[2024] JMSC Civ. 111

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV00553**

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| **BETWEEN** | **LEONARD MCKENZIE** | **CLAIMANT** |
| **AND** | **GERALD REDDICK** | **1ST DEFENDANT** |
| **AND** | **GERALD REDDICK (as personal representative for the Estate of Dorett Reddick)** | **2nd DEFENDANT** |

**IN CHAMBERS**

**Mrs. Tana'ania Small Davis K.C. for the Claimant (instructed by Livingston Alexander and Levy).**

**Mr. Oraine Nelson for the 1st Defendant.**

**HEARD: July 22, 2024 and September 18, 2024**

**Civil Procedure Rules - Application to file defence out of time - CPR 10.3(9)-What are the principles the court will consider in granting such an Application- Whether there is an affidavit of merit**

**MASTER L. JACKSON (AG.)**

**BACKGROUND AND INTRODUCTION**

**[1]** The Claimant Mr. Leonard McKenzie by way of Claim Form and Particulars of Claim filed February 15, 2019, claims against the 1st Defendant Mr. Gerald Reddick the sum of One Million Five Hundred and Ninety-Four Thousand Eight Hundred and Ninety-Two Dollars and Fifty Cents, being the sum withdrawn by the 1st Defendant acting under a Power of Attorney for Mrs. Dorett Reddick (now deceased), from an account jointly held in the names of the Claimant and

Mrs. Reddick, in circumstances where Mrs. Reddick's name was added as a matter of convenience. This was done with the understanding that the Claimant is the sole beneficial owner of the monies therein and deposits were made solely by the Claimant. The Claimant claims that the deposits were done without the authorisation and knowledge of the Claimant and without the requisite passbook to enable withdrawals and in breach of the agreement that the monies belonged to the Claimant and there was a breach of the resulting trust.

**[2]** The Claimant as a result of the foregoing, claims damages in the sum of 1,595,892.50, interest pursuant to the Law Reform (Miscellaneous Provisions) Act at 6% costs and Attorneys' cost.

**[3]** By affidavit of service filed February 28, 2019, the process server Mr. Beresford Richards stated that he served the 1st Defendant with the Claim Form and Particulars of Claim and all the prescribed documents, the affidavit of Leonard McKenzie in support of application for appointment of personal representative ad litem and the application for appointment of personal representative ad litem on February 26, 2019.

**[4]** The 1st Defendant filed his acknowledgement of service February 28, 2019. To be included as part of the chronology, I wish to also add that the Claimant sought and obtained a freezing order against the 1st Defendant in relation to the said sums being claimed that were held at a financial institution in his name or which his name is appended, by way of an application filed February 15, 2019. The orders were granted March 8, 2019.

**[5]** The 1st Defendant having not filed his defence within the 42 days as stipulated by the CPR, the Claimant on May 22, 2019, filed a request for default judgment against the 1st Defendant in default of defence.

**[6]** On July 29, 2019, the 1st Defendant filed an application for court orders to include an application to file his defence out of time and to strike out the application to appoint personal representative ad litem.

**[7]** By way of order dated October 3, 2019, by consent, the 1st Defendant was appointed as personal representative ad litem of the estate of Dorett Reddick. The application for extension of time was adjourned and the court ordered that submissions and authorities were to be filed by the parties.

**[8]** Between that time when the orders were made for the appointment of personal representative, and July 22, 2024 when this application was finally heard, there appears to have been hearings concerning contempt proceedings and inter party's proceedings regarding the freezing order and other factors that accounts for the delay in this application being heard.

**[9]** Needless to say, Counsel for both parties were given an opportunity to make oral submissions in addition to the written submissions and authorities filed previously.

**THE LAW**

**[10]** In dealing with applications of this nature, the starting point is Rule 10.3(9) of the Civil Procedure Rules (CPR) that allows the court to extend the time for the Defendant to file a Defence. Of importance also is rule 26.1(2)(c) of the CPR that enables the court to extend the time to comply with an order, direction or rule of the court after the prescribed time for compliance has expired.

**[11]** Notwithstanding this, there is no guidance, in the CPR as to what the court should take into account in determining whether to grant or refuse an application for the extension of time to file Defence. The principles governing the court's approach in granting or refusing an application for an extension of time can be found in a number of cases. In this regard, I start with **Lightman, J in Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others [All England Official Transcripts (1997-2008)** delivered 19 January 2000] where he stated that,

> *"it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice."*

**[12]** He went on further to say, secondly, that among the factors which are to be taken into account were the length of the delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice.

**[13]** These principles have been applied and endorsed in a number of authorities emanating from the Supreme Court and the Court of Appeal of Jamaica. These include the authorities referred to by both Counsel such as the often cited **Fiesta Jamaica Limited v National Water Commissioner** [2010] JMCA Civ 4 and **Strachan v The Gleaner Company Motion** no 12 1999 Delivered December 6, 1999. Most recently, the Court of Appeal in **Green and Green v Williams Anor** [2023] JMCA Civ 5 Dunbar-Green JA at paragraph 81, in examining the established principles from a number of authorities including **Commissioner of Customs & Excise, Fiesta Jamaica Limited** and **Attorney General (The) and Another v Brooks Jnr (Rashaka)** [2013] JMCA Civ 16, in dealing with an application of this nature had this to say:-

> *"There is no rigid formula and the overriding objective should be paramount in the judge's exercise of discretion whether to grant the application for extension of time to file a Defence" She also stated at paragraph 101 that:- "it is well-established that in considering whether to grant an extension of time in which to file a Defence, the Court should be guided by the overriding objective to deal with cases justly, in the context of settled factors among which are the length of the delay, the explanation for the delay, the merits of the Defence, the prejudice occasioned by the delay to the other party, the effect of the delay on public administration and the importance of compliance with time limits. Dealing with cases justly involves having regard to the appropriate allocation of the Court's resources, saving expenses and ensuring that cases are dealt with expeditiously and fairly (rule 1 of the CPR). The general rule is that a Defendant who has been dilatory in the filing of a*

*Defence must provide an acceptable explanation for that conduct as well as evidence of a viable challenge to the claim".*

**[14]** As can be gleaned from the case law cited above, in dealing with an application for extension of time to file Defence, the Court must examine the delay in applying to extend the time to file a Defence, the explanation for the delay, the merits of the application/Defence, the importance of complying with time limits, the prejudice to the other party and the delay on public administration

**THE DELAY**

**[15]** Counsel for the 1st Defendant argued that the application for extension of time was filed 3 months after the stipulated 42 days within which the defence was to be filed. As a result, he argued that the time frame was not egregious. Reliance was placed on **Phillip Hamilton v Flemmings** [2010] JMCA Civ. 19 where the delay in filing the appeal was 4 ½ months and it was allowed by the court.

**[16]** Counsel for the Claimant, whilst admitting that the delay was not inordinate took issue with whether the reason for the delay was adequate/reasonable in the circumstances.

**[17]** I agree with both parties that the delay in filing the application for extension of time to file defence was not inordinately long. Compared to a number of authorities reviewed, 3 months in this instance is not long.

**[18]** In any event, the length of the delay is only one factor the Court should consider in determining whether to grant the application. This was confirmed by Rattray J in **Devon Davis v Karen Marajah** [2019] JMSC Civ. 7 where he stated that-

*"The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole."*

**THE REASON FOR THE DELAY**

**[19]** Master Orr (as she then was), in the matter of **Wright v AG** [2022] JMSC Civ 25 stated that Rule 11.9(2) of the CPR requires all notices of application for Court orders to be supported by affidavit evidence unless a rule, order or practice direction provides otherwise. In examining this rule in relation to an Application to Extend time to file Defence, she stated that, *"Applications to extend the time to file a Defence have a further requirement that the supporting Affidavit must include evidence outlining the Defence to satisfy the requirement of a Defence of merit and exhibit the draft Defence. The Affidavit must also explain any delay. While the required evidence need not be in one Affidavit, all of the evidence must be before the Court for the application to be properly before the Court for the application to be heard."*

**[20]** The 1st Defendant outlines a series of events in the affidavit in support of his application, that he states contributed to his application being filed late. The 1st Defendant indicated that after filing his acknowledgment of service February 28, 2019, he sought legal advice with respect to the claim from Judith Clarke & Co on the same day. He stated that his wife acted upon his instructions and gave the Attorney fifteen thousand (15,000) dollars on April 11, 2019. He stated that he is a resident of the United States and he returned thinking that his legal representation was settled and paid a further fifty thousand (50,000) dollars May 2019. When he returned he was informed that the Attorney Ms. Clarke would not be able to provide full representation without the full payment of two hundred and fifty thousand (250,000) dollars being paid. This he could not afford. The 1st Defendant was then tasked with finding a new Attorney which he did and hence the application for extension of time to file defence being filed July 2019.

**[21]** Mr. Nelson relied on the authority of **Phillip Hamilton v Flemmings** that the reason given of hardship as a reason for the delay could be considered as a reasonable excuse for the delay in filing the application.

**[22]** Counsel for the Claimant argued that economic hardship without more was not a reasonable excuse. In addition, the 1st Defendant she argued failed to

establish why he believes that after one consultation that a defence was filed on his behalf. He also failed to show whether he retained Counsel and whether he asked what documents were filed on his behalf. She further stated that Counsel appeared for him in the matter March 2019, and as such, they ought to have known what documents were filed on his behalf and that a defence was not filed. Moreover, even after he realised sometime in June 2019 that no defence was filed, the application was not filed until about a month after and no explanation has been given for this further delay.

**[23]** In examining the reason proffered by the Defendant for the delay in filing his application, the starting point can be gleaned from the court in **Peter Hadadd v Donald Silvera** unreported SCCA No 31/2003 delivered on July 31, 2007 where the Court said that *"in order to justify a Court in extending time during which to carry out a procedural step, there must be some material on which the Court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."*

**[24]** Since Mr. Reddick is a lay person, there is a certain amount of ignorance as to the procedural processes involved in civil proceedings that the court will expect him not to be aware of. This is relevant to the reasons proffered by him for the delay in filing the application that the Court will examine.

**[25]** Mr. Reddick said he filed the acknowledgement of service in his own capacity February 28, 2019 and then he consulted an Attorney immediately thereafter. This shows that Mr. Reddick understood the importance of complying with timelines in civil proceedings and he could decipher the documentation served upon him to be able to file an acknowledgement of service himself.

**[26]** He said thereafter, he consulted an Attorney and was told the cost to act on his behalf and he paid for consultation for legal advice only, the sum of twelve thousand five hundred (12,500) dollars. He has not stated why he only paid for legal consultation, although he was told the total sum by Ms. Clarke to act on his behalf. It took Mr. Reddick almost another month and a half to ask his wife

to pay Ms. Clarke fifteen thousand (15,000) dollars. He stated that it is after this payment was made that he believed the defence was filed. At this juncture I wish to point out that, he has not stated the basis for this belief especially if twelve thousand five hundred (12,500) dollars which was first paid, represented consultation only and the full amount for representation was still not paid by him up to this point.

**[27]** The 1st Defendant in his affidavit went on further to say that it is in May 2019 that he paid another fifty thousand (50,000) dollars and that is when he was informed by Ms. Clarke that she could not continue to represent him until the full payment of two hundred and fifty thousand (250,000) dollars was paid. It is still not clear therefore, how Mr. Reddick could believe that based on what he paid thus far that his defence was filed. That is, twelve thousand five hundred (12,500) dollars for consultation only and then fifteen thousand (15,000) dollars a month and a half after consultation and then in May 2019, fifty thousand (50,000) dollars.

**[28]** Needless to say, when he was told this by Ms. Clarke in May 2019, he stated that he could not afford that payment and thereafter made enquiries for another lawyer and was referred to Ms. Willis.

**[29]** He doesn't give a time frame when he first made contact with Ms. Willis but he stated that he was informed in June 2019 that the defence was not filed when Ms. Willis made checks as to what documents were filed on his behalf.

**[30]** Mr. Nelson seeks to rely on hardship for Mr. Reddick's reason for not filing his application, but as far back as May 2019, he was of the belief that his defence was filed. As I stated earlier, the basis of this belief was not stated and based on the monies paid, it is not clear why Mr. Reddick would be of this view that a defence was filed on his behalf. The only time affordability and any hint of hardship arose is when he returned to Ms. Clarke's office in May 2019 and he was told she would not be able to act until a certain amount of two hundred and fifty thousand (250,000) dollars was paid. From his own affidavit, by then he

already thought that his defence was filed, so how would hardship be a relevant factor here.

**[31]** Further to this, he has not stated why having found out June 2019 that a defence was not filed, why his application was not filed until July 22, 2019. I say all of this within the context that Mr. Reddick filed his acknowledgement of service himself and within a relatively short time frame. This shows that notwithstanding that he is a lay person he is appreciative of the need to act with alacrity, hence being able to decipher and file an acknowledgment of service himself.

**[32]** Mr. Reddick's position is similar to the appellant in **Ogunsalu v Gardener** [2022] JMCA Civ 12 where the reason proffered for the delay in filing the application to set aside default judgment was that the Defendant misinterpreted the instructions of his attorney to pay and settle the retainer before the defence could be filed. The Court of Appeal at paragraph 50-52 of the said judgment noted that based on the intelligence and stature of the Defendant there is no way he could misunderstand such basic instructions and rejected the reason for the delay. I too form a similar view with respect to the applicant Mr. Reddick. Economic hardship does not arise and there is no basis on which he could have thought that his defence was already filed from the chronology of events as outlined by him.

**[33]** In addition to the foregoing, no explanation has been provided by Mr. Reddick why after discovering in June 2019 that the defence was not filed, why an application was not filed until July 2019.

**MERITS TO THE DEFENCE**

**[34]** Counsel for the 1st Defendant pointed to the affidavit of Mr. Reddick with draft Defence exhibited in urging the court that the 1st Defendant has a meritorious defence. He also sought to rely on another affidavit filed of even date, but it was pointed out that, that affidavit was in relation to another application and could not be relied on. So for the purposes of this application, it is only one affidavit

that is before the court and that is the one with the draft defence exhibited. He pointed to paragraphs 18 and 19 and the defence for reference.

**[35]** Counsel for the Claimant noted that the Defendant has not shown that he has an arguable defence. She relied on the authorities **Fiesta Jamaica Limited v National Water Commissioner** [2010] JMCA Civ 4 **and Adrian Samuda v Davis** [2017] JMSC Civ 156 **where Pettigrew Collins J cited Stuart Sime in A Practical Approach to Civil Procedure (18th Edition) at paragraph 14.30** states the following:

> *"Any denial of an allegation in the Particulars of Claim must be backed up by reasons in the defence. A Defendant who intends to put forward a different version of events from the one advanced by the Claimant has to state the alternative version in the defence (r 16.5(2)). A denial must go to the root of the allegation in the Particulars of Claim, and must not be evasive. An equivocal denial may be taken by the court to be an admission. For example, stating that 'the terms of the arrangement were never definitely agreed upon as alleged' was held to be evasive and to be an admission that an arrangement was made in Thorp v Holdsworth (1876) 3 ChD 637. A denial that follows the wording of the Particulars of Claim too closely may result in a pregnant negative – a denial pregnant with an unstated affirmative case. For example, in Pinson v Lloyds and National Provincial Foreign Bank Ltd [1941] 2 KB 72 the Claimant stated that the Defendants had 'effected purchases and sales without having been authorized by the [Claimant] to do so'. This was embarrassing, because it could have been a denial that the Defendants entered into the transactions at all, or it could have been a denial of lack of authority pregnant with an affirmative case that they had the Claimant's authority".*

**[36]** Counsel further argued that the 1st Defendant has not shown that he has an arguable defence in his affidavit and that even if one were to examine his defence, it is a classic case of bare denial which is contrary to the CPR specifically rule 10.5 of the CPR.

**[37]** The authorities have shown that, on an application to enlarge the time to file a Defence, the salient issue is whether, on the evidence relied on by the party at fault, the Court can, at the very least, form a preliminary view on the likely outcome of the case. See **Philip Hamilton v Flemmings.**

**[38]** Such an application to extend the time to file a Defence must be supported by affidavit evidence which outlines the facts being relied upon to defend the claim. This affidavit is often called the affidavit of merit. Morrison JA, as he then was, in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 noted that the affidavit of merit must demonstrate a 'prima facie Defence.' This position was followed in **Kimaley Prince v Gibson Trading & Automotive Limited (GTA)** [2016] JMSC Civ 147**.** There, McDonald J placed reliance on **B & J Equipment Rental Limited v Joseph Nanco**, supra, then stated the following at paragraph 22: 'Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the Defence and in my view this obligation is not met by exhibiting a draft of the proposed Defence…'

**[39]** Justice Kirk Anderson in examining the affidavits filed in the matter of **Smith v Jamaica Defence Force Co-operative Credit Union** [2018] JMSC Civ 29 and whether they constituted affidavits of merit stated *"…the Defendant, by its two affiants, has opted to simply exhibit a copy of a draft of the proposed Defence, deny the allegations outlined in the Claimant's Claim, and state that the proposed Defence has a good prospect of success. That was insufficient as the evidence adduced on behalf of the Defendant ought to have disclosed facts which constitute a prima facie Defence in support of the Defendant's application for the Defence which was filed out of time, 'to stand,' and that obligation has not been met by the Defendant merely exhibiting a draft of the proposed Defence to those affidavits and having stated in the affidavit evidence that that proposed Defence has a good prospect of success".*

**[40]** In the most recent Court of Appeal decision of **Green and Green v Williams Anor** the court examined the authorities of **Fiesta Jamaica Limited v National Water Commission and Philip Hamilton v Flemmings** in examining one of

the grounds of appeal which was the fact that the Master examined the draft Defence in the application for extension of time to file Defence when there was no affidavit of merit. The Court stated that the Master should not have examined the Defence without some evidence of its contents. It also held that;

> *"The requirement for some evidence of merit must mean that there should be some facts or material to make even an iota of difference by challenging the appellants' claim. There is no rigid formula and the overriding objective should be paramount in the judge's exercise of discretion whether to grant the application for extension of time to file a Defence, but, as Phillips JA observed in Philip Hamilton v Frederick Flemmings and Gertrude Flemmings, the considerations are on the premise that a defaulting party does not have an unqualified right to an extension of time. The learned master departed from this approach by granting the application without any evidence that there was a meritorious Defence. She therefore erred."*

**[41]** The court in also citing **Fiesta Jamaica Limited v National Water Commission**, confirmed the position that Harris JA, writing on behalf of this court, said: *"16. …The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3(1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit." (Emphasis added).*

**[42]** It is evident from the authorities that the merits of the proposed defence must be contained in the affidavit in support of the application and that the draft defence without an affidavit is not sufficient for such an application. Further, even if a draft defence is exhibited, the merits of the defence most be contained in the affidavit as well. Reliance cannot be placed solely on the draft defence.

**[43]** The rationale for such an affidavit of merit from a reading of the authorities, in my view comes from the fact that, if the Court is being urged to exercise its

discretion to allow a Defendant to file his defence outside of the time required by the CPR, there must be cogent evidence on which the Court is being asked to act upon. The draft Defence is just that, a draft, and I cannot examine an irregular document to see whether I should regularise same. Bearing in mind the principles enunciated by Dunbar-Green JA in **Green and Green v Williams Anor**, I will have to then examine the affidavit in support of the application filed by Mr. Reddick, to see if it contains a meritorious Defence.

**[44]** Although Mr. Nelson pointed to several paragraphs on this point, none of them point to what the defence of the 1st Defendant is or simply put his "arguable version of events". Paragraphs 1-17 outlines what transpired before Mr. Reddick filed the application and the reason for the delay. Paragraph 18 states that *"I do believe that I have a realistic prospect of success in this claim and that my defence is clear as I acted lawfully and within the powers granted to me by this honourable court, attached thereto and marked GR3 is a copy of my draft defence for identification".*

**[45]** The other paragraphs 19 to 25 speak to the delay in filing the application and the appointment of personal representative ad litem. So for all intents and purposes there is only one paragraph dedicated to the proposed defence and that is paragraph 18.

**[46]** Paragraph 18 is inadequate and vague and does not even begin to reach an acceptable threshold for an arguable defence (meritorious defence) as required by the authorities. The affidavit of merit filed by Mr. Reddick, has not revealed why the 1st Defendant is saying he acted lawfully? What are the powers that the court granted him to act within and why is he saying he acted within those powers? Those questions remain unanswered and the 1st Defendant ought to have stated his version in the affidavit and not just make bare/vague statements and then exhibit the draft defence.

**[47]** What I suspect has happened is that the 1st Defendant is of the view that merely saying that he has a meritorious defence and that the Defence is attached

without more would suffice. This is clearly evident from the one-line sentence stated in paragraph 18 of the Defendant's affidavit in support of his application.

**[48]** In the matter of **Adrian Samuda v James Davis and Frania Smith ('Adrian Samuda')** [2017] JMSC Civ 156, similarly the Defendants simply adumbrated in the affidavit filed in support of their application, that *"I believe the 2nd Defendant has a good defence on the merits of the Claimant's claim"* and thereafter stated that he craves leave to pursue same. Paragraph eight stated that the Claimant could not properly claim constitutional damages, however this assertion was acknowledged to be inaccurate by Counsel at the hearing. Paragraph nine of that same affidavit stated that, as it relates to the Claimant's claim for damages arising as a consequence of property allegedly being held by the 2nd Defendant, he Mr. Bailey had been advised and verily believe that properties belonging to the Claimant have been returned. In paragraph four of his further affidavit, Mr. Bailey exhibited the copy of the defence of the 2nd Defendant (which was filed out of time). He went on in paragraph five to state that *"the allegation of defamation is a very serious one which can have a long lasting effect on the 2nd Defendant's life if liability is pronounced upon her without a fair adjudication of the issues."* The application for extension of time was dismissed as the judge found that there was no merit in the evidence before her as the affidavit filed in support of the application *"did not speak to matters which would tend to show that the [2nd respondent] had a defence".*

**[49]** Having regards to the foregoing, the 1st Defendant Mr. Reddick, has failed to demonstrate that he has a meritorious Defence. His affidavit consists of only bare denials and Mr. Reddick has failed to demonstrate that he has a meritorious defence. The court from the authorities is prevented from examining his draft defence only and as such, his application would fail on this limb.

**PREJUDICE TO THE CLAIMANT AND THE ADMINISTRATION OF JUSTICE**

**[50]** I agree with the Claimant's submissions on the issue of prejudice. Merely stating that the Claimant will not suffer prejudice is not sufficient. In keeping with its duty to regulate the pace of litigation, the Court has adopted a strict

approach in giving consideration to the application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay with complying with the rules coupled with a lack of an arguable/meritorious defence.

**[51]** In the circumstances if the extension is granted, the Claimant would suffer prejudice compared to the 1st Defendant as there is clearly no meritorious Defence proffered by him to the Claimant's claim. The claim was filed in 2019 and several years have since passed since the Claimant filed his request for default judgment to be entered for failing to file defence.

**ORDERS**

1. The 1st Defendant's application to file his Defence out of time filed on July 22, 2019 is refused

2. Judgment is entered against the 1st Defendant in default of filing defence

3. Cost awarded to the Claimant to be agreed or taxed

4. Counsel for the 1st Defendant is to prepare file and serve formal order