[2022] JMSC Civ. 240

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV01282

BETWEEN	**DERRICK JOHNSON**	**CLAIMANT**
AND	**ROHAN BOWES**	**DEFENDANT**

IN CHAMBERS

Dr Mario Anderson instructed by the Kingston Legal Aid Clinic for the Claimant.

Miss Sue-Ann Williams for the Defendant.

Heard: July 26, 2021 and February 9, 2022

Civil Procedure Rules Part 37: Rules 37.3(1) and (2) – Filing of defective Notice of Discontinuance – Filing of Bill of Costs – Refiling of Notice of Discontinuance – Second Bill of Cost filed pursuant to Rule 65.20(5) – Application for Default Costs Certificate – Judgment Summons for Attorney's costs – Application to set aside Judgment Summons – Whether defective Notice of Discontinuance can be cured by Court Order – Whether second filing of a Bill of Costs amounted to an abuse of process.

MASTER P. MASON

FACTS/BACKGROUND

[1] The matter for the court's consideration is a claim for damages as a result of injuries sustained by the Claimant as a consequence of an attack by the Defendant's dog. The Claimant, Derrick Johnson, filed a Claim Form and

Particulars of Claim in the Supreme Court on March 5th, 2012. In a bid for a speedier trial, the Claimant thereafter filed a claim in the Kingston Parish Court.

[2] The Claimant filed a Notice of Discontinuance in the Supreme Court on February 8, 2017 and thereafter served it on the Defendant's Attorney-at-law on February 9, 2017. The Notice was in breach of rule 37.3 (1) and (2) of the Civil Procedure Rules, 2022 (hereinafter referred to as "the CPR") which required the Claimant to first serve the Notice of Discontinuance on the Defendant then file a copy with a Certified Clause endorsed thereon indicating that the Defendant was served.

[3] The Defendant, Rohan Bowes, in response to the Notice of Discontinuance, filed a Bill of Costs with Notice to Serve Points of Dispute on August 4, 2017. The Claimant filed Points of Dispute on August 22, 2017 and served same on September 9, 2017 in response to the Defendant's Bill of Costs.

[4] The Registrar issued a requisition on November 6, 2018 for the Claimant to rectify the error on the Notice of Discontinuance. The Notice of Discontinuance was refiled in conformity with Rule 37.3 (1) and (2). The Claimant served the corrected Notice of Discontinuance on December 18, 2018 and filed it on January 7, 2019 with the certification clause.

[5] On January 9, 2019 the Defendant filed a second Bill of Costs and served it with Notice to Serve Points of Dispute on January 11, 2019 on the Claimant. The Claimant did not file Points of Dispute and on March 21, 2019, the Defendant applied for Default Costs Certificate which was granted on May 9, 2019 and served on the Claimant on May 13, 2019. The Defendant filed on July 17, 2019 a Judgment Summons for the outstanding sums owed. The Claimant then filed a Notice of Application for Court Orders on November 2019 seeking inter alia, to set aside the Default Costs Certificate.

ISSUES

I. Whether the Notice of Discontinuance filed on February 8, 2017 and served on the Defendant on February 9, 2017 is valid to have properly brought the proceedings initiated on March 5, 2012 to an end.

II. Whether the Default Costs Certificate was validly entered against the Claimant.

III. Whether the Default Costs Certificate entered against the Claimant can be set aside.

THE LAW

[6] Pursuant to Part 37.2 (1) of the CPR, the general rule is that a Claimant may discontinue all or part of a claim without the permission of the Court.

[7] CPR rules 37.3 (1) and (2) of the CPR state that:

> *(1) To discontinue a claim or any part to the claim, a Claimant **must**:*
>
> *(a) Serve a Notice of Discontinuance on every other party to the claim; and*
>
> *(b) File a copy of it.*
>
> *(2) The Claimant **must** certify on the filed copy that the Notice of Discontinuance has been served on every party to the Claim.*

[8] The literal interpretation must be applied to this rule to avoid ambiguity and absurdity. This rule expressly states that to discontinue any part of a Claim, the Claimant must first serve the Notice of Discontinuance on every party and thereafter must endorse the said notice with a Certification Clause that it was served, before being filed in the registry.

[9] It is clear that the word **"must"** used in the context of the rule is absolute and not discretionary. The Claimant having failed to comply with the rule meant that the first Notice of Discontinuance was irregular/invalid. Failure to comply with the rule offends the rule and amounts to an irregularity – case of **Dorothy Vendryes v Dr. Richard Keane & Anor [2017] JMCA Civ. 15.**

[10] Further rule 37.5(1) states that discontinuance against any Defendant takes effect on the date when the Notice of Discontinuance is served on that Defendant pursuant to rule 37.3 (1) and (2). The issue to be settled is whether the Notice of Discontinuance is deemed validly served on the Defendant, thereby bringing an end to the claim against that Defendant on that date ***(CPR rule 37.5(2))*** setting in motion the taxation process.

[11] According to rule 65.18 (1) of the CPR taxation proceedings are commenced by the receiving party:

(a) Filing the Bill of Costs at the Registry; and

(b) Serving a copy of the Bill of Costs on the paying party

[12] CPR Rule 65.20 (1)(a) states:

The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on –

(a) The receiving party; and….

[13] CPR Rule 65.20 (3) states that Points of Dispute are to be filed and served 28 days after the date of service of the Bill of Costs.

[14] Failure to file Points of Dispute within the stipulated time period will entitle the receiving party to apply for Default Costs Certificate (CPR rule 65.20 (5)).

[15] Where a party to proceedings has failed to comply with any order, rule or directions of the Court, the defaulting party may make an application to the Court pursuant to CPR Part 26.8 for relief from sanctions.

CLAIMANT'S SUBMISSIONS

[16] The Claimant argued that the Notice of Discontinuance filed on February 8, 2017 was merely defective as not having the certification clause, it was not fatal and could be cured. The Claimant relied on the cases of **Chang v Chang 2010HCV03675**, **Saddler v Saddler [2013] JMCA Civ. 11** and **Dorothy Vendryes v Richard Keane & Anor [2011] JMCA Civ. 15** to show that procedural defects were capable of being rectified in the interest of justice. Therefore, the Notice of Discontinuance originally filed was irregular and not a nullity and the processes filed thereafter are valid.

[17] Counsel believe that there was no need for relief from sanctions as the Default Costs Certificate should not have been issued by the Registrar and is not valid, because Points of Dispute were filed on August 22, 2017. Additionally, it was an abuse of process for the Defendant to have filed a second Bill of Costs as the Notice of Discontinuance took effect from the date of service and not when it was filed.

DEFENDANT'S SUBMISSIONS

[18] Counsel for the Defendant argued that the initial Notice of Discontinuance filed was contrary to rule 37.3 (1) and 2 as it was not served before filing. Therefore, the matter was not properly discontinued as the Claimant had the matter in two Courts the Parish Court and the Supreme Court. As a result, the Bill of Costs and Points of Dispute filed on August 22, 2017 were not valid as there was no *proper* discontinuance.

[19] The Defendant therefore acted appropriately by filing a Bill of Costs and Notice to File Points of Dispute on January 9, 2019. No Points of Dispute having been filed

within 28 days of service by the Claimants, the Default Costs Certificate was properly issued. For the Claimant to set aside the Certificate, he must comply with the rules concerning relief from sanctions and make such an application promptly. Not doing so prevents the Claimant from obtaining an Order to Set Aside the Default Costs Certificate.

ANALYSIS

ISSUE I: ***Whether the Notice of Discontinuance filed on February 8th, 2017 and served on the Defendant on February 9th, 2017 is valid to have properly brought the proceedings initiated on March 5, 2012 to an end.***

[20] The procedure for discontinuing a claim is outlined in rule 37.3 (1) and (2) of the CPR.

[21] The word "***must***" is used to signify that the requirement to serve the Notice of Discontinuance before filing is mandatory and not optional. Failure to comply with part 37.3 (1) and (2) would mean that the Notice of Discontinuance filed on February 8, 2017 and served on February 9, 2017 was irregular/invalid and the matter would not have been properly brought to an end on February 9, 2017.

[22] Pursuant to rule 37.5(1), the discontinuance against the Defendant takes effect on the date when the Notice of Discontinuance is served on the Defendant. Since the Notice was filed before it was served on the Defendant, the matter would not have been properly brought to an end on February 9, 2017.

[23] In considering the effect of this procedural irregularity, the Court relies on the Court of Appeal decision of ***Dorothy Vendryes v Richard Keane & Anor. (Supra)*** where at paragraph 12, Harris J A held that:

> *"Rule 8.16(1) expressly specifies that at the time of service, the requisite forms must accompany the Claim Form. The Language of the rule is plain and precise. The word must, as used in the context of the rule is absolute. It places on a Claimant a strict and unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity*

> *which demands that, in keeping with the dictates of rule 13.2, the Default Judgment must be set aside".*

[24] In ***Dorothy Vendryes [supra]***, the initiating documents, Claim Form and Particulars of Claim were served on the Defendants without the supporting documents as required by rule 8.16(1) of the CPR. No Acknowledgment of Service or Defence was filed by the Defendants in response to the claim, and the Claimant sought an Application for Default Judgment against the Defendant for failure to file an Acknowledgment of Service. The Default Judgment was granted against the Defendant. The Defendant sought to have the Default Judgment set aside pursuant to part 13.2 (2)(a) of the CPR on the grounds that the Claimant failed to comply with rule 8.16(1) of the CPR. Harris JA held that the Lower Court Judge was correct in setting aside the Default Judgment on the basis that it was wrongly entered as the Claimant failed to serve the supporting documents with the pleadings.

[25] It therefore stands to reason from the decision of ***Dorothy Vendryes [supra]*** that the Claimant in the instant case, having filed the Notice of Discontinuance on February 8, 2017 before serving same on the Defendant on February 9, 2017 was in direct breach of CPR Rule 37.3(1) and (2) rendering the Notice of Discontinuance irregular/invalid. This therefore could not have brought the matter to an end on February 9, 2017.

[26] The Claimant, in his submissions, argued that the Notice of Discontinuance having been filed before it was served without certifying the document amounted to a procedural error that could be remedied by the Court pursuant to rule 26.9(1). The Claimant relied on the case of ***Chang v Chang [supra]*** to support this position by relying on the dicta of Edwards J (as she then was) at paragraph 89 where the Honourable Judge said:

> *"I believe the lesson to be learnt from this case is that a claim once filed is an administrative procedure, it's not invalid (unless its life has expired and no application to extend has been made) and can either proceed, be amended or refiled. There is no such thing as a dead or invalid claim only*

> *one which is subject to be struck out as an abuse of process or one whose life has expired."*

[27] I am of the view that the case of ***Chang [supra]*** must be distinguished from the case at bar, as the document in question is a Notice of Discontinuance and not a Claim Form which initiates proceedings as opposed to a Notice of Discontinuance which indicates the end of proceedings. Also, in ***Chang (Supra),*** it appears that the Claimant sought to compare Section 13 of the Property Rights of Spouses Act, 2008 (hereinafter referred to as "the Act") with rule 37.3 (1) of the CPR. However, as Edwards J indicated at paragraph 19:

> *"An application under section 13 (2) is an application under the discretionary powers contained in the Act to extend time. The issue facing the court on such an application is whether it should exercise the discretion granted to it in favour of the applicant."*

The mandatory wording of CPR Part 37.3 does not provide for the use of the discretionary powers of this Court.

[28] The Notice of Discontinuance filed on February 8th, 2017 is irregular/invalid and cannot be remedied by the Court invoking rule 26.9 of the CPR to correct the procedural breach.

[29] Harris JA said at paragraph 34 of the ***Vendryes*** case that:

> *"The general words of rule 26.9 cannot be extended to allow the learned Judge to do that which would not have been possible. A Judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an Order of the Court. The service of the requisite documents accompanying the Claim Form is a mandatory requirement. The amended pleadings must be served before any further steps can be taken in the proceedings."*

[30] Applying this statement to the instant case means that the Notice of Discontinuance had to be redone pursuant to rule 37.3 (1) and (2) in order to be valid.

[31] The Claimant served the 2nd Notice of Discontinuance on the Defendant on December 18, 2018, after being directed by the Registrar. This Notice of

Discontinuance was proper and thereby properly brought the matter to an end on December 18, 2018.

[32] It is therefore settled that the refiled Notice of Discontinuance that was served on the Defendant on December 18, 2018 is a valid Notice. Rule 37.5 (1) (a) states that Discontinuance against any Defendant takes effect on the date when the Notice of Discontinuance is served on that Defendant.

ISSUE II: ***Whether the Default Costs Certificate was validly entered against the Claimant***

[33] Pursuant to the Notice of Discontinuance filed on January 9th, 2019 by the Claimant, the Defendant in keeping with rule 37.6 (1), refiled and served its Bill of Costs along with the Notice to Serve Points of Dispute in accordance with Rule 65.18 (1) of the CPR on January 11, 2019. No Points of Dispute were refiled by the Claimant after the Defendant refiled and served its second Bill of Costs.

[34] On March 21, 2019, the Defendant, in the absence of a refiled Points of Dispute by the Claimant, filed an Application for Default Costs; setting out that he had complied with rule 65.21, that is: - *That a copy of the Bill of Costs was served, that no Points of Dispute was received by the receiving party and a copy of the Default Costs Certificate was submitted to the Registrar. The signed copy of the Default Costs Certificate was found to be in good order and was issued by the Court on May 9, 2019 and served on the Claimant on May 13, 2019.*

[35] A Default Costs Certificate was entered against the Claimant for failure to file Points of Dispute within 28 days after receiving the Defendant's Bill of Costs.

[36] Counsel for the Claimant, in his submissions, asserts that the Points of Dispute filed by the Claimant on August 22, 2017 remained valid throughout the entire proceedings. I do not agree. The Bill of Costs filed on August 4, 2017 and the Points of Dispute filed on August 22, 2017 were both invalid as they were filed before a valid Notice of Discontinuance was filed.

[37] It is therefore the Court's position that the Claimant, having failed to file and serve a new Points of Dispute within 28 days of receipt of the Defendant's second Bill of Costs, the Default Costs Certificate was rightfully entered by the Registrar pursuant to rule 65.21 (1), (2) and (3) of the CPR as amended.

ISSUE III: ***Whether the Default Costs Certificate entered against the Claimant can be set aside.***

[38] The Claimant filed a Notice of Application for Court Orders on November 20, 2019 seeking the following Orders amongst other things:

a. *That the Notice of Discontinuance filed on February 8, 2017 and served on the Defendant's Attorney-at-law on February 9, 2017, stand as an effective Notice of Discontinuance in the matter.*

b. *That the Default Costs Certificate filed on March 21st, 2019 be set aside.*

c. *That the date set for the hearing of the Judgment Summons be vacated.*

d. *That the matter be discontinued.*

[39] The Court must first consider whether an application to Set Aside a Default Costs Certificate is tantamount to an application for relief from sanctions. The Court is guided by the decision of Brooks JA (as he then was) in the Court of Appeal decision of **Rodney Ramazan and Ocean Faith N. V. v Owners of Motor Vessel (CFS Pamplona) [2012] JMCA App 37** where the Honourable Judge was of the view that an application to set aside a Default Costs Certificate was similar in nature to an Application for Relief from Sanctions. It can therefore be reasoned that the application for Court Orders filed by the Claimant is in effect seeking relief from sanctions pursuant to rule 26.8 of the CPR.

[40] I am also guided by the decision of the Privy Council in the case of **The Attorney General of Trinidad and Tobago v. Universal Projects Limited [2011] UKPC 37** whereby the Board, after a detailed review of the relevant sections of the Trinidad and Tobago CPR and reference to the **Attorney General v Keron Matthews [2011] UKPC 38**, which also dealt in detail with the difference between an Application to Set Aside a Default Judgment and one for relief from sanctions, concluded that the appropriate application in those circumstances would be for relief from sanctions. I am of the view that the Claimant should have filed an Application for Relief from sanctions, consequently, the Notice of Application for Court Orders filed on November 20, 2019, shall be treated as such.

[41] In applying the provision of Rule 26.8 to the case at bar, the Court must consider whether the Claimant's application for Court Orders has satisfied the requirements of rule 26.8 (1) which states:

> *An application for relief from something imposed for failure to comply with any rule, order or direction must be:*
>
> *(a) Made promptly; and*
>
> *(b) Supported by evidence on affidavit*

[42] In the event the Defendant is successful, costs would be awarded to him as per rule 37.6(1) which states:

> *"A Claimant who discontinues is liable for the costs of the Defendant against whom the claim is discontinued incurred on or before the date on which Notice of Discontinuance was served."*

[43] The Claimant failed to act promptly in challenging the validity of the Default Costs Certificate. The delay in making the said application is tantamount to an unreasonable delay without any plausible justification or explanation. The Notice of Application was made by the Claimant some seven months after being served with the Default Costs Certificate. It is noted also that the Affidavit in Support does not provide any good explanation for the inordinate delay. It is woefully inadequate, consequently, this ground fails.

[44] The Court in arriving at its decision to refuse the Claimant's Applications for Court Orders is guided by the case of **H. B. Ramsay and Associates Ltd and Others v Jamaica Redevelopment Foundations Inc and Another [2013] JMCA Civ 1.** Brooks J.A., in considering the principles applicable to an Application for Relief from Sanctions, opined at paragraph 22 that:

> *"Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph ……"*

CONCLUSION

[45] Therefore, based on the foregoing discussion on the issues, I hereby make the following orders:

1. The Notice of Discontinuance filed on February 8, 2017 and served on February 9th, 2017 on the Defendant is invalid, having failed to satisfy the requirements of rule 37.3(1) and (2) of the CPR, 2002 as amended.

2. The Default Costs Certificate filed on March 21st, 2019 stands as an effective Default Costs Certificate.

3. The Judgment Summons hearing is fixed for March 23rd, 2022 at 11:30 for ½ an hour.

4. Costs to the Defendant to be agreed or taxed.

5. The Claimant's Attorneys-at-Law shall prepare, file and serve this Order.

6. Leave to appeal is denied.