

1979 June 22

[DEMETRIADES, J.]

LAZAROS SOLOMONIDES AND ANOTHER,  
*Plaintiffs,*

v.

CLEARELAND SHIPPING COMPANY LTD.,  
*Defendants.*

*(Admiralty Action No. 346/78).*

*Admiralty—Practice—Writ of summons—Fundamental defect in issue of—Action in personam—Time named in the writ for appearance by defendant—And time within which writ of summons shall be served—Cannot be abridged by Registrar on his own initiative— Rules 11 and 15 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction—Registrar inscribing on the writ a date for the appearance of the defendant falling short of the period provided by rule 11—Defendants not bound to appear on that date—Fundamental defect in issue of the writ—Proceedings against defendant have never started at all—Judgment obtained by default a nullity—Set aside unconditionally.* 5 10

*Admiralty—Practice—Judgment by default—Application to set aside—Whether it should be made within a specified time—And whether an affidavit in support necessary.*

The plaintiffs filed this action on the 4th August, 1978 and the Registrar entered on the writ of summons as the date of appearance of the defendants the 8th August, 1978. The writ was served on the defendants on the 4th August, 1978 and as the defendants failed to appear in Court on the 8th August, the file of the action was taken before the Court for Directions which directed that the petition be filed within 5 days. The petition was filed on the 9th August, 1978 and as the defendants had not yet appeared the plaintiffs proved their case and judgment was given in their favour on the 10th August, 1978. 15 20

Rules 11 and 15 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction provide as follows: 25

5            “ 11. The time to be named in the writ for the appearance of the parties before the Court shall in the case of an action in rem be not less than 25 days and in the case of an action in personam not less than 15 days from the date of the issuing of the writ.

          15. In an action in rem the writ of summons shall be served at least 20 days and in an action in personam at least 10 days prior to the day named in the writ of summons for the appearance of the parties before the Court”.

10            *Upon an application by defendants for an order setting aside the service of the writ of summons and for an order setting aside the judgment given by default:*

*Held*, (1) that the provisions of rules 9, 11 and 15 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction are mandatory; that they do not permit the Registrar to abridge, on his own initiative, the times therein fixed; and that, therefore, he was not entitled, without an order of the Court, to inscribe on the writ a date for the appearance of the defendants which fell short of the period provided by rule 11.

20            (2) That as the Registrar had no authority to fix a date for appearance short of the period provided by the Rules, there is a fundamental defect in issuing the writ and thus the proceedings against the defendants have never started at all.

25            (3) That the defendants were not bound to appear on the date that was inscribed on the writ as the date the defendant was required to appear before the Court i.e. to enter an appearance; that the judgment obtained is a nullity and the defendants are, as of right, entitled to have the judgment set aside.

30            *On the questions raised by the plaintiffs, namely (a) that, as no affidavit in support of the application was filed, the present proceedings are bad in law and (b) that the application of the defendants, was filed out of time:*

*Held*, (1) that there is sufficient material in the file of the present proceedings to support the allegation of the defendants and, therefore, an affidavit in support of the application was not necessary.

          (2) That there is no provision in the rules that an application

as this should be made within a specified time; that the applicants filed their application on the 29th August, 1978; which was a reasonable period of time (rules 31, 32 and 33 of English Order 36 not applicable); and that, accordingly, the judgment given by default on the 10th August, 1978, must be set aside unconditionally. 5

*Order accordingly.*

Cases referred to:

- Hope v. Hope*, 4 De G.M. & G. p. 342 (reported in the English Reports Vol. 43 p. 534 at p. 539); 10  
*Hamp-Adams v. Hall* [1911] 2 K.B. 942 at p. 944;  
*Re Pritchard* [1963] 1 All E.R. 873 at p. 883;  
*Craig v. Kanseen* [1943] 1 All E.R. 108.

**Application.**

Application for an order setting aside the service of a writ of summons and the judgment given by default in an Admiralty Action whereby the plaintiffs claimed the equivalent in Cyprus pounds of 12,000,000 Greek drachmas on a mortgage duly registered on the Cyprus Ship "Georgia". 15

*M. Vassiliou*, for the applicants. 20

*L. Papaphilippou*, for the respondents.

*Cur. adv. vult.*

DEMETRIADES J. read the following ruling. By their application, dated the 29th August, 1978, the applicants-defendants prayed for:- 25

- A. An order of the Court setting aside the service of the writ of summons in the above Action.
- B. An order of the Court setting aside the judgment given by default.
- C. An order of the Court setting aside and/or declaring void the sale and transfer of the M/V GEORGIA in the port of Limassol, made pursuant to the judgment herein in favour of Lazaros Solomonides. 30
- D. That the order made by the Court on the 4th and 8th August, 1978, be rescinded or set aside. 35
- E. That the plaintiffs and each of them be restrained until

5 the hearing and determination of this Action or until further order by the Court from in any way interfering with the use and operation of the said vessel GEORGIA and/or from obtaining possession thereof and/or from attempting to sell it and/or prohibiting them from any dealing with the said ship.

F. Costs.

10 At the commencement of the hearing of this application, counsel for the applicants stated that they were only seeking prayers A and B above and that they did not intend to rely on any evidence—and I am here quoting him—“except for what is apparent on the Court’s record”. In view of this statement of counsel for the applicants, the affidavit filed in support of the application should be completely disregarded and I must confine myself to the facts and grounds relied upon, as these are set out in the application.

20 The application was originally based on the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, rules 15, 35, 44, 203–212, 237 the R.S.C. in England, 0. 2, 12. 7, 13. 9, the Civil Procedure Rules 0. 64, ss. 30 and 35 of Law 45/63, Cap. 149 s. 134 etc., the General Practice of the Admiralty Division of the High Court of Justice in England, the practice and inherent powers of the Supreme Court of Cyprus in its Admiralty Jurisdiction, the record of the Hon. Court in the file of the above Action, s. 32 of Law 14/60 and Cap. 113, ss. 33, 35, 36.

30 After going through the address of counsel for the applicants, I find that they now rely on the following grounds of Law: Rules 5, 11, 15, 41, 44 and 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, the Practice of the Admiralty Courts in England, 0. 13 r. 9 of the Rules of the Supreme Court of England 1973, and a number of English authorities.

The facts relied upon, as these appear in the application, are:

- 35 1. The writ of summons was served upon the defendants on the 4th August, 1978, requiring the defendants to enter appearance on the 8th August, 1978, contrary to the provisions of rule 15 of the Cyprus Admiralty Jurisdiction Order, 1893.
2. Judgment in default of appearance could not be entered

as the service of the writ of summons was irregular or void and in any event premature.

The facts of the case, as they appear from the record in the file, are: The Action was filed on the 4th August, 1978 and the Registrar entered on the writ of summons as the date of appearance of the defendants the 8th August, 1978, that is to say four days after the Action was filed. The writ was served on the defendants on the same day it was filed. As the defendants failed to appear in Court on the 8th August, the file of the Action was taken before the Court for directions. The directions given by the Court were that the petition be filed within 5 days. On the 9th August, as the defendants had not yet appeared, the plaintiffs proved their case and judgment was given in their favour on the 10th August, 1978.

The applicants now complain that there was a fundamental breach of the Admiralty Rules, especially rules 9, 11 and 15.

As I see this application, it is one in which I have to decide whether –

- (a) the Registrar of the Admiralty Division of this Court had the right, on his own initiative, to abridge the time provided by rule 11 for a defendant in an Action in personam, as this one is, to appear before the Court; and
- (b) the steps taken by the plaintiffs–respondents as a result of the failure of the defendants–applicants to appear on the date inscribed on the writ of summons, that is to say to obtain judgment in default of appearance, are null and void as being irregular.

A further issue that falls for decision is whether an affidavit in support of an application as this, was, in the circumstances of this case, necessary.

Before dealing with the issues of this application, I feel bound to say a few words about the intents and purposes for having a writ of summons or other document served on a litigant. As the Lord Chancellor Cranworth said in the case of *Hope v. Hope*, 4 De G.M. & G. p. 342, which is reported in the English Reports Vol. 43 p. 534 at p. 539 –

“ The object of all service is of course only to give notice to

the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required".

The defendants are a limited company registered in Cyprus. Section 372 of the Companies Law Cap. 113, which deals with service on companies, provides:-

" A document may be served on a company by leaving it at or sending it by post to the registered office of the company".

Going through the affidavit of service of the writ of summons, I note that same was served on the 4th August, 1978, on an officer of the company. As there is no complaint that service was not effected on the proper person, I must hold that service was properly effected.

Now, of course this is not the case where the defendants are alleging that the writ of summons was not properly served on them. What they say is that it was not "duly served" on them because the provisions of rule 11, which are mandatory, have not been complied with and, therefore, there was such a fundamental procedural irregularity that makes the judgment given in default a nullity.

In deciding the issues of the case, I feel bound to go through and see what the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, relevant to the commencement of an Admiralty Action and the service on the defendant, provide.

An Admiralty Action is, by rule 5 of the said Order, commenced by a writ of summons calling upon the defendant to appear before the Court at a time to be named therein. There is then rule 9 which says that a statement of the date and hour when the defendant is required to appear before the Court shall be inscribed on the writ by the Registrar. Rule 11 provides that the time to be named in the writ for the appearance of the parties before the Court shall, in the case of an action in personam, be not less than 15 days from the date of the issuing of the writ and rule 15 provides that in an action in rem the writ of summons shall be served at least 20 days and in an action in personam at

least 10 days prior to the day named in the writ of summons for the appearance of the parties before the Court.

Was then the Registrar, in view of the provisions of rules 9 and 11, entitled to force the defendants to appear before the Court on a date and hour that fell short of the period provided by these Rules? And is this failure by the Registrar to comply with the provisions of these Rules, since there was no order for the abridgment of the time under rule 225, so fundamental that it made the further steps taken by the plaintiffs a nullity?

Going through rules 9, 11 and 15 I find that their provisions are mandatory. They do not permit the Registrar to abridge, on his own initiative, the times therein fixed, and he, therefore, was not entitled, without an order of the Court, to inscribe on the writ a date for the appearance of the defendants which fell short of the period provided by rule 11.

Having reached this conclusion, the question that has to be answered is whether the judgment obtained by the plaintiffs is a nullity and thus it has to be set aside.

The present case cannot be differentiated from one in which a judgment is obtained in defiance of the express provisions of the Rules of Court, for instance where judgment is obtained before the time limited for entering appearance or the delivery of the Statement of Defence has expired, as in such a case the judgment would not only be premature but also irregular in that it was entered in contravention of the Rules.

In the case of *Hamp-Adams v. Hall* [1911] 2 K. B. 942, Vaughan Williams L.J. at p. 944 had this to say:-

“ Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Order IX., r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ”.

Upjohn L.J. in the case of *Re Pritchard*, [1963] 1 All E.R. 873 at p. 883, in reviewing the authorities on nullity and irregularity,

finds that there are only three classes of proceedings which are a nullity, namely -

- (a) proceedings which ought to have been served but have never come to the notice of the defendant at all;
- 5 (b) proceedings which had never started at all owing to some fundamental defect in issuing them; and
- (c) proceedings which appeared to have been duly issued but failed to comply with a statutory requirement.

10 I feel that the present case falls within class (b) above in that, as the Registrar had no authority to fix a date for appearance short of the period provided by the rules, there is a fundamental defect in issuing the writ and thus the proceedings against the defendants have never started at all.

15 In the circumstances, I find that the defendants were not bound to appear on the date that was inscribed on the writ as the date the defendant was required to appear before the Court, i. e. to enter an appearance, and that the judgment obtained is a nullity and the defendants are, as of right, entitled to have the judgment set aside.

20 Two points were taken up by counsel for the plaintiffs-respondents; namely that (a) as no affidavit in support of the application was filed, the present proceedings are bad in law, and (b) the application of the applicants-defendants was filed out of time.

25 As regards point (a) above I find that there is sufficient material in the file of the present proceedings to support the allegation of the applicants-defendants and, therefore, an affidavit in support of the application was not necessary.

30 As regards point (b) above, I find that counsel for the plaintiffs relied on the English Order 36 rules 31, 32 and 33. I am afraid that these rules do not help at all the case of the respondents as they make provisions for an application to set aside the judgment which was obtained after an action has been set down for trial. There is no provision in the rules that an application  
35 as this should be made within a specified time. The applicants filed their application on the 29th August, 1978 which, in my view, was a reasonable period of time.



In the result, I set aside the judgment given on the 10th August, 1978, unconditionally (see *Craig v. Kanseen* [1943] 1 All E.R. 108).

As regards costs, in view of the circumstances of the case and as what happened was not the fault of the plaintiffs, I order that each party should pay its own costs.

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*Order accordingly.*