IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV03965

IN THE MATTER OF ALL THAT parcel of land part of SALT POND HUT PEN now called WEST CUMBERLAND, GREATER PORTMORE, in the parish of SAINT CATHERINE being the Lot numbered ONE HUNDRED AND SIXTY-NINE on the Plan part of Salt Pond Hut Pen now called West Cumberland, Greater Portmore registered at Volume 1312 Folio 29 of the Register Book of Titles.

AND

IN THE MATTER OF the Partition Act

BETWEEN	**SHAWN MILLER**	**CLAIMANT**
AND	**NETRICIA MILLER**	**DEFENDANT**

IN CHAMBERS

Mr. Hugh Wildman, Attorney-at-Law instructed by Hugh Wildman and Company, Attorneys-at-Law for the Applicant.

Mrs. Daniella Gentles-Silvera K.C., Kathryn Williams and Analiese Minott, Attorneys-at-Law instructed by Livingston, Alexander & Levy, Attorneys-at-Law for the Respondent.

HEARD: June 1st and 21st, 2023

Application for Leave to Appeal- Whether the Applicant has a real chance of success

P. MASON J (AG.)

[1] This is an application for leave to appeal the decision of the Honourable Miss Justice O. Smith (Ag.) made on the 24th of March 2023. On March 31st 2023, the Applicant, Netricia Miller, filed a Notice of Application for Leave to Appeal. Leave is being sought on the following grounds:

> *"a. The learned trial judge erred in law in holding that the Applicant did not satisfy the conditions of Part 39.6 of the Civil Procedure Rules to set aside the default judgment against her by Justice T. Carr.*
> *b. The learned trial judge erred in law in concluding that on the affidavit evidence produced by the Applicant in the application to set aside default judgment, the Applicant did not aver enough facts to show that, had the Applicant been allowed to defend the claim, some other order would have been made.*
> *c. The learned trial judge erred in law in failing to appreciate that having regard to the evidence before her concerning service of the judgment of Justice T. Carr at the Applicant's place of work during the Covid pandemic, when persons were required to stay away from work, the strict 14 days requirement under part 39.6 of the CPR had to be relaxed especially given the evidence that the Applicant's application was 8 days out of time."*

[2] The Respondent opposes this application on the ground that the appeal does not have a real chance of success.

BACKGROUND

[3] This matter was set for trial before the Honourable Mrs. Justice T. Carr on March 1st 2022 after being adjourned on two previous occasions due to the Applicant's defiant behaviour and blatant disregard and lack of observance of the rules and processes of the court. Her attendance at trial was important as the issue as to credibility was a live one. On the day

of trial, the Defendant who is now the Applicant in this application, did not appear. Several attempts were made to contact the Applicant which proved futile. Carr J proceeded with the trial and the following orders were made in favour of the Claimant:

1. *The Claimant is entitled to 100% absolute interest in ALL THAT parcel of land part of SALT POND HUT PEN now called WEST CUMBERLAND, GREATER PORTMORE, in the parish of SAINT CATHERINE being the Lot numbered ONE HUNDRED AND SIXTY-NINE on the Plan of the part of Salt Pond Hut Pen now called West Cumberland, Greater Portmore registered at Volume 1312 Folio 29 of the Register Book of Titles.*
2. *The Defendant is to execute an Instrument of Transfer to pass her interest in the said Property absolutely to the Claimant within twenty-one (21) days of the date of this Order and shall instruct the National Housing Trust to deliver the Duplicate Certificate of Title for the said Property to the Claimant's Attorney-at-Law to facilitate the transfer.*
3. *The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the transfer of the said Property in the event that the Defendant is unwilling or unable to do so within fourteen (14) days of being notified in writing.*
4. *Costs to the Claimant to be agreed or taxed.*
5. *The Claimant's Attorney-at-Law is to prepare, file and serve this Order.*

[4] The Formal Order dated March 1, 2022 was served on the Applicant, on March 8, 2022 at The Ministry of Health & Wellness RKA Building, 10-16 Grenada Way, Kingston 5 after several attempts to serve her personally proved futile. The Applicant thereafter filed a Notice of Application for Court Orders to set aside Default Judgment on April 1, 2022.

[5] On March 24, 2023, O. Smith J (Ag.) dismissed the Applicant's application to set aside the judgment made by Carr J and gave her reasoning in **Shawn Miller v Netricia Miller [2023] JMSC Civ 60**. It is based on these events that the Applicant is now seeking an order for Leave to Appeal Smith J (Ag.) decision.

[6] In seeking leave to appeal, the Applicant is relying on the Court of Appeal Rules 2002, r. 1.8(9) which reads:

"the general rule is that permission to appeal in civil cases will only be given if the court below considers that an appeal will have a real chance of success".

[7] It is common knowledge that the determining factor in this application rests on whether the Applicant has a real as opposed to fanciful prospect of success. In the case of ***Swain v Hillman [1999] EWCA Civ J1021-8***, the court indicated that the word "real" distinguishes fanciful prospects of success. "Real" indicates that there is a "realistic" as opposed to a "fanciful" prospect of success.

[8] A court is not to analyse whether the grounds of appeal will succeed but rather whether there is a real chance of success. The Court of Appeal will only interfere with the exercise of a Judge's discretion if it is based on a misunderstanding of the law or evidence which can be shown to be demonstrably wrong (see *The Attorney General of Jamaica v John McKay [2012] JMCA App 1*).

SUBMISSIONS

[9] It is noted that Counsel for the Applicant did not file any written submissions in this matter. In his oral submissions, he contends that the order was served on the Applicant at her workplace at the Ministry of Wellness and that she was unaware of it He further stated that she applied to set it aside as soon as she became aware of it. Counsel contends that the application was filed 14 days after the Applicant was served and on that premise she would have complied with CPR r. 39.6. He further contends that O. Smith J (Ag.) did not properly exercise her discretion to set aside the judgment. He further stated that the judgment entered against his client might have been different if his client was present. He goes on to say that the reason the Applicant was absent from the trial was due to personal challenges.

[10] Counsel further states that the Applicant had been attending court via video link and that it was an isolated case for her to attend court in person. He averred that it was highly draconian to make orders against her in the circumstances.

[11] Counsel for the Respondent submits that Smith J (Ag.) correctly found that all 3 criteria under CPR r. 39.6 (2) and (3) must be satisfied for the court to grant the application to set aside the judgment as they are cumulative in nature and, based on the evidence before her, the applicant had not satisfied the three (3) criteria.

[12] Counsel for the Respondent further submits that the Applicant was well aware of the court date for trial and that she being an Attorney-at-Law and an officer of the court, could have sent a representative in her stead. Counsel further contends that the facts of ***Alice McPherson v Portland Parish Council, The National Works Agency and The Attorney General of Jamaica [2019] JMCA App 20*** a case relied on by Counsel for the Applicant, is distinguishable from the instant case. In that case, the Appellant was unaware of the date of the hearing as the Secretary who had been dealing with the matter subsequently left the firm without recording the date for the hearing in the office diary. She is of the view that O. Smith's (Ag.) judgment should not be disturbed as the Applicant was deliberate in her actions and so acted to her own detriment.

LAW AND ANALYSIS

Ground (a): The learned trial judge erred in law in holding that the Applicant did not satisfy the conditions of Part 39.6 of the Civil Procedure Rules to set aside the default judgment against her by Justice T. Carr.

[13] Rule 39.6 of the Civil Procedure Rules, 2002 (CPR) provides:

> *"(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.*
>
> *(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*
>
> *(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."*

[14] CPR r. 39.6(2) and (3) therefore imposes these criteria the Applicant must satisfy:

(a) The Application must be made within 14 days of the date of service of the judgment or order.
(b) The Application must be supported by evidence on Affidavit that there was a good reason for failing to attend the hearing.
(c) The said Affidavit must show that some other judgment or order would have been made had the Applicant attended the hearing.

[15] K. Harrison J.A in the case of **David Watson v Adolphus Sylvester Roper SCCA No. 42 of 2005** delivered on November 18, 2005, reasoned that CPR r. 39.6 is cumulative in nature as it relates to the above-mentioned criteria.

[16] The application to set aside the judgment was made on April 1st, 2022, more than 14 days after service on March 8th 2022. No application was made to extend time and there was no good explanation proffered for not being present and the Applicant further failed to establish that some other judgment might have been made had she been present at the trial.

[17] Similarly, the cases of **Shocked v Goldschmidt [1998] 1 All E.R.372, Barclay Bank PLC v Ellis [2002] The Times, 24 October 2000** and **Lord Neuberger in the Court of Appeal decision of Bank of Scotland PLC v Pereira and others [2011] 1 WLR 2391**, reinforce the position that the rules of the CPR r. 39.6 are cumulative and must be satisfied before it can be invoked to enable the court to set aside a judgment.

[18] Smith JA (Ag.) in her analysis, emphasized that the Applicant failed to satisfy all three conditions. Failure to satisfy even one of the conditions will result in an unsuccessful application.

TIMING OF THE APPLICATION

[19] According to CPR r. 39.6 (2), the application must be made within 14 days once it is proved that the absent party has been served.

[20] In the instant case, the Applicant was served with the Formal Order on March 8, 2022 at her workplace at the "Ministry of Health & Wellness RKA Building 10-16 Grenada Way, Kingston 5", the address for service given in her Acknowledgement of Service filed on November 7, 2019. This is good service. The Applicant, however, filed her application to set aside the judgment on April 1, 2022, more than 14 days after the date of service. She failed to file an application for an extension of time. Again, this rule is cumulative. The Application was late in filing so the court had no jurisdiction to set aside the judgment (see *Joscelyn Massop v Temar Morrison (by his mother and next friend Audrey White [2012]*). I therefore agree with Smith J (Ag.) that the court had no jurisdiction to set aside the judgment of Carr J.

APPLICANT'S REASON FOR HER ABSENCE ON THE DAY OF TRIAL [RULE 39.6(3)(a)]

[21] The Applicant failed to give a good reason as to why she did not attend the trial in person. As such, her failure to give a good reason should not disturb the ruling of Smith J (Ag.) under this head.

[22] Case law reinforces this position. In ***David Watson v Adolphus Sylvester Roper (Supra),*** K. Harrison, J.A. in dealing with CPR r. 39.6(3)(a) had this to say:

> *"The phrase "good reason" in 39.6(3)(a) is sufficiently clear and covers a situation where for example, the applicant did not receive notice of the trial date. The judgment in that situation will be set aside:* ***Brazil v Brazil*** *[2002] EWCA Civ 1135, The Times, 18 October 2002. In* ***Neufville v Papamichael*** *[1999] LTL 23/11/99) an application to set aside a judgment was refused, primarily because no adequate explanation was given by the claimant, who failed to attend trial, and who failed to have kept in contact with his solicitors."*

[23] Similarly, as outlined by Fraser JA (Ag.) in ***Alice McPherson v Portland Parish Council et al [supra]*** at paragraphs [47] and [48] of that judgment stated:

> *"47. The approach to the understanding of what is a "good explanation" for the purposes of the rule that deals with relief from sanctions is clearly transferable to the concept of a "good reason", in the context of explaining*

absence from a hearing, which led to an adverse order being made against the absent party.

48……. A "proper" or "good" explanation or reason must be one which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances. ***Put another way, an explanation or reason may comprehensively outline what caused a particular failing, but to be "good", it also has to have the additional quality of justifying the relief, forbearance or favourable exercise of discretion sought.****" Emphasis mine*

[24] It must be noted, as indicated by Counsel for the Respondent, that the abovementioned quotation was endorsed by McDonald-Bishop JA in **Alice McPherson v Portland Parish Council et al [2020] JMCA Civ 64**.

[25] See also **Sharlton Gilroy v Fernando Hudson [2015] JMSC Civ 117**, F Williams J (as he then was) took into account the applicant's deliberate conduct of leaving the jurisdiction and failing to keep in touch with his Attorneys, in finding that he had not proffered a good reason for his failure to attend the trial in the matter.

[26] In arriving at this decision, F Williams J borrowed the following phrase from Panton JA in the case of **Port Service Ltd v Mobay Undersea Tours Ltd and Firemen's Fund Insurance Co. SCCA No. 18/2001** delivered on 11th March 2002 at paragraph [38]:

"…..this court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

[27] The Applicant in this case was deliberate and defiant in her approach. She refused to attend court for cross examination despite being ordered by Stamp J, who reasoned that it was necessary for the parties to attend in person because the matter turned on their credibility which the court is better able to assess by observing the parties' demeanour.

The Applicant openly told the Judge that she was not attending the trial and insisted that she wanted to attend by video link. This was vehemently rejected by the Judge. The Applicant remarked that she was a single mother who did not want to leave her child unattended. The Judge indicated on October 20, 2021 that she had more than enough time to make arrangements for the child since the matter was fixed for March 1-3, 2022. Notwithstanding, the Applicant did not attend the trial in person. Additionally, there is no indication on the facts, that the Applicant was unaware of the trial dates.

[28] In the scheme of things, I totally agree with the sentiments expressed by my sister, Smith J (Ag.), at paragraph [21] of her judgment. I am of the view that based on the foregoing discussion, this ground must fail as it is without merit. The Applicant is an officer of the court and I find her conduct to be obstinate and deliberate. To date, no reasonable excuse has been offered by the Applicant. Her absence from the trial was not due to any unforeseen event.

Ground (b): The learned trial judge erred in law in concluding that on the affidavit evidence produced by the Applicant in the application to set aside default judgment, the Applicant did not aver enough facts to show that, had the Applicant been allowed to defend the claim, some other order would have been made.

[29] Morrison J (as he then was) in **Morris Astley v The Attorney General of Jamaica and The Board of Management of the Thompson Town High School [2012] JMCA Civ 64** reasoned that:

> *"….In the usual case of a judgment given in the absence of a party, this aspect of the rule could prove to be the most difficult hurdle, requiring the Applicant as it does, to demonstrate that on the merits, he/she could have prevailed had there been an opportunity to advance the case in person."*

[30] It cannot be reiterated further to state that the Applicant failed to provide any good reason for her deliberate absence at the trial. Additionally, after perusing the documents filed in favour of the Applicant, I am of the view that they are inadequate and without merit. The applicant did not provide any documentary proof to support her defence. Further, the fact

that she had not met the requirements as outlined in CPR r. 36.9, which are cumulative, the court cannot invoke its discretionary powers to set aside the judgment and enter another in its stead without more. Again, I am inclined to agree with my sister's reasoning for her refusal to set aside the judgment of Carr J.

Ground (c): The learned trial judge erred in law in failing to appreciate that having regard to the evidence before her concerning service of the judgment of Justice T. Carr at the Applicant's place of work during the Covid pandemic, when persons were required to stay away from work, the strict 14 days requirement under part 39.6 of the CPR had to be relaxed especially given the evidence that the Applicant's application was 8 days out of time.

[31] As outlined in CPR r. 39.6 (2), the application to set aside judgment made in a party's absence must be made within 14 days after the date on which the judgment or order was served on the applicant. The authorities indicate that the court has no jurisdiction to vary this rule. I am in agreement with Counsel for the respondents in that in the circumstances, the Applicant ought to have applied for an extension of time within which to file her application. This was not done.

[32] In the case of ***Joscelyn Massop v Temar Morrison [supra]***, Brooks Ja examined the application of CPR r. 39.6 more particularly CPR r. 39.6(2). He was of the view that if the Applicant did not make the application within 14 days of service of the formal order, the court has no jurisdiction to set aside the judgment entered in the absence of an application for an extension of time to file the application to set aside the judgment. This is the predicament of the Applicant in this case.

[33] Much reliance seemed to be placed on the fact that the Applicant was served at her place of work without noting that the address for service she gave to this court was contained in her acknowledgement of service filed on November 7, 2019. Service was therefore validly carried out. The fact that this matter occurred during the Covid 19 pandemic does not change anything. Especially in light of the Applicant's failure to inform the court of the actual date on which the documents were brought to her attention. Consequently, I am in agreement with the decision made by Smith J (Ag.), hence, the application for leave to appeal fails.

CONCLUSION

[34] In light of the foregoing, I am of the view that the Applicant's appeal has no real chance of success. In the circumstances, I make the following orders:

1. The Applicant's Notice of Application for Leave to Appeal is refused.
2. Costs of this Application to the Respondent to be agreed or taxed.
3. The Applicant's Attorneys-at-Law shall prepare, file and serve this order.