



[2021] JMSC Civ 25

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU 2019 CV 04800**

**IN THE MATTER** of all that parcel of land registered at Volume 1293 Folio 435 of the Register Book of Titles

AND

**IN THE MATTER** of the Registration of Titles Act

<b>BETWEEN</b>	<b>VICKY GOUGH</b>	<b>1<sup>ST</sup> CLAIMANT/RESPONDENT</b>
<b>AND</b>	<b>VARRION FALCONER</b>	<b>2<sup>ND</sup> CLAIMANT/RESPONDENT</b>
<b>AND</b>	<b>NATOYA PETERKIN</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mr. Raymond Samuels instructed by Samuels Samuels, Attorneys-at-Law for the Defendant/Applicant.**

**Danielle Reid instructed by DunnCox, Attorneys-at-Law for Claimants/Respondents.**

**Heard: 11<sup>th</sup> January and 12<sup>th</sup> February, 2021.**

**Civil Procedure - Application for relief from sanctions - Unless Order against litigant in person.**

**C. BARNABY, J**

[1] This is an application by the Defendant/Applicant for relief from sanctions. It was filed on the 23<sup>rd</sup> July 2020 and is supported by the unchallenged Affidavit in Support of Notice of Application for Court Orders sworn to by the Defendant and filed on the 22<sup>nd</sup> and 23<sup>rd</sup> July 2020 respectively.

- [2] The hearing of the application commenced pursuant to Rule 26.7(2) of the Civil Procedure Rules (“the CPR”), in the absence of the Applicant or her Counsel, the latter of whom joined the hearing almost at the close of submissions by Counsel for the Respondents. The Respondent’s oral submissions were consistent with those contained in the Judge’s Bundle of Documents filed on the 8<sup>th</sup> January 2021.
- [3] Having exceeded the time allotted for the hearing of the application, a decision on the application for relief from sanctions was reserved to today’s date.
- [4] After considering the application and the submissions in opposition to its grant, for reasons which appear below, the application for relief from sanctions is granted.

## **REASONS**

- [5] The substantive claim concerns property registered in the name of the Claimants and their father, the now deceased Osbourne Falconer and is brought by way of a Fixed Date Claim Form filed 2<sup>nd</sup> December 2019. The Claimants allege that the Defendant was employed as the latter’s caretaker before his death and that the Defendant, pursuant to that engagement was permitted to live with him at the property. The Defendant continues to reside there even after Mr. Falconer’s death and the Claimants seek to recover possession from her.
- [6] At the first hearing of the Fixed Date Claim Form on the 17<sup>th</sup> January 2020, the Defendant appeared as a litigant in person. The Claimants were represented by their Attorneys-at-Law. On that occasion Hutchinson, J. (Ag.) (as she then was), ordered an adjournment of the first hearing to enable the Defendant to file and serve an affidavit in response to the claim on or before 27<sup>th</sup> March 2020. It was further ordered that if the Defendant failed to comply, orders were to be made in the terms sought in the Fixed Date Claim Form. There was no written application for an Unless Order so it appears that it was made on the court’s own initiative.

- [7] The Defendant did not file her affidavit until the 16<sup>th</sup> July 2020, almost four (4) months after the period limited by the Court. On the said date, a Notice of Change of Attorney was filed indicating that the Defendant was being represented by Attorneys-at-Law, Samuels Samuels.
- [8] At the adjourned first hearing on the 21<sup>st</sup> July 2020, Thomas, J. ordered the Defendant's statement of case struck out for failure to comply with the orders of Hutchinson, J. (Ag.) made on 17<sup>th</sup> January 2020; and directed Counsel for the Claimants to file an application to have judgment entered.
- [9] On the 23<sup>rd</sup> July 2020, the Defendant filed her application for relief from sanction. I am advised, from the Judge's Bundle of Documents filed for the hearing, that the Defendant filed an Amended Notice of Application for Judgment to be entered in favour of the Claimants on the 6<sup>th</sup> January 2021. The initial application was not included in the bundle.

*The court's power to entertain the request for relief*

- [10] It was submitted by Counsel for the Claimants that the order of Thomas J remains undisturbed and that this court, which is of concurrent jurisdiction, is without power to correct it. Counsel went further to state that the Defendant ought properly to have appealed against the said order striking out her statement of case. I am unable to agree with the submission.
- [11] Justice Hutchinson (Ag) ordered the Defendant to file an affidavit in response to the claim by a specified date and went further to direct that if she failed to comply, orders were to be made in the terms sought on the Fixed Date Claim Form. This would entitle the Claimants to judgment without a trial. While the learned Judge did not say that the Defendant's statement of case would stand struck out for failure to comply, that is the practical effect of the sanction imposed by the Judge's order. Further, it is explicitly stated by Thomas, J. that the Defendant's statement of case was struck out for her failure to comply with the order of Hutchinson, J. made on the 17<sup>th</sup> January 2020. In these circumstances it is entirely appropriate that the Defendant invokes the power reserved to the court, and a judge exercising concurrent jurisdiction, by making an application for relief from sanction.

Whether the unless order was irregularly obtained

- [12] In grounds 1 and 2 of her application for relief from sanctions, the Defendant contends that there was no affidavit evidence to support an application for an Unless Order as required by CPR 26.4(2), which rendered the order irregular, and susceptible to being set aside upon an application to the court. I believe reliance on CPR 26.4(2) is misplaced and am unable to conclude that the order of Hutchinson, J. to which the application relates, was irregularly obtained.
- [13] The rule urged permits a party to make an application for an “unless order” where another party fails to comply with any rule or court order for which no sanction for non-compliance is imposed. While such an application can be made without notice, it must be supported by evidence on affidavit. A sanction was in fact imposed by Hutchinson, J. The Defendant was shut out from defending the claim if she did not file and serve her affidavit evidence in the time limited, enabling the Claimants to obtain judgment on their claim. The rule is therefore inapplicable.
- [14] The foregoing notwithstanding, the court, except where provided otherwise by a rule or other enactment, may exercise powers on its own initiative. Where it proposes to do so however, any party who is likely to be affected should be given a reasonable opportunity to make representations, by such means as the court considers reasonable. This is required by CPR 26.2.
- [15] It is the Defendant’s evidence that she attended the first hearing of the Fixed Date Claim Form before Hutchinson, J. as a litigant in person because she was not in a position to engage an Attorney-at-Law. She goes further and avers that Counsel for the Claimants had advised the Judge that she had filed nothing in the claim and that her case should be struck out for having failed to answer to any of the documents served on her. The Defendant had filed but had not served an Acknowledgment of Service. She said she showed the Judge a picture of what she had filed and the Judge advised Counsel for the Claimants that she could not entertain the application to strike out. The

Defendant was ordered to file an affidavit in response and try to obtain legal representation.

- [16] A duly filed Acknowledgement of Service is observed on the Court's file. It was received at the Registry on 17<sup>th</sup> December 2019, the claim having been served on the Defendant on the 6<sup>th</sup> December 2019. It was filed by the Defendant in person. Attached to that document is a completed copy of the form of Defence and Counter Claim which were served upon the Defendant. Among other things, she asserts that she has a right to occupy the property, that she had contributed to its improvement and that the transfer pursuant to which the Claimant's claim they are the registered owners of the property was dishonestly procured.
- [17] It is the Defendant's further evidence that while she remembered that she should have filed documents by 27<sup>th</sup> March 2020, even though she had already filed her defence as a litigant in person, she did not fully understand the orders which had been made by Justice Hutchinson and the consequences of them. She does not say that she indicated her lack of understanding to the Judge; nor is it contended that no attempt was made to explain the orders to her or that she was not permitted to make representation to the court about the orders which were eventually made.
- [18] While I am of the view that it was open to Justice Hutchinson to allow the Defendant time to seek legal representation ahead of her unless order, I am reluctant to say that no reasonable opportunity to make representations was afforded to the Defendant. Other than the Defendant's evidence, there is no other evidence of the exchange between the Court, Counsel and the Defendant at the first hearing of the Fixed Date Claim Form.
- [19] In these circumstances, I cannot say that the order was irregularly obtained and should be set aside as contended in the grounds of the Defendant's application. I therefore proceed to consider the merits of the application for relief from sanction.

Promptitude in making application and Reasons for delay

- [20] An application for relief from any sanction imposed for failure to comply with a rule, order or direction of the court must be made promptly: CPR 26.8(1). The authorities, including the oft cited **HB Ramsay & Associates Ltd. and Ors. v Jamaica Redevelopment Inc. and Anor.** [2013] JMCA Civ 1, on which the Claimants rely in opposing the application, makes clear that the word “promptly” has a measure of flexibility in its application and is dependent upon the circumstances of the particular case.
- [21] In addition to a promptly made application, a party who applies for relief from sanction must also satisfy the court that she has a good explanation for the failure to comply, as mandated by CPR 26.8 (2) (b). Both requirements can conveniently be dealt with together on account that I find them satisfied on the same evidence.
- [22] It is submitted by Counsel for the Claimants that the Defendant’s application for relief from sanctions which was made almost four (4) months to the day that the sanction took effect, and two (2) days after the adjourned First Hearing of the Fixed Date Claim Form on the 21<sup>st</sup> July 2020 was not promptly made. On the facts of this case, I do not agree with that assessment.
- [23] The Defendant was unrepresented on the first occasion that the matter was before the court and it is her evidence that she did not understand all the orders which were made by the court, or the consequences of them. The time for complying with the order for the filing of an affidavit was the 27<sup>th</sup> March 2020. It is the Defendant’s evidence that she did recall that date and attended the Supreme Court to file her affidavit as directed but discovered, on her arrival that the court was closed. She said she was so advised by a worker she saw exiting the court building who had also looked at the documents she intended to file and indicated they were not properly prepared. The Defendant was urged to seek the assistance of an Attorney-at-Law. She asked where she could go for such assistance and was advised that she could walk along Duke Street. The offices were closed however because of the Covid-19 pandemic and the Defendant returned home to St. Elizabeth.

- [24]** The Defendant says that she was unable to return to Kingston because of the pandemic and the restrictions imposed on travel, but had made enquires in respect of legal services in St. Elizabeth. It is her evidence that she was unable to afford the sums required to access those services. She also became unwell.
- [25]** In June of 2020 when the restrictions had abated, she returned to Kingston and was able to meet with her now Attorneys-at-Law and advised to leave her documents for review. Later in the said month, she returned and was interviewed and a statement taken from her. She was advised by telephone on the 15<sup>th</sup> July 2020 to attend at the office of her Attorneys-at-Law on the following day to sign her affidavit and she did so. The Defendant's affidavit in response to the claim was sworn and filed on the 16<sup>th</sup> July 2020, and served on the Claimants. A Notice of Change of Attorney was also filed on the said date.
- [26]** The Claimant's Attorneys-at-Law wrote to the Defendant's Attorneys-at-Law thereafter, enclosing the Formal Order of Hutchinson, J. On the 20<sup>th</sup> July 2020, Counsel for the Defendant called the Defendant to advise of receipt of the correspondence and its contents and explained the effect of the orders made.
- [27]** I take judicial notice of the fact that like much of the world, the declaration of the Covid-19 pandemic in mid-March 2020 brought with it panic and great uncertainty to our shore. On the 27<sup>th</sup> March 2020 when the Defendant was required to file her affidavit in accordance with the order of the court, many measures were being announced and steps taken to control the spread of the virus across the island. Many services were scaled back, access to buildings restricted and persons encouraged, where possible, to work from home. The courts were no exception to the national effort. The Defendant's delay in filing her affidavit in response to the claim before the 16<sup>th</sup> July 2020 is therefore understandable.
- [28]** The application for relief from sanctions was not made until the 23<sup>rd</sup> July 2020 however, some two (2) days after the adjourned first hearing of the Fixed Date

Claim Form. I accept the Defendant's evidence that she did not understand all the orders made when she appeared as a litigant in person or the consequences of the them. When she was able to secure the services of her Attorneys-at-Law, she left with them such documents that she had, which did not include a copy of the Formal Order, although the Claimant's Attorneys-at-Law were directed to prepare, file and serve the same. That order was only served on the Defendant's Attorneys-at-Law after the Claimants were served with the Defendant's affidavit in response to the claim.

**[29]** While the failure of one party to serve an order does not usually assist a non-compliant party who was present when the order was made, in light of the fact that the Defendant was unrepresented; an order for sanction had been made; and the Defendant was encouraged by the court to seek the assistance of an Attorney-at-Law, the Formal Order ought to have been served before it was. Had that been done, it could have been brought to the attention of the Defendant's Attorneys-at-Law, who would then have been in a position, prior to the 16<sup>th</sup> of July 2020, to appreciate the urgency of the situation, advise the Defendant, and perhaps make an application for relief from sanctions ahead of the adjourned hearing before Thomas, J. on the 21<sup>st</sup> July 2020.

**[30]** In all these circumstances I find that the application for relief from sanction was promptly made and that the Defendant has offered a good explanation for the failure to comply with the order of the court relative to the filing and service of her affidavit evidence.

*Failure to comply was not intentional and General history relative to compliance*

**[31]** In addition to a good explanation for the failure to comply, the court may only grant relief if it is also satisfied that the failure to comply was not intentional and the defaulting party has generally been compliant with all relevant rules, practice directions and orders: CPR 26.8 (2) (a) and (c). It is submitted on behalf of the Claimants that the Defendant has not satisfied these additional requirements. I do not agree.

**[32]** I find, as indicated by the Defendant in her affidavit in support of the application, that her failure to comply with the order of the court was not

intentional, and that notwithstanding the relatively brief history of the claim, she has been generally compliant as required by CPR 26.8 (2) (a) and (c) respectively, in the circumstances appearing below.

- [33]** The claim form was served on the Defendant on the 6<sup>th</sup> December 2019 and though unrepresented, she completed and filed an Acknowledgment of Service days later on the 17<sup>th</sup> December 2019. She indicated her intention to defend the claim and completed and attached the form of Defence and Counter Claim in that regard. She was present at the first hearing of the Fixed Date Claim Form as a litigant in person. Her evidence, which I accept, is that she made the effort to comply but was hampered by the Covid-19 pandemic. There is nothing in the Defendant's conduct in these proceedings which suggests that the failure to comply with the court's order was intentional.
- [34]** Other than her failure to comply with the order to file her affidavit in response to the claim, for which I have found there was a good explanation, the Claimants also rely on the Defendant's failure to send a copy of an Acknowledgement of Service to them as required by CPR 9.2 (1).
- [35]** The Defendant readily admits to the latter failure but says no one told her she had to serve the document on the Claimant. That failure is not fatal as the Defendant, in addition to entering an appearance by her filing also submitted to the jurisdiction of the court by appearing at the first hearing of the Fixed Date Claim Form in person. I am satisfied that her failure to send a copy of the Acknowledgment of Service to which her Defence and Counter Claim were attached was due to her ignorance of the court's procedural rules.
- [36]** I note that while the Acknowledgement of Service Form warns the party on whom a claim form is served to complete and return it to the registry at a stated address with fourteen (14) days of service, it does not direct that a copy be sent to the claimant or his Attorney-at-Law. A litigant in person, unless she goes through the provisions of the CPR, is unlikely to know of this additional requirement.

- [37] Additionally, a defendant who intends to defend the claim is given the option of filing a Defence or Affidavit in answer on the form of Acknowledgment of Service. The Defendant, in addition to so indicating, completed the form of defence and counter-claim, which are attached to the Acknowledgment of Service of Fixed Date Claim Form filed by her on the 17<sup>th</sup> December 2019.
- [38] Perhaps the time has come for the warnings in the Acknowledgment of Service Form to be expanded to direct the service of the completed form on the claimant or his Attorney-at-Law; as well as any defence or affidavit in answer to the claim so that litigants in person in particular, could have that important assistance.
- [39] Although the Defendant did not comply with the order of the court to file an affidavit in the prescribed time, I find that she has been generally compliant with all relevant rules and practice directions.

Other considerations

- [40] Where the court is minded to grant the application for relief, it must have regard to the factors listed at CPR 26.8(3) which are,
- (a) the interests of the administration of justice;*
  - (b) whether the failure to comply was due to the party or that party's attorney-at-law;*
  - (c) whether the failure to comply has been or can be remedied within a reasonable time;*
  - (d) whether the trial date or any likely trial date can still be met if relief is granted; and*
  - (e) the effect which the granting of relief or not would have on each party.*
- [41] The consideration of these matters recommend that I exercise the power reserved to me to grant the Defendant's application for relief from sanction.

**[42]** Although the Defendant failed to comply with the order of the court, the default was in fact remedied within a reasonable time, before the adjourned First Hearing of the Fixed Date Claim Form on the 21<sup>st</sup> July 2020, in circumstances where no trial date has been fixed. While the Claimants would no doubt be deprived of having judgment entered in their favour without need for a trial, it would be more prejudicial to the Defendant to be shut out from defending the claim on the merits in the particular circumstances of this case. I therefore believe that it is in the interest of the administration of justice that the relief is granted to enable the Defendant to pursue her defence against the Claimants, which, among other things, alleges fraud and a claim of entitlement to property by operation of rules of equity.

## **ORDER**

**[43]** It is ordered as follows:

1. The Defendant's application for relief from sanctions is granted.
2. The Affidavit of Natoya Peterkin in Response to the Affidavit of Vicky Gough and Varrion Falconer in support of Fixed Date Claim Form, sworn and filed on the 16<sup>th</sup> July 2020, and which has been served on the Claimants, is permitted to stand as duly filed and served.
3. The Fixed Date Claim Form is to proceed to a First Hearing.
4. No order as to costs.
5. Defendant's Attorneys-at-Law are to prepare file and serve this order.

**Carole Barnaby  
Puisne Judge**