



[2021] JMSC Civ 192

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015 HCV 05934**

<b>BETWEEN</b>	<b>Gene Michael Dixon</b>	<b>CLAIMANT</b>
	<b>T/a Zodiac Building Interamericas Company</b>	
<b>AND</b>	<b>The Jamaica Union Conference of Seventh Day Adventists Limited</b>	<b>DEFENDANT</b>

**IN CHAMBERS (by Video Conference)**

**Miss Shantal Jarrett instructed by Zavia Mayne and Company for the applicant**

**Gene Dixon, the claimant/respondent in person**

**HEARD: 20th October & 16th December 2021**

**Civil Procedure - rule 13.3 of the Civil Procedure Rules - Setting aside of default judgment - whether default judgment entered against a party who was not named but who filed an acknowledgment of service admitting to service and intending an intention to defend the claim should be set aside - whether the default judgment should be varied for entry against the named defendant where the named defendant did not file acknowledgment of service or defence - rule 13.3 - whether the default judgment for specified sum should be varied**

**MASTER C. THOMAS (AG)**

**Introduction**

**[1]** The Defendant, The Jamaica Union Conference of Seventh Day Adventists Limited by Ex Parte Notice of Application for Court Orders with Affidavit in Support and Notice of Application for Court Orders with Affidavit in Support, both filed on

October 2, 2020, seeks respectively to stay execution of and to set aside the Default Judgment obtained against the Kings Seventh Day Adventist Church on October 31, 2019 by the Claimant, Gene Michael Dixon a builder, trading as Zodiac Building Interamericas Company. The grounds of the applications are that:

- a. Pursuant to Rule 42.13 of the Civil Procedure Rules (CPR), a Judgment Debtor may apply to the court for a stay of execution on matters which have occurred since the date of the Judgment or Order.
- b. The Applicant was not listed as a party to the claim;
- c. The claim is statute barred;
- d. The Default Judgment is irregular;
- e. Pursuant to Rule 12.5(a) of the CPR the Claimant has failed to prove service of the Claim Form and Particulars of Claim on the Applicant.
- f. Pursuant to Rule 12.5(b) of the CPR an Acknowledgment of Service has been filed by the Applicant.;
- g. Pursuant to Rule 13.2(1)(b) of the CPR the court must set aside the Default Judgment if wrongly entered because conditions in Rule 12.5 were not satisfied.
- h. Pursuant to Rule 13.3(1) of the CPR the Applicant has a real prospect of successfully defending the claim.
- i. Pursuant to Rule 13.3 (2)(a) of the CPR the Applicant has applied to the court as soon as was reasonably practicable after finding out that Judgment has been entered.

- j. Pursuant to Rule 13.3 (2) of the CPR the Applicant has a good explanation for not filing a defence.
- k. If the stay of execution is not granted and the Default Judgment is not set aside the Applicant will suffer irreparable harm severe prejudice and extensive loss.

## **Background**

- [2] The Claimant alleges that he contracted with the Defendant, which operates the Kings Seventh Day Adventist (KSDA) Church, on June 18, 2008, to carry out building work at KSDA Church. Owing to this contract, the Claimant claims that he brought work materials onto the Defendant's premises which the Defendant removed and retained without his authority. The Claimant further asserts that he requested the return of his materials however, not all were returned and a few of those returned were damaged.
- [3] By way of Claim Form and Particulars of Claim filed on December 10, 2015, the Claimant sought damages for the unlawful seizure and detention of goods and tools of trade seizure by the Defendant in June 2008.
- [4] On December 22, 2015 and March 3, 2016, the Claimant filed Affidavits of Service, detailing service of the Claim Form and Particulars of Claim on the Defendant by registered mail. On December 19, 2017, the Claimant filed a Request for Judgment in Default of Acknowledgment of Service. However, counsel representing the Claimant withdrew his services and the Claimant retained a new Attorney at law.
- [5] The new counsel for the Claimant discontinued the Request for Judgment in Default of Acknowledgment of Service and on July, 11, 2018 filed an Amended Claim Form and Amended Particulars of Claim.
- [6] On August 16, 2018, the Defendant filed an Acknowledgment of Service in which the Defendant incorrectly named the Seventh Day Adventist Conference Church as defendant to the claim. By the Acknowledgment of Service, the Defendant also

stated that they were served with the Amended Claim Form and Amended Particulars of Claim but not the Claim Form or Particulars of Claim. The Defendant also indicated that the claim was statute barred. On August 29, 2018, the Defendant filed an Amended Acknowledgment of Service this time correctly naming the defendant to the claim. The Defendant also included the date of service of the Amended Claim Form and Amended Particulars of Claim which was shown as the 4/7/2018. Further, the Defendant highlighted that its name was not properly stated on the Amended Claim Form and that its full name is KSDA Church. The Defendant also indicated that they wished to defend the claim and that it is statute barred. On October 2, 2020, the Defendant filed a Further Amended Acknowledgment of Service which showed the date of service of the Amended Claim Form and Amended Particulars of Claim as August 7, 2018.

- [7]** On October 8, 2019 the Claimant filed an Amended Request for Default Judgment in which KSDA Church was named as the defendant and later on 31 October 2019, it filed a Further Amended Request for Default Judgment in which Jamaica Union Conference of Seventh Day Adventist Limited was named Defendant. On that date, the Court entered Judgment in Default of Defence against the KSDA Church, which was substituted as defendant on the Default Judgment in the sum of \$45,958,513.48.
- [8]** The Defendant on October 2, 2020 filed an Ex Parte Notice of Application for Court Orders in which they sought a stay of execution of the Default Judgment and a Notice of Application for Court Orders to set aside the Default Judgment.
- [9]** In the Affidavits in Support of the Notices of Application for Court Orders, the affiant on behalf of the Applicant outlined that they were never listed as a party to the claim and they were never served with the originating Claim Form and Particulars of Claim. The affiant further stated that since they were not listed as a party to the proceedings there was no valid lawsuit to which they could properly mount a Defence. Also, that more than six years had elapsed since the cause of action arose, the claim was therefore statute barred. Additionally, the affiant said that the

insertion of the Applicant's name in the Default Judgment when they were not a party to the proceedings is irregular and a breach on the part of the Deputy Registrar. Further, that the Claimant has sought to abuse the process of the court in circumstances where the allegations in the Amended Claim Form and Amended Particulars of Claim are the same as those contained in the Plaints filed against the Applicant in the Manchester Parish Court which were determined in the Applicant's favour. Additionally, the affiant stated that the judgment is one of unliquidated damages and a judgment in default has been passed without any assessment of the damages.

### **Applicant's submissions**

### **Claimant's/respondent's submissions**

- [10]** The Claimant outlined in his submissions reasons why the court should refuse the Defendant's Application to set aside the Default Judgment. He submitted that the Defendant's application should fail as it does not comply with rules 13.4(2) and 13.4(3) of the CPR in that the application was not support by evidence on affidavit and no draft of the proposed defence was exhibited. The Claimant further submitted that the Defendant was correctly named in the Amended Claim Form and Amended Particulars of Claim.
- [11]** The Claimant challenged the Acknowledgements of Service filed by the Defendant. He stated that they were defective and they were filed out of time in violation of rule 9.3(1) of the CPR.
- [12]** The Claimant argued that it was the Defendant's failure to file a Defence that formed the basis for the court to grant the Default Judgment and the court should preserve the status quo and dismiss the application to set aside the default judgment.
- [13]** He further argued that The KSDA Church is one and the same as Jamaica Union Conference of Seventh Day Adventists Limited because Jamaica Union

Conference of Seventh Day Adventist Limited is the registered company which built, owns and operates KSDA Church and are registered proprietors of the land on which the church sits.

- [14] The Claimant counters the Defendants defence that the claim is statute barred. He states that the Defendants seizure of the Claimant's tools of trade ended on September 25, 2014 and that was when the Statute of Limitations started to 'toll'.
- [15] Additionally, the Claimant submitted that the Defendant failed to specify the reason why they say the Default Judgment is irregular and this failure is an irregularity. He further submitted that he satisfied all conditions in Rule 12.5 including proving that the Claim Form and Particulars of Claim were served on the Defendant by registered post.
- [16] Additionally, the Claimant submitted that the Defendant has provided no reason for saying that they have a real prospect of successfully defending the claim and they have not acted with alacrity in defending the claim. The defendant also argued that the Defendant has not provided a good explanation for not filing Defence.
- [17] The Claimant urged the court to refuse the Defendants/Applicants application to set aside the Default Judgment as the Claimant will suffer irreparable harm, severe prejudice and extensive loss.

### **Discussion and Analysis**

- [18] The applicant is seeking to set aside the default judgment on the bases that the default judgment was an irregularity and, alternatively, that it has a real prospect of successfully defending the claim. In my view, the following issues arise for consideration:
- (i) Whether the default judgment was irregular for failure to serve the claim form and particulars of claim;

- (ii) Whether the filing of the acknowledgments of service amounted to a waiver of service;

**Whether the default judgment was irregular for failure to serve the claim form and particulars of claim**

[19] I am of the view that this issue may be dealt with in short shrift. It was established from as far back as 2011 by our Court of Appeal in **Dorothy Vendryes v Richard Keane & Ors** [2011] JMCA Civ 15 that where a claim has been amended, the amended claim form and particulars of claim supersede the previously filed claim documents and are the effective pleadings before the court. In that case, a judgment in default was set aside because although the defendant had been served with the claim form and particulars of claim, it had not been served with the amended claim form and amended particulars of claim. Therefore, although, it would have been prudent to serve the claim form and particulars of claim on the defendant, what was paramount is that most recent amended claim form and particulars on which the default judgment was entered, was served.

**Whether the filing of the acknowledgments of service amounted to a waiver of service**

[20] It is trite law that the requirement of service is for the protection of the defendant and that he may waive this requirement even where he has not been served with the documents. This principle was applied by the Court of Appeal in **B & J Equipment v Joseph Nanco**. In that case, the defendant was served with a claim form by registered post. Accompanying the claim form were particulars of claim and a form of acknowledgment of service. However, a form of defence and the prescribed notes for defendants, required to be served with a claim form by rule 8.16(1)(b) and (c) of the CPR, were not served. The defendant's attorneys-at-law filed an acknowledgment of service, within time, in which they indicated that the claim form and particulars of claim were received by the defendant and that it intended to defend the claim. The defendant failed to file a defence and the

claimant obtained judgment in default of defence against it. Subsequently, the defendant's attorneys-at-law participated in a hearing for an order for interim payments against the defendant as well as the hearing of assessment of damages. Final judgment was entered and eventually served on the defendant. At no time did the defendant indicate to the court that he was taking issue with the exercise of the court's jurisdiction on account of the failure of the claimant to serve on him all the prescribed documents with the claim form.

[21] It was held by the Court of Appeal that the failure to serve the prescribed documents was an irregularity but that the actions of the defendant had amounted to a waiver of this irregularity in service. It is also trite law that while an irregularity can be waived, a nullity cannot be.<sup>1</sup>

[22] KDS filed three acknowledgments of service. In the first acknowledgment of service, in response to the question of whether it had been served with the claim form and particulars, it was stated that it had only been served with the amended claim form and amended particulars of claim on 4/7/2018 and the third one, it indicated that it had been served in August 2018. It is clear having regard to rule 9.3(4) of the CPR and **Rashaka Brooks** (which applied rule 9.3(4)) that although these acknowledgments of service were filed well outside the 14-day period limited by the CPR for doing so, they were valid, the further amended document being the effective document before the court. Both 9.3(4) of the CPR and **Rashaka Brooks** are to the effect that a defendant may file an acknowledgment of service at any time before a request for default judgment is received. In the present case, although a request for default judgment had been filed before the acknowledgments of service, the request was withdrawn and the claim form and particulars of claim were amended. The acknowledgments of service were filed

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<sup>1</sup> See judgment of McDonald Bishop in **Rayan Hunter** at paragraph



before the amended request for default judgment was filed on 8 October 2019 and the further amended request on 13 October 2019.

[23] In all of these acknowledgments of service, it stated that it had been served with the amended claim form and particulars of claim. Also, in the amended acknowledgment of service, it not only denied that its name was properly stated, it supplied its name “Kings Seventh Day Adventist Church” in response to the question “If not, what are your full names?”. Significantly, it indicated that it wanted to defend the claim and even mounted a limitation defence. It stated all of this information without any indication or qualification that it would be seeking to challenge service or dispute the court’s jurisdiction to try the claim. It seems to that putting aside for a moment the question of whether the failure to name KDS was a nullity, these circumstances are not dissimilar to the circumstances which obtained in **B & J Equipment v Nanco** because although the defendant did not participate in any hearing subsequent to the grant of default judgment, the answers given in the further amended acknowledgements of service without an indication that there would be a challenge to the jurisdiction of the court, this amounted to a waiver of service. It appears that it was this set of circumstances that led the registry to enter a judgment in default of defence and not in default of acknowledgment of service.

[24] However, before the issue of waiver of service can be disposed of, it is necessary to determine whether a person or entity that is not a party to the claim can waive service of the claim on it. It seems to me that the fact that the party who is not named is able to file an acknowledgment of service is an indication that it knows that it is to be the name party before the court. However, does this mean that the person or entity can waive service of the claim without it being named as a party and further that where the documents have not been amended to name the correct party that the registry can amend the documents to reflect the naming of the correct party?

[25] I am of the view that the provisions of Part 19 of the CPR contemplate that the addition or substitution of a party to a claim form and particulars of claim ought to be done by the claimant even where it appears that there is a mistake in the naming of a party and the party has, as in this case, indirectly accepted the mistake. That Part of the CPR contemplates amendments to add or substitute a defendant being made without the permission of the court before a case management conference and after case management, with the court's permission. It seems to me that this position remains unchanged even where the situation concerns a default judgment. It seems to me that the entry of default being an administrative act, ought to be entered on the claim that is filed. If there are any changes to be made to the claim including the pleadings or the named party or parties, then the claimant ought to amend the claim accordingly. I therefore find that the default judgment ought not to have been entered against KSDA Church without the claim being amended to reflect that it was a party to the claim. Accordingly, the default judgment was wrongly entered.

[26] In the event that I am wrong on this, I am of the view that there is another ground on which the default judgment cannot stand. The claimant has raised the issue of whether KSDA Church has legal personality. The claimant argued that KSDA Church is not registered with the Registrar of Companies. This has not been denied by KSDA Church although it has been filing documents in its name and proposes to file a defence to the claim in its name if this court is of the view that the service of the claim was not irregular and it is granted the permission. It is trite law that a claim brought against an entity that has no legal personality is a nullity. In the absence of any evidence to contradict this assertion, it is my view that the default judgment cannot stand.

[27] However, I am of the view that this is not the end of the matter because rule 13.3(3) provides that where this rule gives the court power to set aside a judgment, the court may instead vary it. In **Singh & ors v Kingston Telecom & Anor; Ocean Petroleum USA Inc v Kingston Telecom & ors** SCCA No 25/2005 (10 July 2009) Smith JA, delivering the judgment of the Court of Appeal, stated:

*It seems to me that rule 13.3(2) enables the court, pursuant to the overriding objective of the rules to ensure that a default judgment offend any rule and does not result in injustice.*

[28] It seems to me that based on the facts, default judgment ought to have been entered against the named defendant Jamaica Union Conference of Seventh Day Adventists Limited. The pleadings demonstrate that the named defendant is a legally recognisable entity, being the Jamaica Union Conference of Seventh Day Adventists Limited, which, it is pleaded at paragraph 2 of the amended particulars of claim, is a limited liability company whose registered office is situated at 125 Manchester Road, Mandeville. An affidavit of service filed on 24 July 2018 sworn to by Easton Harris indicates that the amended claim form and accompanying documents were served on the named defendant. At paragraph 2, Mr Harris depones that he served the documents at Jamaica Union Conference of Seventh Day Adventists Limited's registered office at 125 Manchester Road, Mandeville by delivering the documents to a Ms N Smith, the servant or agent of the defendant who willingly accepted service on behalf of the defendant. It seems to me that service of the amended claim and amended particulars of claim was proven against the named defendant and no acknowledgment of service having been filed, default judgment ought to have been entered against it. I find therefore that pursuant to rule 13.3(3), default judgment should be entered against that defendant.

[29] I am also of the view that I also am empowered by that rule to vary the terms of the default judgment that was entered. In **Singh & ors v Kingston Telecom & Anor; Ocean Petroleum USA Inc v Kingston Telecom & ors**, a default judgment which was entered for a specified sum of money was varied to a default judgment for an amount to be decided by the court as the court of appeal was of the view that the sum to be entered ought to have been decided by the court. In that case, Smith JA stated:

*The mere device of inserting in the claim a specific sum when in fact the claim is really for an unspecified sum of money does not entitle the claimant to enter default judgment for the payment of that amount. The principle may be extracted from **Birbari Ltd v Freda Birbari and anor** 23 WIR 98 – a pre CPR decision.*

**[30]** It is my view that in the instant case, the claim form and particulars stated that the following heads of damages were being claimed:

1. Special/Consequential Damages in the amount of \$35,205,218.84.
2. Damages for loss of use of tools of trade;
3. Damages for loss of profits;
4. Damages for Lost Business Opportunities;
5. Damages for loss of time and other conveniences;
6. Damages for damage and harm to business reputation

**[31]** Default judgment was entered in the sum of \$35,205,218.84, which on the face of it, appears to be for the specified sum claimed. This sum comprises special damages and consequential loss. It seems to me that the special damages that are being claimed are not connected to what is being sought in the claim in that though the claim is for detention of goods and tools of trade, the sums being claimed as special damages are based on invoices for works that were claimed to be done by the claimant and not for the costs of the actual tools. It also seems to me that the damages for consequential loss was arrived at by applying 18% calculation to the sums for each item of special damages without any indication of the basis of using this percentage. In my view, damages for consequential loss is not usually arrived at by purely mathematical calculations but involves an assessment by the court of whether the losses claimed to be suffered are in fact

as a consequence of the loss, are not too remote and then a calculation, based on the evidence, of the sums to which the claimant is entitled. In light of the forgoing, it is my view that default judgment for the sums claimed would not be in the interest of justice and ought therefore to be varied to be for an amount to be decided by the court.

## **Conclusion**

**[32]** In the circumstances, I make the following orders:

1. The default judgment entered against Kings Seventh Day Adventist Church is set varied and judgment is entered against the defendant, Jamaica Union Conference of Seventh Day Adventists Ltd for an amount to be decided by the court.
2. Each party shall bear its own costs.