[2022] JMSC Civ 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV01510

IN THE ESTATE of Michael Culliton (otherwise known as Michael Dermot Culliton, otherwise known as Micheal Dermot Ward Culliton, late of Retirement, Salt Gut, Boscobel in the parish of Saint Mary, deceased, intestate

BETWEEN	**DAISY EULALIA ST. THERESA CULLITON-HAYNES (duly appointed Administratrix of the deceased estate)**	**CLAIMANT**
AND	**LENIN THOMPSON**	**DEFENDANT**

IN CHAMBERS

Mr. Kevin Harriot instructed by Robertson Smith, Legister and company appearing with Ms. Denise Christie who has conduct of the matter for the Claimant

Ms. Jodian Facey instructed by Forsythe and Forsythe for the Defendant

Heard: May 26, 2022 and July 22, 2022

Civil Procedure: Application for Summary Judgment on a FDCF – Summary Judgment – Whether court can correct error in Application – Application to Strike Out.

O. SMITH, J (AG)

[1] On the day of the Hearing of this application there were written submissions on file from counsel representing the Applicant but none had been filed on behalf of the Respondent. The attorney representing the Respondent indicated as his reason, that he had not been served with the Application to Strike Out. However, counsel representing the Applicant pointed out that it had been served on the Town Agent of the Respondent's Attorney's office and further that they had the admit stamp in proof of this. This is a position that the court does not understand since it was counsel representing the Respondent who filed a Notice of Adjourned Hearing on August 19, 2021, notifying the Applicant that the Application to strike out fixed for July 29, 2021 was now set for May 26, 2022. They also filed an Affidavit in response to the application on May 26, 2022.

[2] With no objections from the Respondent's Attorney the hearing of application proceeded. The Respondent's Attorney was given the opportunity to file written submissions within seven days of the date of the hearing.

[3] The Respondent, Daisy Eulalia St. Theresa Culliton-Hanes filed a Fixed Date Claim Form (herein after FDCF) in these Courts against the Applicant Lenin Thompson seeking an order:

1. appointing her to represent the estate of Michael Culliton late of Retirement in the parish of Saint Mary, deceased, intestate for the purpose of bringing an action against Lenin Thompson of Boscobel, Boscobel P.O. in the parish of Saint Mary to recover assets of the estate of her late father Michael Culliton.
2. Granting an injunction restraining the said Lenin Thompson from Registering the land situate in Retirement, St. Mary registered at Volume 1076 Folio 338 of the Register Book of Titles in his own name and forbidding the Registrar of Titles from doing so.

[4] Also on May 19, 2020, The claimant filed a Notice of Application for Court Orders (hereinafter NOA) seeking the following:

a) an order restraining the defendant from registering the land already registered at Volume 1076 Folio 338 of the Register Book of Titles in his name and or that of his nominee.
b) an order forbidding the Registrar of Titles from registering the land already registered at Volume 1076 Folio 338 in the name of the defendant and or his nominee.

[5] The FDCF was accompanied by an affidavit in Support from Daisy Eulalia St. Theresa Culliton-Haynes as was the NOA filed on May 19, 2020. The NOA was heard on the date of filing as an exparte application on the following grounds:

i. the Claimant is one of the late children of Micheal Culliton who died intestate on the 30thof September, 2018.
ii. that said Micheal Culliton was at the time of his death the registered proprietor of the property described supra at paragraph 3 (a)
iii. the defendant has since his death applied to be registered as the proprietor of the said land.

[6] The Court granted the orders sought at (a) and (b) of the NOA and a date was fixed for an inter-partes hearing on June 1, 2020.

[7] The Respondent filed two further NOAs on May 27, 2020. In one application she sought the following orders:

1. That she be appointed to represent the estate of Michael Culliton, late of retirement in the parish of Saint Mary, deceased, intestate for the purpose of bringing an action against Lenin Thompson of Boscobel, Boscobel P.O. in the parish of Saint Mary to preserve and recover assets of the estate of her late father, Michael Culliton.

[8] In the second application she repeated the orders that were made in her NOA filed on May 19, 2020.

[9] At the hearing on June 1, 2020 the court also heard the NOA filed on May 27, 2020 for the Respondent/Claimant to be appointed as the representative of her father's estate. On this occasion, counsel representing the Applicant/Defendant was present. A Consent Order was entered in terms of paragraphs 1 and 2 of the NOA filed on May 27, 2020. The parties also consented to extending the Exparte Injunction granted on May 19, 2020 to June 29, 2020, the new date fixed for the inter-partes hearing. The Respondent/Claimant was given 28 days from June 1, 2020 to file a 'Letter of Application for Administration'.

[10] Thereafter, on June 29, 2020 another consent judgment was entered finalizing the orders made on May 19, 2020. The parties also consented to the injunction remaining in place until the matter is determined. On the same date the Respondent/Claimant was also ordered to file and serve an Amended Fixed Date Claim Form on the Defendant/Respondent on or before September 16, 2020. A First Hearing was set for December 17, 2020.

[11] On June 18, 2020 the Defendant/Applicant filed an Acknowledgment of Service, indicating that he had been served on June 16, 2020 with a Claim Form.

[12] After the June 29, 2020 hearing, it appears that nothing further happened in this matter until a Notice of Application for Court Orders to strike Out Claim and for Entry of Judgment in Favour of the Defendant was filed on November 20, 2020. (Hereinafter Application to Strike out.) It is this application that falls to be decided by the Court.

[13] I should indicate that since the filing of the Notice of Application on November 20, 2020 several things have happened. At the December hearing, the Application to Strike Out was adjourned to July 29, 2021. The parties were then ordered to fie and serve submissions and a list of authorities being relied on, on or before July 15, 2021. However, before the July hearing a Notice of Discontinuance was filed

in relation to this claim on March 18, 2021. Then on October 14, 2021 the Notice of Discontinuance was withdrawn by a Notice of Withdrawal of Notice of Discontinuance. The Notice of Withdrawal indicated that reason for the withdrawal was that the Notice of Discontinuance was sent in relation to the wrong claim and was intended for another matter involving the parties.

[14] Nevertheless, the Notice of Discontinuance derailed this matter because when Application to strike Out came up for hearing on July 29, 2021 the judge recorded the matter as wrongly listed, Notice of Discontinuance filed.

[15] Finally, on May 25, 2022 an Amended FDCF (hereinafter AFDCF) and Affidavit in Support was filed on behalf of the Claimant. I took the time to outline the chronology of events in this matter because it seemed riddled with missteps and delay from the moment of filing and it is that delay which has brought us here today.

The Application

[16] Attorney-at-Law Nelton Forsythe for the Applicant, swore to an affidavit in support of the application on behalf of Mr. Thompson. His complaint in the main, is that on June 29, 2020 the Court ordered that the claimant was to file and serve an Amended Fixed Date Claim Form on the defendants on or before September 16, 2020. They failed to comply with the order. His office contacted the Claimants attorneys requesting service of the documents to no avail.

[17] On October 28, 2020 after further communication between the attorneys they were served with an Amended Statement of Case. The statement of case however, had a number of irregularities, foremost of which was that it had a different Suit No and was dated before the order of the judge on June 29, 2020. The document also had a photocopy of the Claimants signature. Nevertheless, they wrote to the Claimants attorneys and pointed out the irregularities, same was not addressed up to the time of the filing of the application.

[18] He concluded by saying that the defendant has been prejudiced by the late service of the AFDCF as the defendant was left with 19 days within which to file an Affidavit in Response in order to comply with the order of the Court.

The Response

[19] On May 26, 2022, an Affidavit in response to Notice of Application for Court Orders for Striking out was filed on behalf of Kevin Harriott, Attorney-at Law. He indicated that the claimant had complied with the court orders to the extent that they served the AFDCF on or before October 16, 2020. That the Registry made an error and applied a new case number, SU2020CV1669.

[20] Contrary to the assertions in Paragraphs 12, 13 and 14 of Mr. Forsythe's affidavit, he deponed that efforts were infact made to amend the irregularities but that the efforts were "exasperated by the onset of the pandemic and the claimant's challenge in getting (the) signed documents witness(ed) and sent to Jamaica in a timely manner."

[21] Finally, Mr. Harriott deponed that the defendant was not prejudiced as he always knew the substance of the claim against him within months of the death of Micheal Culliton.

Submissions on behalf of the Applicant

[22] Counsel submitted that his application is made pursuant to rule 15.2 of the Civil Procedure rules, 2002 as amended, on the basis that the claim should be struck as the claimant has no real prospect of succeeding on the statement of case as filed.

[23] In his written submissions filed on July 8 2021 counsel for the applicant recounted much of the affidavit filed in support of the application. He argued that "the rules make it clear that compliance is a fundamental and integral part of the litigation process and non-compliance with the rules or orders of the court can have a detrimental effect." he further submitted that despite the rule that striking out was

to be the last resort he was of the view that this case meets the bar and that's such a relief should be granted.

[24] The basis for this statement is that the claimant failed to comply with the orders made on June 29, 2020 by the Honourable Ms. Justice A. Thomas to file and serve an AFDCF on or before September 16 2020. This noncompliance he argued was a clear breach of the order. He relied on the cases of **Norma McNaughty v Clifton Wright, Warder Gordon and Ors.** SCCA NO. 20/2005 and **UCB Corporate Services Ltd (formerly UCB Bank plc) v Halifax (SW) Ltd.** The Times Law Report, December 23, 1999, 882.

Submissions on behalf of the Respondent

[25] Counsel initially made only oral submissions. At the end of the hearing the Court granted Counsel representing the Claimant to opportunity to file written submissions within seven days. They were filed on June 2, 2022. By that time the Court had already written its ruling. However, I have read the written submissions and found that they do not depart significantly from the oral submissions.

[26] In her oral submissions Counsel indicated that the problem arose because two matters were filed via FDCF involving the same matter and the same parties. She submitted that she was advised by the Registrar to withdraw one which was done. However, the notice was filed in relation to the wrong FDCF. In addition, her client lives overseas and there was a difficulty getting documents to and from her. As a consequence, they sought to rely on signed documents that predated the June 29, 2020 order.

[27] She further pointed out that the application seems to be one for summary judgment and it was not a manner in which the court can deal with a FDCF.

[28] In any event, she argued in her written submissions that summary judgment should only be granted "on any claim if: (i) all substantial facts are before the court; (ii) the substantial facts are not disputed; and (iii) there is no real prospect that the oral

evidence of the parties is likely to affect the Court's assessment of the facts. She relied on ***Lyle (Allan) v Lyle (Vernon) (unreported)***, ***Supreme Court, Jamaica,* Claim 2004 HCV 02246,** delivered May 10, 2005 and ***Lyle (Vernon) v Lyle (Allan) (unreported, Court of Appeal, Jamaica*,** SCCA No. 35/2006**,** delivered October 9, 2009.

[29] Counsel in her written submissions cited that under Rule 26.3 "striking out was limited to plain and obvious cases where there was no point in having a trial." In this case the claimant claims a legal beneficial interest in land on behalf of the deceased's estate. The deceased is the registered proprietor on the Certificate of Title for the property. The interest of the deceased has not been defeated by the defendant or any other party as such it is entitled to the protection of the Registration of Titles Act. She relied on **H*elen Weston-Parchment v Pete Weston*** [2016] JMSC Civ 106***, S & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance*** SCCA 112/2004 and ***Sebol Ltd & Selective Homes & Properties Limited v Ken Tomlinson et al*** SCCA 115/2007.

[30] On the argument laid out in paragraph 29 supra the Respondent's attorney pointed out that the applicant has not put before the court any evidence that "the Claimant's right to protect and administer the property as part of the Deceased's estate should not be protected by the Court based on the statutory provision".

[31] Counsel also submitted that even if the court were minded to grant the application it would be on the basis that the respondent's case has no reasonable prospect of success. In that regard she submitted that there is a title in the name of the respondent's father who died intestate and that is prima facie evidence of the strength of the applicant's case. In her written submissions she relied on ***Registration of Titles Act***, specifically sections 68 and 139 ***Gordon Stewart v John Issa*** SCCA 16/2009, ***Associated Gospel Assemblies (By Power of Attorney from Jeremy Karram, Executor for the Estate of Albert Teimer***

Karram, Dec'd v Jamaica Co-operative Credit Union League Limited et al [2019] JMSC Civ 42.

[32] She went further and said that an interim injunction was granted by consent. If a prima facie case had not been made out the injunction would not have been granted. The court had to have been satisfied that there was a serious issue to be tried and whether or not damages was an adequate remedy.

[33] There is also a caveat registered against the title and this was done because the Registrar found that there was a caveatable interest.

[34] Under Rule 26.4 of the CPR an Unless Order could be made. That should have been the remedy sought. To date the applicant has filed nothing that supersedes Culliton's interest in the property.

[35] Finally, the respondent has now complied with the Court's Order by filing the AFDCF and now only needs to serve it to be in full compliance. All the procedural defects pointed out by the defendant have been rectified and as such to strike out a claim for "failure to comply due to technical and/administrative and/or clerical defects," would be unjust.

Issues

[36] I have identified the following as the issue which lie to be determined in this case.

1. Whether an application strike out can be made pursuant to Rule 15.2 on a Fixed Date Claim Form
2. Whether the Court can convert said application to one under Rule 23.6. If yes
3. Whether the Respondent has a more than an arguable case.

The Law

[37] The applicant has made this application pursuant to Rule 15.2 of the Civil Procedure Rules 2002, as amended, specifically, although not stated, Rule 15.2 (a). It reads;

> *"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) …*
>
> *(Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)"*

[38] The Rules also indicate what matters can proceed by way of summary judgment. Rule 15.3 states;

> *"The court may give summary judgment in any type of proceedings except –*
>
> *(a) proceedings for redress under the Constitution;*
>
> *(b) proceedings against the Crown;*
>
> *(c) proceedings by way of fixed date claim;*
>
> *(d) proceedings for –*
>
> *(i) false imprisonment;*
>
> *(ii) malicious prosecution; and*
>
> *(iii) defamation;*
>
> *(e) admiralty proceedings in rem; and*
>
> (f) probate proceedings (other than under rule 68.56 (summary proceedings)"
>
> *(Emphasis mine)*

[39] If the matter is one that can be dealt with via summary judgment, then, having assessed the strength of the case, the Rules also empower the Court under Part 26 to strike out all or a part of a statement of case if it has no reasonable grounds for bringing or defending a claim.

[40] Specifically Rule 26.3 gives the court the discretion to strike out a statement of case or part thereof. It states that,

> *"26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10".*

Whether an application can be made pursuant to Rule 15.2 on a Fixed Date Claim Form

[41] The fact that the Defendant has filed his application pursuant to Rule 15.2 does not mean that the court is empowered to treat with it as such. Before the court can embark upon this application it must satisfy itself that the matter is not barred pursuant to Rule 15.3.

[42] In the case of ***James Brown v Karl Rodney and Maureen Rodney*** [2017] JMSC Civ. 32, Justice Kirk Anderson had to consider a case commenced under the old rules by way of Writ of Summons in 1999 concerning claims for possession of land. This claim was saved as per rules 73.1, 73.4 and 73.6. In that case the Notice of

Appointment for Case Management which was issued to the parties was dated May 18, 2004 and a Case Management date set for September 2004. Justice Anderson was of the view that in the circumstances, the new Rules which came into effect on January 1, 2003 applied. See also ***Norma McNaughty v Clifton Wright, Warder Gordon and Ors.*** SCCA NO. 20/2005. Having so concluded he expressed that the court could exercise its case management powers and convert the Claim to a FDCF, which he did.

[43] However, in response to the claim filed by McNaughty the respondents had filed an Application for Summary Judgment as well as an Application to Strike out Claim. In relation to the former he said at paragraph 8,

> *"On that ground alone, the defendants' application for summary judgment fails. Rule 15.3 (c) of the C.P.R provides that in respect of proceedings by way of Fixed Date Claim Form, the court is precluded from granting summary judgment. It would make a mockery of rules 8.1 (4) and 15.3 (c) of the C.P.R, if summary judgment could properly be granted in respect of a claim such as this.*

[44] At the inception of this matter a FDCF and a Notice of Application for Court Orders were filed together filed on May 19, 2020. That application sought the orders outlined in paragraph 3 supra and was accompanied by an affidavit in support which exhibited several documents. The application was heard on the said date and the orders sought were granted. On June 29, 2020 orders were made for Counsel representing the Respondent to file and serve an AFDCF on or before the 16th day of September, 2020.

[45] An examination of the file reveals that when Mrs. Culliton-Haynes purported to file the FDCF on May 19, she had no authority to do so. Her father had died intestate. The land in question was registered in the name of her father and as such formed part of his estate. No representative having been appointed as at May 19, 2020, Mrs. Culliton-Haynes was without the requisite authority to file the claim.

[46] The NOA filed on May 19, 2020 sought orders restraining the Respondent/Defendant from taking certain steps. The FDCF was intended to

ground that application as it formed the basis for the serious issue to be tried. However, no further steps could be taken until the Claimant had the necessary authority to do so. The Court orders of June 1, 2020 appointing the applicant as the representative of the Estate of Micheal Culliton and the order made on June 29, 2020 granting the Applicant permission to file an Amended FDCF on or before September 16, 2020 gave the claimant the authority she needed to pursue this claim.

[47] The substantive matter before this court having been commenced by way of FDCF, an application pursuant to Rule 15.2 would not be appropriate.

[48] In the event I am wrong and I can proceed to treat the application as filed, I will examine what is required on a summary judgment application. A reading of Counsel's application reveals that it is based on rule 15.2(a), which, as set out in paragraph 1 of his NOA is, "that the claim should be struck out on the basis (that) the claimant has no real prospect of succeeding on its statement of case as filed". In dealing with applications of this nature the courts have consistently applied one approach. First, what is meant by "real prospect of success". In the often cited judgement of ***Swain v. Hillman*** [2001] 1 All ER 92 Lord Woolf, MR at paragraph 7 defined the words "real prospect of success" in the following terms: -

> *"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a 'fanciful' prospect of success."*

[49] In ***International Finance Corporation v. Utexafrica S.P.R.L.*** [2001] EWHC 508 Mr Justice Moore-Bick heard an application to set aside a default judgement. In seeking to interpret what was meant by Rule 13.3.1 of the Civil Procedure said, in interpreting what was meant by 'realistic' as against a 'fanciful' prospect of success,

> *"the fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying that it is hopeless: whereas to say that a case has a realistic prospect of success carries the suggestion that it is something more than merely arguable."*

[50] Before any determination can be made as to whether a case has a real prospect of success some examination of the claimants' case is required. The courts however, must exercise care in not embarking on a mini trial. In ***DYC Fishing Limited v. The Owners of MV Devin and MV Brice*** Claim No. 2010 A 00002, delivered on the 8th October 2010. Justice Brooks at page 19 of the judgement also relying on ***Swain v Hillman*** said;

> *"It is often said that the court is not entitled to embark on a mini-trial when assessing the prospects of success of a party's case. If the case is based on a point of law which is obviously bound to fail, or after relatively short argument proved to be so, then summary judgment may be granted. If, however, there are arguable points of law or issues as to fact which, depending on the resolution, would affect the outcome, then summary judgment ought not to be granted"*

[51] In this kind of application, the onus lies with the applicant to prove that the respondent's case has no real prospect of success. The Respondent in turn will seek to demonstrate why the court should rule in their favour. The Respondent filed a claim in relation to a declaration of interest in land. She in brief, is claiming that the land is owned by the late Micheal Culliton who died intestate and that since his death the defendant has sought to have the land registered in his name.

[52] No Defence was filed in this case up to the time of the filing of the application for Summary Judgment/Strike Out, nor was one filed when this application was heard. I therefore read the Notice of Application and Affidavit in support filed on behalf of Mr. Lenin Thompson. I have also relied on the written and oral submissions that have been made. Nothing in them seeks to impugn the content of the Respondent's case or lay a foundation that can be properly considered on a summary judgment application.

[53] Needless, to say though, the Respondent's case was always known to the Applicant. He was served with more than one affidavit from Mrs. Culliton-Haynes, prior to the filing of this application, which could satisfy him of the nature of the claim. This was not the application that ought to have been made. Their application for summary judgment would also fail if the claim before this court was a matter that was subject to summary judgment.

Whether the Court can convert the application to one under Rule 26.3

[54] The application for Summary Judgment is headed "Notice of Application for Court Orders for Striking Out a Claim and for Entry of Judgment in Favour of the Defendant." Although it purports to be an application to strike out, the body of the application, specifically at paragraph 1, indicates that it is filed pursuant to Rule 15.2. As has been stated previously that rule pertains to an application for summary judgment.

[55] The grounds on which the applicant is seeking the orders do not support an application for summary judgment. They state among other grounds that the claimant has failed to serve the AFDCF on or before September 16, 2020 in accordance with the court order and that to proceed with the Claim would be an abuse of process. See paragraph 60 infra.

[56] The rules pertaining to Applications for Court Orders are found under Part 11. Rule 11.7 sets out what should be included in an application, the order being sought, the grounds being relied on and the length of the hearing. There is therefore room for an argument to be made that the application as filed by the respondent does not run afoul of a Part 11 and as such the court can correct the error.

[57] I accept that this court has broad case management powers. This includes making orders to extend or shorten time for compliance with a rule, practice direction or order. (Rule 26.1(2). This rule does not apply to the case at bar.

[58] The court also has the power to make orders of its own initiative. Rule 26.2(2) states, that if the court intends to exercise this discretion then the other side must be given the opportunity to make representations. In order to bring this application under Rule 26.2 the court would have to make an order in relation to the Notice of Application for Court Orders filed by the Applicant on November 20, 2020. No opportunity was afforded to the Respondent in this case to make submissions on the point in any format or at all. In fact, no mention was made of the possibility of or the intention of the court to make any orders in relation to the Applicant's defective application in order to bring it within the applicable rules. As a consequence, this rule does not apply.

[59] Finally, Rule 26.9(3) also gives the court power to correct an error in procedure or failure to comply with a rule, practice direction or court order in circumstances where no consequence has been stated for non-compliance. Rule 15.2 does not state a consequence for non-compliance. However, it does lay down two very clear grounds that must be satisfied on an application for summary judgment. Rule 26.3 on the other hand, also sets out very clear grounds that must exist in order for a court to exercise its discretion to strike out a statement of case. The applications are substantially different even if the end result is the same. In order for the court to treat it as having been made under Rule 26.3(1), the court is left to select the subsection/s on which the defendant is basing his application as no attempt was during the hearing to correct the defect in the application.

Whether the Respondent has a more than an arguable case.

[60] Rule 26.3(1) lists five bases on which an application to strike out can be made. In that regard I looked at the grounds on which Mr. Thompson made his application. The grounds really just set out the chronology of the case before the court. The main points of contention begin after the June 29, 2020 orders with focus on the Respondent's failure to comply with them. I have sought to set them out in detail as I believe it is necessary to determine under what subsections this application falls;

"1. That the subject matter of this claim Concerns all that parcel of land forming part of Retirement and the parish St. Mary and being all the land comprised in certificate of title registered at Volume 1078 Folio 338 of the Register Book of Titles.

2. That the matter was commenced by way of Notice of Application for Court Orders and Affidavit in support both filed on May 19 2020.

3. That subsequently, a Claim Form and Particulars of Claim were both filed on May 27th 2020.

4. That on the 29th day of June 2020, this Honourable Court ordered that the claimant serve an Amended Fixed Date Claim Form on the Defendant's Attorney's-at-Law on or before September 16, 2020.

5. That the claimant failed to serve on the Defendant's Attorneys at law the Amended Fixed Date Claim Form as ordered by this Honourable Court.

6. That the order has not been complied with as to date we have not received the Amended Fixed Date Claim Form in respect of Claim No. SU2020CV01510.

7. That an Amended Fixed Date Claim Form filed October 21 2020 Claim No. SU2020CV1669 was served on the Defendant's Attorneys-at-Law on October 28 2020.

8. That the amended fixed date claim form contains a new suit a new suit number than that of claim number SU2020 CV 01510.

9.That in any event the Amended Fixed Date Claim Form predates the date of the order entered by this Honourable Court on the 29th day of June 2020, contains a photocopy signature for the Claimant and is not supported by an Affidavit.

10. That to proceed with this claim would also be an inefficient use and abuse of this Honourable Court's limited resources and an abuse of process..."

My reading of the application as filed discloses that perhaps it was counsel's intention to make the application to strike out pursuant to Rule 26.3(1) (a) and (b). The sections have been outlined above.

[61] Counsel submitted, relying on the authority of ***McNaughty,*** that the series of events, *as outlined in paragraph 60*, warrants the claimants statement of case being struck out. In the case of ***Biguzzi v Rank Leisure Plc*** [1999] EWCA Civ

1972 Lord Woolf in considering this appeal against an order of a judge overturning an order of a judge of the lower court striking out the claim, said,

> *"The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out… There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases."*

[62] It is therefore accepted that striking out is a last resort and should not be used lightly by the courts.

[63] It is undeniable that the Respondent failed to comply with an order of the court. This kind of non-compliance is not to be tolerated by any court. I accept that insistence on compliance is key to the courts maintaining its authority and ensuring that the system does not descend into chaos and backlog. That being said the Courts must consider the circumstances of each case.

[64] In the Court of Appeal decision of ***Sandals Royal Management Limited v Mahoe Bay Company Limited*** [2019] JMCA App. 12, Foster-Pusey JA, relying on the case of ***Charmaine Bowen v Island Victoria Bank Ltd, Union Bank Limited etal*** [2014 JMCA APP 14 listed the following as considerations that should be examined by the court when considering an application to strike out: length of Delay, reasons for the delay, the merit of the case and whether any prejudice may be suffered by the respondent. I will apply them accordingly.

Length of Delay

[65] The judge's order was for the AFDCF to have been filed on or before September 16, 2020. Counsel in his Affidavit in Response said that he filed and served the documents on time, that date being October 16, 2020. The problem counsel faces, is that the date given was September 16, 2020. He was therefore 30 days late. Having served the Applicant's attorneys 30 days late, it was borne out that

the documents bore the wrong claim number, predated the June 29, 2020 Order and had a photocopied signature of the Applicant, a state of affairs that this Court will not venture to speculate on. The several errors were not rectified until May 26, 2022. That was a period of eighteen months which was undeniably long.

Reasons for the Delay

[66] In his explanation, counsel cited the onset of the pandemic which affected the ability of his client, who resides out of the jurisdiction, to get documents notarised and sent to Jamaica and for him to get documents to her. In addition, two claims had been filed concerning the same matter and the same parties and this resulted in a bungling when the documents were filed. There is some merit to his reasons. After all the pandemic affected the entire planet. International travel almost grounded to a halt and it took some time for processes to be developed that could facilitate the continuation of business without person to person contact. Nevertheless, if counsel had exercised a little more care, time and attention to this matter it need not have taken 18 months for him to comply with the orders.

Merit of the Case

[67] This case concerns property. Said property is registered in the name of the deceased Micheal Culliton who died intestate. The Respondent, his daughter, has been appointed as Representative of his estate. On the face of it, the Respondent is already in good standing. However, this case goes beyond her, in that, there are other beneficiaries to Micheal Culliton's estate, who are awaiting the outcome of this trial.

[68] An injunction was granted preventing the Mr. Thompson for transferring the property into his name or his nominees and also restraining the Registrar from transferring the property. This injunction, in my view, would not have been granted if the Respondent had not satisfied the court that there was a serious issue to be tried. This is, despite the fact, that the orders in relation to the injunction were by consent. The injunction is not a permanent solution however, as it is expected that

a trial will ensue to settle the matter once and for all. That trial can only commence after the AFDCF is filed. As a result of the late filing, this matter has not progressed beyond the injunction. Despite this, I find there is a case to be tried. If the court were to grant the orders sought, the estate of Micheal Culliton would be closed out from the court. The estate would lose land that is properly registered in the deceased name. In addition, the beneficiaries would not be able to realise any interest in the land that they may be entitled to. That, in my view, would not be in keeping with the overriding objectives.

Prejudice

[69] Counsel for the Applicant has mentioned that his client was prejudiced, in that, because of the late filing of the AFDCF his client had only 19 days to file and serve his response on or before November 16, 2020. I should point out that the late filing counsel is referring to is the offending AFDCF bearing a different Claim number from the one at bar. Despite this I do not agree. A reading of the order makes it clear that one is not on condition of the other. The order did not state that the respondent was to file and serve an affidavit in response upon service of the AFDCF but rather it gave the respondent a date by which he should file an affidavit in response.

[70] Normally, an affidavit in response is filed after service of a FDCF and Affidavit but in this case the respondent had already been served with a FDCF on June 16, 2020 and filed an Acknowledgement of Service confirming same. By that time the Respondent was fully authorised to bring the claim. Prior to that the defendant had been served with several affidavits from Mrs. Culliton-Haynes which stated fully her position on the matter. Again on October 28, 2020 the respondents were served with an AFDCF which also outlined the claim being brought by the claimant. Albeit, that AFDCF is not a part of this matter as it was given a different Claim number by the Registry. It only came to the attention of this court by way of the Applicant's so entitled, application to strike out. In any event, the point of all this, is to say that the Applicant's knew all along what the Respondent's claim was and

as such, in the view of this court, suffered no real prejudice and was equipped with all the necessary information to formulate a response well in advance of November 16, 2020. It was always open to him, if necessary, to request permission to file a Further Affidavit after receiving the correct AFDCF. Even if there was some prejudice I find that it can be ameliorated by the award of cost.

[71] Similarly, in considering whether or not a case should be dismissed as an abuse of process, consideration must be given to all the circumstances of the case. The submissions in relation to an abuse of process are no doubt borne from the fact that there was another case filed which was similar in every respect except for the claim number. It is clear from the submissions of counsel representing the Applicant, that this only came to their attention when they were served with an AFDCF in October which bore a different claim number. From all indications, they did nothing in pursuance of this new claim but instead pointed it out to the Respondent's attorneys. This is what led to the bungling when a Notice of Discontinuance was filed in the wrong matter. Counsel for the Respondent submitted that when the AFDCF was filed in the registry it was given a new number. They were advised by the Registrar to discontinue one. In the circumstances it cannot be said that the Claimant is abusing or misusing the process of the court. It cannot be said that res judicata or any of the estoppels apply. See ***Fletcher & Company Limited v Billy Craig Investments Limited*** [2012] JMSC Civ 128. There is no merit to this ground.

Disposition

[72] I accept that there was delay on the part of the Respondent in filing the AFDCF as ordered on June 29, 2020. However, the reasons put forth by the Respondent has some merit, even if I find that counsel was not as meticulous as he should have been in observing the deadline and in filing the relevant documents. Especially when one considers that it was counsel who extracted and filed the formal order indicating that the AFDCF was to be filed and served on or before September 16, 2020. Even so, there has been no substantial prejudice. In my opinion nothing

that has transpired so far poses a ‘real risk that a fair trial may not be possible’. Striking out a statement of case should be the very last resort and is typically reserved for the most extreme of cases. Bearing in mind the overriding objectives I do not believe that this is a case that warrants the court exercising its discretion under Rule 26.3(1)(a).

Orders

1. The application is dismissed.
2. As a sanction the Claimant/Respondent is to pay the Applicant’s cost on the application.