[2016] JMSC Civ. 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV05731

BETWEEN **HELEN WESTON-PARCHMENT** **CLAIMANT**
(Administratrix, estate Headley Weston)

AND **PETE WESTON** **DEFENDANT**

IN CHAMBERS

Judith M. Clarke instructed by Judith M. Clarke & Co. for the claimant

Melrose M. Baines for the defendant

HEARD: February 23, 2016 and June 24, 2016

APPLICATION TO STRIKE OUT DEFENDANT'S STATEMENT OF CASE - DEFENCE ALLEGEDLY DISCLOSING NO REASONABLE GROUNDS FOR DEFENDING THE CLAIM - NON-COMPLIANCE WITH COURT ORDER- FAILURE TO ATTEND MEDIATION- RULES 74.9(1) AND 74.14(6) OF CIVIL PROCEDURE RULES (C.P.R) -STRIKING OUT- RULE 26.3(1)(C) OF CPR- OVERRIDING OBJECTIVE- NEGLECT OF COUNSEL-ADVERSE POSSESSION

ANDERSON, K. J

THE APPLICATION

[1] On September 09, 2013, the claimant filed a notice of application and an affidavit in support to strike out the defendant's statement of case. Therein, inter alia, the following orders were sought:

(i) that the defendant's statement of case be struck out;

(ii) a declaration that the claimant, Helen Weston-Parchment is the beneficial owner of **ALL THAT PARCEL OF LAND PART OF** Potsdam in the parish of St. Elizabeth containing by estimation eleven acres be the same more or less and butting and bounding northerly on land in the possession of John Weston, southerly on land of Hugh Weston, easterly main road to Malvern, westerly on land of Milton Witter or howsoever otherwise the same may be butted, bounded, known, distinguished or described;

(iii) a declaration that the defendant has no interest in the land described at sub-paragraph 2 hereof;

(iv) that the defendant and/or his servants and/or his agents are hereby restrained from entering upon or dealing with the said land and from interfering with the Claimant and/ or her servants and/ or her agents in her/ their use and occupation of the said land; and

(v) the claimant is empowered and authorized to proceed with a survey of the said land along the lines of and in keeping with the description thereof in sub-paragraph 2 hereof.

[2] The application was based on four (4) grounds:

(i) the defendant failed to attend the mediation proceedings held on May 28, 2013;

(ii) additionally and in any event, the defence filed by the defendant discloses no reasonable ground of defence;

(iii) the defendant has no good defence to the claim herein;

(iv) the defendant has no reasonable prospect of succeeding in his defence.

BACKGROUND TO THE APPLICATION

[3] This is a matter that has been long outstanding and as such, its background is quite lengthy. This court has, for a comprehensive understanding of the nature of the claim, found it prudent and unavoidable to set out, in detail, the prior events which have culminated in this ruling.

[4] On December 03, 2008, the claimant filed a claim form and particulars of claim wherein she sought orders two to five (ii-v) mentioned above in paragraph 1 of this ruling, as well as damages for wrongful obstruction of survey. She also filed a notice of application for interlocutory injunction dated December 03, 2008 and an affidavit in support sworn to on November 24, 2008. In the interlocutory injunction application she sought, inter alia, the following orders:

(i) An order that the defendant by himself, his servants and/ or agents be and are hereby restrained from taking any steps to dispose of, construct upon or otherwise deal with **ALL THAT PARCEL OF LAND PART OF** Potsdam in the parish of St. Elizabeth containing by estimation eleven acres be the same more or less and butting and bounding northerly on land in the possession of John Weston, southerly on land of Hugh Weston, easterly main road to Malvern, westerly on land of Milton Witter or howsoever otherwise the same may be butted, bounded, known, distinguished or described pending the outcome of this claim;

(ii) an order that the defendant, his servants and/ or agents or anyone for him be and is hereby restrained from taking any steps calculated to alter the current official tax records relative to the property described in paragraph 1 hereof, pending the outcome of this claim.

[5] A further affidavit was filed by the claimant on December 10, 2008, in support of the said application.

[6] The defendant filed an acknowledgement of service on December 29, 2008, acknowledging receipt of the claim form and particulars of claim on December 15, 2008, which corresponds with an affidavit of service filed by the claimant on January 28, 2009, proving service of the same on the defendant at Bells Cottage in the parish of St. Elizabeth on December 15, 2008. The defendant indicated in his acknowledgment of service that he intended to defend the claim. On a perusal of the court documents, there is no evidence indicating whether or not the defendant was served with the application for the interlocutory injunction. This may explain his absence from the first hearing on January 15, 2009.

[7] On January 15, 2009, the application for the interlocutory injunction came before McIntosh J. who adjourned the matter to February 24, 2009, or as soon as

counsel could be heard. Counsel for the claimant was present. As aforementioned, it appears from the court records that neither the defendant nor anyone representing him was present.

[8] On January 16 and 28, 2009, relisted applications for the interlocutory injunction were filed and on February 5, 2009, served on the defendant at Stockfarm Road, Golden Spring in the parish of St. Andrew. Proof of service is given in an affidavit of service filed by the claimant on February 18, 2009. A supplemental affidavit was filed on March 17, 2009, stating that on February 05, 2009, the defendant was served with an application for an interlocutory injunction filed on December 03, 2008, an affidavit in support sworn to on November 24, 2008 and further affidavit sworn to on December 10, 2008, in support of the application, at the said address mentioned in the affidavit filed on February 18, 2009.

[9] On February 24, 2009, the matter came before Campbell J. who ordered that the status quo should remain as it was at the date of the order made on February 24, 2009. The matter was adjourned to March 27, 2009 or so soon thereafter as counsel could be heard, to afford the defendant an opportunity to retain counsel of his choice. From the record, counsel for the claimant was present and so too, was the defendant. The claimant filed an affidavit of service on March 20, 2009, proving service of the order made by Campbell J. on the defendant on March 10, 2009, at Stockfarm Road, Golden Spring, in the parish of St. Andrew.

[10] On March 27, 2009, McIntosh J. adjourned the application to September 22, 2009, and ordered that the interim injunction granted on February 24, 2009, to remain in force unless further order of the court. Counsel for the claimant and the claimant were both present along with the defendant.

[11] On May 21, 2009, the claimant filed a notice of application for judgment supported by affidavit. The grounds of the application included, inter alia, that the defendant had been served with her statement of case but had not filed and

served an acknowledgment of service or defence and the time for doing so had expired and no extension of time has been granted to the defendant. This was however not entirely accurate as the defendant had filed his acknowledgment of service on December 29, 2008. There was no evidence however that he had served the same on the claimant.

[12] The defendant, by his counsel, filed another acknowledgement of service on June 04, 2009 and his defence on June 16, 2009.

[13] The application for judgment was heard by G. Brown J. (Ag.) on June 26, 2009 and adjourned to September 29, 2009. Both parties' counsel were present and so was the defendant.

[14] The hearing of the application for the interlocutory injunction was heard by B. Morrison J. on September 22, 2009 and it was ordered that the interim injunction granted on February 24, 2009, would remain in place unless further ordered by the court and the application for judgment was adjourned to March 9, 2010. Counsel for the claimant was present. It does not appear from the record that the defendant or his counsel was present.

[15] As regards the hearing date of September 29, 2009, for the application for judgment, it was duly noted on that date that the matter was already set for March 09, 2010. Therefore both applications were set to be heard on one day, that is March 09, 2010 and the hearing date of September 29, 2009, was vacated. Counsel for the claimant was present.

[16] On October 09, 2009, the defendant filed a notice of application for court orders seeking leave to extend the time for filing a defence down to the date filed as June 16, 2009 and relief from sanctions. The application was supported by two affidavits filed on the said date. The application was heard on December 07, 2009, before Master Nicole Simmons (Ag.) who ordered, inter alia, that by consent, the defence filed on June 16, 2009, is allowed to stand. Counsel for both parties were present, as was the defendant.

[17] On March 9, 2010, when the matter came on for hearing before F. Williams J. (Ag.), it was ordered by consent that the defendant and his servants and/ or agents were restrained from taking any steps to dispose of, construct upon or otherwise deal with the subject property pending the outcome of the claim. Counsel for both parties were present.

[18] The Court did not make an order as regards the claimant's application for judgment, as it appears from other evidence given in this matter, particularly the affidavit filed by the defendant's Attorneys-at-law in support of their application to remove their name from record, that such application was withdrawn. This is understandably so, as the defendant had obtained by consent, an order to have his defence filed out of time, stand and a primary basis of the notice of application for judgment was that he had not filed a defence and had obtained no extension of time to do so.

[19] On January 31, 2011, the defendant's Attorneys-at-Law filed a notice of application with an affidavit in support, for an order to remove their name from the record. The affidavit contains exhibits indicating correspondence from the defendant's counsel to the defendant during the period of February to August 2010, two of which concerned the proposed surveyors of the claimant and the order granting the injunction on March 09, 2010, by consent. The application was set for hearing on November 17, 2011. On November 17, 2011, Master Lindo adjourned the application to a date to be fixed by the Registrar upon the attorney's application. The relisted application to remove name was thereafter set to be heard on May 09, 2012.

[20] The parties were automatically referred to mediation pursuant to **Rule 74.3(3)** of the **Civil Procedure Rules** (hereinafter referred to as the **C.P.R.**) on March 02, 2012. The deadline for mediation was June 13, 2012.

[21] Between March 22, 2012 and July 03, 2012, the parties exchanged written correspondence. By letter dated March 22, 2012, the claimant's attorney wrote

to the defendant's attorney, proposing mediators. They also acknowledged the application to remove name from record and suggested that if they (the defendant's attorneys) no longer acted for the defendant, they should notify the Dispute Resolution Foundation. On April 10, 2012, the defendant's attorneys wrote a letter to the Dispute Resolution Foundation, which was copied to the claimant's attorneys, informing them that they had applied to remove their names from the record and the hearing of that application was scheduled for May 09, 2012. They were accordingly not in a position to represent the defendant's interest at the mediation. On May 09, 2012, the said application was adjourned to July 04, 2012 by Master Bertram-Linton.

[22] On June 14, 2012, the claimant's attorneys wrote a letter to the Dispute Resolution Foundation suggesting dates convenient for mediation and mediators. This letter was copied to the defendant's counsel on record.

[23] On July 03, 2012, the defendant's counsel wrote to the claimant's attorney referring to their letter of June 14, 2012, and advised that they had not yet served their client with the relevant pleadings and would therefore be seeking an adjournment at the hearing on July 04, 2012. On July 04, 2012, the hearing was further adjourned to October 1, 2012, by Master Bertram-Linton.

[24] A notice of mediation dated July 17, 2012, was sent to the parties. Ms. Salma Aitcheson, one of the mediators proposed by the claimant, was selected and mediation was scheduled for August 14, 2012. The defendant's counsel wrote to the Dispute Resolution Foundation on August 02, 2012, advising that they had received notification of mediation but they were still seeking to have their names removed from the record as representing the defendant. Further, they had no instructions to act on his behalf in pursuing mediation and the said date must be vacated. This letter was copied to the claimant's lawyer.

[25] On August 03, 2012, the claimant's attorney wrote to the Dispute Resolution Foundation also advising that the aforementioned date was to be vacated and a

new date during the period October 8-11, 2012, should be set for mediation. This was on the basis that she would be out of the jurisdiction on August 14, 2012. The said letter was copied to the defendant's counsel.

[26] The defendant's attorneys filed an affidavit for approval of alternative method of service on August 13, 2012. Therein, the affiant averred that she attempted to serve the defendant at his last known address for service but was informed by the bailiff for the Resident Magistrate's Court in St. Elizabeth that the defendant no longer resides in St. Elizabeth but was now living in Kingston. That the defendant indicated that he could now be reached at 2 Clanhope Drive, Kingston 19, in the parish of St. Andrew. That on May 07, 2012, she called and spoke with the defendant and informed him that they wished to remove their names from the record. Since then there has been no further contact with the defendant. On July 04, 2012, a notice of adjourned hearing, notice of application to remove Attorneys-at-Law from record and affidavit in support of said notice was served by registered post at 2 Clanhope Drive, Kingston 19, in the parish of St. Andrew, the defendant's last known address.

[27] The application to remove name from the record, again came on for hearing before the learned Master on October 01, 2012, but the application was adjourned for a date to be fixed by the Registrar. The defendant was not present at any of those hearings to remove name from record.

[28] By letters dated January 21, 2013 and April 23, 2013, the claimant's attorney wrote to the Dispute Resolution Foundation proposing new dates for mediation and mediators. These letters were copied to the defendant's counsel. A notice of mediation dated April 24, 2013, was sent to the parties with Mr. Albert Dawkins as the selected mediator and May 28, 2013, as the date of mediation.

[29] On September 09, 2013, the claimant filed a notice of application to strike out the defendant's statement of case, supported by an affidavit, according to the terms as specified in paragraphs one and two of these reasons for ruling.

[30] On September 13, 2013, a mediation report was filed, wherein it was indicated that neither the defendant nor his counsel attended the mediation on May 28, 2013.

[31] On October 31, 2013, a case management conference was scheduled for April 24, 2014.

[32] On March 19, 2014, the claimant filed an affidavit of posting, proving service of the application, affidavit in support and the notice of appointment for case management conference, on the defendant on March 03, 2014, by registered mail at Stockfarm Road, Golden Spring, Stony Hill P.O., in the parish of St. Andrew.

[33] The application came on for hearing on April 24, 2014, before S. George J. The application was adjourned to July 02, 2014, and the case management conference was rescheduled to that date. Counsel for the claimant was present and it appears that the claimant was also present. It was ordered however that she be excused from attending the next hearing of the matter. Neither the defendant nor his counsel were in attendance. An affidavit of posting, proving service of the notice of adjourned hearing and order made on April 24, 2014, on the defendant at Stockfarm Road, Golden Spring, Stony Hill P.O., in the parish of St. Andrew by registered mail, was filed by the claimant on May 08, 2014.

[34] On July 02, 2014, the application was adjourned by Straw J. to September 22, 2014. Neither the defendant nor his counsel were in attendance at that chambers' hearing.

[35] On July 10, 2014, the defendant's attorneys filed a re-listed notice of application for an order to remove their name from the record. The application was set to be heard on November 27, 2014. On September 17, 2014, an affidavit proving service of the said application and affidavit on the defendant by registered post at Belles Cottage, Potsdam, Munro College P.O., St. Elizabeth, was filed.

[36] On September 22, 2014, when the matter came on for hearing, the court ordered that the application to strike out the defendant's claim be adjourned to November 27, 2014. Counsel for both parties were present on that date, but the parties were absent. On the latter date, the applications to remove name and strike out the defendant's claim were adjourned to December 02, 2014. From the record it appears that only counsel for the defendant was present on that occasion and that the parties were absent.

[37] The matter was then heard on December 18, 2014, by Master Harris and was ordered adjourned to January 20, 2015, as an affidavit of service was outstanding. A second affidavit proving service on the defendant of the said aforementioned documents by registered post at Stockfarm Road, Golden Spring, Stony Hill P.O., in the parish of St. Andrew was filed on December 19, 2014. Once again, only counsel seeking to remove their name was present.

[38] On January 09, 2015, the defendant's attorneys filed an affidavit of publication of notice which was advertised in the Gleaner newspaper published on January 07, 2015, whereby notice was given to the defendant of the notice of application to remove attorneys-at-law' name from the record and the hearing date of January 20, 2015.

[39] On January 20, 2015, Master Harris granted the order removing the attorney's name from the record. The defendant was absent.

[40] The application to strike out the defendant's claim came before C. Stamp J. (Ag.) on March 16, 2015, and was adjourned to July 27, 2015. It was ordered that the notice of adjourned hearing was to be filed and served on the defendant, who was absent from the hearing. The claimant filed an affidavit of posting on April 02, 2015, proving service of the said notice of adjourned hearing, by registered post, on the defendant, at Stockfarm Road, Golden Spring, Stony Hill P.O., in the parish of St. Andrew.

[41] The defendant filed a notice of change of attorney on March 25, 2015. On July 23, 2015, the defendant filed an affidavit in opposition to application to strike out defendant's statement of case. On July 27, 2015, Batts J. adjourned the matter to February 23, 2016 and, inter alia, granted the claimant permission to file an affidavit in reply. Counsel for both parties were present, but the parties were absent.

[42] Having been adjourned on several prior occasions, the matter came before this court on February 23, 2016, and, inter alia, the following orders were made:

(i) The hearing of the claimant's application to strike out the defendant's statement of case which was filed on September 9, 2013 and was later relisted shall take place on paper and shall be heard on paper by Mr. Justice K. Anderson and ruling on that application is reserved for delivery upon a date and time to be made known to the parties by the court;

(ii) A duplicate of the bundle of documents which was filed by the claimant on June 08, 2015 shall be passed to the Registrar, Mr. Lloyd Smith by the claimant's counsel for onward delivery to Mr. Justice K. Anderson and that shall be done on or before **March 01, 2016;**

(iii) The claimant shall be at liberty to expound upon her Skeleton Submissions which were earlier filed and in addition to address in an addendum to those submissions, whether affidavit of evidence filed by the defendant on July 23, 2015 and January 20, 2016, should be considered by this court for the purposes of the said application, **provided that,** if the claimant chooses to exercise this option, said addendum shall be filed and served by or before **March 11, 2016;**

(iv) The defendant shall be at liberty to expound upon his Skeleton Submissions which were earlier filed and in addition, to address in an addendum to those submissions, whether affidavit evidence filed by the defendant on July 23, 2015, and January 20, 2016, should be considered by this court for the purposes of the said application, **provided that** if the defendant chooses to exercise this option, he shall file and serve same by or before **March 28, 2016;** and

(v) The claimant shall be at liberty for the purpose of rejoinder, to respond to the defendant's submissions filed hereafter (if any), but only to the extent of therein responding to any point of law or legal authority that was not addressed by the defendant in the submissions which he filed

on January 22, 2016, provided that if the claimant chooses to exercise that option, she shall file and serve same, by or before April 08, 2016.

DOCUMENTS CONSIDERED BY THE COURT

[43] In consideration of the claimant's application, the court has in its possession and has taken regard of the following documents, in making its ruling:

(1) The claimant's claim form and particulars of claim filed on December 03, 2008;

(2) The defendant's defence filed on June 16, 2009;

(3) Affidavit in support of application for interlocutory injunction filed on December 03, 2008;

(4) The claimant's notice of application to strike out defendant's statement of case filed on September 09, 2013;

(5) The claimant's affidavit in support of her application to strike out the defendant's statement of case filed on September 09, 2013;

(6) The defendant's affidavit in support of his application for time to be extended for filing a defence filed on October 09, 2009;

(7) Defendant's affidavit in opposition to application to strike out defendant's statement of case filed on July 23, 2015;

(8) Supplemental affidavit of the defendant in opposition to application to strike out defendant's statement of case filed on January 20, 2016.

(9) Submissions on behalf of the defendant in opposition to application to strike out defendant's statement of case filed on January 22, 2016 and full submissions filed on March 24, 2016;

(10) Claimant's submissions on application to strike out defendant's statement of case filed on February 17, 2016 and further submissions filed on March 14, 2016.

THE CLAIMANT'S CLAIM

[44] The claimant in her statement of case essentially claims that she is beneficially entitled to the subject property, which is described in a Certificate of

Compliance with the Necessary Formalities as, **ALL THAT PARCEL OF LAND PART OF** Potsdam in the parish of St. Elizabeth containing by estimation eleven acres, being the same more or less and butting and bounding northerly on land in the possession of John Weston, southerly on land of Hugh Weston, easterly main road to Malvern, westerly on land of Milton Witter or howsoever otherwise the same may be butted, bounded, known, distinguished or described and that the defendant has no interest in the said property. The said Certificate of Compliance with the Necessary Formalities issued pursuant to the Facilities For Title Law of 1955, displays a mortgage on the said land given by Headley Weston, the claimant's father, to Southfield P.C. Bank Ltd and is exhibited. She further exhibits letters of Administration granted to her, an objection to the survey made by the defendant and, inter alia, correspondence regarding a date for mediation.

[45] She avers that her interest in the property is derived through her father, Headley Weston, who owned the premises during his lifetime and exercised all customary acts of ownership over the said property. She further contends that the defendant's father and her uncle, Hugh Weston, acknowledged her father's ownership of the said property. She is his only child and the administratrix of his estate by virtue of Letters of Administration granted to her on October 08, 2007, in the St. Elizabeth Resident Magistrate's Court. On receiving the letters of administration she has adjusted the tax records to reflect that she is now equitably entitled to and in charge of the property. She has further attempted to have the subject portion of land surveyed but was estopped from so doing by the defendant who has objected to the same.

[46] She also claims that the defendant has no serious intention to proceed with his defence and in any event, his defence discloses no reasonable ground of defence. As such, counsel for the claimant submits that there are no real issues joined between the parties as if he acknowledges as he does, her interest in the 11 acres as described by him, the boundaries along the lines of his very own description can only be established once and for all, by a court ordered (or

agreed) survey, which the claimant seeks. According to the claimant's counsel, there are no substantial points of departure in the material facts set out in both the particulars of claim and the defence.

[47] This court is of the considered opinion, that there is merit in the above submission of counsel, to the extent that the boundaries of the disputed property can only be properly determined by a survey, that being an order which the claimant has sought in her application to strike out the defence, filed on September 09, 2013. However, this court must equally make it clear, that it does not agree with counsel that there are no real issues joined between the parties, as the thrust of the defendant's contention is that, the property identified and being claimed by the claimant is property which belongs to himself and his family and in which she has no beneficial and/ or legal interest. There is therefore, a real issue between the parties as to ownership of the subject land.

[48] The claimant's application for an order empowering and authorizing her to proceed with a survey of the subject property along the lines of and in keeping with the description thereof, cannot be properly granted by this court, at this time, because of the manner in which it has been pursued. In requesting such an order, the claimant, it appears, is essentially seeking the court's permission to obtain an expert report- that is, a Surveyor's report. This is permissible under the rules but there are stated requirements which must be fulfilled. **Part 32 of the CPR** makes provisions for the treatment of the evidence of experts and assessors.

[49] **Rule 32.6(1) and (2)** states essentially that '*no party may call an expert witness or put in an expert witness' report without the court's permission and the general rule is that this permission, is to be provided at a case management conference*.' **Rule 32.6(3)** provides that '*when a party applies for permission under this rule, (a) that party must name the expert witness and identify the nature of the expert witness' expertise; and (b) any permission granted shall be in relation to that expert witness only.'*

[50] From the foregoing, it becomes abundantly clear, that the claimant's request as stated in her application filed on September 09, 2013, for an order permitting her to conduct a survey, does not satisfy the requirements of **Part 32.6.** The claimant has failed to comply with the rules and there is no evidence proffered before this court, which could properly form the basis of such an order. Perhaps, this is an appropriate juncture to note, that the evidence of an expert is really for the assistance of the court. *'Furthermore, the reasons underlying the new rules, require that expert evidence, needs to be prepared in a structured manner under the supervision of the court. Judges sitting at first instance should therefore assert greater control over the preparation for the conduct of hearings than has hitherto been customary'*- per K. Harrison J.A., in **National Commercial Bank Jamaica Limited. (Successors to Mutual Security Bank Limited) v K&B Enterprises Limited,** [2005] JMCA Civ 70, page 11.

THE DEFENDANT'S DEFENCE

[51] The defendant's statement of case is essentially that the land which the claimant claims, does not fit the description of the land which his father delivered to Headley Weston, nor does it match the description contained in the documentary evidence on which the claimant seeks to rely as proof of ownership of the disputed land. Instead, the said land described in the documentary evidence is land which forms part of approximately 19 ¼ acres of land owned by his father and is part of his father's estate and was occupied by his parents during their lifetime and is property which he and his siblings have occupied, since the death of his father. He also exhibits several documents including a letter from his father to Headley Weston granting to the latter, eleven acres of land and notice of application for loan executed by Headley Weston in regards to the said land pursuant to the Facilities for Title Law, tax receipt and a Valuation Roll bearing the name of his father- Hugh Weston, in 1993.

[52] According to the defendant, the land which conforms to the description of the land and to which the claimant's father was entitled, is the land which previously

formed a part of his grandfather's estate and adjoins the approximately 19 ¼ acres of land owned by his father and remains unoccupied. Records at the National Land Agency reflect that his father's property is now identified by a new Valuation number and records at the National Land Agency and Tax Administration of Jamaica reveal that the land claimed by the claimant, is in fact land which forms part of the approximately 19 acres of land owned by his father and was the subject of Valuation number 201-04-001-032.

[53] He further contends that he and his siblings had been paying the taxes for the said property until the Lands Department amended the register and cut 11 acres off the 19 ¼ acres pursuant to the claimant's instructions. In any event, he contends that he and his family members' occupation and payment of taxes since May 1979, are enough to defeat any third party's claim to that land, since they have that land by means of what is known in law, as, 'adverse possession.'

[54] The question of adverse possession can be disposed of quickly. **Rule 10.5** of the **C.P.R.** provides that the defendant in his defence must set out all the facts on which he relies to dispute the claim. Failing so to do, **rule 10.7** provides that he may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission. To date, the defendant has not sought the court's permission to rely on the doctrine of adverse possession, neither has there been any application for leave to amend the defence pursuant to **rule 20.4(1).** Therefore, on the defence as it stands, the defendant is unable to allege adverse possession. In any event, the mere assertion of adverse possession cannot avail him unless he has derived title by possession, via an order of the court. The occupation of premises for a period of not less than twelve years and payment of taxes do not automatically vest a title in the possessor, nor does that constitute what is known in law, as 'adverse possession.'

[55] The defendant also avers that his application for extension of time to file a defence was granted on, inter alia, the premise that his defence had a real

prospect of success. Therefore, asking the Court to revisit the issue at this time is an abuse of process and a waste of the court's time and resources. On a perusal of the court documents however, it has become very clear to this court that on the hearing of the application for extension of time to file defence, Master Nicole Simmons (Ag.) ordered, inter alia, that by consent, the defence filed on June 16, 2009, was allowed to stand. This is permissible by the rules.

[56] **Rule 27.11(5) of the C.P.R.** permits litigants to vary a date other than one mentioned in paragraphs **(1) or (2)** of that rule of court, by an agreement. A party may do so by, inter alia, filing a consent application for an order to that effect. The parties were therefore at liberty to vary the time for filing the defence, by consent. The fact that one of the grounds of his application was that his defence had a real prospect of success does not suggest that the court considered the merits of his defence or that the relisted application to strike out, is an abuse of the court's process. The parties agreed to the court making an order, extending the time for the filing of a defence. Having so agreed, this court would not have considered the merits of the defence filed/ to be filed. It is only now that this court is considering the merits of the defence.

DEFENDANT'S NON-ATTENDANCE AT MEDIATION

[57] It is undisputed that neither the defendant nor his counsel attended mediation, while on the other hand, the claimant and her counsel were present. Further, the defendant's counsel was aware of the mediation meetings and the need to be present. It is apparent that communications between the defendant and his counsel broke down sometime in 2010. The first mediation date scheduled for August 2012, was vacated because counsel for the claimant could not attend and counsel for the defendant indicated that they were attempting to remove their names from the record and they had no instructions to represent him at mediation. Mediation was rescheduled to May 28, 2013. The defendant's counsel was given notice of this date. Counsel on record for the defendant at that time indicated in her affidavit that the last time she spoke with the defendant

was by telephone on May 07, 2012. She further avers in the said affidavit that she told him that they were seeking to remove their names from the records and he said he would visit the office the next day but he never did. That was a missed opportunity for the defendant to get his house in order. In any event, his then counsel at that point, from the evidence presented, would have been aware of, at the very least, the referral for mediation and the deadline for mediation. She was also engaged in corresponding with the claimant's attorney, regarding proposed mediators.

[58] The defendant avers in his affidavits filed on July 23, 2015 and January 20, 2016, that he did not attend mediation as he was overseas and was not informed by his then counsel on record, about the mediation proceedings. This evidence remains largely unchallenged by the claimant, except to the extent that she submits that he cannot successfully contend that he did not have notice of the mediation proceedings, having regard to his own deliberate and prolonged failure to engage in communication with his attorneys. It still remains though, that the defendant's allegation that he was overseas and uninformed, has not been challenged.

[59] At this juncture, it is important to examine a critical point which arises on the defendant's submissions. The defence counsel has submitted that the defendant was not notified of the mediation date as he did not receive any communication regarding same from his attorneys. That averment was made by defence counsel at page 12 of her submissions, filed on March 24, 2016 and in addition, it was made by the defendant, in his affidavits which were filed on July 23, 2015 and January 20, 2016. It is important to note that the more prudent and proper course in such an instance of alleged neglect, would have been for defence counsel to have sought to obtain some statement from the defendant's prior attorney in response to the assertions of professional neglect made against him/ her or them, prior to putting forward such an allegation, either by means of affidavit evidence deponed to by her client, or by means of submissions- whether oral or written. Counsel should not have put forward those allegations, based on what her lay client informed her, without having allowed prior counsel an

opportunity first, to respond. In the absence of having heard from that previous attorney, it is not properly open to this court to conclude that the defendant's failure to attend mediation was due to the previous attorney's neglect to inform the defendant, of the mediation hearing date. A court must not be expected to lightly infer professional neglect. In **Re Doherty and McGregor**, [1997] 2 Cr. App Rep 218, at page 227, the judge opined that :

> *'These new criticisms are of course directed not so much at the former solicitors but at trial counsel. They were not supported by any affidavit or even a signed statement from the Appellant. They are a very long way indeed from what originally was the most serious allegation, namely that her solicitor, and possibly junior counsel, did not advance the Appellant's case in accordance with her account of events. Neither Lord Richard nor his junior had ever been notified of these allegations against them. We are not concerned to protect counsel from justified criticism of their conduct if their incompetence has resulted in a miscarriage of justice. But whatever the conclusion to which the court might eventually come, we regard it as elementary that such criticisms should have been clearly formulated and unequivocally made to counsel before they were advanced in court and that counsel should have had a fair and reasonable opportunity to deal with them.'*

This court therefore, has found it unable, merely based on the contentions of defence counsel provided to it via further submissions filed on March 24, 2016, even though such is supported by the said averment made by the defendant in his affidavit evidence, to conclude that said contention is truthful and this is particularly so, because the making of that averment by the defendant in his affidavits, was never brought to the attention of counsel whose conduct is being impugned, at any time prior to same having been impugned.

THE CIVIL PROCEDURE RULES

[60] **Rule 74.9(1)** provides that:- '*All parties along with their attorneys-at-law (where represented) must attend all mediation sessions.*' **Rule 74.14 (6)** provides that:- '*where the mediator report indicates that a defendant party did not attend the mediation, the court may, on the application of a claimant party, strike out the defence and enter judgment against that defendant.'*

[61] The claimant submits that there is no proper basis upon which this court can refuse the application to strike out the defendant's statement of case, arising from the defendant's failure to attend mediation. In reliance on **rule 74.15**, she contends that from all the circumstances, the defendant did not promptly seek to address the application to strike out his defence; he was intentionally absent from the mediation proceedings; there is no good explanation for his absence and he has not generally been compliant with the rules, practice directions, orders and directions of the court.

[62] She avers that based on the criteria for relief from sanction pursuant to **Part 74 of the rules of court**, the defendant would not succeed, as his assertions are insincere and unmeritorious. He disregards the processes of the court, avoids timelines and essentially, 'resurfaces' every time the claimant seeks to have the matter concluded against him. This court however, agrees with the submission of defence counsel at page 13 of her further submissions filed on March 24, 2016, that the claimant is now seeking to have a sanction imposed. Therefore, the issue of relief from sanction is an entirely irrelevant issue at this stage, since no sanction has, as yet, been imposed.

[63] It is clear that pursuant to **rule 74.14(6)** and **(7),** the court retains its discretion, even where the defendant did not attend mediation and had notice of the date, time and place of the mediation, to determine whether to strike out the defendant's statement of case.

[64] In treating with the issues which arise in the instant matter, the court needs to apply the overriding objective in exercising its discretion in accordance with the rules of court. In **The Commissioner of Lands v Homeway Foods and Stephanie Muir**, 2016 [JMCA] Civ 21, McDonald-Bishop JA (Ag.) states at para. 50 that:-

> *'As Lord Woolf explained in Bigguzzi there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would*

> *enable the case to be dealt with justly in accordance with the overriding objective. The court in considering what is just...is not confined to considering the effect on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice.'*

[65] It may be extrapolated from her ladyship's dictum that the exercise of the Court's powers to strike out a statement of case is discretionary in nature and is based on the circumstances of the particular case.

[66] **Rule 1.2 of the C.P.R.** provides that:- '*The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under `these rules.'*

[67] The overriding objective of the **C.P.R.** is to enable the court to deal with cases justly. **Rule 1.1(2)** provides that dealing with a case justly includes:-

(a) *ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;*

(b) *saving expense;*

(c) *dealing with it in ways which take into consideration-*

(i) *the amount of money involved;*

(ii) *the importance of the case;*

(iii) *the complexity of the issues; and*

(iv) *the financial position of each party;*

(d) *ensuring that it is dealt with expeditiously and fairly; and*

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

[68] It is pertinent to note at this juncture, that if the failure of the defendant to attend mediation was occasioned by his then attorneys' neglect- a conclusion which this court cannot, properly make, there is case law from Jamaica which suggests that the fault of the attorney is to be attributed to the attorney's client. The client will, if necessary, have to seek redress against that attorney- whether by disciplinary measures, or by means of a negligence lawsuit.- See in that regard:

Nadine Billone v Experts 2010 Company Ltd. [2013] JMSC Civ 150, per Anderson J., at para. 16.

[69] Nevertheless, even if the defendant has not put forward a good reason for failing to attend the mediation, the court is to exercise its discretion in a manner that would accord with justice. The court does not countenance delay and disobedience of its rules, orders and/ or directions, but striking out is and should always be, a last resort.

[70] In **UCB Corporate Services Ltd v Halifax (SW) Ltd**, The Times, December 23, 1999, the court held that the correct approach in cases of wholesale disobedience of the rules or court orders was that established in the pre-**C.P.R.** case of **Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd** [1998] 1 WLR 1426, which the trial judge had rightly applied. Lord Lloyd stated that:

> *'The judge regarded flouting of the rules as sufficiently serious to justify striking out. In his view, it was the course justice required….That approach is entirely in line with the underlying purpose of the new rules. It would be ironic indeed if the Civil Procedure Rules and Biguzzi led judges to treat cases of delay with greater leniency than under the old procedure. That could not have been the intention of the Master of Rolls in Biguzzi. He was pointing out that there were lesser sanctions in less serious cases, but in more serious cases striking out was appropriate where justice required it."*

[71] Prosser J in **UCB Corporate Services Ltd v Halifax (SW) Ltd,** declared that: *'Wholesale', meant a significant disregard for the rules of the court which seriously affects the progress of the action.'*

[72] In **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir [2016] JMCA Civ 21,** McDonald Bishop J.A. (Ag.) further stated at para. 50 that:- '*The authorities have equally made it clear that striking out or dismissing a party's case is a draconian or extreme measure and so it should be regarded as a sanction of last resort.'*

[73] Her ladyship noted that some pertinent considerations in the application of the sanction of striking out were laid down by their lordships in **Barbados Rediffusion Services Ltd v Asha Mirchanndani and Others (No.2)-** (2006) 69 WIR 52. At para. 52 she enunciates, inter alia, the following considerations:

(i) Broadly speaking, strike-out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context "fairness" means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court;

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order, that is a situation that calls for an order striking out that party's case and giving judgment against him;

(iii) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance;

(iv) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer, since the consequences of the lawyer's acts or omissions are as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of non-compliance.

[74] It is clear from the authorities, that striking out is a sanction that ought to be employed only in cases of blatant and/ or wholesale disregard for rules and/ or orders of the court. It is also a measure of last resort. The striking out of a party's statement of case has severe implications for the accessibility to justice and rights of that party. Therefore, the court is charged to engage in a balancing exercise. In this process, the overriding objective must continuously be borne in mind.

[75] The defendant was absent from the mediation proceedings but it should be noted that prior to mediation proceedings on May 28, 2013, mediation was initially scheduled for August 14, 2012. It was rescheduled however, as the claimant's attorney was unavailable and the defendant's attorneys were seeking to have their names removed from the record. The evidence being relied on by the defendant, is that he did not attend because he was overseas and did not receive

notification of mediation proceedings from his attorneys. One readily understands the possibility of the defendant not receiving such communication from his lawyers, as by then, having sent him a series of correspondence without obtaining any response, they were seeking to have their names removed from the record. Nonetheless, the defendant does have a duty to diligently address his legal affairs and comply with the orders of the Court and the fact that his attorneys may have failed to inform him, as aforementioned, does not avail him.

[76] The defendant did file an initial acknowledgment of service but there is no evidence that it was served. His second acknowledgment of service which was out of time, along with his defence, were however, served. It was by consent that his defence was allowed to stand. One may infer then, that by virtue of her consent, at the time of the filing of the defence, the claimant was not prejudiced.

[77] The defendant's history of non-compliance with the rules and orders of the court leaves much to be desired. There are several court hearings from which he and his prior counsel were absent. The history of a party's compliance with the rules or orders of the court is always an important consideration.

[78] Nonetheless, in all the circumstances, this court does not regard the defendant's conduct as a wholesale disregard for the rules of the court. The defendant has not been generally compliant with the orders of the court, nor with adhering to timelines, but an unless order should be able to rectify any further delay, going forward. In balancing the rights of both parties and in furthering the overriding objective of the **C.P.R.** and in light of the fact that the delay on the part of the defendant has not thus far significantly hampered the progress of the case, nor does it appear that the claimant has been gravely prejudiced, his statement of case should not be struck out, arising from the defendant's failure to attend mediation. Further, the delay in the mediation proceedings is in all fairness, not only attributable to him.

[79] The message must however remain clear that the orders of the court are, indeed, meant to be obeyed. The rules and orders of the court must be perpetually effectual in ensuring a smooth administration of the civil justice system and in the attainment of a just result in all cases. A culture of compliance is integral to the whole process. At the same time, however, scrupulous steps must be taken to ensure that no one is denied access to justice, undeservedly, in circumstances that could amount to a breach of their fundamental rights to a fair trial enshrined in the Constitution. It would, in the particular circumstances of this particular case, be inappropriate, unduly harsh and on balance, unjustifiable, to strike out the defendant's statement of case, arising from his failure to attend mediation.

THE CLAIMANT'S ALLEGATION THAT THE DEFENCE DISCLOSES NO REASONABLE GROUNDS FOR DEFENDING CLAIM

[80] The claimant also applied to strike out the defendant's statement of case on the basis that it discloses no reasonable grounds for defending the claim.

[81] **Rule 26.3(1)(c)** of the **C.P.R.** provides that:- '*In addition to any other powers under these **Rules**, the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.'*

[82] The learned authors of Blackstone's Civil Practice, 2010, in commenting on rule **3.4(2)(a**) of the **English Civil Procedure Rules**, the equivalent of our **Rule 26.3(1)(c)** state at para. 33.7 that:- '*An application… may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial.'*

[83] In **S & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance,** SCCA 112/2004, Harris J.A. at pg. 29 stated that:-

> *'The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully as against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of action should only be done in plain and obvious cases.'*

[84] In **Sebol Ltd v Ken Tomlinson et. al.,** SCCA 115/2007, Dukharan J.A. after considering the authorities opined at para. 27 & 28 that:-

> *'It can be seen from those authorities that before a claim can be struck out it must plainly be obvious that no reasonable cause of action is disclosed. The focus of the new rules is to deal with matters expeditiously and to save costs and time. If there are no reasonable grounds for bringing an action, then the court ought to strike it out.'*

[85] In ***Gordon Stewart v John Issa,*** SCCA 16/2009, Cooke J.A. opined at para. 14 and 23 that:-

> *'At this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim...I would be loth to give our judges discretion to- under the banner of the overriding objective- shut out prospective litigants from having their viable causes heard. The overriding objective is to deal with cases justly and not to throw them out on the basis that the effort (financial or otherwise) is not worth it. There are provisions within the CPR to ensure that 'the court ought not to be a source of profligacy and waste:-'*

DIFFERENCE BETWEEN APPLICATIONS TO STRIKE OUT & SUMMARY JUDGMENT

[86] *Morrison J.A. (as he then was) at para 31-32 of* **Gordon Stewart v John Issa, supra***, in reference to* ***rule 26.3(1)(c)*** *said:-*

> *'An application to strike out under this rule raises what Gatley (Libel and Slander, 11th ed., paragraph 32.34) describes as 'a pleading point', in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in* ***Sebol Limited and others v Ken Tomlinson and others*** *(SCCA 115/2007, judgment delivered 12 December 2008), 'the pleadings give rise to a cause of action..." (paragraph 18)…The difference between the approach on an application to strike out and on a summary judgment application is neatly captured by Eady J.* ***B v N and L*** *[2002] EWHC 1692 (QB), in the following passage (at paragraph.21.22):*
>
> *21. I must focus on the claimant's pleaded case in first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea, then that would be the end of the matter.*
>
> *22. As to the Part 24 application, however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success.'*

[87] His lordship further stated at para. 32 that:- '*There being no question in this case that the appellant's statement of case was sufficient to raise a cause of action for libel, it appears to me to be clear that the defence filed on behalf of the respondent pleading legal professional privilege, gives rise to an issue which must now be resolved at trial.'*

[88] It is clear from their lordships' dicta, that on an application to strike out a statement of case, the court is merely concerned with the parties' statements of case. The question is whether on the relevant statement of case, there is a cause of action disclosed or reasonable grounds are disclosed for defending a claim. The prospect of success of that statement of case, at trial, is irrelevant, for the purposes of an application to strike out a party's statement of case, pursuant to **rule 26.3(1)(c**) of the **C.P.R.** On an application for summary judgment however,

the court, although not engaged in a mini-trial, can have regard to the evidence supporting the parties' statement of case, in determining whether the claim or defence has a real prospect of success.

[89] Therefore, on the claimant's application in the instant matter, if on the face of the defendant's statement of case, his defence does not disclose any reasonable ground for defending this claim, then his defence should be struck out. This is in keeping with the overriding objective, in so far as ensuring, that expenses are saved and the case is dealt with expeditiously and fairly.

[90] The defendant's defence is essentially that the claimant's father did own eleven (11) acres of land to which she may have a claim but the said parcel of land is not that which was identified and shown to the surveyor to be surveyed. Instead, the portion of land shown to the surveyor, is land which forms part of property which belonged to his father. Further, he contends that the said parcel of land does not coincide with the land described in the document on which she relies to prove her claim.

[91] On an examination of the particulars of the defence and understanding the defendant to say that the claimant is seeking an interest in property which is essentially, the defendant's family property, this court finds that the defendant's statement of case does disclose reasonable grounds for defending the claim.

[92] In the final analysis therefore, this court will not grant the claimant's application to strike out the defendant's statement of case.

[93] This court takes note, that the claimant also sought orders declaring her to be the beneficial owner of the subject property and that the defendant, has no interest in the said land. In light of this court's ruling in the aforementioned paragraph, such orders cannot be made. With the claim still being extant, there remains to be determined, a substantive issue between the parties, as to the ownership of the subject property and this can only be properly ventilated and determined at trial, by a trial judge.

[94] Additionally, the claimant requested an order restraining the defendant and/or his servants and/or his agents from entering upon or dealing with the said land and from interfering with her and/or her servants and/or her agents in her/ their use and occupation of the said land. At this interlocutory stage of the proceedings, this court observes that there was an interlocutory injunction granted by my brother judge, Campbell J., on February 24, 2009. F. Williams J. (Ag.) on March 09, 2010, ordered that by consent, the defendant and his servants and/or agents were restrained from taking any steps to dispose of, construct upon or otherwise deal with the subject property pending the outcome of the claim. There is nothing in the court documents nor in the evidence and submissions of the parties, which reflect that such injunctive relief, granted by consent, was revoked. Therefore, in the circumstances of an existing claim and an extant injunctive relief, the court needs not duplicate its effort.

[95] On June 24, 2016, this court heard oral submissions from the parties on the issue of costs of the application. Despite the submissions put forward on the claimant's behalf, by the claimant's counsel, this court has concluded that costs should, as per usual, follow the event. Accordingly, the defendant is awarded the costs of the application, with such costs to be taxed, if not sooner agreed. The order below reflects accordingly.

[96] This court has not addressed any other aspect of the defence counsel's submissions in these reasons for ruling, as there was no need to do so, in the circumstances.

[97] This court orders as follows:

(i) The application by the claimant-Helen Weston-Parchment, for court orders which was filed on September 09, 2013, is denied in its entirety.

(ii) Mediation is dispensed with.

(iii) This matter shall next come before this court, on a case management conference hearing, which shall be held before a judge in chambers on

a date and time to be set by the registrar in consultation with the parties.

(iv) Costs of the application are awarded to the defendant and such costs shall be taxed, if not sooner agreed.

(v) The claimant is granted leave to appeal this order.

(vi) The defendant shall file and serve this order.

……

Hon. K. Anderson, J.