[2018] JMSC Civ 96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 03278

BETWEEN	**NADINE WILLIAMS**	**CLAIMANT**
AND	**RACHEL FRANCIS**	**1ST DEFENDANT**
AND	**LEEMON WAYSOME**	**2ND DEFENDANT**
AND	**CHARMAINE WAYSOME**	**3RD DEFENDANT**

IN CHAMBERS

Catherine Minto, instructed by Nunes, Scholefield, DeLeon & Company for the Claimant

Lawrence Phillpotts-Brown, instructed by Lawrence Phillpotts-Brown and Company, for the 1st Defendant

HEARD: April 19, 2018

APPLICATION FOR ORDER REQUIRING 1ST DEFENDANT TO PROVIDE INFORMATION PREVIOUSLY REQUESTED – WHETHER SUCH AN ORDER SHOULD BE MADE – WHETHER SUCH AN ORDER IS NECESSARY IN ORDER TO DISPOSE FAIRLY OF THE CLAIM OR TO SAVE COSTS- APPLICATION FOR ORDER REQUIRING THE CLAIMANT TO GIVE SECURITY FOR COSTS – INTERESTS OF JUSTICE – OTHER PERTINENT CONSIDERATIONS – AVERMENTS AS TO CLAIMANT ORDINARILY RESIDING OUT OF THIS JURISDICTION – AVERMENTS AS TO CLAIMANT NOT BEING KNOWN TO THE 1ST DEFENDANT'S ATTORNEY AS HAVING ASSETS WITHIN THIS JURISDICTION – WEIGHT OF SOME OF THE AVERMENTS MADE – WHETHER APPLICATION FOR SECURITY FOR COSTS WAS FILED IN PURSUIT OF AN OBLIQUE MOTIVE

ANDERSON, K. J

[1] Two applications are before this court, for adjudication.

[2] An order of this court was made on February 1, 2018, that the 1st defendant's application for security for costs and the claimant's application for an order directing the 1st defendant to provide the information requested, were to be heard together, on April 19, 2018. I had presided over that hearing on April 19, 2018.

[3] Addressing the order sought by the claimant firstly, it is very clear that this court ought to order that the 1st defendant provide the requested information.

[4] It is very clear that in doing so, the 1st defendant would only be required to provide information in furtherance of the 1st defendant's defence and information which can assist in resolving at least one of the major issues arising out of this disputed claim.

[5] The claimant has, in this claim, claimed that she is the sole beneficiary of the estate of Edrice Delmana Ffrench and that she is entitled to the disputed land – a half square of land, located at Waterford District, Guy's Hill PO, St. Mary and the dwelling house there, as well as some of the contents of that house. The claimant has contended that the deceased died, leaving a will, naming her as the sole beneficiary.

[6] According to the 1st defendant's defence though, the deceased died intestate. She has specifically alleged in her defence that the deceased died, leaving no brother or sisters of the whole blood and only one sister being her, who is of the half blood. She has also therein alleged that since the deceased died intestate, this court granted the 1st defendant a Grant of Letters of Administration. That grant was made on July 21, 2014. See paragraph 1 and 2 of the 1st defendant's defence. Once more, in paragraph 4, the 1st defendant has stated that she is the deceased's sister.

[7] In response to those averments of the 1st defendant, the claimant has requested information. That request for information was filed on November 29, 2016. To

date, the 1st defendant has not responded to same. Her answers to same, will provide further information, in the context of her defence to this claim, bearing in mind that which is strongly disputed between the parties, for the purposes of this claim.

[8] What is the information requested by the claimant, in response to the 1st defendant's allegation that the deceased has no brothers or sisters of the whole blood and only one sister, being the 1st defendant, who is of half blood? In response to same, the claimant is seeking information as to the name of the parent who the 1st defendant allegedly shares in common with the deceased; and the 1st defendant and the deceased's respective dates and places of birth.

[9] Of course, once that information has been provided to the clamant, it will either, significantly buttress the 1st defendant 's defence and by extension, deflate the claimant's claim, or, significantly buttress the claimant's claim and deflate the 1st defendant's defence

[10] This claim alleges that the 1st defendant acted fraudulently in having obtained title to the disputed property, by transmission and that the 1st defendant was not entitled to a Grant of Administration in the estate of the deceased. Several other aspects of fraud on the part of the 1st defendant, have been alleged by the claimant.

[11] In the circumstances, the requested information, once provided, will save time and costs by addressing a central issue which is in dispute between the parties. It is puzzling as to why, if the 1st defendant's contention that she is the deceased's sister of the half – blood, is indeed truthful and accurate, the claimant would have any opposition to that request for information.

[12] **Rule 34.1 of the Civil Procedure Rules (CPR)** permits one party to obtain from another, in respect of a claim, '*information about any matter which is in dispute in*

the proceedings.' The party seeking that information must serve a request identifying the information sought, on the other party.

[13] If the party served with the request has not provided the requested information, within a reasonable time, the party who served the request, may apply for an order compelling the other party to do so. That is exactly what the claimant has done. That is in accordance with **rule 34.2 (1) of the CPR**. An unduly long time has elapsed, since the claimant's request for information, was served on the 1st defendant, on November 29, 2016 – the day when said request was filed. Of course, the length of time that will, in fact, elapse, if the 1st defendant has her way, in response to that request for information, will be, as the saying goes, until, 'the end of never.' That is, to my mind, in the particular context of this particular claim, entirely unacceptable.

[14] **Rules 34.2 (2) and (3)** respectively provide that an order under Part 34 cannot properly be made, unless it is necessary, in order to dispose fairly of the claim, or to save costs for the reasons which have already been given, I am of the considered view that the order being sought, for the requested information to be provided by the 1st defendant to the claimant, can easily be provided, with relatively minimal cost to the 1st defendant and ultimately, will save her and the claimant, legal costs. In addition, the order as sought, is necessary, in view of the 1st defendant's recalcitrance, to put it euphemistically, to provide the information which the claimant has sought, in order to fairly dispose of this claim.

[15] When considering whether to make an order such as the claimant has sought, this court must have regard to the likely cost of giving it. I have already stated my view of same. Also, the court must have regard to the likely benefit which will result if the information is given. I have already stated my view of the benefits of same, to both parties. This court must also have regard to whether the financial resources of the party against whom the order is sought, are likely to be sufficient to enable that party to comply with the order.

[16] Since I have not been provided with any evidence by either party, suggesting that the 1st defendant's financial resources are insufficient to enable her to comply with an order for the required information to be provided, I cannot and thus, have not, formed the view that the 1st defendant's financial resources are insufficient, to enable her to comply.

[17] Of course, I have considered the overall interests of justice, also, for the purpose of adjudicating on the claimant's application. In the final analysis, this court will make that order.

[18] Prior to doing so, however, I will briefly address that which was put before this court, in oral submissions of the 1st defendant's counsel, as to why his client is objecting to providing to the claimant, the information requested and I will also, address in detail, the 1st defendant's application for security for costs.

[19] The 1st defendant's counsel made it known to the court, that his client is objecting to providing to the claimant, the requested information, on the ground that the claimant lacks credibility.

[20] Without going into any details pertaining to that assertion, suffice it to state at this stage, that the issue of the claimant's credibility or lack thereof, is, in terms of the disputing party's view, of the opposing party's credibility or otherwise, not a pertinent factor. It cannot be a pertinent factor, once this claim remains disputed before this court. That is so because, if it were, that would prevent **Part 34 – Rule 34**, from having any useful application in most cases, since, disputing parties to a claim, are often also disputing the credibility of the opposing party or parties, in various respects. In respect of a disputed claim, it is only this court's view as to credibility of a party, or a witness, that will be of any relevance, as far as the assessment of credibility is concerned. In other words, the 1st defendant's view of the claimant's credibility, is of absolutely no moment for present purposes. I have not found it necessary to draw any conclusion as to the

claimant's credibility, for the purpose of adjudicating on the claimant's application for an order directing the 1st defendant to provide the information requested.

[21] In any event, the information requested and not yet provided by the 1st defendant, can only serve to bolster either party's averments as made in their respective statements of case and thus, bolster one or the other of the parties' credibilities, while at the same time, significantly diminishing, if not altogether destroying one or the other of the parties' credibilities. Thus, the order as applied for, should be made, but if made, it could only be made, if, firstly, either the 1st defendant's application for security for costs, is entirely unsuccessful, or alternatively, if such order is made, thereafter, if the claimant complies with same. That is so because, **rule 24.4 of the CPR** provides as follows: On making an order for security for costs the court must also order that -

> *'(a) The claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; and/or*
>
> *(b) That if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out..'*

[22] This court views that particular provision of our rules of court, as mandatory. If the claim is stayed, then no order for information to be provided can properly take effect until after that stay has come to an end. That stay, if ordered, will only come to an end, once the security for costs as ordered has been provided.

[23] Any order of this court therefore, required the 1st defendant to provide information to the claimant, must, of necessity, in terms of how that order will be precisely framed, be contingent upon the outcome of the 1st defendant's application for security for costs. I had expressed a similar view, at the onset of the hearing of both applications, when I presided over same, on April 19, 2018. At that time, as I recall it, only the 1st defendant's counsel had then, expressly agreed with same. Regardless though, that still remains my view, the only difference between then

and now, being that now I am expressing reasoning for that view of mine, which I had not previously expressed.

[24] Therefore, I had, in these written reasons, only addressed the issues as regards the claimant's application, firstly, as a matter of my personal convenience and ease. The 1st defendant has sought an order for security for costs, pursuant to **rule 24.2 (1) of the CPR** which permits the 1st defendant, in these court proceedings, to apply for an order requiring the claimant to give security for the 1st defendant's costs of the proceedings.

[25] **Rule 24.2 (2) of the CPR** provides that, '*where practicable such an application must be made at a case management conference or pre-trial review.*' This **rule – 24.2 (2)**, has not been complied with, by the 1st defendant, who is the sole applicant for an order for security for costs. No explanation has been proferred, via affidavit evidence, for the 1st defendant's failure to comply with that particular rule of court. In addition, no application has been made by the 1st defendant's for an order waiving compliance with that particular rule of court.

[26] I do not though, believe that said rule of court, is mandatory in effect, even though it has been worded using terminology which suggests otherwise, when considered solely on the basis of the ordinary grammatical meaning of the word, 'must.'

[27] **Rule 26.9 of the CPR** is, to my mind, applicable to this circumstance, wherein **rule 24.2 (2) of the CPR** does not state the consequence of any failure to comply with same. That would be so, whether or not, **rule 24.2 (2)** is viewed by this court, as being mandatory in effect, or not. That is so, because, **rule 24.2 (2)** and also, no other rule of court, has specified the consequence of any failure to comply with same. See **rule 26.9 (1) of the CPR**.

[28] It will be sufficient to set out the provision of **rule 26.9 (2)** to make it clear that this court, cannot properly treat with the 1st defendant's application for security for

costs, as invalid and thus, refuse to address that application any further. **Rule 26.9 (2)** states: *'An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.'*

[29] This court will not so order and equally, this court will not make an order to put matters right. Whilst this court can make any of those orders on its own, without an application by a party, this court could only have properly done so, if prior to making any such order, any party likely to be affected, had been afforded a reasonable opportunity to make representations. Having not done so, because neither party made any submission in reliance on **rule 26.9 of the CPR**, I am legally precluded from doing so, now. That though, does not mean that this court can properly treat with the 1st defendant's application for security for costs, as being invalid. The same cannot properly be treated as invalid, unless this court so orders and this court will not so order. Accordingly, I will treat with the said application as being valid and since this court does not need to make any order, *'to put matters right,'* this court will not now do so. The said application is valid, although not, *'made at a case management conference, or pre-trial review.'*

[30] In any event, the said application is made at the time when the Registrar scheduled same to, '*be made,'* or in other words, heard by this court. It was the Registrar who scheduled the said application, which was filed on February 10, 2017, to be heard, prior to the case management conference being held. The 1st defendant/applicant should not suffer because the Registrar has not scheduled her application for hearing, at the appropriate stage of the proceedings.

[31] It must be made clear at this stage, that the claimant's counsel had not , at any time, either stated or implicitly suggested that the said application should be treated with, as invalid and that as such, the same ought not to have been heard by this court. It was undoubtedly, appropriate for her, not to have done so.

[32] **Rule 24. 2 (3) of the CPR** requires that an application for security for costs, must be supported by evidence on affidavit. That has been done by the applicant, in so far as the 1st defendant's attorney – Mr. Phillpotts-Brown, has deponed to an affidavit which is the only affidavit evidence, filed in support of the said application. That affidavit was filed on February 10, 2017. Aspects of that evidence, will be referred to, in detail, further on, in those reasons.

[33] The provisions of **rule 24.3 of the CPR** make it apparent that the primary consideration for this court, in adjudicating upon an application for an order for security for costs, is whether or not, it is just to make such an order. That is the pre-eminent consideration. The manner of wording of that particular rule, makes that clear. There are other conditionalities, or in other words, pre-requisite considerations, which must be considered and which are set out in **rule 24.3 of the CPR**, but to my mind and my understanding, the same are to be viewed and considered disjunctively, as distinct from conjunctively. One of those conditionalities, is that the claimant is ordinarily resident out of the jurisdiction.

[34] In respect of this claim, it is undisputed that the claimant is ordinarily resident outside of the jurisdiction.

[35] That though, is not at all, a sufficient basis upon which this court can properly order that the claimant provide security for costs. That is one of the pre-requisite considerations for present purposes, but is not, the pre-eminent consideration. The pre-eminent consideration is whether it would, '*be just'* to make such an order.

[36] As was stated by Morrison, J in his judgment in the case: **Nicholas Grant v G. Anthony Levy** – Claim No. 2016 HCV 00327/at 2017 JMSC Civ 65, at paragraph 24 – *'the modern approach is that it is not an inflexible rule that if a foreigner sues within the jurisdiction he or she may give security for costs and a defendant is not entitled to security simply because the claimant is poor and costs may not be recoverable.'* See also **Marjori Knox v John Vere, Evelyn**

Dean and Others. – CCJ Appeal No. 8 of 2011, at paragraph 40; and **Aeronave Spa v Westland Charters Ltd.** – [1971] 3 All ER 531; and **Shurendy Quant v The Minister of National Security and the Attorney General of Jamaica** – [2015] JMCA Civ 50.

[37] In respect of this claim, whilst it is undisputed that the claimant is ordinarily resident outside of Jamaica, there is absolutely no evidence whatsoever, suggesting even remotely, that the claimant is impecunious.

[38] Attorney Phillpotts-Brown has deponed, in paragraph 1 of his affidavit in support of the 1st defendant's application for security for costs, that what he has deponed to, in that affidavit, in paragraphs 2 –12, there being 12 paragraphs in total, in that affidavit, have been deponed to, *'from original documents and correspondence in my possession.'* Attorney Phillpotts-Brown has also deponed in paragraph 1 of that said affidavit, that he is the proprietor of the firm of Lawrence Phillpotts-Brown and Company, the attorneys-at-law on record for the 1st defendant.

[39] Mr. Phillpotts-Brown has also deponed to his not being, '*aware of the claimant having and/or holding any assets and/or funds in this jurisdiction which the 1st defendant may satisfy any order for costs or damages arising from these proceedings.'* Whilst Mr. Phillpotts-Brown may not be aware of same, that is not surprising, as he has not deponed to having conducted any search in an effort to properly determine whether or not any such assets exist. It would not be expected that he would have any document(s) in his office's possession, which would be capable of assisting this court, in drawing a proper conclusion, as regards whether or not the defendant has assets within this jurisdiction at the time when he deponed to his said affidavit, unless he had, prior thereto, deliberately made some effort to obtain any such document, which either, may or may not exist. He has given no evidence that he had, at any time, made any such effort. Without there being any evidence before this court, that he has made such effort, his assertion that he is not aware of the claimant having and/or

holding any assets and/or funds in this jurisdiction, is an assertion that carries no weight with this court, whatsoever.

[40] In any event, it is important to recall that even if it had been proven by the applicant, that the claimant is impecunious, nonetheless, that would not have entitled the 1st defendant to the order sought. It would then be another factor to be considered, in concluding as to whether it is just, or not, to order the claimant to provide security for costs.

[41] That has long been so, as a matter of law, even before the new **CPR** came in to existence in England, based upon which, in large measure, Jamaica had, in 2002, modelled its own **CPR**. In that regard, see: **Raeburn v Andrews** – [1874] LR 9 QB 118; and **Sir Lindsay Parkinson and Company Ltd. v Triplan Ltd.** – [1973] QB 609, per Ld. Denning, M.R.

[42] The burden of proof in respect of the 1st defendant's application for security for costs, lies on the 1st defendant/applicant and the applicant has certainly not proven that the claimant is impecunious, or even that she does not hold any assets – whether personal or real property, in this jurisdiction. In any event though, as a matter of law, impecuniosity of a claimant is, in and of itself, an insufficient basis upon which a court should be asked to act, in granting an order applied for, for security for costs. Individuals should not be prevented from seeking justice, merely because of want of means. That would be oppressive to individuals, disproportionate and in all likelihood, in breach of our constitution, which guarantees to persons, a right of access to our nation's courts, for the purpose or resolving civil disputes.

[43] Mr. Phillpotts-Brown has also deponed that, based on the nature of this claim, it is likely that the 1st defendant's costs will be in excess of $750,000.00.

[44] Since any security for costs order, requires that the judge who has heard the application for such an order, make the order for such sum to be lodged with the

court, as security for costs, which is to be such sum as the court thinks fit, in all the circumstances, in accordance with the overall interests of justice, it follows that, the amount of security ordered, should be neither illusory nor oppressive. See: **Hart Investments Ltd. v Larch Park Ltd.** – [2007] EWHC 291.

[45] As such, the court needs assistance as to the amount of costs that the 1st defendant is likely to incur in the claim and thus, for that reason, it is usual to exhibit a summary statement of costs to the 1st defendant's evidence in support. See: Blackstone's Civil Practice, 2014, at paragraph 67.25. This court has taken note of same. Security may be ordered for the entire costs of the proceedings or up to a further point in the claim, and may include past as well as future costs.

[46] A factor that is to be considered and which may, on occasion, be useful in determining whether the interests of justice support the 1st defendant's application for security for costs, is the strengths of the respective parties' statements of case, or in other words, the likely success or failure of either party at trial.

[47] That though, although to be considered, will only be useful as one of the determinative factors, for the purposes of a court's consideration of an application for security for costs, except in circumstances wherein it is apparent, based on all of the material which is before the court, at the time when the application for security for costs is heard by the court, that one or the other of the parties is virtually undoubtedly, expected to succeed, either in proving or disproving the claim. See: **Porzelack KG v Porzelack (UK) Ltd.** – [1987] 1 WLR 420, at 423, per Browne – Wilkinson, V-C.

[48] At this stage of this particular claim, this court has been unable to draw any conclusion, one way or the other, as to the likelihood of success or failure of the claim, in so far as the proof of it is concerned. In fairness too, it must be stated that neither party's counsel rested their submissions in respect of the 1st

defendant's application for security for costs, on the mantle of likelihood of success of their respective client's statement of case.

[49] Instead, what the defence counsel rested his client's application on, was on the shoulders of his assertion, as made out in his affidavit evidence, that the defendant, if successful in resisting the claim, will, in all likelihood, be unable to recover from the claimant, any costs that will likely be ordered as a consequence, if that forecasted eventuality, as per the 1st defendant's perspective, should arise.

[50] For reasons already given, that, in and of itself, is as against an individual claimant, an insufficient basis upon which a court should make an order for security for costs. That must be so, since if it were otherwise, then there would have been no need for the wording in the preamble to **rule 24.3 of the CPR** which requires this court to make an order for security for costs, 'only if it is satisfied, having regards to all the circumstances of the case, that it is just to make such an order...' That is not a useless provision and it is a provision which should, in accordance with the principles of statutory interpretation, be given a purposive construction.

[51] Thus, for that reason alone, the applicant/1st defendant's application for security for costs, should fail. In the event though, that I may be wrong in having reached that conclusion, I will posit yet another factor which this court has taken into account, in having concluded that it would not be in the interests of justice, to grant an order for security for costs.

[52] It is that it appears as though, when considered on a balance of probabilities, it is likely that the 1st defendant has made this application in pursuit of an oblique motive. That has been the contention of the claimant's counsel, from the onset of her submissions, in response to the 1st defendant's application for security for costs.

[53] In other words, whilst it has not been contended by the claimant, that the making of an order for security for costs would stifle her claim, she has contended, through her counsel, that the 1st defendant has made the said application, in pursuit of a motive, other than the overall interests of justice and which is, in fact, an improper motive altogether, that being, to seek to discourage the claimant from pursuing this claim against her.

[54] Even if that motive would not likely become a reality, nonetheless, this court should not allow its processes to be misused in furtherance of improper purposes.

[55] I am of the considered opinion, that if this court were to make the order for security for costs, which has been sought, it would in fact, then be allowing for its processes to be used, in furtherance of an improper motivation or purpose.

[56] The question therefore arises: Why has this court, reached that conclusion?

[57] It is because of the suspicion cast in my mind, as a consequence of the 1st defendant's failure to move with any alacrity whatsoever, in response to the claimant's request for information from her, as to a matter which she should be pleased and comfortable, in providing information as to, since that is a matter which, as earlier stated, has arisen from averments made in the 1st defendant's own statement of case and which, once provided will be taken as forming part and parcel of the 1st defendant's statement of case. See the definition of '*statement of case,'* as set out in the **CPR at rule 24**, in that regard.

[58] Once that information has been provided therefore, in all likelihood, the 1st defendant will have documentary proof of same. Based on that documentary proof, the 1st defendant would be able to properly seek and likely obtain an order for summary judgment, on an important part of this claim, which in fact, forms the primary substratum of this claim, that being that the 1st defendant was not entitled to have applied for, much less, obtained a grant of administration in the

deceased's estate, as she is not – according to the claimant's allegation, a daughter of the deceased – Edrice Delmena Ffrench.

[59] If the claimant is patently wrong in that assertion of hers, which as stated, is the foundation of her claim, then even if it would not bring this claim to an end, if the 1st defendant were to do so, nonetheless, the 1st defendant would be expected by this court, to and should, apply for summary judgment. **Rule 15. 6 (1) (a) of the CPR**, provides that: *'on hearing an application for summary judgment the court may: (a) 'give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.'*

[60] In that context, one has to wonder why it would have been that, for several months now, the 1st defendant has steadfastly refused to provide the requested information, when initially requested, as our rules of court require, by means of letter, sent by the claimant's counsel, to the 1st defendant's counsel. That letter is dated November 28, 2016 and was received by the 1st defendant on January 31, 2017.

[61] It is rather surprising, that it was on February 10, 2017, that the 1st defendant filed her application for security for costs. Why then, did she do that, at that stage, rather than, at an earlier stage?

[62] This just simply, to use a colloquial term, 'does not add up.' It casts doubt, in my mind, as to the 1st defendant's genuineness of alleged motive, as placed during oral submissions before this court, by her counsel, for her filing of her application for security for costs.

[63] For that reason also therefore and most importantly, bearing in mind that, it is the applicant who has the burden of proof in respect of any application for security for costs, I hold the considered view that in the particular context, thus far, of this particular claim, the 1st defendant's application for security for costs, ought not to be granted, because, it would be unjust to do otherwise.

[64] This court's orders are therefore, as follows:

i. The 1st defendant shall provide to the claimant, by means of a document which shall be filed and served, the following information.

   a) The name of the parent, who the 1st defendant allegedly shares in common with the deceased; and

   b) The 1st defendant's date and place of birth; and

   c) The deceased's date and place of birth.

ii. The information to be provided to the claimant, in accordance with order number (i) above, shall be so provided, filed and served on all parties to this claim; by or before May 31, 2018.

iii. The claimant is awarded the costs of the 1st defendant's application for security for costs which was filed on February 10, 2017 and the costs of her application for the 1st defendant to be required to provide the requested further information which was filed on January 29, 2018 and such costs shall be taxed, if not sooner agreed.

iv. The claimant shall file and serve this order.

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Hon. K. Anderson, J.