

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE EDWARDS JA  
THE HON MISS JUSTICE SIMMONS JA  
THE HON MR JUSTICE LAING JA**

**PARISH COURT CIVIL APPEAL NO COA2025PCCV00002**

<b>BETWEEN</b>	<b>DAVID COUSINS</b>	<b>APPELLANT</b>
<b>AND</b>	<b>MONICA DAVIS</b>	<b>RESPONDENT</b>

**Appellant in person**

**Respondent did not appear and was not represented**

**9 October 2025 and 27 March 2026**

**Civil practice and procedure — Parish Court — Counterclaim — Service of summons out of time — Return date expired prior to service — No renewal or re-issue — Whether defect rendered proceedings a nullity — Distinction between nullity and procedural irregularity — Exercise of curative discretion — Whether prejudice or irremediable injustice established — Orders VII, rule 8 and XXXVI, rule 23 of the Judicature Parish Court Rules**

**Evidence — Self-represented litigants — Scope of trial judge’s duty to assist — Judicial neutrality — Whether failure to guide litigant on procedural requirements amounted to unfairness — Admissibility of audio recording — Whether recording was formally tendered — Whether refusal to admit evidence established**

**Civil procedure — Discretion of trial judge — Whether refusal to order return of drill erroneous.**

**Fair hearing — Allegation of confusion by learned judge — Judicial comments during evaluation of credibility — Whether remarks demonstrated prejudice or undermined fairness of proceedings**

## **EDWARDS JA**

[1] I have read the draft judgment of my brother Laing JA, and I agree with his reasoning and conclusion.

## **SIMMONS JA**

[2] I, too, have read the draft judgment of my brother Laing JA. I agree with his conclusion and have nothing to add.

## **LAING JA**

[3] By a notice of appeal filed on 30 May 2024, the appellant appeals against the decision of Her Honour Ms Khian Lamey, a judge of the Parish Court, for the parish of Saint Catherine ('the learned judge'), made on 16 September 2022, whereby the learned judge ordered as follows:

"Judgment for the Defendant/CounterPlaintiff in the sum of \$11,540.00 (being the value of the drill) plus costs of \$2,016.00."

### **The proceedings in the Parish Court**

[4] On 15 November 2021, the appellant commenced legal proceedings against the respondent by filing a plaint note for breach of contract, claiming damages in the sum of \$41,498.85 — comprising \$11,498.85 for the cost of a drill and \$30,000.00 for loss of use. In his particulars of claim, the appellant asserted that on 3 November 2021, he lent his Black and Decker Amplifier Drill ('drill') to the respondent, which was supposed to be returned by 7 November 2021. However, when the appellant visited the respondent's address to retrieve his property, she refused to give it back. He claimed that she said that she had lent a similar drill to Mr Lincoln Thompson, the appellant's work partner, who did not return it, and therefore she was withholding the appellant's tools to replace her own, which had not been returned.

[5] The respondent filed a counterclaim on 10 January 2022, alleging breach of contract, detinue, and conversion. In her particulars of claim, she asserted that on 28

July 2021, she lent the appellant a "SKIL [sic] drill", which was to be returned at the end of the appellant's work. The appellant did not return the drill but left a drill in the yard that was not hers. As of the time of filing, the appellant had still not returned her drill.

### **The trial**

[6] It was common ground between the parties that the appellant and another worker named Lincoln Thompson ('Mr Thompson'), also referred to as "Rasta", were hired by the respondent to do various tasks at her home.

[7] In his testimony, the appellant stated that issues concerning the respondent's payment of money led him to cease working for her, but Mr Thompson continued working for her. Prior to this, the appellant asserted that the respondent called his phone on several occasions requesting to borrow his drill. On 3 November 2021, he took the drill and loaned it to her. He said they had agreed that he should return on 7 November 2021 to retrieve it, but on that day, when he went to the respondent's house to do so, she was "hostile argumentative and disrespectful". He further asserted that by withholding the drill, she deprived him of its use, resulting in a loss of income, as the drill was a tool he used daily and sometimes rented out. Consequently, he contended he was faced with no choice but to bring proceedings against the respondent.

[8] The appellant stated that he served a notice of intention on the respondent along with the summons and other documents. He also produced a pro forma invoice he received from Courts Unicomer Jamaica Limited, bearing his name, for a Black & Decker Amplifier Drill at a cost of \$11,498.85. The pro forma invoice was tendered and admitted into evidence, marked Exhibit 1.

[9] In cross-examination, the respondent suggested to the appellant that he was not telling the truth, but the appellant denied it. She further suggested to him that he borrowed her drill because he had broken the foot of her basin and needed to "hustle to buy back the basin foot". The appellant denied the suggestion, saying it was not true because he had his own drill and there was no need to borrow hers.

[10] Mr Thompson gave evidence that he worked with the appellant at the respondent's home. He asserted that they were to install a "toilet" for the respondent, but they did not have a drill to fully screw it down. They subsequently installed it correctly, but not the sink, because that fell and broke. In cross-examination, he stated that the drill that he saw the appellant use to drill the holes in the wall to put up the brackets to support the face basin was the same drill the appellant used on various construction sites.

[11] In response to questions from the learned judge, he stated that the respondent did not lend him a drill and that the appellant had a drill, but he did not remember its exact colour or name. He admitted that he did not see the appellant lend the respondent the drill.

[12] In her evidence, the respondent admitted that the appellant's drill came into her possession because the appellant left it at her house. She stated that, on 28 July 2021, Mr Thompson returned to her home with the appellant to complete outstanding work. The respondent testified that the appellant informed her that Mr Thompson had called him into the bathroom where Mr Thompson was working, and that when the appellant pushed the locked door, it "brushed against" the foot of the basin, which was behind the door, causing it to break. The respondent told the appellant that he was required to replace the damaged "basin foot", and he promised to do so by the weekend. The respondent stated that the appellant then borrowed her drill and replaced the "basin foot" on 28 August 2021, but did not return the drill.

[13] On 3 November 2021, following her 31 October 2021 request for the return of her drill, the appellant visited her home. However, she was occupied cooking at the time, and by the time she returned to where she had left the appellant, he was gone, and a drill was found in an old settee on the outside. Upon closer inspection of the drill, she discovered that it was not her drill and believed that it had been swapped. She stated that she made numerous attempts to contact the appellant to have her drill returned in exchange for the drill left in her possession, but these efforts were unsuccessful.

[14] In cross-examination, when it was suggested that she had the drill in her possession for approximately 10 months, she acknowledged this, stating that she had had possession since 3 November 2021. She also stated that there was no agreement in respect of the time for the return of the appellant's drill, and accordingly, there could be no breach of any contract on her part. She denied that the appellant attended her home and sought to retrieve the drill on 7 November 2021. Instead, she asserted that he went directly to the police station. She further stated that when contacted by a female police constable from the station on 3 November 2021 (which I understand to be a reference to 7 November 2021) regarding the drill, she informed the constable that she had the drill but instructed the appellant to bring her drill and collect the one left in her possession.

[15] The respondent denied that she withheld the drill from the appellant or deprived him of any earnings.

### **The appeal**

[16] The appellant filed six grounds of appeal, which are:

(A) The trial judge had error [sic] in law and in fact because the court lacks jurisdiction over the subject matter by allowing and accepting the respondent's counter-claim to proceed.

(B) The Trial judge had error [sic] in law and fact by committed judicial misconduct and vindictiveness by tampering and altering summon [sic] expired date for it to appear lawful and active.

(C) The Trial judge had error [sic] in law and in fact by failure to instruct or properly instruct both parties concerning the law and other legal procedure concerning the filing of 'Notice of intent to produce evidence at trial.

(D) The learned judge had error [sic] in law and in fact by wrongfully exercised [sic] her discretion by refusing to admit appellant's relevant material evidence (exhibit (D) at trial without meaningful justification.

(E) The Trial judge had error [sic] in law and fact by allowing, condoning and supporting the continuation of unlawful detention of the appellant's property by the respondent.

(F) The Trial judge had error [sic] in law and in fact by rendering a decision while being in confused state of mind which prejudice the appellant to fair and impartial trial."

### **Submissions on behalf of the appellant**

[17] In relation to grounds (C) and (D), the essence of the appellant's complaint was that the learned judge failed to properly instruct the parties, who were unrepresented litigants, on the requirement to file a "Notice of Intention to Produce Evidence" prior to the trial date in order for the evidence they intend to rely on to be admitted. He submitted that, had adequate guidance been provided, he would have taken the necessary steps to ensure the admission of the phone recording of a conversation between the appellant and the respondent on 7 November 2021.

[18] The appellant further contended that the learned judge erred in refusing to admit the phone recording into evidence on procedural grounds. He contended that the phone recording was relevant and material to the issues in dispute, and its exclusion deprived the court of evidence capable of materially assisting the learned judge in her determination of the matter. He argued that, had the phone recording been admitted, it would have influenced the outcome of the trial as it would have revealed that the respondent was not honest, when she said that the appellant did not visit her home on 7 November 2021 to retrieve the drill.

[19] In respect of ground (E), the appellant submitted that the learned judge erred by allowing the respondent to keep, carry away and detain his drill, notwithstanding the evidence before the court and the respondent's admission that the drill belonged to the appellant. He argued that her conduct infringed his constitutional right to property, deprived him of the use of the drill, resulting in a loss of earnings. He contended that the learned judge ought to have ordered the return of the drill.

[20] Regarding ground (F), the appellant argued that the learned judge was not in a rational state of mind to deliver a fair and impartial decision. He pointed to the learned judge's statement that it was "mindboggling" that Mr Thompson could not identify the colour and name of the appellant's drill. The appellant claimed Mr Thompson's testimony showed no confusion, and if the learned judge was confused, she should have sought clarification rather than forming an adverse view. He argued that this demonstrated confusion on the part of the learned judge was prejudicial and affected his right to a fair trial.

### **Analysis**

[21] I appreciate that the appellant is self-represented and his grounds of appeal were not formulated with the precision that is necessary. However, I understand that the following issues fall for determination in the appeal:

(i) Whether the learned judge erred in law in permitting the respondent's counterclaim to proceed, given that the service of the summons was after its return date. (ground (A))

(ii) Whether the learned judge altered the return date on the summons and, if so, whether such conduct constituted a procedural irregularity or a breach of the appellant's right to a fair and impartial hearing. (ground (B))

(iii) Whether the learned judge erred in the conduct of the proceedings by (a) failing to guide the parties on procedural requirements for the admission of the phone recording, and (b) the exercise of her discretion in refusing to admit the appellant's phone recording into evidence. (grounds (C) and (D))

(iv) Whether the learned judge erred in making no orders concerning the drill in that was admittedly in the possession of the respondent. (ground (E))

(v) Whether the learned judge's comments and conduct demonstrated confusion in relation to the evidence sufficient to undermine the fairness of the proceedings and the integrity of the decision. (ground (F))

**Issue (i) – ground (A)**

[22] In relation to ground (A), the appellant submitted that the learned judge lacked the jurisdiction to entertain the respondent's counterclaim as the time prescribed by the Parish Court Rules for service of the summons in the counterclaim had expired. He stated that the expiry or return date on the summons was 25 February 2022, but he was not served with any process relating to the counterclaim until 11 March 2022, at the hearing itself. He argued that in the absence of any renewal or extension of the return date, the counterclaim ought to have been dismissed. Further, he submitted that by assuming jurisdiction over the counterclaim, the learned judge acted in excess of her judicial authority.

[23] It is well established that judges of the Parish Courts are creatures of statute and therefore only possess such powers as are conferred upon them by statute. This fact was plainly stated in **Tracy Taylor v Rudolph Melliphant** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 14/2008, judgment delivered on 12 December 2008, where Harrison JA observed that a judge of the Parish Court has no inherent jurisdiction and so its power is circumscribed to that conferred by statute. At para. 12, he stated:

“12. Since the Resident Magistrate is a creature of statute he therefore enjoys no greater power in the exercise of his duties other than what is expressly or impliedly granted by statute. The courts over which he presides are inferior courts without any inherent jurisdiction and with only such jurisdiction as conferred upon them by Statute. See **Lindo v Hay** Clarke's Reports 118.” (Emphasis as in the original)

[24] It follows that judges of the Parish Court, in treating with civil actions as in this case, must act strictly within the confines of the powers conferred by the Judicature

(Parish Courts) Act ('JPCA'), (formerly the Judicature (Resident Magistrates) Act), being the statute of their creation, and the rules made thereunder, the Judicature Parish Court Rules ('Parish Court Rules'). It is, therefore, necessary to examine those instruments to determine whether, and in what manner, the time for service of a summons in a civil matter before the Parish Court is statutorily controlled.

[25] The JPCA does not address the time for service of a summons. That requirement is found exclusively in the Parish Court Rules. Order VII, rule 8 of the Parish Court Rules prescribes the minimum period for service of a summons and provides that a summons must be served at least eight clear days before the return date. Its provisions are in the following terms:

"8. A Summons to appear to a plaint where it is to be served within the parish should, in order to ensure its service, be delivered to the Bailiff at least fifteen clear days, and where it is to be served in another parish at least eighteen clear days before the Return Day; but **it shall in either case be served at least eight clear days before the Return Day thereof:**" (Emphasis supplied)

[26] Order XXXVI, rule 23 further provides:

**"23. Non-Compliance with the Rules not to render the Proceedings void.**

23. Non-compliance with any of these Rules or with any Rule of Practice for the time being in force shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, **or otherwise dealt with in such manner and upon such terms as the Court shall think fit.**" (Emphasis appearing second supplied)

[27] In the present matter, the appellant filed a motion on 28 March 2022 challenging service of the summons in respect of the counterclaim. It bore a return date of 25 February 2022, but it is undisputed that service was not effected before that date. The certificate of service on the respondent by the bailiff of the court indicates that service occurred on 11 March 2022. There is no indication of any amendment, renewal or re-

issue of the summons. Accordingly, the service of the summons after the return date constituted a breach of Order VII, rule 8.

[28] However, while the Parish Court Rules prescribe the time for service, they do not expressly stipulate that noncompliance with this provision is fatal, nor do they specify any consequences for failing to comply with the rule regarding service. In such circumstances, where the rule is silent as to consequences, there is a general provision in Order XXXVI, rule 23, dealing with the consequences of such non-compliance. It is necessary to consider that provision to determine the effect of the breach.

[29] Order XXXVI, rule 23 states that non-compliance with the Parish Court Rules will not be automatically treated by the Parish Court as invalidating/nullifying the proceedings. The Parish Court also retains a wide curative discretion to determine the procedural consequence of such non-compliance, which includes the power to declare the proceedings void, set aside the proceedings as irregular in whole or in part, to permit their continuation upon amendment or to otherwise deal with them in a manner and on such terms as the court considers fit.

[30] The first question that arises is whether the improper service of the summons constituted a mere irregularity, capable of being cured by appropriate treatment by the learned judge as permitted by Order XXXVI, rule 23 of the Parish Court Rules or whether it amounted to a nullity depriving the court of jurisdiction to hear the counterclaim.

[31] In **MacFoy v United Africa Co Ltd**, Lord Denning considered the applicability of Order 50 rule 1 to 4 of the Rules of the Supreme Court of Sierra Leone, which are *in pari materia* with Order XXXVI, rule 23 of the Parish Court Rules, in cases of non-compliance with the rules of procedure or practice. Order 50 r 1 states:

"Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall so direct, but such proceedings may be set aside either wholly or in part as

irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit.”

[32] He distinguished between errors in proceedings that are nullities and wholly void and those which are merely irregular and voidable and, therefore, capable of cure or waiver. At page 160, he explained that:

“... The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.... But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it....”

[33] Lord Denning also proposed that a useful test to distinguish between procedural errors that are nullities and those that are mere irregularities, “...is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?”. Upjohn LJ in **Re Pritchard (deceased)** [1963] 1 All ER 873 expressed reservations about Lord Denning’s “waiver test” as he opined that the issue could not be determined until it has been decided whether the proceedings are a nullity. He, however, identified three classes of proceedings where the defects are so fundamental that they would render the proceedings nullities. These included, but he reluctantly acknowledged that they may not be limited to:

“... (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or

service by filing in default, or cases where service has properly been dispensed with: see eg, *Whitehead v Whitehead (otherwise Vasbor)*; (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: see eg, *Finnegan v Cementation Co Ltd.*" (Italics as in the original)

[34] In the instant case, the summons was properly issued and ultimately served on the appellant, thereby notifying him of the counterclaim, albeit after the return date. There was no failure to comply with a statutory condition in the sense contemplated by Upjohn LJ. The defect instead concerned the timing of service and not the validity of the originating process itself.

[35] Those decisions concerned writs of summons issued under the rules of the Supreme Court in other jurisdictions; however, a similar approach has been adopted in the Supreme Court of Jamaica. In **Douglas Thompson v Peter Jennings** [2021] JMCA Civ 6, V Harris JA (Ag) (as she then was), delivering the judgment of the court, examined the power of the Supreme Court in this jurisdiction to use the curative powers in rule 26.9 of the Civil Procedure Rules ('CPR'), which is similar to Order XXXVI, rule 23 of the Parish Court Rules.

[36] Notwithstanding that these cases concern the jurisdiction of the Supreme Court, which has wider discretionary powers, I am of the opinion that the underlying principles are applicable here, despite the learned judge being a creature of statute, because the discretion to deal with the summons served in non-compliance with the rules is granted by the rules themselves.

[37] The summons in this matter, constituting the counterclaim, was served on the appellant, albeit not served before its return date. The summons became ineffective for the purpose of effecting service on the stated return date of 17 December 2021, but it continued to exist as a valid originating process capable of reissue or regularisation. This defect, therefore, only affected the regularity of the service. The summons did come to the attention of the appellant, and this case does not fall within the categories of

fundamental defects rendering proceedings a nullity as described by Upjohn LJ. It instead fell squarely within the category of procedural irregularities contemplated by Order XXXVI, rule 23, which expressly empowers the court to determine the consequence of non-compliance.

[38] Accordingly, the service out of time did not deprive the Parish Court of jurisdiction. It was an irregularity which could be cured and did not automatically invalidate the counterclaim. The question, therefore, becomes whether the learned judge properly exercised her discretion under Order XXXVI, rule 23, notwithstanding the breach of Order VII, rule 8 and the subsequent objection to service.

[39] The principles governing appellate interference with the exercise of the discretion by a judge at first instance is well settled. An appellate court will only interfere with the exercise of a judge's discretion if it is demonstrated that the exercise of the discretion was based on a misunderstanding of the law or the evidence that was before the judge or that the decision was palpably wrong (see para. [20] of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, where this court adopted the guidance of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**'). Accordingly, for this court to justifiably interfere with the exercise of the learned judge's discretion, her decision must fall within the **Hadmor** principles.

[40] In the instant case, the appellant filed a formal motion challenging service within a reasonable time. From that moment, the learned judge was required to adjudicate upon the validity of the service and to decide whether the proceedings should be set aside or regularised as the irregularity ceased to be a passive defect capable of being overlooked. It became an issue requiring judicial determination. The record, however, does not disclose that the learned judge addressed the objection, nor does it provide any reason why she exercised her discretion to permit the counterclaim to proceed. In the absence of reasons, this court is obliged to assess whether the decision reached demonstrated a proper exercise of the learned judge's discretion.

[41] The appellant admitted that the trial did not proceed on the day he was served, and the record indicates that it did not commence until August 2022, several months later. The counterclaim was, therefore, brought to the attention of the appellant with adequate time to prepare his response to it. There is no material upon which it could properly be concluded that the irregularity occasioned any real prejudice, far less irreparable injustice.

[42] It is also to be noted that the fundamental purpose of the service of the summons is to provide formal notice to the appellant that a claim has been initiated against him and to inform him of the date on which he is required to attend court to participate in the proceedings and advance his case. In this case, the respondent asserted a counterclaim, and it was the mechanism by which the court became properly seised of it. While the service of the summons is an essential procedural step, its fundamental purpose was achieved in this case with sufficient time given to the appellant to prepare and respond to the counterclaim.

[43] In those circumstances, despite the technical breach of the Parish Court Rules, the learned judge was justified, in the exercise of her wide discretion under Order XXXVI, rule 23, to permit the counterclaim to proceed to trial and to adjourn the matter to afford the appellant sufficient time to prepare for the trial. Ground (A) accordingly fails.

**Issue (ii) Whether the learned judge altered the return date on the summons and, if so, whether such conduct constituted a procedural irregularity or a breach of the appellant's right to a fair and impartial hearing. (ground (B))**

[44] With respect to this issue (ii), ground (B), the appellant contended that the learned judge altered the original return date on the summons from 25 February 2022 to 11 March 2022. He stated in his presentation to the court that he observed the learned judge marking out and writing on the summons and later confirmed this when he was served with the documents at court. He submitted that the learned judge lacked the authority to amend the summons in this manner and that this conduct amounted to a procedural irregularity, and that it breached his right to a fair and impartial trial. Although the court

permitted the appellant to file a copy of the summons evidencing this alteration, he failed to do so.

[45] In respect of the complaint raised under this issue, there is no evidence on the record to support the appellant's allegation that the learned judge altered the return date on the summons. Ground (B) is, therefore, unfounded and unsupported and would necessarily fail.

**Issue (iii) Whether the learned judge erred in the conduct of the proceedings by (a) failing to guide the parties on procedural requirements for the admission of the phone recording, and (b) the exercise of her discretion in refusing to admit the appellant's phone recording into evidence. (grounds (C) and (D))**

[46] Grounds (C) and (D) generate two distinct but related issues: (i) the scope of the trial judge's duty to assist unrepresented litigants, and (ii) the exercise of the learned judge's discretion in relation to the admissibility of evidence.

[47] Where parties appear without legal representation, the court has a responsibility to ensure that the proceedings are conducted fairly. Incorporated in this duty is an obligation on the court to assist an unrepresented litigant in issues concerning substantive legal rights, but also procedural matters. This principle is universal and was recognised in several cases, including the persuasive authority of **Noone v Operation Smile (Aust) Inc** (2011) 31 BHRC 211, a decision from the Supreme Court in Victoria that clearly addresses the subject and in which, Pagone J relying on a passage from the Court of Appeal in **McWhinney v Melbourne Health** [2011] VSCA 22, stated at para 12:

"... Recently the Court of Appeal has said in *McWhinney v Melbourne Health* [2011] VSCA 22 (11 February 2011) at paras 25–26 (Neave, Redlich and Mandie JJA):

'25. The appellant referred to passages from the decision in *Tomasevic v Travaglini* [[2007] VSC 337 (13 September 2007), (2007) 17 VR 100 at 130] where Bell J observed:

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in circumstances – it must ensure a fair trial, not afford an advantage to the self-represented litigant ...

26. These propositions are not controversial. It is well understood that a trial judge has certain obligations to assist a self-represented litigant, but those obligations are to be balanced against the requirement that the judge preserve his or her neutrality between the parties ...”

[48] This excerpt illustrates the principle that a judge owes a measured but real duty to assist unrepresented litigants. That may include explaining procedural steps and clarifying evidential requirements in a manner that enables the litigants to present their cases effectively. However, that duty must be exercised in a manner consistent with judicial neutrality. The judge must remain impartial and not confer a positive advantage to the unrepresented litigant. The duty, therefore, does not require the court to rescue a party from the consequences of non-compliance, but to provide assistance that is fair in the circumstances.

[49] In his examination in chief, the appellant stated the following:

"A few days later I had 2 Bog Walk Police Officers assist me to retrieve my property from the Defendant. She had described her drill which had a black bottom and the defendant had leave a voicemail on ma phone describing her drill to be shiny and purple. She also described her drill to me in a voicemail again to be red in colour."

In the cross-examination of the respondent, there was the following exchange on the issue of the respondent's description of her drill:

Q: As you may or may not have known that the Plaintiff recorded you in the 7<sup>th</sup> November.

A: You didn't come to retrieve no drill; you make the Police call me.

Q: Within your recording the conversation with you, have with the Plaintiff on 7<sup>th</sup> November 2021.

A: I don't have any conversation with you, only the police lady.

Q: Within the conversation with you had with the Plaintiff on Nov 7 you claim your drill was red in colour?

A: I don't know what you are talking about. I don't hold no conversation with him [sic] is only the officer and I told her yes I have the drill.

Q: You had sent Plaintiff a whatsapp voicemail and one in particular you had described your drill as being purple and shiny?

A: Mr Cousins all mi tell you is fi bring mi drill come and tek you drill me and you nuh hole no such convo."

[50] A careful review of the record discloses no application by the appellant to tender the phone recording into evidence, and no demonstrated refusal by the learned judge to admit the recordings on the basis of any non-compliance with procedure as the appellant has asserted before the court.

[51] However, the cross-examination of the respondent by the appellant raised the possibility of the existence of two separate recordings. These recordings, if produced, had the potential of showing that the respondent had given conflicting descriptions of her drill. This evidence could have been material in the learned judge's assessment of the respondent's credibility, whether one recording was by the respondent on 7 November 2021 of her saying that the drill was red in colour, as suggested by the appellant, or contained in a voice note, as the appellant said in examination-in - chief.

[52] At the point in the cross -examination of the respondent where the appellant raised the issue of the recording, he had already on his case, tendered and had admitted into evidence an exhibit in the form of a pro forma invoice for a Black and Decker drill, which he said he bought.

[53] There was, therefore, no evidence before the learned judge that the appellant was not aware that he could produce the recordings which he mentioned as a part of his case if he was desirous of using them to contradict the respondent. Further, there was nothing during the proceedings that ought to have reasonably caused the learned judge to conclude that these recordings existed and were available but were not being produced because of the appellant's ignorance of the court procedure.

[54] While it is axiomatic that the court owes a measured but real duty to assist an unrepresented litigant, the extent of this duty will vary from case to case. Whereas it may have been desirable for the learned judge to have made enquires of the appellant about the recordings, the circumstances of this case did not impose a positive duty on the learned judge to have done so, and her failure in that regard did not affect the fairness of the trial.

[55] Accordingly, it cannot be said that the learned judge erred in her duty to the appellant or improperly exercised her discretion by refusing to admit evidence. Grounds (C) and (D), therefore, fail.

**Issue (iv) Whether the learned judge erred in making no orders concerning the drill in that was admittedly in the possession of the respondent. (ground (E))**

[56] The appellant's argument proceeds on the premise that the learned judge erred in allowing the respondent to keep, carry away and detain his drill despite the respondent's admission that it belonged to him. This submission, however, must be examined against the factual findings made by the learned judge. The learned judge found that the appellant did not lend the respondent the drill and that the respondent did not fail to return it. The learned judge accepted that the appellant left his drill on a settee on the pretext that he had returned her drill, and when she discovered this, she called him by telephone and told him to come and retrieve it. The learned judge further found that the respondent brought the drill to each court hearing, made it available to the appellant, and expressly offered to return it. Importantly, the learned judge found that the appellant refused to accept the drill, asserting that it was not working, without producing any evidence to support his assertion. The learned judge concluded that by refusing to retake possession when afforded the opportunity to do so, the appellant had impliedly consented to the respondent remaining in possession of the drill.

[57] Those findings are critical. On the learned judge's findings, the respondent did not unjustifiably retain the drill or refuse to return it. To the contrary, she actively sought to have the drill returned. It was the appellant who declined to retake possession. In light of these findings, the learned judge cannot be faulted for declining to make an order for the return of the drill. Such an order utilising the coercive power of the court would have been unnecessary where the respondent had already offered to return it, stood ready to do so, and the appellant refused to accept it.

[58] The facts, as determined by the learned judge, were that the continued separation of the appellant from the drill resulted from his own refusal to accept it without any justifiable basis for doing so. In such circumstances, any ongoing inability to use it cannot, therefore, be attributed to the respondent. Ground (E) fails.

**Issue (V) Whether the learned judge's comments and conduct demonstrated confusion in relation to the evidence sufficient to undermine the fairness of the proceedings and the integrity of the decision. (ground (F))**

[59] Ground (F) challenges the quality of the learned judge's analysis and asserts that she did not fully understand the evidence.

[60] To understand the complaint raised here, it is necessary to set out some of the critical remarks of the learned judge. In her reasoning, she stated:

"30. I do not believe Mr Cousins took his drill and lent it to Ms Davis out of the goodness of his heart, after she called him uttering profanity and at a time when they had an acrimonious relationship. Further, Mr Thompson, who had been working with Mr Cousins on various sites and had allegedly seen Mr Cousins' drill at Ms Davis' house as late as July 2021, could not identify the drill or at the very least state the colour of the drill. This is mindboggling."

[61] The learned judge's remark was not isolated but part of her broader assessment of the credibility and plausibility of the appellant's claim that he lent the respondent his drill. The use of the word "mindboggling" therefore indicates scepticism towards the appellant's account that he lent the drill, and the fact that a supporting witness, who had worked with the appellant on various sites and had recently seen the drill, could not provide basic identifying details. The learned judge's evaluation of the evidence and her conclusions, based on her findings of fact, were well-reasoned. They do not suggest confusion or a misunderstanding of the evidence. She considered the nature of the parties' relationship, assessed the plausibility of the alleged loan of the drill by the appellant, and drew conclusions about credibility as she was well-placed to do.

[62] There is, therefore, no indication that the learned judge was confused so as to prejudice the appellant's fair trial rights. Accordingly, ground (F) is without merit.

**Disposition**

[63] The appellant has failed on all grounds of appeal. Accordingly, I would recommend the following orders:

1. The appeal is dismissed.
2. No order as to costs.

**EDWARDS JA****ORDER**

1. The appeal is dismissed.
2. No order as to costs.