



[2024] JMSC Civ. 173

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV03339

BETWEEN	LOXLEY FULLER (Executor of the Estate of Ellery Fuller)	1ST CLAIMANT
AND	JOYCELEIN FULLER (Executor of the Estate of Ellery Fuller)	2ND CLAIMANT
AND	DAISY JOHNSON	DEFENDANT

IN CHAMBERS

Mr Oraine Nelson for the Claimant

Mr Raymond Samuels instructed by Samuels and Samuels for the Defendant

Heard: October 15th, 2024 and December 13th, 2024

Civil Procedure — Application to enter Default Judgment — Application for Defence to stand — Application for Extension of time to file Defence — Relevant considerations — Whether the delay was lengthy and inordinate — Whether a good explanation/reason was provided — Whether Defence has a real prospect of success — Locus Standi — Whether a ‘Second Executor’ can commence an action in another estate

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 8th of October, 2021, the Claimants commenced an action in this matter seeking a mandatory injunction to restore and/or transfer Part of Burtons called Cowhide or Rose Cottage situated in Saint Thomas in the Vale District and registered at **Volume 1525 Folio 38** of the Register Book of Titles (hereinafter

referred to as "the subject property") to the Claimants and in the alternative, compensatory and restitutionary damages on the basis that the Defendant had fraudulently caused the subject property to be transferred to her by way of gift from her predecessor in title who the Claimant alleged was non-compos mentis at the time of the transfer.

- [2] The pleadings were served on the Defendant on the 29th of October, 2021 and an Acknowledgement of Service was filed on her behalf within the prescribed time. No Defence was filed and on the 22nd of April 2022, the Claimants' Notice of Application to Enter Default Judgement was filed. On the 21st of June, 2022, a Defence was filed. The Defendant's Application for an Extension of time was filed five (5) months later.
- [3] On the 15th of October 2024, the two (2) Applications were heard by the Court. At the hearing, in addition to the submissions made on the respective Applications, the Court also heard from the Attorneys on the preliminary point raised by Mr. Samuels in which he took issue with the Claimants' standing to bring the claim.
- [4] The Claimants' Application was filed on April 27th, 2022. It was supported by an Affidavit of Oraine Nelson and the following orders are sought therein:
- i. *Judgement (sic) is entered on the claim for the Claimants against the Defendant*
 - ii. *It is declared that DAISY JOHNSON procured Certificate of Title volume 1525 folio 38 fraudulently;*
 - iii. *Certificate of Title volume 1525 folio 38 is cancelled;*
 - iv. *Certificate of Title volume 1161 folio 38 is reinstated*
 - v. *It is declared that the Claimants, as personal representatives of ELLERY FULLER deceased, are entitled to be registered as transferees of certificate of title volume 1161 folio 38 in their capacity as executors.*
 - vi. *Costs to the Claimants to be taxed if not agreed.*
- [5] The Grounds on which the foregoing Orders sought are:

- (a) *The Defendant was served with the Claim Form and Particulars of Claim and have failed to file a Defence — rule 12.1(1)(b)*
- (b) *The Claimants can prove service of the Claim Form and Particulars of Claim — rule 12.4(a)*
- (c) *The period for filing a Defence has expired — rule 12.5(c)*
- (d) *There is no pending application for an extension of time to file the defence — rule 12.5(e)*
- (e) *Default judgement (sic) where not for a specified or unspecified sum or for goods may be in such form as the court considers the Claimant to be entitled to on the particulars of claim — rule 12.10(4)*

[6] The Defendant's Application was filed on the 24th of November 2022 and seeks the following orders:

- 1. That Defendant (sic) is permitted an extension of time to file and serve her Defence.*
- 2. That the Defence filed on the 21st of June 2022 and served on the Claimants on the 4th of July 2022 is allowed to stand as filed and served in time.*
- 3. Such further and other relief and orders as this Honourable Court' shall think fit in the circumstances.*

[7] The grounds for seeking the said Orders are:

- i) Rules 10.3 (9) of the Supreme Court of Jamaica Civil Procedure Rules, 2002 ("CPR" permits the Defendant to apply for an order extending the time for filing her defence.*
- ii) Rule 26.1 (2) (c) (sic) of the CPR empowers the Court to extend or shorten the time for compliance with any rule, practice direction, order, or direction of the Court.*
- iii) The Defendant has a good (sic) for requesting an extension of time to file their defence and a good explanation for the delay in filing same. .*
- iv) The delay has not been lengthy.*
- v) The granting of the Application would be in the interest of Justice.*
- vi) The failure to comply was not deliberate and the Defendant has a good explanation for failing to comply (sic) the Orders of the Court.*

vii) The Claimants do not stand to be prejudiced by the Orders being granted.

viii) That the failure to comply with the Rules of the Court was not intentional

ix) The Defendant has a good explanation for the failure to comply.

x) It is in the interest of justice that the claim proceeds to trial as it raises live issues which can only be determined by hearing oral evidence.

xi) That the failure to grant relief would be highly prejudicial to the Applicant.

xii) To ensure a full presentation and determination of all issues involved in this claim.

xiii) There is a minimal risk of injustice to one or both parties.

ISSUES

[8] The issues for the Court's determination are as follows:

1. Do the Claimants possess the requisite standing to bring this claim?
2. Should the Claimants' Application for Judgment be granted?
3. Should an Extension of time be granted to the Defendant to file and serve the aforementioned Defence?

Issue One - Do the Claimants possess the requisite standing to bring the claim?

Defendant's Submissions

[9] In submissions in support of the preliminary point, which attacks the foundation of the claim, Mr. Samuels contended that Probate would have had to be granted in Ellery Fuller's Estate in order to ground the Claimants' action in Eric Constantine Douglas's estate. Mr. Samuels relied on the provisions of Rule 68.49 of the Civil Procedure Rules (hereinafter referred to as "CPR") which states:

Chain of Representation

68.49 (1) An application for a grant of probate may be made by an executor (the "second executor") in relation to any estate (the "principal estate") that was being handled by his predecessor (the "first executor") where the principle of the chain of representation is applicable.

(2) In order for the second executor to obtain a grant of probate the second executor must:

obtain probate of the first executor's will;

file an oath in relation to the principal estate; and

file a draft grant naming the second executor as executor by representation for the principal estate.

(3) The oath to lead the grant to the second executor in the principal estate must contain the following:

proof of the grant of probate to the first executor;

details of the unadministered part of the principal estate;

an exhibited copy of the grant of probate to the second executor in the First executor's estate, and

a statement that the first executor was the last or sole surviving executor under the will of the deceased testator in relation to the principal estate.

(4) Where the second executor has applied for a grant of probate it will not be necessary for the will of the deceased testator in relation to the principal estate to be marked by the second executor or any of the attesting witnesses.

[10] Mr. Samuels argued that for the Claimants who would be the 'second executors' to obtain a Grant of Probate, they would have to satisfy the provisions of Rule 68.49(2), namely (a) obtain probate of the first executor's will; (b) file an oath in relation to the principal estate; and (c) file a draft grant naming the second executor as executor by representation for the principal estate. The requirements of 68.49(3) would also have to be satisfied.

[11] Counsel submitted that it is not disputed that an Executor having taken Probate of his own Testator's will becomes ipso facto executor, not only of that will, but also of the will of a Testator for whom the other was sole Executor or surviving proving Testator. Mr. Samuels argued that the condition of this rule, however, is that the

Will of each Testator shall have been duly proved. Counsel referred to a number of authorities in support of this argument, the first being ***Fowler v Richards 5 Russ Ch. 39*** where it was held by the Master of the Rolls that:

'in order to shew that the executor of an executor is entitled to administer the goods of the first testator, it must be shewn by legal evidence that he is the executor of the deceased executor. Of this probate alone is evidence'.

[12] The case of ***In the Goods of Bridget Gaynor (1869) L.R. 1 P. & D. 723*** was also cited in which Lord Penzance relied on the case of ***Twyford v Trail 7 Sim 92*** wherein the marginal note stated:

"A. died in India; B., one of his executors, proved his will in India. B. died, and C., his executor, proved his will in England. C. is not the personal representative of A."

[13] Mr. Samuels asked the Court to note Lord Penzance's remark at page 726 that:

"This marginal note shortly states the result of that case, and it seems to me that it decides the matter we are dealing with."

[14] Mr. Samuels submitted that the situation in that case is similar to the issue in this matter as the Claimants are basing their claim on being Executors of Ellery Fuller which they purport 'clothes them' with the power to bring the instant claim and application for a property which falls within the estate of Eric Constantine Douglas and not that of Ellery Fuller.

[15] Mr. Samuels quoted further from the dicta of Lord Penzance where he stated:

"Either a man takes a grant and is executor, having power over and the obligation and the duty of administering the estate, or he does not take a grant, and then is nothing quoad the estate, and cannot be a link in the chain of representation."

[16] Mr. Samuels argued that applying this principle to the instant claim, the Claimants are not clothed with the authority to bring the claim and the suit is defective because there is no Personal Representative for Eric Constantine Douglas and the Will of Ellery Fuller has not been proven in Jamaica.

[17] Mr. Samuels contended that in the circumstances, the chain of representation could only be maintained by a succession of Probate and in this claim, the chain of representation is broken. Counsel asked the Court to find that the claim is a nullity. The decision of **Wilfred Emmanuel Forbes and another v Miller's Liquor Store (DIST.) Limited** [2012] JMCA App 13, in which the Court of Appeal acceded to the Respondent's submission that the appeal filed therein was a nullity and that any application thereunder was also a nullity was cited in support of this position. In that case, the 1st Appellant/Applicant had died and his Attorneys who filed the appellate documents had no authority to do so. Reliance was placed on paragraphs 23 and 25 of the judgment where Brooks JA stated:

*[23] Another general rule which is applicable to the present application, is that a claim, "commenced in the name of a non-existent person, or company, is a nullity" (per Evans LJ in **International Bulk Shipping Services Ltd**). On the basis of that rule, an appeal filed on behalf of Mr Wilfred Forbes would be a nullity. I, therefore, agree with Mrs Taylor-Wright that Phillipson Partners, having been aware of the prior death of Mr Wilfred Forbes, acted without authority in filing a notice of appeal on behalf of both men and that the appeal, at least on behalf of Mr Wilfred Forbes, is a nullity.*

*[24] That finding brings me to the **Tetlow** case. The headnote states, in part, that "[w]here an action is commenced in the name of a dead man his representative cannot be substituted as plaintiff". In **Tetlow**, a writ was issued in the name of a man who had died some years before. It was issued in the mistaken belief that he was still alive. When an attempt was made to substitute his personal representative, the court held that the rules of the Supreme Court of England, at the time, did not permit the substitution. Russell J ruled that substitution was only allowed where the original party, substitution of which was sought, was a living person.*

[18] Mr. Samuels contended that the Claimants commenced these proceedings without proving the Will of the Ellery Fuller in the Probate Court of Jamaica and without taking Probate of the Estate of Eric Constantine Douglas, as such, they were not cloaked with the authority of being Personal Representatives. Counsel argued that this is a fatal error and an incurable nullity and the Court should uphold the preliminary point and strike out the Claim against the Defendant.

[19] Mr. Samuels further argued that while **Re Crowhurst Park Simms-Hilditch v Simmons** [1974] 1 All ER 991 provides useful guidance, it is not on all fours with

the instant case which deals with a chain of representation and as such it is distinguishable. Counsel asserted that in the instant case notwithstanding the general principle, that an Executor derives his title and authority from the Grant, it cannot save and/or assist the Claimants who are seeking land in the possession of a different estate.

[20] Mr. Samuels further submitted that it is instructive that in ***Re Crowhurst Park supra***, the Court was reluctant to proceed as the Judge remarked:

"Had I strictly followed authority I should have adjourned the trial of this action until the plaintiff should have obtained probate in this country "

[21] In ***Re Crowhurst Park supra***, the Plaintiff had only obtained Probate in Jersey and not the United Kingdom where she had brought her claim and while the action was determined against her on another issue, the Court found that she would have been unable to obtain the relief without the Grant. Mr. Samuels contended that in the circumstances, the case supports the Defendant's contention that in order to bring the claim the Claimants need to obtain Probate. They did not obtain a Grant of Probate in Jamaica and in the circumstances, they have no proper Grant of Representation in the estate of Ellery Fuller or the estate of Eric Constantine Douglas.

[22] Mr. Samuels argued that the decision of ***SMKR Meyappa Chetty v SN Supramanian Chetty [1916] AC 603*** can be distinguished from the instant claim, as in the circumstances of this case, there are two (2) separate estates and the Claimants are seeking to venture into the estate of Eric Constantine Douglas. In order to do so, they would first have to obtain the Grant in the Ellery Fuller Estate and register it in Jamaica before anything can be done. Counsel asserted that the error being made by the Claimants is that the property falls within the estate of Ellery Fuller, whereas it is in the estate of Eric Douglas.

Claimants' Submissions

- [23] In submissions in response, Mr. Nelson relied on the decisions of ***Chetty v Chetty*** *supra* and ***Re Crowhurst Park*** *supra*. Counsel asked the Court to adopt the reasoning of the Court, in both matters, that the Executor's authority is derived from the title and not from Probate. Mr. Nelson acknowledged that the estate of Mr. Douglas was not administered and the subject property was not passed to Ms. Fuller. He argued however that it would still form a part of the property that would have fallen to be distributed in her estate, subject to Probate being obtained. Counsel submitted that her right of action comes from being a Beneficiary of the estate of Eric Douglas and Executor of the estate which the fraud was committed against.
- [24] Mr. Nelson contended that Ms. Fuller would be able to act as a Beneficiary in the estate of Ellery Fuller in circumstances where there was no Executor or an Executor who was refusing to act. He rejected the Defendant's assertion that the Claimants were seeking to go into the estate of Eric Douglas for which they would have to apply for Probate. Mr. Nelson argued that what is being pursued is a transaction which if it were not for the claim would defeat the intention of Eric Constantine Douglas. He asserted that the Claimants ground their application on the right that Ms. Fuller would have had to pursue the action. Counsel argued that the ***Chetty*** case makes a distinction between instituting the claim and obtaining a declaration to deal with the assets. If the Claimants were seeking to do the latter, then the Grant of Probate would become necessary.
- [25] Mr. Nelson submitted that the decision in ***Re Crowhurst Park*** *supra* confirms that a Claimant can sue before Probate is granted but cannot obtain relief without first obtaining a Grant. He argued that based on this authority, the claim does not amount to a nullity as the Claimants are not seeking to deal with an asset but to set aside a transaction that the deceased is alleged to have been involved in.

Discussion/Analysis – Preliminary Point

[26] In my analysis of the issue raised by the Defendant, I did not agree with the Defendant that the situation for consideration would fall within the provisions set out at Rule 68.49 of the CPR. The language of the provision makes it clear that what is being addressed is the right of a ‘second executor’ to apply for Probate in an estate that was being handled by his predecessor, ‘the first executor’ and the procedure which needs to be followed.

[27] The Application, which is before the Court, seeks declarations in respect of the disputed property to include the cancellation of the Title held by the Defendant and the re-instatement of the original title held by Eric Constantine Douglas. A declaration is also sought that the Claimants, as Personal Representatives of Ellery Fuller, are entitled to be registered as Transferees on the original title in their capacity as Executors.

[28] The background to this claim and application by the Claimants is found in the Amended Particulars of Claim and its attachments. Exhibit **EF1** is a document entitled, ‘This is the last will and Testament’ of Eric Constantine Douglas. In this ‘Will’ it is stated;

‘I give devise and bequeath all my estate both real and personal and wheresoever situated to my wife Martybell Douglas for life and after her death to my step-daughter Ellory Fuller in fee simple absolute.’

[29] The document is alleged to have been signed by the Testator on the 19th of April 2007 and witnessed by the two (2) witnesses named therein. It is accepted between the Parties that the Will was never admitted to Probate. On the 5th of November 2009, Ellery Fuller executed a will in which the Claimants were named as her Executors. A clause in the will provided for her residuary estate to pass to the 1st Claimant after specified obligations owed by the estate had been discharged. Ms. Fuller died on the 10th of May 2021. It does not appear that a Grant of Probate was obtained in her estate either.

- [30] The question which then had to be determined by the Court is whether the claim instituted by the Claimants could stand in circumstances where there had been no Grant of Probate in either estate. In considering the matter, the Court reviewed the authorities which had been cited by the Attorneys. It was noted that whereas the **Chetty** decision is accepted as the locus classicus on the institution of proceedings for a Court action by an Executor who has not yet obtained Probate, additional guidance was provided in **Re Crowhurst Park supra**. In that matter, the Applicant had sought to obtain orders which would allow her to carry out actions including conducting business transactions involving property which had been in the possession of the Testator. She sought to do so without the benefit of a Grant of Probate in the UK where said property and business agreement existed.
- [31] In a carefully reasoned decision on the ability of an Executor to act, Goulding J stated as follows¹:

In my view the position of an executor who has accepted office but not yet proved the will is well established by authority. It is conveniently stated by Lord Parker of Waddington in Meyappa Chetty v Supramanian Chetty¹. He said:

- [32] 'It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, **including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title.** An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled'.(emphasis added)

¹ Page 999 of the Judgment

[33] That was a judgment of the Judicial Committee of the Privy Council. It was accepted by the English Court of Appeal as a conclusive and authoritative statement of the law in **Ingall v Moran**. In the latter case Goddard LJ said:

***'There is no doubt that, where a deceased person leaves a will and therein names an executor, the latter can institute actions before obtaining probate, though the action may be stayed until the probate is granted: Tarn v. Commercial Banking Co. The reason for this is, no doubt, that the executor's title is derived from the will, which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position.'*(emphasis added)**

[34] Applying the principles which were carefully enunciated and affirmed by the Learned Judge to the instant claim, it is clear that Ms. Fuller as the Executor of the Estate of Mr. Douglas could have properly instituted court proceedings in respect of the alleged fraud against his estate. The Claimants, as her Executors stand in her shoes, and would be cloaked with the authority to act in this regard. In coming to this conclusion, I have noted that the authorities are quite specific as to the extent of the power of the Executor, as it is specific to the institution of an action and not an application for Probate. At the stage when the action was filed, there was no bar to the Claimants' entitlement to pursue the claim as they were not seeking to distribute the assets of Mr. Douglas's estate as this could only have been pursued under a Grant of Probate in keeping with Rule 68.49.

[35] It is for the foregoing reasons that the Court finds that there is no merit in the submissions of the Defendant and her request for the claim to be struck out on this ground is refused.

Issues Two (3) and Three (3) - Should the Claimants' Application for Judgment be granted? Should an Extension of time be granted to the Defendants to serve her Defence?

Claimants Submissions

[36] In submissions in support of the entry of Judgment and opposing an Extension of time, Mr. Nelson posited that while a Defence was filed it was not filed within the prescribed time as it was filed approximately seven (7) months and twenty-three (23) days post service of the Claimants' pleadings.

[37] Mr. Nelson referred to Rule 10.3(1) which governs the period for filing a Defence and states:

'The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form'.

[38] Counsel submitted that the Defendant was served on the 29th day of October, 2021 at 25 Coley Drive, Rose Hall, Linstead in the parish of St Catherine and would be obliged to file her Defence within the period of forty-two (42) days in keeping with the rules. The date for filing would have been December 10, 2021. Consequently, by filing her Defence on June 21, 2022, she filed her Defence six (6) months and eleven (11) days after she was required to file same.

[39] Mr. Nelson submitted that the Defendant's situation did not fall within the exceptions permitted at Rule 10.3(4) which makes the general rule for the period of filing a Defence subject to several exceptions these being:

- *'Where the claim form is served outside the jurisdiction; or*
- *Where the defendant disputes the court's jurisdiction; or*
- *Where an agent of a principal outside the jurisdiction is served; or*
- *Where the claimant seeks summary judgement.*

[40] Counsel argued that the Defendant would then have to be accommodated under one of the two (2) remaining exceptions these being:

- *Where the parties agree to extend the period for filing a defence - rule 10.3(5); or*
- *The defendant applies to the court for an order extending the time to file a defence — rule 10.3(9).*

[41] Mr. Nelson submitted that not only were the exceptions under rule 10.3(4) inapplicable; there was also no agreement between the parties to extend the period for filing the Defence and the Defendant has not applied for or obtained an order extending the time for the filing of her Defence.

[42] Mr. Nelson argued that the failure to file the Defence within the stipulated period results in a sanction being applied. The applicable sanctions being indicated in Rules 10.3(5); 10.3(6); 10.3(7); 10.3(9); 12.1(1)(b) and 12.5. Rule 10.3(5) applies a sanction in that the Defendant would have to secure the Claimant's agreement to extend the time to file her Defence and by rule 10.3(6), the Defendant can only receive such agreement for an extension from the Claimant on two (2) occasions.

[43] Mr. Nelson further submitted that pursuant to rule 10.3(7), even if the Defendant had received the Claimant's consent to extend the time for filing her Defence, she could only have a maximum extension of fifty-six (56) days, otherwise in accordance with rule 10.3(9), she would have been obliged to *'apply for an order extending the time for filing a defence'*.

[44] Counsel asserted that the application of the rules means that in the first instance, the sanction for failing to meet the prescribed period to file her Defence would be that the Defendant would not be permitted to file said Defence without the consent of the Claimant or an order of the court extending the time for so doing. In the second instance, the sanction for failing to meet the prescribed period would be a Default Judgement being ordered against her per Rule 12.1(b) which states:

'This Part contains provisions under which a claimant may obtain judgement without a trial where a defendant —

(a)...

(b) has failed to file a defence in accordance with Part 10'.

[45] Mr. Nelson referred to Rule 12.1 and 12.5 of the CPR which treat with a Default Judgment and the circumstances in which it can be obtained. He argued that the sanctions apply once the period for filing the Defence has elapsed and any purported filing of a Defence after the period for doing so has elapsed would not prevent the sanction from applying.

[46] Mr. Nelson also asked the Court to consider the provisions of Rule 26.7(2) and 26.8(1) which state:

26.7(2) 'where a party has failed to comply with any of these Rules...any sanction for non-compliance imposed by the rule...has effect unless the party in default applies for and obtains relief from the sanction...'

26.8(1) 'an application for relief from sanctions imposed for a failure to comply with any rule...must be

(a) made promptly and

(b) supported by evidence on affidavit'.

[47] Reliance was also placed on the provisions at 26.8(2) and (3) of the CPR. Mr. Nelson argued that the Defendant has not made any Application for Relief from Sanctions. Consequently, the question of whether she made her Application promptly does not even arise for consideration. On the timing of the Application, Counsel made reference to a number of authorities to include ***Ray Dawkins v Damion Silvera*** [2018] JMCA Civ. 25 which quoted the case of ***National Irrigation Commission Ltd v Conrad Gray and Marcia Gray and Regency Rolls Limited v Carnall*** [2000] EWCA Civ. 379 where Arden L.J. observed that the dictionary meaning of "*promptly*" was "*with alacrity*".

[48] Mr. Nelson further submitted that the Defendant cannot be said to have acted with alacrity or with all reasonable celerity as having failed to file her Defence within the prescribed period, she also failed to file an Application for Relief from Sanctions. He contended that the Application filed in November 2022 was filed because of the

stimulus of the Claimant's Application for Judgement which was served on the 14th of November, 2022.

[49] Mr. Nelson argued that the Defendant's Application cannot be properly considered as it has not been supported by evidence on affidavit sworn to her. He submitted that the Defendant has not fulfilled any of the pre-requisites and under the rules, she is not in a position to have the court's discretion exercised in her favour. The decision of ***Tingles Distributors Limited v Liquid Nitro Beverages Inc and Tamarind Sales and Services Limited*** [2020] JMCA Civ. 24 was cited in support of this contention, specifically the pronouncement of the Court at paragraph 65 as follows:

'In treating with an application for relief from sanction pursuant to rule 26.8, the court must first consider whether the preconditions of rule 26.8(1) have been met. If the preconditions are met then the court must consider rule 26.8(2).

[50] Mr. Nelson further submitted that there is no evidence to assist the Court on whether the failure to comply was intentional. He argued that the Defendant has also failed to assist the Court on whether there is a good explanation as she has not provided an Affidavit for the failure. Implicit in this submission was the assertion that the Affidavit sworn to by Counsel in support of the Application should be disregarded.

[51] Mr. Nelson contended that the Defendant had not generally complied with the other rules and posited that the administration of justice would not be served by an extension of time being granted to her as the Defence had been filed over seven (7) months beyond the prescribed time.

[52] On the question of whether the failure to comply has been or can be remedied within a reasonable time, Mr. Nelson submitted that the Claimant has been prejudiced as the claim is already three (3) years old, their Application for Default Judgment is two (2) years old and the matter has not been able to progress because of the delayed Defence and further delayed Application by the Defendant.

[53] Mr. Nelson conceded that no trial date had been set and there was no risk of it being lost but the delays impacted the likelihood of obtaining an early trial date. Counsel accepted that prejudice would likely occur to either side depending on the ruling of the Court. He contended however that the prejudice to the Claimants would be greater and Judgment ought to be entered in their favour as they have satisfied rule 12.5 and are entitled to same.

Defendant's Submissions

[54] The Defendant did not present any written or oral submissions on the request for an extension of time. Mr. Samuels relied on his submissions in respect of the point in limine as well as the Affidavit sworn to by him in support of the Application. He submitted that the Affidavit could properly be considered by the Court as his averments were formalities and did not go to the issues joined between the Parties. The salient points extracted from this Affidavit, to which a Defence signed by the Defendant was attached, are as follows:

- a) That the Defendant was served with the Claim Form and Particulars of Claim. The Defendant had to travel overseas and as such, instructions were received to file an Acknowledgement of Service which was done on the 17th day of November 2021.
- b) The Claim Form and Particulars of Claim failed to disclose any material in support of the Claim and the allegations made that Eric Constantine Douglas was non-compos mentis and that the Defendant had committed acts of fraud.
- c) With the Defendant being abroad, it proved difficult to get full instructions from her especially as there was no corroborating documents attached to the initial Claim Form and Particulars. The Defendant also was very shocked and in disbelief as to the said allegations made against her and this added to the delay.

- d) There were challenges communicating with the Defendant, who was still overseas, following service of the Amended Claim Form and Particulars in March 2022. Instructions for the filing of a Defence were not obtained until May 2022 and the Defence prepared and sent for signing. It was returned to the Attorney on the 20th of June 2022 and filed June 21st, 2022. Service on the Claimants was effected on the 4th of July 2024.
- e) The granting of an order for extension of time would not prejudice the Claimants as the Defence is already in the possession of the Claimants' Attorney-at-Law and the allegations of fraud and non-compos mentis made by the Claimants will have to be specifically proved. The evidence presented is not adequate or sufficient to sustain the allegations made in the Amended Claim Form and Particulars of Claim.
- f) The Defendant has good prospects of defending any claim brought against her by the Claimants on the basis that following his accident, the Defendant had invited Eric Constantine Douglas into her home and operated as a Caregiver for him. As a result of the love and affection he had for the Defendant, he, by his own free will instructed and had prepared a Transfer by gift to the Defendant and transferred the subject property to the Defendant. The Defendant was not party to the decision made by Eric Constantine Douglas any or at all nor the actions taken to facilitate the transfer.

DISCUSSION/ANALYSIS – Issues 2 and 3

- [55]** Although issues 2 and 3 were extracted and individually stated above, it is readily apparent that they are so interconnected that the Court's determination of either of them would result in a full determination of both Applications.
- [56]** It is established practice that Part 12 of the CPR regulates the circumstances in which Judgment can be entered in default of a Defence. These provisions were

the subject of judicial discourse in ***Sterling (Eileen Beverley) v Frank Arthur Sterling*** 2009 JMCA Civ. 107 where Smith JA stated:

[17] Rule 12.1 defines a default judgment and sets out the general circumstances under which it may be obtained. It clearly confers on a claimant the right to obtain a default judgment. Rule 12.2 indicates that this right is circumscribed by the cases or circumstances slated in that rule. In such circumstances, default judgment may not be entered even where no acknowledgement of service or defence has been filed. Rule 12.3 imposes on the registrar a duty that is the corollary of the right created by Rule 12.1. Save and except for the circumstances enumerated in Rule 12.2, the claimant has an entitlement to default judgment provided that the prerequisites have been satisfied. Thus, if a claim does not fall within Rule 12.2 and the conditions outlined in 12.4 and 12.5 are satisfied, a claimant is entitled to have default judgment entered in his/her favour.

[57] Having made these pronouncements, the Learned Judge then considered the approach which would be followed depending on the nature of the claim and stated as follows:

[18] It is clear that the form of the default judgment differs according to the remedy sought. Where the claim is for a specified sum of money, the registrar must enter default judgment for that specified sum. Where the claim is for an unspecified sum, judgment is to be entered for a sum to be determined by the court and where the claim is for goods, judgment should be for their delivery or for the payment of their value. Where the claim is for a remedy other than the foregoing, judgment is for a remedy to be determined by the court. The claimant must file an application for court orders supported by affidavit evidence and the court shall enter judgment in the form it considers appropriate based on the particulars. In my judgment then, the judge is under an obligation to determine the form of the default judgment. Anv discretion that the judge has is limited to determining the form the default judgment should take, provided that the particulars or claim discloses a justiciable claim. I agree with counsel for the appellant that the learned judge was obliged to determine the terms of the default judgment once she was satisfied that the prerequisites stipulated by the Rules had been fulfilled and she had jurisdiction " (emphasis added)

[58] It is the Claimants'/Applicants' position that they have done enough to move the Court to enter Judgment as they have complied with the requirements of the rules and the information contained in the Particulars of Claim and the attachments thereto provides a justiciable basis for this order.

[59] Although Mr. Nelson made extensive submissions on the provisions of Rule 26.8, I am satisfied that the relevant provisions for the purpose of both applications are found at Rule 10.3(9) and 26.2(c). As alluded to in Mr Nelson's submissions, Rule 10.3(9) provides that the Defendant may apply to the Court for an extension of time within which to file his Defence. Rule 26.2(c) provides as follows:

(2) Except where these Rules provide otherwise, the court may –

(a) transfer proceedings to the Family Court or a Resident Magistrate's Court;

(b) consolidate proceedings;

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed (emphasis added)

[60] While the factors for the consideration of the Court are not outlined in these rules, there have been several authorities which have provided guidance in respect of same. In **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors.** 2000 Lexis Citation 2473, the Court outlined the factors which should be at the forefront of the Court's mind on an Application for extension of time. These principles were adopted and applied in **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ. 4. At paragraph 15 of the Judgment, Harris JA stated as follows:

'the principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J in an application for extension of time to appeal in the case of Commissioner of Customs and Excise v. Eastwood Care Homes (Ilkeston) Ltd and Ors. [2001] EWHC Ch 456. He is reported to have outlined the principle as follows:

"In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.

Among the factors which had to be taken into account werethe length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the

delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."

[61] The Learned Judge then identified the primary considerations as being whether the Affidavit supporting the Application contained material which was sufficiently meritorious to warrant the order sought and whether the proposed Defence has merit.

Reason for delay

[62] In the instant matter, the reason for the delay is outlined in the Affidavit of Mr. Raymond Samuels to which the Draft Defence was attached. In considering the contents of this Affidavit, the Court took note of the concerns raised by Mr. Nelson in respect of same. While it would have been far better for the Affidavit to be provided by the Defendant herself, the rules provide for an Affidavit to be provided by a 3rd party on an Interlocutory Application provided the source of the information is provided.

[63] The additional concern which arises in this instance is that Rule (p) of Canon V of the Legal Profession (Canons of Professional Ethics) Rules states:

"While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of his client, except as to merely formal matters, or when essential to the ends of justice, and if his testimony is material to the cause, he shall, wherever possible, leave the conduct of the case to another Attorney"

[64] In light of the indication that this was the only affidavit filed on the part of the defendant, I made the decision to give fair consideration to same bearing in mind the overriding objectives. While the Court is loathe to condone the practice of Affidavits being sworn to by the Attorney with conduct of a matter, in an effort to facilitate the expedient disposition of the matter, the Affidavit was allowed to stand and its contents and exhibit considered for the purpose of this hearing.

[65] The explanation which was summarised at paragraph 52(a) to (d) of this Judgment indicate that there were challenges in the taking of instructions with the Defendant

being outside of the jurisdiction. It was also indicated that some additional time had been lost due to her shock and disbelief in respect of the allegations. The instructions having been taken in May 2022, the Defence was filed on June 21st, 2022 and served on July 4th, 2022. There was no explanation provided however for the additional delay in filing the Application for an extension of time.

- [66] In assessing whether the reason advanced for the delay is a meritorious one, the guidance provided by the Court in ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes (Motion No 12/ 1999)*** and ***Jamaica Public Service Company Limited v Rose Marie Samuels Supreme Court Civil Appeal No. 25/2010, Application No 116/2010, [2010] JMCA App 23, of July 1, and November 26, 2010*** was carefully reviewed.
- [67] It is the Claimant's position that the address on record for the Defendant is the one at which she was served and they had never been informed of a change. In considering the evidence and submissions on this issue, I noted that the Defendant had taken no issue with the assertion that she had been served on the 29th of October 2021. The Acknowledgment of Service was not filed until the 17th of November 2021 which meant it was also outside the fourteen (14) days provided for in the rules.
- [68] It was also observed that in the body of the Acknowledgment of Service, the address provided was the same address in Linstead, St Catherine where she had been served. There has been no evidence provided as to when she went overseas or why the instructions could not have been provided by way of telephone calls or other means of technology in order to meet the established timelines. The indication that she was in shock and disbelief is a poor explanation for the over six (6) months delay.
- [69] In the circumstances, I find that the explanation provided falls woefully shy of the benchmark established and no good reason had been provided as to the delay in finalising and filing the Defence. The additional delay in the filing of the Application

to extend time further compounds the situation as it paints a picture of a pattern of delay.

[70] Although the Defendant has failed to successfully navigate this hurdle, the other factors highlighted by the Court in the *Fiesta* decision were nonetheless considered.

Length of delay

[71] It is not in dispute that the Claimants' documents were served on the Defendant's six (6) months and eleven (11) days before she filed a Defence. This Application was filed almost five (5) months after the Defence. I have considered whether the period which elapsed before the filing of the Defence and the Application for extension was inordinately long and sufficient to cause the Application to be refused. In *Fiesta Jamaica Limited*, a period of six (6) months had elapsed before the Application was filed. It is instructive however that the matter was not determined against the Applicant based on the lapse of time but because the reason advanced for the delay was found to be poor and the Defence lacked merit.

[72] In the instant case, while the additional delay caused by the Defendant's failure to file her Application promptly was inexcusable, I do not believe that the period which elapsed was so protracted and/or so egregious to justify a refusal of the orders sought.

Merit of the Defence

[73] Consideration was then given to the contents of the Affidavit of Merit and specifically, the Draft Defence attached. In this Defence, issue is joined with the Claimants' allegation that a fraud was committed against the estate of Mr. Douglas to the prejudice of his Beneficiary. The Defendant outlined that she shared familial ties with Mr. Douglas as he had been married to her late sister. She asserted further that he had been involved in an accident which had resulted in him being hospitalized. His injury had resulted in his need for a Caregiver and this was how

he came to reside with her as he had no one at home to assist. The Defendant further asserted that no objection was raised to these arrangements by any of his relatives and none of them visited him.

[74] It was also stated that in 2018, Mr. Douglas filed a Lost Title Application and had the documents prepared for a love and affection transfer of his property to her for which the Title was issued on the 28th of May 2019. (The Title states 26th of May 2020). She denied being involved in any fraudulent conduct in respect of the subject property and asserted that Mr. Douglas made the arrangements and filed the paperwork to effect transfer in her absence as he attended on his Attorney without her.

[75] Although the Defence was served on the 4th of July 2022, its contents were not specifically addressed by the Claimants as their contention is that Judgment should be entered in keeping with Rule 12.5. The situation is not that cut and dried however as the Application for an Extension requires that the merit of the Defence be considered.

[76] In analysing whether the Defence raised meets the threshold of a real prospect of success, the relevant legal principles enunciated in the authorities cited were reviewed. It is well established that even in the face of a poor explanation and lengthy period of delay, if the Defendant can satisfy the Court that the Defence meets the required standard, the matter can proceed to trial. In my consideration of this issue, I am mindful of the fact that the Court should not engage in a mini-trial and should only consider the evidence available at this time.

[77] On consideration of the pleadings, submissions and authorities on this point, the Court observed that the pleadings filed by the Claimants contain a Medical Certificate prepared by Dr. EW Lowe dated December 11th, 2017, which states that Mr. Douglas suffered from Alzheimer's Disease and Hypertension. It is on this basis that they assert that he was non-compos mentis and could not have signed the transfer. In considering the competing positions on this matter, I note that the

document does not provide any details as to whom it was addressed and the purpose for which it was prepared. Neither does it say for what period Mr. Douglas had been the patient of Dr. Lowe. There is also no indication as to whether he would or could have had lucid moments or was wholly incapable of giving instructions or preparing documents such as those alleged by the Defendant.

[78] There was also some concern as to the absence of a Death Certificate for Mr. Douglas as while the Court is aware of the date of Ms. Fuller's passing, there was no evidence provided on either side as to the date of his passing and whether Ms. Fuller had survived him or passed before him. With the gaps identified in the Claimant's case and the unchallenged assertions by the Defendant, at this stage, I am unable to conclude that the Defence has no real prospect of success if the matter were to proceed to trial.

Prejudice to the other Party

[79] It is evident that the delay has occasioned some prejudice to the Claimant as the failure to file a Defence would have pushed back the Case Management Conference and ultimately the scheduling of the matter for trial. In respect of any prejudice which may be suffered by the Defendant, the Court having found that the Defence has a real prospect of success, she would also suffer great prejudice if she were not afforded the opportunity to present her Defence at trial. In the circumstances, given that the Defendant has created the challenges identified, the justice of the case requires that the Claimant be compensated in costs.

Effect of the Delay on Public Administration

[80] In assessing the effect of the delay on public administration, the Court finds that any failure of a party to comply with timelines does have the undesirable result of rendering hearing dates ineffective and push matters further into the future and the Defendant would need to be penalised by costs being awarded against her for same.

Conclusion

[81] In reviewing the Claimant's Application, while it is agreed that the Claimants had done all that is required under the rules to apply for this order, the Court having found that the delay was not inordinate, the prejudice occasioned can be addressed with costs and importantly that there is merit in the Defence, the Court would be constrained to refuse the Claimant's Application for Default Judgment.

Disposition

[82] In conclusion, the orders of the Court are as follows:

1. The Claimants' Application for Default Judgment is refused.
2. The Defendant's Application for Extension of Time to file Defence is granted. The Defence filed on June 21st, 2022 and served on July 4th, 2022 is permitted to stand.
3. Costs awarded to the Claimant to be taxed if not agreed.
4. The Claimant's Attorney to prepare, file and serve the Formal Order herein.
5. A Case Management Conference is scheduled for the 13th of February 2025 at 10am for thirty (30) minutes.