

BASMA v. JABER

SUPREME COURT (Luke, Ag.J.): April 15th, 1952
(Civil Case No. 264/51)

- 5 [1] Civil Procedure—execution—land—order to deliver up possession must comply with Supreme Court Rules, O.XXVIII, 1947, r.4—writ of possession issues only on proof of service and disobedience to order: An order to deliver up possession of land under O.XXXIV, r.2 of the Supreme Court Rules, 1947 is an order to do an act within 10 O.XXVIII, r.4, and therefore must state a time within which the act is to be performed and must be served as provided therein; and a writ of possession can issue only on proof of such service and disobedience to the order (page 231, lines 21–37).
- 15 [2] Civil Procedure—execution—wrongful execution—damages—if wrongful act unauthorised, damages assessed as if wrongdoer had no official character: When in the course of an execution a wrongful act is committed which is not merely irregular, but altogether unauthorised, so as to be a trespass or act of conversion, the measure of damages will be the same as if the wrongdoer possessed no official character (page 232, lines 9–18).
- 20 [3] Civil Procedure—judgments and orders—order to deliver up possession of land—order must comply with Supreme Court Rules, 1947, O.XXVIII, r.4—writ of possession issues only on proof of service and disobedience to order: See [1] above.
- 25 [4] Civil Procedure—parties—defendants—action for recovery of possession of land—person in occupation normally proper defendant—plaintiff seeking forfeiture may direct writ to sub-tenant or tenant or both: Although in ordinary cases it is the proper practice to direct a writ for the recovery of possession of land to the person in occupation, this is not imperative and regard should be had to all the circumstances of the case; thus, in an action to recover possession on forfeiture, if the occupation is that of a sub-tenant, the landlord 30 may join both the tenant and the sub-tenant, or make either of them defendant without the other (page 230, lines 5–16).
- [5] Land Law—recovery of possession—defendants—person in occupation normally proper defendant—plaintiff seeking forfeiture may direct writ to sub-tenant or tenant or both: See [4] above.
- 35 [6] Landlord and Tenant—determination of tenancies—forfeiture—action for recovery of possession—person in occupation normally proper defendant—landlord may direct writ to sub-tenant or tenant or both: See [4] above.
- 40 [7] Landlord and Tenant—possession—action for possession—defendants—person in occupation normally proper defendant—landlord seeking forfeiture may direct writ to sub-tenant or tenant or both: See [4] above.

- [8] Tort—damages—measure of damages—trespass to goods—if wrongful execution unauthorised, damages assessed as if wrongdoer had no official character: See [2] above.
- [9] Tort—trespass—trespass to goods—damages—if wrongful execution unauthorised, damages assessed as if wrongdoer had no official character: See [2] above. 5

The plaintiff brought an action against the defendant to recover special and general damages for trespass.

The plaintiff was the sub-tenant of certain premises which were sold by the owners to the defendant, who then sued the tenant for possession. Judgment was given for the defendant in proceedings reported in 1950-56 ALR S.L. 97. In execution of a writ of possession in respect of the premises occupied by the plaintiff, his stock-in-trade and personal effects were deposited outside on the pavement. The plaintiff was not given notice of the judgment against the tenant before the writ was issued and execution levied. He instituted the present proceedings to recover general and special damages for trespass. 10 15

The plaintiff contended that he was not a party to the proceedings against the tenant, his lessor, and, since no notice of the judgment was served on him, the issue of the writ of possession was wrongful and the execution amounted to an act of trespass. He further contended that the premises in question were wrongly described in the writ, and that the defendant knew that the plaintiff's lease had six months still to run. 20 25

The defendant maintained that the judgment in his favour entitled him to recover possession of the whole of the premises, and that the writ for delivery of possession was in compliance with the judgment. He denied that he had caused the writ to be executed against the plaintiff's personal effects. 30

Cases referred to:

- (1) *Savage v. Bentley*, [1904] W.N. 89; (1904), 90 L.T. 641, applied. 35
- (2) *Townend v. Townend* (1905), 93 L.T. 680; 22 T.L.R. 50, applied.

Legislation construed:

Supreme Court Rules, 1947 (P.N. No. 251 of 1947), O.XII, r.1:
 "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction 40

or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise”

O.XXXIV, r.1: The relevant terms of this rule are set out at page 230, line 40—page 231, line 1.

O.XXXIV, r.2: The relevant terms of this rule are set out at page 231, lines 11–17.

Rules of the Supreme Court (England) O.XLVII, r.1:

“A judgment or order that a party do recover possession of any land may by leave obtained on *ex parte* application to the Court or a Judge supported by affidavit, be enforced by writ of possession”

O.XLVII, r.2: “Such leave shall not be given unless it is shown that all persons in actual possession of the whole or any part of the land have received such notice of the proceedings as may be considered sufficient to enable them to apply to the Court for relief or otherwise.”

Zizer for the plaintiff;

R.W. Beoku-Betts for the defendant.

LUKE, Ag.J.:

The plaintiff claims the sum of £933. 5s. 10d., being the value of goods lost from his premises when the defendant caused a writ of possession to be wrongfully executed against him by the Sheriff on March 21st, 1951, and also for damages in consequence thereof.

The facts briefly are that the plaintiff leased the ground floor and a portion of the first floor of No. 44 Little East Street as sub-tenant of one Abdul Radar, who in turn held a lease from a Mrs. Marian Taylor of the entire premises situated at and numbered 6 Garrison Street and 44A Little East Street. The reversion was sold by Marian Taylor and others to the defendant.

The defendant brought an action against Abdul Radar for recovery of possession of the said premises for breach of a covenant under the lease and judgment was given in his favour. As a result of this judgment he issued a writ of possession, and acting on this the Sheriff evicted the plaintiff. It was this execution which the plaintiff challenges as being wrongfully executed against his personal effects and stock-in-trade.

The plaintiff deposed that he was not a party to the action between the defendant and Radar, and that prior to the execution he had six months of his lease still to run. He tendered a copy of his lease, Exhibit A, and claimed that the defendant knew of its existence as, prior to the purchase of the reversion, he and the

defendant held as sub-tenants of Abdul Radar. The plaintiff alleged that no notice of the judgment had been served on him that the defendant wanted possession of the premises. He further stated that he had obtained an order from the court restraining the defendant from final execution, but that in the meantime he had suffered in consequence of the execution the loss of the sum of £933. 5s. 10d. He also alleged that the writ, Exhibit E, was to deliver possession of premises at Nos. 6 Garrison Street and 44A Little East Street which was different from his holding at No. 44 Little East Street. 5

The defence is that the plaintiff was a sub-tenant of Abdul Radar, against whom judgment for the recovery of possession of the whole premises had been obtained, and that Exhibit E, the writ for delivery of possession, was in compliance with the said judgment. The defendant denied that he caused the writ to be executed against the plaintiff's personal effects or his stock-in-trade. 10 15

Witnesses were called by both parties and their evidence conflicts but these facts are clear and not contradicted, *viz.*: that the writ was for delivery of possession; that it was executed on the premises in question; that the plaintiff's stock-in-trade and personal effects were removed from the premises and placed outside in the street for some hours before they were replaced in the shop when an interim injunction was obtained from the court; that there are three shops comprised in the premises at Nos. 6 Garrison Street and 44A Little East Street occupied by three different tenants; that Exhibit E, the writ, refers to No. 6 Garrison Street and No. 44A Little East Street and that Exhibit A, the plaintiff's lease, is for No. 44 Little East Street; that no notice of this judgment was served on the plaintiff before the writ was issued and execution levied; and that no affidavit was filed as required by O.XXXIV, rr.1 and 2 of our Supreme Court Rules. 20 25 30

There was an exhaustive argument by counsel on both sides as to the legal position between the parties, which as far as I can gather boils down to these questions:

(i) Was the plaintiff entitled to be joined in the proceedings between the defendant and Radar? 35

(ii) Was the writ of possession issued in pursuance of that judgment regular or irregular?

(iii) If irregular, is the plaintiff entitled to damages?

(iv) Did the plaintiff lose all the goods and personal effects which he alleged? 40

With regard to the first question, O.XII, r.1 of our Supreme Court

Rules deals with the parties in an action. The relevant rule in the English Rules of the Supreme Court is O.XVI, r.1, and the notes on this rule found in the *Annual Practice*, 1949, at 250, read, under the heading "Forfeiture of Lease Defendants":

5 "It is, however, no longer imperative to make the persons
in actual occupation defendants, as it was formerly (C.L.P. Act,
1852, s.168), and regard should be had to all the circumstances.
Thus, if the occupation is that of a sub-tenant, the landlord
10 may join both the tenant and the sub-tenant or make either of
them defendant without the other, though in ordinary cases
it is the proper practice to direct the writ to the person in
occupation (*Berton v. Alliance Economic Inv. Co.* [1922] 1
K.B., p. 759; *Minet v. Johnson*, per Lindley, L.J., 63 L.T.
507)."

15 Thus it is no longer necessary to make underlessees or sub-tenants
parties, and so the defendant did not have to join the plaintiff.

20 The plaintiff not having been joined as a party in the previous
proceedings and being in actual occupation of a portion of the
premises, could the judgment which had been obtained in the action
be levied on his own portion of the premises?

25 The plaintiff was holding his property under a lease, six months
of which had still to run. He deposed that he did not know of
the action which the defendant took against Abdul Radar, and that
no notice of the judgment was served on him. The Master and
Registrar was called and he deposed—

30 "that no affidavit was filed stating that notice of the judgment
was served on the plaintiff in this action; that he has no affidavit
showing that the plaintiff in this action has refused to give up
possession of the subject-matter of the action (1950 J. No. 7).
There is no affidavit in the file (1950 J. No. 7) for premises
at No. 44 Little East Street stating that the plaintiff in this
action had refused to give up possession. Before I issued
the writ, Exhibit E, there was no affidavit such as has been
claimed by counsel. There was no notice filed that judgment in
35 this action had been served on the plaintiff. The plaintiff was
not a party in those proceedings (1950 J. No. 7). Stay of pro-
ceedings was granted in the case in which the plaintiff was
not a party. I tender in evidence the file of the previous action
(1950 J. No. 7, *Jaber v. Radar*) marked Exhibit F."

40 Order XXXIV, r.1 of our Supreme Court Rules states: "A
judgment or order that a party do recover possession of any land

may be enforced by writ of possession." Order XLVII of the English Rules of the Supreme Court, which is fuller and more explanatory than ours, states that a party cannot recover possession of any land without leave on an *ex parte* application to the court or judge supported by affidavit, and unless it is shown that all persons in actual possession of the whole or any part of the land have received notice to enable them to apply to the court for relief or otherwise, leave will not be given. In this case the writ was endorsed "Cause possession to be delivered to the plaintiff." Order XXXIV, r.2 of our Supreme Court Rules, dealing with the writ of possession, reads: 5 10

"Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed." 15

This rule is the same as that found in O.XLVII, r.2 of the English Rules. In the notes in the *Annual Practice*, 1949, at 896, under the heading "To deliver up possession," it is stated: 20

"An order under this rule is an order to do an act within O.41, r.5, and must state a time within which the act is to be performed Such an order must be served as prescribed by O.41, r.5, and a writ of possession can issue only on proof of such service and of disobedience." 25

See also 14 *Halsbury's Laws of England*, 1st ed., at 76.

In this case the writ is for delivery of possession and so it is a condition precedent that the judgment should be served. In *Savage v. Bentley* (1), Farwell, J. said (90 L.T. at 641): "I cannot assist you in the face of Order XLI, r.5, which is explicit." [These words do not appear in the report of the case at [1904] W.N. 89.] See also *Townend v. Townend* (2), which decided that O.XLI, r.5, requiring that any person to do an act thereby ordered shall state the time within which the act is to be done, was not sufficiently complied with if no time was stated in the order, and that a writ of attachment issued against the person for contempt of court in failing to attend the application before the court was wrongly issued. 30 35

Had the judgment in Exhibit F been served on the plaintiff as required by the Supreme Court Rules before the writ was issued, the plaintiff would have been able to move the court as he did when the writ was actually executed on him and he thereupon 40

obtained an injunction restraining the Sheriff from carrying out the execution. The defendant issued his writ without complying with the condition precedent. From the evidence given by the plaintiff and the Master and Registrar it is clear that the defendant, having
 5 failed to comply with a condition precedent, has issued his writ irregularly. Such being the case the answer to the second question is in the negative.

Having answered the second question in the negative, it follows that the plaintiff will be entitled to damages. In 10 *Halsbury's Laws of England*, 1st ed., at 302, para. 558, damages are defined as—"the recompense given by process of law to a person for the wrong that another has done him." *Clerk & Lindsell on Torts*, 10th ed., at 868 (1947), states:

15 "When in the course of an execution a wrongful act has been committed which is not merely irregular, but altogether unauthorised, so as to be a trespass or act of conversion, the measure of damages will be the same as if the wrong-doer possessed no official character."

[The learned judge then considered the nature of the goods which the plaintiff alleged were missing, and continued:]

20 In conclusion, I allow the plaintiff the sum of £100 in damages for the irregular execution of the writ on his premises and he will have his taxed costs of the action.

Judgment for the plaintiff.

DOGBOWU v. REGINAM

30 WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Beoku-Betts, Ag.C.J. (Sierra Leone) and Coussey, J.A.): June 16th, 1952
 (W.A.C.A. Cr. App. No. 7/52)

35 [1] Criminal Law—mistake or ignorance—transferred malice—mistake no defence where death of one person caused by unlawful blow intended for another: An accused is not relieved of responsibility for the crime of murder by the fact that the blow which caused the death of the deceased was intended to cause death or grievous bodily harm to another (page 233, lines 30–36).

40 [2] Criminal Law—murder—mens rea—transferred malice—murder where death of one person caused by unlawful blow intended for another: See [1] above.