[2018] JMSC Civ 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 03928

BETWEEN	**LYN'S FUNERAL HOME**	**CLAIMANT**
AND	**PAUL FEARON**	**DEFENDANT**

IN CHAMBERS

Craig Carter, instructed by Althea McBean and company, for the Claimant

Everton Dewar, instructed by Everton Dewar and Company, for the Defendant

HEARD: July 10 & 31, 2018

DEFENDANT'S APPLICATION TO SET ASIDE DEFAULT JUDGMENT – WHETHER OR NOT DEFAULT JUDGMENT WAS REGULARLY OBTAINED – WHETHER APPLICANT CAN PLEAD INCONSISTENT ALTERNATIVE GROUNDS IN SUPPORT OF APPLICATION – WHETHER THE FAILURE TO SERVE ACCOMPANYING DOCUMENTS ALONG WITH THE CLAIM FORM AND PARTICULARS OF CLAIM RENDERS THE CLAIMS A NULLITY – HOW TO PROPERLY DISPUTE THE COURT'S JURISDICTION TO TRY THE CLAIM

ANDERSON, K.J

BACKGROUND

[1] This is an application to set aside a default judgment. The claim arose out of an unpaid debt. On the 20th of January, 2007, the claimant entered into an agreement with the defendant for a loan of $1,500,000.00 mortgaged using a specified premises, as collateral for that loan. The claimant avers that the defendant agreed to pay a monthly sum of $150,000.00, for a period of 68 months at an interest rate of 20% per annum. It is alleged that the defendant had only made one payment of $100,000.00, up until the date when the defendant's application to set aside default judgment came on for hearing in this court, when that hearing was presided over, by me. The defendant has failed to make payments according to that agreement and the sum that has been claimed by the claimant is $8,739, 670. 53.

[2] The claimant filed a claim form and particulars of claim on August 14, 2014. An affidavit of service, deponed to, by Junior Hollingsworth, was filed on August 27, 2015, outlining that the defendant was served with the claim form and particulars of claim. A default judgment was sought and obtained by the claimant on August 27, 2015, because the defendant failed to file an acknowledgement of service and/or a defence. The defendant filed a notice of application for court orders on March 15, 2018, seeking to set aside that default judgment.

APPLICANT'S/DEFENDANT'S SUBMISSION IN SUPPORT OF APPLICATION

[3] The defendant/applicant asserts that he was never served with the requisite court documents and was only made aware of these court proceedings, pertaining to this claim against him, when he was served with the default judgment.

[4] Upon being served with the default judgment, his attorney attended the Supreme Court Registry to obtain a copy of the court's file when, after having reviewed that file, it was discovered that Form 6, the application to pay by instalments, was not a part of the documents alleged to have been served. It is argued that the absence of Form 6 from the documents served, makes the default judgment irregularly

obtained and the application to set aside default judgment, should be granted as a result.

[5] It is contended that the applicant was not served in accordance with **Civil Procedure Rules (CPR) 8.16(1)** and that said failure rendered service of the claim form irregular. **Rule 8.16(1)(e)** outlines that where the claim is for money, a claim form '**MUST**' (highlighted only for emphasis) be filed with a form of application to pay by instalments (Form 6). The applicant's counsel, has submitted that the word 'must' used in **rule 8.16(1)**, makes the service of a form of application to pay by instalments, mandatory. The applicant's counsel relies on the authority of **Dorothy Vendryes v Richard Keane and Karene Keane** – [2010] JMCA App 12, to support his submissions.

[6] In **Vendryes** a claim form was filed without the required forms under **Rule 8.16(1)**. Harris, JA outlined that **Rule 8.16(1)** expressly specifies that, at the time of service the requisite forms must accompany the claim form. The language of the rule is plain and precise. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that the default judgment must be set aside.

[7] The applicant also seeks to rely on the authority of **Claim No. 2011 HCV 05718 First Global Bank Limited v Garfield Dussard**, [2015] JMSC Civ 19 (hereinafter referred to as '**First Global Bank Case**'), delivered on February 19, 2015, where Mr. Justice Rattray, in this court, abided by the Court of Appeal's position, as had been expressed in the **Vendryes** judgment, when he stated in paragraph 23, that failure to comply with the provisions of **Rule 8.16(1)** may deprive a defendant of the opportunity to utilize those forms for his advantage. Rattray, J found that the claimant was in breach of **Rule 8.16(1)** and as a result, the default judgment obtained was irregular and must be set aside.

[8] The applicant submits that the default judgment was irregular because of the non-compliance with **Rule 12.4 of the CPR**, regarding the requirement to prove service. **Rule 12.4** outlines:

> *'The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgement of service, if-*
>
> (a) *The claimant proves service of the claim form and particulars of claim on that defendant.'*

Although there is no express provision in that rule, which requires that the claim form must be served along with other documents, this provision cannot stand alone and must be read in conjunction with **Rule 8.16(1)**, which clearly states that the documents must be served along with the claim form and particulars of claim.

[9] Also, if default judgment is irregularly obtained, there is no need to consider the factors outlined in **Rule 13.3 of the CPR**. Once it is proven that the judgment was entered irregularly, it is a nullity and cannot be cured by this court and must be set aside as of right.

[10] Finally, it is the applicant's counsel's contention, that the applicant/defendant, had not, in this matter, at any time, admitted the claim and acted in any manner, such as to grant the claimant a waiver in this matter.

RESPONDENT'S/CLAIMANT'S SUBMISSIONS IN OPPOSING APPLICATION

[11] The claimant/respondent submits several grounds as to why the application to set aside default judgment should be dismissed.

[12] Firstly, it is contended that the court should not allow the applicant to plead obviously inconsistent alternative grounds. The case of **Lavery Company ltd v Wong Lee Yuk Ping Agnes and Kelly Wong** [2017] HKEC 55, HCA 393/2016, outlines that it must only be in exceptional cases, that a party should be entitled to plead inconsistent alternative arguments. In the present case the applicant

contends that he was not served with the claim form and particulars of claim, along with accompanying documents and only came to know of the proceedings when the judgment in default was served on him.

[13] According to the respondent's counsel, it is obviously inconsistent for the defendant to alternatively allege that he was served with the claim form and particulars of claim, yet not with Form 6. The defendant has given sworn testimony, by means of affidavit evidence, as to his not having received service of any documents and therefore, he should be barred from relying on a further alternative ground which is completely inconsistent and a mutually exclusive factual assertion, that he was served with originating documents pertaining to this claim, without form 6.

[14] Secondly, the respondent contends that the applicant should not be permitted to posit an assertion, without substantiating evidence. This principle is highlighted in the case: **Amy Bogle v The Transport Authority et al** [2015] JMSC Civ 258, which also illustrates that where a litigant wishes to rely on another litigant's failure to comply with legal requirements as part and parcel of their defence, then evidence must be placed before the court to support the allegation. The respondent does not need to satisfy the court that all requirements were met.

[15] The defendant/applicant avers that the default judgment should be set aside, because Form 6 was not attached to the court's copy of the claim form and particulars of claim. The Court of Appeal however, in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, outlined that it is not a nullity for a claim form to be served on a defendant without accompanying documents but rather, an irregularity of service.

[16] The respondent asserts that the default judgment was properly obtained. **Part 12.5 of the CPR** outlines the conditions to be satisfied where a party fails to file a defence. The issue of service must be determined on a balance of probabilities. In determining this issue, the court must consider the affidavits of Junior

Hollingsworth, the process server. Mr. Hollingsworth outlines the date and time that he personally served the documents on the defendant, and that he knew the defendant for over 30 years. The defendant is essentially asserting that Mr. Hollingsworth is dishonest. No request however, was made, to cross-examine Mr. Hollingsworth. The omission to summon Mr. Hollingsworth for cross- examination, puts the court in a precarious position, since it would be deprived of the ability to properly ascertain, who is a witness of truth, in this matter, with respect to an issue on which there exists conflicting evidence and the parties who have respectively provided to this court, that conflicting evidence, on affidavits were not tested/challenged on that evidence of theirs, by means of cross-examination.

[17] The respondent/claimant also asserts that the defendant/applicant does not have a real prospect of successfully defending the claim. **Rule 13.3 of the CPR** outlines that the court may set aside/vary a judgment entered under **Part 12** if, *inter alia*, the defendant has a real prospect of successfully defending the claim. The test for, 'real prospect of success,' was set out in **Swain v Hillman and another** [2001] 1 All ER 91. Also, in **Nanco v Lugg & B&J Equipment Rental Limited** [2012] JMSC Civ 81, McDonald- Bishop, J (as she then was), highlighted that an application to set aside default judgment must be accompanied by an affidavit of merit, setting out a defence. It is submitted that the defendant/applicant has not provided an affidavit of merit to show a defence to the action.

[18] Finally, the claimant/respondent contends that setting aside the default judgment in the circumstances would not give voice to the overriding objective and the interests of justice. Significant prejudice would be caused to the claimant/respondent if the judgment were to be set aside. The loan in this matter was from 2007, which means that the claimant would have been out of pocket for more than 12 years and this state of affairs would continue if the judgment is set aside.

LEGAL ISSUES

[19] The following issues have arisen, for this court's determination:

1. Can the applicant be allowed to plead inconsistent alternative grounds?
2. Whether or not the default judgment was regularly obtained.

LEGAL CONCLUSIONS OF THE COURT

Issue 1- Can the defendant/applicant be allowed to plead inconsistent alternative grounds?

[20] The averment of the claimant/respondent is that the court should not allow for the defendant/applicant to plead 'obviously' inconsistent alternative grounds. The claimant/respondent's counsel has relied on the authority of **Lavery Company Ltd v Wong Lee Yuk Ping Agnes and Kelly Wong** [2017] HKEC 55, HCA 393/2016 delivered January 13, 2017 which outlines that it must only be in exceptional cases, that a party should be entitled to plead inconsistent alternative arguments. In the present case, the applicant contends that he was not served with the claim form and particulars of claim, along with accompanying documents and only came to know of the proceedings when the judgment in default was served on him.

[21] The claimant/respondent argues that it is obviously inconsistent for the applicant to alternatively allege that he was served with the claim form and particulars of claim, yet with no Form 6. The defendant/applicant has given sworn testimony as to his having not received service of any documents and should be barred from relying on a further alternative ground, which is a completely inconsistent and a mutually exclusive factual assertion, that he was served with originating documents of the claim, without Form 6.

[22] It must be noted that the authority submitted by the respondent is from a first instance court in Hong Kong and is, at most, persuasive to this court. It has been

standard practice in this jurisdiction, that alternative arguments may be made, as long as they are not incredulous.

[23] Furthermore, the applicant is not asserting that he was not served and that if he was served, he was served irregularly. The defendant/applicant is asserting that he was not served at all and was only made aware of the proceedings when he was served with a copy of the default judgment. Afterwards, his attorney went to the Supreme Court Registry to obtain a copy of the claim and noticed that Form 6 was missing. The applicant is submitting that the absence of Form 6 from the documents on the court's file, pertaining to this matter, means that the claim is a nullity and the default judgment was irregularly obtained. It is my considered view, that there is no good reason to deny the applicant, the opportunity to pursue those submissions.

Issue 2- Whether or not the Default Judgment was regularly obtained?

[24] The success or failure of this application will be based on whether the default judgment was regularly obtained. The power of the court to set aside a default judgment, which has been irregularly obtained, is outlined in **Rule 13.2 of the Civil Procedure Rules,** 2002 as amended in 2006:

> *'(1) The court must set aside a judgment entered under **Part 12** if judgment was wrongly entered because-*
>
> *In the case of failure to file an acknowledgment of service, any of the conditions in **Rule 12.4** was not satisfied;*
>
> *In the case of judgment for failure to defend, any of the conditions in **Rule 12.5** was not satisfied;*
>
> *The whole claim was satisfied before judgment was entered.'*

The defendant/applicant did not file an acknowledgement of service, and judgment against him was entered, as a consequence of the default on his part, with respect to the filing of an acknowledgement of service and therefore, the burden of proof

is on the defendant/applicant to satisfy this court, that the conditions outlined in **Rule 12.4 of the CPR**, were not satisfied.

[25] **Rule 12.4 of the CPR** outlines the requirement that the claimant proves service of the claim form and particulars of claim on the defendant, in order for the registry to enter a default judgment against the defendant:

> *'The registry at the request of the claimant must enter a judgment against a defendant for failure to file an acknowledgement of service, if-*
>
> (a) ***The claimant proves service of the claim form and particulars of claim on that defendant*** (highlighted for emphasis)
>
> (b) *The period for filing an acknowledgement of service under **Rule 9.3** has expired;*
>
> (c) *That defendant has not filed-*
>
> *(i) An acknowledgement of service; or*
>
> *(ii) A defence to the claim or any part of it.'*

[26] The defendant/applicant contends that he was never served with the claim form and particulars of claim in accordance with **Rule 12.4** and was not aware of the proceedings until he was served with the default judgment. Alternatively, the defendant/applicant avers that the absence of Form 6 from the court's copy of the claim form, renders the claim a nullity. Hence, the default judgment should be set aside as of right.

[27] The claimant/respondent avers that failure to serve Form 6 does not render the claim a nullity, but instead, constitutes an irregularity of service. Also, it is argued that the defendant/applicant has failed to discharge his burden of proof that he was not served with the claim at all, or that the service was an irregularity.

In determining whether the judgment was regularly obtained in this case, the following questions must be determined:

(i) Was service of the claim proved?

(ii) What is the effect of failing to serve Form 6 with the claim form and particulars of claim? and,

(iii) Was the service irregular?

(i) Was service of the claim form and particulars of claim proved?

[28] In order to be granted a default judgment in accordance with **Rule 12.4**, the claimant/respondent filed an affidavit of service by Junior Hollingsworth on August 27, 2015. Mr. Hollingsworth stated that he visited the address of the defendant/applicant at Florence Close, Santa District, Santa Cruz P.O. in the parish of Saint Elizabeth on September 19, 2014 at about 3:40 p.m. At that time, he saw the defendant whom he has known for thirty years (30) and served him with the claim form and particulars of claim for the matter. Based on the affidavit evidence of Mr. Hollingsworth and that no acknowledgement of service was filed, the Registry was both entitled and bound by law, to enter a default judgment against the defendant.

[29] The defendant/applicant has given evidence that he was never served with any documents, which directly contradicts the evidence given by Junior Hollingsworth. How is the court to deal with the opposing evidence regarding service?

[30] It is a settled principle that, he who asserts must prove. The burden always rest on the shoulders of every applicant who applies for a default judgment to be set aside, to prove on a balance of probabilities that said default judgment should be set aside. If the applicant fails to meet that burden, then of necessity, the default judgment that was issued by the court, must remain intact and effective. In the present case, to support the application, the applicant has filed affidavit evidence,

which he has personally deponed to. In that written evidence of his, he has stated that he was in Manchester at the time of the alleged service, that being nowhere near Saint Elizabeth. Clearly, the court cannot accept both the evidence of the defendant and of Mr. Hollingsworth, as constituting the truth.

[31] In the Privy Council decision of **Western Broadcasting Services v Edward Seaga** [2007] UKPC 19, at paragraph 17, it was illustrated that where there are divergent views on affidavit evidence, cross-examination must be permitted to resolve the dispute.

[32] In the **Western Broadcasting Services** case, a radio programme had published defamatory remarks about the claimant/respondent, the former Prime Minister of Jamaica. A settlement was made where it was stated that the defendant/appellant would, *inter alia*, publish an apology. Negotiations broke down between the parties and the respondent sought to enforce the agreement. The appellant however, contended that there was no agreement. The parties submitted divergent affidavit evidence, but the judge at first instance did not allow cross-examination. The Court of Appeal agreed with the judge's decision. The Privy Council disagreed with both the trial judge and the Court of Appeal noting at paragraph 17:

> *'… the procedure adopted [disallowing cross-examination] was unfair and went outside the ambit of the judge's power of case management. Similarly, the Court of Appeal was wrong to uphold the judge's factual conclusion, given the unresolved conflicts of evidence. As the Board held in **Chin v Chin** [2001] UKPC, paragraph 14, in the absence of cross-examination it was in no better position than the judge to assess the credibility of the respective deponents.'*

[33] **Western Broadcasting Services** merely illustrates what is settled practice, that where there is divergent affidavit evidence there must be cross-examination to help the court determine the credibility of the witnesses. In the present case it is clear that there is divergent affidavit evidence.

[34] Bearing in mind that the burden of proof is on the defendant/applicant, the onus was on him to apply for cross-examination in order to test the veracity of the evidence given by Junior Hollingsworth. No such application to cross-examine was made, hence the divergent evidence, cannot be resolved by this court, in terms of ascertaining who is, in affidavit evidence, being truthful and who is not, as regards the alleged service of the claim documents on the defendant, by the claimant's process server – Mr. Hollingsworth. In the circumstances, this court has concluded that the defendant/applicant has failed to prove that the default judgment obtained against him, was irregularly obtained.

(ii) <u>What is the effect of failing to serve Form 6 with the claim form and particulars of claim</u>

[35] Recent case law from Jamaica's Court of Appeal, has stipulated that failure to comply with **Rule 8.16(1)** does not render the claim a nullity but an irregularity of service. In **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2, the appellant was served with the claim form and particulars of claim without the accompanying documents, in accordance with **Rule 8.16(1)**. The appellant filed an acknowledgement of service but did not file a defence. Default judgment was entered against the appellant. Damages were assessed, and the bailiff entered the appellant's premises to execute the judgment. At that stage, the appellant made an application to set aside default judgment, on the basis that the claim was not served with the accompanying documents in accordance with **Rule 8.16 (1)**.

[36] McDonald-Bishop, J (as she then was) distinguished **Vendryes** and concluded that the respondent's failure to serve the accompanying documents did not render the service a nullity but was an irregularity of service, meaning that the defendant could waive its right to receive the accompanying documents by its conduct. Given that the appellant had filed an acknowledgement of service and taken part in several proceedings regarding the matter, McDonald-Bishop, J opined that the appellant had waived its rights.

[37] Morrison, JA agreeing with the reasoning of McDonald-Bishop, J, outlined at paragraph 37:

> *'Indeed, it is difficult to see why, as a matter of principle, it should follow from a failure to comply with **Rule 8.16(1)**, which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular, as Sykes, J and this court found in **Vendryes**, I would have thought that the validity of the claim form itself would depend on other facts, such as whether it was in accordance with **Part 8 of the CPR**, which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service because of non-compliance with **Rule 8.16(1)**, should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule.'*

[38] The position taken by the Court of Appeal in the **Joseph Nanco** case relaxes the rigid principle enunciated in **Vendryes**. The failure to serve accompanying documents, along with the claim form and particulars of claim in accordance with **Rule. 8.16(1)** does not render the claim a nullity; it is an irregularity of service. An irregularity of service can be waived based on the defendant's conduct. The Court of Appeal's reasoning, as enunciated in the **Nanco** case, ought, to my mind, as far as is possible so to do, to be complied with, by this court. In the present case, the absence of Form 6 from the claim form, if proven by the defendant/applicant, would be an irregularity of service and not, render the claim, a nullity.

(iii) Was the service irregular?

[39] At first glance, the service seems irregular. The supplemental affidavit of service filed by the claimant/respondent and which was deponed to, by Junior Hollingsworth, on March 29, 2016 outlines all the documents that were served on the defendant and noticeably, it has not been mentioned in the affidavit, of his, that Form 6 was served on the defendant/applicant, notwithstanding that same ought

to have been served, since this claim pertains to an unpaid, specified debt owed by the defendant to the claimant. The claimant/respondent has never alleged that Form 6 was served.

[40] It should be noted however, that the judgment in default which was entered by the Registrar, is a judgment in default of acknowledgement of service, just as was the case in **Vendryes**. The **Joseph Nanco** case was expressly distinguished by Morrison, JA at paragraph 60:

> *'[60] Having considered all the circumstances of this case... the issues raised in the instant matter make it distinguishable from what obtained in **Vendryes**. In **Vendryes**, the defendant had apparently done nothing to waive the irregularity, unlike this case. Accordingly, I find that, any irregularity there was in service of the claim on the 2nd defendant was waived and so the default judgment obtained in default of defence is not irregular. There is thus no irregularity forming a proper basis for setting aside of the default judgment in issue as of right under **Rule 13.2(1)**.'*

[41] **Rule 26.9** is applicable, even in cases which have underlying facts, either the same as, or similar to those which existed in **Vendryes**, such as, for example, in this case. Morrison, JA addressed that, in the **Joseph Nanco** case at paragraphs 32-34:

> *'[32] But the appellant relies even more heavily on **Vendryes** itself, in which Harris, JA twice characterised the claim form as a nullity (paragraphs [27] and [34]). In considering the significance of this, context is, of course, all important. The two issues in **Vendryes**, it will be recalled, were whether Sykes, J was correct (i) to set aside the default judgment by reason of the non-compliance with **Rule 8.16(1)** in serving the claim form; and (ii) having set aside the judgment, to proceed to exercise his case management powers by ordering summary judgment against the defendant on the ground that she did not have a defence with a real prospect of success. On the first issue, in respect of which the court agreed with the judge, no question arose as to the validity of the claim form itself and the only matter for consideration was the legal effect of the respondent's*

*failure to serve all the documents required by **Rule 8.16(1)** to be served with the claim form. This is clear from paragraph [12] of Harris' JA's judgment, in which she stated that the failure to comply with **Rule 8.16(1)** 'clearly amounts to an **irregularity** which demands that, in keeping with the dictates of **Rule 13.2**, the default judgment must be set aside.'*

[33] The second issue calls for consideration in somewhat greater detail. As I have already pointed out (see paragraph [16] above), the claim form and particulars of claim were amended, but the amended documents were not served on the appellant. Before entering summary judgment, Sykes, J had rehearsed the allegations contained in the original claim form, but, as Harris, JA put it (at paragraph [24]), '...he ignored the fact that the amended claim form and amended particulars of claim were the effective pleadings before him.'

*Among the grounds of appeal filed by the appellant in **Vendryes** were these:*

> *'(a) That the Learned Judge erred as a matter of law, in that, he failed to apply and/or misapplied the correct principles of law and the proper considerations relevant to the effects of an amendment on the statement of case as originally filed (see **Warner v Sampson** [1959] 1 All ER 120).*
>
> *(b) That the learned Judge failed to appreciate that there was no or no valid claim before the court owing to the respondent/claimant's failure to serve the amended claim form filed on the 29th October 2007 on the appellant/defendant (see **CPR 8.14**).'*

[34] In support of these grounds, counsel for the appellant made the following submission (as summarised in the judgment of Harris, JA, at paragraph [17]):

> *'... if the judgment in default is a nullity, as, at the time of the entry of the judgment, the original claim had ceased to exist. The original claim… being not in existence would no longer define the issues between the parties to be resolved at a trial and as a consequence, it could not have properly formed the*

foundation upon which a default judgment could have been entered. The amended claim related back to the date of the filing of the original claim…'

[42] In the **Joseph Nanco** case, it was concluded by Morrison, JA in the Court of Appeal and by McDonald-Bishop, J in this court, that the defendant had waived the irregularity by having filed an acknowledgement of service and not, therein, challenged the jurisdiction of the court, to try the claim. See Morrison, JA's analysis in that regard, at paragraphs 45-56 and at paragraph 59.

[43] Interestingly, in the **Vendryes** case, Harris, JA at one stage, referred to the claimant's failure to comply with **Rule 8.16(1)**, as an irregularity. See paragraph 12. Yet, at a later stage of her judgment, in the same case, Harris, JA referred to the claim form as having been a nullity and presumably did so, on the basis that **Rule 8.16(1)** had not been fully complied with, by the claimant.

[44] In any event though, in the **Vendryes** case, the court took the view that **Rule 26.9** has no applicability, in circumstances wherein, **Rule 8.16(1)** has not been complied with. Morrison, JA though, in paragraph 37 of **Joseph Nanco** has outlined, that **Rule 26.9** is applicable in circumstances wherein, **Rule 8.16(1)** has not been complied with. **Rule 26. 9** reads as follows:

'26.9 (1)This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure of failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4)The court may make such an order on or without an application to a party.'

[45] If a defendant wishes to defend a claim, he must file an acknowledgement of service – **Rule 9. 2(1) of the CPR** – which is expressed in mandatory terms, requires this. **Rule 9.2(1)** reads as follows:

> *'(1) A defendant who wishes-*
>
> *(a) to dispute the claim; or*
>
> *(b) to dispute the court's jurisdiction must file at the registry at which the claim form was issued an acknowledgement of service in form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgement of service to the claimant or the claimant's attorney-at law.'*

In the present case, the defendant/applicant never filed an acknowledgment of service, prior to the default judgment having been entered against him. He filed an acknowledgement of service on March 27, 2018, after the default judgment had been entered against him. That acknowledgement of service therefore, at this stage, serves no useful purpose. The filing of same is unnecessary as outlined in **Rule 13.4**:

> *'(1) An application may be made by any person who is directly affected by entry of judgment.*
>
> *(2) The application must be supported, by evidence on affidavit.*
>
> *(3) The affidavit must exhibit a draft of the proposed defence.'*

[46] Thus, if the defendant/applicant wished to challenge the court's jurisdiction to try this claim, he ought to have first, filed an acknowledgement of service and then, an application for a declaration that the court has no jurisdiction to try this claim as outlined in **Rule 9.6(1) of the CPR**. **Rule 9.6(1)** reads as follows:

> *'(1) A defendant who –*
>
> *(a) Disputes the court's jurisdiction to try the claim; or*
>
> *(b) Argues that the court should not exercise its jurisdiction,*

may apply to the court for a declaration to that effect.'

[47] Of course, though, the defendant would not have been able to file any acknowledgement of service in circumstances wherein he was, as he has alleged, never served with even the claim form or particulars of claim, much less, any accompanying documents, as mandated by **Rule 8.16(1**). **Rule 8.16(1)** reads as follows:

> *'(1) When a claim form is served on a defendant, it must be accompanied by –*
>
> *(a) a form of acknowledgement of service (form 3 or 4);*
>
> *(b) a form of defence (form 5);*
>
> *(c) the prescribed notes for defendants (form 1A or 2A);*
>
> *(d) a copy of any order made under **Rules 8.2 or 8.13**; and*
>
> *(e) If the claim is for money and the defendant is an individual, a form of application to pay by instalments.'*

[48] Accordingly, it was incumbent on the defendant/applicant, for present purposes, to have challenged by means of cross-examination, the claimant/respondent's deponent's evidence that the defendant/applicant was served with the claim form and particulars of claim. Having not decided to do so, it can hardly be unjust for the defendant/applicant to face the consequences of the alleged service on him of that claim form and particulars of claim. The primary consequence of same, is that, as happened here, wherein the defendant/applicant has failed to file an acknowledgement of service or defence in response, is that a default judgment will likely be entered against that defendant.

[49] Reliance on **Rule 8.16(1)** in that sort of circumstance, is, it seems to me, misplaced. There cannot be anything unjust in refusing to set aside a default judgment, in circumstances wherein the defendant has not challenged the jurisdiction of this court to try the claim which has been brought against him, this

even though it is his contention, now that default judgment has been entered against him, that he was either never served with the claim form, or any accompanying claim documentation at all, or at the very least, was served with the claim form and requisite accompanying claim documentation, save and except for Form 6.

REAL PROSPECT OF SUCCESS

[50] The claimant/respondent submits that the defendant/applicant has no real prospect of success in accordance with **Rule 13.3 of the CPR**. It should be noted that the defendant/applicant never intended to argue in accordance with **Rule 13.3**, because it was their only contention that the judgment was irregularly obtained. Therefore, there is no need to assess the viability of the defendant/applicant's defence.

CONCLUSION

[51] In concluding, the application to set aside the default judgment is dismissed. The defendant/applicant has not discharged his burden of proof to satisfy the court that the application should be granted. The defendant/applicant, by having omitted to apply for cross-examination, on clearly divergent evidence, could not prove on a balance of probabilities, that he was not served. Also, the absence of Form 6 from the court's copy, does not render the claim a nullity, but, would be an irregularity of service.

[52] In order for the defendant/applicant to have succeeded on his present application, on the basis that the service was irregular, he would have had to have filed an acknowledgement of service and then disputed the court's jurisdiction to try this claim. No acknowledgement of service was filed and therefore, the defendant/applicant cannot properly dispute this court's jurisdiction to try this claim.

[53] To my mind, the requirements as specified in **rule 9.2(1) of the CPR**, for an acknowledgement of service to be filed, if the court's jurisdiction is being disputed,

ought to be given a mandatory interpretation, bearing in mind the context of that particular rule of court. Additionally, that acknowledgement of service should be filed before a default judgment is entered against the defendant because otherwise, if filed thereafter as occurred in this case, said acknowledgement of service will serve no useful purpose save and except to allow for that defendant to pursue an application to set aside default judgment, or to be heard on the few matters enunciated in **rule 12.13 of the CPR**. An application disputing this court's jurisdiction to try the claim, is not one of those, 'few matters.'

[54] This court's orders are therefore as follows:

i) The defendant's application to set aside default judgment which was filed on March 15, 2018 is denied;

ii) The costs of that application are awarded to the claimant;

iii) The defendant shall file and serve this order.

.....
Hon. K. Anderson, J.