



[2020] JMSC Civ 177

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019CV00917**

**BETWEEN**

**EAIN WILLIAMS**

**CLAIMANT**

**AND**

**DOTLYN TULLOCH**

**DEFENDANT**

**IN CHAMBERS (VIA ZOOM)**

**Ms Nieoker Junor instructed by Knight Junor Samuels Attorneys-at-law for the Claimant/Respondent**

**Mrs Christine Chung-Nunes and Ms Vanessa Taylor instructed by Mrs Christine Chung-Nunes Attorneys-at-law for the Defendant/Applicant**

**Heard: July 16, 2020**

**Civil Procedure - Application to file defence out of time – Civil Procedure Rule 10.3 and 26.1**

**MOTT TULLOCH-REID, MASTER**

## **BACKGROUND**

[1] The Defendant has applied to the Court for an extension of time to file Defence. The application is supported by an Affidavit of Urgency sworn to by Mrs Christine Chung-Nunes who appears on the record for the Defendant. Exhibited to the Affidavit is a draft Affidavit of the Defendant in response to the Claimant's Affidavit

in support of his Fixed Date Claim Form. The application and affidavit of Mrs Chung-Nunes were both filed on May 8, 2020.

- [2]** The Fixed Date Claim Form and Affidavit in Support were filed on March 7, 2019. The Claimant by way of written application supported by an Affidavit obtained an order of the Court permitting service outside the jurisdiction on the Defendant. On April 25, 2019, Master Harris granted the Claimant permission to serve outside of the jurisdiction and also ordered that the Defendant was to file and serve her acknowledgment of service within 28 days of the service of the claim form and file and serve a defence within 42 days of service of the claim form.
- [3]** The Claimant served the Defendant by registered post on June 20, 2019 as set out in the Affidavit of Service by registered post sworn to by Dorothy Franklyn filed on July 2, 2019. I have searched through the physical file and on JEMS for an order permitting the Claimant to serve the Defendant outside the jurisdiction by registered post but I have found none. In such circumstances, service would have been irregular but surprisingly the Defendant's attorney-at-law has not taken the point and has instead pursued an order for permission to file defence out of time without making reference to this irregularity. I have therefore concluded that the Defendant has acquiesced to the irregular service of the Fixed Date Claim Form (with accompanying documents) and Affidavit in support. I am supported in this view by virtue of the fact that Mrs Chung-Nunes at paragraph 4 of the Affidavit of Urgency filed in support of the application, indicated that her client, the Defendant, was served on December 27, 2019. At paragraph 5 she goes on to say that having been served on December 27, 2019 a defence should have been filed on or about February 7, 2020 (see paragraph 5).
- [4]** No acknowledgement of service has been filed on behalf of the Defendant. The Defendant is also deficient in this regard but I notice that there is no application before the Court seeking an order for the Acknowledgment of Service to be filed out of time. In fact, albeit Mrs Chung-Nunes has indicated in the Affidavit that the reason for the delay in filing an affidavit in response was because she was retained

after the time within which the said affidavit was to be filed had elapsed, even now, some seven months subsequent to being served with the Fixed Date Claim Form, no Acknowledgement of Service has been filed or served and no permission sought for this to be done outside of the period in which it should have been done.

## **THE AFFIDAVIT IN SUPPORT OF APPLICATION**

**[5]** The Affidavit in Support of the application was sworn to by Mrs Christine Nunes-Chung and not her client, the Defendant. This is an usual practice in circumstances where the Court will depend on the evidence of the Defendant to explain:

- a. the length of the delay
- b. the explanation for the delay
- c. the prejudice occasioned by the delay
- d. the merits of the case of the party applying for the extension of time
- e. the effect of the delay on public administration
- f. the importance of compliance with time limits; and
- g. where prejudice is alleged, the comparative resources of the parties.

Both counsel for the Applicant and Respondent relied on these principles albeit different cases were cited. The Defendant/Applicant relied on the case of **Raymond Lewis v Dr Eva Lewis Fuller and ors [2016] JMSC Civ 127** while the Claimant/Respondent relied on the case of **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4** which reaffirmed the said principles as set out by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and ors [2001] EWCH Ch 456**.

[6] In the affidavit, Mrs Chung-Nunes failed to indicate the basis on which she was able to provide the evidence contained therein. She does say at paragraph 3 that

*“her knowledge of the facts herein are derived from her perusal of the file and handling of the same...”*

She does not indicate whether she was told by the Defendant and verily believed what the Defendant said to be true or that she knew the information to be factual and true in and of themselves. It would have been better if the evidence had come directly from the Defendant who would have been the best person to provide the evidence to support her application.

[7] Ms Junor submits that the explanation given for the delay in filing the Affidavit in Response is non-existent. She argues that Mrs Chung-Nunes says that she was contacted only after the time had already passed but that the Defendant has failed to say why she was tardy in filing her response (see page 5 of the Claimant's Written Submissions filed on July 13, 2020). I would go further to say that the Defendant also failed to indicate why she delayed in seeking the assistance of counsel. Attached to the Fixed Date Claim Form is a Note to the Defendant and Prescribed Notes to the Defendant which indicate the time within which she was to act. I note that in this document, the time is 14 and 28 days. I am also aware of the Affidavit of Service by Registered Post which is not being disputed, which indicates that the Formal Order of Master Harris which was granted on April 25, 2019 was also served on the Defendant. This order indicates that the time to respond was 28 and 42 days respectively. Having all this information in hand, the Defendant did not respond and has not offered a good explanation or any explanation for her failure to file documents in response in a timely manner.

[8] Both counsel agree that the Affidavit in Response should have been filed on or before February 7, 2020. The application for permission to file the document out of time was filed in May 2020, approximately two months after the Affidavit in Response should have been filed. I do not believe the time within which the application was made was excessive and I am guided by the case of **Philip**

**Hamilton (Executor in the estate of Arthur Roy Hutchinson, deceased, testate) v Frederick Flemmings and Gertrude Flemmings [2010] JMCA Civ 19.** Phillips JA at paragraph 41 of the judgment indicated that a delay of 4½ months was not excessive and as such I must find that a period of less than 4 months cannot be considered an excessive delay.

[9] The Affidavit of Mrs Chung-Nunes is also lacking in respect of setting out the merits of the defence. Paragraph 7 reads as follows:

*“The Defendant’s Draft Affidavit of Response is attached and marked “CCN-1” for identification. **The said draft Affidavit in Response will outline the real prospect of success that the Defendant has regarding the claim before this Honourable Court.**”* (my emphasis).

The draft affidavit is not evidence and so what is contained in that document cannot be considered evidence before the Court. It is what is intended to be put before the Court. The evidence of merit of the Defendant’s case would have to be contained in the Affidavit supporting the application. Unfortunately for the Defendant, that evidence is missing and the merits of the case of the party applying for the extension of time is not before me.

[10] I am supported in this position by the Court of Appeal Decision of **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2.** Morrison JA (as he then was) provided the written judgment on the procedural appeal and my decision is based primarily on paragraphs 42-44 of the judgment. Morrison JA relied on the decision of **Evans v Bartlam [1937] AC 473** which was a case dealing with an application to set aside default judgment. While the case before me is one that is dealing with the extension of time to file defence, I find the principle of law in the **Nanco Case** and by extension **Evans v Bartlam** useful as it speaks to what amounts to an affidavit of merit. In **Evans v Bartlam** Lord Atkin said that one of the rules laid down by the courts for guidance in exercising the discretion to set aside a regularly obtained judgment in default is that

*“there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence” (see page 480).*

[11] In the **Nanco case**, Morrison JA also relied on the case of **Ramkissoon v Olds Discount Co (TCC) Ltd (1961) 4 WIR 73**. Morrison JA reasoned that in that case, the application to set aside the judgment in default was supported by an affidavit sworn to by the defendant’s solicitor, to which was attached a defence signed by counsel. The Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) dismissed an appeal from the order of the judge in chambers dismissing the application, in part on the ground that no merit had been shown by the defendant. McShine CJ (Ag) pointed out (at page 75) that the solicitor’s affidavit

*“does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence”.*

The learned judge went on to say, further,

*“[s]ince the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us”.*

Since there is no affidavit of merit and the draft affidavit by itself is insufficient to give rise to a meritorious defence, I am unable to determine whether the Defendant would have a real prospect of successfully defending the claim, which is what filing a meritorious defence boils down to.

[12] I do not find that there is any prejudice occasioned to the Claimant because of the delay. Mrs Chung-Nunes depones that no trial date has as yet been fixed and therefore the Claimant will not be prejudiced if the application is granted (see paragraph 8 of her urgent affidavit in support of the application). This is not true. On perusing the Court’s file, I see where a trial date was set for September 23, 2019 but nobody appeared on that day. I am not sure why a date was set when based on the evidence before me, the claim form and other documents had not yet been served on the Defendant. So although not very accurate in regard to the

setting of the date, I must agree with Mrs Chung-Nunes that there is no trial date pending. In fact, a Case Management Conference has not yet been held and as such the Claimant would not be prejudiced because, if the Defendant were allowed to file an Affidavit in response, there would still be sufficient time for the parties to meet a trial date which has not yet been set.

## **Summary**

**[13]** The findings so far are as follows:

- a. The length of delay was not excessive
- b. The Defendant has not put forward a good explanation as to the reason for failing to file an Acknowledgement of Service and Affidavit in Response in time
- c. The Defendant has not indicated the merits of her defence
- d. The Claimant will not be prejudiced if the Defendant is allowed to file an Affidavit in Response
- e. The Defendant has not filed an Acknowledgment of Service or sought permission to file one out of time.

**[14]** I note that the case law does not suggest that all components have to be met in order for me to determine whether to grant the orders as prayed. In fact, the case law merely states that these are the things I must consider. Unlike Part 13.3 of the Civil Procedure Rules, which deals with setting aside default judgments which says that real prospect of successfully defending the case is of more significance than are offering a good explanation for the reason for the delay and applying to set aside as soon as reasonably practicable after learning of the default judgment, no such sequence of priority has been indicated in the case of applications for extending the time within which to file a defence. I note however the decision of

Smith JA (now retired) in the case of **Peter Haddad v Silvera SCCA No 31/2003 Motion 1/07 heard on February 14-16, 22 and July 31, 2007**. In that case said

*“The Court in my view should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application” (see page 13 of the judgment).*

He then went on at page 14 of the judgment to consider the merits of the appeal and concluded that

*“There was not one scintilla of evidence in respect of the merit of the applicant’s appeal...”*

He concluded his decision by saying

*“It is not possible to deal with an application for extension of time...justly without knowing why the claimant had failed to comply with the rule... The absence of any explanation for this failure is decisive.”*

[15] In **Devon Mark Davis v Karen Marajah [2019] JMSC Civ 7** Rattray J in relying on the various principles of law set out herein held that the Defendant ought not to be granted time to file their defence. This was so even though he found that the Defendant had an arguable defence. He instead emphasised the fact that the delay was excessive, the Claimant would be prejudiced and there was no good explanation for filing the defence late. In the case before me, the delay was not excessive and the Claimant will not be prejudiced but there is no affidavit of merit and there is no good explanation for failing to file in time. I therefore am inclined to agree with Smith JA and say that in circumstances where the applicant wants to file a defence out of time, he or she as the case may be, should provide the Court with a good explanation as to why he or she failed to file the documents in time in accordance with the Rules of Court.

[16] In **Attorney General of Jamaica v Roshane Dixon and Attorney General of Jamaica v Sheldon Dockery [2013] JMCA Civ 23** Harris JA at paragraph 32 to the judgment had this to say:

*“In keeping with its duty to regulate the pace of litigation, the Court has adopted a strict approach in giving consideration to an application for an*

*extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay in complying with the rules. ...*

*Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

**[17]** In light of the Defendant's failure to offer a satisfactory excuse for the delay in filing the Defence and in circumstances where an Acknowledgment of Service has neither been filed nor served and where there is no material before me on which the Defendant's defence can be established, the interest of justice would not be served if I were to grant the orders sought in the application filed on May 8, 2020. In the circumstances I therefore order as follows:

- a. The Defendant's application for permission to file Defence/Affidavit in Response out of time is refused.
- b. By consent the Defendant is to pay the Applicant costs in the application in the amount of Thirty Thousand Dollars (\$30,000.00).
- c. The hearing of the Fixed Date Claim form is to take place on May 5, 2021 at 10:00am for three hours before a Puisne Judge in Chambers.
- d. The Defendant's attorney-at-law is to file and serve the Formal Order.