



[2019] JMSC Civ 189

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV00411

BETWEEN	GERALD WEST	CLAIMANT
AND	ALTON MARTIN	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

IN CHAMBERS

Mr. Keith Bishop instructed by Bishop & Partners for the Claimant

Miss Kamau Ruddock instructed by the Director of State Proceedings for the Defendants

Heard: May 15, June 26 and September 20, 2019

Application for Extension of Time to File Defence pursuant to rules 10.3 (9) and 26.1(2)(c) of the Civil Procedure Rule (CPR) as amended – Length of Delay – Whether a good explanation is offered for the delay – Whether the Defendant has a good defence – whether the Claimant would suffer prejudice if the application is granted.

MASTER P. MASON

Background

[1] The Claimant Gerald West on January 28, 2008 filed a claim for damages for negligence. He alleges that due to the negligence of the police, parts were

removed from his Nissan Sunny motor car, whilst the said vehicle was in their custody. It is significant to note that the Claim Form and Particulars of Claim were served on the 2nd Defendant on January 29, 2008 who thereafter, acknowledged service on February 8, 2008.

- [2] By letter dated February 25, 2008, the 2nd Defendant sought instructions from the Commissioner of Police and were advised by letter dated April 7, 2008 that the 1st Defendant was on vacation and would not return until April 30, 2008.
- [3] By letter dated May 5, 2008, the 2nd Defendant's attorney-at-law wrote the Claimant's attorney-at-law requesting that no further steps be taken since they had not yet obtained instructions. In the Attorney General's Chambers, the file was reassigned on more than one occasion due to the fact that the attorneys with conduct of the matter had left the 2nd Defendant's chambers without moving the matter along.
- [4] On March 28, 2011 the 2nd Defendant filed a Notice of Application for Court Orders with Supporting Affidavit seeking an extension of time to file a Defence. It is noted that neither party made any effort to move the matter forward. However, on April 3, 2019, the 2nd Defendant's attorney-at-law filed a further Affidavit in Support of Application for Extension of Time to File Defence exhibiting a draft Defence. The Claimant's attorney-at-law filed an Affidavit in response on May 15, 2019 asserting that none of the affidavits filed by the 2nd Defendant provide any reasonable excuse for the delay in obtaining full instructions in order to file a Defence. The 2nd Defendant now seeks permission to file the said Defence with a view to the matter being ventilated.

Chronology of Events

- (a) *The Claim Form and Particulars of Claim were filed on January 28, 2008 seeking damages for negligence as a result of the removal of parts from the alleged Nissan Sunny motor car registered 1870 DV.*

- (b) *The Claim Form and Particulars of Claim were served on the 2nd Defendant on January 29, 2008.*
- (c) *The 2nd Defendant filed an Acknowledgment of Service on February 8, 2008.*
- (d) *On February 25, 2008 the 2nd Defendant's attorney-at-law sought instructions from the Commissioner of Police.*
- (e) *On April 7, 2008, the Commissioner of Police by letter stated that the 1st Defendant was on vacation leave until April 30, 2008.*
- (f) *By letter dated May 9, 2008 the 2nd Defendant requested instructions from the Assistant Commissioner of Police.*
- (g) *By letter dated March 23, 2011, the 2nd Defendant requested further instructions from the Assistant Commissioner of Police.*
- (h) *On March 28, 2011, the 2nd Defendant filed a request for information from the Claimant dated March 23, 2011 for the following information:*
 - (i) *Whether the vehicle was returned to the Claimant*
 - (ii) *If the vehicle was returned, the date it was returned; and*
 - (iii) *The motor vehicle parts that were removed from the vehicle.*
- (i) *On May 24, 2011 the Claimant's attorney-at-law filed answer to the request for information dated May 20, 2011 as follows:*

Question #1 No

Question #2 Not Applicable

Question #3 The entire car was taken

- (j) *On April 3, 2019 the 2nd Defendant's Application to Extend Time to file Defence was adjourned by Master Harris to May 15, 2019 for the applicant to*

file a further Affidavit on April 3, 2019 and to file and serve a Notice of Adjourned Hearing.

- (k) *On April 3, 2019 the 2nd Defendant filed a further Affidavit in Support of Application for Extension of Time Exhibiting a draft Defence.*
- (l) *On May 15, 2019 Mr. Keith Bishop attorney-at-law for the Claimant filed an Affidavit in response to the Affidavits of Faith Hall and Althia Whyte.*
- (m) *On June 7, 2019 the 2nd Defendant filed and served written submissions and authorities.*

Issue

- [5] Does the court have jurisdiction to grant an extension of time to the 2nd Defendant to file its Defence given the fact that there was a long delay by the registry in giving a date for the hearing of the application?

Statement of Law

Rule 10.3 (a) of the CPR states that:

“a Defendant may apply for an Order extending the time to file a Defence”.

Rule 26.1 (2) (c) of the CPR provides that:

“Except where these rules provide otherwise, the court may, extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application is made after the time for compliance has passed.”

- [6] The above rules are absent of any explicit/clear cut criteria to be used by the court in exercising its discretionary power to enlarge time. In the absence of specific guidance, reliance is placed on the overriding objective and case law.
- [7] Rule 1.1 (1) of the CPR imposes an obligation on the court whereby the court must ensure that cases are dealt with justly. Rule 1.1 (2) (a) goes further to

express that when dealing with cases firstly the court must ensure, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position among other things.

- [8] However, approved guidelines which influence the court's approach to enlarge time are to be found in case law. In the case of **Fiesta Jamaica Limited v National Water Commission** [2010]JMCA Civ 4, a case involving the issue of filing a Defence out of time, Harris J A adopted and applied the principles laid down by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Home (Ilkeston) Limited and Others** [2001] EWHC Ch 456.

"In deciding whether an application for extension of time was to succeed 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. Among the factors which had to be taken into account were the length of the delay, the explanation of the delay, the prejudice to the other party, the merit 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 questioning of prejudice."

- [9] The court has a discretionary power to grant an extension of time provided there is sufficient material before it to do so. In the case of **Strachan v The Gleaner Company** Motion No. 12/1999 delivered on December 6, 1999, Panton JA (as he then was) outlined the factors which a court should take into consideration in the exercise of its discretion on an application for extension of time:

- (i) The length of the delay
- (ii) The reason for the delay
- (iii) Whether there is an arguable case for an appeal
- (iv) The degree of prejudice to the other party if time is extended

- [10] It is well established that provided the criteria is met as outlined in the authorities, extension of time is left to the discretion of the court.

[11] In the case of **The Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23, the court had this to say about an application for an extension of time to file a Defence.

[12] Harris J A

“The court is endowed with discretionary powers to grant an extension of time but will only do so where it is satisfied that there is sufficient material before it which would justify it in so doing that justice has to be done.”

Submissions

[13] The 2nd Defendant filed its submissions on June 7, 2019, in which it avers that the procedural position and overriding objective favour an extension to a Defendant who is unable to meet time lines because the Defendant face certain difficulties in obtaining instructions. Further, the 2nd Defendant submits that it being unique in nature and a creature of instructions, and pursuant to the Crown Proceedings Act, whenever there are allegations of a tort involving a crown servant, it is obliged to gather instructions in order to draft a Defence. It contends that it is a tedious process to gather instructions as some of the state entities it represents are located island wide.

[14] In the instant case, the 1st Defendant, a Police Officer was on extended vacation at the time the claim was filed. As such, the 2nd Defendant adopts the guidelines set out in the case of the Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks (a minor) by Rashaka Brooks Snr (his father) [2013]JMCA Civ 16) coupled with the overriding objective in assessing its application for an extension of time to file a Defence, they are:

- (i) The application is made within reasonable time
- (ii) There are good reasons for the delay
- (iii) There is good reason why the extension should be granted; and
- (iv) There would be no undue prejudice to the Claimant.

- [15] Under the 1st and 2nd limbs the 2nd Defendant concedes that there was delay in making its application and attributed the delay and good reason for the delay to the file being reassigned to several attorneys in the Chambers, oversight and staff resignations.
- [16] With regard to the third limb, the 2nd Defendant submitted that an extension of time ought to be granted in the interest of justice on the basis that the parts of the Claimant's Nissan Sunny motorcar registered 1870 DV were removed while in police custody. The said car had been examined at the Swallowfield Examination Depot where it was revealed that the car had two separate identification numbers (VIN), one of the numbers belonged to another Nissan Sunny motor car reported stolen at the Stony Hill Police Station. The Claimant was questioned and his car was seized by the 1st Defendant pending investigation.
- [17] The 2nd Defendant is of the view that the matter ought to be ventilated at trial to reveal the true owner of the car.
- [18] On the issue of prejudice, the 2nd Defendant submitted that the Claimant would not suffer undue prejudice having not filed or served an application for permission to enter Default Judgment and therefore believe that costs would be an appropriate remedy in the circumstances.
- [19] The Claimant on the other hand, regrettably did not comply with the court's order made on May 15, 2019 where it was ordered that the parties are to file and serve submissions with authorities on or before June 7, 2019.
- [20] The Claimant instead made oral submissions to substantiate his position that the 2nd Defendant has not raised a good or sufficient reason for not filing a Defence in the prescribed time. He further argued that the delay was inordinate and the 2nd Defendant did not proffer any suitable explanation for the delay.

- [21] The Claimant is of the view that he has been prejudiced and would continue to suffer undue prejudice if an extension of time is granted to the 2nd Defendant as it would mean an even longer delay for the matter to be resolved.
- [22] The Claimant maintains that no proper explanation was given for the retention of his vehicle. He has been out of pocket since its retention, sometime after January 19, 2006. The Claimant opposes the application and has posited that an award of costs in the circumstances to be unjust.

Analysis

- [23] Was the application to extend time to file Defence made within a reasonable time?
- [24] The Claim Form and Particulars of Claim were filed on January 28, 2008 and served on the 2nd Defendant on January 29, 2008. The 2nd Defendant acknowledged service on February 8, 2008. On March 28, 2011 some three years and one month after the Pleadings were served the 2nd Defendant filed an application for an extension of time to file a Defence. I find that this was an inordinate length of time.

Is there a good reason for the delay?

- [25] According to an Affidavit of Alethia Whyte, an attorney-at-law attached to the Attorney General's Chambers filed on March 28, 2011, the 2nd Defendant wrote several letters to the Commissioner of Police requesting instructions pertinent for filing a Defence in the matter. Apart from receiving information that the 1st Defendant was on vacation leave and would resume duties on April 30, 2008, her Affidavit revealed that partial instructions were received but were not enough to file a Defence. It is noted that no mention was made as to when the partial instructions were sent and whether any further instructions were expected. The Affidavit spoke to further request being made by the 2nd Defendant.

[26] The Affidavit of Ms Whyte is devoid of any good explanation for the delay in securing instructions. There were follow up requests for information, but there is no evidence of urgency on the part of 2nd Defendant. It would appear that little or no effort was exerted by the 2nd Defendant to retrieve the much needed information from the Commissioner of Police. In this age of modern technology, there is no evidence to indicate that the 2nd Defendant even attempted to email, fax or visit the office of the Commissioner of Police to extract pertinent material necessary to draft a Defence.

[27] Further, I do not find favour with the deponent's casual remarks at paragraphs 11 and 12 of her affidavit where she states:

"Our failure to file a Defence is not intended to thwart the rules of the court, but we are constrained by not having complete instructions in the matter."

Paragraph 12:

"That there is no intention to prejudice the Claimant and the Claimant would not be adversely prejudiced by our delay in filing a Defence. However, if the Claimant suffers any prejudice an order for costs will be sufficient compensation."

[28] I am of the view that the above paragraphs help to demonstrate the lack of effort on the part of the 2nd Defendant as it continues to rely on the same excuse of not being able to retrieve instructions in time.

[29] It is noted that a Further Affidavit in Support of Application for Extension of time to file Defence was filed some eight years later on April 3, 2019 after the Affidavit of Ms. Whyte. This reinforces my position that the 2nd Defendant neglected to give this matter the attention it deserved. The Affidavit of Ms Faith Hall filed on April 13, 2019 does not add anything new to the effort, it merely makes reference to paragraph 10 of Ms. Whyte's Affidavit and exhibits a draft Defence.

[30] The 2nd Defendant in her submissions briefly mentions that the application was delayed due to oversight and the fact that the file changed hands due to high

staff resignation. I regard this explanation as being woefully inadequate. In fact there is no reasonable or good explanation given for the lapse of approximately 11 years delay in filing a Defence, and I find that there is no reasonable explanation for this delay.

- [31] It was decided in the case of **Peter Haddad v Donald Silvera SCCA No. 3/2003** that some reason must be given for the delay and at paragraph 12 Smith JA said:

“As has already been stated the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But since reason must be proffered..... The guiding principle which can be extracted is that the court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly favoured factor. As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly. The court in my view should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application.”

Is there a good reason why the extension should be granted?

- [32] In the case of **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend) (Supra)**, Brooks JA at paragraph 16 said:

*“The facts in the instant case, however, have a significant feature distinguishing it from the cases to which the learned Master referred that is the **Philip Hamilton case** and **Fiesta Jamaica Ltd. v National Water Commission**. It is to be noted that in each of those cases, the defendant had provided, in support of its application for extension of time, a draft defence. The draft defence enabled the court to access whether there was any merit to justify it going forward.”*

- [33] Based on the foregoing, it is necessary to examine the proposed Defence to decipher whether the content is meritorious and present a real prospect of successfully defending the Claim. The 2nd Defendant filed two affidavits, however, I am of the view that the affidavits do not contain any cogent or credible information necessary to give weight to the draft Defence. Therefore in the absence of any supportive evidence in the affidavits, it is against this background that the draft Defence is examined.

- [34] The Claimant alleges that he bought a 1999 Nissan Sunny motor car with registration 1870 DV. The car was involved in an accident and was taken to the Constant Spring Police Station. He further alleges that he entered an agreement to sell the car, which fell through. The Claimant took back the car and repaired it. It was realised at the Swallowfield Examination Depot that the car had two separate identification numbers (VIN). One of the numbers belong to a stolen Nissan Sunny. The matter went to court but was dismissed on January 19, 2006 because the complainant did not attend court on any occasion. The 1st Defendant took the Claimant's car to investigate the matter, the claimant alleges that the 1st Defendant refused to hand over the car.
- [35] It is noted that on an application made on August 23, 2006 the learned Resident Magistrate ordered the car be returned to the Claimant. The car could not be returned to the Claimant as parts had been removed from the vehicle. The 2nd Defendant in its defence did not deal with this allegation, and has offered no satisfactory answer to the issue.
- [36] The 1st Defendant owes a duty of care to the Claimant to ensure that the Claimant's vehicle is safe and secure while it is in the 1st Defendant's custody. However, the vehicle was vandalised during this time and no account is given by the 1st Defendant for the current condition of the vehicle. The Claimant has been deprived of the use of his vehicle since August 2006.
- [37] The 2nd Defendant submits in its defence that "it is very possible that the car is not the Claimant's". This is insufficient to constitute a defence as it does not provide any evidence that the vehicle does not belong to the Claimant.
- [38] Based on the above, I am of the view that the Claimant has a real prospect of succeeding as the Defence is without merit and as such there is no good reason advanced by the 2nd Defendant for an extension of time to file a Defence.

Would the Claimant be prejudiced if the 2nd Defendant is granted permission to file its Defence out of time

- [39] The 2nd Defendant submits that there would not be undue prejudice to the Claimant since he did not take any steps to move the matter forward. Further, the 2nd Defendant believes that costs would remedy any prejudice suffered by the Claimant.
- [40] I do not support that view, in fact, I believe that the Claimant is prejudiced and will continue to be prejudiced until this matter is resolved. The Claimant has been deprived of the use of his motor car from as long as August 2006 when it was ordered by the Resident Magistrate to be returned to him.
- [41] If the 2nd Defendant is allowed to file a Defence at this late stage it would prevent the Claimant from having his matter dealt with sooner as opposed to later. The matter would likely proceed to mediation within 90 days and it may not be successful. Added to that, trial dates are some four years away.
- [42] Before concluding this matter, I find it necessary to remark on the issue of delay. The overriding purpose of the rules is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings. The long delay works against the Defendant's application for an extension of time and against the Claimant in that he is prejudiced and continues to suffer financially.
- [43] The claim was filed in January 28, 2008 and neither the Claimant nor the Defendant saw it fit to move the matter forward. During that time, the Claimant neglected and or omitted to file an application for permission to enter Default Judgment. Both parties are derelict in their duty to their clients as they fail to observe the overriding objective which ensure fairness and equity while dealing with cases justly.
- [44] In circumstances like this, it is the Claimant who suffers. I have noted that the 2nd Defendant has pointed blame towards the registry of the Supreme Court in failing to fixing a date, but I am of the view that either party could have taken steps to ensure that the matter was set down for hearing and dealt with expeditiously.

Instead, neither party saw it fit to have the matter determined in a timely manner. Accordingly, the issue of costs should be determined in the claim.

[45] In view of the foregoing, I conclude that the 2nd Defendant's application must fail. Accordingly, I make the following orders:

1. The 2nd Defendant's application to file Defence Out of Time is refused.
2. The Claimant is granted permission to enter Default Judgment against the 2nd Defendant.
3. Judgment is entered for the Claimant against the Defendant in Default of Defence.
4. Case Management Conference is fixed for October 23, 2019 at 11:00a.m. for ½ hour.
5. Assessment of Damages is fixed for November 24, 2020.
6. Costs to be costs in the claim.
7. The Claimant's attorney to prepare, file and serve the Formal Order.