



[2018] JMSC Civ 184

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV05084

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| BETWEEN | ORLANDO EARL PALMER | CLAIMANT |
| AND | WOMAN CONSTABLE HARRISON | 1ST DEFENDANT |
| AND | CONSTABLE BAILEY | 2ND DEFENDANT |
| AND | CONSTABLE ANDERSON | 3RD DEFENDANT |
| AND | CONSTABLE BROWN | 4TH DEFENDANT |
| AND | THE ATTORNEY GENERAL FOR JAMAICA | 5TH DEFENDANT |

IN CHAMBERS

Obika Gordon instructed by Frater, Ennis and Gordon for the Claimant

Dale Austin instructed by the Director of State Proceedings for the Defendants

Heard on: May 9, 2018, July 5, 2018 and November 9, 2018

Application for extension of time to file a Defence Pursuant to Sections 10.3(9) and 26.1(2) of the Civil Procedure Rules (CPR) (as amended)

MASTER MASON (Ag.)

[1] There are two applications before the court. The first application was filed on March 9, 2017 by the Attorney General to extend time within which to file a

Defence. The second application was filed on November 13, 2017 by the Claimant for permission to obtain Default Judgment. The parties agreed to proceed with the Defendant's application for an extension of time and to defer the Claimant's application pending the outcome of the Defendant's application.

The Facts

- [2] On or about July 8, 2016 at about 9:30p.m., the Claimant visited the Oracabessa Police Station to take some food and drink for a relative who was being held in custody there. The food and drink was inspected by the 1st Defendant and then handed to the person in custody. The Claimant left the said Police Station approximately 9:45p.m. and returned to his home in St. Mary. At about 10:07p.m. the Claimant received several calls from a Officer Bailey of the Oracabessa Police Station who demanded that he return to the Police Station as a phone belonging to the 1st Defendant was missing. On his return to the Police Station the Claimant was unlawfully and intentionally detained for approximately 4½ hours. He alleges that he was subjected to threats, humiliation, assault and vigorous interrogation by the 1st, 2nd, 3rd and 4th Defendants the servants and or agents of the 5th Defendant.
- [3] The Claimant thereafter filed a claim on December 1, 2016 against the Defendants jointly and or severally to recover special damages, aggravated damages, damages for false imprisonment, assault and breach of Constitutional Rights resulting from the actions of the 1st to 4th Defendants in the performance or purported performance of their duties as officers of the Jamaica Constabulary Force without reasonable or probable cause.

The Application

- [4] By Notice of Application for Court Orders filed on March 9th 2017 the 5th Defendant seeks Orders that:

- (1) The Defendants be granted permission extending time to file a Defence thereby permitting the 3rd Defendant for and on behalf of the Defendants to file and serve her Defence within 21 days of the date of this Order.
- (2) Such further and other relief as the Court deems just in the circumstances be granted.

The grounds on which the 5th Defendant is seeking these Orders are as follows:

- (a) The Applicant make this Application pursuant to rule 10.3(9) and 26.1(2)(c) of the Supreme Court of Jamaica Civil Procedure Rules 2002.
- (b) The Applicant has a good explanation for his delay.
- (c) The delay in filing the Defence is not deliberate.
- (d) The granting of the Order sought will not adversely prejudice the Claimant and if it does, an Order for costs will be sufficient compensation for any prejudice caused.

The Law

- [5] The Court's power to extend time can be found at rule 10.3(9) of the CPR which states "the Defendant may apply for an Order extending time for filing a Defence."
- [6] To enable the Court to exercise the discretion provided in rule 10.3(9), part 26 outlines the Court's powers in respect of the court's general powers of management of particular importance to this application are Rules 26.1(2)(c) and, Rule 26.1(2)(v).

Rule 26.1(2)(c) states:

The Court may extend or shorten the time for compliance with any rule, practice direction order or directions of the Court even if the application for an extension is made after the time for compliance has passed.

Rule 26.1(2)(v) states:

The Court may take any other step, give any direction or make any order for the purpose of managing the case and furthering the overriding objective.

- [7] The exercise of the discretionary process of the court is to be done within the context of the overriding objective of the CPR in that the Courts are to ensure that cases are dealt with justly as outlined in rule 1.1(1) of the CPR 2002 which states:

1.1(1) These rules are a new procedural code with the overriding objective enabling the Court to deal with cases justly.

And rule 1.2 which states that the Court is mandated to seek to give effect to the overriding objective when interpreting or when exercising any of its powers under the rules.

Factors to Consider in Determining the Application to extend time to file a Defence

- [8] It is noted that the rules do not set out any specific criteria to be used when the discretion to enlarge time is to be exercised. It is therefore prudent to examine decisions that are settled in case law, for guidance, when dealing with applications such as those in the instant case.
- [9] In the case of **Fiesta Jamaica Limited v. National Water Commission** [2016] JMCA Civ. 4. The Court of Appeal considered the factors to be taken into consideration where an application was made to file a Defence out of Time. Harris, JA at paragraph 15 said as follows:

*“The principle governing the Court’s approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J, in an application for extension of time to appeal in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd. and Ors.** [2001] EWHC456.”*

[10] Lightman J in the abovementioned case said:

“It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of factors which must be taken into account.”

[11] Among the factors which had to be taken into account were:

- (a) the length of the delay,
- (b) the explanation of the delay,
- (c) the prejudice if any, which would be occasioned by the delay to the other party,
- (d) the merits of the appeal,
- (e) the effect of the delay on public administration,
- (f) the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might in particular be relevant to the question of prejudice.

The Delay

[12] The Claimant filed a Claim Form and Particulars of Claim on December 1, 2016 and served same on the 5th Defendant on December 2, 2016. The 5th Defendant filed an Acknowledgment of Service on December 15, 2016.

[13] The 5th Defendant not being in a position to file a Defence within 42 days pursuant to rule 10.3(1) of the CPR, filed a Notice of Application for Extension of Time to file a Defence on March 9, 2017, seven (7) weeks after the Defence was due to be filed.

In the circumstances, I am of the view that the delay was not inordinate. In any event the length of the delay should not be considered as determinative of the application.

The Explanation for the Delay

- [14]** Mr. Dale Austin instructed by the Director of State Proceeding for the Defendant relied on the affidavit evidence of Mr. Andre Moulton of the Attorney General's Department in which he proffered the explanation for the delay.
- [15]** Mr. Moulton in his affidavit related the sequence of events which occurred after the 5th Defendant was served. An attorney-at-law who would have conduct of the case was assigned and immediately sought instructions from the Jamaica Constabulary Force.
- [16]** The 5th Defendant was unable to obtain instructions by February 2017 and further request for instructions were sought from the Jamaica Constabulary Force by means of letters, telephone communications which up to May 8, 2018 were unanswered.
- [17]** It was further revealed in Mr. Moulton's affidavit that the Claimant failed to properly identify the first, second, third and fourth Defendants in the action by their full names and their respective regulation numbers and the Jamaica Constabulary Force had not been able to identify the crown servants against whom allegations have been made or confirm any of the allegations.
- [18]** It was further stated that the delay in filing a Statement of Defence in the matter was not deliberate but was occasioned by the Defendant's attorney-at-law not being in receipt of the requisite information and instructions to file and serve their Defence within the time limited by Part 12 of the CPR.
- [19]** It is common knowledge that the Attorney General is a creature of instructions and as such is handicapped if the instructions are not forth coming. The 5th Defendant finds itself in a vulnerable position as outlined by Mr. Moulton in his

Affidavit. In this regard, paragraph 19 of the Rashaka Brooks case is instructive where Brooks JA opined.

“In our view, it is only just that a Defendant who expects to be able to file a Defence, but anticipates that he will not be able to file it within the time prescribed, or realises that the time prescribed has passed, should not be shut, out, as of course, from being able to apply successfully for an extension of time.”

- [20] Therefore, after careful examination of the Affidavit evidence of Mr. Andre Moulton, it is my opinion that the explanation put forward by the 5th Defendant is credible and meritorious in the circumstances.

Prejudice

- [21] The issue of prejudice was not raised by the Claimant at all. And it does not appear that there will be any prejudice to the Claimant that costs could not cure if the Defendants were granted an extension of time. Therefore, I accept the position taken in **Finnegan v Parkside Health Authority** [1998]1AER595 that where no prejudice has been deponed to or claimed, the applicant should not be denied full access to justice.

Are there good reasons why the extension should be granted?

- [22] As posited in his oral submissions, Mr. Dale Austin, instructed by the Director of State Proceedings for the Defendants argues that the Claimant in his pleadings has provided only the surnames of the Defendants, for example Woman Constable Harrison, Constable Bailey, etcetera. Mr. Austin pointed out early in his submissions that Part 10.5(7) of the CPR under the heading Defendant’s duty to set out case is relevant.

Section 10.5(7) states as follows:

A Defendant who defends in a representative capacity must say:

(a) *What that capacity is; and*

(b) *Whom the Defendant represents*

[23] Mr. Austin further submitted that a Defendant in a representative capacity must be placed in a proper position to represent that person or persons and therefore, the pleadings are deficient as they stand, as the Defendants numbered 1-4 are not properly identified, they are not provided or identified with their full names, titles or regulation numbers. The rules make it mandatory for the Defendants to be properly identified.

[24] Mr. Austin submitted that it is a fundamental principle of fairness and in order to preserve the rights of the 5th Defendant and to remove any suggestion of prejudice, it would be prudent to amend the pleading with a view to having the Crown Servants properly identified.

[25] In response to the submissions of the 5th Defendant, the Claimant submitted that the court cannot make an order in futility, that is, to get the names and particulars of the Defendants.

Mr. Austin referred to the Claimant's response to request for information filed on May 21, 2018 in that the answer to the question:

"What are the full names of Defendants 1-4 and their regulation numbers?"

[26] With regard to question 1: what are the full names of the Defendants 1-4 and their regulation numbers? The answer to that question was as follows:

The Claimant at this time does not have the regulation numbers of the 2nd and 4th Defendants. The regulation numbers for the 1st Defendant is Badge #11634 and the regulation number for the 3rd Defendant is Badge #19173.

[27] Question 2 of the request was as follows:

Please provide details of where each of the Defendants, who are alleged to be crown servants, are assigned in the crown's service in respect of their duty stations.

The reply was as outlined in the Claimant's statement of case, that the 1st, 2nd, 3rd and 4th Defendants are all stationed at the Oracabessa Police Station.

- [28] At this point Mr. Gordon, Attorney-at-Law for the Claimant retorted that the court has to be reasonable in this case and must put things into context – he relied on the decision in the cases of **Burke v The Attorney General and Constable Sinclair** Suit No. CL1999/B163 and **Delroy Thompson The Attorney General of Jamaica and Detective Douglas Taylor** to reinforce his position that a Claim made against the Crown for the tort of its agents and or servants who ought to be the proper party to be sued, that once it is established that he was acting within the course or scope of his employment, the proper Defendant to be sued was the Attorney General.
- [29] I do agree with the Claimant that the proper party to this action is the Attorney General, however, in my view, it is clear that it is the Claimant's duty to present information that will properly identify the parties to the action. That responsibility cannot be ignored. I do not agree with the Claimant that the 5th Defendant should carry out investigation to properly identify the Defendants. I am of the view that the 5th Defendant could assist and or facilitate the Claimant in retrieving the requisite information from the Commissioner's office to answer the outstanding question. The reality is that the Claimant cannot rely on the surnames alone to identify the Defendants to prove his case. The information provided in the request for information is far from adequate. To my mind, the limited information is not helpful as the 5th Defendant is still unable to certify the Defendants.
- [30] Consequently, I consider the explanation offered in Mr. Moulton's Affidavit regarding the 5th Defendant's efforts in retrieving information from the JCF to be credible given the fact that the Attorney with conduct of the matter acted promptly upon receiving the file on the matter.

[31] Therefore, I adopt the reasoning of Brooks JA at paragraph 17 in the case of **Rashaka Brooks** where he said:

“If, however, a draft defence is not available because the defendant’s attorneys-at-law are not seised with the requisite instructions by the time the defence is due, does it mean that the defendant has no hope of pursuing a successful application to extend time until he is able to file a draft defence?” It would seem to me, on the application of the overriding objective, that in certain special circumstances, such a defendant, as long as he can satisfy the Court that:

- (a) *The application is made within a reasonable time;*
- (b) *There are good reasons for the delay;*
- (c) *There is a good reason why the extension should be granted; and*
- (d) *There would be no undue prejudice to the Claimant.*

should be able to secure an extension of time.”

The effect of the delay on time limits

[32] The effect of delay on the part of a party is aptly stated by Harris, JA at paragraph 18 in the case of **Attorney General of Jamaica v. Roshane Dixon** and **Attorney General of Jamaica v. Sheldon Dockery** Civil Appeal Nos. 148 & 149/2011.

“It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. Delay ultimately aid in creating a backlog of cases in the system and it goes against the overriding objectives in that the financial position of the parties is prejudiced and the importance of the case is diminished as parties tend to forget pertinent facts in their cases due to a long delay.”

[33] In light of all that I have considered above I am of the view that the applicant should be granted an extension of time to file its Defence. Therefore, I make the following orders:

1. The Defendants are granted permission extending time to file their Defence.

2. The Defendants are to file and serve their Defence on or before December 20, 2018.
3. The Claimant must file and serve an Amended Claim Form and Particulars of Claim on or before December 14, 2018.
4. The 5th Defendant to file and serve an Amended Defence if necessary within twenty-eight (28) days of being served with the Amended Claim Form and Particulars of Claim.
5. Case Management Conference is scheduled to take place on May 13, 2019 at 11:00a.m. for ½ hour.
6. Costs to the Claimant to be agreed or taxed.
7. The Applicant's Attorney-at-Law to prepare, file and serve this order.