[2022] JMSC Civ 104

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU2014 HCV03039

IN THE MATTER of a family home situate at West End Negril in the parish of Westmoreland

AND

IN THE MATTER of the Property (Rights of Spouses) Act, 2004

BETWEEN	**MITCHELL WEDDERBURN**	**CLAIMANT**
AND	**SALVATORE BRUCCELERI**	**DEFENDANT**

Leonard Green and Makene Brown instructed by Chen Green and Company for the claimant.

Canute Brown and Miss Zaieta Sykers instructed by Brown Godfrey and Morgan for the defendant.

HEARD: 8th December 2021 & 31st January 2022

Civil Procedure - Rule 39.6(1) of Civil Procedure Rules - application to set aside judgment given in defendant's absence at trial - whether good reason given for the defendant's failure to attend trial - whether some other order would have been made had the defendant or his counsel been in attendance.

MASTER C. THOMAS (AG.)

Introduction

[1] This is an application by the defendant seeking orders to, among other things, set aside a judgment which was given in his absence at the adjourned trial of this claim on 10th May 2018.

Background

[2] The claimant filed the instant fixed date claim form proceedings on 25th June 2014 claiming declaratory reliefs in respect of property situated at West End, Negril in the parish of Westmoreland ("the property"). The claimant sought a declaration in relation to: her ownership of the property, which she described as the "family home", with the defendant as "joint owners in equal shares" or alternatively that the defendant holds the property "on trust" for both of them in "equal shares" or "proportionate to their contributions to the construction" or alternatively "in such shares as the court shall determine". She also sought orders for a division of the property in accordance with the shares as determined by the court; and for consequential orders such as a valuation of the property and the first option to purchase the defendant's share of the property.

[3] The claimant's evidence in support of the claim as contained in her supporting affidavit filed on 25th June 2014 in brief is that sometime in or around January 1986, she met the defendant and shortly thereafter they became intimately involved. She deponed that in or around March 1987, the defendant purchased the property and they lived there in various structures ranging from a tent to a board house and in February 1988, they started constructing a concrete house on the land. During the construction of the house the defendant would visit from the United States of America on average three times a year and spend approximately six weeks on each of those visits. While the defendant was abroad, he would send money to pay workmen and for other business related to their family and she would see that these things were done. During the construction of the house, she used funds from

a bar that she operated to fund the construction. Sometime in December 2013, the defendant told her he no longer wanted to be with her as he was seeing a younger woman. He left and did not return to Jamaica until about February 2014 when he informed her that he was going to sell the land and that she would not get any money from the sale.

[4] The defendant's evidence in summary is that in or around 1986 he bought the land and put up a board house on it. In or around 1992, the claimant moved in with him. She brought her two sisters and her brother with her. He started a building with two floors. He deponed that at the time he was seeing the claimant he was living with another woman in the USA, with whom he had two children. He and the woman separated in 2001. He stated that for about eight years between 1993 and 2001, he did not visit Jamaica. He did not visit Jamaica every year after that and he travelled to different places. Whenever he came "home, he would stay at the house". He stated that he and the claimant had not spoken to each other for over two years and had not slept together for about three years. He returned to Jamaica in 2012. He stated that he and the claimant never lived as man and wife and that when he did not visit Jamaica for eight years, the claimant was involved with another man and that that man lived at the house with her and that he (the defendant) was cohabiting with another woman throughout that period. He also denied that the claimant contributed anything towards the building of the house.

[5] The procedural history reveals that on 15th April 2015, the first hearing took place at which it was ordered, among other things, that affidavits were to be exchanged on or before 15 May 2015 and trial was fixed for 29th July 2015. At the pre-trial review on 4 June 2015, the defendant was granted an extension of time to 10 June 2015 to file his affidavit in response. When the claim came on for trial on 29th July 2015, the defendant's affidavit which was filed on 17th June 2015, after the extended deadline given at the pre-trial review, was ordered to stand. The trial was adjourned to 25th April 2016 and the claimant was permitted to file affidavits in response.

[6] On the adjourned trial date of 25th April 2016, the trial was again adjourned. The new trial date was 18th January 2017 and it was specifically ordered that the defendant should be available to be cross-examined by video-link, if not present in court, and that the defendant's attorney-at-law should be responsible for the making of the appropriate video link arrangements. When the claim came on for trial on 18th January 2017, it was further adjourned to 10th October 2017 and it was ordered that all affiants including the defendant were to attend for cross-examination and the parties were permitted to file further affidavits.

[7] On the new adjourned trial date of 10th October 2017, the trial was further adjourned to 10th May 2018 and it was ordered that the claimant should file and serve two additional affidavits in support of her claim on or before 13th December 2017 and the defendant was permitted to respond on or before February 2018. The affidavits on behalf of the claimant were filed on 15th January 2018.

[8] On the fourth adjourned trial date of 10th May 2018, neither the defendant nor his counsel was present. However, the claimant and her counsel were present and the court made the following orders:

(1) Defendant's Statement of Case is struck out and judgment entered in favour of the claimant in terms of paragraphs 1,3 and 9 of the Fixed Date Claim Form dated 24th June 2014 and filed on the 25th day of June 2014.

(2) Costs to the claimant to be agreed or taxed.

(3) Liberty to apply

(4) Formal order to be prepared filed and served by the claimant's attorney-at-law.

Orders 1,3 and 9 of the fixed date claim form read as follows:

> (1) That the Claimant and Defendant are the joint owners in equal shares in the untitled family home situate at West End, Negril in the parish of Westmoreland.
>
> (3) An order for Division of the family home in accordance with the respective shares of the parties declared at Order one (1) above.
>
> (9) That the Claimant and Defendant are joint owners of the furniture, fixtures and appliances contained in the family home and on the property where the family home is.

[9] The instant application mentioned at paragraph 1 was made by way of notice of application for court orders filed on 25th May 2018, and sought, in addition to the setting aside of the judgment entered on 10th May 2018, an order for there to be a new trial of the claim and a stay of execution of the judgment. The grounds relied on in the application are:

> 1. The Applicant was not present at the trial at which judgment was given against him and in accordance with the provisions of rule 39.6(1) of the Civil Procedure Rules 2002, he may apply to set aside that judgment;
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> 2. The Applicant has a good reason for failing to attend the hearing because being an alien he was deported from the island in 2014 and seeking permission to land in order to attend court and participate in the proceedings in the claim.
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> 3. It is likely that had the Applicant attended and was present or represented, some other order, may have been made, among them an adjournment, on such terms as the judge thinks just, or one permitting the cross-examination of witnesses by the Applicant's legal representative and the

terms of the judgment may have been more favourable to the Applicant [sic] might have been made.

[10] The application was supported by two affidavits: one sworn to by the defendant's counsel, Mr Canute Brown, and the other by the defendant. In his affidavit in support, the defendant deponed that in the same year that he was served with the claim, he was deported from Jamaica, He also deponed that he had been visiting Jamaica for over 30 years, acquired property and would stay for whatever period the immigration authority allowed him and that he had never been in breach of the laws of Jamaica so he was shocked at the treatment he received when he applied for his extension of time in June 2014. He further deponed that the travel documents for him and his disabled brother were kept by the immigration authority until he was arrested and taken to court for overstaying.[1] He exhibited letter dated 30th June 2014 from the Passport Immigration and Citizenship Agency which stated that the application for an extension of stay in Jamaica by himself and his brother were denied and they were expected to depart the island no later than 14th July 2014. He deponed that he wanted to come back to Jamaica to complete his business affairs and to defend the claim but he had not received permission to land. He had been making efforts in the United States of America to get that permission and had also sought the assistance of lawyers in Jamaica. On the day of the trial, his brother telephoned him in the early afternoon to say that the claimant was claiming that she is now the owner of the property.[2]

[11] The affidavit evidence of Mr Brown on behalf of the defendant was to similar effect. Mr Brown also deponed that when the claim first came on for trial, based on the judge's observations, the claimant got an adjournment to in order to file further affidavits and that the judge urged the use of video-link method of having the applicant's testimony. He deponed that they had explored this method but because of the remote area in Pennsylvania at which the defendant resides, the use of

[1] See paragraph 3 of affidavit
[2] See paragraph 8 of affidavit

technology proved impracticable for him[3]. Mr Brown also deponed that he had had a hearing scheduled in the Court of Appeal for the 7th May 2018 and that on Friday, 4th May 2018, he was advised by the Court of Appeal that it would be heard on 10th May 2018, the date of trial of the instant claim. He deponed that he had advised the registry at the Supreme Court as well as counsel for the claimant as to the difficulty that had arisen and that he would make efforts to have counsel present.[4] On the morning of trial, the matter that he had in the Court of Appeal went beyond the one hour allocated and he was unable to leave until 11am. When he arrived at the judge's chambers at the Supreme Court, he was advised that the matter had already been disposed of.[5]

[12] [No evidence was filed on behalf of the claimant. Therefore, there is no evidence as to what transpired before the judge on the morning of 10th May 2018.

Submissions

[13] Mr Brown submitted that the defendant has never been served with the order but had learnt "along the way" that it was a 50:50 share to each party. He submitted that rule 39.6 of the Civil Procedure Rules ("CPR") is sometimes regarded as being akin to setting aside a default judgment and that it goes to the heart of the principle that the court should hear both sides or both parties before making a determination on a claim. He relied on the cases of **Bank of Scotland v Pereira** [2011] 1 WLR 239 and **TBO Investments Ltd v Mohun Smith** [2016] EWCA 403 as to the approach of the English Court of Appeal in relation to the interpretation and application of the relevant English rule which is similar to our rule 39.6, although he pointed out that the English rule places a higher burden on the applicant in that it requires him to show that he has a reasonable prospect of success at the retrial, whereas under our rule 39.6 what is required is for the applicant to show that the defaulting party's presence and participation would have made a difference in that

[3] See paragraph 7 of affidavit of Canute Brown filed on 25 May 2018
[4] See paragraph 11
[5] See paragraph 12

the desired result would have had to be favourable to the applicant in some meaningful way.

[14] He referred to the decision of **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19, for his submission as to the significance of the conduct of the applicant's legal representative in determining whether the applicant has a good explanation for his absence from the trial. He submitted that it is not that the applicant's physical absence was the only factor, but it was the absence of the party that justifies the making of the order in their absence. He submitted that there was no question that the main reason for the defendant's absence was that he was under a disability and there was no evidence of an avoidance of the trial. The defendant, he argued, had every reason to want to attend the trial to defend the claim.

[15] Mr Brown submitted that a different result could have been arrived at if the applicant had attended ranging from the grant of an adjournment to enable the claimant to comply with the case management orders or face sanctions or a dismissal of the claim or an award to the claimant of an interest considerably less than one half of the property since the judge would have likely considered, among other things, that the evidence was insufficient to show cohabitation between the parties as man and wife for five years immediately preceding the filing of the claim; the house was not the family home; and if the house was to be treated as other property under the Property Rights of Spouses Act, the claimant made no contribution to its acquisition or improvement.

[16] On behalf of the claimant, Mr Green submitted that it is a requirement under rule 39.6 of the CPR that the party and his attorney should know the order. If they do not know the order, he argued, how can they say that another order would have been made? It impossible to satisfy the rule without knowing the order, he submitted.

[17] It was also submitted on behalf of the claimant that the deportation of the defendant could not be regarded as sufficient reason for nonattendance as the defendant had

the option and was ordered to make arrangements to appear via video link from as early as 2016. Mr. Green submitted that the affidavit in support of the application did not provide a cogent and reasonable explanation in light of the technological opportunities which were available to the defendant in 2014 and would have been more available at the time of the court's orders.

[18] Mr. Green also submitted that there is nothing in the order of the court nor does the defendant depone to any fact that he has been prejudiced by the order. In the absence of any allegation of prejudice which may lead to the conclusion that a different order might have been made had the defendant been in attendance, the court was duty-bound to deny the application as prayed. In order to convince the court that some other order would have been made then the defendant would have to show some prejudice. The prejudice would be that he did not receive the order that he would have wanted. It was not for the court to infer prejudice; it was for the claimant to prove it, he argued.

[19] Mr. Green also argued that the court should take into account the length of time the matter has taken. If the defendant really felt that the order had caused him loss and prejudice, he had ample time to show loss. Also, if the court were to accept that the defendant could not have availed himself of video link, there was no explanation for his absence at this hearing having regard to the availability of the ZOOM platform.

[20] No arguments were advanced by either party in respect of a stay of execution of the judgment.

Discussion and Analysis

[21] The application has been made pursuant to rule 39.6(1) of the CPR, which states:

> *39.6 (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.*

[22] The authorities have clearly established that rule 39.6(3) is cumulative in its application with the consequence that the order or judgment made in the absence of a party cannot be set aside unless both requirements have been met. As K Harrison JA put it in **David Watson v Adolphus Sylvester Roper** SCCA No 42 of 2005 (delivered 18 November 20015), "there is no residual discretion, therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied"[6] (see also Morrison JA (as he then was) in **Morris Astley v the Attorney General & the Board of Management of the Thompson Town High School** [2012] JMCA Civ 64[7]; and Phillips JA in **Ivor Walker v Ramsay Hanson**[8].

[23] Rule 39.6(2) requires that the application must be made within 14 days after the judgment or order was served on the applicant. The order was filed on 11th July 2018 and the court file reveals that a requisition was issued by the registrar. There is no indication that the requisition was complied with and it does not appear that the order was ever perfected or served. Mr Brown in his oral submissions, stated

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[6] See page 9 of judgment
[7] See paragraph [30]
[8] See paragraph [34] of judgment

that the defendant was never served with the order. Mr Green did not dispute that the order was not served; instead it impelled him to submit that since the defendant does not know what the order is, this was a basis, without more, to dismiss the application.

[24] As Mr Brown did not take this point and no issue was raised with respect to the promptness of the application, I will not detain myself further with this issue save to say that the claimant's counsel ought to have been concerned that they had failed to serve the order as required by the order of the court and in circumstances where service of the order is the trigger for the time to start running for the application to be made.

[25] In considering whether there was a good reason for the defendant's failure to attend, while I accept that our rule 39.6(3) does not fully mirror the relevant rules in the United Kingdom, I find that the difference in the rules is not of such significance as to render the approach of the courts in the United Kingdom on this issue inapplicable. The relevant rule in that jurisdiction is rule 39.3(5) which states:

> *(5) Where an application is made … by a party who failed to attend the trial, the court may grant the application only if the applicant;*
>
> *(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an orders against him;*
>
> *(b) had good reason for not attending the trial; and*
>
> *(c) has a reasonable prospect of success*

I therefore find to be highly persuasive the dictum of Lord Neuberger MR in **Bank of Scotland v Pereira** that what amounts to a good reason is fact-sensitive and that the assessment of the reason proffered should not be too rigorous. I am also

of the view that while the assessment should not be too rigorous, the court is still required to carefully examine the reason.

[26] The reason advanced by the defendant for his failure to attend is that he was deported from Jamaica shortly after the filing of the claim and was unable to obtain permission to land in Jamaica. There is no evidence disputing the defendant's and Mr Brown's evidence that the defendant had been deported from Jamaica from 2014. There is also no evidence to dispute the defendant's assertion that he had been making efforts to get permission to land. In my view, absence from the trial as a result of a deportation order is, on the face of it, a good reason.

[27] However, it seems to me that this cannot be the end of the issue of whether there is a good reason for nonattendance in circumstances where attendance at the trial need not to have been physical. I agree with the submissions on behalf of the claimant that from as far back as 2016, the court contemplated and made provision for the attendance of the defendant at trial by means of video link. In 2016 when the claim came on for trial on the second occasion, the court made an explicit order for the defendant to attend trial to be cross-examined by videolink, if not present in court, and that the defendant's attorney-at-law should be responsible for the making of the appropriate video link arrangements. Therefore, the sufficiency of the reason for the failure to attend must also be assessed in the context of his attendance by video-link.

[28] The claimant did not speak to the reason for his failure to attend trial virtually; however, his counsel, Mr Brown, indicated that the remoteness of the defendant's residence or location made it impracticable for this method to be utilised by him. I agree with counsel for the claimant that there is no explanation as to why it was impractical for the defendant to use the technology. No details are given as to the physical features or attributes of the defendant's location that would have made it impracticable for him to participate by video link. In addition, no evidence was given to explain why he could not have made arrangements to attend the hearing at some location that would have been facilitative of a video-link hearing. In addition,

there is no indication as to whether this state of affairs remained the case from 2016, when the order was made, up to the date of the trial on 10 May 2018. This was important information that ought to have been addressed as it cannot be assumed that the situation remained the same in 2018 particularly given the advancement of technology over the years. In the absence of this critical information and given the time period of almost two years between the making of the order for the attendance by video link and the trial, I find that no good reason has been advanced for the failure of the defendant to attend the trial by video link.

[29] Notwithstanding my finding that there is no good reason for the defendant's failure to attend trial, I am of the view that this would not be the end of my consideration as to whether there was a good reason for the failure to attend trial. Given that by virtue of rule 2.4 of the CPR, "a party" is defined as including the party to the claim as well as the party's legal representative and there is nothing from the context of rule 39.6(1) to indicate that the rule is specifically referring to the attendance of the party and not his attorney-at-law, I must be satisfied that there was no good reason for the absence of the defendant's attorney from the trial in order to conclude that there was no good reason for the failure to attend the trial. In other words, if there is a good reason for the failure of the defendant's counsel to attend the trial, this would be sufficient basis on which to conclude that rule 39.6(3)(a) of the CPR has been met. I am guided in this approach by the dictum of Phillips JA in **Walker v Hanson** where the argument was made in opposition to an application under rule 39.6 of the CPR that though the attorney-at-law for the absent party had proffered a good reason, no reason had been proffered for the party's failure to attend. The learned judge of appeal stated:

> *I do not think that counsel's submission that the fact that there was no evidence why the applicant himself was absent as against his attorney-at-law, was fatal to the application, as the rule refers to "a party" not being present at the trial. The sub-rule therefore would of necessity also be referring to "a party", and rule 2.4 of the CPR (the definition section) provides that*

> *"party" includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only". This rule does not do so. In those circumstances, in my view, there was a good reason for the respondent's failure to attend the hearing*.

[30] It is my view that the reason given by Mr Brown for not attending the trial is a good one as it is accepted that a fixture before a superior court would take priority over a fixture in a lower court and he had no control over the duration of the hearing in the Court of Appeal. I do not think that Mr Brown's failure to revert to the registry as to whether he was able to secure counsel to hold brief for him affects the strength of the reason given the short period of time in which he would have had to brief counsel and also having regard to the fact that he had advised the registry of the Supreme Court and counsel for the claimant of his difficulty.

[31] I therefore find that a good reason has been proffered for the failure of the defendant's counsel to attend the trial.

[32] It is now necessary to consider whether had the party been present it is likely that another order would have been made.

[33] In **Morris Astley**, Morrison JA (as he then was) expressed the view that "in the usual case of a judgment given at trial in the absence of a party, this aspect of the rule could well 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".[9] It follows from this that there will be cases where judgment has been given at trial in the absence of a party but because of the surrounding circumstances, it is not necessary for that party to prove the merits of his case to succeed in his application to set aside the judgment. I consider that this may occur in cases where leading up to trial, the circumstances

[9] See paragraph 37 of judgment

are such that all the case management orders including the orders for the filing and service of witness statements or affidavits have not been complied with or the requisite bundles pursuant to Part 39 of the CPR have not been filed with the result that the parties are not ready for trial. This was the case in **Walker v Hanson** where Phillips JA found that had the defendant's counsel been present she would have placed heavy reliance on her illness and the fact that the documentation and the bundles for the trial had not been settled and therefore, it seemed that the parties were not ready for trial.[10]

[34] Mr Brown deponed that had he been present he would have sought an adjournment to give the defendant sufficient time to have the Minister consider granting his permission to land. He also depones that even though the defendant was absent, he would have raised the issue of the failure on the part of the claimant to file the affidavits ordered by the court and also sought the leave of the court to cross-examine the claimant on her affidavit.[11]

[35] It is significant that on 16th October 2017, an order was made for the filing of two additional affidavits on behalf of the claimant on or before 15th December 2017 and the defendant was permitted to file a response to these on or before February 2018. The affidavits were filed out of time on 15th January 2018 but there is no indication that they were served on the defendant to allow him the opportunity to respond. It is not clear whether the defendant's attorney-at-law was even aware that those affidavits had been filed particularly in light of his evidence that had he been present he would have sought the leave of the court to cross-examine the claimant only. In fact, it was submitted in the written submissions that the issue of the failure to file and serve the affidavits would have been raised with the court.

[36] No evidence has been filed on behalf of the claimant and therefore there is no evidence disputing the assertion that the defendant was not served with the two additional affidavits filed on behalf of the claimant on 15th January 2018. It seems

[10] See paragraph 37 of judgment
[11] See paragraph 13 of affidavit

to me that in order for the court to have made an order taking into account the evidence contained in the two additional affidavits, fairness to the defendant would have required that those affidavits be served on him for him to be given an opportunity to respond. There is no way of knowing how the defendant would have responded to those affidavits including whether he would have filed affidavits sworn to by other persons in support of his defence. It was therefore critical that the affidavits were served on him.

[37] I do not have the benefit of any evidence as to what transpired before the learned trial judge including whether she was aware of the failure to serve the two additional affidavits on the defendant. I also do not have any evidence as to the evidence that the court considered in granting the orders that it did and so there is no way of determining whether the evidence contained in those two additional affidavits was considered by the court; but there is no reason to think that these two affidavits were not considered. It is my view that had Mr Brown been in attendance he would have alerted the court to the failure of the claimant's attorney to serve the two additional affidavits on the defendant, and since the claimant was no doubt relying on these affidavits in support of her claim, in fairness to the defendant, the court would likely have granted an adjournment to allow for service of the affidavits on the defendant. Such an order would likely have been made because although the claim had had a long history before the courts and the court would have been concerned with the claimant's interest in having her claim determined, this consideration would have to be balanced against fairness to the defendant. In light of this, I do not think it is necessary to consider whether the merits of the defence would have resulted in another order being made. I have therefore come to the conclusion that had the defendant, through his counsel, been present, it is likely that another order would have been made.

[38] I do not agree with Mr Green that it is necessary for the claimant to give evidence of prejudice before the application can be successful. The authorities do not support the position that such a requirement should be imported into the application of rule 39.6(3) of the CPR.

Conclusion

[39] I therefore find that the defendant has made good on his application to set aside the judgment that was obtained in his absence on 10th May 2018. Accordingly, I order as follows:

1. The judgment entered on 10th May 2018 in favour of the claimant is set aside.

2. The claimant shall serve the Affidavit of Karlene Doulat and the Affidavit of Marva Coote-Brown both filed on 15th January 2018 on the defendant on or before 7th February 2022.

3. The defendant is permitted to file a response to the affidavits mentioned at paragraph 2 of this order on or before 7th March 2022.

4. No further affidavits are to be filed after 18th March 2022.

5. Pre-trial review is set for 5th April 2022 at 2:00pm for ½ hour.

6. Leave to appeal is granted.

7. The defendant's attorneys-at-law are to prepare, file and serve this order.