



[2024] JMSC Civ 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM No. SU2023CV01407

BETWEEN	HEADLEY ALLEN	1ST CLAIMANT
AND	DORETHA AUTHILONEY ALLEN	2ND CLAIMANT
AND	PAULINE LOUISE ALLEN	3RD CLAIMANT
AND	LASTRY DURANT	4TH CLAIMANT
AND	HEADLEY ALLEN Jnr	DEFENDANT

IN CHAMBERS

Mr Ruel Woolcock instructed by Ruel Woolcock & Co for the Claimants

Neco Pagon instructed by Peter Champagnie, KC for the Defendant

Heard: 28 February, 15 March and 31 July 2024

CIVIL PROCEDURE RULES, 2002 - APPLICATION TO EXTEND TIME TO FILE DEFENCE - WHETHER DELAY INORDINATE - WHETHER GOOD REASON FOR DELAY - WHETHER DEFENCE HAS ANY REAL PROSPECT OF SUCCESS - FRAUD - REGISTERED TITLE

MASTER C McNEIL (AG)

INTRODUCTION

[1] This is a matter involving two competing applications by the parties who are related by blood. At the heart of the contention is the ownership of land. One application is for the granting of a judgment in default of the

filing of a defence; and the other is for the enlargement of time in which to file the defence.

- [2] Practically and by necessity, the application for the enlargement of time to file defence, even though made later in time, must be heard before the application for the judgment in default can be entertained. And such was the order of the proceedings.

BACKGROUND TO THE APPLICATIONS

- [3] The 1st claimant is the father of the defendant. Both have identical names, but distinguished by the letters “Jr” appended to the defendant’s. The 2nd claimant is the paternal grandmother of the defendant. The 3rd claimant is the aunt of the defendant, and the 4th claimant is the grandaunt.

- [4] By claim form and particulars of claim filed by the claimants on the 3 May 2023, the claimants challenged the legitimacy of the transfer of lands from themselves to the defendant. In the challenge they allege fraud on the part of the defendant, and accordingly sought *inter alia* declaratory and injunctive reliefs. The land in question, as averred in the claim, is that property registered at Volume 1111 Folio 312 in the Register Book of Titles.

- [5] The Claim Form and the Particulars of Claim were served upon the defendant on the 16 May 2023. He filed his acknowledgement of Service on the 29 May 2023. However, he did not file a defence. His reason for not doing so was ill-health. More will be said of this later.

- [6] With no defence filed within the prescribed time, the claimant, on 29 August 2023, filed an application seeking an order for the entry of a judgment in default against the defendant. Undoubtedly the claimants’ application was prompted by the obvious failure on the part of the

defendant. It is to be noted that on 29 August 2023 the Supreme Court was on its “*long vacation*” as defined in part 3.4(1) CPR 2002.

- [7] On 9 October 2023, the defendant filed an application for an extension of time in which to file his defence. His application was supported by an affidavit in which he outlined the reason for the delay in filing. The proposed defence was exhibited to the affidavit. The thrust of the reason for the delay in filing, was acute sickness, which he described, and supported by a report from the medical doctor who treated him. There was no objection, or otherwise challenge to the medical report, other than an argument by the claimants that it was not detailed enough.

THE LAW

- [8] In matters involving claims of the nature brought by the claimants, the prescribed period in which the defendant must file a defence to the claim is set out in Civil Procedure Rules, 2002 (CPR). Part 10.3 (1) of the CPR provides that:

”the general rule is that the period for filing of a defence is the period of 42 days after the date of service of the claim form.”

The CPR also makes allowance for the defence to be filed outside the prescribed time. According to part 10.3 (9)

“the defendant may apply for an order extending the time for filing a defence”.

In any such application, the order extending time, is at the discretion of the court. See **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23.

SUBMISSIONS

- [9] Counsel on both sides made extensive written submissions, which were amplified in their oral arguments. A plethora of authorities were cited, demonstrating counsel’s industry for which the court is grateful. However,

the issue is of a narrow compass, and does not necessarily warrant a discussion of all the cases referenced by counsel.

- [10] The issue is whether or not the court should exercise its discretion and grant the extension of time in which to file the defence, as sought by the defendant. Should this extension be granted, then the need to consider the application for default judgment would become otiose.
- [11] Counsel for the defendant submitted that he had a good and arguable case, with a reasonable prospect of success, and that his illness was the cause of the delay. The delay, according to counsel was not inordinate, and that the extension of time would not occasion any prejudice to the claimants. He relied on a number of decided cases, including **Marcia Jarrett v SERHA et al.** [2010] JMCA Civ 15; **Cynthia Bravo v Avis Baxter Anor.** Suit No CLB 301/1998 judgment delivered on 12 October 2006; **Paulette Richards v NERHA et al** [2020] JMCA Civ 90; and **Costellow v Somerset County Council** [1993] 1 WLR 256
- [12] In his full-blown resistance to the defendant's application, counsel for the claimants submitted *inter alia* that the defendant did not have an arguable case. He argued that the mere denial of fraud by the defendant cannot support the defendant's case since he, the defendant, is the transferee in the fraudulent transfer of the property.
- [13] Further, counsel for the claimants argued that the defendant's delay in filing his defence cannot be justified. He submitted that the period between the time of service of the claim form, and the time when the defendant became ill, was sufficient for him to have settled his instructions with his attorneys, thereby putting the attorneys in a position to prepare and file the defence in time.
- [14] In his sustained attack on the defendant's application, counsel for the claimants also submitted that the illness referred to by the defendant was

in essence vague, and could not assist the court evidentially in explaining why he could not have instructed his counsel. According to counsel, there was no explanation from the defendant as to what was happening to him that prevented him from concluding his instructions to his lawyer before becoming very ill in early June.

[15] Counsel for the claimant further submitted that the defendant's affidavit does not disclose an arguable defence. He cited several reasons to support his submission, not least of which was the assertion by the Claimants that the Justice of the Peace who witnessed the signatures of the 2nd, 3rd and 4th claimants for the purpose of the transfer, contradicted the defendant's description of the circumstances surrounding the signing of the said transfer documents.

ISSUE

[16] The dispositive issue for consideration in the proceedings is whether the court should exercise its discretion in favour of the defendant, by granting his application for the extension of time in which to file his defence.

ANALYSIS

[17] There is no dispute as to the factors to be considered in any application for the extension of time to file defence. They are set out clearly by the Court of Appeal in **Strachan v The Gleaner Company**, Motion No 12 of 1999, in the judgment delivered on 6 December 1999. The factors were reiterated, repeated and applied in several cases thereafter. For example, in **Edwards v Kelly and Kelly** (Claim No 2008 HCV 00303) unreported judgment dated 2 November 2009; and in **Attorney General v Roshane Dixon** [2013] JMCA Civ 23. The factors are:

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) whether there is an arguable case for an appeal; and
- (d) the degree of prejudice to the other parties if time is extended.

[18] Brooks, JA (as he then was) in **Attorney General and Western Regional Health Authority v Rashaka Brooks** [2013] JMCA Civ 16 said that the court should not be inflexible in the exercise of its discretion when considering an application to enlarge time. He re-framed the factors to be considered with respect to a defendant's application, as follows:

- (a) the application is made within a reasonable time;
- (b) there are good reasons for the delay;
- (c) there is good reason why the extension should be granted;
and
- (d) there would be no prejudice to the claimant should the extension of time be granted.

Taking each factor separately.

Was the application made within reasonable time

[19] The claim form and particulars of claim were served on the defendant on 16 May 2023. He filed an acknowledgement of service on 29 May 2023. His Notice of Application for Extension of Time was filed on 9 October 2023, nearly five months, or 145 days after being served with the claim. This amounts to 103 days or approximately three and a half months beyond the 42 days prescribed by Part 10.3(1) of the CPR.

[20] In **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23, the court found that the delay of over seven months on the part of one of the applicants, was unacceptable; however, the one-month delay on the part of the co-applicant was not inordinate.

[21] In the case **Clarke and Clarke v Clarke and Clarke** [2017] JMCA Civ 195, the court found that the delay of 332 days was inordinate. In **Edwards v Kelly and Kelly**, unreported judgment dated 2 November 2009, the delay of more than a year was found not to be "not prompt".

[22] Recognizing that the decision is not based upon mathematical calculations, and cognizant of the fact that each case has to be considered on its own particular facts, I find that the delay of 103 days in the instant case, whilst not being a shining example of alacrity, could not reasonably be regarded as inordinate in the circumstances of the case. This however is not determinant of the larger issue.

Reasons for the delay

[23] The reason for the delay in applying for the extension of time is grounded in the sickness suffered by the defendant. In paragraph 7 of his affidavit, the defendant explained his medical condition which started in early June 2023.

[24] The court understands the anxiety on the part of the layman, which develops when judicial proceedings are instituted, particularly on the part of a defendant, be it civil or criminal. The evidence in paragraph 7 of the defendant's affidavit is not far-fetched, and in the court's view, is indeed credible.

[25] However, it is not lost upon the court the fact that the defendant's dates in the medical report exhibited by the defendant himself, certified that the defendant was *"unable to fulfill his civic duty from June 29th 2023 to September 29th 2023."* This does not accord with the defendant's personal assertion at paragraph 7 that he became sick from early June 2023. While this does not necessarily negate the fact that the defendant was sick from as early as the beginning of June 2023, it lends support to the conclusion contended for by the claimants, that the defendant did not act with sufficient promptitude.

[26] The evidence from the defendant is that he had always intended to defend the claim. The history of the dealings between the defendant and his father, the 1st claimant, includes previous judicial proceedings which

touched and concerned the property which is the subject of the current dispute. In those previous proceedings, the defendant mounted vigorous contests. The upshot of this is that the court finds that the defendant's decision to defend the claim was not merely an afterthought but was a settled one from the time of service of the claim upon him. The failure to do so in the prescribed time was due to his health condition.

Whether there is good reason for granting an extension

[27] Whether or not there is good reason for granting the extension sought, depends partly on the defence to be advanced in answer to the claim. In **Edwards v Kelly and Kelly** (Claim No. 2008 HCV 00303) unreported judgment dated 2 November, 2009, Sykes, J (as he then was) puts it this way at paragraph 12 of the judgment --

"It goes without saying that unless there is a real prospect of success then the extension of time within which to file a defence should not be granted because it would [be] a waste of the court's resources to entertain a hopeless case".

[28] Without delving into the facts of the case, it behooves this court to examine the defence standing alone, in order to determine whether on its merit, it has a real prospect of success in the face of the claim. McDonald-Bishop, J (Actg), as she then was, encapsulated the principle quite appropriately in **Marcia Jarrett v SERHA & Ors** [2010] JMCA Civ 15, when she said at paragraph 39 -

"A defence on the merits would simply be a defence that, when examined in relation to the claim, would show that the defendants have a real prospect of defending the claim. It must be a 'real prospect' as opposed to a 'fanciful prospect' of success."

[29] In the instant case, the claimants have alleged fraud committed by the defendant. In particularizing the fraud, the claimants averred in their pleadings that the defendant, *inter alia*, impersonated the first claimant. They contended that the transfer to, and the ultimate acquisition of the property by the defendant, were the fruits of the proverbial poisoned

chalice, and was *ipso facto* illegal. Hence the relief prayed for in their claim.

[30] Under the Registration of Titles Act, a registered title confers on the proprietor, indefeasibility of his title, save for fraud. This is the very basis of the Torrens system of land registration in Jamaica. P Harrison, J.A., in **Registrar of Titles v Ramharrack**, SCCA No 80 of 2002 delivered on 29 July 2005 described the indefeasibility in the following way--

“Under the Registration of Titles Act the registered proprietor of any estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud.”

[31] A litigant who seeks to defeat a registered title on the basis of fraud on the part of the registered proprietor, has a high threshold in establishing his case. Jurisprudentially, the standard of proof required to prove fraud in a civil matter is on a balance of probabilities. However, a court when considering a case of fraud in a civil matter will of course require a higher degree of probability than in other civil cases like negligence for example. See **Hornal v Neuberger Products Ltd.** [1957] 1 QB 247 (CA). This principle necessarily has to be reckoned with, when considering the prospect of success of the proposed defence

[32] The defendant has unequivocally denied any form of fraud. In his affidavit filed on 9 October 2023, he deposed that the signatures were genuine; the transfer was legitimate; and that consideration was by way of gift in exchange for him clearing and having discharged, the then existing mortgage on the subject property. He exhibited documents in his affidavit in proof of that assertion.

[33] The proposed defence raises serious legal and factual issues which frontally contradict the claim in all material particulars. Without opining on the outcome of the substantive matter, this court holds the view that the proposed defence renders the case a triable one, with a real prospect of

success. The very nature of the matter demands ventilation. In this regard, I adopt the words of Wolfe JA (as he then was) with appropriate modifications, in **Lilia Newman v Delroye Salmon** (1994) 31 JLR 108; p. 110 I: --

“It is fair to say that most of the allegations have been denied by the [defendant] in the affidavit filed by him. These allegations, however, raise serious questions of fact to be resolved at a trial. The nature of the [denials] demand that the [defendant] ought to have [his] day in court.”

Whether any prejudice to the claimants

1. The subject matter of the claim is land. The relief sought is primarily in the form of a declaration and injunction. There is also a prayer for an Order directing the Registrar of Titles, to cancel the transfer to the defendant.
2. There is no evidence to suggest that that piece of real estate is deteriorating or diminishing in value. The land is not a wasting asset. The claim was filed in May 2023, just over a year ago, and there is no evidence that to date, the claimants have been disadvantaged in any shape or form by the effluxion of time.
3. The only prejudice imaginable is the expense to which the claimants will be put for the retention of legal counsel for the extended period of the litigation. This perceived prejudice can be cured by costs orders. At paragraph 90 of the judgment in **Edwards v Kelly and Kelly** (Claim No 2008 HCV 00303) unreported judgment dated 2 November 2009, Sykes, J (as he then was) put it this way-

“Mr. Edwards would be put through the expense of retaining counsel for a further period of time. However, in this case, this can be addressed with an appropriate cost order at this stage and also at trial. Part 64.6 gives the court the power to make costs orders having regard to the conduct of the parties”.

4. This court finds that if the time for the filing of the defence were extended, there would be no undue or irreparable prejudice to the claimants.

CONCLUSION

5. Having regard to the overriding objectives of CPR 2002, and considering all the factors, this court is satisfied that the defendant has met the criteria set down by the law for the extension of time within which to file his defence. In the circumstances, the application is granted. The application for the entry of judgment in default of defence is thereby refused.

6. The Orders of the court are:
 - (a) Application for an extension of time within which to file a defence is granted.
 - (b) The defence is to be filed and served within seven days from the date of this order.
 - (c) The application for default judgment is refused.
 - (d) Costs of the application to be costs in the claim.