

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2007/0185

BETWEEN:

CECIL MAITLAND

Applicant/Claimant

AND

CHARLES MAITLAND

First Respondent/Defendant

ERROL MAITLAND

Second Respondent/Defendant

Appearances:

Mr D. Horsford for the Applicant/Claimant

Mr H. Paryag for the Respondents/Defendants

2008: December 19

2007: March 7, 14

April 4

JUDGMENT

[1] **CUMBERBATCH, J.:** The applicant herein by a claim form and statement of claim filed on the 3rd May 2007 commenced proceedings against the defendants seeking the following relief:

- "(1) A Declaration or Decree (Order) that the said Deed of gift executed on the 9th day of November 2006 in favour of the first Defendant be set aside;
- (2) An Order that the said Deed of Gift be struck off and/or cancelled from the Register of Deeds;

- (3) Rectification of the Deeds and lands Register of the title of the said Property by deletion therefrom of the entry relating to the said Deed of Gift;
- (4) Damages for trespass on the said property at True Blue, St. George's;
- (5) Restitutionary damages against the First and Second Defendants;
- (6) Exemplary damages;
- (7) Costs;
- (8) Such further or other relief as the Court deems just."

[2] An application was filed on even date seeking injunctive relief and a number of affidavits were filed by both parties on matters raised therein. After hearing Counsel who appeared for the interlocutory proceedings, Justice Clare Henry on the 11th May 2007 granted the injunctive relief sought by the applicant/claimant. The learned judge also ordered a speedy trial of the matters in the substantive action. Subsequent thereto on the 16th May 2007 the second respondent/defendant instituted proceedings against the applicant/claimant for injunctive relief supported by affidavits. After hearing Counsel for the parties Justice Clare Henry on the 8th June 2007 granted the injunctive relief sought by the second respondent/ defendant. No further pleadings were filed by the respondents/defendants and finally on the 3rd October, 2007, the applicant herein filed an application for judgment in default of defence supported by an affidavit of the applicant.

[3] The Court ordered the application to be served on the respondents and on the 30th November, 2007, leave was granted to the respondents to file and serve affidavits in response within 14 days. It is significant to note that no such affidavits were filed.

[4] The applicant in his affidavit deposed inter alia that five months after service of his claim form and statement of claim no defence had been filed by the defendants. The respondents/defendants though granted leave by this Court to file affidavits in response have not done so nor have they applied for leave to file their defence out of time and relief from sanctions.

[5] The thrust of the submissions of Counsel for the applicant is that the Court has the power to grant the relief sought in his application by virtue of the discretionary power accorded

the courts in part 12.10 (4) & (5) of the Civil Procedure Rules 2000 (" the CPR"). Part 12.10 (4) & (5) provide thus: -

"(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply."

[6] Part 10.2 (5) of the CPR provides:-

"If a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered if Part 12 allows it."

[7] Part 12.2 of the CPR provides :-

" A claimant may not obtain default judgment if the claim is –
(a) a claim in probate proceedings;
(b) a fixed date claim; or
(c) an admiralty claim in rem"

[8] It is common ground that the time for the filing and service of the defence has long passed and as is hereinbefore stated no application has been made by the respondents/defendants for leave to file their defence out of time, nor has an application been made for relief from sanction. Moreover, the provisions of Rule 12.2 of the CPR are not applicable herein. That being so, without more the application should succeed.

[9] Counsel for the respondents submits that the Court should not exercise its discretion to grant the relief sought by the applicant since the Court would have to make certain findings of fact which could only be made after a full hearing. Counsel also submits that the Court ought to deem the several affidavits submitted by the respondents/defendants in the interlocutory applications aforesaid as pleadings, in lieu and instead of a defence. Counsel's submissions were unsupported by authority.

[10] The Court has had sight of those affidavits which do indeed raise factual matters. In fact, the affidavits of the applicant quite clearly set out the factual matrix in support of his substantive claim. It is against that background that the Court finds it difficult to appreciate why no defence has been filed. The Court in the circumstances is left to conclude that the respondents/defendants decided for better or for worse to rely on the Court deeming their affidavits as pleadings.

[11] In response to this submission Counsel for the applicant relies on the provisions of Rule 2.4 of the CPR, more particularly the definition of the 'statement of case'

" Statement of case means:-

(a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and

(b) any further information given in relation to any statement of case under part 34 either voluntarily or by any order of the Court;"

[12] Part 30 of the CPR provides inter alia that affidavits may be required by the courts instead of or in addition to oral evidence. The rules do not elevate affidavits to the level of pleadings either in part 30 or in part 2.4, the definition of statement of case.

[13] The Court does not accept the submission by Counsel for the respondents/defendants. Not only is it unsupported by authority but there is no provision of the CPR which vests in the court the authority either discretionary or absolute to deem affidavits pleadings irregardless of their content. As was stated aforesaid there is no application before the Court pursuant to the provisions of part 26.8 of the CPR hence no more would be said about that.

[14] In the circumstances the application succeeds and the Court grants the orders sought in the application of October 3, 2007.


.....
Francis Cumberbatch
High Court Judge