) was satisfied. In the circumstances the interlocutory judgment was irregularly entered.

Section 13. 2 (1) states:

"The Court must set aside a judgment entered under part 12 if the judgment was wrongly entered because

- (a) In the case of a failure to file an acknowledgement of service, any of the conditions in rule 12:4 was not satisfied.

Having found that section 12: 4(a) was not satisfied, it follows that the subsequent proceedings, i.e the Assessment of Damages and final Judgment which were predicated upon the interlocutory judgment that was wrongly entered, were consequently wrongly obtained.

Accordingly, it is ordered that the Interlocutory Judgment entered herein on the 9<sup>th</sup> May 2002 and all subsequent proceedings be set aside.

Leave granted to second defendant to file and serve his defence within 14 days of the date hereof.

No order as to costs.