

## KEISTER v. MUSTAPHA and ANOTHER

SUPREME COURT (Dobbs, J.): April 28th, 1964

(Civil Case No. 28/64)

- [1] **Civil Procedure—pleading—failure to comply with previous judgment—terms of judgment must be pleaded specifically:** In an action for specific performance of a judgment it is necessary to plead in detail that the terms of the judgment have not been carried out (page 50, line 30—page 51, line 3). 5
- [2] **Civil Procedure—pleading—object of pleadings:** The whole purpose of pleadings is to define, to clarify and to delimit the issues which are to be the subject of the pending contest (page 50, lines 3–6). 10
- [3] **Civil Procedure—pleading—striking out pleading—summary process—recourse only in plain and obvious cases:** Only in plain and obvious cases should recourse be had to the summary process under the rules for striking out a defence (page 50, lines 6–8). 15
- [4] **Civil Procedure—specific performance of judgment—terms of judgment must be pleaded specifically:** See [1] above.
- [5] **Civil Procedure—writ of summons—capacity of persons sued—actions against personal representatives—statement of defendants' capacity in statement of claim insufficient—capacity must be indorsed on writ:** Where persons are sued in their capacity as executors or personal representatives of a deceased person such capacity must be indorsed on the writ in accordance with O.III, r.4 of the Supreme Court Rules (*cap.* 7); the rule is not observed if it is entered only in the statement of claim (page 50, lines 21–27). 20
- [6] **Succession — executors and administrators — defendants to action — capacity must be indorsed on writ:** See [5] above. 25

The plaintiff brought an action against the defendants in the Supreme Court for specific performance of a judgment given against the person whose executors and personal representatives the defendants were. 30

The plaintiff obtained judgment against the defendant in a previous case that the defendant among other things convey certain real property to him. The defendant died before carrying out the judgment. The plaintiff then sued the present defendants, who were the executors and personal representatives of the deceased, for specific performance of the judgment. When the defendants entered their defence the plaintiff applied to the court asking that the defence be struck out on the grounds that it disclosed no reasonable defence or that judgment be entered for the plaintiff in the terms of the statement of claim. 35  
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The defendants denied that no reasonable defence had been offered. They maintained (a) that if the action was against them personally they had put forward a sufficient defence to make the issue triable, and (b) if the action was against them as executors of the deceased's estate there was no admission that they had not performed the judgment as the statement of claim said the deceased was ordered "among other things" to convey the property, and the plaintiff should have pleaded the "other things" specifically.

10 Cases referred to:

- (1) *Esso Petroleum Co., Ltd. v. Southport Corp.*, [1956] A.C. 218; [1955] 3 All E.R. 864.
- (2) *Merricks v. Nott-Bower*, [1965] 1 Q.B. 57; [1964] 1 All E.R. 717.

15 Statute and Rules construed:

Supreme Court Rules (Laws of Sierra Leone, 1960, *cap.* 7), O.III, r.4:  
 "If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show in what capacity the plaintiff or defendant sues or is sued."

20 O.XVIII, r.9: The relevant terms of this rule are set out at page 49, lines 20-24.

O.XXI, r.4: "The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer. . . ."

25 Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c.41), s.4:  
 The relevant terms of this section are set out at page 49, lines 5-17.

Rules of the Supreme Court, O.XIX, r.13:  
 The relevant terms of this rule are set out at page 49, lines 36-41.

30 O.XXXII, r.6: The relevant terms of this rule are set out at page 49, lines 27-34.

*McCormack* for the plaintiff;  
*Doe-Smith* for the defendants.

DOBBS, J.:

35 This is an application by way of motion by the plaintiff for an order that the defence filed herein be struck out on the grounds that it discloses no reasonable defence to the plaintiff's statement of claim herein; or in the alternative, that judgment be entered for the plaintiff in terms of the statement of claim.

40 The application to strike out is presumably made under O.XXI, r.4 of the Supreme Court Rules. Mr. McCormack, counsel for the

plaintiff, cited the following authorities, which, for the sake of convenience, I shall set out in full at this stage.

Section 4 of the Conveyancing and Law of Property Act, 1881, which is as follows:

"(1) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

"(2) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

"(3) This section applies only in cases of death after the commencement of this Act."

Order XVIII, r.9 of the Supreme Court Rules (*cap.* 7), which is as follows:

"Where the court shall be of the opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted."

Order XXXII, r.6 of the English Rules of the Supreme Court, which is as follows:

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment, as the Court or Judge may think just."

Order XIX, r.13 of the English Rules, which is as follows:

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

Before analysing the pleadings in detail I have the following preliminary observations to make. In giving a decision I must be guided by the following general principles: (a) that the whole purpose of pleadings is to define, to clarify and to limit the issues which are to be the subject of the pending contest (*Esso Petroleum Co., Ltd. v. Southport Corp.* (1)) and (b) that it is only in plain and obvious cases that recourse should be had to the summary process under the rule for striking out (*per* Harman L.J. in *Merricks v. Nott-Bower* (2) ([1965] 1 Q.B. at 70; [1964] 1 All E.R. at 723)).

I shall now consider the case before me in more detail. I cannot see how O.XVIII, r.9 of our Rules and O.XIX, r.13 of the English Rules are in point. With regard to the latter, after carefully reading the pleadings I cannot see any allegation in the statement of claim which has not been dealt with in the defence either by express admission or denial.

As I understand Mr. McCormack's argument, it is that the admissions contained in the defence entitle him to say that no reasonable defence is disclosed and that either the defence should be struck out or judgment given on the admission by virtue of O.XXXII, r.6 of the English Rules.

It would appear that this action is against the defendants personally because although they are described in para. 2 of the statement of claim as executors and personal representatives of the estate of Elijah Jonathan Speck, deceased, the indorsement on the writ of summons does not state that they are sued in this capacity as would be required by O.III, r.4 of the Supreme Court Rules if such were the case. If the action is against the defendants personally then I think despite certain admissions in the defence there is sufficient denial to make a triable issue of their alleged liability to the plaintiff.

If they are sued in their representative capacity (supposing the plaintiff successfully applies to amend the indorsement on the writ of summons) then it must be shown that they have not carried out the terms of the judgment against the deceased mentioned in para. 3 of the statement of claim. I shall repeat that paragraph verbatim:

"By a judgment of the Supreme Court dated June 23rd, 1961, in an action marked C.C. 414/60 - 1960 K. No. 42, between the plaintiff herein and the said Elijah J. Speck (then alive) as defendant, it was ordered and adjudged *among other things* that the said Elijah J. Speck do sign and execute a deed of conveyance of the house and premises at No. 23 Sibthorpe Street, Freetown to the plaintiff herein." [Emphasis supplied].

In my view these "other things" should have been pleaded if the admission contained in para. 1 of the defence is to be fully operative. According to 36 *Halsbury's Laws of England*, 3rd ed., at 334 para. 494:

"The judgment for specific performance generally commences with a declaration that the agreement in question ought to be specifically performed and orders and adjudges the same accordingly. The judgment then usually includes directions consequent on the declaration, which vary according to the circumstances of the case. Thus, the judgment may include an inquiry as to damages suffered by the plaintiff by reason of the defendant's delay. . . . [T]he judgment may contain directions for the ascertainment of how much is payable by the purchaser in respect of the purchase-money, whether with or without interest, and whether with or without compensation or abatement. It may also contain special directions as to the rents or the deterioration of the property."

So far as this court is aware at this stage, any of the above-instanced consequential orders or directions might have been included in the expression "among other things" and it would need to be shown that they had been carried out to render the defendants liable.

I should remark that I do not think s.4 of the Law of Property and Conveyancing Act, 1881, is relevant to the circumstances in this case. The section appears to confer a power on the personal representatives but not to impose a duty.

To sum up, I am of the opinion that on the present state of the pleadings there are triable issues in the action, especially in view of the denials of the defendants. I do not think this is a plain and obvious case for me to exercise my summary powers of striking out or of giving judgment on admissions. The application is accordingly dismissed with costs to the defendants to be taxed.

*Application dismissed.*