SUPREME COURT LIBRARY
KINGSTON
JAMAICA
Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/W 239

BETWEEN	**GIRVAN WILLIAMS**	**PLAINTIFF**
A N D	**OMOTOSO UZWALE**	**DEFENDANT**

IN CHAMBERS

HEARD: 25th September, 2002, 27th September, 2002, 25th October, 2002, 22nd November, 2002

Mrs. Antoinette Haughton-Cardinas for Respondent.
Miss Nadine Lawson for Applicant.

DAYE, J (Ag.)

The issue in this summons to set aside proceedings rest on whether the writ of summons dated the 5 Sept. 1996 , which commenced this action was served on the applicant/ defendant.

The applicant/defendant contends the writ of summons and the Statement of Claim was not served on him and challenges the affidavit of Detective Corporal Ross of September 8, 1996 . He further contends that

the judgment and all proceedings accordingly were irregularly obtained and applies them be to set aside ex debito (italics) justitiae.

I accept as a the principle of law that any judgment obtained without jurisdiction. e.g. without a writ being served or not properly served , can be set aside as a nullity by this court in its inherent discretion. I accept also that it is never too late to set aside an order made without jurisdiction.

Having heard the submissions of law of counsel on both sides I formed the view that there were issues of fact concerning the writ of summons to be determined. This was necessary before the law could be applied.. As a result counsel agreed with the suggestion of the court that Detective Corporal Ross should be called for cross examination.

He attended the hearing and gave oral evidence and was cross examined. The applicant countered this evidence by calling a witness from his place of employment through whom a record of attendance was admitted. as exhibit sought to prove that he was at work when the writ of summons was allegedly served on him. On the evidence I found the witness Detective. Corporal Ross to be frank and truthful about the service of the writ of summons. I hold the applicant was not at work when the writ of summons was served on him. The evidence of system of keeping the record of attendance and the process of checking in and out of employees at the applicant's place of employment is unreliable and does not satisfies me that he was at work at the relevant time. I find on a balance of probability:

1. Detective Corporal Ross served the writ of summons on the 8 Sept. 1996 on the applicant.

2. The witness Ross made an error in the affidavit of service which stated the writ was served on the 8th August, 1996.

3. The writ of summons was not served on a Sunday.

4. The writ was not served after 6.00 p. m.

5. The applicant was known to the witness Ross at the time he served him the writ.

The reasons I do not accept that the applicant was not served the writ are :

1. His conduct of not taking any steps to intervene in this action between 1998when he claim he got the papers and this summons Sept. 25, 2002.

2. He was convicted of assaulting the plaintiff on the 12 June 1996 and was sentenced for this. Therefore I do not accept paragraph 15 of his affidavit supporting this summons. He is intelligent . He is an accounting supervisor. I do not accept that he was mistaken that the document served on him related to the criminal case for which he was convicted.

3. The affidavit of service of John Williams Oct.31,1998listed all the proceedings served on the applicant. He accepted he got service of these but seeks to avoid the legal effect by saying it was served outside the proper hours of service. I find the applicant insincere and evasive on all questions of the issue of process in this action.

4. His failure to protest but rather his submission to the payment of $75,000.00 on the 7 March 2001 of the writ of seizure and sale dated 15 October 1999disclose that he was aware and had knowledge of the writ and all

proceedings therefrom.

Even if the writ of summons was not served on the applicant ,which I do not hold, his conduct indicate that he waived service of the writ . In this regard I accept and adopt and apply the principle enunciated by **Lord Brandon of Oakbrook** who delivered the judgment of the Privy Council in Murray Warshaw v. Willard Drew Privy Council App. No. 18 of 1988, His Lordship said at page 7 supra.:

> "....On the assumption that the writ in the present was not served on the appellants, their conduct in voluntarily applying for an order dismissing the action for want of prosecution constitute a clear waiver by them of service . .... A defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action was begun."

I find the present applicant's conduct fall within the principle relating to the defendant in the above case. Therefore his application to set aside is dismissed.