



[2026] JMSC Civ 81

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 03600

BETWEEN	ERROL GREEN	CLAIMANT
AND	EVANS BRYAN	1ST DEFENDANT
AND	PATSIE GUTZMORE	2ND DEFENDANT

Consolidated with

CLAIM NO. SU 2019 CV 03700

BETWEEN	PATSIE KAMEKA (NEE) GUTZMORE	CLAIMANT
AND	ERROL GREEN	1ST DEFENDANT
AND	UNKNOWN OCCUPIERS	2ND DEFENDANT

IN CHAMBERS, VIA VIDEO CONFERENCE

Leonard Green instructed by Chen, Green & Co attorney-at-law for the claimant/applicant (Patsie Kameka) in Claim No. SU2019CV03700 (2nd defendant in Claim No. 2009HCV03600) – Written submissions

Marc Williams and Stevie Spence instructed by Williams, McKoy and Palmer for the 1st defendant/respondent (Errol Green) in Claim No. 2019HCV03700 (Claimant in Claim No. 2009HCV03600) – Written submissions

Heard: May 14, 2025, August 31, 2025 and June 26, 2026

Civil Procedure – Notice of application to set aside order – Order made at hearing of Fixed Date Claim Form in absence of party – Is the order of the Honourable Mr. Justice Brooks a default judgment – Has the applicant satisfied the conditions of rule 39.6 of the CPR, which empowers a court to set aside an order made in party’s absence – Whether application made within fourteen days of the date the judgment or order was served on the applicant – Good reason for failing to attend hearing – It is likely that had the applicant attended some other judgment or order might have been given or made – Rules 12.2, 13.3 and 39.6 of the Civil Procedure Rules – Interlocutory Application

Anderson, K. J.

BACKGROUND TO THE APPLICATION

[1] This matter pertains to an interlocutory application to set aside an order of Mr. Justice Brooks (as he then was) made on the 26th day of July, 2011, only with respect to the claim in HCV 3600 of 2009. On the said date, the parties attended a hearing of the Fixed Date Claim Form that was filed in the 2009 claim by the claimant, Errol Green, who sought to have the probated Will of the deceased, Suzie Giutzmore revoked and to have the Will of the 3rd of June, 1997 established as the true last Will and testament of the deceased - Suzie Gutzmore.

[2] Counsel for the claimant filed a notice of application for court orders in April 2010, seeking permission to have the Fixed Date Claim Form and supporting documents served on the second defendant, Patsy Kameka (nee) Gutzmore outside of the jurisdiction, and

that personal service on the second defendant be dispensed with, service be effected by substituted service by way of publication, and by insertions in the Weekly Gleaner. The notice of application for court orders was supported by affidavit evidence of Carol Marcia Vassall.

[3] The learned judge granted the notice of application for court orders, permitting the claimant to serve the fixed date claim form and particulars of claim, and all subsequent necessary documents on the 2nd defendant/applicant outside the jurisdiction and by way of publication.

THE 2019 CLAIM

[4] In 2019, the 2nd defendant, Patsie Kameka (nee) Gutzmore filed a Fixed Date Claim Form seeking to recover possession of disputed land between the parties located in Mount Providence, St. Mary. The disputed land was previously owned by the deceased, Suzie Alice Gutzmore, who the claimant contended was her aunt, much to the denial of the respondent to the claim, Errol Green. The claimant, however contended she was the new owner of the property and served notice to quit on the occupiers on or about July 30, 2017. The 1st and 2nd defendants continue to occupy the premises. The claim was supported by affidavit evidence of Timothy George Burton, acting for and on behalf of the claimant under Power of Attorney.

[5] The 1st defendant, Errol Green filed an affidavit in response to the claim, contending that he is the sole beneficiary in the last Will and testament of the late, Suzie Alice Gutzmore. The 1st defendant's evidence is that the purported will of the late, Suzie Alice Gutzmore, probated on June 18, 2003 to Executor, Evans Uriah Bryan, was not in fact the true Will and testament of the deceased. As a result, the claimant should not be entitled to possession of the parcel of land located in Mount Providence, St. Mary as he is not in trespass of said land.

BROOKS J.'S ORDER

[6] At the hearing of the Fixed Date Claim Form, in respect of the 2019 claim, the 1st defendant sought to rely on the order made by Mr. Justice Brooks (as he then was) on the 26th day of July, 2011. The orders of the learned Justice Brooks are as follows:

- (i) Subject to the Claimant filing an Affidavit exhibiting a certified copy of the Certificate of Title registered at Volume 518 Folio 53 of the Register Book of Titles which demonstrates that Suzie Alice Gutzmore is registered as proprietor of the lands comprised therein, the Probate granted on the 18th day of July 2003 in the Estate Susie Alice Gutzmore deceased is hereby revoked;*
- (ii) The defendants shall return the grant of Probate to the Supreme Court within Fourteen (14) days of notice of this Order coming to their attention;*
- (iii) Permission is hereby granted for an application to be made [to prove] the paper writing dated 3rd June 1997 as the Last Will and Testament of Suzie Gutzmore of Castleton P.O., Content District, in the parish of Saint Mary, deceased;*
- (iv) The costs of the claim shall be paid from the estate of the late Suzie Gutzmore;*
- (v) This Order shall be advertised in the Weekly Gleaner (N.A.) Edition on Two (2) occasions seven (7) days apart. ’*

THE NOTICE OF APPLICATION TO SET ASIDE ORDER

[7] The 2nd defendant, Patsie Kameka (nee) Gutzmore (2009 claim) sought to set aside the order of Brooks J. (as he then was) by filing a notice of application to set aside order, on January 18, 2022, almost eleven years after Brooks J. granted the order. The

application was supported by affidavit evidence of the 2nd defendant/applicant in claim no HCV 3600 of 2009.

[8] The application was made pursuant to **rules 12.2, 13.3 and 39.6** of the **Civil Procedure Rules (CPR)**. The application seeks the following orders:

1. *That the Order of The Honourable Mr. Justice Brooks upon the Fixed Date Claim Form in Claim No. HCV 3600 of 2009 dated 26th day of July, 2011 filed August 14, 2017 against the Defendants be set aside.*
2. *The Claimant be ordered to serve the Fixed Date Claim Form and Affidavit in Support and/or Particulars of Claim and Notice(s) of Application for Court Orders and Affidavits in Support of the Notice(s) of Application for Court Orders, if any, filed in Claim No. HCV 3600 of 2009 on the 2nd Defendant.*
3. *The 2nd Defendant be granted further and other relief which the Court considers just and appropriate including leave to file an Affidavit in Response if the Court deems it necessary herein within fourteen (14) days from the date of this order.*
4. *Such consequential orders as this Honourable Court deems just. ’*

[9] The grounds of the application are set out in the notice of application for court orders. The grounds are hinged upon the argument that the 2nd defendant/applicant has a real prospect of successfully defending the claim and that she has a good explanation for failing to attend the hearing of the notice of application for court orders and fixed date claim form. The 2nd defendant/applicant maintains that she resides in Germany, therefore any local notice would not have been brought to her attention. The 2nd defendant/applicant wishes to defend the claim. The 2nd defendant/applicant further argued that the order was

irregularly maintained pursuant to **rule 12.2(a)**, as the claimant cannot obtain default judgment where the claim is a fixed date claim form. The 2nd defendant/applicant argued that she was never served with the original statement of case or any subsequent process in the matter. The 2009 proceedings were only brought to the 2nd defendant's/applicant's attention as a result of affidavit evidence in the 2019 claim. The 2nd defendant/applicant argued that had she participated in the proceedings, it would have likely resulted in a different order. If the 2nd defendant/applicant is not allowed to defend this claim, she will be severely prejudiced. Therefore, the orders sought by the 2nd defendant/applicant are necessary to dispose fairly with the claim.

[10] The affidavit evidence in support of the application was sworn to by Patsie Kameka (nee) Gutzmore, the said 2nd defendant/applicant in the 2009 claim.

[11] The 2nd defendant/applicant swore that she is the beneficiary of **ALL THAT** parcel of land part of Mount Providence in the parish of Saint Mary registered at Volume 518 Folio 53 of the Register Book of Titles by virtue of the last will and testament of her late aunt, Susie Alice Gutzmore, who died on February 14, 1998.

[12] The 2nd defendant/applicant swore that the will of her late aunt was probated on July 18, 2003. Thereafter, she proceeded to take steps to have the property secured. The 2nd defendant/applicant swore that she had spoken to the claimant, Errol Green on many occasions about his leaving the property and he was fully aware that the property was left to her by will of the late aunt. The 2nd defendant/applicant swore that she became aware that the claimant, Errol Green filed a claim against her and the deceased executor, Evans Uriah Bryan through his attorney, Carol M. Vassall in 2009.

[13] The 2nd defendant/applicant swore that her late aunt, Susie Alice Gutzmore did not make a will subsequent to the one made in July 24, 1995. The 2nd defendant/applicant swore that even though she notified the claimant, Errol Green of the grant of probate in 2003, he took no action until 2009. Even then, the claimant made no effort to serve the 2nd defendant/applicant with any papers in his claim up until the timing of her making her present affidavit.

[14] The 2nd defendant/applicant swore that she became aware that there was an order made by the Honourable Mr. Justice Brooks on the 26th day of July, 2011, through her attorneys sometime in 2020. There is and can be no dispute though, that the relevant application of the 2nd defendant was not filed in January of 2022, that being of course, approximately two years since 2020. Prior to 2020, the 2nd defendant/applicant swore that she was not served with any documents by the claimant. The method of service that had been used to notify the 2nd defendant/applicant in the claim, which was by publication in the Jamaica Gleaner, North American edition, would not have come to her attention, since there was no evidence that the publication was circulated in Germany, where she has resided for the past forty (40) years.

ISSUES

[15] The legal issues that arise for consideration in respect of the application are:

- i. Is the order of the Honourable Mr. Justice Brooks a default judgment.
- ii. Is **rule 39.6** of the CPR applicable
- iii. If **rule 39.6** of the CPR is applicable, has the applicant satisfied the conditions of same

[16] I have considered and taken into account submissions, arguments and authorities provided by counsel for both the claimant and the respondent, and their relevance in support of their positions in the determination of this application. To the extent that any of same is/are not herein referred to, such is not meant to convey any form of disrespect to counsel, but is so, merely for the sake of brevity.

DEFAULT JUDGMENT

The Law

[17] The 2nd defendant's/applicant's notice of application for court order was made pursuant to **rules 12.2, 13.3** and **36.9** of the CPR. In order to determine the relevance and applicability of these rules, the relevant provisions must first be considered in entirety.

[18] **Rule 12.2** of the **CPR** refers to claims where default judgment may not be obtained. **Rule 12.2** provides that:

' 12.2 A claimant may not obtain default judgment where the claim –

(a) is a fixed claim;

(b) is an admiralty claim in rem; or

(c) a claim in probate proceedings '

[19] **Rule 13.3** of the **CPR** refers to cases where the court may set aside or vary default judgment. **Rule 13.3** provides that:

' 13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it. '

Non-applicability of Rules 12.2 and 13.3 CPR

[20] The 2nd defendant/applicant in her notice of application for court orders stated that the application is made pursuant to **rules 12.2, 13.3 and 39.6** of the **CPR**.

[21] Upon reading the relevant provisions of **rules 12.2 and 13.3** of the **CPR**, it is this court's view that these rules do not apply to the present application. Rules **12.2** and **13.3** make specific reference to default judgments. The order on fixed date claim form of the Honourable Mr Justice Brooks dated the 26th day of July, 2011 is not considered a default judgment, since under the **CPR**, default judgments cannot be obtained for fixed date claim forms. Actually, **rule 12.2(a)** of the **CPR**, specifically so provides.

SETTING ASIDE AN ORDER PURSUANT TO RULE 39.6 OF THE CPR

[22] An order upon fixed date claim form may either be appealed in accordance with the **Court of Appeal Rules (CAR)** or be the subject of an application to set it aside. An application to set aside an order upon fixed date claim form is to be made pursuant to **rule 39.6** of the **CPR**, which requires the applicant to show a good reason for failing to attend the hearing, and that it is likely that had the applicant attended, some other judgment or order might have been made.

[23] Counsel for the 2nd defendant/applicant submitted that **rules 39.5 and 39.6** of the **CPR** apply to this application. Counsel argued that **rules 39.5 and 39.6** govern the consequences for and relief available to a party if an order is made in their absence. Counsel relied on the Court of Appeal in **Morris Astley v The Attorney General of Jamaica and The Board of Management of the Thompson Town High School** [2012] JMCA Civ 64. Morrison JA (as he then was) in delivering his judgment, stated at paragraph 28, that **rule 39.6(2)** of the **CPR** requires a litigant seeking to set aside a judgment or order made in his/her absence to make the application within 14 days of the date the judgment or order was served on the applicant, while **rule 39.6(3)** requires that the application be supported by an affidavit showing (a) a good reason for the failure to attend the hearing and (b) that 'it is likely that had the applicant attended some other judgment or order might have been given or made.'

[24] Morrison JA continued at paragraph 29:

*“In **Watson v Roper**, a case decided under rule 39.6, this court cited with approval (at page 8) the following statement taken from the judgment of Langrin JA in **Edwards v Robinson’s Car Mart and another** (page 6), a case decided under section 354 of the repealed Judicature (Civil Procedure Code) Act:*

“The predominant consideration 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 at 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.”

[25] I accept counsel’s submission that **rule 39.6** of the **CPR** is relevant for the purpose of the present application. Incidentally, opposing counsel did not disagree in that regard.

Requirements of Rule 39.6 of the CPR

[26] It is clear from a reading of **rule 39.6** of the **CPR** that there are three requirements an applicant must satisfy in order to have a judgment or order made in his or her absence set aside. The first requirement is that the application must be made within fourteen (14) days of the date of the service of the judgment or order. Secondly, the affidavit evidence in support of the application must show: (i) good reason for failure to attend the hearing and (ii) it is likely that some other judgment or order would have been made had the applicant attended the hearing. These requirements are conjunctive, not disjunctive and

thus if an applicant fails to meet any of these requirements, then the application under **rule 39.6**, must fail.

[27] In **Nathaniel Bennett v Sunshore Jamaica Shipping & Whyte** [2021] JMSC Civ 82. Master Orr, (Ag) noted the conditions to be satisfied in **rule 39.6** are strict and mandatory. There is no residual discretion of the judge hearing the application, as all three requirements under **rule 39.6** must be satisfied.

[28] The first condition the 2nd defendant/applicant must satisfy under **rule 39.6** relates to timing of the application. **Rule 39.6** requires that the notice of application to set aside the order was made within 14 days of the date on which the judgment or order was served on the applicant. The date of the order of Brooks J. is the 26th day of July, 2011. The notice of application to set aside that order was made on January 18, 2022, almost eleven years after the order was granted. It is clear that the notice of application to set aside order was not made promptly or within 14 days required under **rule 39.6**.

[29] The 2nd defendant/applicant gave affidavit evidence that she was never served with any documents in the 2009 claim by the claimant. She became aware of the order entered by Brooks J. (as he then was) when her attorneys advised her of this sometime in 2020. The 2nd defendant/applicant also averred that the method of service used to notify her of the claim was incapable of coming to her attention, since at the time the advertisement shown to her that was published in the Jamaica Gleaner (North American edition) without any evidence that that publication was circulated in the Republic of Germany, where the 2nd defendant has resided for the past forty (40) years and more.

Timing of the application

[30] The rules require that an application to set aside a judgment or order made in the party's absence must be made within 14 days of the date on which the judgment or order was served on the applicant. The application must therefore be made promptly.

Was the 2nd defendant/applicant served with Brooks' J. order

[31] The first question for consideration by the court is whether the 2nd defendant/applicant was served with the judgment or order of Brooks J. dated the 26th day of July, 2011. The 2nd defendant/applicant provided in her affidavit evidence that the respondent/claimant swore in his affidavit evidence that he has complied with the order of the court regarding service of the order.

[32] The first part of **rule 39.6** requires that the application must be made within 14 days of the date the judgment or order is served on the applicant. Counsel for the claimant/respondent submitted that the application must fail since the application was not made within 14 days, and there is no residual discretion of the judge. The evidence in support of the application point to the 2nd defendant's/applicant's undue delay in filing the notice of application to set aside judgment or order. The date of the judgment or order of Brooks J. (as he then was) is the 26th day of July, 2011 and the date of the notice of application to set aside the order is January 18, 2022.

[33] There is no affidavit evidence before this court from the claimant/respondent as it relates to service of the order of the court. However, the evidence before this court on behalf of the 2nd defendant/applicant is that she was not served with the order of Brooks J. within the stipulated 14 days, and therefore the application could not have been and was not made within the 14 days of the service of the judgment or order required by **rule 39.6**. Therefore, **rule 39.6(2)** of the **CPR** was not satisfied by the 2nd defendant/applicant.

Good reason for failing to attend hearing

[34] The standard and burden of proof in respect of the present application rests on the shoulders of the 2nd defendant/applicant. Since the 2nd defendant/applicant had the burden of proof resting on her shoulders, in respect of her present application, if there is absence of evidence that is required in proving the application, the 2nd defendant/applicant who has the burden of proving that she has met all the requirements of **rule 39.6** of the **CPR**, would have failed to meet that burden. That conclusion of mine, is sufficient to dispose of the application, which is now under consideration. In the circumstances, this court will not delve any further into said application, as to do so would merely be an academic exercise.

Whether some other judgment or order would have been made

[35] The court therefore finds that had the 2nd defendant/applicant been served with the documents in the claim and been notified of the hearing, and been present at the hearing, the court would have made a different order. The 2nd defendant/applicant has therefore satisfied the condition under **rule 39.6(3)**.

[36] In light of the above, this court is unable to grant the notice of application to set aside the order of the Honourable Brooks J. dated the 26th day of July, 2011.

DISPOSITION

[37] My orders therefore will now be as follows:

1. The order of the Honourable Mr. Justice Brooks upon the Fixed Date Claim Form in Claim No. HCV 3600 of 2009 dated 26th day of July, 2011 filed August 14, 2017 against the Defendants be set aside is refused;
2. Costs of the Notice of the Application to Set Aside Order, which was filed on January 18, 2022 are awarded to the respondent/claimant against the 2nd defendant/applicant and are to be taxed if not sooner agreed;
3. The respondent/claimant in Claim No. 2009 HCV 03600 shall file and serve this order.

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Hon. K. Anderson, J.