

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

GRENADA

CLAIM NO. GDAHCV2009/0410

BETWEEN:

**PRESTON MITCHELL
(IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF CLARINE ADLYN (ALSO
SPELT ADELINE) MITCHELL, DECEASED)**

Claimant/Applicant

and

RONNY ANDREWS

Defendant/Respondent

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Aloytha Thomas for the Claimant/Applicant

Mr. Kristopher Ross-Fields for the Defendant/Respondent

2024: March 21st;
December 2nd.

RULING

- [1] **ACTIE, J.:** The judgment creditor seeks permission pursuant to Part 46.3 of the CPR (Revised Edition) 2023 edition to issue a writ of execution upon a judgment given in excess of six years. The application is refused for the reasons outlined below.
- [2] In a claim filed on 30th September 2009, Clarine Mitchell claimed against the defendant for damages for trespass and for the removal of a chattel house erected on a lot of land situate in Belmont. In a judgment dated 27th May 2016, Theodore J. (Ag) ordered the defendant to deliver up vacant possession of the property to Clarine Mitchell no later than the 31st December 2016. Clarine Mitchell died testate

on 21st June 2017, appointing Preston Mitchell as the executor of her Will. A grant of probate of the said Will was obtained on 20th July 2022.

- [3] Preston Mitchell Qua Executor in a notice of application filed on 26th January 2024 seeks permission to issue execution of the judgment pursuant to Rule 46.3. The application is opposed by the judgment debtor.

Law and Analysis

- [4] **Rule 46.2 of CPR 2023** provides that:

“A writ of execution may not be issued without permission if –

- (a) any party against whom a judgment or order was liable to be enforced is no longer liable to have it enforced against it;
- (b) any statutory provision requires the permission of the court to be obtained before judgment is enforced;
- (c) **6 years have elapsed since the judgment was entered;**
- (d) the goods against which it is wished to enforce the judgment or order are in the hands of a receiver or confiscator appointed by the court;
- (e) the judgment creditor is no longer entitled to enforce the order;
- (f) the judgment debtor has died and the judgment creditor wishes to enforce against assets of the deceased person which have passed to that person’s personal representatives since the date of the order or the judgment was made subject to conditions.” (emphasis mine)

- [5] **Rule 46.3** under which the application is made requires the application to be supported by evidence on affidavit, and where six (6) years have elapsed to give reasons for the delay.

- [6] The applicant in his supporting affidavit states that the delay was not intentional as time escaped him. He further states that the main reason for the delay was that (i) he did not receive the necessary legal advice in a timely fashion to determine the way forward in dealing with his mother’s estate, (ii) due to the Covid-19 pandemic which restricted the movement of people, and (iii) through his own inadvertence.

[7] Mr Kristopher Ross-Fields, counsel for the judgment debtor, in submissions in opposition states that the starting point for the court on such an application is that the lapse of six (6) years is typically a sufficient reason to refuse the application unless the applicant can prove that the reasons for the delay take the applicant's case outside of the ordinary. Counsel contends that the applicant's affidavit is lacking in detail to take the applicant's case outside of the ordinary. He contends that the judgment debtor would be greatly prejudiced by enforcement of the judgment at this late juncture.

[8] **Part 46** of the **CPR** confers a discretionary jurisdiction to grant an extension of time for a writ of execution after six years. However, the rule is silent on the factors to be taken in consideration when exercising that discretion. Each matter is usually determined on a case-by-case basis on its particular facts and circumstances.

[9] In **Patel v Singh**¹ Peter Gibson LJ said:

"But it seems to me to be impossible to ignore the fact that, whereas in the six-year period the judgment creditor was entirely free to issue execution on his judgment in any way he chose, that freedom has been removed after the expiry of the period and it is left to the court to decide whether to allow the judgment creditor to proceed with one form of execution, the issuing of a writ of execution".

[10] The court both in **Duer v Frazer**² and **Patel v Singh**³, confirmed that:

"The lapse of six years is, in itself, enough to refuse the creditor permission to enforce the judgment. In general, the court will not extend time beyond six years unless there are exceptional circumstances, and it is demonstrably just to do so".

[11] The applicant in the case at bar is seeking execution of a judgment entered almost eight (8) years ago. It is the evidence that the original claimant who is the

¹ [2002] EWCA Civ 1938

² [2001] 1 All ER 249; [2001] 1 WLR 919

³ Civ 1938

applicant's mother died on 21st June 2017, almost 6 months after the date by which the judgment debtor was ordered to vacate the property.

- [12] The burden rests on the judgment creditor to satisfy the court that it is demonstrably just to exercise its discretion to extend the time for the writ of execution. The authorities in **Duer v Frazer** and **Patel v Singh** established that although each case turned on its own facts, the court would have regard, in the absence of special circumstances, to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, and any prejudice which the judgment debtor might have been subject to as a result of such delay including, in particular, any change of position by him. The longer the period that had been allowed to elapse since the judgment, the more likely it was that the court would find prejudice to the judgment debtor.
- [13] Basically, the applicant relies on the grief on the passing of his mother and the Covid-19 pandemic restrictions for the delay in enforcing the judgment within the prescribed time. However, the affidavit is devoid of an explanation, or any steps taken after his mother's death from 2017 to 2020 prior to the Covid-19 pandemic.
- [14] Counsel for the applicant relies on the decision of Ward J in the case of **Dexter Brandy Greene v Jounie Gumbs**⁴, where the claimant in that case sustained serious injuries as a result of a motor vehicular accident. Judgment was obtained against the defendant and damages were awarded on 8th November 2006. The judgment creditor died intestate on 21st December 2009 without having taken any steps in court to enforce the judgment. A grant of Letters of Administration was obtained on 30th December 2015. An application for the enforcement of judgment was made some fourteen (14) years after the grant of judgment, pursuant to Part 46.2 (c) . Ward J in refusing the application accepted that a lapse of six years or more may be regarded as presumptively prejudicial to the judgment debtor. He stated that the longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor. The court further having looked at all the circumstances rejected the applicants'

⁴ SKBHCV2004/0194

reasons for their inactivity between 2006 and 2012, and then between 2017 and 2021, to take the case out of the ordinary to justifying a departure from the general rule.

- [15] The case of **Society of Lloyds v Longtin**⁵, gave some guidance as to the exceptional circumstances that may guide the court in considering an application under part 46.2 namely:

“(i)The defendant must have known that the claimant remained intent on enforcing the judgment;

(ii) The claimant remained active throughout in trying to enforce the judgment;

(iii) There was no prejudice to the defendant;

(iv) It had come to light that the defendant had assets that were previously not known about.”

- [16] The evidence before the court does not reflect any attempts made by the applicant for enforcement during the six years after judgment was obtained. There is no evidence of any steps taken by the applicant’s mother prior to her demise which was approximately six (6) months after the date by which the judgment debtor had to vacate the premises. . Secondly, the applicant as executor was duly constituted to put the judgment debtor on notice either by way of letter or to bring an action for the enforcement of the judgment without first applying for the probate of the Will.

- [17] The decision in **Chetty v Chetty**⁶ in respect of an executor states:

“It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. ***The personal property of the testator, including all rights of action, vests in him upon the testator’s death, and the consequence is that he can institute an action in the character of executor before he proves the will.*** He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of

⁵ [2005] EWHC 2492 (Comm)

⁶ [1916] 1 AC 603 at pp 608-609

probate is the only way in which, by the rules of the court, he is allowed to prove his title.” (my emphasis)

[18] The applicant by his own admission states that the lack of activity to enforce the judgment was due to his own inadvertence in not receiving the necessary legal advice. It is the evidence that the applicant obtained the grant of probate on 20th July 2022 but only issued a demand letter on the 5th September 2023 in excess of one year. The extant application was filed on the 26th January 2024, some eighteen (18)months after the grant of probate.

[19] Further, the affidavit also fails to mention the prejudice to the judgment debtor. The court notes that the main issue in the judgment delivered by Theodore J (Ag) on 27th May 2016 was whether the judgment debtor in constructing a dwelling house in 2008 on the claimant’s land acted on the reliance on a promise that the claimant would give him the house spot. The court found in favour of the claimant and directed the judgment debtor to deliver vacant possession no later than 31st December 2016. The facts indicate that the judgment debtor has been in occupation of the lot of land with a dwelling house in excess of twelve years. This in the court’s view would be prejudicial to the defendant at this juncture.

[20] The court is of the view that the applicant has failed to justify any circumstances of the case which takes it out of the ordinary for the granting of permission for a writ of execution more than six years since the judgment. Accordingly, the application for a writ of execution is refused.

ORDER

[21] It is ordered and directed as follows:

- (i) The application for permission to issue a writ of execution is refused with costs to the judgment debtor in the sum of \$750.00 to be paid with fourteen (14) days of today’s date.

Agnes Actie
High Court Judge

By the Court

Registrar