[2017] **JMSC Civ.48**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV01247

BETWEEN	**ADASSA EVELYN**	**CLAIMANT**
AND	**ALBERT EVELYN**	**DEFENDANT**

Mrs. A. Leith-Palmer instructed by Kinghorn and Kinghorn for Claimant/Applicant

Mr. D. A. Scharschmidt, QC instructed by Robinson, Phillips and Whitehorne for Defendant/Respondent

Heard on: 13th February, 2017

MORRISON, J

[1] By way of a Notice of Application for Court Orders dated and filed on the 27th day of July, 2016 the Claimant moved this Court to declare that she is entitled to a 50% share in the matrimonial home at Guys Hill in the parish of Saint Catherine In the parish of Saint Catherine.

[2] On the 20th day of September, His Lordship Rattray, J made the following orders:-

1. Claimant's Application for Court Orders filed on 27th July, 2015 and adjourned to the 13th December, 2016 at 10:00 am for 2 hours.

2. Skeleton submissions with a List of Authorities being relied on by the parties to be filed and served on or before 25th October by 4:00 pm.

3. Copies of the Skeleton Submissions as well as copies of authorities relied on to be prepared in a Judge's Bundle by each side and filed and a copy of the said bundle together with the Core Binder delivered to the clerk of

the Judge who is set to hear this application on before the 8th December 2016 by 4:00 p.m.

4. This order is to be field by the Claimant's Attorney-at-Law and served on the Defendant's Attorney-at-Law.

5. No order as to costs.

[3] The above orders were prepared and signed by the acting Registrar of the Supreme Court. It bears the seal of the court and is dated October 5, 2016.

Subsequently the Claimant filed a Notice of Application for Court Orders dated July 27, 2016 in which she sought orders that-

a) that the time for the filing and serving of this Notice of Application be adridged

b) that the time for filing her application for division of property, particularly that parcel of land on which the matrimonial home of the Claimant and Defendant sits, be extended to the 19th February, 2015.

c) that the Fixed Date Claim Form filed on the 19th February, 2015 be permitted to stand."

[4] The records will reflect that on the substantive matter (set for two days trial in Chambers') coming before me on the 20th day of July, 2016 it was adjourned to the following day. On that day the matter was again adjourned for a date to be fixed by the Registrar pending the outcome of the Claimant's interlocutory Application as is noted above and which was filed on July 27, 2016.

The Claimant, in obedience to the orders of Rattray, J filed her Skeleton Submissions on December 8, 2016. In it she recruited the case law authorities of –

a) **Angela bryant-Saddler v Samuel Saddler** and **Fitzgerald Hoilette v Valda Hoilette** and **Davion Hoilette** and **Simeon Davis**, [2013] JMCA Civ. 11

b) **Delkie Allen v Trevor Mesquita,** SCCA No. 8/2011
Queens Counsel, Mr. Scharschmidt in opposing the Claimant's application placed reliance upon the following-

c) **West Indies Sugar v Stanley Minnell**, (1993) JLR 543

d) **Delkie Allen v Trevor Mesquita**, supra

[5] It will be observed that on the 13th December, 2016 when the matters came up for hearing only Mrs. A. Leith-Palmer was present. However, having had the benefit of the submissions from both sides I proceeded to hear the application being of the view that the principles to be applied in an application for extension of time to claim property where the time for doing so had passed was clearly expressed in both the **ALLEN v MESQUITA** and the **BRYANT-SADDLER** and **FITZGERALD HOILETTE** cases

THE ARGUMENTS

[6] Mr. Scharschmidt relied on some factual statements on the part of the Claimant in his attempt to refute the Claimant's argument. First, that the parties were married on the 16th April, 2005.

Second, that they lived together until August, 2010 when the Claimant left the home.

Third, that the Claimant, pursuant to her affidavit of 14th September 2016, "clearly indicate that the applicant regarded the separation as one covered by 13 (c) of the act (sic)." That this is the case, submits Mr. Scharschmidt, is borne out of the fact of a letter dated 4th September, 2010 that was written by the Claimant's attorney-at-law who signalled her intention to institute proceedings under the Property (Rights of Spouses) Act, Section 13(1)(c). Further, asserts Mr. Scharschmidt, paragraph 9 of the Claimant's affidavit ..."clearly contradict the assertion in paragraph 8 of the said affidavit of Allia Leith-Palmer." At this point it will suffice to mention what paragraph 8 of the Leith-Palmer affidavit dated the 27th day of July 2016 states: "That although the Claimant moved out of the matrimonial home in 2010 it was not until she was served with the Petition for Dissolution of Marriage that she recognised and accepted that the marriage was at an end."

[7] From these facts learned Queen's Counsel submitted that the Claim Form dated 9th August, 2013 fell outside the (12) months period contemplated by Section 13(2) of PROSA, namely, August 2010 to August 2011. That, viewed as such, the delay of 4½ years is inordinate and inexcusable and the reasons therefor unacceptable.

[8] In the **WEST INDIES SUGAR** case, cited by learned Queen's Counsel, the Court of Appeal in allowing an appeal where an application to extend time to file a Statement of Claim had been granted by the Master, Forte JA pronounced as follows:

"In my view, it is not debatable that the delay in filing the statement of claim so long after it was due in accordance with the rules of court was inordinate, and the concession in that regard by Mr. Daly, Q.C. who argued the case for the respondent, is indeed admirable. The delay was inexcusable, the reason given in the affidavit in support of the Respondent's application not being sufficient to explain the long delay and tardiness of the Attorneys-at-Law." For his part Downer, JA said that: To grant such an extension therefore, as was done in this case would require the most compelling circumstances seeing that the delay was found in the court below to be inordinate."

[9] Counsel for the Defendant adopted the extracted excerpts above to bolster his argument on inexcusable delay.

Also, Counsel for the Defendant relied on the principles of law enunciated by Harris, JA in the **ALLEN v MESQUITA** case:

"Where the factors governing an extension of time are not provided for by statue or the rules of court, a court of first instance or an appellate court may, in exercising its inherent jurisdiction give consideration to the conditions which generally support an extension of time to do an act or to comply with any rule or law. <u>It follows that, in determining whether an extension of time should be granted, a court ought to follow the general procedure underpinning an entitlement to such grant. Thus, in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court</u>

reasons to be evaluated by the court to justify his right to do so. Such reasons should explain the delay in filing the claim. The grant of leave is a precursor to the grant or refusal of an extension of time." (emphasis mine)

[10] Continuing her Ladyship said, "The court, in exercising its discretion for an extension of time, is required to take into consideration factors such as the length of delay, the reason for the delay, whether an applicant has a claim worthy of a grant of an extension of time and the question of a prejudice to the other party." Farther on, Her Ladyship continued: "The failure to advance an excuse is not simply a fact which goes towards deciding the justice of the case... The reasons for tardy applications are fundamental factors to be taken into account in determining whether an applicant had explained the delay in not acting time timeously In order to justify an extension of time to carry out a requisite step in any proceedings, there must be some material on which the court can exercise its discretion."

[11] I shall here now refer to the affidavit of Allia Leith-Palmer in aliquot part, which was given in support of the Application.

Eliding formal matters, this affidavit says at paragraph 3 of her affidavit, "That I have present conduct of this matter, the information deposed herein is as a result of my perusal of the file and from my personal conduct of matter and are true to the best of my knowledge, information and belief."

She then goes on to depone that the parties got married on the 16th day of April, 2005 and that owning to the Claimant's strained relationship with the Defendant's daughter who resided in the parties' matrimonial home, she left in 2010. That on the 7th day of December, 2016 the Defendant filed a Petition for divorce which was served on the Claimant on the 26th day of January, 2012. That on the 18th day of March, 2012 the Claimant filed a Fixed Date Claim Form "seeking a similar relief as outlined in the instant Claim", in which she sought "a half interest in the entire parcel of land on which the matrimonial home rests."

That the Claimant did not recognise that her marriage was at an end until she was served with the divorce Petition though she had moved out of the

matrimonial home. That her Fixed Date Claim Form was struck out on the 31st May, 2013 it not being heard on its merits. In consequence, the Claimant filed, on 9th August 2013, another Fixed Date Claim Form in which she sought the self-same relief as earlier indicated in her prior claim. This latter Fixed Claim Form was that served on the Defendant within the required time, hence it was discontinued on the 19th February, 2015 and the instant claim filed.

[12] Next comes the crux of the matter as per paragraph 12: "That the Claimants failure to file her initial Fixed Date Claim Form within a year of moving from the matrimonial house was not intentional and was due to inadvertence on the part of her Attorney-at-Law."

The affiant concludes that no prejudice will befall the Defendant should the relief sought be granted. However, were the relief sought be refused that the Claimant would suffer irreparable harm as she would be barred from her rights under the Property (Rights of Spouses) Act,

[13] As to the question of the ownership of land under PROSA, Phillips, JA in the case of **ANGELA BRYANT-SADDLER v SAMUEL OLIVER SADDLER** and **FITZGERALD HOILETTE v VALDA HOILETTE** and **DAVION HOILETTE** and **SIMEON DAVIS**, [2013] JMCA Civ. 11, stated that "The fact that the legislation specifically provides a time within which a claim shall be made, but also refers to a longer period being allowed by the court, indicates that although the time is limited, the time period is flexible, and can be extended, once the Court exercises its discretion in favour of the applicant after hearing him/her." Her Ladyship continues, "Before that application is made, however, the claim... is not invalid. The words in the statue... give the court a wide discretion to permit persons to access the benefits provided in PROSA, particularly since the statue is dealing with the protection of the rights of persons within families."

[14] I find that given the state of the law as is laid down in both the **ALLEN v MESQUITA** case and that of **SADDLER v SADDLER** and **HOILETTE v HOILETTE** that the absence of learned Queens Counsel or any other from his

chambers at the time and place appointed for the trial of this issue, notwithstanding, and given that this court had the benefit of the Respondent's submissions and list of authorities, the outcome of these deliberations would not have made a difference even had counsel been present. While it is true that inordinate and excusable delays ought to be viewed as an unjust way of dealing with cases expeditiously it cannot be viewed in a vacuum. Rather, it must be that the circumstances of the delay are scrutinized.

I fail to see anything in the Allia Leith-Palmer affidavit or from any statements on the part of the Claimant which are in contradiction to each other so as to militate against invoking Section 13(1)(c) of PROSA. Section 13(1)(c) is procedural and judicial pronouncements on this aspect of the matter recognises what is to be done in circumstances where the time for doing of an act has passed.

In any case I am unable to discern any prejudice which would befall the Respondent in granting the Application. The Applicant's right to be heard should not be thwarted even in the face of any real or perceived inadvertence on the part of her attorneys-at-law, provided that the explanation meets the threshold principles as is noted above. For the above reasons, I accepted the Claimants application for Court orders.

[15] In passing, I cannot but observe that absolutely no excuse for the Respondent's absence was ever given to this court and, in keeping with the overriding objectives of the Civil Procedure Rules I took the view that the Application should be heard and determined.