



[2021] JMSC Civ 168

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2017 HCV 00859**

<b>BETWEEN</b>	<b>HUGHBURN HYATT</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>YVETTE SHIRLEY - WALKER</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mr George St. A. Traile instructed by Phillip, Traile and Company for the Claimant.**

**Ms Dameta Franklyn instructed by Law office of Dameta Gayle for Defendant.**

**Heard: 19<sup>th</sup> and 22<sup>nd</sup> October, 2021.**

**Extension of time to file defence- Application for default judgment**

**L.SHELLY WILLIAMS, J**

**Background**

**[1]** The Claimant filed Particulars of Claim on 17<sup>th</sup> day of March, 2017 against the Defendant for a number of Declarations and orders to include:

- i. A Declaration that the Certificate of Title registered at Volume 1442 Folio 773 of the Register Book of Titles concerning Certificate of Title registered at Volume 1442 and Folio 773 in the name of the Defendant was obtained by fraud.
- ii. An Order that the said Certificate of Title registered at Volume 1442 Folio 773 be cancelled.

- iii. An Order that the Defendant has no legal or beneficial interest in the land registered at Volume 1442 Folio 773 of the Register Book of Titles.
  - iv. An Order that the Claimant is the sole legal beneficial owner of the land registered at Volume 1431 Folio 915
  - v. An Order that the Claimant is the fee simple owner in possession of the land registered at Volume 1163 Folio 51 of the Register Book of Titles.
  - vi. An Order that the Defendants be restrained from interfering with the Claimant's right of possession of land registered at Volume 1431 Folio 915 and Volume 1163 Folio 51 of the Register Book of Titles.
  - vii. An Order directing the Registrar of Titles to produce all documents used by the Defendant in Application number 1361340 to obtain the said Certificate of Titles registered at Volume 1442 Folio 773 of the Register Book of Titles
- [2]** The Claimant served the said Claim Form and Particulars of Claim on the Defendant on the 2<sup>nd</sup> day of December, 2017. The Defendant filed her Acknowledgment of Service on the 24<sup>th</sup> day of January, 2018. The Defendant did not file the Defence within the time stipulated by the Civil Procedure Rules.
- [3]** The Claimant filed a Notice of Application for default judgment on the 9<sup>th</sup> day of January, 2019. The Notice of Application was supported by an affidavit of Hughburn Hyatt.
- [4]** The Defendant filed an Application for extension of time to file and serve a Defence on the 4<sup>th</sup> day of August, 2020. That application also had an affidavit in support.
- [5]** The two applications were heard on the 19<sup>th</sup> October, 2021.

## **Issues in the Case**

[6] The two issues in these applications are:-

- a. Whether the Court should enlarge the time for the Defendant to file their defence.
- b. If the court refuses to extend time, whether a default Judgment should be entered in favour of the Claimant.

## **The Civil Procedure Rules 2002**

1. There are three sections of the Civil Procedure Rules that are relevant to these issues. These are Rule 10.3 (1), Rule 10.3 (9) and Rule 26 (1). Rule 10.3 (1) and 10.3 (9) states that:

*(1) The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form.*

*(9) The defendant may apply for an order extending the time for filing a defence. They are Rule 10.3 and Rule 26.1. of the Civil Procedure Rules 2002.*

2. **Rule 26.1 (2)** also provides for extension of time generally. It states that:

*'Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension of time is made after the time for compliance has passed.*

## **Case Law**

[7] There have been a number of cases that have opined as to how the court should approach the issue of extending time. Rattray J in **Devon Davis v Karen Marajah [2019] JMSC Civ. 7** adopted and approved dicta in **Strachan v The Gleaner Company Limited and Dudley Stokes, Motion No. 12/1999, a judgment delivered on the 6th December, 1999**, where the learned Judge of Appeal, Panton JA, enunciated at page 20 that: -

(1) *Rules of court providing a time-table for the conduct of litigation, must, prima facie, be obeyed.*

(2) *Where there has been a non-compliance with a time table, the Court has a discretion to extend time.*

(3) *In exercising its discretion, the Court will consider-*

- i. the length of the delay;*
- ii. the reasons for the delay;*
- iii. whether there is an arguable case for an appeal and;*
- iv. the degree of prejudice to the other parties if time is extended.*

5. In the Court of Appeal case of **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4** at 15 where Harris JA (as she then was) relied on the dictum of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others [2001] EWHC Ch 456** on the question of what the Court should consider in granting an application to extend time. Lightman J stated :

*“In deciding whether an application for extension of time was to succeed...it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice. Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice.”*

### **Length of delay**

- [8] In the case of **Devon Davis v Karen Marajah (supra)** the delay in question was seven months. Rattray J in para 27 in opining about delay stated: -

*The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However,*

*the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole.*

- [9] The case of **Attorney-General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23, at paragraph [19]

*The first issue to be addressed relates to the length of the delay in making the applications. In Dixon's claim, the appellant did not make his application until approximately one month after the time for filing the defence had expired. In Dockery's claim more than seven months had expired before the appellant sought to make his application. In Dixon's claim, the delay was not long. This cannot be said to be true in Dockery's case. However, in either case, the length of the delay cannot be regarded as being determinative of the issue.*

#### **The reason for the delay**

- [10] Harris JA in the case of **Carlton Williams v Veda Miller [2012] JMCA App 39** stated at paragraph 32 that: -

*The reason for the failure of the applicant to comply within the requisite time is highly material. Some reason for the delay must be advanced. Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so require.*

- [11] In the case of **Peter Haddad v Donald Silvera** SCCA No. 31/2003, Motion 1/2007, a judgment delivered on the 31st July, 2007, Smith JA opined at page 11 that:

*The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules.*

#### **D. Whether any prejudice to the Claimant upon grant of extension of time**

[12] In the case of **Attorney General v Roshane Dixon and Sheldon Dockery**, (**supra**) Harris JA held, referring to the case of **Haddad v Silvera**, at paragraph 31 that

*The respondents have filed their claims against the appellant and are desirous of having the matter concluded by the court. In each case, leave has been granted for a judgment in default of defence to be entered against the appellant. Any attempt to deprive the respondents of their right to proceed with their claim, in these circumstances, would be unduly prejudicial to them. An order for an extension of time would preclude them from proceeding to take steps to realize the fruits of their judgments. In such circumstances, compensation by way of costs would not be an option.*

## **ANALYSIS**

### **A. The length of the delay**

[13] In this case the delay in question has been three years. There can be no debate that an extraordinarily long time has elapsed since the Particulars of Claim were filed and the Application for extension of time to file defence. This length of time would normally lend itself to a refusal of such an application. The length of time, however would have to reviewed in conjunction with a number of other issues including the reason for the delay.

### **Reason for the delay**

[14] The reason being preferred by the Defendant for the delay is that shortly after receiving the Claim Form her child became ill and had developed psychological problems. She indicated in her affidavit that she had to expend her resources on her child's illness and as such had become impecunious and was unable to retain counsel. She had attached to her affidavit medical reports in support of this fact. The reasons advanced by the Defendant under the circumstances are valid and

reasonable. I note that the Defendant had filed her Acknowledgement of Service within the requisite time, but then failed to file her Defence. This would lend some support to her position.

### **Whether the Defendant has an arguable Case?**

[15] This case concerns a property in Albert Town. The land is the subject of three registered titles. The Defendant is in possession of one title which encompasses the entire area of the disputed property. The Claimant is in possession of two titles, one of which is in his name and the other in the name of a relative. The survey diagrams that are attached to the titles in the possession of the Claimant together details the same parcel of land in the title of the Defendant. This situation is untenable. The Claimant is claiming possession through, among other things, a series of Court Cases in the Parish Court. The Defendant is claiming the property by means of a will. These are issues that should be decided at a trial. The Defendant does have an arguable case.

### **Degree of Prejudice to the Claimant?**

[16] There would be some prejudice to the Claimant in granting the extension of time to file the Defence as it would deprive the Claimant from a grant of a default judgment. The prejudice would have been greater if the default Judgement had already been granted. In this case the prejudice can be cured by cost.

### **Decision**

[17] I will grant the extension of time in this matter. The issues in this case require full ventilation. The Court, after hearing evidence, and submissions, would not only have to make a decision on the ownership of the property, but would make orders that touches and concerns the registered titles that now exists.

## **Orders**

1. Time is extended to file the defence. The defence to be filed on or before the 29<sup>th</sup> of October 2021.
2. The application for Default Judgment is refused.
3. Cost of the Application to the Claimant, to be agreed or taxed.