[2016] [JMSC] Civ. 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 02917

BETWEEN	**DR. RICHARD KEANE**	**CLAIMANT**
AND	**KARENE KEANE**	**2ND CLAIMANT**
AND	**DOROTHY VENDRYES**	**DEFENDANT**

Mr. Nigel Jones & Kashina Moore instructed by Nigel Jones & Company, Attorneys-at-Law for the Claimants.

Mr. Matthieu Beckford & Demetrie Adams instructed by Rattray, Patterson, Rattray, Attorneys-at-Law for the Defendant.

Purported application to challenge jurisdiction of court; default judgment entered as application did not state on its face that rule 9.6 application; nor did it seek a declaration; whether application in fact one challenging the court's jurisdiction; whether default judgment irregularly entered.

HEARD: JUNE 29, 2016

CORAM: GEORGE, J.

[1] In November 2003, the parties entered into a sale agreement for a parcel of land in Unity Hall St. James. The property was mortgaged to the Jamaica Redevelopment Foundation. By agreement, the Claimants were in possession as tenants pending the completion of the sale. The Claimants commissioned a survey. The survey revealed a defect in the title. Consequently lawyers on behalf of the Bank of Nova Scotia on 22nd April, 2005, the proposed mortgagees for the Claimants, wrote to the Defendant's attorney requiring perfection of the title as a precondition to the release of the balance of the purchase price.

[2] It appears that the defect in title was as a consequence of compulsory acquisition of a part of the property by the Commissioner of Lands. This required a part of the land to be severed and the Defendant's title to be transferred. In addition consent for the sale was not obtained from the vendor's mortgagee.

[3] On 6th October 2005 the attorneys for the Defendant sent a letter to the Claimants' attorneys indicating that as the title was not forthcoming, they would have to cancel the sale agreement unless the Bank of Nova Scotia was willing to forego their initial pre-condition.

[4] None of the parties exercised the option to terminate the sale and the Claimants remained in possession without paying rent from November 2004. The lawyers for the Defendant on 6th December 2006 wrote to the lawyers for the Claimant requesting payment on the rent account. It is the Defendant's position that this agreement was unable to be completed.

[5] It is not in dispute that the claim and particulars were served on the Defendant but the mandatory requirement for service of the acknowledgment of service form, the prescribed notes and defence form at the same time, were not complied with. The initial claim was filed on the 17th July 2007. Subsequently the Claimants on the 29th October 2007 amended their claim, in the main to add the Jamaica Redevelopment Foundation as a second defendant. This amended claim was never served on the Defendant. The Claimants obtained judgment in default after having amended their claim.

[6] As a consequence of the non compliance with the mandatory requirement of service of the aforementioned documents, Sykes, J. had no hesitation in setting aside the Default Judgment obtained by the Claimants, as one that had been irregularly obtained. This aspect of the judgment of Sykes, J. was upheld by the Court of Appeal. Strong criticism was made by the Court of Appeal of Sykes, J.'s decision to thereafter immediately proceed to enter summary judgment in favour of the Claimants. The main basis for the Court of Appeal's disagreement with this

position was that the amended pleadings had not been served on the Defendant and that Sykes, J. had proceeded in error to summary judgment on the initial pleadings.

[7] Following the hearing of the procedural appeal, which decision was handed down in 2011 (the filing and service having taken place in 2011), a further amendment to the Claim and particulars was made on the 5th December 2011. This has caused further contention between the parties. The further amended claim form and particulars were served along with acknowledgment of service form, prescribed notes and defence form. There is no dispute as to this. In fact the Defendant filed an acknowledgment of service on the 7th December 2011. Subsequently default judgment was again entered against the Defendant for failing to file a Defence. The issues highlighted by the Defendant's notice of applications now before the Court are mainly that:

(i) She had filed an acknowledgment of service and subsequent application disputing the jurisdiction of the court but nevertheless, the Registrar upon the request of the Claimant entered default Judgment against her.

(ii) The Application filed is one to challenge jurisdiction and is valid; therefore the Registrar was wrong to enter default judgment.

(iii) Consequently the default judgment should be set aside as being irregularly obtained

(iv) The service of the claim form was a nullity without the requisite accompanying documents and therefore the Court has no jurisdiction to entertain it.

(v) The jurisdiction of the court is further challenged in the alternative on the basis that the initial amended claim form had not been served on the defendant and or that;

(vi) At the time of the filing and service of the further amended claim form, the claim form had expired and was therefore a nullity.

(vii) There had been no application to extend the life of the claim form and so the Defendant contends that the Further Amended claim form is in these circumstances an invalid pleading and so the Court has no jurisdiction to adjudicate on it.

1. At the request of Counsel for the Claimants, I agreed that I would deal firstly with the application to set aside the Default Judgment. In doing so, I have had to have regard to the matters listed at 1-3 above and is in relation to these that this decision is concerned.

The Defendant's Purported Application to Challenge Jurisdiction

2. **Rule 9.1 (**1) of the Civil Procedure Rules provides that "A defendant who wishes (a) to dispute the claim; or (b) to dispute the court's jurisdiction, must file at the registry at which the claim form was issued an acknowledgment of service in form 3 or 4 containing a notice of intention to defend…"
3. It expressly further provides at Rule 9.5 that the right to dispute the jurisdiction of the Court is not taken away by the filing of an acknowledgment of service.

[8] It then sets out at Rule 9.6 the procedure for disputing the court's jurisdiction as follows:

"A defendant who (a) disputes the court's jurisdiction to try the claim; or (b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect." Such a defendant must first file an acknowledgment of service, followed by an application supported by evidence on affidavit. This application must be made within the time set for filing a defence. Part 10.3 sets out in the circumstances of this case, that the relevant period is 42 days.

[9] In this case the Defendant filed an acknowledgment of service which indicated on its face that there was an intention to challenge the jurisdiction of the court by making an application under rule 9.6(1). This would have clearly given notice to the registrar and the Claimants and as such it would have been expected that 'all hands' would be stayed for the full period of 42 days, which is given for such an application to be made.

[10] However the application filed by the defendant on the 4th January 2012, although being within the 42 days, had not expressly challenged the jurisdiction of the Court as foreshadowed in the Acknowledgment of service. According to Counsel for the Claimants there is nothing in the application or its supporting affidavit which shows that it is one challenging the Court's jurisdiction. The Notice of Application reads as follows:

The Applicant, **DOROTHY VENDRYES**, seeks the following orders:

(i) That the proceedings filed herein on the 17th July 2007 be stayed;

(ii) Further or in the alternative, that the Claimants' statement of case be struck out;

(iii) Costs to the Defendant on a full indemnity basis to be taxed if not agreed; and

Such further or other relief at the Honourable Court may deem fit.

The grounds on which the Applicant is seeking the orders are as follows:

(1) The Claimants amended the claim on the 29th October 2007;

(2) The averments in the amended Claim Form and the amended Particulars of Claim related back to the original date of filing which was 17th July 2007;

(3) The amended pleadings were never served on the Defendant;

(4) Pursuant to CPR 8.14, a Claim Form must be served within 12 months after the date when the Claim was issues or the Claim Form ceases to be valid;

(5) The amended Claim Form was not served on the Defendant within the period of its validity;

(6) The Claimants have not sought any extension of time for filing the amended Claim Form from the court;

(7) Thus there were no valid pleadings before the Court at the time the Claimants purported to file and serve the Further Amended Claim Form and Particulars of Claim;

(8) The further amended pleadings constitute an abuse of process of the Court;

(9) The orders sought are required to give effect to the overriding objective to deal with cases justly, including saving expenses, and allotting an appropriate share of the court's resources while taking into account the need to allot resources to other cases;

(10) The above orders are necessary for the just, fair and effective disposal of these proceedings; and

1. That the Defendant is incurring unnecessary expense defending this matter.

The affidavit in support reads as follows:

I, ANNA M. GRACIE, being duly sworn make oath and say as follows:-

(i) That for the purpose of this Affidavit my postal address is in care of Messrs. Rattray, Patterson, Rattray of 15 Caledonia Avenue, Kingston 5 in the parish of Saint Andrew and I am an Attorney-at-Law and a Partner in the law firm of Rattray, Patterson, Rattray on the record for the defendant herein and I am one of the Defendant's Attorneys having conduct of this matter.

(ii) I am duly authorized to swear this Affidavit on the Defendant's behalf and that the facts contained herein, so far as they are within my personal knowledge, are true and so far as they are not withing my own persnal knowledge, are true to the best of my information and belief.

(iii) On the 17th July 2007, the Claimants herein filed and subsequently served the Claim Form and Particulars of Claim in this matter. On the 29th October 2007, the Claimants filed an Amended Claim Form ad

Amended Particulars of Claim in this matter but did **NOT** serve these documents on the Defendant.

(iv) On the 15th April 2011, the Court of Appeal handed down its ruling in this matter wherein the Court of Appeal found that it was undisputed that the Defendant was not served with the amended claim and that the amended claim replaced the original claim as filed in the Supreme Court. A opy of the said Court of Appeal Judgment is exhibited hereto and marked "**AMG-1**"for identification.

(v) The Civil Procedure Rules 2002 (as amended) provide that a Claim Form must be served within twelve (12) months of it being issued. The Claimants failed to serve the Amended Claim Form and Amended Particulars of Claim on the Defendant and failed to seek an extension of time for filing the claim.

(vi) I do verily believe that based on the operation of the rule, by 29th October 2008, there was no longer any valid claim before the Supreme Court capable of being amended.

(vii) I do verily believe that the Further Amended Claim Form and Amended Particulars of Claim constitute an abuse of process of the Court and the Defendant is being put to unnecessary expense in defending this action.

(viii) Based on the above, I would humbly ask that this Honourable Court exercise its discretion in the Defendant's favour and grant the orders as prayed in the Notice of Application for Court Orders.

[11] The Defendant asserts that indeed the application before the Court is one which sought to challenge the jurisdiction of the Court. However, it is noted that there was no express reference in the application to 'challenge of the jurisdiction of the court', neither was there any reference to the relevant rule (Rule 9.6); nor an

expressed request for a declaration; and it is for these reasons the Claimants disagree.

[12] Rule 11.7 of the Civil Procedure Rules, sets out what an application (generally) must include. An application must state -

> (a) what order the applicant is seeking; (b) briefly, the grounds on which the applicant is seeking the order; and (c) the applicant's estimate of the likely length of hearing.

[13] An analysis of the Defendant's application reveals that he was seeking an order for the Claimant's statement of case to be stayed or alternatively to be struck out. These are possible orders that rules 9.6 (6) (a) and (d) permits in relation to a Rule 9.6 application.

[14] The grounds relied on were clearly relevant grounds for the order sought and bases for a rule 9.6 application. The evidence contained in the supporting affidavit also revealed the same.

[15] However, Rule 9.6 (1) (a) & (b), specifically indicates that where a defendant wishes to dispute the Court's jurisdiction or argues that the court should not exercise its jurisdiction, he should apply to the Court for a declaration to that effect. The application filed was not expressly a request for a declaration to that effect. It appears that this is why the Registrar proceeded to enter judgment in default of defence, although the defendant had indicated on the acknowledgment of service that she intended to make an application under rule 9.6. It is true that this was not expressly reflected in the one that was in fact filed.

[16] It is my view that it was not for the registrar to determine whether this was in fact an application to challenge jurisdiction in circumstances where clearly there may have been some ambiguity. Any ambiguity required the determination of a Judge; to hold otherwise would be to accord to the registrar powers of legal

interpretation and determination which are within the province of a judge and which would not and could not be binding on the parties. This would amount to fettering the discretion conferred on a Judge by the Civil Procedure Rules, by the administrative hand of the Registrar.

[17] It is significant to note that it is the Defendant's position that she had strenuously attempted to get a date for the Hearing of the Application prior to the entry of the Default Judgment, but that this was to no avail. Instead, Default judgment was entered and it is only sometime thereafter that she was able to obtain a date for the Hearing of the Application.

[18] It is my view that the defendant's application taken in light of the intention expressed on the acknowledgment of service filed should have alerted the Registrar to refer the matter to a Judge for an urgent hearing of the application, before entering default judgment; particularly as the application had been filed prior to the request for default judgment and prior to the expiration of the 42 days provided by the CPR for filing a defence. It would have been clear that at the very least there would have been a real likelihood that the Application was in reference to the position stated on the Acknowledgment of Service, even if it did not appear on its face to fully comply with Rule 9.6. This necessity for the Registrar to refer the matter to a Judge, is particularly evident, in light of Rule 26.2 which provides that "an error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders."

[19] It is clear that although the application and its affidavit may have been clumsily drafted, the notice provided on the acknowledgment of service form, read in the context of the notice of application and supporting documents, indicated implicitly or provided doubt that an application under rule 9.6 was being made. As stated above, it is my view that once the intention was stated on the acknowledgment of service form and a subsequent notice of application and affidavit is filed, stating

grounds and evidence which supports a Rule 9.6 application, but there is nevertheless ambiguity or uncertainty as to its nature, then any interpretation or query as to the nature of the application should have been judicially determined and not administratively by the Registrar.

[20] In these circumstances therefore, the issues of clarity or whether the application could stand or not, ought to have properly been left for the determination of a Judge on the hearing of the application. This could have been done by placing the Application before a Judge before the expiry of the 42 days or as soon as practicable after or before an application for default judgment was made.

[21] Having considered the acknowledgment of service, the affidavit and the Notice of application filed and the overriding objectives of the Civil procedure rules; although there was no express statement by the Defendant as to the Rule relied on; or that a declaration was being sought; the substance of the notice of application and the affidavit combined with the intention expressed in the acknowledgment of service, when construed together, makes this application one seeking to challenge the jurisdiction of the court pursuant to Rule 9.6 of the CPR.

[22] In so finding, I intend to exercise my power under Rule 26.9, which allows the court to rectify matters where there has been a procedural error and where no consequence has been provided for a failure to comply with a rule, practice direction or court order.

[23] The Defendant made no formal application for the invoking of Rules 26.3 & 26.9, although this was done as part of their verbal submissions to the Court and which the Claimants argue was not applicable in these circumstances. I however respectfully, disagree. I also take into account that by Rule 26.4 “The court may make such an order on or without an application by a party”.

The Default Judgment Entered

[24] In treating this Application as one where the Defendant is seeking to invoke Rule 9.6, the question arises as to what then would be the position in relation to the default judgment already entered. The issue to be considered is whether the judgment in default of filing a defence had been regularly entered. This would determine whether the defendant is entitled as of right at this stage, to have the judgment set aside.

[25] The defendant complied with Part 9 as it relates to filing an acknowledgment of service within 14 days of service prior to filing its Notice of Application. As an acknowledgment of service was filed, the Registrar was precluded from entering Judgment in default of entering an appearance by way of acknowledgment of service. Thereafter if the defendant was seeking to dispute the jurisdiction of the court—she after filing the acknowledgement of service, would have to file a Notice of Application to this effect. She had the full period of 28 days from the service of the further amended claim to the expiry of the period for filing a defence, in which to do so.

[26] The judgment entered against the defendant was in default of filing a defence as one had not been filed within the period specified by The Civil Procedure Rules. Part 10.5 provides that where a defendant fails to file a defence within the period for filing, judgment for failure to defend may be entered against that defendant, if Part 12 allows it. However although this might have been the procedure followed by the Registrar, a closer look at Part 12 of the CPR in conjunction with Rule 9, reveals that such a default judgment ought not to have been entered and is one which had been irregularly obtained.

[27] There is no express provision in the CPR for the ‘staying of the Registrar’s hand’ where the claimant request the entry of Default Judgment where acknowledgement of service or in lieu, a defence has not been filed within 14 days; or an acknowledgement being filed, no defence was filed within the period

required. See Rules 9.2 (5) and (6)). The Registrar in these circumstances has no discretion and will have to enter judgment in default if the provisions of Part 12 are met. However, in this regard, the situation where an application to challenge the jurisdiction of the court has been filed, requires further attention. There is some interplay between Part 12 and Part 9 which is determinative of this issue.

[28] As can be seen from the above, Part 12 of the CPR contains provisions under which a claimant may obtain judgment without trial, where a defendant has failed to file an acknowledgment of service or defence. Rule 12.1, defines judgment entered in these circumstances as "default judgment". Part 12 sets out the conditions to be satisfied for entry of default judgment for failing to file acknowledgement of service or defence and it basically states that the registry at the request of the claimant must enter judgment against a defendant (on whom service of the claim form has been proved), for failure to file acknowledgement of service or defence within the time required (see Rule 12.4 and Rule 12.5, respectively).

[29] Rule 9. 6(7) states that:

"Where on application under this rule the court does not make a declaration, it -

(a) must make an order as to the period for filing a defence; and

(b) may - (i) treat the hearing of the application as a case management conference; or

(ii) fix a date for a case management conference."

This is further elucidated by Rule 9.6 (8) which provides that:

"Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph (7)(a) and such period may be extended only by an order of the court"

[30] It therefore follows that following the filing of an acknowledgment of service and a Rule 9.6 application is filed, the Registrar's hand is stayed. In that a judgment cannot be entered in default of defence as the period for filing of the defence within 42 days of service of claim form or 28 days of service of amended claim form would not apply. The Registrar in these circumstances would have to await the outcome of the application. This of course makes good sense because if the defendant's application is successful, she would not be required to file a defence and if it is not successful then, the Judge hearing the application is required to give directions as to the time by which any defence should be filed. It is only after such time has expired, that the Registrar would be at liberty to accede to any request for the entry of Judgment in default of defence.

[31] In fact, Rule 10.3(4) (b) specifically provides that the general rule that a defence should be filed within 42 days of service of the claim and particulars is subject to Rule 9.6(8), which provides that, where the defendant makes an application disputing the Court's jurisdiction, he need not file a defence before the hearing.

Irregularly Obtained Default Judgment

[32] Rule 13.2 provides for when a court must set aside a default judgment upon the request of a defendant. By 13.2(1) the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because—

(a) In the case of a failure to file an acknowledgement of service, any of the conditions in Rule 12.4 was not satisfied.

(b) In the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied, or the whole of the claim was satisfied before judgment was entered.

[33] The applicable provision in this case is rule 13.2(b) in that Rule 12.5(c), (that is, the period for filing defence as given by the rules; or agreed by the parties; or

ordered by the Court has expired) had not yet been engaged. The period for filing a defence had not expired as it had not yet arisen.

[34] It is my view that the judgment in default of defence was irregularly obtained as the time for filing a defence had not yet arisen and so logically the defendant could not have failed to file a defence not yet due.

[35] Accordingly, the default judgment entered on 18th March 2014 was irregularly obtained. It is hereby set aside.

[36] Costs

The Defendant did not fully comply with Rule 9.6. This has led to the uncertainty which has resulted in the default judgment. The Claimants have done no more than seek to protect the judgment they have obtained and cannot be faulted for this. Due to these circumstances, it is my view that it is appropriate to depart from the usual rule, that the successful party is awarded costs against the other, and I make an order that each party be responsible for its own costs in this application.

[37] Orders

(i) The application by the Defendant filed on the 4th January 2012, is hereby declared a valid Rule 9.6 application challenging the jurisdiction of the court.

(ii) Permission is granted to the Defendant to amend the application to reflect that an order for a declaration is being sought and by denoting a heading "Notice of Application to Challenge Jurisdiction of the Court."

(iii) Default Judgment entered on the 18th March 2007 is hereby set aside.

(iv) Each party to bear its own cost on this application.