



[2022] JMSC Civ.19

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

**CIVIL DIVISION**

**CLAIM NO. SU2019CV01631**

**IN THE MATTER OF ALL THAT** parcel of land part of Bengal in the parish of Saint Ann registered at Volume 1046 Folio 562 of the Register Book of Titles.

AND

**IN THE MATTER OF** the Registration of Titles Act.

**BETWEEN**

**CHRISTOPHER SMALL**

**CLAIMANT**

**AND**

**DONOVAN MURRAY**

**DEFENDANT**

**IN CHAMBERS**

Miss Cardena Clarke, Attorney-at-Law instructed by Nicholas Manley & Company Attorneys-at-Law for the Claimant

Mr. Courtney Rowe, Attorney-at-Law for the Defendant

Heard: December 15, 2021 and February 4, 2022

**Application to extend the time to file defence, claim for adverse possession, failure to file defence due to inadvertence, real prospect of success, explanation for the delay, application of the overriding objective; parties' duty to further the overriding objective.**

## **MASTER STEPHANY ORR**

### **INTRODUCTION**

- [1] There are two applications presently before me: an application by the Claimant to enter judgment in default of defence, and an application by the Defendant to file his defence out of time.
- [2] At the root of this claim is a dispute as to the ownership of a title over one acre of land in Bengal in the parish of St. Ann. The Defendant is the registered owner of this property which is Registered at Volume 1046 Folio 562 of the Register Book of Titles.
- [3] From the endorsements on the duplicate certificate of title, the land was registered and a title issued in 1968 to Elgin Lawrence Shaw. In 1975 he subsequently transferred the land to Sprout III Limited, a company incorporated in Cayman. By way of gift the property was transferred to the Defendant on August 10, 2018.
- [4] In his Fixed Date Claim filed on March 15, 2019, the Claimant seeks to challenge the Defendant's title and asks the court to grant the following relief:
- (a) That caveat number 2159270 lodged at the National Land Agency be allowed to stand.
  - (b) That certificate of title registered at Volume 1046 Folio 562 under the name of Donovan Murray be removed from the Register Book of Titles by the Registrar of the National Land Agency.
  - (c) That the Registrar of the Supreme Court be empowered to sign any and all documents giving effect to this order in the event that the Defendant neglects or refuses to sign.

- [5] An affidavit of service filed on July 4, 2019 indicates that the Claimant was served with the originating documents on May 22, 2019. The Acknowledgement of Service filed on May 30, 2019, does not include the date of service. The date of service included in the Claimant's affidavit of service was never challenged.
- [6] At the first hearing of the Fixed Date Claim on July 10, 2019, both parties were represented. No defence or affidavit in response to the Fixed Date Claim was filed. Thompson-James, J in adjourning the hearing extended the time for the Defendant to file his affidavit in response to the claim. Same was to be filed no later than July 31, 2019.
- [7] The Defendant's affidavit in response was filed on July 19, 2019, well within the extension period granted by the court.
- [8] The affidavit of Dwieth Green outlines his several attempts to serve the Claimant's former Attorney-at-law with the Defendant's affidavit and his inability to serve same. He alleges that on diverse days in July, August and September 2019 when he visited her office it appeared to be closed. Notably he has not stated the address that he visited to serve counsel.
- [9] The claim was again before Rattray, J on January 15, 2020. He made the following orders:
- (1) *Counsel undertakes to serve a copy of the Acknowledgment of service on the claimant's Attorney at Law on or before January 22, 2020.*
  - (2) *Matter treated as commenced by way of a Claim form*
  - (3) *Particulars of Claim to be filed and served on/before February 28, 2020 by 3:00pm*
  - (4) *This order is to be filed by the Claimant's Attorney-at-Law and served on the Defendant's Attorney-at-Law*
  - (5) *No order as to costs*

- [10] The Claimant having alleged fraud on the part of the Defendant in procuring his title, the matter could not proceed as a Fixed Date Claim hence the order for the claim to proceed as if commenced by a Claim Form.
- [11] In keeping with the order of the court the Claimant filed a Particulars of Claim on February 27, 2020, and served this document on the Defendant's Attorneys-at-Law on February 28, 2020. There being no defence filed in response to this Particulars of Claim, on May 12, 2020, the Claimant filed a notice of application to enter judgment in default of defence.
- [12] Subsequent to the Claimant filing his application to enter judgment against the Defendant, on July 20, 2020, the Defendant filed this application for an order extending the time to file and serve his defence.
- [13] On July 27, 2020 the court adjourned the Claimant's application to September 23, 2020. The Defendant was not represented at that hearing and there is no indication that his Attorney-at-Law was served for that date.
- [14] At the adjourned hearing on September 23, 2020, the court was informed of the Defendant's pending application and both applications were adjourned to be heard on March 18, 2021. On March 16, 2021 the Defendant filed an Amended Application for Court orders for permission to amend the draft defence.
- [15] As no bundles or submissions had been filed, the applications was again adjourned to October 26, 2021. The applications were not heard on this further date and was again adjourned to December 15, 2021 when they were before me.

## **THE LAW**

- [16] CPR 10.3(9) allows the court to extend the time to file a defence. By virtue of Rule 26.1(2) (c) the court is given the power to extend the time or abridge the time to do anything under the rules, even where the time for compliance has already expired.

- [17] Neither rule contains a list of criteria to guide the court in the exercise of its discretion to grant an extension of time. There are also no automatic sanctions for failing to comply with Rule 10.3(1) which requires a Defendant to file a defence within forty-two days of service of a claim.
- [18] In considering whether time should be extended to a Defendant on an application to extend time, the court must therefore have regard to all the circumstances of the case in accordance with the overriding objective.
- [19] Brooks, JA ( as the then was) said as much in **Attorney General of Jamaica & Anor v Rashaka Brooks Jnr. and Anor**<sup>1</sup> where in reviewing the court's exercise of its discretion in refusing to grant an extension of time to file a defence he said that:

*“...the principle that operates is that in the absence of specific guidance in a particular rule, the court is to have regard to the overriding objective in applying that rule. The overriding objective of the CPR is that courts are to strive to ensure that cases are dealt with justly. Rule 1.1(1) states :*

*(1)These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly”*

He went on to reference CPR 1.2, which he explained the method by which the overriding objective is applied in the CPR. Rule 1.2 provides that:

*The court must seek to give effect to the overriding*

*objective when interpreting these rules or exercising any powers under these rules.*

- [20] The result of applying this principle is that the court should not adopt “a one size fits all approach” in exercising its discretion. What is just will vary according to the particular circumstances of each case. Brooks, JA suggested that the court should not adopt an inflexible or rigid stance where the court is given a discretion in

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<sup>1</sup> 2013 JMCA Civ 16

interpreting the rules. In considering an application where the rules do not lay down any mandatory provisions or guidance, each case is therefore to be decided on its own particular set of circumstances against the background of the overriding objective of dealing with cases justly and expeditiously.

[21] Further guidance was also given by Lightman, J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston Ltd.) & Others**<sup>2</sup> where he sets out some of the considerations that a court must have in deciding what justice requires in respect of an application to extend time. He said:

*“...It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors ( some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.”*

[22] The exercise of the court’s discretion to extend time generally therefore involves a multifactorial approach. However, no single factor is determinative of the application. Similarly, not all of the criteria set out by Lightman, J will be applicable to every case. It all depends on the circumstances of each case.

[23] In considering the Defendant’s application I have considered the following factors:

- (i) whether there was any delay in making the application,
- (ii) any explanation provided for the delay,
- (iii) the merits of the defence; and

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<sup>2</sup> All England Official Transcripts (1997-2008) delivered January 18, 2000

(iv) the effect of any delay on public administration and the importance of complying with time limits

As I believe that these factors are relevant to disposing of this application.

**WHETHER THERE WAS ANY DELAY IN APPLYING FOR THE EXTENSION AND THE IMPORTANCE OF COMPLYING WITH TIME LIMITS**

**[24]** The particulars of claim having been served on February 28, 2020, the defence should have been filed and served within forty-two days or by April 4, 2020, in light of the intervening Easter Holiday.

**[25]** The application to file the defence out of time was filed on July 20, 2020, some nearly five months out of time and thus there was a delay of five months on the part of the Defendant. In considering the issue of delay, the court is always concerned to see how quickly the Defendant acted to take steps to remedy his breach.

**[26]** The starting point in considering any delay in an application for an extension of time should be the starting point prescribed by the rules. In this case forty-two days. The Defendant applied to remedy this breach five months after the time to file the defence had expired.

**[27]** It is not uncommon to compare periods of delay as between Defendants. However, if we are truly considering each case on its own facts or particular circumstances, a comparison with other cases may not always do justice.

**[28]** In this case the Defendant already had the information to include in his draft defence and affidavit of merit having filed an affidavit in response to the Fixed Date Claim. This delay could only be seen as inordinate in the circumstances.

**THE EXPLANATION FOR THE DELAY**

- [29]** The Defendant has filed three affidavits in support of his application. The affidavits filed on July 7, 2020 and March 16, 2021 outline his explanation for the delay in applying to file his defence out of time.
- [30]** In his first affidavit he explains that the delay was caused by his inadvertence in giving his Attorneys-at-Law proper instructions to file the defence within the prescribed time.
- [31]** In his second affidavit he alleges that the defence was not filed within the forty-two-day period prescribed by the rules as a result of inadvertence. He says further that this oversight was unintentional.
- [32]** It is notable that the draft defence exhibited to Mr. Murray's first affidavit mirrors the affidavit that was filed on July 19, 2019 in response to the Fixed Date Claim. The affidavit filed on June 20, 2020 goes further to include the evidence to satisfy the court that he has a meritorious defence. His second application wherein he seeks to amend his proposed draft defence is also similar in content to the affidavit of July 19, 2019 save and except that it includes a counterclaim for orders that would deny the orders sought by the Claimant. This supplemental affidavit was filed much later on March 16, 2021.
- [33]** I could not see why his Attorneys-at-Law would therefore need additional instructions to prepare a defence where the Particulars of Claim raised no new issues and essentially mirrored the Fixed Date Claim to which the Defendant had already responded.
- [34]** In explaining what amounted to a good explanation Fraser, David, JA (Ag) ( as he then was) pointed out that "A proper or good explanation or reason must be one



which not only adequately reveals why the default occurred, it must also show that the default is excusable in the circumstances.”<sup>3</sup>

**[35]** Inadvertence in this instance is not an acceptable excuse for failing to comply with the requirement to file a defence within the prescribed period. On the evidence before me the Defendant has not provided a sufficient and adequate explanation for the delay in applying to file his defence out of time.

### **THE EFFECT OF THE DELAY ON PUBLIC ADMINISTRATION**

**[36]** The chronology outlined earlier shows that the Defendant’s application was before the court on three separate occasions before it was actually heard – March 18, 2021, October 26, 2021 and December 15, 2021. This resulted in the claim languishing before the court for a period of seven months without the court determining any issues as between the parties. On each occasion, either or both of the parties were not in a position to proceed with the application. Indeed, on October 26, 2021, Anderson Kirk, J issued unless orders in relation to both parties requiring them to comply with Practice Direction 8 of 2000 to file and serve written submissions and a list of authorities.

**[37]** While litigants often ask the court to consider the overriding objective, it is to be remembered that dealing justly with cases requires the court to ensure that cases are dealt with expeditiously and fairly; and allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

**[38]** While the court must seek to give effect to the overriding objective of the rules when interpreting the rules or exercising any powers under the rules, one must not forget that it is the duty of the parties to help the court to further the overriding

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<sup>3</sup> Alice McPherson v Portland Parish Council and Anor. [2019]

objective. It is therefore hoped that the parties and counsel will ensure that their future conduct in this claim reflects an appreciation of CPR 1.3.

## **THE PROPOSED DEFENCE**

- [39]** The Defendant has relied on three affidavits; filed on July 20, 2020, March 16, 2021 and December 15, 2021, to support his application to file his defence out of time.
- [40]** In his claim the Claimant alleges that he has been in possession of the land at Bengal, Saint Ann since an unknown date in 1991. He wishes to claim the property at Bengal, Saint Ann by adverse possession. This would require him to establish that he has been in possession for no less than twelve years to the exclusion of the registered owner and all others. When he attempted to register his interest in the property and secure a title in his name, he discovered that the property was already registered in the Defendant's name since 2018. He therefore alleges that the Defendant obtained title to the lands by fraud.
- [41]** In his Particulars of Fraud, Mr. Smalling alleges that Sprout III Limited is no longer registered with the Cayman Islands Companies Registry and that the certificate of good standing relied on by the Defendant to register the transfer of the property into his name is fraudulent.
- [42]** He also alleges that if the company no longer exists, the property could not have been transferred by way of gift to the Defendant in 2018. The Claimant therefore states that he has dispossessed the former registered owner, Sprout III.
- [43]** In response to the Claimant's claim the Defendant has outlined his evidence to support his right to ownership of the property in his affidavit of July 20, 2020.
- [44]** He explains that he met Astley Hunter a director of Sprout III the former registered owner of the land in March 2010.

- [45] Mr. Hunter's company he says was the owner of three surrounding lots in Bengal which he offered to sell the Defendant. Mr. Murray's further evidence is that he did not accept this offer to purchase as he had recently invested in other property which he intended to develop.
- [46] He says further that Mr. Hunter who was ill and undergoing medical treatment subsequently borrowed funds from him over time and was unable to repay same. In order to repay the funds amounting to some \$14,000,000.00. Mr. Hunter agreed to transfer the disputed lot to him. The transfer was effected in 2018.
- [47] Prior to the transfer being registered on the title, Mr. Hunter suggested that Mr. Murray clear the land so as to distinguish it from the other lots his company owned.
- [48] Mr. Murray said in his evidence that when he visited the lot in March of 2014 it was unoccupied and heavily wooded. He employed workmen to clear the lot and even built a temporary structure on the lot where the labourers remained while they were clearing the lot.
- [49] He therefore denies that the Claimant has been in possession of the land since 1999 which would thereby enable him to acquire a possessory title to the Bengal lot. He also Mr. Murray to proof of his possession.
- [50] In his further affidavit of March 16, 2021, he seeks to amend his proposed draft defence to include a counterclaim for damages he incurred as a result of the registration of the Claimant's caveat on his title which would have precluded him from dealing with his title. He has not particularized this loss, but that is not fatal to his defence and counterclaim at this stage. He also seeks an order for the removal of the caveat and a further order that the Claimant has no right to the disputed property.
- [51] It is trite law that an individual claiming title to private lands by adverse possession must establish that he has been in exclusive, open, undisturbed and continuous

possession of the property for a period of no less than twelve years immediately preceding his application to be registered by adverse possession.

- [52]** The Defendant has provided evidence as to how he acquired title to the disputed property and also speaks to visits to the subject property in 2014 and taking possession of the property by clearing the land and fencing it. He has also attached receipts in proof of his dealings with the registered owner's director/agent to substantiate his evidence.
- [53]** Mr. Murray's evidence shows that his dealings with Alan Hunter, a director of the company that formerly owned the land dates back to 2010 when he met Mr. Hunter who he says subsequently sold him the property.
- [54]** Mr. Smalling's claim is that he took possession of the property in 1991 some nineteen years before Mr. Murray's dealings with the registered owner's representative. On the other hand, Mr. Small alleges that the former registered owner abandoned his property allowing him to dispossess that owner of his title.
- [55]** To my mind the Defendant has provided evidence which raises several triable issues on the Claimant's claim which include:
- (a) Whether the Claimant was in possession of the property since 1991,
  - (b) Whether Sprout III Limited was dispossessed of its title to the lot at Bengal, Saint Ann by the Claimant, and if so when was the company dispossessed?
  - (c) Whether as the Claimant alleges, Sprout III was not registered as a company in good standing with the Registrar of Companies in Cayman when the transfer was effected to the Claimant,
  - (d) Whether Sprout III existed as a viable entity in 2018 when title passed to the Defendant.
- [56]** Indeed the Defendant's evidence could not be described as fanciful as it raises triable issues that go to the crux of the Claimant's claim and as such he has a

realistic prospect of success. A trial court would have to assess the evidence provided by both parties under the scrutiny of cross-examination to determine which of the parties is entitled to the disputed property.

**[57]** While Mr. Murray has included evidence in his affidavit that may go to the claimant's credibility, that is not a necessary consideration for me at this stage. I have not considered this evidence, as I am not required to embark upon a mini trial to assess the credibility of a party at this stage.

## **CONCLUSION**

**[58]** In conclusion, while the Defendant has provided evidence of a meritorious defence, I must balance this against the fact that he delayed some nearly five months in filing this application to extend the time to file his defence. He has also failed to provide a satisfactory explanation for his delay in filing a defence or application within the prescribed period.

**[59]** But these are not the only considerations I must make. While Mr. Murray delayed in filing his defence, some consideration must be given to the fact that at the time that his application was filed, he had already filed a defence. The order made by Rattray, J converted the Fixed Date Claim to a Claim Form. The Defendant had already filed a response to that Fixed Date Claim, albeit that it was after the initial forty-two day period, he was nevertheless well within the extension granted by Thompson-James, J.

**[60]** The allegations contained in the Particulars of Claim filed on February 27, 2020 substantially mirrored the information in the Fixed Date Claim. There was no new suit filed with the filing of the Particulars of Claim.

**[61]** I accept as Mr. Rowe has submitted that since the Defendant had already filed a defence to the Fixed Date Claim he should have been able to file a defence to the Particulars of Claim within the prescribed period.

- [62]** Nevertheless, I am reminded that the courts exist to determine matters as between parties. Litigants should not be turned away lightly and barred from pursuing or defending a claim because of a procedural breach, particularly where the rules do not provide an automatic sanction for such a breach.
- [63]** While the court is always concerned to ensure that parties and their Attorneys make every effort to comply with the rules of court and orders, we are also bound to deal with matters justly.
- [64]** In the particular circumstances of this case, dealing justly means allowing this Defendant to file his defence in the proper format in response to the Claimant's Particulars of Claim. I have therefore granted the Defendant's application to file his defence out of time.
- [65]** Dealing justly means also considering both parties to the claim. The Claimant has been unable to pursue his claim because of the Defendant's breach. The Defendant will be permitted to file his defence out of time, however, so that he is reminded of the importance and necessity of complying with the rules and orders of the court, as we work towards determining this claim expeditiously, I have included an unless order in my orders below. Where the Defendant fails to file and serve his defence within the period of extension granted, he will not be permitted to defend this claim.
- [66]** The orders of the court are therefore as follows:
1. The Defendant is granted an extension of the time within which to file and serve his defence and counterclaim.
  2. Unless the defence and counterclaim are filed and served within seven days of this order, and no later than by February 11, 2022 at 3pm the Defendant will not be permitted to defend this claim.
  3. A statement of the factual and legal issues arising on each party's statement of case is to be filed and served by March 4, 2022.

4. The time for the parties to attend Mediation in this claim is abridged and mediation must take place by March 31, 2022.
5. A copy of each party's statement of the factual and legal issues is to be emailed to the mediator at least three clear days before the scheduled mediation session.
6. Copies of the documents which the parties intend to rely on at trial are to be made available to the mediator and opposing counsel at least three clear days before the scheduled mediation session.
7. A case management conference is scheduled for June 16, 2022 at 10:00am or one hour.
8. Any applications which either party intend to make prior to the trial are to be heard at this case management conference.
9. Any such application is to be filed and served by May 20, 2022.
10. Any affidavit in response to these applications are to be filed and served no later than by June 3, 2022
11. All parties are to attend the case management conference by video link.
12. Each party is to be in a position to state the number of witnesses they will call and the legal or factual issues that each witnesses' evidence will address at the case management conference.
13. The application filed by Hannah Harris-Barrington to remove her name from the record as the Claimant's Attorney-at-Law is withdrawn.
14. The Claimant's application to enter default judgment is refused.
15. Costs are awarded to the Claimant against the Defendant in the sum of \$15,000.00 for this application.
16. The Defendant's Attorney-at-Law is to prepare file and serve this order on Counsel for the Defendant on or before February 25, 2022.

Stephany Orr

Master in Chambers