[2026] JMSC Civ 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2020CV04215

BETWEEN	**ANDY FRANCIS**	**CLAIMANT**
AND	**JACQUELINE SALMON**	**DEFENDANT**

CONSOLIDATED WITH:

CLAIM NO. SU2020CV04796

BETWEEN	**JACQUELINE SALMON**	**CLAIMANT**
AND	**ANDY FRANCIS**	**DEFENDANT**

Ms Zara Lewis and Mr Gifford Thompson instructed by Gifford Thompson & Shields, for the Applicant

Mr Patrick O Forrester Esq. for the Respondent

Civil procedure – Application for leave to appeal – Application for stay of execution

HEARD JANUARY 29 & 30, 2026

WINT- BLAIR J

[1] At the case management conference on May 3, 2023, in the absence of Mr Francis, Anderson, J, having taken steps to ensure that the applicant was not virtually present at the remote hearing, and, having satisfied himself that the applicant had received notice of the hearing and was absent, made the orders below:

[2] Anderson, J ordered that:

> *"upon the hearing of these claims and in the absence of Andy Francis upon this hearing, this court strikes out Claim No. SU2020CV04215 and enters judgment in favor of the Defendant in that claim and enters judgment against the Defendant in Claim No. SU2020CV04796 and the costs of those claims are awarded to the litigant - Jacqueline Salmon, pursuant to the provisions of Rule 27.8 of the Civil Procedure Rules."*

[3] Mr Francis, in his affidavit[1] filed in support of this application, said that he had been served with the above orders on June 9, 2023. He applied on June 21, 2023, to have those orders set aside.

[4] The applicant was present at the hearing of his application to set aside Anderson, J's orders of November 30, 2023. The orders sought were refused by the Honourable Miss Justice P. Mason (Ag).

[5] He now seeks orders from this Court by way of Notice of Application filed August 5, 2024, for leave to appeal the decision of Mason (Ag), requesting an extension of time for filing this application, and that the execution of the orders of the Honourable Miss Justice P. Mason (Ag), made on November 30, 2023, be stayed pending the determination of the appeal. Additionally, he requests relief from sanctions to seek leave to appeal out of time.

[6] The applicant also filed a Notice of Application for Court Orders on August 26, 2024, seeking a stay of execution of the orders for taxation made on the 30th day of November, 2023, until the determination of the appeal.

[7] The applicant submitted that his failure to attend the hearing of Anderson, J was not his fault. He was unrepresented, out of the country, and did not receive notice or a Zoom link for the Case Management Conference, which proceeded in his absence. His non-attendance was therefore not wilful or negligent but due to logistical issues and a lack of legal representation. Further, on a prima facie basis,

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[1] filed August 5, 2024

the court could have looked at his affidavit. Even if he was not present, the Court could have ruled on the substantive evidence.

Discussion

[8] Rule 1.8 (1) of the Court of Appeal Rules ("CAR") states:

> *"an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission* ***within 14 days*** *of the order against which permission to appeal is sought."*

[9] This application was filed on August 5, 2024, some eight months after the orders were made by Mason, J(Ag.) on November 30, 2023. This delay is plainly inordinate and constitutes non-compliance with the rule. A delay of this length requires an explanation that is compelling, detailed, and supported by evidence.

[10] In seeking leave to appeal the orders of Mason, J(Ag.), it is incumbent that the applicant satisfy this court that he would have a realistic prospect of success on appeal.

[11] I will address that issue first in **Netricia Miller v Shawn Miller**[2] where McDonald-Bishop, JA(as she then was) states:

> *[13] Rule 39.6 of the CPR sets out three conjunctive and mandatory conditions that must be satisfied before an order made in a party's absence may be set aside. This court has held that there is no residual jurisdiction to set aside an order made in a party's absence where the three conditions are not met. Therefore, a failure to establish one of the three conditions listed in the rule will inevitably result in the refusal of an application made pursuant to rule 39.6 of the CPR (see Joscelyn Massop v Temar Morrison (by his mother and next friend Audrey White) [2012] JMCA Civ 56 ('Massop v Morrison') and Ivor Walker v Ramsay Hanson [2018] JMCA Civ 19).*

[2] [2024] JMCA App 6

[12] The applicant has averred[3] that the orders of Anderson, J., were served on him by FedEx on June 9, 2023, and he raises no issue with the regularity or propriety of that service. The delay in filing the application was explained as unintentional, and due to his inability to retain new counsel and obtain the Zoom information to join the hearing.

[13] The application was made within the 14 days stipulated by Rule 39.6. In **Miller v Miller**,[4] the learned judge of appeal went on to agree with the learned judge's conclusion at paragraphs [20] and [21] and stated thus:

> *"[20] The requirements of rule 39.6 must be cumulatively satisfied. Therefore, our agreement with the learned judge's conclusion that she had no jurisdiction to grant the set-aside application because it was out of time is, without more, determinative of the application for permission to appeal. On that basis alone, it is evident that the applicant has no real prospect of successfully arguing that the learned judge erred when she refused the application to set aside Carr J's order. The application for permission to appeal must, inevitably, fail.*
>
> *[21] In all these premises, this court does not need to consider whether the learned judge appropriately exercised her discretion under rule 39.6 of the CPR by considering whether the applicant had successfully satisfied the other conditions for the grant of the application."*

[14] In Rule 39.6(3), the court must be provided with evidence of both a good reason for failing to attend the hearing and that, had the applicant attended, some other judgment might have been made.

[15] In **David Watson v Adolphus Roper**,[5] K. Harrison, JA said,

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[3] In his affidavit filed on June 21, 2023
[4] [2024] JMCA App 6
[5] SCCA 42/005; November 18, 2005

"The predominant consideration therefore for the court in setting aside a judgment given after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. This court has approved these principles, and have applied them, from time to time - See Thelma Edwards v Robinson's Car Mart and Lorenzo Archer SCCA 81/00 (un-reported) delivered 19th March 2001.

Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given, the chance of not having to prove his case all over again, with all the attendant expense that this will involve and, if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed.

The conditions in rule 39.6 are similar to those enunciated in the case of Shocked v Goldschmidt [1998] 1 All ER 372 but under the CPR they are 9 cumulative. There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied: Barclays Bank plc v Ellis (2000) The Times, 24 October 2000."

[16] Parties are expected to remain in contact with their attorneys and, where there is no counsel, with the court throughout litigation. As a result, the applicant's assertion that he, though aware of a court date, did not know how to join the remote hearing is difficult to accept. Even after legal representation ends, it is unlikely that a former client would receive no guidance from his previous counsel on how to join

a remote hearing in person. There is no evidence that the applicant tried to obtain the Zoom information, including the attempts made and whom he contacted.

[17] The applicant is required to satisfy all the conditions set out in Rule 39.6(2) and (3). There is no residual discretion to set aside the judgment if one of these factors is missing. The absence of evidence that constitutes a satisfactory explanation in the affidavit before this court demonstrates that there is no need to consider the remaining factor, as the learned judge had no discretion to set aside Justice Anderson's orders.

[18] In respect of this application before me, according to rule 1.8 (1) of the Court of Appeal Rules (CAR) which the applicant relies on:

> *"an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."*

[19] This application was filed some eight months after the order was made (between November 30, 2023 and August 5, 2024). This delay is plainly inordinate and constitutes non-compliance with the rule. To excuse such a delay, the explanation must be compelling, detailed, and supported by evidence. The applicant has stated that the delay in making this application was not intended but due to his inability in retaining new counsel and obtaining a copy of the record of the proceedings. He added that the application was made promptly thereafter. His explanation, as stated, is vague and does not account for the entire delay. Further, these reasons do not negate the breach itself.

[20] At the hearing before Mason (Ag), both the applicant and his attorney were present when the orders were made. Consequently, he was duly informed of the proceedings and the resulting decision. Ms Lewis has submitted, citing **Reeves v Platinum Trading Management Ltd**,[6] that a delay which is reasonably and

[6] HCVAP 2008/004

promptly explained should not hinder a deserving appeal from being heard. However, in the present case, there is no justifiable reason for the applicant's delay, nor can it be considered that he acted expeditiously in filing the instant application.

[21] Despite his knowledge of the orders made by Mason, J(Ag.), the applicant failed to act within the prescribed time and delayed filing the application by approximately eight months. The authority of **Reeves** does not assist the applicant. His delay was neither prompt nor adequately explained, and the reasons advanced do not account for the full period of non-compliance.

[22] If this conclusion is in error, then moving on to the merits of the defence, I am not at this stage to conduct a mini-trial. The presence of contested facts, particularly where credibility is in issue, necessitates a full trial in which both parties can present their evidence and be subjected to cross-examination to determine the cogency of either case.

[23] The cases of **Swain v Hillman**[7] and **Gissing v Gissing**[8] were relied on by the applicant to submit that the applicant has a good case with a reasonable prospect of success. He seeks orders for equal legal and beneficial ownership of the property and for its sale, with the proceeds divided equally. He relies on the title of the property showing joint ownership, payment of the deposit and closing costs from his own funds, and avers that he has made a significant direct financial contribution to the purchase, with no evidence to the contrary to suggest that the parties did not have a common intention to share the beneficial interest.

[24] In his affidavit in support of the Fixed Date Claim Form, which has been exhibited to his affidavit in support of his application at bar, the applicant avers that monies were sent from his account and the respondent's account to Michael G. Feurtado, their attorney. Mr Feurtado made deposits on their behalf for the property. He

[7] [2001] 1 All ER 91
[8] [1970] UKHL 3

exhibits cheques drawn on CHASE Bank in support of this assertion. Notably, the cheques reference deposits made in relation to Lot 242. He also refers to a letter indicating that the unit was changed to Lot 210 between the time the deposit was made and the payment of the balance; however, that letter pertains to Lot 243, not 242.

[25] The respondent submits that the applicant's claim/defence is full of falsehoods, as he has taken inconsistent positions that cannot be supported by the documents, cheques, and receipts he will rely on at trial. The documentary evidence does not bear the correct lot number, and the cheques do not match the receipts. The applicant would fail at trial as the documents are clearly false and associated with another property on the same premises, owned by someone named Michael G. Feurtado.

[26] The respondent avers that while the applicant asserts that he contributed to the purchase of the property, the documentary evidence does not support that claim. Furthermore, he has not provided any evidence that he transferred funds to Mr Feurtado. In the absence of documentary evidence establishing such transfers, his bare assertion is insufficient to demonstrate that he made any financial contribution toward the purchase of the property. This undermines the nexus between the alleged contributions and the specific property ultimately purchased. In the absence of clear and coherent evidence showing that his funds were applied toward the acquisition of the same property, it would be difficult for him to establish that he contributed to its purchase.

<u>The prejudice against the respondent</u>

[27] The respondent submits that she has received orders from the Court and is now seeking to comply with the orders of Anderson, J. The applicant has not demonstrated diligence or provided a satisfactory explanation for his delay. To grant permission to appeal in such circumstances would effectively reward non-

compliance and place the respondent at a procedural disadvantage through no fault of her own.

[28] The applicant submits that the claim was struck out and not heard on its merits. The appeal would proceed on the procedural point and not on the merits as there was no trial. To that extent, the submission finds favour with this Court.

The overall justice of a decision on the application

[29] Having regard to the delay in this matter and the overriding objective, justice requires that the appeal of the orders made by the learned judge be refused. The interests of justice require consideration of whether the applicant has a real prospect of success on appeal. This is a critical factor because, where an appeal has no prospect of success, it would not be in the interests of justice to deprive the respondent of the fruits of the judgment (see **JAMALCO (Clarendon Alumina Works) v Lunette Dennie**).[9]

[30] The applicant's failure to adequately explain his absence did not impress Justice Mason, and that is enough to dispose of this application, as the learned judge had no discretion to set aside the orders of Anderson, J, in the circumstances.

[31] Consequently, the applications for a stay of execution of the Order of the Honourable Miss Justice P. Mason (Ag) and stay of execution of the application for taxation fail, as it there is no evidence before this court upon which to ground the finding that there will be a realistic prospect of success on appeal in the circumstances. The holding of the Court of Appeal is applicable to the facts in the application at bar, and I adopt it as dispositive of the application for leave to appeal.

The application for a stay of execution

[32] The applicant has requested an order to stay the execution of the learned judge's orders pending the hearing of the appeal. If leave to appeal is not granted, there

[9] [2010] JMCA App 25

can be no stay of execution. Consequently, the concerns regarding prejudice to the parties and the justice of the case would not arise

[33] Consequently, the applications for a stay of execution of the Order of the Honourable Miss Justice P. Mason (Ag) and stay of execution of the application for taxation fail.

[34] Orders

1. The orders sought in the Notices of Application filed August 5, 2024 and August 26, 2024 respectively, are refused.

2. Costs to the respondent to be costs in the claim.

3. Leave to appeal is granted.

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Wint-Blair, J