

SAINT VINCENT

-IN THE COURT OF APPEAL-

Civil Appeal No. 2 of 1974.

BETWEEN:

LUCELLE CONSTANCE)
 and }
ALEXANDRA WILLIAMS } APPELLANTS

 vs

ELROY SMITH RESPONDENT

Before: The Honourable the Chief Justice (Ag.)
 The Honourable Mr. Justice St. Bernard
 The Honourable Mr. Justice Peterkin (Ag.)

H. Samuel for Appellants
E. Robertson for Respondent

1974, September 17

JUDGMENT.

PETERKIN J.A. (Ag.).

In this matter two summonses were taken out. One by the defendants in the action, i.e. the Appellants, that the action be dismissed for want of prosecution. The second summons was taken out by the Plaintiff in the action, i.e. the Respondent, and it sought an order that the defendant's Entry of Appearance be set aside.

On the 29th December, 1971, time was limited by the

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Court for entry of appearance by the defendants to twenty-eight days. On the 7th March, 1974, which is over two years later, the defendants entered appearance but sought no leave of the Court to do so.

When the matter was argued before the Learned Judge he was referred to Order 2, Rule 1, and to Order 12, Rule 5. He was also referred to the case of Stern vs Freedman. The Learned Judge with regard to the Appellants' summons, that the action be dismissed for want of prosecution, dismissed that summons, and with regard to the summons which was taken out by the Respondent he ordered that the appearance entered by the Appellants be struck out with costs. Both sides have appealed.

Now Order 12, Rule 5 reads as follows:-

" 5-(1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.

(2) Except as provided by paragraph (1), nothing in these Rules or any writ or order thereunder shall be construed as precluding a defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time."

Learned Counsel for the Plaintiff in the action, i.e. the Respondent, has pointed out to us that, in the first place, leave of the Court was granted and limited to 28 days. In short, that the time for appearance was

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extended by the Court and limited to 28 days only. Then he further went on to submit that the leave of the Court was necessary for a late appearance for a late appearance in those circumstances where time has been extended for appearance in the first place by the Court.

I am of the opinion that this cannot be read into the rules. As regards the Defendant/Appellant's late appearance, I take the view that the appearance should be allowed to stand. Judgment off course had not yet been entered. Accordingly, I would allow the appeal, but make no order as to costs.

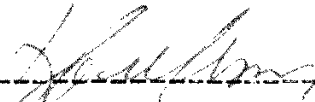
With regards the second matter, it is quite clear that the defendants in the action i.e the Appellants having entered appearance out of time, namely, 2 years late, ^{is} as pointed out by the Rules shall not, unless the Court otherwise orders, be entitled to serve a defence or to do any other thing later than if they had appeared within time. It follows that the summons is completely out of order because they did not seek leave of the Court.

I am therefore of the opinion that the order made by the Learned Judge in this matter should stand. Accordingly, I would dismiss the appeal, but make no order as to costs in all the circumstance.



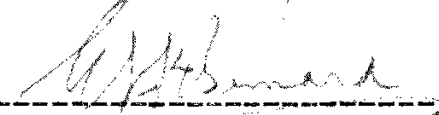
N.A. Peterkin
Justice of Appeal (Ag.)

I agree.



P.C. Lewis
Chief Justice (Ag.)

I agree.



E.L. St. Bernard
Justice of Appeal.