

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2021/0014

BETWEEN:

EDSON LEWIS

Appellant

and

HILARY GHANSAH

(AS EXECUTRIX OF THE ESTATE OF RUTH VICTORIA THOMAS, DECEASED)

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Kema Benjamin for the Appellant
Ms. Michelle G. Sterling for the Respondent

2022: October 20.

Civil appeal — Fixed date claim — Failure to file defence — Rule 27.2(3) of the Civil Procedure Rules 2000 — Procedure for dealing with a fixed date claim summarily — Summary trial — Trial judge under an obligation to receive evidence from or for the respondent, whether orally or by affidavit — Whether judgment entered for the respondent irregular

ORAL JUDGMENT

[1] **MICHEL JA:** By fixed date claim filed on 4th March 2020, the respondent instituted proceedings against the appellant for possession of a portion of land located at

Bendals Village in the Parish of Saint John's in Antigua, together with other claims arising from the appellant's occupation of the land for several years.

[2] On 11th May 2021, in the presence of the parties and their counsel, but without taking any evidence, the learned judge made the following order:¹

- “
- (1) That Judgement (sic) is hereby entered for the Claimant.
 - (2) The Claimant is hereby awarded possession of the property registered in the Registry of Lands as Registration Section Bendals, Block 51 1887 C Parcel 28.
 - (3) That the Defendant shall vacate the property within 30 days from the date of this Order.
 - (4) The Defendant shall pay to Antigua Public Utility Authority any outstanding utilises (sic) to date consumed by him and owing on the property.
 - (5) The Claimant shall have carriage of this Order.”

[3] By notice of appeal filed on 14th June 2021, the appellant appealed the order of the judge on five grounds (which are contained in the notice of appeal and need not be repeated here).

[4] By amended notice of appeal filed on 14th December 2021, the appellant added a sixth ground of appeal (which is contained in the amended notice of appeal and need not be repeated here).

[5] On 12th April 2022, the appellant filed submissions in support of his appeal; on 21st September 2022 the respondent filed submissions in response; and on 7th October 2022, the appellant filed submissions in reply.

[6] The appellant's first ground of appeal is as follows:

“The learned judge erred in law in adjudicating upon the matter summarily and pronouncing judgment in the absence of any evidence, being no oral

¹ Court of Appeal Electronic Hearing Bundle, page 8.

evidence and no written evidence in the form of either a witness statement or an affidavit.”²

[7] In his submissions in support of ground one, the appellant concedes that he did not file an acknowledgement of service or defence and that it was open to the learned judge, at the adjourned first hearing of the fixed date claim, to treat the first hearing as the trial. The appellant submits that, when the court decided to proceed summarily, it was under an obligation to receive evidence from or for the respondent, either orally or by affidavit, in order to satisfy itself that the respondent was in fact entitled to judgment as claimed. This, the appellant submits, required the court to hold a trial, albeit a summary trial, before entering judgment. The appellant submits that the learned judge did not do so; no summary trial was held; no evidence was taken (orally or by affidavit); judgment was merely entered for the respondent. The appellant argued that, essentially, what the learned judge did was akin to entering a default judgment in favour of the respondent, which is impermissible on a fixed date claim. The appellant accordingly submitted that the judge erred when she adjudicated the fixed date claim summarily and entered judgment in favour of the respondent in the absence of any evidence to establish the claim on a balance of probabilities. He submitted therefore that the order made by the judge on 11th May 2021 is irregular and should be set aside.

[8] In her submissions in opposition to ground one, the respondent sought to argue, in essence, that the procedure followed by the learned judge in arriving at her order may have been faulty, but that the outcome would have been no different had the correct procedure been followed; that there was material before the judge on the basis of which she could conclude that the respondent was the beneficiary of the land in question; the appellant had no defence to advance; and if the respondent had given evidence she would only be affirming on oath that she was the beneficiary, because there was no defence asserting any title to the contrary.

² Court of Appeal Electronic Hearing Bundle, page 5.

- [9] In his submissions in reply, the appellant essentially reiterated his original submissions.
- [10] The oral submissions made today by counsel on behalf of the parties were mere reinforcements of their written submissions.
- [11] Having read and heard the submissions made on behalf of the parties, and having considered the authorities referred to by them, we are of the view that the learned judge clearly erred when she failed to take evidence, whether viva voce or by affidavit, from or for the respondent, to substantiate the claims made in her fixed date claim form and statement of claim. The **Civil Procedure Rules 2000** (“the CPR”) does not permit the entry of judgment in default of acknowledgement of service or defence when a defendant in a fixed date claim fails to file an acknowledgement of service or a defence. What the CPR provides for is for the court to treat the first hearing of the fixed date claim as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.
- [12] So there must be a trial. The statement in rule 27.2(3) of the CPR about the court treating the first hearing as the trial of the claim if it is not defended ‘or it considers that the claim can be dealt with summarily’ must not be understood to mean that there can be a summary judgment without a trial on a fixed date claim, because rule 15.3 specifically states that ‘[t]he court may give summary judgment in any type of proceedings except ... (c) proceedings by way of fixed date claim’.
- [13] Once there is a trial, there must be evidence by or for at least one of the parties to the proceedings; and this evidence must satisfy the court to the requisite standard of the merits or demerits of the claim, as the case may be.

[14] This Court, in a judgment which I authored in 2015 in the case of **Travis Augustin v Choc Estates Limited**,³ and which both parties to this appeal referred to, held that:

“Having decided to treat the first hearing of the fixed date claim as a trial after striking out the appellant’s defence, the learned judge was obligated to receive evidence from or for the respondent, whether orally or on affidavit, on the basis of which the claim would be determined. Notwithstanding that a matter is being dealt with summarily, the claimant must prove that he/she is entitled to the relief being sought – a trial must be conducted, albeit in a summary way. Accordingly, the learned judge erred in treating the first hearing of the claim as a trial of the matter and/or in dealing with the claim summarily, and proceeding to adjudicate the matter in favour of the respondent without receiving any evidence from or for the respondent.”⁴

[15] Counsel for the respondent sought to distinguish that case from our present case, but – apart from the fact that in **Travis Augustin v Choc Estates Limited** the Court struck out the appellant’s defence whereas in this case the appellant did not file one - the **Travis Augustin** case is directly on point.

[16] In the present case, the judge was obliged to take evidence, whether viva voce or by affidavit, to prove the claim which was made by the respondent. The judge did not do so, and ground one of the appellant’s grounds of appeal, which is set out in full in paragraph 6 hereof, is accordingly made out.

[17] We accordingly allow the appeal on ground one. Counsel for the appellant concedes that the other five grounds of appeal do not advance or enhance her appeal and she does not seek to rely on them. We will not therefore address these other grounds.

³ SLUHCVP2014/0002 (delivered 9th June 2015, unreported).

⁴ See Held Point 1.

[18] Our order is that the appeal is allowed, the order of the learned judge dated 11th May 2021 is set aside, and the matter is remitted to the High Court to be tried by another judge. Costs of the appeal to the appellant in the amount of \$1,000.00.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

Gerard St. C. Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar