



[2020] JMSC Civ 222

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2019 CV 00959

BETWEEN	ALLISON WILLIAMS	1ST CLAIMANT
AND	GLORIA WILLIAMS	2ND CLAIMANT
AND	LAXIE WILLIAMS	3RD CLAIMANT
AND	LOCKSLEY BROWN	1ST DEFENDANT
AND	PETRONA BROWN	2ND DEFENDANT

IN CHAMBERS

Mr Linton Walters instructed by Linton Walters & Company, Attorneys-at-law for the Defendant/Applicant

Mr G Peter Abrahams Attorney-at-law for the Claimant/Respondent

Heard: September 23, 2020 and October 5, 2020

Civil Procedure - Application for attorney-at-law to depone to affidavit and present himself to be cross-examined on his evidence.

MOTT TULLOCH-REID, MASTER

BACKGROUND

[1] Mr Locksley Brown has by an application filed on September 18, 2019 with affidavit in support applied to the Court for an order that Mr G Peter Abrahams, the Claimants' attorney-at-law, depone to an Affidavit in this matter and make himself

available to attend the Trial for Cross-Examination pursuant to Rule 26.1(1)(m)(v) of the Civil Procedure Rules. The grounds on which the application is being made are:

- a. Mr Abrahams represented the Claimants in his capacity as attorney-at-law in the purchase of property, which is the subject of the claim.
- b. The affidavit of Mr Abrahams's secretary which is filed in support of the Fixed Date Claim Form will not advance the matter because she can only address the issues that were communicated to her by Mr Abrahams.

[2] What makes the application interesting is that Mr Walters, the Applicant's attorney is insisting on Mr Abrahams deponing to the affidavit and presenting himself for cross-examination in circumstances where Mr Abrahams is a sole practitioner and the only attorney on record for the Claimants.

[3] The application is made pursuant to CPR 26.1(1)(m)(v). I have perused the rules but have not come across that rule so I am assuming that counsel is intending to rely on CPR 26.1(2)(m) and CPR 26.1(2)(v). They provide as follows:

CPR 26.1(2) – “Except where the Rules provide otherwise, the court may:

“(m) require any party or a party’s attorney-at-law to attend the Court.

(v)take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objectives”

[4] I will say initially that I do not understand CPR 26.1(2)(m) to mean that the court can require a party's attorney to attend court to be cross-examined. I believe it means the Court can require a party's attorney-at-law to attend Court for the purposes of representing the interest of his client.

- [5] On July 29, 2020, I made orders that the Claimants' should file an affidavit in response to the Applicant's affidavit and for written submissions to be filed and served. Neither order was complied with. On September 23, 2020 when the matter came up before me, submissions were given orally and no legal authority was cited by either the Applicant or the Respondent in support of their respective positions.
- [6] The gist of Mr Brown's affidavit in support of the application is that he and his wife, the second defendant, entered into an agreement with the claimants to sell their property to them. Several discussions were held between both their attorneys, who happen to be Mr Walters for the Vendors (now the applicants) and Mr Abrahams for the Purchasers (now the respondents). Mr Brown alleges that the claimant failed to honour the terms of the agreement for sale and the sale was cancelled because the Letter of Undertaking from the Mortgagee came late. A formal letter was issued demanding the letter of undertaking and making time of the essence and it is his view that since Mr Abrahams was the only person who was communicating with Mr Walters about the issues on the Claimants' behalf only he would have the knowledge of the transaction and so only he should be able to testify to the facts of the transaction at the trial. He should therefore swear an affidavit and submit himself to be cross-examined by Mr Walters.

Mr Walter's submissions

- [7] Mr Walters submits that none of the claimants has filed an affidavit in support of the claim. The affidavit which supports the claim was sworn to by Mrs Claudia Thompson-Smith who describes herself as the legal assistant to Mr G Peter Abrahams. Mr Walters argues that the issues that are raised in Mrs Thompson-Smith's affidavit are matters that came up during the sale and that as she did not engage with him on the issues, she is not able to speak to them except to say what she was told by Mr Abrahams. I asked Mr Walters if his position would be the same if Mrs Thompson-Smith had been the person who was dealing with the

transaction. He responded by saying that all his correspondence was with Mr Abrahams not with Mrs Thompson-Smith.

- [8] I agree with Mr Walters that the absence of affidavits from the Claimants in support of their claim is rather unusual. One would expect the Claimants to give the evidence to set out the loss they are alleged to have experienced because of the actions or inactions of the defendant. While Mr Abraham's secretary may have knowledge of the transaction, it is not her loss, and so she while she could be a witness in the Claimants' cause, her evidence on its own, would not be sufficient to set out the loss which the Claimants are alleging they suffered.

Mr Abrahams' submissions

- [9] Mr Abrahams argues that there are no cases of a Court making an order for a sole practitioner to give evidence in the matter in which he acts for a party. He says if this were permissible he would be asked to retain a lawyer to act for his clients so he could be a witness on his client's behalf. He submits that since Mr Walters is suggesting that he (Mr Abrahams) should give evidence and submit to cross-examination because of conversations they had with each other, it must mean that Mr Walters himself should give evidence and submit to cross-examination. He further submits that his secretary was able to speak to the issues that are the subject of the claim because she was the person dealing with the matter in his office.

THE ISSUE

- [10] I am required to consider whether Mr G Peter Abrahams, attorney-at-law for the Claimants should be compelled to swear an affidavit in this claim and subject himself to cross-examination.

THE LAW

- [11] Neither counsel saw it fit to assist the Court with authority which supported their respective positions. I was therefore tasked with doing my own searches.

Canon V of The Legal Profession (Canons of Professional Ethics) Rules, set out in the Jamaica Gazette December 29, 1978 provides as follows:

“(p) While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of that client, except as to merely formal matters, or when essential to ends of justice, and if his testimony is material to the cause, he shall, wherever possible, leave the conduct of the case to another Attorney”

[12] The case of ***Cable & Wireless Jamaica Limited v Eric Jason Abrahams [2019] JMCC Comm 7*** delivered on March 15, 2019 is also helpful. In that case, one of the Defendant’s attorneys-at-law swore an affidavit on which they wished to rely in putting forward the Defendant’s defence. At paragraph 3 of the judgment, the Honourable Mr Justice Batts indicated that he would not be recognising the said attorney as appearing as counsel in the matter since his affidavit would be relied on by the defendants. He reasoned that

“...the well-recognised rule of practice that, save for matters of a purely formal nature, an attorney at law ought not to give evidence in a matter in which he appears. If circumstances arise where it becomes necessary, or desirable, for him or her to give evidence then other counsel ought to be briefed. The practice or convention is obviously designed to maintain that degree of dispassion, desirable or proper representation, and to avoid the prospect of an attorney being cross-examined by opposing counsel in the same case.”

Batts J drew attention to Canon V(p) of the ***Legal Profession (Canons of Professional Ethics) Rules*** set out above. He questioned if an attorney has to be subjected to cross-examination, how would he then be re-examined. In the case before Justice Batts, the attorney was one from a firm of attorneys-at-law and he was not the only attorney on record for the Defendant. In the case before me, Mr Abrahams is a sole practitioner so the question as to how he would be able to

conduct the matter on behalf of his client becomes even more pointed. It would seem he would have to leave the conduct of the case to another attorney.

[13] Canon V(p) is aimed at preventing attorneys-at-law from giving evidence and making submissions on the same issue. It also protects the attorney-at-law in that it allows him or her to give full uninhibited representation to his or her clients. It protects the client in the same way in that the client is assured of full uninhibited representation by his attorney-at-law.

[14] Are the matters which the Defendants want Mr Abrahams to depone to merely formal matters? Is the evidence that the Defendants want Mr Abrahams to depone to essential to ends of justice? Would Mr Abrahams' evidence be material to the cause? The answer to all the questions must be answered in the negative. I do not find that Mr Abrahams should be compelled in these circumstances to swear an affidavit. I also do not find that in these circumstances he needs to leave the conduct of the case to another attorney. I am of the view that the evidence which Mr Walters wishes to solicit can come from the Claimants with the supporting evidence from Mr Abrahams' legal assistance. If I were to find otherwise, I would also have to order that Mr Walters is obliged to swear an affidavit and submit to cross-examination because on his own submissions and on the evidence of Mr Locksley Brown, it was he who had dialogue with Mr Abrahams concerning the issues that now form the basis of the claim. The claim is not one as between the attorneys. It is one as between the parties. I therefore order as follows:

- a. Mr G Peter Abrahams, Attorney-at-law is not required to depone to an Affidavit in this matter or make himself available or attend the trial to be cross-examined.
- b. The trial date set for October 6, 2020 is vacated and the trial is to take place on April 13, 2021, for one day.
- c. The Claimants, Allison Williams, Gloria Williams and Laxie Williams are permitted to file and serve an Affidavit or Affidavits in Support of the Fixed

Date Claim Form filed on March 8, 2019 but must do so on or before November 30, 2020, failing which their statement of case will be struck out.

- d. The parties are granted an extension of time to file their skeleton arguments and list of authorities and must do so on or before January 29, 2021.
- e. The Core Bundle is to be filed by the Claimants' attorney-at-law on or before April 6, 2021 and the Index to the core bundle is to be served on the Defendants' attorneys-at-law on or before April 8, 2021.
- f. Costs are to be costs in the claim.
- g. The Claimants' attorney-at-law is to file and serve the Formal Order.