



[2016] JMSC Civ. 127

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015 HCV 00003**

<b>BETWEEN</b>	<b>RAYMOND LEWIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DR. EVA LEWIS FULLER</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>VIOLET LEWIS CRUTCHLEY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>SUSAN LEWIS FORBES</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

**Mrs. Sandra Minott Phillips, Q.C and Mrs. Kristian Lewis, instructed by Ms. Dianne Edwards for the Claimant**

**Mrs. Margarette Macaulay and Ms. Eileen Felix, instructed by Margarette May Macaulay Chambers for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Mrs. Gloria Langrin for the 3<sup>rd</sup> Defendant**

**HEARD: June 23 and 24, 2016**

**ORAL APPLICATION FOR EXTENSION OF TIME – FAILURE TO LEAD AFFIDAVIT EVIDENCE WHEN MAKING APPLICATION TO EXTEND TIME – OPPOSITION TO APPLICATION TO EXTEND TIME – RELEVANT FACTORS TO BE CONSIDERED WHEN EXTENDING TIME TO FILE DEFENCE – OVERRIDING OBJECTIVE – WHAT IS JUST IN THE CIRCUMSTANCES**

**ANDERSON, K., J**

## **The Introduction**

- [1] The 1<sup>st</sup> and 2<sup>nd</sup> defendants have applied for extensions of time to be afforded to them, to file four (4) affidavits which their clients wish to rely on, in support of their defence.
- [2] Those defendants had, through counsel, given notice of their intention to make that application upon the 'hearing' of this matter – which came before this court upon a scheduled trial yesterday. This matter was scheduled for trial over two (2) days, being yesterday and today.
- [3] No application for court orders was filed and no evidence filed in support of those defendants' application. The application was made orally. Notice was given of the intention to make the application and that notice was given, by means of filing and service of notices of intention to so apply, on separate occasions and in respect of separate affidavits.

## **The law as regards extension of time applications**

- [4] Our Court of Appeal has addressed the issue of extension of time applications, on several occasions, among the latest of which, was in a judgment which was brought to this court's attention by learned Queen's Counsel, for the claimant. That case is: **The Commissioner of Lands & Homeway Foods Ltd. & Stephanie Muir** – [2016] JMCA Civ. 21.
- [5] In deciding on applications for an extension of time, our Court of Appeal, just as does this court, applies the provisions of **Part 26 of the Civil Procedure Rules (CPR)**. Those provisions permit this court to correct any irregularity in court proceedings, subject to such conditions as may be just and also permit this court to grant extensions of time, even after the time for compliance has passed. The rules referred to though, do not specify what approach is to be used by the courts in assessing applications for extension of time. The rules wisely do not so prescribe, because inflexible rules may often lead to injustice. As such, since

there is the absence of specific guidance in that respect, this court is to have regard to the over-riding objective in assessing any extension of time application.

**[6]** The over-riding objective requires that this court exercise its discretion, in a manner which accords with justice. In that regard, there are several relevant factors, but those as stated here, should not be taken as constituting an exhaustive list. Relevant factors are:

- (1) The length of the delay – In this case, the length of the delay varies between approximately one (1) to three (3) months of when all of those affidavits ought to have been filed and served, as they ought all to have been filed and served on or before November 13, 2015. That one (1) to three (3) months length of time may not be considered as being unduly lengthy, but everything must be considered in context. If the delay is such as to impact the commencement of the trial, then it may very well be, that said delay is, quite frankly, lengthier than can properly be justified, as a matter of justice.
- (2) The explanation for the delay – In this case, this court has been provided with no evidence explaining same and, accordingly, learned counsel for the applicant was unable, from the bar table in court, to proffer any explanation.
- (3) The prejudice occasioned by the delay – there is prejudice to the claimant, both in terms of the delayed trial commencement and also, arising from the fact that he had to travel from overseas to be present for the trial yesterday and today.
- (4) The merits of the case of the party applying for the extension of time – No evidence has been provided to this court, in this specific respect.
- (5) The effect of the delay on public administration – In this case, it has been detrimental, because it has led to a delay in the commencement of the trial and is therefore contributing to delays in the hearing of other cases and is also leading to persons overall, as a result of what they may view as the

inefficiencies of Jamaica's justice system, losing confidence in the administration of justice.

- (6) The importance of compliance with time limits.
  - (7) In particular, where prejudice is alleged, the comparative resources of the parties – No evidence has been alleged in that regard.
- [7] This court has considered all of the aforementioned factors, as did our Court of Appeal in the case: **The Attorney General and Western Regional Health Authority and Rashaka Brooks Jr. by Rashaka Brooks Sr.** [2013] JMCA Civ. 16.
- [8] Jamaica's Court of Appeal has concluded, on more than one occasion, that an application for an extension of time to file a defence, must be supported by evidence, not only outlining the reason for the failure to file within the prescribed time, but also demonstrating that there was merit in the defence. See: **Fiesta Jamaica Ltd. and National Water Commission** – [2010] JMCA Civ. 4; and **Philip Hamilton (Executor in the estate of Arthur Roy Hutchinson, deceased, testate) v Frederick and Gertrude Flemmings** – (2010] JMCA Civ. 19.
- [9] In the case at hand, which was commenced by way of fixed date claim form, the affidavits of the defendant stands as the defendant's statement of case and the defendant's evidence. Thus, if further affidavits are sought to be relied on by a defendant, it is not only an effort on the part of that defendant to rely on further evidence, out of time, but also to vary his or her statement of case – which, if being done after case management, requires the leave of the court to be done. Accordingly, the Court of Appeal cases cited above are of direct relevance and applicability to the case at hand.
- [10] In the present case, it must be emphasised once more, that no evidence has been provided in support of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' application. It ought only to be in special circumstances, therefore, that the 1<sup>st</sup> and 2<sup>nd</sup> defendants'

application for an extension of time for the filing and service of the various latest affidavits, ought to succeed. It all comes down to justice.

### **Court's conclusion/analysis**

[11] In the final analysis, it is my conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' should be permitted to pursue their defence, as fulsomely as possible. This, though, ought not to be viewed as this court either condoning the failure to file the relevant documents within the prescribed time, or condoning and/or setting precedent, *vis-a-vis* the failure to file evidence in support of the application for an extension of time. Each case has to be considered on its own merits. Thus, in the Privy Council case of: **The Attorney General and Keron Matthews** – [2011] UKPC 38, an extension of time was permitted on appeal to the Privy Council, even though, in respect of the application for an extension of time, no merits of the defence, evidence, was placed before the Trinidad and Tobago Supreme Court Judge, who had first considered the extension of time application. In that case, at first instance, the Supreme Court Judge had granted an extension of time for filing and service of defence. On appeal to the Court of Appeal, the appeal was allowed and default judgment entered – as the claimant had applied for same, to the Supreme Court, but Gobin J. had denied that application and instead granted the defendants' extension of time application. On appeal to the Privy Council, the ruling of Gobin J. was restored and the appeal allowed. Our Court of Appeal referred with approval to the **Matthews** case (*op. cit.*), in **The Attorney General of Jamaica v Western Regional Health Authority** case (*op. cit.*).

[12] The claimant should be compensated by means of an order of costs, not only in respect of his attorney, but also in respect of his travel, and costs, will be assessed on an indemnity basis. Additional time, over and above two (2) days, will be scheduled for trial. This court will now make those orders and in addition, will order that skeleton arguments be filed and served.

## Orders

- (i) The trial of this claim is adjourned for hearing on September 17-19, 2018, commencing at 10 a.m. on each day.
- (ii) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are granted an extension of time for the filing and service of all affidavit evidence upon which they propose to rely and all affidavit evidence for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants shall be deemed as if, having been filed and served within time, provided that all of same have been filed and served, by or before February 12, 2016.
- (iii) The costs of today and yesterday, are awarded to the claimant as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants only and such costs shall be assessed and taxed on an indemnity basis, if not sooner agreed and subject to the claimant providing to the registrar, proof of travel from overseas to and from Jamaica, for the purposes of his attendance at trial, set for June 23 and 24, 2016, the costs of same, shall be awarded to him, by the registrar.
- (iv) The parties shall respectively, file and serve skeleton arguments and authorities, by or before August 31, 2018.
- (v) The claimant is granted leave to appeal this order.
- (vi) The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall file and serve this order.

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**Hon. K. Anderson, J.**