[2022] JMSC Civ. 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02598

BETWEEN	**VIVIENNE DOUGLAS CHANNER**	**CLAIMANT**
AND	**LORNA CHANNER**	**DEFENDANT**

IN CHAMBERS VIA ZOOM

Mrs. Bobette Brown Hibbert for the Applicant.

Mrs. Caprice Morrison and Miss Stacy Ann Williams instructed by McMorrison and Williams the Respondent.

Date Heard: January 24, 2022 and February 25, 2022.

Application to stay or set aside order - Rule 18.11 - Rule 39.6 of the Civil Procedure Rules.

Pettigrew Collins J

BACKGROUND

[1] On the 1st of May 2019, E Brown J granted orders on a Fixed Date Claim Form (FDCF) which was filed on June 21,2016 by the respondent in these applications. The orders were to the effect that the disputed property which is located in Brumalia, Mandeville in the parish of Manchester and registered at volume1333 folio 858 of the Register Book of Titles, was owned by Burnette Channer in law and in equity, that Lorna Channer should transfer to Burnette Channer her ex-husband, all her rights, title and interest in and to the property, in order to enable his widow to properly distribute his estate. The respondent in these applications is the widow of Burnette Channer.

THE APPLICATIONS

[2] The applicant filed a Notice of Application for Court Orders on April 7, 2020, seeking the following orders:

1. A stay of execution of the judgment/order
2. That the order be set aside

[3] A notice of application was also filed on December 15, 2020. In that application, an extension of time was sought for the filing of the application dated April 7, 2020. Counsel averred that this second application was filed out of an abundance of caution, as she is of the view that it ought not to be required.

[4] The bases for her April 7, 2020 application are: that the applicant was never served with the claim and had no knowledge of any matter against her in a court in Jamaica and that she is not aware of any marital agreement between herself and her now deceased ex-husband.

DECISION

[5] The application for extension of time to file the application seeking the setting aside or stay of the order was necessary and is granted so that the court can properly hear the April 7, Notice of Application on the merits. Although the court admits of the possibility (and I put it no higher) that the applicant was not served with the claim, the applicant has not demonstrated on a balance of probabilities that had she been present at the hearing, it is likely that a different order might have been made, hence neither of the substantive orders sought should be granted.

THE APPLICANT'S EVIDENCE AND SUBMISSIONS

[6] The applicant filed a total of four affidavits in support of both applications. In one of her affidavits, the applicant stated that she is one of the registered owners of property comprised in Certificate of Title registered at volume1519 folio 671 of the Register Book of Titles.

[7] The applicant also asserts that the respondent is now taking steps to enforce the order made by E. Brown J. She says that if the stay is not granted, she will suffer irreparable harm.

[8] It is the applicant's affidavit evidence that she was never served with any document related to the claim by one Andrew Esposito as was stated in the affidavit of Mr Esposito dated October 12, 2017, on which reliance was placed for proof of service of the FDCF upon her.

[9] According to the applicant, she was not residing at the Craigs Road address on the alleged date of service. This is the address at which she was purportedly served by Mr Esposito. She stated that she had ceased living at that address from the 13th of May 2017. She gave a different address which she said she lived at from 2016 to sometime in 2018. She averred that "we" had lost the property at which it is said that she was served, in foreclosure proceedings. It is not clear who else was being referred to when the applicant said "we". She did not state when the foreclosure process was completed.

[10] The applicant said that the reason that the Craigs Road address was used after May 2017 for the purposes of noting her ex- husband's death on the certificate of title to the disputed property, was because the attorneys at law who represented her for the purpose, had that address on record since she had previously engaged the services of that firm of attorneys.

[11] The applicant also deposed that she learnt of the matter in this court when she instructed her attorney at law to list the disputed property for sale through a real estate agent. This was on the 30th of January 2020.

[12] The applicant relies on Rule 11.18 of the Civil Procedure Rules as well as rule 39.6. She also relies on Rule 26.1 (7). Reliance was also placed on the case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ. 4.

[13] With regard to the position that the December 15, 2020 application was filed out of an abundance of caution, Mrs Brown Hibbert submitted that rule 11.18 as well as rule 39.6 require that the application to set aside the order be filed within 14 days of being served with the order, but the applicant's contention as seen from her

affidavit evidence, is that she was never served with the documents regarding the initiation of the proceedings and she was also never served with the formal order.

[14] Counsel submitted that in light of the applicant's credible and compelling evidence that she was not served, she was not in a position to file a defence, so she definitely has a good reason for not filing one. She contends that the delay in filing this application was some two months and two days, having regard to the time when she learnt of the court order.

[15] Counsel submitted that among the factors the court should consider is that the issue of fraud is a live one. She pointed out that an expert report was provided which shows that the applicant was not the signatory to the supposed settlement agreement. She also asked the court to consider that real estate is the most important interest that an individual is likely to acquire in a lifetime and given the fact that the legal title is vested in the applicant, the property in question is prima face her own.

[16] Counsel placed heavy reliance on the applicant's assertion that the marital settlement agreement on which the respondent relies is not a document known to the applicant. According to Counsel, the only other party who could speak to the validity of any such document is the applicant's now deceased husband.

THE RESPONDENT'S EVIDENCE AND SUBMISSIONS

[17] In response to the application, Mrs Morrison asked the court to have regard to the affidavit evidence of the respondent and to note that whether it is rule 39.6 or rule 11.18 that is applicable in this instance, the requirements under each is the same; that is, the applicant is required to satisfy a two-pronged test. She directed the court's attention to the case of **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16 and **Walker v Hanson** [2018] JMCA Civ 19.

[18] In seeking to demonstrate that the applicant had no good defence and so even if she was present at the hearing when the order was made, it is not likely that some other order might have been made, the respondent directed the court's attention to the affidavit of Loida John Nicholson filed on the 24th of November 2021.

[19] In that affidavit, the deponent stated that she is an attorney at law who is licensed to practise in Connecticut and has practised there for over 30 years. She deponed that she was retained by Mr Burnett Channer to represent him in divorce proceedings against Mrs Lorna Channer. She said Mr Channer was the defendant in the proceedings. She spoke of the grant of the divorce which she said proceeded as an uncontested trial before His Honour Mr John Caruso of the Superior Court of Hartford Connecticut. She averred that the parties had executed a Settlement and Property Distribution Agreement which was also signed by her as Mr Burnett's legal representative and by an attorney at law Caryl Balskus-Walker in her capacity as legal representative for Mrs Lorna Channer.

[20] She deponed that prior to the execution of the agreement, both parties were cautioned and advised by their respective attorneys in order to ensure that they both completely understood the agreement. She further deponed that both parties were required by the court to confirm that it was their signature which appeared on the document and that the agreement was not signed under duress or coercion. She exhibited a certified copy of the transcript as to what transpired in court on the occasion.

[21] I will make reference to the respondent's affidavit evidence and further reference to other evidence in the analysis, as is deemed necessary to resolve the applications.

ANALYSIS

[22] The respondent's attorney at law was of the view that rule 11.18 is the applicable rule. I am inclined to accept that rule 39.6 is the applicable rule, as we are here concerned with an order that was made on a FDCF in circumstances where evidently the first hearing of the FDCF was treated as the trial of the claim and the order was made, putting finality to the claim. In any event rule 11.18 and rule 39.6 bear certain marked similarities.

[23] Rule 11.18 of the Civil Procedure Rules 2002 (CPR) states as follows:-

> "(1) *A party who was not present when an order was made may apply to set aside that order.*

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing-

(a) a good reason for failing to attend the hearing; and

(b) *that it is likely that had the applicant attended some other order might have been made."*

[24] Rule 39.6 states:

(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

a. A good reason for failing to attend the hearing; and

b. *That it is likely that had the applicant attended some other judgment or order might have been given or made.*

[25] At paragraph 41 of **Patrick Allen v Theresa Allen**, it was made clear that both limbs of rule 11.18 of the test must be satisfied. **Walker v Hanson** dealt with rule 39.6 and a similar observation was made at paragraph 34 of the judgment that the two requirements are cumulative. Therefore, the applicant is required to establish on a balance of probabilities that she had a good reason for failing to attend the hearing and that had she been present at the hearing, it is likely that some other order might have been made.

[26] Rule 26.1 (7) provides as follows:

> *A power of the court under these Rules to make an order includes a power to vary or revoke that order.*

[27] This court reserves the power by virtue of the provisions of rule 26.1 (2) (c) to extend or shorten the time for compliance with any rule, practice direction or order, even if the application for an extension of time is made after the time for compliance has already gone.

[28] Rule 26.1 (2) (e) is also relevant to this application. This rule permits the court to stay the whole or part of any proceedings. Proceedings may be stayed generally, or until a specified date or event. The applicant is desirous of defending the FDCF, hence her application. It is presumed that the applicant is seeking one or the other of the orders in the application.

[29] It was the applicant's position that she applied for the extension of time to file the application out of an abundance of caution but was of the view that the court ought to find that the application was not necessary. In light of the lack of opportunity to cross examine Mr Esposito, I make no definitive finding that the applicant was served. I observe however, that the applicant has amply demonstrated that she is capable of speaking other than the truth and it would not be difficult to reject her assertion that she was not in fact being truthful about the lack of service. I am mindful that she produced evidence in the form of a case incident report (see paragraph 4 of her affidavit filed June 21, 2021) The writer of the report who it appears at the time was a member of the police department of Windsor, indicated that he was dispatched to the applicant's address at Craigs Rd Windsor Connecticut for an eviction complaint. It would also appear from the report that the applicant was being evicted from the premises. The date of that incident report is consistent with the date the applicant said she ceased living at the premises.

[30] Without evidence, it is not open to this court to speculate but that information is not definitive proof that the applicant in fact removed from the Craigs Road address on the occasion she was by inference, said to be evicted from the property. The applicant also exhibited documents she says are proof of payment of rent for the address she said she had relocated to and a receipt from a florist to confirm that she

resided at a different address. The documents purporting to be rent receipts were simply not at all legible for this court to have been able to discern the contents. The receipt from the florist did in fact give a different address for the applicant which she says is one of the of the addresses she had lived at. That receipt bears no date and is wholly unhelpful.

[31] Even if this court should consider based on the applicant's evidence that she was not served with the order and so the question of 14 days from the date of service of the order would not be applicable, what is evident is that the applicant made this application over two months after becoming aware that there was a court order. In my view, it would be reasonable to expect that the application would have been made within 14 days of becoming aware of the order. For that reason, I believe the applicant requires an extension of time to make this application and that extension of time granted. I am mindful that the granting of an extension of time is predicated upon the applicant showing for example that she has a good defence to the substantive matter to be considered. I took the view however that one option available to this court is to grant the application for extension of time so that the substantive application can be heard on the merits.

[32] The question of whether or not the applicant was served in respect of the FDCF, is of course a relevant factor when giving consideration to whether or not the orders of E. Brown J should be set aside or execution of same should be stayed. Thus even assuming based on the analysis above that the applicant was not served, she still has to satisfy the second limb of the test.

[33] It is undisputed that the property in question was registered to the applicant and her now deceased ex-husband. The difference in the volume and folio numbers appearing in the respondent's court order and that stated by the applicant may be explained by the fact that the applicant had made a lost title application in 2018. See her affidavit filed on April 7, 2020. It is the respondent's evidence that her late husband had informed her that the certificate of title bearing volume number 1333 folio 858 was in the possession of his sister. This assertion offers an explanation as to why the applicant may have made a lost title application in respect of the property.

[34] A copy of the settlement agreement was exhibited. In that document, it was detailed among other things, that the applicant in this case would become the sole owner of the residence occupied by herself and Mr Channer at Craigs Rd Windsor Connecticut and that she would transfer all her rights in the property located in Mandeville which I am satisfied is the disputed property to Mr Channer. There was also an agreement whereby the applicant would transfer 26% of her pension to Mr Channer. Further, there was a clause in the agreement directing that no changes were to be made to the covenants and agreements contained in the document, except by an instrument in writing.

[35] Pursuant to the settlement agreement, the applicant had agreed to execute and notarize the necessary documentation to effect transfer of the disputed property to her ex-husband but based on the respondent's evidence, that transfer was never done in Mr. Channer's lifetime.

[36] It is noteworthy that the applicant did not specifically raise the question of fraud in her affidavit or in the Notice of Application. The assertion was that she did not remember signing an agreement.

[37] Without setting out all of the evidence and the contents of the settlement agreement, it appears overwhelmingly evident that the applicant Mrs Lorna Channer was questioned in the court in Connecticut at the time of the execution about the details contained in the settlement agreement and that on the same occasion, she consented to same.

[38] Counsel for the respondent points to the respondent's affidavit evidence (paragraph 17 of her affidavit filed November 22, 2021). In that paragraph, the respondent deposed that there is a case which she says was brought by the applicant in Connecticut regarding bankruptcy proceedings. She pointed to what I accept to be cogent reasons for believing the applicant is the individual involved in the case and to the fact that reference was made in that case to the Settlement and Property Distribution Agreement by virtue of which the applicant was divested of her interest in the disputed property.

[39] I accept the respondent's assertion that it is not plausible that the applicant would not be aware of the settlement agreement but as she admitted, was aware of

the divorce, in circumstances where the settlement agreement was annexed to the divorce decree.

[40] **Fiesta Jamaica Limited v National Water Commission** dealt with the requirements that must be shown where an application was made for extension of time to file a defence. The Court of appeal stated that the judge was constrained to consider whether the affidavit that had been filed in support of the application contained sufficiently meritorious material to warrant the grant of the orders sought. Among the information that the court said should be included, was that the applicant should show that it had a good reason for failing to file the defence within the time prescribed by the rules and that the proposed defence had merit. Although rule 39.6 is not worded in a way that specifically says that the applicant must have a defence on the merits, in essence that is what the applicant is required to show in order to demonstrate that had she been present, it is likely that a different order would have been made and consequently, that this court should exercise its discretion to set aside or stay execution of the orders made by Brown J

[41] The good defence that the applicant relies on, is firstly that she does not recall signing any agreement in relation to properties in the United States or Jamaica. Secondly, she places much reliance on a report from one Beverly Y East, a forensic document examiner who stated in her report that she has practised the science for some 32 years. Ms East detailed her training and experience which no doubt shows that she is eminently qualified to examine questioned documents and identify handwritings. She explained in the report that she examined some 11 different documents bearing the applicant's signature and she concluded that the questioned document does not bear an authentic signature of Lorna Channer.

[42] It has not escaped notice that six of the the documents described by Ms East and/or Robert Farr (presumably a qualified document examiner who performs duties for and on behalf of Ms East) as those examined for the purposes of comparing the applicant's signature bear dates between the period 4th of May 2010 and 11th of June 2021. The other five documents are undated. This choice of documents it is accepted, represents a reasonable range of documents in terms of the date of the signature and the variety of documents. It was explained in great detail, the basis on

which the conclusion was arrived at. I do not find it necessary to detail that information here.

[43] Without detailing all the information contained in the three affidavits filed by the respondent in this application, there is an abundance of evidence to support the respondent's assertion that Mrs Lorna Channer the applicant, agreed to be divested of her legal and equitable interest in the disputed property by virtue of the Settlement and Property Distribution Agreement which I find that she voluntarily entered into, hence she has no basis on which to maintain her application that the order should be revoked or execution of same stayed.

[44] This is so notwithstanding the contents and conclusion to be found in the report of the question document examiner. I also do not doubt that the applicant would have no difficulty in having the report accepted by a court as an expert report. Counsel for the respondent had questioned whether the court could have regard to its contents since the report had not been treated with in accordance with rule 32. I am very firmly of the view that it was not necessary for the applicant to have treated with the report so that it conformed to the provisions of rule 32 for the purposes of this application. This is so as the main purpose was to produce the information contained in the report at this stage as potential evidence available to her should the matter ever go to trial. Although the court is required at this stage to consider the contents, it was not really presented as an expert report. Thus I took the view that it was proper to have regard to its contents, just as I had regard to the other documents exhibited by the respondent in proof of her contention that the applicant was the one who executed the agreement.

[45] On the matter of the overwhelming evidence available to show the applicant's full knowledge of the document, Mrs Morrison asked the court to observe that the applicant relied on the very same agreement in filing a motion to enforce the terms of the agreement. It is noted that as counsel pointed out, paragraph 2 in the case exhibited, reproduced the exact contents of article 3 1 (a) of the settlement agreement.

[46] The attorney at law Ms. Loida John Nicholson who deponed to the circumstances of the execution of the settlement agreement, was present by video

link (on zoom) and tendered for cross examination. Of preeminent significance, is the fact that Mrs Brown Hibbert on behalf of the applicant, declined the opportunity to cross examine her. I made it clear to her the significance of doing so. Counsel intimated that her client's position was that she was not served in the proceedings resulting in the order that she is seeking to have set aside or stayed and that she was therefore entitled to have it set aside. She also pointed out that she had requested the presence of Mr Esposito. Counsel for the respondent advised the court that Mr Esposito was available via zoom on the previous occasion that the matter was set for hearing. He did not however appear on the day the hearing.

[47] As was pointed out by Mrs Morrison, based on the wording of both rules 11.18 and 39.6, as well as the case law, the applicant is required to satisfy both limbs of the rules. Even if this court might admit of the likelihood that she was not served, that probability would not be sufficient to cause the court to make either of the orders sought.

[48] I am mindful of Brooks JA (as he was then) observation in **Sharon Allen v Ronique Patterson** [2017[JMCA Civ. 7 that Counsel's submission that a party who was not served with a notice of application, should not, in applying to set aside the order made in their absence have to show that it is likely that some other order might have been made if they were present at the hearing. He further observed that such a requirement could be considered a fetter or an abridgement of the constitutional right to be heard. Notwithstanding this observation, the rule remains in place. In other circumstances this observation might have given rise to serious hesitation on my part. However, in the particular circumstances of this case, I am faced with overwhelming evidence that the applicant has no real chance of being able to show that some other order might have been made, and particularly one that could conceivably be an order in favour of her holding an interest in the disputed property.

[49] It is noted that at the time of the making of the order of Brown J Mr. Burnette Channer was deceased so that the order could have reflected that the property be transferred to his estate. In my view nothing turns on that perceived irregularity as far as the applicant in this matter is concerned, since nothing would change as it relates to her interest or entitlement to the property.

[50] In passing, I must mention that the applicant appears to be quite aggrieved at the likelihood that the respondent may derive an interest in the disputed property and she expressed among other things, that the deceased marriage to the respondent was of very short duration and her concern as to her children's entitlement. The respondent was clear in her affidavit that she was mindful of the entitlement of the deceased adult children and that she needed to administer his estate.

[51] It is now the position that a grant of a stay of execution of judgment is to be dictated by the justice of the case. The primary consideration is whether there is a risk of irremediable harm to one party or the other if the stay is granted or refused. More detailed considerations were set out in the cases of **Combi (Singapore) PTE Limited v Sriram and another** (unreported) Court of Appeal of England and Wales, judgment delivered 23 July 1997 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ. 2065.

[52] The principles distilled from these case were applied in local cases to include **Traille Caribbean Limited Applicant v Cable & Wireless Jamaica Limited T/A Lime** [2020] JMCA App 45. I do not find it necessary to detail all the relevant considerations since I am of the view that the applicant cannot succeed in establishing that she has a meritorious defence and hence the likelihood of a proper claim in respect of the disputed property. To make any order that would result in giving her an opportunity to defend the claim or to grant a stay of execution of the order of the court, would result in unnecessary delay in the administration of the estate of Mr Channer deceased.

[53] In light of the foregoing, the application is refused with costs to the respondent to be taxed if not agreed.