

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 33/2014

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)**

BETWEEN LISA CAMPBELL APPELLANT

AND ANDREW TAYLOR RESPONDENT

Miss Tamara Green instructed by Cecil July for the appellant

Respondent in person

12 November 2015

ORAL JUDGMENT

BROOKS JA

[1] This is an appeal from the order of the learned Resident Magistrate for the parish of Saint Elizabeth, made on 3 September 2014, in which she set aside a default judgment entered in favour of Miss Lisa Campbell against Mr Andrew Taylor. The judgment had been in the sum of \$250,000.00 being the value of a motor car. Miss Campbell has complained that the learned Resident Magistrate was not entitled to set aside the judgment.

[2] The matter came on before the learned Resident Magistrate for the hearing of a commitment summons in enforcement of the default judgment that had been entered on 4 July 2014 when Mr Taylor had failed to attend on the date set for the trial of Miss Campbell's claim. The learned Resident Magistrate made some enquiries of Mr Taylor and formed the view that he was joining issue with Miss Campbell's claim and had a real prospect of success. In consequence of that view and of the fact that Mr Taylor was not represented by counsel, she set aside the default judgment and set the matter for trial.

[3] Although the learned Resident Magistrate was authorised by section 186 of the Judicature (Resident Magistrates) Act to set aside a judgment entered in default, the procedure used by her was not in accordance with Order 28 rule 1 of the Resident Magistrate's Court Rules. There was no application in writing to set aside the judgment. Nor was there any affidavit of merit as is required by the case law. The learned Resident Magistrate did not take any evidence on oath or allow Miss Campbell's counsel to cross-examine Mr Taylor in order to determine if the judgment ought to have been set aside.

[4] Section 186 allows a Resident Magistrate to enter and thereafter to set aside a default judgment. It states:

"186. If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the

service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:

Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose."

[5] Order 28 rule 1 of the Resident Magistrates Court Rules sets out the procedure for applications to set aside proceedings. It states:

"1 – An application for a new trial, or to set aside proceedings, may be made and determined on the day of hearing, if both parties be present, or such application may be made at the first Court holden at the same place as the original trial next after the expiration of twelve clear days from such day of hearing: Provided the intended applicant shall, seven clear days before the holding of such Court, deliver to the Clerk at his Office, and also give to the opposite party, by serving the same personally on such party, or by leaving the same at his place of abode, or in the case of a corporation or company, at their usual place of business, a notice in writing signed by himself, his attorney or agent, stating that such an application is intended to be made at such Court, and setting forth shortly, the grounds of such intended application, but such notice shall not operate as a stay of proceedings unless the Judge shall otherwise order;...and if such notice be not given in the manner aforesaid, or such application be not made at the Court mentioned in the notice, no application for a new trial, or to set aside proceedings, shall be subsequently made, unless by leave of the Judge and on such terms as he shall think fit:..."

[6] The decision therefore, cannot stand. The default judgment must be restored and the judgment summons re-set for hearing before another Resident Magistrate on 6 January 2016.

ORDER

1. The appeal is allowed.
2. The order of the learned Resident Magistrate made on 3 September 2014 is set aside.
3. The commitment summons which was before the Resident Magistrate's court on 3 September 2014 is restored and set for hearing on 6 January 2016 before another Resident Magistrate for the parish of Saint Elizabeth.
4. The clerk for the Resident Magistrate's Court shall inform the parties of the venue of the court and shall do so at least 14 days before the date of the hearing.
5. Costs to the appellant in the sum of \$7,500.00.