

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2011/1214

BETWEEN:

Imelda Estephane qua representative of the estate of
Cherilyn Estephane.

Claimant

and

[1] Kervinus Coolie
[2] Peterson Smith

Defendants

Appearances:

Lydia Faisal of Counsel for the Claimant

Egan Modeste of Counsel for the First Named Defendant

2012: 3rd May
2013: 2nd, 3rd August

REASONS FOR DECISION

Brief Facts

- [1] Case **SLUHCV2011/1214** was filed in the High Court of Saint Lucia on the 23rd day of November 2011, alleging that the defendants Kervinus Coolie and Peterson Smith had in a vehicular collision caused injury to the claimant Cherilyn Estephane from which she subsequently died. Cherilyn Estephane is represented in these proceedings by the administrator of her estate Imelda Estephane.

- [2] Judgment in default of acknowledgment of service was entered against both defendants on the 9th January 2012. Service on the defendants was proven by affidavit of service of Emmanuel St. Croix a bailiff of the High Court of Justice who deposed to have served the defendants on the 1st of December 2011, and deposed that the mode of service employed was personal. This is in keeping with Rule 5.1 and 5.5 of the CPR 2000, which provides that service of the claim form should be personal and that personal service is proved by an affidavit of the server stating (a) the date and time of service; (b) the precise place or address at which it was served; (c) the manner by which the person served was identified.
- [3] The evidence of service of Emmanuel St. Croix was sworn before a justice of the peace and the jurat was executed on the 14th December 2011.
- [4] By application to set aside the default judgment filed on the 14th February 2012 the defendants alleged that the judgment is bound to be set aside pursuant to Part 13.2(1) (a) of the Civil Procedure Rules 2000 (CPR) for failure to satisfy part 12.4 (a), the conditions necessary for default judgment to be entered. In particular the defendants allege that contrary to the affidavit of Emmanuel St. Croix the defendants were not personally served.
- [5] I had the benefit of both written and oral submissions and I also read the affidavits of Peterson Smith filed the 14th February 2012; Anastasia Fenelon filed the 14th February 2012; Kervinus Coolie filed on the 14th February 2012; Michel Coolie filed on the 14th February 2012; the affidavit of service of Emmanuel St. Croix filed on the 8th December 2011; I also read the Affidavits of Emmanuel St. Croix both filed 5th March 2012 and the affidavit of Imelda Estephane filed on the 9th March 2012.
- [6] I am satisfied that on the evidence before me, that at the time of the entry of judgment in default of acknowledgment the claimant did satisfy the court office of her entitlement to have judgment entered, the claimants proving service consistent with Part 5.5 of the CPR 2000.
- [7] It is the very proof of service by Emmanuel St. Croix that has been made subject to scrutiny and the veracity of his evidence that is under challenge.

[8] The affidavit of Emmanuel St. Croix dated the 8th December 2011 stated:—

Date and Time of Service: Both defendants were served on the 1st day of December 2011 at 9:29 am and 8:29 am respectively.

Place of Service: 1st Defendant at La Caye, Dennery and the 2nd Defendant at La Ressource, Dennery

Name of Person Served: (1) Kervinus Coolie (2) Peterson Smith

Manner of Identification: The claimant directed me to the homes of the Defendants. Upon arrival there the Defendants confirmed personally that they were the persons named as the defendants.

Method of Service: I personally hand delivered the documents to the defendants.

[9] In support of their application the defendants both filed affidavits and attested to not having been personally served with the proceedings. They are in effect challenging the proof of service.

[10] On cross examination and in a further affidavit that he filed, Mr. St. Croix was forced to concede that he did not effect personal service, the effect of which was that he lied under oath. Counsel for the claimant correctly conceded the issue that there had not been personal service.

[11] It was in further affidavit evidence filed on the 5th March 2012, after the request for entry of the judgment, which would have prompted the entry of the judgment, the claimant sought to prove service and knowledge by the defendants of the proceedings by alternate means.

[12] Notice of the proceedings has not been challenged. The defendants admit receiving notice of the documents through third party intermediaries and subsequently receiving the documents.

[13] I nevertheless set aside the default judgment entered for the following reasons:—

- (a) Proof of service has been successfully challenged. There was no personal service on the defendants.
- (b) Although I am satisfied that the object of rule 5.1 and 5.5 is to satisfy the court office that the claim had been brought to the attention of the defendants, and that they understand their obligations thereunder, there is a reasoned procedure by which that is to be done. The latitude granted to affiants to provide evidence by means other than *viva voce*, is to be treated as inviolable. Its deliberate abuse should be met with stern and effective castigation. This is evidence on which the court office is asked to place reliability on without question. I hesitate to add that in this case the violation was made even more egregious by the fact that the process server was at the time a bailiff of the High Court.
- (c) CPR 5.5 in my view has a particular function. It allows the court to facilitate the proceedings moving forward without the delay of waiting for the court to satisfy itself of the correctness of service. This is for the protection of all litigants and it facilitates the ordered dispensation and adjudication of justice.
- (d) Although the evidence now before me establishes that the claim was subsequently brought to the attention of the defendant, I am satisfied that that evidence would have to have satisfied part 5.13 both in terms of the procedure and the timing of that evidence. Alternate service must be accepted by the court before it may be used as proof of service.

[14] This affidavit of Emmanuel St. Croix being an untrue record of service is struck out with the consequence that the judgment entered in default of acknowledgment of service was irregular and must be set aside.

[15] The effect of my finding is that the defendants have not yet been served with the claim form.

[16] I have had to consult Part 1 of the CPR 2000 many times over in rendering this decision, as I was forced to consider the conduct of the defendants who also had an obligation, in so far as they had had notice of the action, to further the overriding objective and in my view they have not done so. In the circumstances, although I have set aside the judgment, I do not make any award in costs.

Amended affidavit a legal anomaly?

[17] An affidavit is the evidence of a witness in written form. It is an alternative to a witness giving oral evidence, usually in chief. Its drafting is at all times governed and constrained by the rules and law of evidence. An affidavit is not a pleading, it is sworn testimony and as such, it is incapable except, I would submit, for minor typographical errors to be later amended. The proper course for an affiant who wants to add or alter his evidence would be to provide further evidence. In the circumstances I opted to treat the amended affidavit of service of Emmanuel St. Croix filed on the 5th March 2012 as a further affidavit.

[18] This finding did not affect my ruling. The requirement as to proof of service is at the time of the request for entry of judgment in default of acknowledgment of service. I had earlier concluded that the proof on which the court office had operated was flawed, inaccurate and untrue.

Consequential orders

[19] The claimants are now challenged by rule 8.12 and 8.13 of the CPR 2000. The claim form had expired by the time this application was set for hearing. I order this restriction removed under the power of CPR Part 26.1 (w) and extend retroactively the validity of the claim form until the 30th November 2013, to facilitate proper service of the claim.

Summary of orders:—

- (a) The affidavit of Emmanuel St. Criox filed on the 8th of December 2011 is hereby struck out.
- (b) The judgment in default entered be and is hereby deemed irregular and is set aside.
- (c) The validity of the claim form is extended to the 30th November 2013.

**TAYLOR-ALEXANDER M
HIGH COURT MASTER**