[2023] JMSC Civ 81

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018 HCV 02909

IN THE MATTER of an Application by **LORRAINE NADINE EDWARDS**, daughter and beneficiary and **IONA EDWARDS YOUNG**, Executrix in the Estate of **DILLION WESLEY EDWARDS**, deceased for a declaration under Sections 3, 4(a), 14 and 30 of the Limitation of Actions Act of Jamaica

AND

IN THE MATTER of the Estate of **DILLION WESLEY EDWARDS**, deceased, testate, Businessman, late of 3 Locksley Avenue, Hampton Green in the parish of St. Catherine

BETWEEN	**IONA EDWARDS YOUNG** (Executrix in the estate of Dillion Wesley Edwards, deceased)	**RESPONDENT/1st CLAIMANT**
AND	**LORRAINE NADINE EDWARDS**	**RESPONDENT/2nd CLAIMANT**
AND	**GILDA JOYCE GORDON**	**APPLICANT/DEFENDANT**

IN CHAMBERS (by Video Conference)

Ms Ingrid Lee Clarke Bennett and Ms Renae Robinson instructed by Pollard, Lee Clarke & Associates for the Claimant/Applicant

Mrs Donna Scott Mottley instructed by Scott, Bhoorasingh & Bonnick, Attorneys-at-Law for the Defendant

HEARD: 23rd NOVEMBER & 8th DECEMBER 2022, 23rd JANUARY & 30 APRIL 2023

Civil Procedure Rules – Setting aside judgment given in party's absence – whether the applicable rule is rule 39.6 or rule 13.2 – Rule 39.6 - whether good reason given for absence of defendant – whether some other order would have been made if the defendant had been present

IN CHAMBERS (by Video Conference)

MASTER C. THOMAS

Introduction

[1] The defendant is seeking to set aside the following substantive orders of Nembhard J made at the first hearing of a fixed date claim form in the absence of the defendant:

1. The title of the Defendant, Gilda Joyce Gordon, to the premises situate at lot 285, Hampton Green in the parish of Saint Catherine, being the land comprised in Certificate of Title formerly registered at Volume 982 Folio 271 and now being registered at Volume 1450 Folio 196 of the Register Book of Titles, is extinguished by virtue of the operation of section 30 of the Limitation of Actions Act 1881;
2. Dillion Wesley Edwards is declared to be the owner of the legal and beneficial interests in the land situate at lot 285, Hampton Green in the parish of Saint Catherine, being the land comprised in Certificate of Title formerly registered at Volume 982 Folio 271, and now being registered at Volume 1450 Folio 196 of the Register Book of Titles.
3. The Registrar of Titles is directed to cancel the Certificate of Title registered at Volume 1450 Folio 196 of the Register Book of Titles, in the name of Gilda Joyce Gordon, and to issue a new Certificate of Title, in respect of the property situate at lot 285 Hampton Green in the parish of St Catherine, being the land

comprised in Certificate of Title formerly registered at Volume 982 Folio 271, and now comprised in Certificate of Title registered at Volume 1450 Folio 196 of the Register Book of Titles. The new Certificate of Title is to be issued in the name of Dillion Wesley Edwards;

4. Liberty to apply;
5. The Claimants' attorneys-at-law are to prepare, file and serve the orders made herein. This order is to be served on the defendant by way of registered mail at the address 1000 NW, Terrace 116, Miami, Florida, United States of America, 33168.
6. …

Background

The Claim

[2] On 2 August 2018, the claimants initiated the instant claim by filing a fixed date claim form seeking a number of declarations and orders with respect to property located at Lot 285 Hampton Green in the parish of St Catherine formerly registered at Volume 982 Folio 271 now registered at Volume 1450 Folio 196 of the Register Book of Titles ("the subject property"). Title to the property was at first registered in the names of Dillion Wesley Edwards ("the deceased"), who died in 2007, and the defendant, as joint tenants, and was subsequently registered in the sole name of the defendant in 2011. The 1st claimant is the executrix of the deceased's estate and the 2nd claimant is the deceased's daughter and a beneficiary under the deceased's will.

[3] In summary, the evidence as contained in the 2nd claimant's affidavit in support of the fixed date claim form is as follows. The deceased and the defendant had a common law relationship. The couple resided at the subject property in or about 1980. The 2nd claimant lived with them for a period of time before residing elsewhere. She returned to the subject property in or about 1984 when the defendant left for the United States of America ("the USA"). The 2nd claimant maintains that to the best of her knowledge, information and belief, the relationship between the deceased and the defendant terminated upon the defendant's departure for the USA and the defendant has never returned to

Jamaica, nor has she visited the subject property. At the defendant's written request by way of letter, the defendant's possessions which remained at the subject property were moved to New Roads, Clarendon in the 1980s. Aileen Bryan, who was involved in a relationship with the deceased, went to reside at the subject property and did so until 2012.

[4] The 2nd claimant deponed that the property was registered in the names of the deceased and the defendant as joint tenants in 1985. The purchase was financed solely by the deceased and the defendant did not make any contribution to the property, nor contribute anything to the discharge of the mortgage payments or any maintenance of the property since its purchase in 1985. The deceased paid all the property taxes for the subject property for the period 1999 - 2001. For the period of 2002 - 2006, the property taxes for the subject property were paid by the 2nd claimant.

[5] Prior to the deceased's death in 2007, the 2nd claimant effected repairs to the roof of the house and in 2006, she added a kitchen and storeroom. The renovations were made with the understanding and knowledge that the property belonged to the deceased.

[6] In or about 31 May 2011, the subject property was registered at Volume 1450 Folio 196 of the Register Book of Titles. The 2nd claimant alleged that the defendant procured a new title fraudulently by way of a lost title application from the Registrar of Titles, the 'true' title having never been lost but had remained in the deceased's possession, and upon his death in the claimants' possession. The 2nd claimant deponed that in any event, the defendant's interest in the property would have been legally extinguished in or around 1997 and the defendant had not taken any interest or active steps to revive any interest that she would have had in the subject property.

[7] The claimants sought declarations that, among other things, the 2nd claimant was entitled to a legal and equitable interest in the subject property by virtue of her father's Last Will and Testament; and by virtue of the deceased's exclusive possession and control of the subject property for a period of twelve years and upwards prior to his death and the commencement of this claim, he acquired an absolute title to the subject property against the defendant pursuant to

sections 3, 4(a), 14 and 30 of the Limitation of Actions Act on or about the year 1997.

[8] On 9 January 2019, Barnes J (Ag) considered an application which had been filed by the claimants on 2 August 2018 in respect of service of documents filed in the claim and granted the following orders:

> 1. Permission is granted to the claimants/applicants to serve the Fixed Date Claim Form, accompanying documents, the Affidavit in Support and any other documents in connection with the claim herein on the defendant who resides outside the jurisdiction;
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> 2. Permission is granted to the claimant/applicants to dispense with personal service of the Fixed Date Claim Form, accompanying documents, the Affidavit in Support and any other documents in connection with the claim filed herein and that same are to be served on the defendant outside the jurisdiction at:
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> 1000 NW 116 Terrace,
> Miami, Florida
> United States
>
> or such other address in the jurisdiction of the United States of America by registered mail **or** courier, **or** alternatively by advertisement published in the Miami Herald Newspaper.
>
> 3. The oral application for extension of time to serve the Fixed Date Claim Form and supporting documents as filed on the 2nd August 2018 is granted pursuant to rule 8.15(4)(b) of the Civil Procedure Rules and the supporting affidavit of Lorraine Edwards filed on the 2nd August 2018. (Emphasis supplied)

[9] The first hearing came before Henry-McKenzie J on 25 June 2019 and was adjourned to 18 November 2019. On 18 November 2019, Nembhard J made

the orders listed at paragraph 1 of this judgment. As a consequence of Nembhard J's judgment, the defendant filed a notice of application for court orders seeking the following substantive orders:

> (1) That the Order of this Honourable Court entered on the 18th day of November 2019 be set aside and the issues involved in this claim be fully ventilated before it;
>
> (2) That all actions flowing from the said Order be stayed pending final determination of the issues between the parties hereto, the actions specifically to be stayed to include but not limited to the application for the Grant of Probate, the Transmission and Transfer of the land subject of the said Order which can be effected pursuant to any Grant of Probate made by this Honourable Court;
>
> (3) That the Executrix of the Estate DILLION WESLEY EDWARDS be ordered by this Honourable Court to take no step(s) to part with the said property until the determination of the various interests of the parties hereto to prevent the Applicant from being permanently deprived of any benefits to be derived from the property;
>
> (4) That the Registrar of Titles be directed not to effect any further change to the registered proprietorship of the said land until further ordered by this Honourable Court;

The defendant's evidence in support of the application

[10] In an affidavit in support of the application filed on 6 October 2021, the defendant deponed that she was unaware of the claim being filed by the claimants against her with respect to the subject property. She stated that on 23 July 2019, the attorney-at-law representing her in the sale of the subject property informed her that there was a caveat lodged with the Registrar of Titles, prohibiting any dealings on the title. She sought the advice of that

attorney as to how to proceed to deal with the claim but he could not assist as he confines his practice to non-litigious matters. The defendant further stated that she did not receive the claim because she was not living at 1000 NW, 116 Terrace, Miami Gardens, Florida ("1000 NW, 116 Terrace") at the date of posting since she had moved to live with her daughter at 1100 NW, 206 Terrace, Miami Gardens, Florida, since 2013. She stated that she believes that she has a real prospect of successfully defending the claim as she and the deceased had discussed the situation while he was alive and they had come to the understanding that she was asserting her right to the property but would allow him to live in the property pending resolution of certain issues between them.

The proposed defence to the claim

[11] The defendant also exhibited to her affidavit in support of the application, the affidavit in answer to the claim that she proposed to file should the judgment be set aside. In her affidavit, among other things, she asserted that she contributed significantly to the purchase of the subject property. She stated that she did leave Jamaica in or around 1983 and that the relationship between herself and the deceased was ongoing until 1997. Her son continued to reside at the subject property for around six (6) years after she had migrated. She had her furniture removed from the subject property by choice and refused to visit the subject property on her visits to Jamaica because the deceased had entered into another relationship. She paid the property taxes for the subject property up to 1997 but ceased doing so due to her disgust with the conduct of the deceased and her desire for him to bear some of the responsibilities for himself. The defendant maintained that the expenditure incurred by the deceased and the 2nd claimant does not amount to giving any additional rights to the deceased and can only be viewed as standard maintenance for the use and occupation enjoyed by the deceased. She also deponed that she engaged in direct communication with the 2nd claimant and up to 2013 remitted monies to the 2nd claimant for the upkeep of the property.

[12] The defendant deponed that she had asserted her right of ownership over the property and was, prior to the deceased's death, engaged in discussions about resolving this particular issue. In this regard, she exhibited a letter from an attorney-at-law dated 4 August 2004 addressed to her, the subject of which was "You vs Dillon Edwards" in which the attorney informed her that they had written to "Mr Edwards requesting an appointment with him in our office before the end of July 2004, to date we have not heard from him. Should he fail to accept our offer to arrive at a settlement as instructed by our letter to him, we will have no alternative but to file a suit against him". With respect to the application for a replacement title for the subject property, the defendant asserted that she enquired of the 2nd defendant as to the whereabouts of the duplicate certificate of title for the subject property (then registered at Volume 982 Folio 271 of the Register Book of Titles) and the 2nd claimant never intimated or openly indicated that she was in possession of same.

[13] The defendant maintained that her ongoing financial contributions to the property over the years up to 1997 and the ongoing discussions about her interests in the property demonstrate that she is the sole proprietor of the subject property. She deponed that no period long enough has elapsed that could be deemed to have extinguished her interest in the property. On this basis, she asserted that for the ruling to be permitted to stand unchanged, it would be an act of significant injustice.

The 2nd claimant's evidence in opposition to the application

[14] I must at the outset say that the affidavits contained evidence which was irrelevant and also prejudicial. However, I will attempt to summarise those portions which are relevant to this application.

[15] The 2nd claimant deponed that the defendant is attempting to mislead the court into believing that she had moved from the property situate at 1000 NW 116 Terrace, Miami, Florida, to which the documents had been sent. She stated that she and her attorneys-at-law carried out an online search which revealed that the defendant had lived at that address from July 1987 to January 2022. The online search also revealed that the defendant's current husband owns the

property situated at 1000 NW 116 Terrace. Also, the online results reflected that the address of the defendant's daughter was the defendant's address only for the period 2013 to 2014. A copy of the results for the online search was exhibited.

[16] Referring to an affidavit sworn to by Eunice Williams filed on 20 June 2019, which concerned service of the claim documents by DHL, the 2nd claimant stated that the defendant had signed for the said documents when they were delivered by a DHL representative on 13 March 2019 and that the defendant had delivered the acknowledgment to the DHL representative on that same date. The 2nd claimant deponed that she had been advised by a DHL employee that after the defendant had "herself acknowledged that she was the defendant and signed the documents", days later she called DHL's office and "tried to tell them that the address was the wrong address and they should retrieve the documents". She was further informed by the DHL employee that DHL did not arrange for retrieval as the documents had already been signed for.

[17] Since the court's decision in November 2019, she and the 1st claimant, in reliance on the judgment, expended a great deal of funds, time and resources in dealing with the property. These expenditures include significant attorneys' fees, to make the application to the Registrar of Titles to have the previous title duly cancelled and to have a new one issued. Additionally, the subject property was and still remains in a deplorable, dilapidated and deteriorated condition, and very large sums of monies have been spent on it since the date of the judgment. She stated that no discussions took place between herself and the defendant since 2012 when the defendant came to Jamaica.

[18] The 2nd claimant asserted that it would be an injustice to permit the defendant to wait around for more than two years, when she would have been aware of the substantive proceedings from at least July 2019. She reiterated that the defendant's interest in the subject property was duly extinguished in 1997 and the defendant has no remaining interest in same.

The defendant's evidence in response to the 2nd claimant's evidence

[19] In so far as service was concerned, the defendant's response to the 2nd claimant's evidence concerning the online search was that the documents were not "duly certified and properly obtained for presentation as evidence as such documents are available online and are generally untested". She denied receiving or signing for the documents nor, she deponed, did anyone acting on her behalf do so. She stated that she did not recognise the signature on the proof of delivery document which was produced by DHL as she has never and does not sign her signature in that manner. She exhibited a copy of her driver's licence issued by the state of Florida. With respect to the 2nd claimant's evidence in relation to information from the DHL employee, she stated that it was hearsay and could not be substantiated. In relation to the 2nd claimant's evidence that she would have been aware of the documents from July 2019, she stated that being aware of something and all the requirements relating to the matter being fulfilled is not the same thing and that she owed the claimant no duty to make herself available for service of the documents.

Submissions

For the defendant

[20] The contentions of the defendant may be distilled as follows. The important issue is whether the court accepts that the documents were served on the defendant. If there was no service of the order and the affidavit of service was shown to be defective, the judgment should be set aside because if the documents were not served the defendant could not have been present. Mrs Scott Mottley further submitted that the three methods of service employed by the claimant were defective in that the publication of the notice of proceedings was in the Gleaner newspaper in the USA instead of the Miami Herald; the registered slip which was exhibited to the affidavit in relation to service by registered post did not have any date stamp and therefore, the court would not be able to ascertain when the defendant was served; and the signature of the person who accepted the documents from DHL was clearly not that of the defendant as it was clearly different from the signature of the defendant on her

driver's licence and passport. Also, the appropriate person to give the affidavit evidence was the person from DHL who served the document and therefore the affidavit of the 2nd claimant giving evidence as to the service by courier was not acceptable.

[21] Mrs Scott-Mottley submitted that the reason for the lateness in the filing of the application and for failing to attend the hearing on 18 November 2019 was that the defendant had not been served with any documents. The defendant, therefore, has a good reason for the failure to attend the hearing on 18 November 2019, she argued.

[22] In written submissions, relying on section 68 of the Registration of Titles Act as well as sections 3, 4, 14 and 30 of the Limitation of Actions Act, it was argued that in order to dispossess the paper owner of land, the person making the claim must prove that he or she remained in possession of the land for at least twelve years, without the permission of the lawful owner. Time begins to run from the time of the last act of possession or ownership. The paper owner's right is only extinguished at the end of the twelve-year period of the last act or assertion of ownership. Ms Scott-Mottley submitted that the burden of proving the extinction of the paper owner's title rests with the claimant. To support this submission, Mrs Scott-Mottley relied on the decisions of the Privy Council in the case of ***Ramnarace v Lutchman [2001] 1 WLR 1651*** and Shelly-Williams J (Ag) (as she then was) in ***In the Matter of an Application by Raymond Johnson [2015] JMSC Civ. 112***.

[23] Ms Scott-Mottley also referred to and relied on ***Davis v Gray [2018] JMSC Civ 145*** and argued that slight acts by an owner will negate the burgeoning right of the possessor. It was submitted that from the time of the purchase of the subject property, the defendant carried more than an equal share or portion of the expenses related to the property. In addition, the defendant contributed to or paid the mortgage until it was discharged and paid the taxes until 1996 when she advised the deceased that she was passing that responsibility to him. Having her son reside on the property until in or around 1988 was an arrangement through which the defendant also exercised her assertion of

ownership. After the defendant's son left the premises, she continued bearing expenses for the premises.

[24] It was also submitted that the removal of the defendant's personal items of furniture from the premises was by the defendant's choice and was not due to any steps by the deceased to dispossess her or assert any exclusive use and occupation of the subject property. At no time prior to 1997 or any time thereafter, did the defendant abandon or relinquish her interest in the property to the extent where the deceased could have credibly claimed to have dispossessed her. The defendant's interest was confirmed by her "slight acts", of occupation and payments of expenses, which were sufficient to ensure the continuity of her ownership or interest in the subject property.

For the claimant

[25] Mrs Clarke-Bennett in her skeleton submissions submitted that the application ought to have been made within fourteen (14) days of the date on which the order was served. She asserted that the order was served on the defendant in November 2019, and, in any event, based on the defendant's own admission, she would likely have become constructively aware of the proceedings by at least July 2019.

[26] Where service was concerned, the order of Barnes J (Ag) permitted the claimants to choose which of three methods to employ although the claimants chose to utilise all three methods of service. In so far as it could be said that the affidavit in relation to service by registered post did not exhibit a registered slip that included the date stamp, the registered slip should be read in conjunction with the affidavit exhibiting it. In response to the contention that the signature on the DHL documents was not that of the defendant, it was submitted that the defendant had not brought any evidence from an expert to prove this. In any event, the defendant's signature on the document that the defendant was relying on was almost illegible. It was also submitted that where a party comes to the court contending that he was not served, it is for the court to determine on a balance of probabilities whether there was service. In addition, the defendant had not disassociated herself from the property located at 1000 NW

116 Terrace. It was for the court to decide the weight to give the claimant's online search information.

[27] It was submitted that the reasons provided by the defendant for her absence from the hearing are either inadequate or lack the ring of truth. The defendant had not provided any information in her affidavit which could genuinely controvert the position put forward to the court by the claimants.

[28] It was also submitted that the defendant's evidence was that she received no benefit from the property. Mrs Clarke-Bennett argued that the mere fact of asserting a right of ownership is inadequate to establish a right to property. To buttress this submission, Mrs Clarke-Bennett relied on ***Wills v Wills*** *2003* UKPC 84. Reference was made to paragraph 12 of the decision of the learned Sykes J, (as he then was) in ***Lois Hawkins (Administrator of the Estate of William Walter Hawkins, deceased, intestate) v Linette Hawkins McIniss [2016] JMSC Civ 14*** for the court's approach to analysing and applying the common law and relevant statutory provisions with respect to dispossession of property.

[29] Mrs Clarke-Bennett argued that the defendant abandoned the subject property from the latest 15 April 1985, had not returned to same and only obtained a duplicate certificate of title to the subject property in her name in 2011. The defendant's request for the removal of her possessions from the subject property in the mid-1980s further bolstered the position that the defendant abandoned the premises from in or around that time. Further, the deceased was in factual possession of the subject property for a period of twenty-two (22) years and twenty-eight (28) days. Any variation in the date would not affect the requisite period of dispossession. On this point, Ms Clarke-Bennett relied on ***Fullwood v Curchar [2015] JMCA Civ 37***. The deceased resided at the subject property from the time it was transferred in his name as joint tenant on 15 April 1985 to the time of his death. During this period, the 2nd claimant also resided at the premises from 1984 to 2001 along with his common law spouse, Ms Aileen Bryan. During 2000 and 2006, Mr Edwards and his daughter made substantial improvements and repairs to the subject property without the consent of and without regard to the desires of the defendant; and substantial

expenditure was incurred by them to effect these repairs. This was clear evidence that the deceased considered the subject property to be his own and he used the subject property for his own benefit and to the exclusion of the defendant. It was submitted that the acts of the deceased cumulatively show an unequivocal intention to exercise control of the subject property for his own benefit without regard to the defendant.

[30] Mrs Clarke-Bennett argued that generally a person claiming title under the Limitation of Actions, who has been in factual possession, will not normally be required to adduce further evidence to establish his intention to possess save and except in circumstances where his acts in relation to the land are equivocal. In the context of a joint tenancy, in assessing the intention of the dispossessor in the absence of intention, an inference may be drawn from the acts of possession to establish the requisite intention.

[31] The defendant's admission that she "ceased paying" any taxes after 1997 means that more than the requisite twelve (12) years would have elapsed, extinguishing her interest before she sought to transfer the title to the subject property. The earliest indication of interest by the defendant was about twenty-one years after she first left the premises, by way of a letter of demand to Mr Edwards. The legal position, however, is that a mere demand or claim without more is inadequate to stop time running under the statute.

[32] It was also submitted that registration by operation of the rule of survivorship cannot revive a title previously extinguished by the operation of section 30 of the Limitation of Actions Act. If it is proven on a balance of probabilities that the paper owner's title was automatically extinguished on the expiration of the limitation period before the surviving joint tenant could acquire title automatically on the death of the joint tenant who predeceased her, then a duplicate certificate of title registered on the basis of the joint tenant's title having been obtained through the rule of survivorship is improperly obtained. The act of registration on 31 May 2011, naming the defendant as the sole proprietor was a nullity and the certificate of title evidencing title in the name of the defendant was *void ab initio*.

Issues

[33] The application was made on the assumption that the judgment entered by Nembhard J was a default judgment. However, counsel for the defendant conceded that the proper application was one under rule 39.6 as a default judgment could not be entered in fixed date claim form proceedings. She was thereafter granted permission to orally amend her application to seek to set aside what was in effect a judgment given at a trial in the absence of a party. Having regard to the provisions of rule 39.6 of the CPR, which are by now well-known, the following issues arise for consideration:

i. Whether there was service on the defendant of the fixed date claim form, supporting affidavit and the orders of Henry-McKenzie J and Nembhard J;
ii. If there was service of the order of Nembhard J, whether the application was made within the time stipulated by the CPR for doing so;
iii. Whether the defendant has demonstrated a good reason for failing to attend the hearing on 18 November 2019;
iv. Whether it is likely that had the defendant attended some other order might have been made;

Whether there was service on the defendant of the fixed date claim form, supporting affidavit and the orders of Henry-McKenzie J and Nembhard J;

[34] This issue assumes immense significance because there are authorities such as the English Court of Appeal decision in ***Nelson and Hanley v Clearspring Management Limited [2006] EWCA Civ 1252*** and our Court of Appeal decision of ***David Watson v Adolphus Sylvester Roper SCCA No 42/2005*** (delivered 18 November 2005) which support Mrs Scott-Mottley's submissions that if there was no service, the judgment or order must be set aside.

[35] In determining this issue, it must be stated at the outset that the thrust of the defendant's contention was that she was not personally served. However, Barnes J (Ag) having dispensed with personal service of the fixed date claim

form and all the other documents filed in the claim, this was no longer a requirement. Once it is shown that service was in accordance with the order, the defendant must be regarded as being served. It seems to me that there is no provision in the Civil Procedure Rules ("CPR") for the defendant to rebut this by evidence that she was not served with the documents. This is to be contrasted with a provision such as rule 5.19 of the CPR, which stipulates a deemed date of service of the claim form by prepaid registered post within a certain time and allows for the "contrary to be shown". There is no like provision in rule 5.14, which authorises service by a specified method. Therefore, once it is proven that the terms of the order have been carried out, service can no longer be an issue.

[36] In so far as the methods of service employed is concerned, I agree with Mrs Lee Clarke Bennett that the claimant was given three options for service. This is made clear from the use of the word "or" in the order of Barnes J (Ag). The claimant was therefore not obliged to employ all three methods. Therefore, although there is merit in Mrs Scott-Mottley's contention that service of the notice of proceedings of the claim documents by publication was not in accordance with the order as it was published in the North American Edition of the Daily Gleaner and not the Miami Herald, this would not have rendered service ineffective. For service to be ineffective, it must be shown that none of the methods of service employed was effective.

[37] The question that then arises is whether there was service in accordance with the other two methods of service allowed. Although there were arguments made in relation to service by registered post, there does not appear to be an affidavit of service by anyone who actually received the fixed date claim form and affidavit in support and took them to the post office to be mailed. This is to be contrasted with the evidence contained in the affidavit of Leighton Greenland filed on 18 October 2019 with respect to service of the order of Henry-McKenzie J in which Mr Greenland deponed to receiving the envelope with the document and attending the Half Way Tree post office to mail it. It seems to me that an affidavit from the person who took the fixed date claim form and supporting affidavit to be posted was necessary to meet the requirements of rule 5.15 of

the CPR that service is proved by an affidavit made by the person who served the document showing that the terms of the order have been complied with.

[38] The remaining question is whether service at 1000 NW 116 Terrace by courier as permitted by the order of Barnes J (Ag) was carried out. The affidavit of service in respect of service by courier filed on 20 June 2019 was sworn to by one Eunice Williams who simply asserted that the documents were served by DHL at 1000 NW 116 Terrace and exhibited the Proof of Delivery courier slip obtained from DHL. She did not indicate whether she was the one to have delivered the documents to DHL for service at 1100 NW 116 Terrace. While it may be that an affidavit deponed to by the DHL representative who served the documents would have been ideal, I am of the view that the courier slip from DHL containing the date, time and address of delivery would be sufficient along with the evidence of the 2nd claimant which she received from the DHL representative. Of course, this aspect of the 2nd claimant's evidence would be regarded as hearsay evidence but this being an interlocutory matter, such evidence would be permissible under rule 30.3 (2) of the CPR as the source of the information has been stated. The proof of delivery slip stated that the documents were received by Gilda Joyce Gordon on 13 March 2019 at 12:59pm at 1000 NW 116 Terrace.

[39] It is my view that the issue of whether the receiver's signature on the Proof of Delivery slip was actually that of the defendant is immaterial for the purpose of proving service. What was permitted by the order was that the documents should be served at 1100 NW 116 Terrace and there was no requirement for the documents to be personally served on the defendant as personal service was dispensed with. The evidence is clear that the documents were delivered to the address at 1100 NW 116 Terrace and were not returned, which demonstrates that they were received and signed for by someone, regardless of whether it was the defendant. The documents having been received at 1100 NW 116 Terrace, I am of the view that the terms of the order for the documents to be served by courier at that address were satisfied and therefore the defendant was served by courier at 1100 NW 116 Terrace.

[40] In respect of service of the order of Henry-McKenzie J which contained the information that the adjourned first hearing date was 18 November 2019, there was no need for personal service. The affidavit evidence of Leighton Greenland as contained in his affidavit filed on 18 October 2019 was that it was posted to 1000 NW 116 Terrace on 7 October 2018. There appears to have been an error in the year of service as the order was made in 2019 and the registered slip indicates that it was posted in 2019. The evidence of Marjorie Campbell as contained in her affidavit filed on 1 February 2022 was that it was not returned. There is no issue in relation to when the time for service would start to run for the purposes of the deemed date of service because the original delivery slip which was exhibited to the affidavit on the court's file confirms that the envelope containing the order was mailed on 7 October 2019. It seems that the date of posting may have become illegible on counsel's copies as a result of the process of photocopying. There is also the evidence of service of Nembhard J's order by Mr Greenland by way of his affidavit filed on 3 December 2019 in which he stated that on 27 November 2019, he had the envelope containing the order which was addressed to the defendant at 1000 NW, 116 Terrace registered. This was supported by the original of the registered slip which bore the same date. The evidence of Marjorie Campbell is that the letter was never returned undelivered. In those circumstances, the terms of the order were complied with and the ineluctable conclusion is that the defendant was served with the documents at 1000 NW 116 Terrace, Miami.

[41] The defendant has strenuously denied living at 1100 NW 116 Terrace and has produced evidence of her driver's licence issued in Florida with her address stated thereon as 1100 NW 2016 Terrace, Miami. The driver's licence that was exhibited indicated that it was issued on "12/02/2013", was replaced on "04/07/2021" and would expire on "10/10/2022". The fact that at its replacement in 2021, the driver's licence was issued with the same address as the address in 2013 would tend to suggest that between 2013 and 2021, the defendant was living at that address. I am of the view that this document issued as it was by a public authority should be ascribed more weight than the online search because the information contained in the online search was hearsay evidence and there was no indication as to the source of the information or how the information as

to the ownership of the property was obtained. I am therefore inclined to the view that the defendant may not have resided at 1000 NW 116 Terrace in 2019 at the time the documents filed in this claim were served. However, I agree with Mrs Clarke Bennett's submission that the defendant did not disassociate herself from the premises at 1000 NW 116 Terrace. It seems to me that if the defendant had no association with the premises, which the claimant was asserting was owned by the defendant's husband, it would have been fitting for her to quite simply say so. Instead, she merely denied residing there. In the face of the defendant's failure to deny any association with the premises other than saying that she did not reside at 1000 NW 116 Terrace and against the background that service by specified method would not have been ordered unless the court was satisfied that it was likely that service by those means would likely bring the contents of the documents to the defendant's attention, I find that there is no basis for concluding that the defendant was not served by service of the documents at 1000NW 116 Terrace. I therefore find that the defendant was served with the fixed date claim, affidavit in support and the orders of Henry-McKenzie J and Nembhard J.

If there was service of the order of Nembhard J, whether the application was made within the time stipulated by the CPR for doing so

[42] Based on the date of posting of the order of Nembhard J, service on the defendant would have been effected on or about 18 December 2019. Compliance with rule 39.6 of the CPR would have required filing of the application within 14 days of 18 December 2019. The application was not made until 6 October 2021, which was an inordinately long time after the date of service. Even if I were to accept that the defendant did not personally receive the documents, and she may not, therefore, have become aware of the documents on the day that they were served at 1100 NW 116 Terrace, in light of her failure to disassociate herself from the property at 1000 NW 116 Terrace which she did not deny belonged to her husband, it is unlikely that she would not have become aware of the documents until sometime in 2021.

[43] In any event, the defendant's evidence is that in July 2019, she was made aware that a caveat had been lodged against dealing with the land. In addition to her evidence as to her knowledge of the caveat in July 2019, there is the evidence of the 2nd claimant that the fixed date claim form proceedings was expressly referred to in her statutory declaration which was filed in support of the caveat that was lodged at the Office of Titles and that the fixed date claim form and supporting affidavit were exhibited to the statutory declaration. This was discovered by the attorney who was handling the sale of the property for her. It seems unlikely that any attorney being put on notice of the caveat would not have investigated to find out the basis for the caveat that affected the very property he was dealing with, which it seems likely would have led to the discovery of the claim. The defendant's own evidence at paragraphs 6 and 7 of her affidavit in support of the application confirms that she became aware of the claim from then. At paragraph 6 she deponed that the information sent her "into a state of shock and depression as I had been in constant communication about the subject property with the 2nd claimant and she had not at any point indicated to me that she was **filing a claim** against me in respect of the said property". At paragraph 7, she stated that she sought the advice of the attorney representing her in the sale as to how to proceed to deal "with the claim" but he could not assist her. The fact that his reason for being unable to assist the defendant was that he was not a practising litigation attorney also confirms that the defendant knew of the claim.

[44] Knowledge of the existence of the claim would not have been sufficient to amount to service of the claim but it seems to me that in circumstances where the defendant was served in March of 2019 and had knowledge in July 2019 of the existence of the claim filed in 2018, the filing of the application to set aside the order in October of 2021 can by no means be regarded as being made within 14 days of the service of the order. I, therefore, am of the view that the first requirement under rule 39.6 of the CPR has not been satisfied. This is sufficient to dispose of the application because the Court of Appeal has held in ***Watson v Sylvester*** *and* ***Morris Astley v Attorney General & Board of Management of Thompson Town High School [2012] JMCA Civ 64*** that the requirements are cumulative and there is no residual discretion in the court to

grant the application where all the requirements have not been met. I will nonetheless go on to consider the other issue.

If there was service, whether the defendant has demonstrated a good reason for failing to attend the hearing on 18 November 2019

[45] The defendant's reason for not attending the hearing on 18 November 2019 is that she was never served with any documents. I have already determined that she was served and that by her own admission sometime around July 2019, she would have become aware of the existence of the claim. It seems to me that the defendant having become aware of the claim filed in 2018, it was incumbent on her to take active steps to protect her interest in the property by responding to the claim. Having become aware that the attorney-at-law who was handling the sale of the property could not assist her, she ought to have rigorously redoubled her efforts to retain another attorney. The defendant did not provide evidence as to when she retained the services of her current attorney but it seems to me that by November 2019, four months after having become aware of the claim, had she made strenuous efforts to locate and retain an attorney, she would have been successful in doing so and that would have resulted in efforts being made to peruse the file to ascertain the orders that were made and to take the necessary action. I am of the view that it cannot be said that the defendant has put forward a good reason for failing to attend.

Whether it is likely that had the defendant attended some other order might have been made

[46] In **Morris Astley**, Morrison JA (as he then was) expressed the view that "**in the usual case of a judgment given at trial** in the absence of a party, this aspect of the rule could well prove to be the most difficult hurdle, requiring the applicant as it does to demonstrate that, on the merits, he/she could have prevailed had there been an opportunity to advance the case in person" (emphasis supplied). It is my view that implicit in the use of the phrase "usual case" is a recognition that like all general rules, there will be exceptions. As I stated in ***Mitchell Wedderburn v Salvatore Brucceleri [2022] JMSC Civ 104***, there may be

cases where a judgment has been given at trial in the absence of a party but because of the surrounding circumstances, it is not necessary for that party to prove the merits of his case to succeed in his application to set aside the judgment. I am of the view that this may be one such case.

[47] It should be considered that this was a first hearing and was not a date set for the trial or the hearing of the substantive claim. It is true that rule 27.2(8) of the CPR allows for the trial of the claim to take place at the first hearing where the claim is undefended or the court considers that the claim can be dealt with summarily. Although the learned judge did not indicate which of these two options she was exercising, given the absence of the defendant and any affidavit filed on her behalf, it seems that the trial of the claim took place because it was undefended.

[48] I am of the view that had the defendant attended, it is likely that the court would have considered that: although the defendant was claiming that she had not been served, she had been served as the order of the court for service had been complied with; even if the contents of the claim had not come to her attention immediately upon them being served at 1000 NW 116 Terrace, it is likely that this occurred sometime in July 2019 when she states that she became aware of the claim. The court would also have considered that even though she would not have filed an affidavit by the hearing in November 2019, the matter had not yet received a date for the trial or the substantive hearing. Given that the question of whether a possessory title has been established is one that will usually involve issues of fact that this was not a matter that could be dealt with summarily and that an opportunity should be given to the defendant to file an affidavit if she had not done so at that point.

[49] I also consider that if the defendant's attorneys-at-law had gotten the opportunity to apprise himself/herself of the claim, they may have taken the view that it would be prudent to file an affidavit in answer to the claim as they have done in this application although this would have been well outside the time for the filing of the affidavit. Had the court had sight of that affidavit, the court would have considered that even though the defendant had admitted that she had left the premises from sometime in the 1980s, had had her possessions

removed sometime during that same period, and had stopped paying taxes in 1997, the proposed evidence raised issues of fact, which had to be resolved before the court could make a finding that the defendant had been dispossessed of her title. These include: (i) the date when time would start to run in light of the defendant's assertion that she had paid property taxes up to 1997 and had still been in a relationship with the deceased up to 1997; (ii) if time had started to run from 1997, whether the deceased would have been in undisturbed possession in light of the attorney's letter dated 2004 (although a mere demand may not be sufficient to stop the limitation period from running, the letter raised questions about whether the discussions between the deceased and the defendant's lawyers had been ongoing and there was no indication of the nature of those discussions and when they had first been embarked upon); and (iii) whether the defendant had been making contributions to the property up to 2013 and the effect of this on when she would have been dispossessed. These issues of fact could only be answered after subjecting the parties to cross-examination which would involve an assessment as to their credibility. In those circumstances, I think that it is unlikely that the court would have come to the view that the trial of the claim should take place at the first hearing on 18 November 2019 and would have proceeded to make the orders which were made.

[50] I therefore take the view that it is likely that had the defendant been present, another order would have been made and therefore this aspect of the requirements of 39.6(3) of the CPR has been satisfied. In the light of this conclusion, it is not necessary for me to consider the merits of the claim.

[51] Despite the conclusion that I have reached in relation to the requirement under rule 39.6(3)(b), the application must be refused as the defendant has failed to satisfy the other requirements.

Conclusion

[52] I therefore make the following orders:

1. The application to set aside the order of the court made on 18 November 2019 is refused.
2. Costs of the application to the claimants to be taxed if not agreed.