



[2017] JMSC Civ 195

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 03029

BETWEEN	MARLINE CLARKE	1st CLAIMANT
AND	MONIQUE CLARKE	2nd CLAIMANT
AND	LESIA CLARKE	3RD CLAIMANT
AND	ENOS CLARKE	1st DEFENDANT
AND	VICTOR CLARKE (executor of the estate of Linton Lloyd Clarke)	2ND DEFENDANT

IN CHAMBERS

Ms. Michelle Phillips instructed by Nunes Scholefield Deleon & Co. for the Applicant.

Mr. Anwar Wright instructed by Taylor-Wright & Company for the Respondent.

Heard September 21, 2017 and October 17, 2017

***APPLICATION FOR EXTENSION OF TIME TO FILE DEFENCE – WHETHER DELAY INORDINATE –
WHETHER THERE IS A GOOD REASON FOR THE DELAY – WHETHER THERE IS AN ARGUABLE
CASE – RULES 10.2, 10.3, 26 (1) 2 AND 68.62***

Master A. Thomas

Introduction

[1] This is an application by the 1st Defendant, Enos Clarke, for permission to file his Defence/Affidavit in Response out of time and for his Acknowledgement of Service filed on November 2, 2015 to stand. This is in relation to the Fixed Date Claim Form of the Claimants, Marline Clarke, Monique Clarke and Lesia Clarke, filed on July 12, 2015.

History and Background

[2] The Claimants are children of Linton Lloyd Clarke and beneficiaries of his estate. The Defendants, Enos Clarke and Victor Clarke, are the executors of that estate.

In summary, the Claimants are alleging inter alia;

- (i) That since the testator's death in 2010, the executors have failed to take steps to administer the estate, to apply for probate and complete the administration of the estate.
- (ii) They are being prejudiced by the failure of the executors to carry out their duties as executors.
- (iii) The executors have fraudulently and or negligently disposed of the assets of the deceased with a view to depleting same and depriving the beneficiaries of their interest.
- (iv) The executors have fraudulently received income to suit their personal interest and for their personal benefit have been offering for sale; or selling assets for their personal benefits without regards for the Claimants interest as beneficiaries.

[3] In their Fixed Date Claim Form, they are requesting the following relief;

- (i) That the Defendants be forthwith removed as executors of the estate of Linton Lloyd Clarke.

- (ii) That the Claimants be permitted to apply for a grant of the administration of the estate in their names.
- (iii) That the Defendants deliver up to the Claimants through Taylor-Wright and Company, Attorneys-at-Law, the death certificate of the deceased, titles, deeds, bank account, books, all insurance contracts, car titles, investment contracts, and all other instruments, documents or paper whatsoever touching and concerning the estate of the late Linton Lloyd Clarke, deceased.
- (iv) That the Defendants forthwith furnish an account of all income and other monies collected or received on behalf of the estate since the death of the deceased.
- (v) That the Defendants pay to the Claimants, the beneficiaries of the said deceased's estate, any sums due to the said beneficiaries as per the account and in accordance with the terms of the Last Will and Testament of Linton Lloyd Clarke together with interest thereon at the average commercial lending rate or at any such rate and period as the court sees fit.
- (vi) That the Defendants pay the cost of the proceedings.

[4] The Fixed Date Claim Form was filed on June 12, 2015. February 5, 2016 was set as the date for the first hearing.

On October 2, 2015 service was effected on the 1st Defendant.

On November 2, 2015 an Acknowledgement of Service was filed on behalf of the 1st Defendant.

On October 19, 2016, an Application was filed for an extension of time to file an Affidavit in Response/Defence.

On May 22, 2017 that application was withdrawn.

On May 27, 2017 this second application was filed.

Submissions

[5] The following submission were made by Ms. Michelle Phillips on behalf of the Applicant;

- (i) In support of this Application the Applicant is relying on the Affidavits of Ms Catherine Minto and Mr. Enos Clarke.
- (ii) In the interest of Justice the matter must be determined on the merits. There is Draft Defence before the court. The omission can be remedied in reasonable time. (In support of this point, she relies on **Hubert Edwards v Milton Kelly an Anor**, In the Supreme Court of Jamaica Civil Division 2009).
- (iii) The court needs to consider the length of delay but that is not determinative. The court also needs to look at the reason for the delay and the matter of prejudice. (She refers to **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.)
- (iv) The delay on the part of the 1st Defendant is 329 days. In the Kelly case it was over a year. In the present case, no trial date is set. No prejudice can befall the Claimants if the Application is granted. The prejudice to the Defendant outweighs that to the Claimants if he is not allowed to be heard. In his Affidavit he states that the 1st Claimant collected rent. She should account for that rent. He also states that the Will could not be located.

[6] Mr. Anwar Wright made the following submissions on behalf of the Respondent;

- (i) The Defendant having failed to file a defence, the matter can be dealt with summarily.
- (ii) The 1st Defendant has no standing in this Application. He made an Application then withdrew it. He did not amend his Application in relation to the Affidavits that were previously filed. The Court has no material on which it can make a decision.
- (iii) This is a case about the failure of the Defendants as executors to administer the estate of Claimants' father. If the court is to entertain this Application on merits of the Defence, the court has to ask upon what basis the Defendant is trying to remain as an executor. The Defendant has no interest in the estate. The Claimants have said that they have been waiting 7 years for the estate of their father to be administered. In order for the extension of time to be granted, the Defendant has to show that the Defence has a real prospect of success. (He refers to **Swain v Hillman** [2001] 1 All ER 91).
- (iv) The Rules state that at the first hearing, if the Defendant fails to file a Defence, then the court can deal with the matter in a summary manner. The first hearing was adjourned for November 2, 2017. The Defendant is seeking to hijack the process. The court must not permit the Defendant to hijack the process and undermine the regime created by the Rules. This is a Fixed Date Claim. The Rules allow the court to take specific steps when Acknowledgement of Service and Defence have not been filed. This is the reason why Default and Summary Judgments are not allowed for Fixed Date Claim Form.

The Issue

[7] The issue which I must consider is whether the 1st Defendant has satisfied the legal requirement for me to exercise my discretion in his favour for an extension of time within which to file his Defence.

The Law

[8] The Procedure and time for filing a Defence is governed by the Civil Procedure Rules (herein after referred to as the Rules).

Rule 10.2 (1) states, "A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5).

Rule 10.2 (2) states:

"However where -

(a) a claim is commenced by a fixed date claim in form 2 and there is served with that claim form an affidavit instead of a particulars of claim; or

(b) where any rule requires the service of an affidavit, the defendant may file an affidavit in answer instead of a defence.

(3) In this Part the expression "defence" includes an affidavit filed under paragraph (2)

(4) In particular, a defendant who admits liability but wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.

(5) Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it.

Rule 10.3 (1) provides that the general rule is that the period for filing a Defence is the period of 42 days after the date of service of the Claim Form.

[9] **Part 68 of the Rules** deals with the consequence of failing to file an Acknowledgement of Service and or a Defence in relation to a Fixed Date Claim Form. It specifically indicates that Part 12 does not apply to Probate Proceedings. Therefore, in these proceedings, the Claimants do not have the right to apply for Default Judgment in the absence of a Defence.

Section 68.62 (1) reads:

“Part 12 does not apply to probate proceedings.”

However, **Rule 68.62** does give the Claimant certain entitlements where the Defendant fails to file an Acknowledgement of Service and a Defence. These provisions are as follows;

“68.62(2) Where any of several defendants to probate proceedings fails to file an acknowledgment of service or to file and serve a defence, the Claimant may -

(a) after the time for entering an acknowledgment of service or filing a defence has expired; and

(b) upon filing an affidavit proving due service of the claim form and particulars of claim on that defendant, proceed with the claim as if that defendant had entered an acknowledgment of service.

(3) Where the defendant, or all the defendants, to probate proceedings, fails or fail to file an acknowledgment of service or file and serve a defence, then, unless on the application of the claimant the court orders the claim to be dismissed or discontinued, the claimant may apply to the court at the first hearing for -

(a) the claim to be dealt with summarily at that hearing; or

(b) a trial date to be fixed and any necessary directions to be given.

(4) Before applying for an order under paragraph (3) the claimant must file an affidavit proving due service of the claim form and particulars of claim on the defendant.

(5) Where the court grants an order under paragraph (3), it may direct the proceedings to be tried on affidavit evidence”.

[10] It should be noted, however, that **Rule 26** gives the court a general power to extend or shorten time for the compliance with any rule. The relevant Provision is **Rule 26.1 (2) (c)** which states,

“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 for an extension is made after the time for compliance has passed;”

This Rule does not outline specific circumstances in which an extension of time should be granted. However, the court is mandated “to seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules”. (**See Rule 1.2**) Therefore, in exercising its discretion under **Rule 26.1 (2)**, the court must ensure that the cases are dealt with justly. (**See Rule 1.1 (2)**).

[11] In **Strachan v The Gleaner Company** Motion No 12/1999 delivered 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 an extension of time. They are:

“(i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.”

[12] In the case of **the Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jr. (A Minor) By Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16, the Defendants missed the 14 days for the filing of an Acknowledgement of Service. It was only after the Claimant filed his application for permission to enter judgment in default and served a copy on the Defendants that they filed an Acknowledgement of Service. They did nothing further until a few days short of four months when they filed and

served their application for an extension of time to file their Defence and for their Acknowledgment of Service to stand.

At paragraph 15 of that judgment, Brooks J A stated that;

“..... there should not be an inflexible stance where the court is given a discretion. Generally, each case is to be decided on its own

It would seem to me, on the application of the overriding objective that in certain special circumstances, such a defendant, as long as he can satisfy the court that:

- a. the application is made within a reasonable time;*
- b. there are good reasons for the delay;*
- c. there is a good reason why the extension should be granted;*
and,
- d. there would be no undue prejudice to the claimant should be able to secure an extension of time.’*

[13] In the case of **the Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23, the court had to deal with the issue of how a judge should exercise the discretionary power in an application for an extension of time to file a Defence.

Harris JA, at paragraph 17 stated that:

“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.”

At Paragraph 18, she further stated that;

“It cannot be denied that rule 1.1 of the CPR under which the appellant seeks assistance, imposes an obligation on the court to deal with cases justly. In order to give effect to the overriding objective, under the rule, the court, in its application and interpretation of the rules, must ensure as far as is practicable that cases are dealt with fairly and expeditiously. The court, in considering what is just and fair looks at the circumstances of the particular case. In an application for an extension of time, the delay and the reasons therefore are the distinctive characteristics to which the court’s attention is initially drawn. It cannot be too frequently emphasized

that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.”

At paragraph 19 of the judgment, she did emphasize the fact that;

“The length of the delay cannot be regarded as being determinative of the issue”.

At paragraph 20, she further stated that;

*“The proposition that the inadequacy of a reason does not in itself prevent the court from assisting a tardy applicant does not mean that the court will look with favour upon such an applicant in all cases. Failure to act within the requisite period is a highly material criterion, as Smith JA stated in **Haddad v Silvera**. The weaker the excuse, the less likely the court will be inclined to countenance a tardy applicant who seeks the court’s aid to extend time.”*

Despite the fact that the court found that there was “clearly some substance to the defence”, at paragraph 27, she stated that;

“This however, does not mean that the appellant would be entitled to have time extended to file his defence. The opportunity to pursue his defence would be available to him only if all the other requisite criteria for an extension of time are fulfilled.”

[14] Therefore, the legal requirements that the Applicant should satisfy in order for me to exercise my discretion in his favour are;

- (i) The delay in making this application is not unreasonable or inordinate
- (ii) He has a good explanation for the delay.
- (iii) He has an arguable case.
- (iv) The granting on this application will cause no prejudice to the Claimants.

Analysis

Was this Application Filed within a Reasonable Time

- [15] The 1st Defendant admits that he was served with the Fixed Date Claim Form on October 2, 2015. The Defence or the Affidavit in Response in accordance with the Rules became due on November 15, 2015 (see **Rule 10.3 (1)**). The first application for an extension of time to file a Defence was made on October 19, 2016. That is 332 days late. This length of time is clearly inordinate.

Is there a Good Reason for the Delay

- [16] At paragraph 6 of her Affidavit filed on the May 25, 2016. Ms. Catherine Minto seeks to explain the reasons for the delay. She states that the “Defence was not filed as the Claim required that the 1st Defendant locate and produce **several and numerous** (my emphasis) receipts pertaining to his administration”. She further stated that;

“He attended the offices of my instructing Attorney-at-Law (Ms. Jacqueline Minto) on at least three (3) occasions to provide a detail statement and accounting in relation to the estate. The meetings have been extensive given the information required to address the Claimant’s allegations.”

At paragraph 7 she stated;

“That the 1st Defendant was required by me and my instructing Counsel to locate receipts bank statements, etc. And once this was located, it has taken us some time to go through all the documents to prepare the Affidavit in Response and to complete the computation”

I do not accept this explanation as a reasonable excuse for delay in filing the Defence. In fact, I find that the excuse is poor. The fact that receipts and documents are numerous; the mere act of locating them is not a sufficient or good reason for delay. If they are kept in one place, they could be located within a day. There is no indication as to why the search took so long.

[17] Additionally, while I in fact expect that it would take some time to peruse a large volume of receipts and documents and take instructions, in this instance, I have no indicator as to how I should translate “several and numerous”. There is no indication as to an approximate quantity and or volume of receipts and documents.

Despite the fact that Ms. Minto has said, “The meetings have been extensive given the information required to address the Claimant’s allegations”, in her own words, the extensive meetings were only for approximately three of those 332 days. While I am not expecting a precise allotment of the amount of days for each activity, and neither am I attempting an exact mathematical calculation in assessing the reason for the delay, the fact is that 332 is quite a significant amount of time. In light of that, I would expect that the court would be given an approximation as to how long it took to locate the receipts and documents. Further, I expect that the court would be furnished with further information beyond the numbers as to why it took that amount of time to locate the documents. That is, what was the hindrance or obstacle, if any.

[18] With regard to the taking of instructions, the issues arising are not so complex that it should take counsel a prolonged period of time to take instructions. In any event, the 1st Defendant and his attorney were present at the first hearing on February 5, 2016. There is no indication from the Judges Minutes of Order that there was an intention to defend the Claim or to file this application. Therefore, the Claimants would be entitled to a legitimate expectation that the matter would be dealt with expeditiously in accordance with the Rules. The point I am making is that the Application could have been made by then, requesting the court to give directions as to the time for the filing of the Defence. This was not done. When the matter again came up for first hearing on September 20, 2016, there is no indication from the Judges Minutes of Order that the 1st Defendant intended to Defend the Claim despite the fact that he and his attorney were both present.

Therefore, I find that the Applicant has not given a reasonable explanation for his delay in the filing of his Defence.

Whether the Defendant has an Arguable Case

[19] In order for me to determine whether the Applicant has an arguable case, I must examine what is being claimed and the proposed Defence to the Claim.

In the case of **Hubert Edwards v Milton Kelly an Anor, In the Supreme Court of Jamaica** (Civil Division 2009) which was referred to by counsel for the Applicant, Sykes J indicated at paragraph 18 that;

“Unless there is a real prospect of success then the extension of time within which to file a defence should not be granted because it would a [sic] waste of the court’s resources to entertain a hopeless case”

Further, at Paragraph 89 he stated that;

“The interest of the administration of justice is multifaceted. It is always in the interest of justice that litigation is pursued within the rules and within the intended time frame. It is also in the interest of the administration of justice that so far as possible, matters be disposed of on the merits. The interest of the administration of justice also suggests that litigants who proceed with alacrity and do what is required of them should reap the reward of their efforts.”

[20] I will not go into all the allegations bearing in mind that I am not conducting a mini trial. However, I must examine the main substance of the Claim in order to determine whether or not the Applicant has an arguable case. The Claimants are alleging that their father, Linton Lloyd Clarke, died in 2010. He left a Will and named them as the beneficiaries of his estate. They also alleged that the 1st and 2nd Defendants have been named as executors in the Will of the Testator, Mr. Linton Lloyd Clarke. They further allege that the Defendants have failed to apply for probate and have failed to perform their duties as executors in completing the administration of the estate for the benefit of the beneficiaries. They allege some amount of misconduct, negligence and fraud on the part of the Applicant. They

are essentially seeking the removal of the Defendants as executors and for them to render an account in relation to their dealings with the estate.

- [21] The Applicant/Defendant is not denying the failure of himself and his co executor to apply for probate and complete the administration of the estate. In his Affidavit, he alleges that the 1st Claimant found and kept the original Will. He also asserts that she disclosed a copy of the Will to the 2nd Defendant and refused to provide him with one. He also indicates that he only became aware of the fact that he was an executor in 2011. However, he admits intermeddling in the estate since October 2011. Additionally, he cites conflict with the 1st Claimant and money given to the Claimants from the Estate as some of the reasons for them being unable to administer the estate. If these were the only reason given, I would be obliged to find that the Defendant has an arguable case.

In the matter of **Kershaw v Micklethwaite** [2010] EWHC 506, it was held that “friction or hostility between an executor and a beneficiary is not, of itself, a reason for removing the executor”.

- [22] **Angus v Emmott** [2010] EWHC 154 (Ch) also established the principle that while friction or hostility between personal representatives and beneficiaries is a relevant consideration; that, without more, will not result in the court removing the personal representatives. However, where it is established that the proper administration of the estate or the welfare of the beneficiaries is being adversely affected, that removal will be considered.

Therefore, where the only issue is one of conflict between the beneficiaries and the personal representative, that would be a triable issue.

- [23] However, the issues in the present case are not merely about conflicts between the executors and the beneficiaries. Despite the fact that the Applicant/Defendant indicates that he will render a full and proper account of his administration, he also states that he is unable to perform his main duty as an executor.

At paragraph 21 of his Affidavit, he states, "I intend to render a full and proper account of the executor's administration of the Estate after we have completed our administration of the Estate, which is still incomplete"

[24] However, at paragraph 22 of his affidavit, Mr. Enos Clarke indicates that the executors are unable to wind up the estate because of a lack of funds. He states,

"We are unable to wind up the estate as we would require funds for the probate death duty and legal fees."

He further states;

"It is impossible for the estate to amass all the required funds to cover the duties as we had to support the claimants from the only income source for the estate, which is the Hillsboro Property."

Then at paragraph 25, he states;

"The 1st Claimant fails to acknowledge that her own conduct has delayed the winding up of the Estate. That we require significant sums to complete the probate and pay death duties. We cannot do so given the demands of the Claimant."

[25] The Applicant states that the executors are financially unable to wind up the estate; that it is impossible for them to wind up the estate. Essentially he admits that they lack the capacity to wind up the estate. In that regard I conclude that there is no arguable defence to them being replaced by the Claimants who by implication are saying they have the capacity to wind up the estate.

Furthermore, the Applicant has admitted that he intermeddled in the estate. In his affidavit, he admitted collecting rent from October 2011. Additionally he states that he received a watch belonging to the deceased before he discovered that he was an executor which he intends to keep as a memorabilia. The testator has willed his personal and real property to the Claimants. Therefore, this watch would naturally form a part of the deceased estate. The Applicant has not indicated whether or not he has reneged from that position having discovered

that he is in fact an executor of the estate. Having intermeddled in the estate, it is a natural consequence and legitimate expectation that he would give an account.

The case of **Swan v Hillman** [2001] 1 All ER 91 dealt with the power and the approach of the court in relation to summary judgments. The court highlighted the distinction between a “reasonable prospect of success” and a “fanciful prospect of success”. The Applicant has presented no arguable case or real prospect of success in relation to this aspect of the Claim. In fact, he is not refusing to render an account. He has said “We will do so when we have completed the winding up of the estate”. However, in light of the fact that he has said they are unable to wind up the estate, I find that there is no arguable case in this regard.

Whether there would be Prejudice to the Claimants

[26] I am convinced that there would be prejudice to the Claimants if this Application is granted. The main contention of their Claim is that they have been prejudiced by the failure of the executors, after seven years, to administer the estate and to transfer property to them to which they are entitled as beneficiaries. There is no denial on the part of the Applicant of the failure of himself and his co-executor to complete the administration of the estate after 7 years. To allow the Applicant to file a defence at this late stage when he had ample time to do so before, would deny the Claimants of their right to proceed to apply for the matter to be dealt with summarily or to have the matter tried on Affidavit. This will result in further delay in the disposal of the matter and consequently the administration of the estate to which they are entitled as beneficiaries. The guiding principle in treating with Probate matters is welfare of the beneficiaries, while being mindful of the wishes of the testator. Any further delay could only engender more prejudice to the Claimants. The granting of this Application would deny them the right of an expeditious and fair resolution of the matter. This would be in contravention of the overriding objectives of the Rule to deal with cases justly. (See Rule 1.1 (1) and (2)).

The other issues of fraud negligence are contingent upon the results of the executors rendering of the account. Therefore, I do not perceive any injustice to the Applicant if this Application is denied.

Conclusion

[27] The Applicant has not satisfied the legal requirements for me to exercise my discretion in his favour to grant and extension of time for the filing of his Defence.

Order

Application denied.

Cost to the Claimant to be agreed or taxed.

Leave to appeal denied.