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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2017/0227

BETWEEN:

IN A MATTER IN THE ESTATE OF MAYRALDA BOWEN, DECEASED

AND

ROSELINE SWAN
(In her capacity as administrator in the Estate of Mayralda Bowen, deceased)
Claimant

AND

1. **SHADAY "SHADER" ALEXANDER**
2. **DAVID "BENTLY" BOWEN**

Defendants

Appearances:

Ms. Celene Edwards of Counsel for the Claimant
Ms. Karen Samuel appearing amicus curiae for the Defendants
The Claimant being absent. The Claimant's lawful attorney Richard Bowen and the Defendants being present.

2018: May 14; 17.

RULING

[1] **DYER, J. (Ag):** This case came up on 14th May 2018. The Claimant, who had given evidence on affidavit in this matter and was to be the sole witness if the matter were to be heard as undefended claim, was absent. Her lawful attorney Richard Bowen was however present. An issue arose as to whether this matter should be dealt with as an undefended claim. This issue arose because the Claimant's counsel, Ms. Edwards, invited the Court to treat the matter as an

undefended claim and essentially determine it summarily on the basis that on the 27th November 2017 the Court (as differently constituted) had essentially ordered that: (i) the Defendants were to file their defence by the 18th December 2017; and (ii) that if they failed to do so, the matter was to be heard as an undefended claim. Ms. Edwards informed the Court that the Defendants had failed to file their defence and as such *"t]oday is for the hearing of the matter pursuant to the Order of Justice Roberts dated 27th November 2017*."

[2] This Court having heard Ms. Edwards, enquired about whether (i) the Order of the 27th November 2017 ("the Order") had been served on the Defendants; and (ii) the (summary) trial could proceed in the absence of the Claimant who was the sole witness. Ms. Edwards thereupon informed the Court that the Claimant was not required by the Court to serve the Order on the Defendants. It later became clear that Ms. Edwards was contending that the Court at the First Hearing had dispensed with service of the Order on the Defendants. Ms. Edwards appeared to be unfazed by the fact that there was no such hint of any such decision in the Order which incidentally was settled and filed by her Chambers. The Court having heard Ms. Edwards then heard Ms. Samuel, who was not on the record and appeared amicus.[1] Ms. Samuel indicated that she had been recently instructed by the Second-Defendant who was desirous of defending the claim. The Court having heard both counsel reserved its decision on whether the matter is to be dealt with summarily as an undefended claim.

[3] It would perhaps be prudent to outline at this juncture the circumstances of this case as gleaned from the record against which the foregoing issue falls to be considered.

[1] Ms. Samuel had no instructions regarding the First-Defendant's position. The First-Defendant has been present at the hearings in this matter but has taken no step to defend the matter.

The Circumstances of this Case

[4] The Claimant (in her capacity as the Administrator of the estate of Mayralda Bowen) filed a fixed date claim herein on the 8th June 2017 whereby she sought (i) immediate possession of the lands situate at Columbier, Byelands, in the parish of St. Andrew's which she averred was the property of the estate of Mayralda Bowen, deceased; and (ii) damages for trespass. This claim was personally served on the Defendants on the 13th June 2017.

[5] On the 23rd June 2017 the Second-Defendant caused a document ("the document") to be filed which was seemingly drafted by him or by a lay person and was purporting to be a defence to this claim. This document was filed within the time limited by the Civil Procedure Rules 2000 ("CPR 2000") for the filing of an acknowledgment of service. The Second-Defendant in so doing presumably sought to conduct his own defence. There is no evidence that this document was served on the Claimant. The Claimant's counsel informed the Court that it had not been served.

[6] It is essentially the Second-Defendant's case as gleaned from the document that he is not "*trespassing on the land*" as the Claimant avers. He asserts that the deceased was his grandmother and that he is a beneficiary under her Estate. He further avers that he was given permission by his mother, who is the deceased's daughter, to erect a small house on the property. He says that the estate was undivided when such permission was given and when he later built his house on the plot in dispute. He was unaware that the plot was earmarked for the Claimant who is his aunt. He avers that he has in any case "*been living on the property since 2005 and no one has objected to my doing so*". The Second-Defendant also denies "*receiving Notice to Quit*." He also denies that the First-Defendant was a trespasser. He asserts that he had invited the First-Defendant to stay on the property. She was responsible for looking after his personal property whenever he returned to England. The Second-Defendant, according to the contents of the

document, lives between Grenada and England. The Second-Defendant also purported to counterclaim for compensation in respect of his improvements to the property which he says was "*woody, unkept and uncultivated*" before he started occupying it.

[7] The matter came on for the First Hearing on the 27th November 2017. The Claimant and Second-Defendant were both absent. The First-Defendant was present. Ms. Karen Samuel who was present in Court appeared amicus curiae. Thereat, according to Ms. Edwards, there was some discussion about the document and the Court took issue as to the form of the Second-Defendant's defence. The Order seems to bear this out as paragraph 3 thereof directs that *"[i]f the matter* ***remains undefended*** *…*" (my emphasis). It can be inferred that the matter could only be undefended if the Court took issue with the form of the Second-Defendant's purported defence. The Court directed that the Defendants were to file and serve their defences by the 18th December 2017. The Defendants failed to comply with the Order. The Claimant filed an affidavit in support of her claim on 1st March 2018 seemingly pursuant to paragraph 3 of the Order which directed that *"[i]f the matter remains undefended the Claimant shall file affidavit in support of the claim and the matter will be heard as an undefended claim*". This affidavit was not served on the Defendants. The matter was adjourned to 26th March 2018. Ms. Edwards says that it was adjourned for trial. The matter did not come up on that date owing to circumstances not attributable to the parties. It was listed by the court office on the 14th May 2018 "*for report*." Ms. Edwards essentially avers that it was listed for summary trial of the matter as an undefended claim.

[8] It is against this backdrop that this Court must consider the issue whether the matter should be heard as an undefended claim in circumstances where the Second-Defendant did not comply with the terms of the Order which was not served on him and attended the hearing on the 14th May 2018 and indicated to the Court, through Ms. Samuel, that he wished to defend same.

Discussion

[9] In **Kenton Collinson St. Bernard v The Attorney General of Grenada and others** Civil Case No. 0084 of 1999 Barrow J (as he then was) posited that the fundamental objective of the CPR 2000 was to put a stop to habitual non-compliance which was commonplace under the old rules. He also admonished that "*the rules need to be obeyed, they need to be enforced*". It cannot be disputed that it is this Court's role to ensure that the rules are obeyed by all the parties. It is the law that the Court can adopt a more flexible procedure when managing cases involving litigants acting *pro se*. The Court in so doing is nonetheless not to disregard the processes and procedures set out and mandated by the CPR 2000 and thereby give an advantage to the unrepresented litigant over that of the party or parties represented by counsel. It is the Court's duty to apply the provisions of the CPR 2000 as **fairly** as the circumstances of the case dictate.[2]

[10] Whilst the Court did not give a reason for extending the period within which the Defendants were to file their witness statements, it can be inferred that it did so because it was cognizant that the procedural demands of the CPR 2000 may well be overwhelming for a *pro se* litigant. It also bears noting that the Second-Defendant could not be said to be a litigant who was indifferent as to the question of whether the Claimant obtained judgment. He had sought to put forward his case. He in so doing did not comply with Part 10 of the CPR 2000. It bears noting that our Court of Appeal has held that in circumstances where a litigant appears in person accommodation should be made for the drafting style of a lay person which may well be very different from that of a lawyer.[3] Whilst this statement was made within the context of a witness statement which was drafted by a lay person, it is applicable to this case since it was a statement of general application.

[2] See First Montana Services LLC and others v. Best Concrete Corporation and others [2010] ECSJ No. 184 at paragraph 6.
[3] Joseph W. Horsford v. Geoffrey Croft ANUHCVAP2014/0006 at paragraph 37.

[11] The Second-Defendant was given another opportunity to put his case before the Court in the form of a proper defence. He was however surprisingly not made aware of this. The Claimant did not serve him with the Order. Ms. Edwards says that the Claimant was not required to. Ms. Edwards however conceded that any such decision is not reflected in the Court's Order which was prepared and filed by her Chambers. Any lingering doubt as to whether the Order was to be served on the Defendants might be dispelled by the fact that the Order was endorsed with a Penal Notice which was addressed to both Defendants and informed them that if they failed to comply with the terms of the Order proceedings could be commenced against them for contempt. I would be surprised if this Court were to exercise its coercive powers to require defendants to defend a claim which they were not minded to. Ms. Edwards however accepted that this Court could not commit the Second-Defendant unless it was proved that he was served with the Order or at least had notice of the terms of same.[4]

[12] The Second-Defendant therefore seemingly had a good reason for failing to file a proper defence within the extended time frame. He was not present at the hearing. The Order was not served on him. There is no evidence that he was notified of its terms. Ms. Edwards informed the Court that Ms. Samuel who appeared amicus at the First Hearing was not prepared to undertake to inform him of the terms of the Order. The Second-Defendant had purported to file a defence within the time limited by the CPR 2000 wherein he outlined his case. He was seemingly oblivious to the fact that the Court had taken issue with the form of his defence. Ms. Edwards sought to counter the fact that the Second-Defendant did not have notice of the terms of the Order. She indicated, from the bar table, that the First-Defendant was present at the First Hearing and it appeared from the document filed by the Second-Defendant that she was in a relationship with him. Even if the Court were minded to give any weight to such evidence from the bar table, which it is not, it cannot, with respect to Counsel, be reasonably inferred

[4] See Rules 53.3 and 53.5 of CPR 2000.

therefrom that the First-Defendant was authorized to represent the Second-Defendant at the First Hearing.

[13] It my respectful view and I so hold that fairness and the justice of this case demanded that the Second-Defendant, who is a lay person and was then acting *pro se,* be made aware that issue had been taken with the form of his defence and that he had been given an opportunity to file a 'proper defence' by 18th December 2017. I am fortified in this view inasmuch as Rule 42.6 of the CPR 2000 provides that every order is to be served on "*every party to the claim in which the … order is made*" unless the court directs otherwise. As aforementioned, there is no hint in the Order filed by the Claimant's Solicitors that the Court had directed otherwise.[5] Moreover, it can be inferred that the purpose of the extension was to give the Defendants another opportunity to defend the claim; any such order dispensing with service would clearly militate against that purpose. Further, whilst this Court has jurisdiction to dispense with service, Rule 6.7 of the CPR provides that it may do so (on application) if it is appropriate to do so. The record does not disclose any circumstances which would have warranted the Court making the Order which Ms. Edwards says it did. Moreover, it would in any case be highly unusual if not irregular for the Court to give leave to endorse the Order with a penal notice directed to the Second-Defendant in circumstances where there was no intention to serve him with the Order. **Rules 53.3 and 53.5 of the CPR 2000** make clear that this Court only has jurisdiction to commit where a person was aware of the deadline by being served with the Order or being present when it was made or being notified of its terms by post, telephone, fax or otherwise.

Claimant's failure to attend the hearing on the 14th May 2018

[14] It bears noting that even if this Court were minded to summarily determine this matter as an undefended claim, the Claimant would still be required to prove that

[5] If the Court had indeed made such an order then the Second-Defendant being dissatisfied would be required to appeal.

she was entitled to the relief that she seeks. This is clear from **Part 27.2 of the CPR 2000** which sets out a prescribed procedure for disposing of undefended claims brought by way of fixed date claim form.[6] Indeed, our Court of Appeal held in **Richard Frederick and another v Comptroller of Customs and another HCVAP 2008/037** that "*[d]ealing with a claim summarily under CPR 27.2 does not mean entering summary judgment but* ***requires a trial*** *of the issues between the parties to be conducted in a summary manner.* ***The claimant must still prove*** *that he is entitled to the relief sought*" (My emphasis). At the hearing on the 14th May 2018 Ms. Edwards initially urged the Court to proceed with the trial although the Claimant was seemingly not in a position to prove her case in circumstances where she as the sole witness was not present. Ms. Edwards maintained that the Claimant's lawful attorney could adopt her evidence. She provided the Court with no authority for this proposition.

[15] **Section 30 of the Evidence Act** ("the Act") stipulates the circumstances in which the statement of evidence of a person who cannot be called as a witness can be admitted in evidence at the trial. The Claimant tellingly does not rely on this section and does not assert that any of the circumstances identified in that section exist in this case. On the evidence before this Court, section 30 of the Act does not assist the Claimant.

[16] It also bears noting that whilst the Court had directed at the First Hearing that the Claimant was to file evidence in support of her claim if the Defendants failed to file their defences within the extended time frame, it did **not** direct that such evidence was to stand as the examination-in-chief herein. It follows therefore that the Claimant was required to prove the facts in her claim by direct "*oral evidence in public*" in accordance with **Rules 29.2 and 29.8 of the CPR 2000**.[7] The Claimant who was her sole witness was therefore required to attend the trial. **Rule 29.10 of the CPR 2000 and section 138 of the Act** makes clear that the Claimant would in

[6] See Richard Frederick and another v Comptroller of Customs and another HCVAP 2008/037 at paragraph 73.
[7] See also sections 58 and 138(1) of the Act.

such circumstances be liable to cross-examination if the Defendants so desired. If the Claimant were given leave to adduce her statement in evidence in this matter without being called as a witness, it would severely prejudice the Defendants who were present at the hearing and had the right to cross-examine her.

Conclusion

[17] In my view, was there ever a case which cries out for the Court to exercise its discretion under **Rule 53.2 of the CPR 2000** and further extend the time limited for the filing of the Second-Defendant's defence, this is such a case. The Second-Defendant was at all material times a litigant acting pro se. He attempted to mount his own defence. He did not comply with CPR 2000. An extension was granted so that as Ms. Edwards says he could file a 'proper defence.' He was unaware of this as the Order was not served on him and he was not made aware of its terms. The Claimant, who was her sole witness, was absent at the hearing but nonetheless urged the Court through Counsel to deal with the matter summarily. If the Court were minded to do so, it would have been constrained to strike out her claim pursuant to **Rule 39.4 of the CPR 2000** on the basis she was unable to prove her case.

Order

[16] In summary, based on my findings and conclusions above I order as follows:-

1. The time limited for the filing of the Second-Defendant's defence to this action is further extended to 30th May 2018.
2. This matter is to thereafter proceed in accordance with CPR 2000.

Jean M. Dyer
High Court Judge (Ag.)

By the Court

Registrar