



[2023] JMSC Civ. 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV036

BETWEEN	MELISSA LEWIS	1st CLAIMANT
AND	JOAN LINDSAY LEWIS	2nd CLAIMANT
AND	NOEL LEWIS	1st DEFENDANT
AND	JENNIFER ELAINE ROYE	2nd DEFENDANT

IN CHAMBERS

Georgia Hamilton instructed by Georgia Hamilton and Company Attorneys-at-Law for the Claimant

Jamila Thomas and Judith Clarke instructed by Judith Clarke and Company for the 2nd Defendant

Heard: January 30, 2023

Civil Procedure- Relief from Sanction- whether the application was promptly made- whether the failure to comply was not intentional- whether there is a good explanation for the failure to comply

MASTER T. DICKENS (AG.)

INTRODUCTION

- [1]** This is the Claimants' application for relief from sanction for failure to file and serve witness statements within the time prescribed by Case Management Order.
- [2]** The substantive claim was filed on September 26, 2018, wherein the Claimants seek declaratory relief and damages, inter alia, on account of certain alleged fraudulent acts carried out by the Defendants in relation to lands forming part of

Lynch and Ballards Patent called Dunder Hill in the parish of St. Elizabeth comprised in the Certificate of Title registered at Volume 1490 Folio 884 of the Register Book of Titles.

- [3] The matter came on for Case Management Conference on July 19, 2021 before Stamp J., who ordered that witness statements be filed and exchanged by July 1, 2022. On December 6, 2021, Master Orr (as she then was), in order to facilitate an early trial of the claim, varied the orders of Stamp J. in part, ordered that witness statements were to be filed and served by May 13, 2022 and scheduled a Pre-Trial Review Hearing for June 15, 2022 at 10:00 a.m.
- [4] The Claimants filed their witness statements on November 9, 2022 and now seek relief from sanction for failure to file and serve witness statements in keeping with the orders of the Court.

THE APPLICATION

- [5] The Claimants' application for relief from sanction was filed on November 4, 2022 and is supported by the Affidavit of Gytanna Pinnock sworn and filed November 4, 2022, the Affidavit of Ashley Clarke sworn and filed November 11, 2022 and a further Affidavit of Ashley Clarke filed November 28, 2022.
- [6] The Court finds it apposite at the outset to state that the relevant court order for the purpose of this application for relief from sanction is that of Master Orr (as she then was) dated December 6, 2021, which required witness statements to be filed and served by May 13, 2022. This is necessary as the Affidavit of Gytanna Pinnock identifies the order of Stamp J. dated July 19, 2021 as the order which the Claimants failed to comply with, regarding the filing of their witness statements.
- [7] The said Affidavit of Gytana Pinnock outlines that the Claimants were not able to complete their witness statements in time due to a series of "unexpected and unfortunate events". Ms Pinnock depones that in June 2022, the 1st Claimant contracted Covid-19 and was unwell for a considerable time thereafter. She also

depones that counsel, Ms Hamilton, also contracted Covid-19 in late June 2022, which resulted in junior counsel, Ms Ashley Clarke, being the only attorney in office and she was unable to meet the firm's deadlines. Ms Pinnock further depones that on August 17, 2022, the Firm (Georgia Hamilton & Co.), made a request for information from the Defendants' (sic) attorneys-at-law and that they responded, refusing to produce documents.

- [8] The Affidavit of Ashley Clarke filed November 11, 2022, outlines that service of the Claimants' witness statements filed November 9, 2022, was attempted at the office of the 2nd Defendants' attorneys-at-law on the same day, but said service was rejected. The Affidavit of Ashley Clarke filed November 28, 2022, chronicles challenges faced by the Claimants and counsel for the Claimants, between June to October 2022.
- [9] The 2nd Defendant has not filed any affidavit in response to the Claimants' application for relief from sanction.
- [10] I have had regard to the written submissions of the Claimants contained in Bundle filed November 11, 2022, further submissions filed February 3, 2022, as well as oral submissions before the Court. I have equally had regard to the written submissions of the 2nd Defendant contained in Bundle filed January 10, 2023 and further submissions of the 2nd Defendant filed February 7, 2023 and oral submissions on the application before the Court.

THE CLAIMANTS' SUBMISSIONS

- [11] The Claimants' counsel submits that the application was made promptly. Counsel further submits that the Claimants' application for inspection was made long before an order for the filing and service of witness statements was made. By that application, the Claimants seek to inspect and take copies of all deeds, instruments and documents retained by the Registrar of Titles evidencing the 1st Defendant's title to property comprised in Certificate of Title registered at Volume 1490 Folio 884 of the Register Book of Titles. The said application was filed on June 11, 2021,

amended on June 23, 2021 and further amended on May 20, 2022. The Claimants' counsel submits that as there was no inspection they were unable to file witness statements.

- [12] Counsel further submits that the question of “promptitude” must be assessed by reference to the circumstances of the case and asks the Court to view the application for relief from sanction filed on 4 November 2022, in the context of an earlier application seeking an extension of time to file witness statement filed May 20, 2022, as well as the notice given in their Listing Questionnaire. Counsel relies on the decision of **Nardia Beatrice Clarke (Executrix of the Will of Erolita Rancharan) v Nairobi Rancharan**, unreported, decision of the Supreme Court of Belize, decided April 2, 2019.
- [13] The Claimants' counsel also submits that the failure to file witness statement was not intentional and that there is a good explanation for the failure. In particular, she highlights that the developments which hindered the Claimants in complying with the order to file and serve witness statements should be accepted as good explanations for their failure to file witness statements, namely, the death of the 1st Claimant's brother in June 2022 and counsel for the Claimants contracting Covid-19 in the same month.
- [14] Counsel submits that the Claimants have filed all that is required of them and the only documents to be served have not been served as the 2nd Defendant has refused to accept service and asks that they be treated as being generally compliant in the circumstances of this case.

THE 2ND DEFENDANT'S SUBMISSIONS

- [15] Counsel for the 2nd Defendant, Ms. Thomas, submits that the Claimants have failed to comply with rule 26.8(1) of the Civil Procedure Rules (“the CPR”), in that the application was not made promptly and the evidence they seek to rely on in support of their application for relief from sanction in the Affidavit of Gytana Pinnock filed

on November 4, 2022 does not comply with rule 30.3 of the CPR and therefore cannot be considered by the Court.

[16] Counsel further submits that even if the Claimants were to be found to have satisfied the requirement of promptitude, they would also have to satisfy the requirements of rule 26.8(2), failing which the Court would be unable to proceed to consider the requirements of rule 26.8(3) and to grant the relief sought.

[17] The 2nd Defendant's counsel submits that the Claimants are unable to pass the three (3) requirements set out in rule 26.8(2), and therefore this Court would be unable to exercise its discretion in favour of their application since a failure to meet just one of these three (3) requirements is fatal to an application for relief from sanctions. The 2nd Defendant's counsel relies on the authority of **H.B. Ramsay and Associates Limited et al v Jamaica Redevelopment Foundation and Another** [2013] JMCA Civ 1.

ISSUE (S)

[18] The issue to be determined by this Court is whether the Claimants should be granted relief from sanction and in particular:

- i) whether the application for relief from sanction was made promptly;
- ii) whether the failure to comply was not intentional;
- iii) whether there is a good explanation for the failure to comply; and
- iv) whether the Claimants have generally complied with rules, orders and directions of the court.

LAW AND ANALYSIS

[19] Pursuant to rule 29.11 of the CPR, a party who has failed to serve a witness statement within the time specified by the Court may not call that witness unless

the Court permits and the party is required to seek relief from sanction pursuant to rule 26.8 of the CPR.

[20] Rule 26.8 of the CPR, treats with applications for relief from sanction and provides that:

- “ 26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
- (a) made promptly; and
 - (b) supported by evidence on affidavit.
- (2) The Court may grant relief only if it is satisfied that –
- (a) the failure to comply was not intentional;
 - (b) there is a good explanation for the failure; and
 - (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
- (3) In considering whether to grant relief, the Court must have regard to -
- (a) the interests of the administration of justice;
 - (b) whether the failure to comply was due to the party or that party's attorney-at- law;
 - (c) whether the failure to comply has been or can be remedied within a reasonable time;
 - (d) whether the trial date or any likely trial date can still be met if relief is granted;
 - (e) the effect which the granting of relief or not would have on each party.
- (4)...”

[21] Rule 26.8(1)(a) and (b) require that an application for relief from sanction be made promptly and be supported by affidavit evidence. The Claimants have satisfied rule 26.8(1)(b) in that their application is supported by affidavit evidence. It must

however be highlighted that one of the affidavits being relied on by the Claimants, the further Affidavit of Ashley Clarke filed November 28, 2022, was not executed by the deponent and as such cannot be relied on by this Court. Counsel for the Claimants had sought an adjournment to have the issue of the affidavit rectified by having Ms Clarke attend at a later date to give oral evidence. The Court having begun to hear the application did not find it fit and fair to grant an adjournment.

[22] In relation to the Affidavit of Gytanna Pinnock, parts of paragraph 5 were struck out, which speak to the death of the 1st Claimant's brother and the steps taken by the 1st Claimant consequent to her brother's death, as this information was not in the deponent's personal knowledge and the deponent failed to provide the source of the information in breach of rule 30.3(2) of the CPR.

[23] The Court will now consider the relevant factors under rule 26.8(1) and (2) of the CPR.

WHETHER THE APPLICATION WAS MADE PROMPTLY

[24] The Court must now determine whether the Claimants' application was made promptly.

[25] This is the first hurdle that the Claimants must clear. If this criterion is not met, then this application must fail. In the seminal case of **H.B. Ramsay & Associates Ltd & Another v Jamaica Redevelopment Foundation Inc. & The Workers Bank** [2013] JMCA Civ 1, Brooks JA, (as he then was), at paragraph 31 noted that:-

“[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, **must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application**

promptly the court need not consider the merits of the application.” [Emphasis added]

[26] In the case of **National Irrigation Commission Limited v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, Harrison JA, at paragraph 14, stated the following, in relation to the criterion of promptitude:

“[14] The first stage ... is for the court to consider whether or not the appellant’s application seeking relief from sanctions was made promptly. Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of *Regency Rolls Limited v Carnall* [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said: **"I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."**

[27] Harrison JA, at paragraph 16 further opined that:

“[16] **Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard.** In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.”
[Emphasis Added]

[28] The Court in **National Irrigation Commission Limited v Conrad Gray and Marcia Gray** [2010] JMCA Civ 18, clearly recognized promptness as a “controlling factor” under rule 26.8(1) and noted that the meaning of promptly is with “alacrity”.

[29] It is to be noted however that in the case of **HB Ramsay & Associates Limited & Ors v Jamaica Redevelopment** [2013] JMCA Civ 1, Brooks JA also noted that promptness has some degree of flexibility. In this regard, his Lordship noted at paragraph 10 of the judgment that:

“[10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word “promptly”, does have some measure of flexibility in its application. **Whether something has been promptly done or not, depends on the circumstances of the case.**” [Emphasis added]

[30] In the instant case, the Claimants filed their application for relief from sanction on November 4, 2022, almost six (6) months after the sanction was imposed. The Court has observed that the Affidavit of Gytanna Pinnock and the Affidavit of Ashley Clarke filed November 11, 2022, offer absolutely no explanation as to why it took the Claimants six (6) months to make the application for relief from sanction in circumstances where a speedy trial was ordered and where a Pre-Trial Review Hearing was held on June 15, 2022, where the Court addressed the failure to file witness statements and the necessity for the Claimants to file an application for relief from sanction.

[31] It is noted that the Claimants applied for an extension of time to file witness statements in the 2nd further amended urgent application for court orders filed May 20, 2022. It must however be observed that this is an application for extension of time and not an application for relief from sanction. The date of the 2nd further amended application therefore cannot be applied to the application for relief from sanction. The Court also could not have granted an extension of time without relief from sanction first being granted. The witness statements were to have been filed by May 13, 2022, there was a Pre-Trial Review Hearing on June 15, 2022, yet the application was not made until November 4, 2022. It is observed that the

Claimants' counsel wrote to the 2nd Defendant's counsel on August 17, 2022 requesting inspection of documents, yet still did not make the application for relief from sanction at that time, when the matter was being addressed.

[32] Alacrity is required on an application for relief from sanction and this Court accepts that there is some flexibility in determining whether an application is promptly made, but in the absence of any explanation for the delay of six (6) months in filing the application for relief from sanction, particularly after a Pre-Trial Review Hearing was held on June 15, 2022, this Court is constrained to find that the application was not made promptly and consequently this application must be dismissed.

[33] Though it is accepted that a finding that the application was not made promptly is dispositive of the application, this Court will however go on to examine the criteria set out under rule 26.8(2) of the CPR.

WHETHER THE FAILURE TO COMPLY WAS NOT INTENTIONAL AND WHETHER THERE IS A GOOD EXPLANATION FOR THE FAILURE TO COMPLY

[34] The Courts have found it convenient to examine and treat with both issues together.

[35] In the **Rodney Herbert (dba 4A Car Rental) v Andre Pickering** decision of the Eastern Caribbean Supreme Court BVIHCV2019/0100, decided June 30, 2020, Sandcroft, M.(Ag.), considered the criteria set out in the similar provisions for relief from sanction in their Civil Procedures Rules and stated that:

“[50] In that respect, it will be the affidavit evidence adduced by the claimant/applicant, in support of his application for relief from sanctions, which will be most pertinent.

[51] This court is therefore now left to carefully and judiciously consider and analyze the claimant's/applicant's affidavit, in deciding as to whether the applicant has satisfied the burden of proof, as legally cast upon him, to meet the requisite standard of proof, that being on

a balance of probabilities, that the failure to comply with the order, was not intentional, or in other words unintentional and that there exists good explanation for the failure to comply with the order.”

[Emphasis Added]

[36] The affidavit evidence in support of the application for relief from sanction is therefore critical and must provide evidence which accords with the criteria set out under rule 26.8(2) of the CPR. It is based on the evidence provided that the Court will determine whether the failure to comply was not intentional and whether there is a good explanation for the failure.

[37] In the case of **Jamaica Public Service Company Limited v Charles Vernon Francis and Others** [2017] JMCA Civ 2, Edwards JA(Ag.), as she then was noted at paragraph 42 that:

“[42] ...In my view the paramount issue was not whether the explanation covered all the period limited for compliance. Certainly it would have been better for the appellant if it did, but the fact that it did not, by itself, should not have prevented the learned trial judge from considering it. **What mattered was whether he considered it to be a good explanation for failing to comply in the time limit.** Rule 26.8 (2) of the CPR requires the learned judge to be satisfied that there is a good explanation for the failure to comply in order to exercise his discretion to grant relief from sanctions...” [Emphasis added].

[38] It is therefore quite clear that in determining whether the failure to comply was not intentional and whether there is a good explanation for the failure to comply, the Court’s examination of the relevant facts must be limited to the period between when the order was made and when compliance was due. In the instant case, that relevant period is December 6, 2021 to May 13, 2022.

[39] The Claimants have provided no affidavit evidence which covers the relevant period of December 6, 2021 to May 13, 2022. In the absence of such evidence,

this Court has no material upon which to assess whether the failure to comply was not intentional and whether there is a good explanation for the failure to comply.

- [40]** Therefore, even if this Court is in error on the issue of promptitude, there is equally no evidence before the Court to speak to the failure to file the witness statements on behalf of the Claimants within the time prescribed by the Court. It is observed that the Affidavit of Gytanna Pinnock speaks to the 1st Claimant and the Attorney-at-Law for the Claimant experiencing challenges in June and July 2022, which are dates after the sanction was imposed. There is absolutely no evidence as to what happened on and before May 13, 2022 that caused the Claimants not to comply with the order to file and serve witness statements.
- [41]** The evidence outlined in the Affidavit of Gytanna Pinnock all relate to circumstances which occurred after the witness statements were due, and after the sanction was imposed. In the absence of evidence surrounding the period before and when the witness statements were due on May 13, 2022, this Court cannot be satisfied that the failure to comply was not intentional and that there is a good explanation for the failure to file witness statements. Even if the Affidavit of Ashley Clarke filed November 28, 2022 was allowed, this would not have assisted the Claimants in meeting the criteria set out in rule 26.8(2)(a) and (b) of the CPR. The Claimants having failed to clear the hurdles of rules 26.8(1)(a), 26.8(2)(a) and 26.8(2)(b), this Court need not examine the final criterion under rule 26.8(2)(c) as this application cannot succeed.
- [42]** It is noted that the Claimants' counsel has advanced arguments in submissions and has made heavy weather that they were awaiting inspection of documents from the 2nd Defendant and as such could not file witness statements within the time stipulated by the Court. The Claimants' counsel submits that the application for inspection of deeds, instruments and documents retained by the Registrar of Titles was filed on June 11, 2021, amended on June 23, 2021 and further amended on May 20, 2022. The Claimants' counsel contends that as this application was not disposed of, the Claimants' ability to file witness statement was impacted.

- [43]** It cannot be gainsaid that any document submitted to the Registrar of Titles by the Defendants in order to obtain title to the subject property would be relevant to these proceedings. This Court however must sound a reminder that court orders must be complied with and take effect unless and until they are set aside, varied or overturned on appeal. Therefore, notwithstanding the extant application for inspection, the Claimants were still required to comply with the order to file witness statements. Indeed, they eventually did file witness statements on November 9, 2022, even though the application for inspection was still not heard.
- [44]** Additionally, this Court must highlight that rule 29.4(6) of the CPR permits a party to apply to file supplemental witness statements. The submissions of counsel for the Claimants that the fact that the application for inspection was not heard contributed to the Claimants' failure in filing witness statements, therefore do not to my mind constitute a good explanation. In any event, the evidence on affidavit in support of the application did not raise this as a reason for the failure to comply and as already noted, it is the affidavit to which the Court must turn in determining this issue.
- [45]** The issue of inspection was only raised by counsel for the Claimant in submissions and did not constitute part of the reason for the failure to file witness statements outlined in the affidavit evidence in support of the application for relief from sanction. The Affidavit of Gytanna Pinnock merely states that the Claimants' counsel requested information from the 2nd Defendant's counsel by letter dated August 17, 2022. In any event, this was three (3) months after the witness statements were due and therefore does not rise to the standard of a good reason for the failure to comply as this was not done within the relevant period.

DISPOSITION AND ORDERS

[46] Accordingly, and in all the circumstances, I find that the application for relief from sanction was not made promptly. I am also not satisfied that the failure to file witness statements was not intentional and that there is a good explanation for the failure to file witness statements.

[47] I therefore make the following orders:

- i. The Claimants' application for relief from sanction filed November 4, 2022 is refused.
- ii. Costs are awarded to the 2nd Defendant on this application to be taxed if not agreed.
- iii. Leave to appeal granted.
- iv. Pre-Trial Review is scheduled for **October 11, 2023 at 12 noon for ½ hour** pending the determination of the appeal of this decision.
- v. The Claimants' attorneys-at-law to prepare file and serve this order.