IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2012/0451

BETWEEN:

FESTUS ALEXANDER

Claimant

and

ROOSEVELT PHILLIP
RUDOLPH PHILLIP
GODWIN PHILLIP
VERALYN JAMES nee PHILLIP
MARGARET LEE nee PHILLIP

Defendants

Appearances:

Ms. Celia Edwards, Q.C. for the Claimant
Ms. Ayanna Nelson instructed by Afi Ventour and Co. for the Defendants

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2014: August 5

REASONS IN ORAL RULING

[1] **MOHAMMED, J.:** On the 2nd November 2012 Festus Alexander, the Claimant herein, instituted proceedings by Fixed Date Claim against Roosevelt Phillip, Rudolph Phillip, Godwin Phillip, Veralyn James nee Phillip and Margaret Lee nee Phillip ("the Defendants") for an order to set aside the writ of possession issued on 4th October 2012 in Civil Suit 164/2001 ("the old suit') and all which precipitated or necessitated the same or flowed therefrom.

[2] By notice of application filed on 9th January 2014 ("the application"), Roosevelt Phillip, Godwin Phillip and Margaret Lee nee Phillip applied to set aside three orders of the Court. The first order of 13th February 2013 ("the February order"), the second order dated 4th April 2013 ("the April order") and the third order dated 24th June 2013 ("the June order").

[3] The February order granted the Claimant permission to serve First Defendant, Roosevelt Phillip, copies of the Fixed Date Claim and accompanying documents by personal service by a Bailiff at an address in the United States of America, 611 E 84th Street, Brooklyn, New York ("the New York address"). The April order granted the Claimant permission to serve the aforesaid documents on the Second to Fifth Defendants on the First Defendant at the New York address. By the June order the Court granted the substantive relief sought in the Fixed Date Claim.

[4] The grounds of the application with respect to the February order are:

(a) the evidence relied on to obtain the February order was inadmissible hearsay and did not comply with CPR 30.3 (2);

(b) the address of the First Defendant is not the address used for the purported service;

(c) the affidavit relied on to obtain permission failed to state and/or show that the Claimant had a realistic prospect of success on the merits, which is material in such an application;

(d) the affidavit failed to specify the method of service to be used; and

(e) the February order failed to state the periods within which the First Defendant must file an acknowledgment of service in accordance with Part 9 and file a Defence in accordance with Part 10.

[5] The grounds of the application with respect to the April order are similar to the February order. They are:

(a) the Second and Fourth named Defendants are deceased and as such the information relied on by the Claimant to obtain the April order was unreliable;

(b) the Fixed Date Claim as filed does not name the correct parties of the two deceased Defendants;

(c) the information relied on to obtain the order was inadmissible hearsay and unreliable;

(d) the remaining Defendants who are alive do not live at the New York address;

(e) the affidavit relied on to obtain permission failed to state and/or show that the Claimant had a realistic prospect of success on the merits, which was material to such application;

(f) the affidavit failed to specify the method of service to be used; and the April order failed to state the periods within which the other Defendants must file an acknowledgment of service in accordance with Part 9 and file file a Defence in accordance with Part 10;

(g) the method of service used by the Claimant was via Federal Express and the order stated personal service by way of a bailiff; the affidavit of Aaron Leet filed 16th May 2013 fails to comply with the orders since the Travel History states "delivered to address other than recipient" and it fails to state that the Defendant was personally served.

[6] With respect to the June order. The Defendant's position is the Claimant is estopped in law from challenging the validity of the old suit since settlement talks were initiated to settle the old suit and the parties were in negotiations to sell and convey the property. It was also contended that the Claimant is confined to challenging the enforcement proceedings under the old suit rather than filing a new suit, which is an abuse of process.

[7] At the hearing of the application, Queen's Counsel for the Claimant raised a preliminary objection to the application which she contended must be addressed

before the merits of the application can be addressed. Queen's Counsel submitted that the application on its face is made pursuant to CPR 7 and 11 which state that an application to set aside must be made 14 days after the applicant, in this case the three Defendants became aware of the orders. However, the First Defendant has deposed that he was not served with the proceedings, but he has failed to state when he became aware of these proceedings. It is therefore essential that the First Defendant state when he became aware of the proceedings before the merits of the application can be addressed. The other challenge to the June order is a ground for a Defence and is not appropriate in an application to set aside.

[8] In response, Counsel for the First Defendant submitted that his contention is he was not served, the order for service was not complied with, in particular, the method of service, and that under CPR 39.5 the evidence to be presented by the applicant is not when he had knowledge of the matter but when he was served with the order.

[9] The three relevant rules in the CPR are rule 7.7, 11.16 and 39.5 all which deal with the setting aside of an order made in the absence of a party but at different stages of proceedings. CPR 7.7 states:

"(1) Any person on whom a Claim Form has been served out of this jurisdiction under rule 7.3 may apply to set aside service of the claim form.

(2) The court may set aside service under this rule if -

(a) service out of the jurisdiction is not permitted by the rules;

(b) the claimant does not have a good cause of action; or

(c) the case is not a proper one for the court's jurisdiction..

(3) This rule does not limit the court's power to make an order under rule 9.7(proceedings for disputing the court's jurisdiction, etc.)"

[10] Rule 11.16 states that:

"(1) A respondent to whom notice of an application was not given may apply to the court for any order made on application to be set aside or varied and for the application to be dealt with again.

(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."

[11] CPR 39.5 deals with applications to set aside a judgment given in a party's absence. It states:

"(1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by affidavit evidence showing -

(a) good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[12] All three rules are consistent with the position that an application to set aside an order made in the absence of a party is to be made 14 days after service of the order on the party who was absent. In my view, although the three rules state "service" on the absent party, to adopt a rigid, inflexible interpretation to the word "service" in these rules would defeat the purpose of the rule, which is to give an aggrieved party an opportunity to be heard. In this regard, even if the order was not served on a party but it otherwise became aware of these proceedings, the rules do not prevent it from applying to the Court to set aside the order. However, the rules prescribe one limitation. The party making such application should do so

within 14 days from becoming aware of the order. A Court will not set aside an order unless it is satisfied that a party was shut out and prevented from having his day in Court. However, this power must be delicately balanced with the time limit within which a party is to make such an application since there must be finality to the litigation process. The Defendant's position is he was not served with the documents filed in the instant proceedings, which will include the orders.

[12] The application was made 11 months after the February Order, nine months after the April Order and seven months after the June Order. The strength of each application is with the evidence placed before the Court and turn on its own facts. For the First Defendant to file the instant application he must have become aware of the instant proceedings. If that is indeed the case, his affidavit ought to have stated what was the catalyst for him to make the application. However, his affidavit is silent on when and how he became aware of any of these proceeding. It is because of this material deficiency in his evidence in support of the application the Court is unable to entertain the application since it cannot determine when time started to run against the First Defendant to make the application. Further, even if he was out of time in making the application, there is no evidence to persuade the Court to exercise its discretion to extend time.

[13] For the aforesaid reasons, I agree with the Claimant/Respondent's preliminary objection to the application. The application is dismissed with the Applicant to pay the Respondent/Claimant's cost. I will hear the parties on quantum.

[14] By consent costs is assessed in the sum of $1,000.00.

Margaret Y Mohammed
High Court Judge