[2020] JMSC Civ 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 02810

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF VIOLET SKINNER-LEWIS also known as VIOLET THERESA SKINNER LEWIS, Deceased, Late of 30 Coleyville Avenue, Kingston 20 in the parish of St. Andrew.

AND

IN THE MATTER OF all that parcel of land part of Washington Gardens in the parish of St. Andrew being the lot numbered Eight Hundred and Sixty-Five on the plan of Washington Gardens aforesaid deposited in the Office of Titles on the 13th day of February, 1963 of the shape and dimensions and butting as appears by the plan thereof and being the land compromised in Certificate of Title registered at Volume 997 Folio 111 of the Register Book of Titles and known by its civic address as 30 Coleyville Avenue, Kington 20 in the parish of St. Andrew.

BETWEEN	**DEBBIE-ANN TAYLOR**	**CLAIMANT/RESPONDENT**
AND	**CYNTHIA ALLEN**	**1ST DEFENDANT/APPLICANT**
AND	**LENAR ALLEN**	**2ND DEFENDANT/APPLICANT**

IN CHAMBERS

Mr. Renaldo Mclean, Attorney-at-Law for the Defendants/Applicants.

Mrs. Tamara Powell Francis, Attorney-at-Law for the Claimant/Respondent.

Claimant/Respondent represented by Ms. Stacey-Ann Sweetland.

24th June and 10th July 2020

Civil Procedure - Application to set aside judgment entered after statements of case struck out - whether CPR 26.6 is applicable to a judgment entered by the

court after non-compliance with an unless order for attendance at adjourned Case Management Conference.

CPR 26.8 - Application for relief from sanctions - whether application complete without filing of affidavit evidence - effective date of making of application – whether application for relief was promptly made.

C. BARNABY, J (AG)

INTRODUCTION

[1] The Claimant/Respondent in her substantive claim challenges the validity of the alleged Last Will and Testament of Violet Skinner-Lewis dated 25th June 2006, for which a Grant of Probate was issued to the Defendants/Applicants. The Claimant/Respondent alleged that the grant was fraudulently obtained. In consequence, she sought the setting aside of the grant; cancelation of the transmission of registered property pursuant to it; delivery up of the certificate of title issued in consequence of that transmission; and a declaration that she is entitled to apply for a Grant of Letters of Administration in the estate of Violet Skinner-Lewis.

[2] The claim was filed some six years (6) years ago in 2014 and had a number of adjourned case management conferences. At one such hearing on the 1st March 2018, the conference was adjourned to 30th July 2018 on account that the Defendants/Applicants failed to appear. There was proof of their having been served with a Notice of Adjourned Hearing by registered mail at their addresses in London. Such service became necessary on the disbarment of their former counsel, Mr. Bonner. It was also ordered that if the Defendants/Applicants failed to attend the further adjourned case management conference on 30th July 2018, their statements of case would be struck out. They were again ordered to be served with Notices of Adjourned Hearing by registered post.

[3] On the 30th July 2018 when the further adjourned case management conference came on for hearing before K. Anderson J, and the Defendants/Applicants again failed

to appear, their statements of case were struck out and judgment entered for the Claimant/Respondent.

[4] Almost a year later, on the 15th July 2019, the Defendants/Applicants filed a Notice of Application for Court Orders (the "Notice of Application") claiming the following relief:

> *1. That pursuant to Rule 26.6 of the Civil Procedure Rules, 2002, that the Orders made on July 30th, 2018 and filed on the 21st December 2018 by His Lordship, the Honourable Mr. Justice Kirk Anderson be set aside.*
>
> *2. That pursuant to Rule 26.8 of the Civil Procedure Rules, 2002, that the Defendants/Applicants be granted relief from sanctions.*
>
> *3. That the Defendants/Applicants statement of case be restored.*
>
> *4. There be any such further order and other relief as this Honourable Court may deem fit.*

[5] The application is supported by an affidavit of the 1st Defendant/1st Applicant sworn and filed on the 15th November 2019, five (5) months after the Notice of Application was filed. No affidavit was filed by the 2nd Defendant/2nd Applicant in support of her application.

[6] After hearing Counsel for the parties on the application for relief from sanctions on the 24th June 2020, a decision on it was reserved to today's date.

ISSUES

[7] The following issues are regarded as determinative of the application:

i. Are the Defendants/Applicants entitled to an order setting aside the judgment entered for the Claimant, after their statements of case were struck out for failure to comply with an "unless" order?

ii. Did the Defendants/Applicants apply promptly for relief from sanctions?

[8] A number of authorities were helpfully referenced by both Counsel during the course of submissions. Having regard to the issues which determine the application, I have only found it necessary to cite one of those cases, which was relied on by both Counsel.

THE RELEVANT EVIDENCE

Defendants'/Applicants' Evidence

[9] Ms. Cynthia Allen states that she is the mother of Ms. Lenar Allen. Both are resident in the United Kingdom at separate addresses. The elder Ms. Allen states that the substantive matter was initiated on the 10th June 2014 on the filing of a Fixed Date Claim Form. The last date on which Ms. Allen attended court in these proceedings was 10th March 2016, which was an adjourned case management conference.

[10] According to Ms. Allen, the only correspondence she or her daughter ever received from the Claimant's/Respondent's Attorney-at-law was that post marked 3rd April 2019. It contained a letter and a copy of the Order of R. Anderson J wherein their statements of case were ordered struck out and judgment entered for the Claimant/Respondent. It was Ms. Allen's evidence that the contents of the registered mail came to her knowledge in late April 2019. She and her daughter immediately contacted relatives in Jamaica and she then became aware that Mr. Bonner, the Attorney-at-Law retained to defend the claim, had been struck from the roll of Attorneys-at-Law and that they were without legal representation.

[11] She states further that both her and her daughter earnestly sought to secure the services of a new Attorney-at-Law. Counsel who represents them in these proceedings was engaged. Ms. Allen is silent as to the date on which she secured Counsel's services. She merely declares that the Notice of Application was filed by him on 15th July 2019. I observe that this is some two and a half (2 ½) months after she is said to have discovered that an order had been made striking out the statements of case.

Claimant's/Respondent's Evidence

[12] Counsel for the Claimant/Respondent swore an affidavit wherein a history of the progress of the claim through these courts is set out. Consistent with Ms. Allen's evidence, Counsel avers that both Defendants/Applicants were last present in court on the 10th of March 2016 and that the Claimant was represented by her agent and daughter. On that occasion, all parties were ordered to be present for cross examination on the 18th and 19th January 2017. Neither Defendant was present on the latter occasion but it is stated that Richard Bonner who was then on the record for them was present. No explanation was offered for their absence. The Claimant's/Respondent's application for extension of time within which to file a defence to their counterclaim was heard and granted; and the Defendants'/Applicants' application to strike out that defence was refused by Lindo J. The Case Management Conference was further adjourned to 9th October 2017.

[13] The Defendants/Applicants failed to appear on 9th October 2017. V. Harris J (as she then was), adjourned the Case Management Conference to 1st March 2018 and directed that a Notice of Adjourned Hearing be served on the Defendants/Applicants by Registered Post. Notices of Adjourned hearing dated 9th November 2017 were sent by registered post to each Defendant/Applicant at their London addresses on the 17th November 2017.

[14] On 1st March 2018, the adjourned Case Management Conference came on for hearing before Wolfe-Reece J. The Defendants/Applicants did not appear and after being shown an affidavit of Service by Registered Post filed on 14th December 2017, the Case Management Conference was once again adjourned to the 30th July 2018. It was ordered that a Notice of Adjourned Hearing be served on the Defendants/Applicants by registered post and it was also ordered that if they failed to attend on 30th July 2018, their statements of case would stand struck out. Notices of Adjourned hearing dated 15th March 2018 were again sent by registered post to each Defendant/Applicant at their London addresses on 4th April 2018.

[15] On 30th July 2018 when the matter came on for hearing before K. Anderson J, the Defendants were absent once again. On being shown an Affidavit of Service of Registered Post filed on 28th May 2018 and the Defendants/Applicants being absent, it was ordered that their statements of case were struck out and judgment entered for the Claimant/Respondent.

[16] It was Counsel's evidence that none of the registered post sent to the Defendants/Applicants were returned and that each had been set to the addresses to which the order of K. Anderson J had been directed, which Ms. Allen admits was received by her daughter.

[17] On the 18th December 2019, when the instant application came on for hearing before Wolfe-Reece J and adjourned to the 24th June 2020, it was ordered that the Defendants/Applicants were at liberty to file affidavits in reply to any affidavits filed on behalf of the Claimant/Respondent. No reply was filed and the Claimant's/Respondent's evidence in response to the application for relief from sanctions therefore stood unchallenged.

Issue 1: Are the Defendants/Applicants entitled to an order setting aside the judgment entered for the Claimant/Respondent, after their statements of case were struck out for failure to comply with an "unless" order?

[18] On the Notice of Application, the Defendants/Applicants request that the Order of K. Anderson J on 30th July 2018, wherein judgment was entered for the Claimant be set aside pursuant to CPR 26.6. The referenced rule states,

> *CPR 26.6* *(1) A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.*

> *(2) An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application.*
>
> *(3) Where the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside judgment.*
>
> *(4) Where the application to set aside is made for any other reason, rule 26 .8 (relief from sanctions) applies.*

[19] CPR 26.5 sets out the procedure for obtaining judgment without trial where a party's case is struck out for failure to comply with an "unless order" by a specified date. The requesting party in those circumstances may ask for judgment to be entered and for costs, by filing a request for judgment. There is no evidence that this course was adopted by the Claimant/Respondent.

[20] The statements of case of the Defendants/Applicants were struck out by order of R. Anderson J, following their failure to attend the adjourned Case Management Conference. It was on that occasion that judgment was entered for the Claimant/Respondent. It is common ground that the Defendants/Applicants were not in attendance contrary to the order of Wolfe-Reece J.

[21] The evidence for the Claimant/Respondent is that Notices of Adjourned Hearing were sent to the Defendants/Applicants by registered post on the occasions they were ordered, and that the articles posted were never returned to the sender. All the articles were sent to the respective addresses of the Defendants/Applicants in London, including the order of K. Anderson J. Ms. Allen only admits to being shown the latter which she said was received by the 2nd Defendant/2nd Applicant.

[22] Ms. Allen avers that she was shown affidavit evidence which addressed the service of the Notices of Adjourned Hearing dated 9th November 2017 and 15th March 2018 by registered mail. There is a blanket denial of the contents of those affidavits

and a mere assertion that the notices were not received. I do not find this bare averment acceptable, particularly in the absence of any affidavit evidence from Ms. Allen addressing the evidence before the court that the notices, which were sent to her address, were never returned to the sender. This default is in circumstances where Ms. Allen was permitted to file a reply to the evidence of the Claimant/Respondent in opposing the application for relief, if such a reply was necessary.

[23] The statements of case of the Defendants/Applicants having been struck out for their failure to attend the Case Management Conference on the 30th July 2018, in disobedience of an order of the court, the right to enter judgment for the Claimant/Respondent arose. In my view, the Defendants'/Applicants' reliance on CPR 26.6 is misplaced.

Issue 2: Did the Defendants/Applicants apply promptly for relief from sanctions?

[24] It is also prayed on the Notice of Application that the Defendants/Applicants be granted relief from sanctions and that their statements of case be restored. It was argued that the application for relief from sanctions was promptly made.

Applicable Law and Analysis

[25] CPR 26.8 makes provision for relief from sanctions. In particular, CPR 26.8(1) states,

> *An application for relief from any sanction imposed for failure to comply with any rule, order or direction must be –*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*

[26] Both parties relied on the decision of Brooks JA in **H.B. Ramsay and Associates Limited et al v Jamaica Redevelopment Foundation and another**,[1] who remarked that although the word *"must"* has been interpreted as mandatory or directory in certain contexts, its inclusion in CPR 26.8 suggests a mandatory element and demands compliance.[2] He also stated, *"it is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief."*[3] He goes on to say,

> *[10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case.*

[27] In what I believe to be a principle of general application, Brooks JA in one of his concluding paragraphs recommends the approach to be taken on an application for relief from sanctions when he said this,

> *[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief.*

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[1] [2013] JMCA Civ 1
[2] Ibid. [9].
[3] Ibid.

> *There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant.*

[28] In addition to promptitude, it is my view that CPR 26.8(1) also mandates that an application for relief from sanctions be supported by evidence on affidavit, and that until some evidence has been filed by a requesting party, that party has not complied with the rule. This conclusion is arrived at, not only on the basis that paragraphs (a) and (b) of the rule are connected by the conjunctive *"and"*, but because the court, in the absence of some affidavit evidence would be unable to properly consider the merits of the application for relief.

[29] The Notice of Application of the Defendants/Applicants was dated and filed on the 12th and 15th July 2019. Five (5) months later, on the 15th November 2019, the Affidavit of Cynthia Allen was sworn and filed in support of it. No affidavit evidence in support of the application by Ms. Lenar Allen has been placed before the court for consideration.

[30] In respect of Cynthia Allen's application for relief from sanctions, I am of the opinion that until the 15th November 2019, the date of filing of her affidavit in support, she was not fully compliant with CPR 26.8(1).

[31] At the end of Counsel's oral submissions for the Defendants/Applicants, I enquired whether there was evidence which addressed the delay of five (5) months between the date of filing of the Notice of Application and the filing of Ms. Allen's supporting evidence on affidavit. Counsel responded that an affidavit addressing the issue could be filed, if the court was minded to grant an adjournment for that purpose. The court was not so minded having regard to passage of five (5) months between the filing of Ms. Allen's affidavit in support of the Notice of Application which was previously filed; the fact that the hearing of the application had been adjourned on previous occasions, the last being on the 18th December 2019; that the Claimant/Respondent on that occasion was permitted to file affidavits, with leave to the Defendants/Applicants to

file affidavits in reply by 17th April 2020 if necessary; and the point at which the application for an adjournment was being proposed. There is therefore no evidence of the reason for the delay of five (5) months in Ms. Allen effectively making her application for relief from sanctions.

[32] The Defendants/Applicants were excused from attending today's hearing and there was therefore no opportunity for cross examination. In any event, that facility could only have been provided if the hearing of the application was further delayed, which the court was not minded to allow.

[33] Between 10th March 2016 and the latter part of April 2019, there is no evidence of any contact between Ms. Allen and Mr. Bonner, whom she had engaged to defend the claim. There is nothing which demonstrates that within those three (3) years, Ms. Allen had any interest in being apprised of the progress of the case and of her responsibilities as a defending party.

[34] Giving Ms. Allen the benefit of any doubt I might harbour in respect of the Notices of Adjourned Hearing not coming to her attention, by her own admission, she became aware that her statement of case was struck out in the latter part of April 2019. She did not contact Mr. Bonner, whom she believed to be her Attorney-at-Law at the time, she being ignorant of the fact that he was struck from the roll. Contact was made with family in Jamaica *"immediately"* and it was only then that she made the discovery that she was unrepresented. Again, giving Ms. Allen the benefit of any doubt I might have in the *bona fides* of that averment, the Notice of Application for relief was filed two and a half (2 ½) months later.

[35] I accept as stated by Brooks JA that whether an application has been promptly made is dependent on the circumstances surrounding its making. Ms. Allen merely states that earnest efforts were made to retain Counsel after she was advised of Mr. Bonner's disbarment. She does not say the point at which she actually secured representation in the form of Mr. McNeil, only that he filed the application on 15th July 2019. Ms. Allen has not supplied any explanation, or if I am wrong, any good

explanation for the passage of two and a half (2 ½) months between knowledge of the imposition of sanction and the filing of the Notice of Application, which was only made CPR compliant on 15th November 2019. Cumulatively, there was a delay of seven and a half (7 ½) months in making an application for relief from sanctions as contemplated by CPR 26.8(1).

[36] While I accept that promptness has some degree of flexibility, its limits are not boundless. In the circumstances of the instant application, which have been outlined in the preceding paragraphs, I am unable to conclude that the application for relief from sanctions was promptly made by Ms. Allen. Her application for relief from sanction therefore fails.

[37] No affidavit has been sworn by the 2nd Defendant/2nd Applicant Lenar Allen in respect of the instant application and no reason has been supplied for its absence. Consequently, I have come to the conclusion that her application to the court for relief is not CPR 26.8(1) compliant and must also fail.

[38] In light of the foregoing conclusions, there will be no consideration of the merits of the applications for relief from sanctions.

DISPOSITION

[39] Following the hearing of the Defendants'/Applicants' Notice of Application for Court Orders filed on the 15th July 2019, it is ordered that:

1. The application is refused.

2. Costs of the application to the Claimant/Respondent to be taxed if not agreed.

3. The Attorney-at-Law for the Defendants/Applicants is to prepare, file and serve the order herein.