

THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE

(CIVIL) DOMHCV2016/0063

BETWEEN: DAVID MICHAEL
 GERALD MICHAEL Claimants
 and
 RUTH MITCHELL JAMES (as PR of the Estate of John F Michael) Defendant

Before: Madame Justice M E Birnie Stephenson

Appearances:

Hazel Johnson of de Freitas, de Freitas & Johnson Chambers of Counsel for the Claimants

Geoffrey L Letang of Zenith Law Chambers of Counsel for the Defendant

2021: November 19

2022: February 11

Ruling on written submissions:

[1] **Stephenson J.:** This is a very long outstanding application to set aside a judgment made in the absence of a party. It is to be noted that this file was one of the many files that were destroyed during the passage of Hurricane Maria and upon being reconstructed were infected with mold.

[2] This file amongst others was reconstructed and brought up for status hearing in November of 2019 and directions were given regarding the outstanding application. It was decided that the application would be considered on written submissions and the parties were ordered to file written submissions in both soft and hard copy on or before the 19th November 2021 for consideration by the court.

- [3] It is a fundamental principal of law that litigants before the court are entitled to have their case dealt with at a hearing at which they are present or duly represented and are heard. If the case is disposed of in the absence of a party, and the party makes a prompt application for the judgment to be set aside or vacated and that person also has a good reason for not attending and had an arguable case based on the merits there would have to be very unusual circumstances existing for the court to refuse to set aside the order (**Bank of Scotland –v- Pereira**)

Background

- [4] This is a claim brought by the claimants who are beneficiaries of the estate of John F Michel against the defendant who is the Executor of the estate of John F Michel. The parties are all siblings.
- [5] In this action the claimants seek the following orders against the defendant, for:
- a. an account by her of all assets forming part of the estate of the late John F Michel and all expenses incurred by the estate;
 - b. that she completes the administration of the estate of John F Michel within a reasonable time period as determined by the court;
 - c. further or in the alternative that she be removed as Executor of the said estate;
 - d. that letters of administration *de bonis non-administratus* with will annexed be granted to the claimants; and
 - e. costs to be paid personally by the defendant.
- [6] The claimants sought and obtained an order of court permitting them to serve the proceedings on the defendant pursuant to the provisions of the Civil Procedure Rules (CPR 2000). That order was made on the 23rd March 2016 and entered on the 18th April 2016.
- [7] The claimants subsequently applied for and obtained permission of the court pursuant to the provisions of CPR 2000 to instead, serve the defendant by way of advertisement in a local newspaper on the grounds that the defendant lives outside of Dominica and that the claimants were unaware of her address and further, that she has relatives and friends in Dominica with

whom she has maintained a close relationship and would likely bring to her attention the publication of the claim in a local newspaper of wide circulation.

- [8] This order was granted on the 7th July 2016 and entered on the 2nd August 2016. An affidavit of service was filed confirming the service by publication and exhibiting the publication of the fixed date claim in the newspapers. It is noted that there was a first hearing date which was indicated on the fixed date claim form to be the 1st day of December 2016. The notice to the defendant was also published informing the defendant of the time within which she had to take action on her behalf in defence of the claim.
- [9] The first named claimant on the 30th November 2016 filed an affidavit averring *inter alia* that a claim was filed against the defendant on the 29th February 2016 and that attempts were made to execute service personally on the defendant in the United States of America where the defendant live and stated that the defendant successfully evaded service. The second named claimant further confirmed that there was service by way of advertisement in a local newspaper subsequent to obtaining the court's leave to do so.
- [10] The first named claimant further in a rather lengthy affidavit spoke to the fact among other things that the defendant had not filed a defence in the matter and that he travelled from the United Kingdom to Dominica to appear in court for the first hearing of the claim.
- [11] On 19th December 2016 judgment was entered against the defendant upon the court being satisfied that the matter was served on the defendant and that there was no acknowledgement of service or defence filed for and on her behalf. The court heard the evidence of the first named claimant for and on behalf of the claimants and judgment was granted in the absence of the defendant in the following terms:
- a. "that the defendant Ruth James is removed as the personal representative of the estate of the Late John F Michel;
 - b. the claimants David Michael and Gerard Michael are granted leave jointly and or severally to apply for letters of administration *de bonis non-administratus* with will annexed in the estate of John F Michel deceased;

- c. that the said Ruth James provide an account to the claimants of all assets forming part of the estate of John F Michel and of all expenses incurred by the said estate;
- d. that pursuant to Rule 21.2 and 21.4 of the Civil Procedure Rules 2000 made by the claimants with affidavit in support that the claimants are appointed representatives of the estate of John F Michel for the purpose of commencing proceedings against Catherine Ormand and Daniel John Ormand; and
- e. no order as to costs.”¹

THE APPLICATION

[12] The defendant has applied to the court for an order that the judgment entered in favour of the claimants in her absence be set aside and that she be allowed time to file her defence². The application is supported by two affidavits one of the defendant herself and the other from the alternate executor named in the will of John F Michel. (for ease of reference the court refers to the applicant as the defendant and the respondents to this application as the claimants)

Affidavit in support of application to set aside judgment obtained in defendant's absence

[13] The defendant avers that she was never served with the proceedings in this case neither was she ever informed of the case in any way shape or form. The defendant avers that due to the nature of her job she has moved around a bit however her email has remained the same and that she could have been contacted by telephone and or through her siblings who are not parties to this matter with whom she has a close relationship.

[14] The defendant further avers that since the commencement of this law suit she has been in close contact with her brother Luke Michael who has informed her and whom she verily believes spoke to David Michael the first named claimant who has never mentioned the need to be in contact with her urgently or asked for her contact information. The defendant spoke of her belief that had

¹ Order of Court dated the 19th December 2021 and entered on the 20th March 2017

² Application filed on the 29th May 2017

this been done she would have found out about the proceedings and that she could have been served.

[15] The defendant stated that it is her belief that the claimants deliberately attempted to commence proceedings and obtain a default judgment behind her back as there were multiple ways to get in contact with her and in the alternative to make contact with her co-executor William James who lives in Dominica and through her brother Luke who also lives in Dominica.

[16] Mrs James further averred that she first became aware of the proceedings when her sister Catherine Ormand was served with proceedings commenced against her by the claimants herein as Personal Representatives of the Estate of John F Michael. Mrs James said she sought legal representation and instructed her counsel to make a search as to how the claimants could be taking action against her sister in the capacity that they were seeking to do.

[17] Mrs James stated that she was subsequently informed by her legal counsel by email of the legal proceedings in the case at bar and that she had been legally removed as Executor of her father's estate by the claimant's herein. She exhibited a copy of the email she received from Counsel Mr John Elue Charles in support of her statement.

[18] Mrs James averred that she immediately instructed Counsel on record who after entering an appearance on the record was able to obtain copies of the court file and that a copy of the court order removing her as Executor was duly emailed to her for her information.

[19] Mrs James averred that she never knew of the proceedings brought against her by the claimants and had she known of this she would have staunchly defended the claim. She also informed the court that since the filing of the claim prior to being made aware of it, she in her capacity as executor applied for first certificate of title for a portion of land subject of the litigation at bar.

[20] Mrs James said that subsequent to her retaining the services of Counsel on record and a copy of the proceedings were obtained she found out that:

- a. the claimants lodged a caveat on the application for first certificate of title who claimed to be the owners of the land in question;
- b. that in May 2017 the claimants applied for and obtained an order for substituted service from the court on the grounds that she could not be found or was evading service;
- c. that the claim was served by way of advertisement that said advertisement was never brought to her attention;
- d. that it is not true that she could not be found or evaded service and that the statements made by the claimants in support of their application for alternative service were not true and fabricated, further that she did not believe that the claimants made any diligent efforts to contact her as she was at all times accessible through her siblings or through William James who was the alternate Executor of the estate of John F Michel.

[21] The defendant went on to deny the allegations made in the claim and that during the course of her administering the estate she was seeking to amicably settle the dispute relating to the occupation of Estate Land by Catherine Ormand.

[22] The defendant contended that based on the advice of her counsel which she verily believes that there are exceptional circumstances in this case which warrant the setting aside of the judgment obtained in her absence. The defendant contended that the claimants in this action failed to make full and frank disclosure to the court in that they did not disclose material facts to the court and further that they were untruthful in their representations to the court.

[23] The defendant further stated that as far as she has been informed that the alternate executor has always been willing and able to perform his duties as executor appointed under the will of John F Michel. Further, that a draft defence has been prepared which was exhibited to the affidavit and that her application was made as soon as she became aware of the proceedings and the order obtained by the claimant. Further that she has a real prospect of successfully defending the claim.

[24] A further affidavit in support of the application to set aside the judgment obtained in default was filed by William James. Mr James averred that he was named as the alternate executor in John F

Michel's will and even though he and the named defendant are no longer married it is not true as alleged by the claimants that he is unwilling to act as executor of the estate of John F Michel.

[25] Mr James averred that he has at all material times relevant to these proceedings lived in Marigot and that he is well known in the community of Marigot. That he has never been served with documents in the matter.

[26] Mr James averred that even though he and the defendant are no longer married they have a very cordial relationship as they continued to co parent their daughter. Further it was stated that he also gets on well with the defendant's family including the claimants. Mr James stated that he was once approached by David Michael the first named claimant who asked if he would be willing to give up his duty as executor in order to expedite the settlement of the land. That no decision was made by him in that regard.

[27] Mr James averred that he would have expected the claimants to contact their sister the defendant herein and to have received something in writing from her. Mr James said that had he decided not to act as executor he would have put it in a notarized document and stated further that he stands willing to act as Executor in the stead of the defendant. Mr James stated that the first name claimant has always had the means and capability of being in contact with him.

[28] The application is being contested by the claimants who essentially claim in a very lengthy and prolix affidavit that the defendant failed to execute her duties as executor of their late father's estate which was detrimental to the estate. Those averments to this court's mind are not relevant to the issue for determination at this stage.

[29] Mr David Michael averred that they filed for and obtained two orders for service in this matter both applications were in total compliance with the provisions of the Civil Procedure Rules. The first order being for leave to serve proceedings overseas. That there were many attempts and efforts made to serve the defendant overseas but to no avail. The first name claimant exhibited evidence of the many unsuccessful attempts at service on the defendant.

[30] The second order that was obtained was for service by way of advertisement and that the proceedings were advertised in the newspaper widely circulated in Dominica in order that it would come to the attention of the defendant through her friends and relatives including her ex-husband and alternative executor who resides here in Dominica.

[31] Mr David Michael said among other things, which are not really relevant to the application at bar that at all material times the defendant was duly and properly served and that her application to set aside the *ex parte* order should not be granted and that essentially to grant the defendant's application would be prejudicial to the estate of John F Michel.

[32] The claimants contend that the after due service on the defendant the matter was set for hearing and the defendant failed to appear at the hearing and in the circumstances the court proceeded to summary trial in her absence and that judgment was duly handed down in their favour. This judgment was handed down on the 19th December 2016. It is to be noted that the application filed by the defendant was filed on the 29th May 2017.

[33] The issue that arises for the court to resolve is whether the court should exercise its discretion to set aside the judgment made in the absence of the defendant pursuant to part 39.5 of CPR 2000.

The Law

[34] This application is governed by the provisions of CPR part 39.4. It is useful to start by enunciating the applicable principles. Part 39.4 of CPR 2000 gives a trial judge power to proceed with a claim when a party does not appear in court for the trial³.

³Part 39.4 provides

'Failure of party to attend trial

39.4 If the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules—

...

(b) if one or more but not all the parties appear, the judge may proceed in the absence of the parties who do not appear.'

[35] A party against whom a judgment has been entered is at liberty to apply to the court for judgment granted in his absence to be vacated.

[36] The power of the Court to set aside such judgment granted in the absence of a party is provided for at Part 39.5 of CPR 2000. Part 39.5 provides

(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 evidence on affidavit showing –

(a) 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.

[37] It is incumbent on a Judge on hearing an application to set aside an order made in the absence of a party to have due regard to the provisions of part 39.5 of the CPR 2000.

The applicable test:

[38] In the case of **Justin Pemberton –v- The Attorney General of the Commonwealth of Dominica et al**⁴ part 39.4 & 39.5 fell to be considered by the Court of Appeal. Justice of Appeal Michel after considering the facts of the case and the case of **Brazil-v-Brazil**⁵ had this to say

“The court must examine all the evidence relevant to the party's non-attendance. Looking at the matter in the round, the court must ask whether the reason proffered is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. The phrase

⁴(2012) 80 WIR 255

⁵[2002] EWCA Civ 1135

'good reason' is a perfectly ordinary English phrase and a sufficiently clear expression of the standard of acceptability to be applied. "⁶

[39] The court does not have a broad discretion whether to grant an application under Part 39.3(5); all three of the conditions listed in CPR 39.3(5) must be satisfied before the court can exercise its discretion to set aside an order. Re: **Bank of Scotland –v- Pereira**⁷

[40] In that case⁸ it was held that if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.

Promptitude:

[41] Part 39.5 makes provision for the application to be made promptly within 14 days of the order coming to the attention of the applicant.

[42] In the case at bar according to her averments the applicant states that the order came to her attention via email from Counsel Geoffrey Letang on the 15 May 2017. Her application to set aside the judgment was made on 29th May 2017 which was clearly within the 14 days required by the CPR 2000.

[43] It is the respondent's contention that the application brought by the applicant is out of time as according to her evidence that she became aware of the terms of the judgment on 3rd March 2017 when Mr John E Charles emailed her. ("Exhibit RJ2")

[44] It would be important to quote the statement made by Counsel Mr John E Charles to the applicant as this court is of the view that the question that has to be answered is whether or not this amounts to notice of the terms of the order as contemplated by CPR and as insisted and relied on by the respondents.

⁶ Pemberton –v- The Attorney General of Dominica op cit at paragraph
72011] 1WLR2391

⁸ ibid

[45] In his email to the applicant Mr John E Charles stated “... *The information I have received is that you have been removed as PR of the estate of John F Michel. ...*” is this or can this amount to notice of the terms of the order made in the case at bar?

[46] This court does consider that this is in fact the first notification to the applicant that there was an order made against her therefore her application does fall outside of the 14 day requirement as stipulated by CPR 2000.

Reasons – was there a good reason for failing to attend court:

[47] CPR 2000 does not provide a definition as to what is a good reason. It is incumbent on the court to look at all the evidence adduced regarding applicant’s non-attendance at court. This court will look at the reasons provided by the applicant and ask itself the question whether or not this reason is sufficient to move the court to exercise its discretion of the court to set aside the order.

[48] The test to be applied can be stated thus, has the applicant provided the court with a good reason for her absence and non-participation in the matter. Where a defendant fails to attend a hearing, the court will no doubt be require to be satisfied that the defendant has been duly served.

[49] In the case at bar the claimants applied for and obtained leave to serve the defendant by way of advertisement in a local newspaper. This application was made and granted pursuant to the Part 5 of the CPR 2000⁹. An affidavit of service by way of advertisement with advertisement duly exhibited was filed by the claimant on the 8th September 2016 establishing that the defendant was duly served by way of advertisement on the 15th August 2016.

[50] On 30th November 2016 the first named claimant filed an affidavit in which he made averments regarding the filing of the claim, the application for substituted service and of the fact that the advertisement was duly made and that as at the 30th November 2016 the defendant failed to file a defence to the claim.

[51] The applicant has averred that she was never served with the proceedings neither was the advertisement in the newspaper drawn to her attention.

[52] The applicant has also averred that the claimants had ample means of contacting her if not directly through their siblings and family members. The applicant also claimed that at the time the claimants commenced the action her ex-husband who is named as the alternate executor in the will was in Dominica, that he could have been found and that he in fact spoke with the claimants but no mention was made about trying to contact her. It is to be noted that Mr William James filed an affidavit corroborating the applicants' averments in this regard.

[53] It is further noted that Mr James denied informing the claimants that he was not willing to act as executor for the estate of John Michel deceased.

[54] The defendant's case is that she was not served. (against the backdrop of her making a case that the application for substituted service obtained by the claimant was premised on falsehoods presented to the court by the claimants).

[55] The question therefore to be asked at this juncture can the court consider setting aside what appears to be good and proper service pursuant to the provisions of CPR.

[56] The words of the Master of Rolls in the Pereira case lends great assistance to matters such as the case at bar he said

"The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR r 39.3 is subject to the overriding objective, and must be applied in that light. ..." (para 26)

[57] Therefore the applicant has failed to cross the first hurdle of the three hurdles which are to be considered cumulatively and in the circumstances of the case the application will not be successful.

[58] This court feels compelled to ask the question however, are there unusual and compelling circumstances attendant to the case at bar?

[59] The first named claimant who, when the court considers the entire matter is the driving force behind this litigation and went to great lengths in his affidavit in opposition filed on 21st August 2017 to place before this court his experience, legal qualifications, expertise and success at the Bar in London England both as a police officer and as a lawyer. This raises a question in this court's mind as to why the claimants chose to embark upon the proceedings knowing full well that there was an alternate executor named in their father's will with whom they were in contact and who was willing to act as executor.

[60] This court accepts the averments of Mr William James in his affidavit filed on 12th June 2017 in support of the application to set aside the judgment order that he did not refuse to act as the executor.

[61] This gives rise to another question in this court's mind as to whether misrepresentations were made which led to the claimants obtaining leave to serve by way of advertisement. The entire actions by the claimants herein do cause some questions to arise and gives the court some pause for concern.

[62] That having been said the court notes that the substantive issue before the court is one which can be settled between the parties, for these reasons:

- a. The parties are siblings and beneficiaries to their father's estate;
- b. Their father died testate and the law in that regard is straight forward, that is basically that the terms of his will are to be carried out after the due expenses of the testator has been settled;
- c. The estate is not a large one by any means and should be settled;

- d. The Court at all times retains jurisdiction to ensure that the deceased estate is properly and fully administered.

[63] It is this court's view that for this matter to proceed to trial would not be the best use of the court's time and resources and therefore not in keeping with the Overriding Objective of the CPR 2000. It is this court's view that it is in the best interest of all the parties concerned to seriously attempt to have these matters mediated and accordingly this court invites the parties to consider mediation and this court stands ready to make a mediation order in this matter."

[64] The order of this court is therefore:

- a. Application to set aside judgment made in absence of the defendant is not granted
- b. That the parties attend mediation
- c. There shall be no order as to costs

[65] This court records it's thanks to counsel for their assistance rendered through their submissions.

**M E Birnie Stephenson
High Court Judge**

BY THE COURT

REGISTRAR