[2013] JMSC Civ 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV03027

BETWEEN	**RAY ELECTRA JOBSON – WALSH (Administrator ad litem for deceased of Gilbert Baron Jobson, deceased)**	**1ST CLAIMANT**
AND	**GILBERT JOBSON (Administrator ad litem for deceased of Gilbert Baron Jobson, deceased)**	**2NDCLAIMANT**
AND	**ADMINISTRATOR GENERAL OF JAMAICA (Administrator of the estate of Gilbert Baron Jobson, deceased)**	**1ST DEFENDANT**
AND	**BARON STEPHENS (Administrator for the estate of Rudyard Spencer, deceased)**	**2ND DEFENDANT**
AND	**EXLEY HO**	**3RD DEFENDANT**
AND	**FEDERAL INVESTORS LIMITED**	**4TH DEFENDANT**

Maurice Manning and Ayana Thomas, instructed by Nunes, Scholefield, DeLeon & Co., for the Claimants.

Ransford Braham Q.C., Jacqueline Wilcott and Stacey Salmon, instructed by Braham Legal, for the 1st and 4th Defendants.

Michael Howell and Eon Stewart, instructed by Knight, Junior & Samuels, for the 2nd Defendant.

HEARD: September 11 and 12, 2013

APPLICATION TO SET ASIDE EX PARTE ORDER – RULES 11.16 AND 11.18 OF CIVIL PROCEDURE RULES (CPR) – WHETHER ADMINISTRATOR AD LITEM WAS PROPERLY APPOINTED BY COURT – RULES 26.9 AND 26.2 OF CPR.

ANDERSON, K., J.

[1] The 1st and 4th defendants in respect of this claim have filed an application for court orders seeking by that means, to set aside the order made by the Honourable 'Ms. Justice George,' as was made on May 17, 2013. That application was filed on June 19, 2013 and is supported by one affidavit, which has been deposed to by the Administrator General for Jamaica, this being: Lona Millicent Brown. That affidavit was filed on June 19, 2013. Although the claimants have filed no affidavit evidence in response to the said application for court orders, they nonetheless, have strongly opposed the said application. They have done so by means of legal arguments which their counsel, namely: attorneys Maurice Manning and Ayana Thomas, have strongly advanced before this court. Equally, the attorneys for the 1st and 4th defendants, namely: Ransford Braham, Q.C. and Jacqueline Wilcott and Stacy Salmon, have very strongly advanced, on their clients' behalf, the reasons why they believe that their clients' application for court orders, ought to be granted by this court. The said application for court orders is also supported by the 3rd defendant, counsel for whom, not only expressed that support, but in addition, advanced arguments of their own, before this court, in support of the said application.

[2] This court has taken into account all arguments advanced both in support of the application as well as those in opposition to it. This court will not though, in these reasons for its ruling on that application, expressly refer to all of those arguments, or even in any great detail, to any of those arguments, except to the extent that this court considers doing so necessary, for the purpose of setting out herein, the reasons for its ruling. This court though, wishes to express its thanks to all of the counsel who addressed the court in respect of the said application, not only for the clarity with which they respectively advanced their clients' arguments as to same, but also, for the helpful assistance which they all provided to this court in answering questions asked of them by this court with a view to better enabling this court to resolve the legal issues in dispute, as regards the said application.

[3] The grounds for the said application for court orders, are as follows:

i) The 1st defendant, the Administrator General for Jamaica, was granted letters of administration on December 30, 1982, to administer the estate of Gilbert Baron Johnson, deceased.

ii) The Administrator General, in its capacity as administrator for the estate of Gilbert Baron Jobson, deceased, is responsible for representing the said estate in legal proceedings.

iii) Notwithstanding the Administrator General having obtained letters of administration to administer the estate of Gilbert Baron Jobson, deceased and order was made by the Honourable Ms. Justice George on May 17, 2013, appointing the claimants herein, administrators ad litem, for the said estate.

iv) The said order appointing the claimants administrators ad litem, was wrongly obtained.

[4] The 1st and 4th defendants have taken no issue with regard to the hearing before Mrs. Justice George (this being her correct marital designation), having taken place without either of them having been notified of the making of such application prior to the orders which were made by the court arising from same, having, at a later date, been served on them. To put it another way, the applicants have taken no issue with the court order which they are now seeking to have set aside, having arisen from an ex parte application for court orders. It is appropriate for them to have taken such a position, since rule 21.2 of Jamaica's civil procedure rules, makes express provision at paragraph 5 thereof (5), for the appointment of a representative claimant without notice. The order of Mrs. Justice George appointed the claimants as administrators ad litem of the estate of Gilbert Jobson, deceased. As such, in that capacity, the claimants having been so appointed by this court, are expected to represent the estate of the deceased during the pendency of court proceedings pertaining to this claim and only represent such estate for the limited purpose of pursuing this claim on behalf of the deceased's estate.

[5] This then brings sharply into focus, the precise nature of the reasons as to why the 1st and 4th defendants are now seeking to have the order of Mrs. Justice George

appointing the claimants as administrators ad litem of the deceased's estate, now set aside by another judge of the same court which granted the order in the first place. The essence of those reasons is that since it is undisputed, that the Administrator General was appointed as the administrator of the deceased's estate and thus, is possessed of lawful authority, unlimited in scope as and when granted, to perform the functions of administrator of the estate of the deceased, there now exists therefore, it is contended, a palpable incongruity between that order, which would have been obtained in separate legal proceedings, appointing the Administrator General as the administrator of the deceased's estate and thus, as an administrator thereof, without limitation being placed on the scope of that office's administrator's powers, duties and privileges, whilst performing that office's functions in that capacity, as against the order made by Mrs. Justice George appointing the claimants as administrators ad litem, solely for the purpose of representing the estate of the deceased for the limited purpose of pursuing this claim. It should be noted though, that Mrs. Justice George is to be taken as having been fully aware, prior to her order having been made, that this court had, before then, appointed the Administrator General as the administrator of the deceased's estate. She is presumed to have been so aware, since the affidavit evidence which was led in support of the claimants' application to be appointed as administrators ad litem, had expressly stated not only that such appointment had been made, but also, the date of such appointment. The alleged legal impropriety, or otherwise, of the making of the order by Mrs. Justice George appointing the claimants as administrators ad litem of the deceased's estate, for the purposes of enabling the pursuit of this claim by them, in circumstances where, on the date when the claimants were so appointed by this court, there already existed an administrator of the deceased's estate, whose office was thereby possessed of an unlimited grant of administration, is therefore at the nub of the 1st and 4th defendants' contentions as regards this particular application of theirs.

[6] This court though, for present purposes, ought not to be considered by anyone as being even capable of, much less actually functioning as, an appellate court would. That is not and cannot be this court's rule when considering whether an order made by another judge of this same court and therefore possessed of the same jurisdiction as I

have, whenever I am presiding in this court, ought to be either set aside or varied. This court though, undisputedly, is possessed of both a general power to vary or revoke any order earlier made by this court (see rule 26.1 (7) of the CPR) as well as a special power, in accordance with rule in 11.16 of the C.P.R. to set aside or vary any order made on application which was made without notice. This court considers that the applicable rule of court for the purposes of the present application, would not be the general powers of this court, to vary or revoke any earlier order made by this court, but instead, the special power to set aside or vary any order made on an application which was made without notice. The parties' counsel, it should be noted, seem to accept this, since they respectively made submissions to this court in the context of rule 11.16 of the CPR, as distinct from and indeed, without having referred at all, to rule 26.1 (7) of the CPR. Additionally, this court wishes to state, primarily for the benefit of litigants and legal practitioners generally, that rule 11.18 of the CPR, although for the most part, framed in very similar terms as rule 11.16 of the CPR, is nonetheless inapplicable to the matter at hand. This is because, as this court understands it, rule 11.18 applies only in circumstances wherein, after notice of an application has been provided, that application is later heard, in the absence of the party to whom such notice had earlier been given. Rule 11.18 will then operate, so as to permit a person who has acted in compliance with that rule, to apply to this court to set aside an earlier order of this court, which was made in that party's absence, this though, provided that notice of that application had been provided to that party. This court so concludes because firstly, it is noticeable that rule 11.17 of the CPR specifies the power of this court to proceed with the hearing of an application, notwithstanding the absence of a party on whom notice of the hearing of that application had been served, at the actual hearing of that application. Secondly, in respect of rule 11.18, unlike as with respect to rule 11.16, in order for such an application to be successful, affidavit evidence must be led, showing not only that if the applicant had been present, some other order might have been made, but also, that the applicant had a good reason for having failed to attend the hearing. No doubt, this is not at all required to be shown in circumstances wherein a party is applying to either vary or set aside an ex parte order, pursuant to rule 11.16, since it would not be necessary to do so, in circumstances wherein, no notice of the application was given.

[7] What is not in doubt and not disputed at all, is that Mrs. Justice George's order when served on the 1st and 4th defendants, did not contain any statement informing the 1st and 4th defendants of the right to make an application to set aside or vary the said order, pursuant to rule 11.16 of the CPR. It is though, accepted by the 1st and the 4th defendants' counsel, that the rule which requires that the said order contain within it, such a statement, does not, in and of itself, invalidate the service of the said order, such as to render the same a nullity. The 1st and 4th defendants do though, place significant reliance on the failure of the claimants when having served the relevant order, having failed to comply with the rules of the court in terms of having that statement within same, as being a discretionary factor which must be considered by this court, bearing in mind that this present application for court orders, was also, on the part of the applicants, non-compliant with the applicable rules of court as regards the time period within which, after service of the same, the application 'must' be made. Quite rightly too, although the applicable rule is framed in mandatory terms, counsel for the claimants has not at all contended that the failure on the part of the 1st and 4th defendants, to have filed this application within the required 14 day period post-service of the court's order on them, has invalidated this application.

[8] This court accepts that it does not automatically follow that failure to comply with any of the mandatorily expressed rules of court comprised within rules 11.16 and 11.18 of the CPR, renders any court proceeding carried out in a manner which is non-compliant, as being invalid, or a nullity. Rule 26.1(8) of the CPR makes it clear that this cannot be so. That rule provides that – '*In special circumstances on the application of a party the court may dispense with compliance with any of these rules*.'

[9] There is no doubt that in respect of the present application, not only did the claimants fail to comply with the rule of court as regards the 'statement' to be included within the order, informing the respondent of the right to make an application under rule 11.16 of the CPR, but insofar as failure to comply with applicable rules of court is concerned, the 1st and 4th defendants failed to file this application within the required 14

day period, post-service of the order of Mrs. Justice George, upon them, via their counsel.

[10] This court can though, upon application of a party and 'in special circumstances' waive non-compliance with any rule of court. Indeed, by virtue of rule 26.9(3) of the CPR this court may make an order to put matters right. As such, the 1st and 4th defendants contend that although their application was indeed filed out of time, it should be deemed as having been validly filed, insofar as the requisite 'statement' was not contained within the court's order.

[11] This court therefore, does have certain discretionary powers available to it, which can regularize the irregularity which has occurred insofar as the date of filing of the present application is concerned. For the record, it should be noted that the present application was filed on June 19, 2013 and by virtue of certain deeming provisions that exist in Jamaica's rules of court, since the relevant order was, according to what this court has been informed of by the claimants' counsel, served at sometime after 5 p.m. on May 17, 2013, on the office of the 1st defendant, to be thus taken as having been duly served on May 20, 2013. As such, this court concludes that this application has been filed at least two weeks (14 days) out of time.

[12] The aforementioned discretionary powers are buttressed in respect of the present application, by rule 26.1(2) (c) of the CPR, which provides that:

> *'Except where these rules provide otherwise, the court may 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.'*

[13] Notwithstanding the existence of all of these discretionary powers though, this court cannot and should not be expected to exercise its discretionary powers in a vacuum. That would be capricious and not enure to the interests of justice. Indeed, it would be anathema to the interests of justice, if this court were to do so.

[14] The 1st and 4th defendants' counsel, in respect of his clients' application, did not, it should be noted, ever so much as even apply for an extension of time. This was a point which was raised by counsel for the claimants, in response to the applicants' oral submissions. In any event, if this court is, 'to make an order to put matters right,' arising from the late filing by the 1st and 4th defendants, of their application, this court must firstly, give consideration to any reason offered as to why that application was filed out of time. The late filing by the 1st and 4th defendants, of their present application, cannot solely be deemed by this court as having arisen as a consequence of the failure of the claimants to have complied with rule 11.16(3) of the CPR. Whilst this may very well have been a factor leading to this application not having been filed within time, this court should not and indeed, cannot properly presume this to be so. Evidence needs to have been led by the 1st and 4th defendants, as to why their application was filed out of time and that evidence must go beyond merely setting out the reasons for same, but further, should provide to this court, good as well as credible reasons for said delay. Even beyond that, evidence should have been placed before this court, in support of the present application, as would serve to have provided to this court, a proper basis upon which this court could have properly exercised its discretionary powers, in favour of the applicants. In respect of this application though, the evidence which has been provided to this court in support thereof, has not at all addressed the very pertinent issue of the delay in the filing by the applicants, of their application.

[15] It is true that the claimants and the 1st and 4th defendants respectively, have been, in different respects, non-compliant with the applicable rule of court – rule 11.16. It is equally true though, that at this time, it is the 1st and 4th defendants who wish to have this court grant their application to set aside the order of Mrs. Justice George. It is not the claimants who, at this time, are desirous of this court applying in their favour any relief which this court may grant in the exercise of its discretion. In the circumstances, it was incumbent on the applicants – these being the 1st and 4th defendants, to have satisfied this court as to why its discretion ought to be exercised in their favour, to the extent of granting the application, notwithstanding that the same was filed out of time. The 1st and 4th defendants have failed to put forward any, or at least, any sufficient basis

upon which this court, ought to exercise its discretion in their favour, in that regard. This court does not accept that the failure of the claimants to have complied with rule 11.16(3), provides any adequate basis for same. This is not only so, because everyone is presumed to know the law and thus, the applicants are presumed to know that they should have applied to set aside the order, within 14 days of the date when the order was served on them, but also because, the applicants have not placed any evidence before this court, as could even remotely assist this court in so much as inferring that it was because they were unaware that an application such as the present one, needed to have been made within the 14 day period after service of the order upon them, that they failed to make their present application, within the time allotted by the applicable rule of court. In fact, the applicants have offered no explanation to this court whatsoever, by means of evidence, as distinct from submissions which have been made from the bar table, by counsel, as to why their application was filed out of time. This court, in order to exercise its discretionary powers in a party's favour, can only properly do so, if evidence has been provided to it, which, at the very least, would properly enable the court, if it accepts such evidence, to act on same and exercise its discretion in favour of the party who/which is applying for that discretion to be so exercised.

[16] In addition, this court is mindful that delays can, in some circumstances, be inimical to the interests of justice and that, as such, if a party requires an extension of time, then such party should show good reason why this court's discretion ought to be exercised in 'his' favour, in that regard. Extensions of time ought never to be permitted as a matter of course. The Court of Appeal of Jamaica has made this clear, time and time again.

[17] This court does have the power to make an order, in exercise solely, of its own initiative. See rule 26.2 of the CPR in that regard. Counsel for the 1st and 4th defendants, Mr. Braham, Q.C. has urged this court to grant the orders as sought by means of the exercise of this court's own initiative, in the event that this court is not minded to grant the application as made by his clients, because that application was filed out of time. This court though, even if doing so in exercise of its own initiative,

ought never to do so and certainly cannot properly do so, capriciously. This court must always, in exercising any power granted to it by rules of court, do so in a manner which enables this court to deal with cases justly. See rule 1.2 of the CPR in that regard. As such, this court must always ensure and indeed, be astute that it has before it an adequate evidentiary basis as would, at the very least, enable this court to exercise powers granted to it as a matter of discretion, in a party's favour. Thus, whilst this court can exercise its discretion and in appropriate cases, make orders in exercise of its own initiative, this court is not omnipotent in the exercise of its lawful authority. This court is bound by law and thus, cannot act outside of the law, nor can it act capriciously, even when it is exercising its discretionary power to make an order as a matter, 'of its own initiative.' In the circumstances, this court is not minded to and will not exercise its discretion in the applicants' favour, in that regard, as no proper basis has been provided to enable this court to do so.

[18] Finally on whether this court ought to grant the 1st and 4th defendants' application notwithstanding that the same has been filed out of time, this court wishes it to be noted that since no application for an extension of time was ever made by the applicants, this court would, in any event, by virtue of the provisions of rule 11.13 of the CPR, have been unable to have granted an extension of time. This is so because that rule of court provides, in respect of applications for court orders, that- *'An applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission.'* Thus, insofar as the applicants in respect of the present application, never sought any extension of time, this court would, by virtue of rule 11.13 of the CPR, in any event, have been precluded from granting an extension of time, unless 'special circumstances' were shown. No such 'special circumstances' were shown. Equally too, of course, the applicants have failed, in this court's considered view, to provide to this court, any proper basis upon which this court could conclude that it ought to waive compliance with rule 11.16(2) of the CPR. Furthermore, it should also be noted that even if counsel for the applicants had orally applied for an extension of time, the applicants could, in present circumstances, only properly have made such application orally, if this court had dispensed with the requirement for the application to be made in

writing. Of course, this court did not so dispense with that need, because, to begin with, the applicants made no application for same. Furthermore, it ought always to be noted by litigants and legal practitioners, that as specifically provided for in rule 11.9(2) of the CPR*, 'evidence in support of an application must be contained in an affidavit unless – (a) a rule; (b) a practice direction; or (c) a court order, otherwise provides.'* Rule 26.1(2)(c*)* of the CPR does not otherwise so provide, as regards an application for an extension of time.

[19] Although it is clearly no longer necessary for this court to do so, for the purpose of making its ruling on the present application, nonetheless this court will, very briefly, address its mind as to whether it would, in terms of the substance of the application, have likely agreed with the submissions as made to it, not only by counsel for the applicants, but also, by counsel for the representatives of the 3rd defendant's estate, as appointed by this court, to act as administrators ad litem for the purposes of this claim.

[20] In that regard, this court has borne in mind firstly, that since this court is not acting for present purposes, as an appellate court, this situation is not one in which this court is to review the impugned order of my sister Judge and revoke or set aside the same, if, in exercise of its own independent judgment, as now being exercised, this court holds the view that my sister Judge, in exercise of this court's discretion which she had, to have appointed the claimants as administrators ad litem, was then, 'plainly wrong.' That is not the role of this court at present. That would have been the role of an appellate court if the order as made by my sister Judge, as is now being challenged, were to have been, or to hereafter be, challenged before such court. Rule 11.16(1) though, makes it clear that this would not be the role of this court, in addressing its mind to an application such as this. That rule 11.16(1), allows for this court to either set aside or vary an earlier order made by another Judge of this court, if that order arose on an application in respect of which, no notice was given and for the court to then deal with the application again. In other words, this court would then be dealing with the application afresh.

[21] If, as presently constituted and with all parties being present on the hearing of the application to appoint the claimants as administrators ad litem in respect of this claim, this court were dealing with the said application afresh, this court has no doubt that it would have adjudicated on same in precisely the same manner as was done by my sister Judge and as is now impugned before this court.

[22] There is no doubt, firstly, that as many legal authorities make it clear, it is a general rule that administrators ad litem will typically be appointed by a court, in circumstances wherein no one has been appointed by the court as an administrator of the deceased's estate and a claim is required to be brought either by that deceased's estate, or alternatively, against that deceased's estate. See: **Parry and Clark** – The Law of Succession, (11th ed.), at p. 439.

[23] The estate of Gilbert Jobson, deceased, has had, as its administrator, the Administrator General, who was appointed in December of 1982. The Administrator General, although being an individual, represents an office established by statute. This claim though, is patently not one which could properly have been instituted by the Administrator General. That office could not have done so, since at least one of the primary aspects of this claim, concerns the challenge of the claimants, to the actions of the Administrator General in that office's administration of the deceased's estate as regards the sale of the property situated at 10 Red Hills road. The office of Administrator General, as it was then constituted, was constituted by the then Administrator General, Mr. Andrew Gyles. The Administrator General's conduct as administrator of the estate of Gilbert Baron Jobson, deceased, is specifically being challenged, as part and parcel of this claim. In fact, it is being challenged to the extent whereby, it is being sought to have the Administrator – General be altogether removed as administrator of the estate of Gilbert Baron Jobson, deceased. In the circumstances, this court takes the view that, if it had to decide on the claimants' application to have been appointed as administrators ad litem for the purposes of pursuing this claim, afresh, it would grant that application, notwithstanding the arguments against same,

which were very strongly placed before this court by counsel for the 1st and 4th defendants, as well as by counsel for the representatives of the 3rd defendant's estate.

[24] Even if I am wrong therefore, in having refused to set aside the order of my sister Judge, nonetheless, in dealing with the claimants' application again – this being their application to be appointed as administrators ad litem for the purposes of this claim, this court now, would decide on that application in precisely the same way as was done by my sister Judge. In other words, I would, in any event, not have granted the application as sought. Overall therefore, this application of the 1st and 4th defendants must be and is, denied. The orders of this court, made as regards costs and leave to appeal, after having heard from all relevant counsel as regards same are set out immediately below.

Orders :

1. Application by 1st and 4th defendants, for court orders, as filed on June 19, 2013, is denied.

2. Application for leave to appeal is granted.

3. Costs of and pertaining to the application and the hearing of the application in chambers, are awarded to the claimants as against the 1st and 4th defendants and the same is summary assessed at $60,000.00.

4. The claimants shall file and serve this order.

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Hon. K. Anderson, J