



[2023] JMSC Civ. 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV02446

BETWEEN	CLINTON BARNETT	1ST CLAIMANT/ 1ST RESPONDENT
AND	ARLIAN SALMON-BARNETT	2ND CLAIMANT/ 2ND RESPONDENT
AND	VALENTINE HENRY	DEFENDANT/ APPLICANT

IN CHAMBERS

VIDEO CONFERENCE

Miss Analiesa Lindsay for the 1st and 2nd Claimants/Respondents

Dr. Mario Anderson and Mr. Jamaiq Charles for the Defendant/Applicant

Heard: 16th May and 9th June 2023

CIVIL PROCEDURE – APPLICATION FOR RELIEF FROM SANCTIONS – WHETHER THERE WAS GOOD EXPLANATION – WHETHER THERE WAS GENERAL COMPLIANCE WITH COURT ORDERS – CIVIL PROCEDURE RULES 2002 (AS AMENDED) 1.1, 1.2, 1.3, 26.8 (1) AND (2).

MASTER, CARNEGIE (AG)

[1] The substantive claim was filed against the Applicant who it is alleged, prevented the Surveyor commissioned by the Respondents, from surveying the property which is the subject of this claim. The subject property is unregistered land and is described as “all that parcel of land known as Mount Cheerful, Lawrence Tavern, containing an estimated $\frac{1}{4}$ acre in the parish of St. Andrew.”

[2] The Respondents filed a Fixed Date Claim Form seeking –

- (a) A Declaration that the Claimants are the true, right and lawful legal and equitable owners of property known as Mount Cheerful, Lawrence Tavern containing approximately quarter (1/4) acre, [sic] the parish of Saint Andrew, butting and bounding; North by lands belonging to Gertrude Edwards; South by lands belonging to Yvette Henry; East by a reserved road; and West by lands belonging to Gertrude Edwards;
- (b) A Declaration that they, the Claimants, procured and obtained ownership of the said property mentioned above by virtue of Deed of Indenture dated the 1st day of November 2011 from Joel and Maxwell Henry lodged and assigned by the Stamp Commissioner on the 14th day of November 2011, Official Certificate No. 111114039/1111107016
- (c) An injunction against the Defendant, Valentine Henry, and his servants and/or agents, restraining them from obstructing, interfering, encumbering and or otherwise dealing with the said property in a manner detrimental and prejudicial to the Claimants' ownership thereof;
- (d) Costs of this Application be awarded to the Claimants;
- (e) Such further and other relief that this Honourable Court deems fit and appropriate in the circumstances.

[3] The Applicant filed an Application for Relief from Sanctions, consequent on an unless order being imposed for failure to file a report on the property which is the subject of the claim on or before March 6th 2023.

[4] The orders sought were for -

- (a) For relief from sanctions to be granted from case management orders given on the 1st of February 2023;
- (b) That the Applicant 's statement of case be allowed to stand;

- (c) That an extension of time be given for the Applicant to comply with the Orders made;
- (d) No orders as to cost; and
- (e) That the Applicant be granted any other relief as this Honourable Court deems just.

[5] Unless orders were imposed at a Case Management Conference on the Applicant after two (2) orders were made for the Respondent to file in court the report from the National Land Agency on the subject property.

[6] An order for the report was first made on July 25th 2022 and then the said order was repeated on November 9th 2022. On February 1st 2023 the hearing of the matter was adjourned to March 16th 2023 when the following orders were made -

- (a) The hearing is adjourned to allow the Applicant to comply with order number 3 of orders made on July 25th 2022;
- (b) The Claimant is granted an extension of time in which to obtain the surveyor's report on or before March 1st 2023;
- (c) Unless the Applicant complies with order number 1 on or before March 1st 2023, his statement of case stands struck out;
- (d) Costs to be cost in the claim;
- (e) Respondents' attorney-at-law to prepare, file and serve orders herein.

[7] To put in context the unless orders made on February 1, 2023, the orders made on July 25th 2022, is reflected as follows –

- (a) The First Hearing of the Fixed Date Claim Form is adjourned to November 9th 2022, at 10:00 am for 1 hour

(b) The Defendant's attorney-at-law is to provide from the National Land Agency a report on the disputed property.

(c) The Claimants are permitted to proceed to obtain a surveyor's report by a Commissioned land surveyor.

(d) The attorney-at-law for the Defendant is to file and serve a supplemental affidavit exhibiting the documents referred to as "VH1" on or before September 16, 2022.

(e) The parties are granted an extension of time to negotiate/mediate, if necessary, on or before October 30th 2022.

(f) No further affidavits are to be filed after October 14, 2022

(g) Costs to be costs to be in the claim.

(h) Claimant/Applicant's attorney-at-law to prepare, file and server orders herein.

[8] At the adjourned hearing on November 9, 2022, the following orders were made –

(a) The hearing of the Fixed Date Claim Form is adjourned to February 1, 2023, at 10:00 am for half an hour for the parties to comply with minute order dated the July 25, 2022 with respect of paragraphs 2 and 3.

(b) The Defendant's Attorney-at-law undertakes to file and serve a supplemental affidavit exhibiting the document referred to as "VH1" on or before November 25, 2022.

(c) The Claimants are to respond to the Defendant's Affidavit filed on March 8, 2022 on or before January 6, 2023.

- (d) The parties are granted an extension of time to mediate or negotiate on or before the January 18, 2023.
- (e) No further affidavits are to be filed after January 25, 2023
- (f) Costs to be cost in the claim.
- (g) The Claimants' Attorney-at-Law is prepare, file and serve this order

SUBMISSIONS ON BEHALF OF THE APPLICANT

[9] The Attorney-at-Law for the Applicant submitted that, having reviewed the documents filed, Order 1 of the formal orders made on February 1st 2023, required that the Applicant obtain a report from the National Land Agency on the disputed property. Counsel submitted that in furtherance to the orders made on February 1st 2023, they received from the National Land Agency, an enclosure diagram of the community containing the property. It was Counsel's submission that an officer from the National Land Agency informed him which persons are in possession of the disputed property and adjoining properties.

[10] In relying on the affidavit deponed by Mr. Jamaiq Charles, Counsel for the Applicant submitted that it was his understanding that the Court sought confirmation that the parties were in dispute over the same property and not different properties.

[11] In further reference to the affidavit by Mr. Jamaiq Charles, Counsel submitted that that he attended previous hearing in this matter, judged and he verily believed, that the information obtained from National Land Agency made it clear which property was the disputed property. Counsel continued his reliance on the affidavit in support of the application at bar, that he made this judgment, based on a comparison of the land valuation numbers displayed on the tax receipt exhibited in affidavits, and the one corresponding to the lots depicted on the enclosure as indicated by the National Land Agency.

[12] Counsel for the Applicant submitted that though insufficient, the documents were submitted on time, and that the factor to consider is that it would not be an injustice to grant the application for relief from sanctions as there is a requirement to determine the real owner of the property.

[13] Counsel for the Applicant, in closing, submitted that having a beneficial interest does give legal interest, as the Applicant can defend a chose in action; that the failure to file a report was not intentional as per CPR 26.8(2) and the Applicant has a good explanation from the National Land Agency as they gave what they could; it is unregistered land and it is in the interest of justice that the application for relief from sanctions be granted.

[14] Counsel indicated when asked by the court that he relied on the decision of **HB Ramsay & Associates Ltd & Ors v Jamaica Redevelopment Foundation Inc and Anor [2013] JMCA Civ. 1** (“**HB Ramsay Case**”) in making his submissions on behalf of the Applicant.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[15] Counsel for the 1st and 2nd Respondents raised objections to the application at bar submitting that on 25th July 2022, orders were made pursuant to a request by Counsel for the Applicant, who asserted they could give a report as the owners of the land. Counsel submitted that what Counsel for the Applicant purported to file and append to the affidavit was a drawing prepared by National Land Agency which was not signed.

[16] Counsel submitted that Mr. Jamaiq Charles identifying lot 012 as being owned by Uton Henry, has a different area than lot 032 which is adjoined to lot 012, and does not show the land which is the subject matter of this Claim. In placing reliance on the affidavit of Miss Jhenelle Small, Counsel submitted that there is nothing to show that Counsel for the Applicant wrote to the Registrar that the report sought is pursuant to a court order. Counsel argued that pursuant to paragraph (3) of the Affidavit supplied, it is two different parcels of land and Counsel for the Applicant continued to “hang on” to the parcel which they do not know whether it is part of the Applicant’s property.

[17] It was Counsel's further submission in referencing the 1st affidavit of Miss Jhenelle Small, that having obtained the order to obtain the surveyor's identification report the Respondents got another surveyor but was obstructed by Counsel for the Applicant and the Applicant himself.

[18] Counsel submitted that though a trial date has not been set in this matter what obtains is the Applicant saying things which ought not to detain the court. Counsel maintained there is no locus standi if you are not the beneficiary of an estate and the Applicant has not provided evidence of same to the court.

[19] Counsel submitted that if the survey had been done there would have been a clearer picture as the Respondents asked for the survey of the land they bought. Counsel concluded that this application for relief from sanctions should be dismissed and an order made by the court that the Applicant complete the surveyor's report and costs be awarded.

THE LAW AND ANALYSIS

[20] Applications for relief from sanctions are governed by CPR Rule 26.8 and which is reflected –

“Sanctions have effect unless defaulting party obtains relief

26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(3) *In considering whether to grant relief, the court must have regard to –*

(a) *the interests of the administration of justice;*

(b) *whether the failure to comply was due to the party or that party's attorney-at-law;*

(c) *whether the failure to comply has been or can be remedied within a reasonable time;*

(d) *whether the trial date or any likely trial date can still be met if relief is granted; and*

(e) *the effect which the granting of relief or not would have on each party.*

(4) *The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."*

[21] The provisions of the CPR 26.8 operate to the extent that there are a series of mandatory steps which must be fulfilled before consideration should be given to granting relief from sanctions under CPR 26.8(3). Therefore, CPR 26.8 (1) and (2) are mandatory requirements which must be overcome (see: **HB Ramsay Case (supra) paragraph [9];** and **Morgan v Gordon & Dixon [2022] JMSC Civ. 79**).

[22] The **HB Ramsay Case** concerned an appeal of Fraser J's (as he then was) decision to reject an Application for Relief from Sanctions by the Appellant. The Court of Appeal heard the matter and upheld the decision of the learned judge. Brooks JA in giving the leading judgment concluded that the Appellants not only failed to make their application promptly, but also gave no explanation for their default – which indicated that the appellants did not satisfy CPR 26.8(1) or (2), both of which Brooks JA held as being mandatory. Brooks JA held that the failure to satisfy CPR 26.8(1) or (2), means that the Application for Relief from Sanctions should be refused without further consideration of the factors outlined in CPR 26.8(3).

[23] The parties did not make submissions in respect to the promptness of the application. However, having regard to the mandatory requirements of Rule 26.8 all three

criteria will be addressed. Once there is an opposition to an application for relief from sanctions the issue of promptitude must be considered: (see: **HB Ramsay Case (supra)**).

**WHETHER THE APPLICANT SATISFIED THE REQUIRMENTS UNDER CPR
26.8(1)**

[24] The learned Brooks JA in the **HB Ramsay Case (supra)** held that the word promptitude has some measure of flexibility in its application, is determined by the circumstances of the case and the explanation given depending on the circumstances of the case.

[25] The Application for Relief from Sanctions was made on March 27th, 2023, with an affidavit in support, once it was determined in the March 6th 2023 hearing that the unless order took effect. The time between the unless order taking effect and the time the application for relief from sanction was made with an affidavit in support was twenty-one (21) days would be prompt in the circumstances and in compliance with 26.8(1 (a) and (b) (see: **Kristin Sullivan v Rick’s Café Holdings Inc T/A Rick’s Café (No 2) (unreported) Supreme Court of Jamaica Claim No. 2007 HCV 03502 judgment delivered 15 April 2011)**).

**WHETHER THE APPLICANT SATISFIED THE REQUIREMENTS UNDER CPR
26.8(2)**

[26] Brooks JA in the **HB Ramsay Case (supra)** held in paragraph 24 that –

“Rule 26.8 (2) stipulates that it is a precondition for granting relief that the applicant must satisfy all three elements of the paragraph.”

Was the failure on the part of the Applicant intentional?

[27] Brooks JA held in the **HB Ramsay Case (supra)** that if an applicant for relief from sanction satisfies the requirements under 26.8(1), then the court should go on to consider whether the applicant has fulfilled the requirements under CPR 26.8(2). Therefore, Rules 26.8 (1) and 26.8 (2) are to be interpreted conjunctively (see also: **Morgan v Gordon & Dixon (supra)** at paragraph [28]).

[28] Counsel for the Applicant submission on this point was that he made requests at the National Land Agency and was given a copy of a diagram which was exhibited to the affidavit in fulfilment of the court orders. Counsel's submission was that since a request was made to the National Land Agency to provide a specific report pursuant to the court orders and a report was provided, he felt that the proper report was what was provided, and thought that it was enough to comply with the court orders.

[29] Counsel for the Respondents rebutted the submission on the basis that this was non-compliance because the report was unsigned and did not give a report as to the property which is the subject of the dispute. It was Counsel's further submission on the point that the report did not state who made the report and the same could have come from anywhere.

[30] I agree with Counsel for the Claimant that in the circumstances the submission of a report in the form presented to the court where the report was unverifiable is unacceptable. However, I accept that there were steps taken to get the report, though not enough, in the circumstances, do not rise to the level of being intentional on the part of the Applicant.

Whether the explanation for the default was a good explanation

[31] Brooks JA in the **HB Ramsay Case (supra)** held at paragraph 22 that –

“Where there is no good explanation for the default the application for relief from sanctions must fail.”

[32] The explanation given in the affidavit in support of the Application reflects that Counsel for the Applicant, suggests that what was received from the National Land Agency was in keeping with such requests. Counsel's submission made reference to making a request to the National Land Agency and being told that was how the information is usually presented. Counsel indicated a misunderstanding as to what was required of the court orders in the task being able to distinguish the subject properties that is that of the Applicant's and the Claimants'.

[33] The affidavit filed with the diagram submitted indicated the information Counsel thought the court had requested. I would accept the explanation given by counsel as good explanation as what was provided by the National Land Agency as being what he thought was typical of what is provided by way of report by the National Land Agency, in the circumstances.

Whether there is general compliance with court orders?

[34] Brooks JA in the **HB Ramsay Case (supra)** went on to state –

“In the instant case it would have been open to the court to consider whether the applicant demonstrated that they were serious about getting their case back on track and placing themselves in a position where the adverse effects of the default were minimised.”

K. Anderson J, in **Morgan v Gordon & Dixon (supra)** stated:

“In looking at whether there has been general compliance with court orders the court should look at same, in terms of its flexibility as to whether the non-compliance has been repeated on more than one occasion, arising from separate orders having been made on separate occasions, and there having been non-compliance with one or more of those orders.

Ultimately this court has had to look at the overall interests of justice as per Rule 1.1 and has borne in mind that as it now stands, as at the time when the application was filed, there had been general compliance with the orders of the Court, save and except with certain documents, they were filed and served out of time, as distinct from not having been filed and served at all. To my mind that meets the flexible standard of general compliance.”

[35] In **Morgan v Gordon & Dixon (supra)**, the Applicants failed to comply with three (3) case management orders and the Court had to consider whether this amounted general non-compliance with orders made by the Court. It was ultimately decided that

there had been general compliance despite the Applicant not filing certain documents in time, which the three (3) case management orders pertained.

[36] Though also distinguishable on the facts, **Corey Jackson v Ann Marie Phillips (Executrix in the Estate of Barrington Gaynor, deceased, testate) & Priscilla Fisher (Executrix in the Estate of Barrington Gaynor, deceased, testate) [2017] JMSC Civ 30**, provides guidance in the application of CPR 26.8 (2)(c). In this case, the Court ruled that there had not been general compliance with the orders of the court as the case management conferences were adjourned on three (3) separate occasions to facilitate the Applicant providing evidence to the court of Mr. Gaynor's death where the death certificate was issued four (4) days after Mr. Gaynor's death and approximately one (1) year before the first case management conference was adjourned. Simmons J (as she then was), believed that the production of the death certificate was integral to the advancement of the case and failure to comply with orders on three (3) separate occasions to produce same could not amount to general compliance with orders of the court.

[37] A review of the file of the application before me reflects that there have been delays in compliance with some orders of the court. For example, the Defence was filed out of time and there was a delay in the Defendant filing the information regarding tax receipts. However, consideration has to be given to the distinguishing facts of the application at bar with **Morgan v Gordon & Dixon (supra)** that there were orders made for survey to be facilitated on at least two separate occasions and for the parties to have discussions with a view to moving the matter in an efficient and just manner.

[38] In making an assessment as to whether there has been general compliance by the Applicant, I have made note of the fact that Case Management Conference orders were made with a view to prepare the matter for trial **if** discussions did not bear fruit. The matter was adjourned on several occasions with the issue of the survey being outstanding. Further, to allow for effective Case Management Conference to take place, the matter was adjourned on those occasions to facilitate the survey being done in furtherance of the overriding objectives in dealing with cases expeditiously and fairly which the parties

are to play a role (see CPR 1.1 (d) and (e); 1.3). As such, the survey report was to identify the exact boundaries to ascertain the portion of land which is the subject matter of the claim.

[39] There may have been compliance with other orders though delayed. However, in respect of the orders made in respect of the survey, the Applicant objected to the survey in 2023 after speaking with his Attorney-at-Law. This prevented the surveyor from completing the report. The objection to the survey was in the context where Counsel for the Applicant was present at the time the orders were made regarding the survey to be completed and raised no objections nor filed an application to vacate or vary the orders regarding same. CPR 42.2 –

“Parties present when order made to be bound

42.2 A party who is present whether is present whether in person or by attorney-at-law when the judgment given or order was made is bound by the terms of a judgment or order whether or not the judgment or order is served.”

[40] Further the CPR provides that a court order once made remains in effect until it is varied or vacated. The relevant rule reflects –

“Time when judgment or order takes effect

42.9 A party must comply with a judgment or order immediately, unless –

(a) the judgment or order specifies some other date for compliance;

(b) the court varies the time for compliance including specifying payment by instalments;

or

----. ”

[41] Counsel for the Defendant contended that the Defendant has a right to object to the land being surveyed, as the adjoining landowner and one who has a beneficial interest in the subject property. That may be so, however, to date no such evidence of beneficial interest in the subject property has been presented to the Court.

[42] Further, it cannot be ignored that the Applicant in the face of two (2) consecutive court orders made by this Honourable Court objected to the survey of the subject property being done. Not only was this non-compliance, but a blatant disregard of court orders to facilitate the survey being done. To borrow the words from the learned Brooks JA, in the **HB Ramsay Case (supra)** the Applicant missed that opportunity for making a favourable impression in that regard.

[43] It is determined therefore in the circumstances that the failure to comply with orders to facilitate the survey rises to the level of a lack of compliance with court orders. This in light of the fact that the production of the survey is necessary and would have assisted in the just and efficient advancement of this case.

[44] In these circumstances, I have determined the application has not met the requirements set out in CPR 28.6(2)(c). The point is well settled that when the cumulative requirements of CPR 28.6(1) and (2) have not been met, the court need not consider the requirements under 28.6(3) (see: **Brodber v EW Abrahams & Sons Limited & Anor [2020] JMSC Civ 145**; and the **HB Ramsay Case supra**).

CONCLUSION

[45] Having regard to the failure of the Applicant to meet the requirements of CPR 28.6(2)(c) this application for relief from sanctions must fail.

I make the following orders therefore –

1. The Notice of Application for Court Orders for Relief from Sanctions filed March 27th 2023 is refused;
2. The Defendant's statement of case stands struck out;
3. Attorney-at-law to apply for judgment to be entered;
4. Leave to appeal is granted
5. Costs to the 1st and 2nd Claimants to be agreed or taxed
6. Claimants' attorney-at-law to prepare file and serve orders herein.