



[2018] JMSC Civ 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV00222

BETWEEN	PAULA REYNOLDS	CLAIMANT
AND	KENUTE SAMUELS	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA & ORS.	2ND DEFENDANT

IN CHAMBERS

Lauri Smikle instructed by Caribbean Legal Suite for the Applicant/1st Defendant

Jacqueline Asher instructed by Asher & Asher for the Claimant/Respondent

Heard: March 1, 2018, April 25, 2018, June 20, 2018 and October 19, 2018

Application for Extension of Time to File Defence Pursuant to rules 10.2(1), 10.3(1), 10.3(9), 26.1 (2)(c), and 20(1) of the CPR as amended in 2006.

MASTER MASON. (Ag.)

[1] By a Notice of Application for Court Orders filed on September 7, 2017 and amended and filed on January 18, 2018. The 1st defendant seeks the following orders:

- (1) That the Acknowledgment of Service dated July 28, 2017 and filed on July 31, 2017, the Defence and Counterclaim filed herein on July 31, 2017 and the Amended Defence and Counterclaim filed on January 17, 2018 on behalf of the 1st Defendant be permitted to stand as filed or;

- (2) That the time for filing the Acknowledgment of Service and Defence be extended to July 31, 2017.
- (3) That permission be granted to amend the said Defence.
- (4) That the Amended Defence dated and filed on January 17, 2018 be permitted to stand as filed.
- (5) That the parties be directed to attend Mediation with respect to the matter.
- (6) Costs to be costs in the Claim.
- (7) Such consequential orders as this Honourable Court deems fit.

[2] The grounds on which the 1st Defendant is seeking the Orders are as follows:

- (i) The Defendant has a real prospect of successfully defending the Claim.
- (ii) A Defence was filed on July 31, 2017 and served on August 3, 2017.
- (iii) There is a good explanation for having failed to file and serve the Defence within time.
- (iv) Rule 10.3(9) of the CPR, as amended permits the Defendant to apply for an Order extending the time for filing a Defence.
- (v) Rule 26.1(2) (c) of the CPR, as amended empowers the Court to extend or shorten the time to comply with any rule, practice direction order or direction of the Court even if the application for the extension is made after the time for compliance has passed.
- (vi) Rule 26.9(3) of the CPR as amended empowers the Court to make an Order to put matters right where there has been an error of procedure or failure to comply with a rule or practice direction.
- (vii) This application was made as soon as was reasonably practicable.

- (viii) The Orders requested are necessary to dispose of the claim fairly.
- (ix) The 1st Defendant stands to be severely prejudiced if not allowed to defend this claim which he intended to defend at all times.
- (x) That no request for Default Judgment has been filed by the Claimant and the Claimant would not likely be seriously prejudiced by the 1st Defendant's delay.
- (xi) The failure to file a Defence within the prescribed time was not deliberate.

The Facts

- [3] The Claimant Paula Reynolds is a Chemistry teacher employed by the Ministry of Education and is assigned to the Meadowbrook High School. On March 12, 2012 while performing her duties in the Chemistry Lab, the 1st Defendant Kenute Samuels, a student at the said institution, but not a current student of the claimant entered the lab and pulled the Claimant's chair away while she was in the process of sitting on the said chair. As a result of his action, the Claimant fell to the floor and sustained injuries, loss, damage and expenses.
- [4] The Claimant filed a claim form and particulars of claim on January 26, 2017 and served the 1st defendant on April 25, 2017. The 1st defendant filed an Acknowledgement of Service, Defence and Counterclaim on July 31, 2017. The said documents were served on August 8, 2017. The 1st defendant's attorney-at-law made several attempts to obtain consent from counsel for the claimant to file the Acknowledgment of Service and Defence out of time but was unsuccessful.
- [5] On September 7, 2017, the 1st defendant filed an application for defence filed out of time to stand as filed, having not received consent from counsel for the 1st defendant to file his defence out of time. On January 18, 2018 the 1st defendant filed an amended notice of application to include an application for the

Acknowledgment of Service to stand as filed and for the Amended Defence to be permitted to stand.

Chronology of Events

[6] The incident occurred on March 12, 2012.

1. The Claim Form and Particulars of Claim were filed on January 26, 2017
2. The 1st Defendant was served with a copy of the Claim Form and Particulars of Claim on April 25, 2017. The Acknowledgment of Service was due on May 9, 2017 and the Defence June 6, 2017 respectively.
3. The 1st Defendant filed an Acknowledgment of service, Defence and Counterclaim on July 31, 2017 out of time.
4. The 1st Defendant's Attorney-at-Law served the Acknowledgment of Service, Defence and Counterclaim on the Claimant's Attorney-at-Law on August 8, 2017.
5. The 1st Defendant filed a Notice of Application to Extend Time within which to file a Defence on September 7, 2017.
6. An Amended Notice of Application to include that an Acknowledgment of service was filed and an Amended Defence to stand was filed on January 18, 2018.
7. An Amended Notice of Application to include that an Acknowledgment of Service was filed and an Amended Defence to stand was filed on January 18, 2018.
8. The 1st Defendant filed an Amended Defence and Counterclaim on January 17, 2018.

9. On January 17, 2018 the 1st Defendant filed a Supplemental Affidavit in Support of Notice of Application for Court Orders for Defence filed out of time to stand as filed.

The Issue

- (i) Whether the court should exercise its discretion and allow the 1st Defendant's Acknowledgment of Service and Defence to stand as filed; and
- (ii) Whether the Amended Defence filed is permitted to stand.

The Law

[7] The Court's power to extend time can be found at the following parts of the CPR.

- (i) Rules 10.2(1) and 10.3(1) of the CPR states that a Defendant who wishes to defend all or part of a claim must file a defence. The general rule is that the period for filing a defence is 42 days after the date of service of the Claim Form.
- (ii) Rule 10.3(9) states that the Defendant may apply for an Order extending the time for filing a Defence.
- (iii) Rule 26.1(2)(c) outlines the court's general powers of case management and says that the court can extend the time for compliance with any rule, practice direction, order or direction of the court, even if the relevant application is made after the period of compliance has passed.
- (iv) Rule 20.1 permits a party to amend their statement of claim at any time before the Case Management Conference.

Factors to consider in deciding the instant Application

[8] Rules 10.3(9) and 26.1(2)(c) of the CPR do not set out any criteria that govern the exercise of the courts power to enlarge time, it is accepted, however, that guidance may be found within the context of the overriding objectives of the CPR in that courts are to ensure that cases are dealt with justly. Rule 1.1(2) provides a non-exhaustive definition of the term “deal with cases justly”. “Dealing with a case” includes:

- (a) Ensuring so far as is practicable that the parties are on equal footing and are not prejudiced by their financial position.
- (b) Saving expenses
- (c) Dealing with it in ways which take into consideration:
 - (i) The amount of money involved
 - (ii) The importance of the case
 - (iii) The complexity of the issues; and
 - (iv) The financial position of each party
- (d) Ensuring that it is dealt with expeditiously and fairly; and
- (e) Allotting to it an appropriate share of the court’s resources while taking into account the need to allot resources to other cases.

[9] Another source from which guidance may be had in assessing the application of rules 10.3(9) and 26.1(2)(c) is case law.

In the case of **Fiesta Jamaica Limited v. National Water Commission** [2010] JMCA Civ. 4 Harris, J A considered the factors to be taken into consideration where an application is made to file a defence out of time. At paragraph 15 Her Ladyship said:

*“The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the Court’s approach in determining whether leave ought to be granted on an application for extensions of time was summarised 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) Limited and Others**. [2001] EWHC 456.”*

[10] Lightman J at para 8 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 other factors which must be taken into account.”

[11] Among those factors which are to be taken into account are:

- (a) The length of the delay
- (b) The explanation for the delay
- (c) Whether there is a good reason why the extension should be granted, i.e. merits of the appeal
- (d) Whether there would be any prejudice to the other party
- (e) The importance of compliance with time limits

Length of the delay

[12] In deciding whether or not the length of the delay was inordinate it is necessary to examine the time frame in which the 1st Defendant responded after he was served with the various documents. The Claim Form and Particulars of Claim were filed on January 26, 2017 and served on the Defendant on April 25, 2017.

[13] The 1st Defendant filed his Acknowledgment of Service, Defence and Counterclaim on July 31, 2017 and served them on the Claimant on August 3, 2017. In compliance with rule 10.3(1) of the CPR, the defence would have been

due within 42 days of service – the correct dates for service of the Acknowledgment of Service would have been May 9, 2017 and for the Defence and Counterclaim would have been on or about June 6, 2017. In the instant case, the delay was approximately two months and twenty days in respect of the Acknowledgment of Service and about four and a half months in respect of the Defence and Counterclaim.

- [14] The Notice of Application for Court Orders was subsequently amended and filed on January 18, 2018. In the circumstances, in my opinion a delay of 2 months and 20 days in filing of the Acknowledgment of Service and approximately 4½ months in filing the Defence and Counterclaim is not inordinate.

Explanation for the Delay

- [15] Another issue to be decided is whether the explanation given by the 1st Defendant for the delay is satisfactory.

The 1st Defendant at paragraph 5 of his Affidavit in Support of the Application for Extension of Time to file Acknowledgment of Service, Defence and Counterclaim filed on October 5, 2017 explained that he received a sealed package from his father, he stated:

“He was in the middle of his exam season, and his focus was on studying in preparation for his end of semester exams. He did not open the envelope until exams was completed on or about May 10, 2017”

At paragraph 6 of this Affidavit, he stated:

“When I finally opened the package I brought the documents to my mother’s attention, but my parents did not have the money to get a lawyer at the time, and I had to wait until about July to get a lawyer”.

- [16] The 1st Defendant through the efforts of his parents was able to secure legal representation at the end of July and a Defence, Counterclaim and Acknowledgment of Service was prepared and filed on July 31, 2017.

- [17] The 1st Defendant in his Supplemental Affidavit filed on January 18, 2018 argued that the delay was not inordinate as the Defence was filed and served about three (3) months after the date of service of the Claim Form and Particulars of Claim and an Application for Extension was made a month after the Service of the Defence.
- [18] Efforts were made by the 1st Defendant's attorney-at-law to have the Claimant agree to the filing of the Acknowledgment of Service, Defence and Counterclaim out of time, but all efforts were unsuccessful.
- [19] I am of the view that the explanation of the 1st defendant which was proffered in his affidavit evidence is sufficiently meritorious to warrant his delay in responding in the stipulated time frame.

Is there a good reason why the extension should be granted based on the merits of the case?

- [20] The Claimant submits that the affidavit of the 1st Defendant contains no information concerning the potential defence, further that there is no sworn testimony before the court which directs the court as to the merits of the defence. The Claimant is relying on the case of **Lee Ramkisoan v. Olds Discount** [1961] 4 WIR 73 – which she submits is still good law. In that case, it was held that the merit of the defence must be contained in the evidence which is placed before the court in order for the court to determine whether an extension of time to file the defence ought to be granted.
- [21] Further to the case of **Murray-Brown v Harper** [2010] JMA Appl endorses the decision in the **Lee Ramkisoan case**. In this case, Phillip J A said:

*“The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the case. Additionally, it was mentioned in the case **International Finance v Utexafrila Sprl** [2001] CLC 1361 where it was spelt out that in order for there to be a determination that there is a real prospect of success, the prospect must be better than merely arguable.”*

- [22] I am of the view that the reasons advanced by the 1st Defendant for the delay in filing the Acknowledgment of Service, Defence and Counterclaim are valid and there is merit in the defence.
- [23] The 1st Defendant has filed a counterclaim claiming damages against the Claimant for assault of his person and breach of Statutory Duty pursuant to Section 9 of the Child Care and Protection Act. He highlights particulars of breach of statutory duty of the Claimant/Ancillary Defendant.

The Issue of Prejudice to the other party

- [24] The Claimant submits that she would suffer prejudice if the 1st Defendant is granted an extension of time and the orders sought in his application. Further that the matter would be tied up in the court for a protracted period. It is my view that there is no real basis for these concerns. There are live issues which the court ought to weight and determine and would not create any prejudice to the Claimant whatsoever.
- [25] Mediation is compulsory and the parties will now be obliged to attend mediation which is structured so that the parties will engage in discussions in an effort to having the matter settled amicably and expeditiously.

The Issue of Compliance with Time Limits

- [26] It is important that time lines are met in the court's calendar. The effect of delay on the part of any party to court proceedings can have an adverse effect. Harris, JA put it this way at paragraph 18 in the case of **Attorney General of Jamaica v. Roshane Dixon and the Attorney General of Jamaica v Sheldon Dockery** Civil Appeal Nos. 148 and 149/2011.

“It cannot be too frequently emphasised that judicial authorities have shown that delay is inimical to the good administration of justice, in fact, it fosters and procreates justice.”

[27] In the instant case, the 1st Defendant failed to file the relevant documents in the prescribed time. However, I find that the omission on the part of the 1st Defendant was not deliberate, based on the particular situation, the fact that he was a minor totally dependent on his parents. If in fact any prejudice could arise it would not be of such a nature that it could not be cured with costs.

[28] I have considered the submissions and the affidavit evidence presented by the parties and I am satisfied that the 1st Defendant's application should be allowed.

[29] I order as follows:

1. That the Acknowledgment of Service dated July 28, 2017 and filed on July 31, 2017, the Defence and Counterclaim filed herein on July 31, and the Amended Defence and Counterclaim filed on January 17, 2018 on behalf of the 1st Defendant is to stand.
2. The Claimant/Ancillary Defendant must file a Defence to the Counterclaim within twenty-eight (28) days of today's date.
3. The parties are to attend mediation on or before January 25, 2019.
4. Case Management Conference is scheduled to take place on February 28, 2019 at 2:30p.m. for ½ an hour.
5. Cost of this application to the Claimant to be agreed or taxed.
6. The Applicant's attorney-at-law to prepare file and serve this order.