

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(MATRIMONIAL)

DOMHMT2019/0002

BETWEEN:-

FRED EMMANUEL JOHN

Petitioner /Respondent

And

FUNMILAYO EBUN DAIBI FEYIDE JOHN
(a.k.a Funmi Feyide John)

Respondent/Applicant

Appearances

Hazel Johnson of de Freitas de Freitas & Johnson for the Petitioner/Respondent

Heather Felix Evans of Optimum Legal Services for the Respondent/Applicant

2019, June 6, 21

July 19

RULING ON WRITTEN SUBMISSIONS

- [1] **STEPHENSON J.:** This is an application brought by the Respondent (“Mrs John”) by way of summons filed on the 1st April 2019 for leave to file her Answer to the Divorce petition out of time. There is an affidavit in support of the application with the proposed answer exhibited therewith. The Petitioner (“Mr John”) opposes the application.

[2] It is important to have a quick review of the filings in this matter as it regards only the petition for divorce¹ to put the application for leave into full perspective as follows:

	Date	Documents filed	By which party
1.	January 18 th 2019	Petition	Mr John
2.	January 18 th 2019	Affidavit in support of petition	Mr John
3.	January 18 th 2019	Notice of Application to serve out of jurisdiction by substituted Service	Mr John
4.	January 18 th 2019	Affidavit in support of Application for service of petition and other documents out of the jurisdiction	Mr John
5.	January 22 nd 2019	Notice of Proceedings	Mr John
6.	January 25 th 2019	Order of Court granting leave to serve petition and other documents out of the jurisdiction on the respondent by post	Mr John
7.	February 20 th 2019	Affidavit of service of documents served out of the jurisdiction with Fed Ex Receipt exhibited (Documents couriered to Mrs John on the 28 th January 2019 and delivered on the 30 th January 2019)	Mr John
8.	March 12 th 2019	Notice of Change of Solicitor	Mrs John

¹ There are a number of applications that have been filed as it regards custody of the minor children of the marriage. At the time of writing a date has been set for the hearing of those applications.

9.	March 20 th 2019	Acknowledgement of service of the Petition	Mrs John
10.	March 21 st 2019	Amended Acknowledgment of service of Petition	Mrs John
11.	March 25 th 2019	Request for directions for trial	Mr John
12.	March 25 th 2019	Notice of hearing (a) Lodged on the 19 th March 2019 (b) Signed by Registrar on the 20 th March 2019	Mr John
13.	March 25 th 2019	Re-Amended Acknowledgment of Petition	Mrs John
14.	March 29 th 2019	Affidavit of Service for request for directions for trial and notice of hearing served on Counsel for Mrs John on the 26 th March 2019	Mr John
15.	April 1 st 2019	Summons for leave to file answer out of time listed for hearing on the 3 rd April 2019	Mrs John
16.	April 1 st 2019	Affidavit in support of application to file answer out of time	Mrs John
17.	April 1 st 2019	Certificate of Urgency filed requesting that the application for leave to file answer out of time be heard on the grounds that the court has set a date for the hearing of the petition	Mrs John

18.	April 4 th 2019	Affidavit in opposition to respondent's summons for leave to file answer out of time	Mr John
19.	May 31 st 2019	Submissions in support of application for leave to file answer out of time filed	Mrs John
20.	June 6 th 2019	Application heard in chambers ... Court orders that matter to be dealt with on written submissions ²	The Court
21.	June 21 st 2019	Written submissions in opposition to the grant of leave to file answer out of time filed	Mr John

The application

[3] In her affidavit in support of her application for leave to file her answer out of time Mrs John averred that when she was served with the petition for the dissolution of her marriage she was pre-occupied with the legal proceedings brought by Mr John as it regards the children of the marriage.

[4] Mrs John further averred that she was on the 30th January 2019 served with the divorce petition in the United States of America and that she also appeared in the Circuit Court in Montgomery County Maryland USA when she was ordered by that court to return the children of the marriage to Mr John based on an ex parte order obtained by Mr John from this court.

[5] Mrs John stated that she was devastated by the order of court to hand the children of the marriage over to Mr John. She said that she became focused on and determined to regain custody of the

² The court did in its order say that it would rule on the 7th July 2019 but due to circumstances beyond the court's control this could not be done and I do extend my apologies to counsel and the parties for any inconvenience which may have been caused by not ruling on that date.

children of the marriage and was accordingly preoccupied with instructing counsel in that regard. During all this, she also changed solicitors and consequently overlooked instructing her counsel regarding the divorce petition and responding to same.

[6] Mrs John said that on the 20th March 2019 she inadvertently instructed her solicitor not to indicate on the acknowledgement of service that she intended to defend the divorce proceedings and when she realised her error she immediately instructed her solicitor to file an amended acknowledgment of service indicating her intention to defend the proceedings.

[7] Mrs John contends that she has not behaved in such a way that it would be unreasonable for Mr John to be expected to live with her as pleaded by Mr John in his Petition. She stated that she has been advised by her counsel and verily believes that the court ought to have regard to the whole history of the marriage before coming to a conclusion that her behaviour was unreasonable.

[8] Mrs John averred that notwithstanding the fact that she left Dominica with the minor children of the marriage and returned to the United States without the knowledge and consent of Mr John it was with the intention that she and the said children would continue to live in the United States but it was never any intention or attempt to deprive Mr John of his children or keep them out of his reach for an extended period.

[9] . She said that her actions were based on fear and panic caused by the behaviour of Mr John.

[10] She averred further, that basically the United States has also been the home of the family where she and Mr John met and were married and where the children were born and went to school before moving to Dominica. That there was a family home there and that she was surrounded by family and friends and felt more secure at that location. Mrs John speaks also to placing herself in a position where she felt she would have been on a level playing field to deal with the actions and statements of Mr John in terms of him wanting to be divorced by the end of the fiscal year of 2018 and springing this information on her. This court does note that Mrs John was not in her place of birth or in a place where she would have had friends and family which would have afforded her any support or comfort in the circumstances of her crumbling marriage, whereas Mr John was in his native land surrounded by family and presumably friends.

[11] Mrs John stated in her affidavit that a reading of the petition filed by Mr John alleges against her unreasonable behaviour which was all subsequent to him asking her for a divorce and that he has not made out a case of unreasonable behaviour on her part and that the matter should go to trial for a determination on the merits. She further averred that it would be in the interest of justice for her to be given leave of the court to answer the petition filed herein.

[12] Learned Counsel Felix Evans on behalf of Mrs John urged the court to allow Mrs John to file her answer out of time, as to do so would afford the court with an opportunity to grant the divorce either on the petitioner's petition or the respondent's answer which advances the administration of justice. That to refuse to allow her leave to file her answer out of time will deny her client the opportunity to respond to Mr. John's accusations and place her case before the court.

[13] Learned Counsel Mrs Felix Evans submitted that her client is seeking the discretionary relief of the court and adopted the statement of Davies LJ in **Collins –v- Collins**³ when he said “*filing a pleading out of time is not a matter of right; it is a matter of concession or grace.*”

[14] The application at bar was filed on the 1st April 2019 one month after Mrs John would have been required to file her answer. Counsel Mrs Felix Evans further submitted that Mr John would suffer from no injustice or prejudice for what she described as a slight delay in the proceedings. That it really is in Mrs John's interest to defend the allegations made against her by Mr John. If she is successful then her preventing a public decree based on Mr John's statements solely outweighs the slight inconvenience caused by the delay making it necessary for the grant of leave. Reliance was placed on the decision in **Huxford –v- Huxford**⁴ and **Rogers –v- Rogers**⁵.

The objection

[15] Mr John submits to this court that there is no good and compelling reason for Mrs John to be granted leave to file her answer out of time.

³ [1972] 2 ALL E R 658 at 660

⁴ [1972] 1 ALL E R 330

⁵ [1974] 2 ALL E R 361

[16] Mr John in his response made reference to the various documents filed in the matter as it regards the divorce and which have been reviewed and listed by this court at paragraph 6 of this ruling. Mr John stated further that Mrs John at the *interpartes* hearing of the custody application when asked by this court indicated to the court that she did not intend to defend the petition and that at that time she was represented by counsel albeit a different counsel from the one that currently represents her. Mr John also sought to highlight the fact that Mrs John herself is a fully qualified attorney at law admitted to practice in Dominica.

[17] Mr John averred that the first two acknowledgements of service of the petition filed and served by Mrs John is and was always indicative of the fact that she did not intend to defend the proceedings as stated by her to this court previously.

[18] Mr John contends in his affidavit that there was ample time following the *interpartes* hearing in Dominica for Mrs John to file her answer within the time prescribed by the law, and further, that she has failed to act with any promptness in filing her answer or applying to this court for leave so to do.

[19] Mr John averred that the facts as contained in his petition speak for themselves and conclusively establish unreasonable behaviour by the respondent sufficient to result in establishing irretrievable break down in the marriage and that whether or not an answer is filed, the result of the proceedings would be the same.

[20] Learned counsel Mrs. Hazel Johnson on behalf of Mr John submitted that there has been no criteria provided by the Matrimonial Causes Rules ("MCR 1977) for the grant of leave to file the answer out of time as is required by Rule 20, that however in the circumstances of this case the grant of leave is discretionary and that the court must be satisfied that the applicant has reasonable cause and good reason for her delay in filing her answer. Learned counsel relied on the decision

in the **Huxford Case**⁶ and the St Lucian case of **Denis Mauricette –v- Eunice Brenda Mauricette**⁷ in support of her submission in this regard.

[21] Mrs Johnson urged the court to assess Mrs John's reasons for not filing her answer in time in the full context of the matter. Learned Counsel submitted to this court that consideration should be given to the fact that Mrs John is herself an attorney at law and was at all material times represented by counsel. Counsel urged the court to consider that Mrs John was well aware of the time lines required and that in the circumstances of this case it was not reasonable for her to ignore same.

[22] Learned Counsel on behalf of Mr John also urged the court to find that the facts and circumstances of the divorce and custody proceedings are the same and considering the time lines given by the court in the custody matter, it is reasonable to conclude that Mrs John had sufficient time to consider the divorce proceedings and instruct her counsel in that regard.

[23] Mrs Johnson drew to the court's attention that Mrs John indicated to the court that she did not want to defend the divorce proceedings when asked by the court and made that same indication on her acknowledgement of service and amended acknowledgment of service, both of which were filed out of time. That on those three occasions her position was consistent with her not wanting to defend the divorce proceedings. Further, that her wanting to defend the divorce and make the application at bar is really an attempt by Mrs John to get an opportunity to vent as occurred in the **Mauricette Case**⁸, and in that case it was held that was not a good enough reason to grant leave.

[24] Learned Counsel for Mr John launched into submissions regarding the nature of Mrs John's behaviour which in this court's view is not necessary at this stage as is supported by authorities cited later in this ruling.⁹

⁶ Op cit

⁷ SLUHMT2010/120

⁸ ibid

⁹ See paragraph 46 below

[25] Mrs Johnson on behalf of Mr John urged this court not to grant leave to Mrs John to file an answer out of time and submitted that he would be prejudiced in delay, cost and time and that an answer would be of no real benefit as the outcome of the matter will be no different.

Court's considerations and disposition

[26] I have read and reviewed the submissions made by both counsel including the law submitted by each of them.

[27] The MCR 1977 are the relevant rules to be considered in this case.

[28] Rule 15 of the MCR 1977 makes provision for the Notice of Intention to defend and it states

“(1) In these Rules any reference to a notice of intention to defend is a reference to an acknowledgement of service in Form 6 containing a statement to the effect that the person by who or on whose behalf it is signed intends to defend the proceedings to which the acknowledgment relates, and any reference to giving notice of intention to defend is a reference to returning such a notice to the court office.

(2) In relation to any person on whom there is served a document requiring or authorising an acknowledgement of service to be returned to the court office, references in these Rules to the time limited for giving notice of intention to defend are reference to eight days after service of the document, inclusive of the day of service, or such other time as may be fixed.

(3) Notice of intention to defend a cause begun by petition may be given at any time before the directions for trial are given, notwithstanding that the time limit for giving the notice has expired.

(4) Subject to paragraphs (2) and (3), a person may give notice of intention to defend notwithstanding that he has already returned to the court office an acknowledgement of service not constituting such a notice.”

[29] Rule 18 of the MCR 1977 is also relevant and provides that, where a respondent wishes to defend a petition he or she shall do so **within 21 days** after the expiration of the time limited for giving

notice of intention to defend that is to file an answer to the petition. At paragraph 2 of Rule 18 it says *“an answer may be filed at any time **before** directions are given for the trial of the cause notwithstanding that the time for filing an answer has expired or that the person filing the answer has not given notice of intention to defend”*

[30] Rule 20 of the MCR 1977 states that *“No pleading shall be filed without leave after directions for trial have been given”*

[31] Rule 3(1) of the MCR 1977 states that the rules of the Supreme Court 1965 shall apply to the practice and procedure in Matrimonial Proceedings in the High Court. Rule 3(2) states:

“For the purposes of paragraph (1) any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as ... in the case of proceedings pending in the High Court a provision of the rules of the supreme court 1965”

[32] So it is quite clear that from rule 3(2) of the MCR 1977 there is need to look at the Supreme Court Rules as to the practice and procedure.

[33] The application in the case at bar is for leave to file an answer out of time. It is noted that even though Mrs John in her acknowledgment of service did initially state she was not going to defend the petition and subsequently re-amended her acknowledgment of service to say she was going to defend, Rule 15(4) to this court’s mind does give her the option to attempt to defend the case in spite of her stating that she was not going to defend.

[34] Under the MCR 1977, Notice of intention to defend must be given within eight days and an answer filed within 21 days thereafter, making 29 days in all. Mrs John had in fact 29 days from the service of the petition on her to file her answer. In the case at bar Mrs John was served via the courier service (Federal Express Mail) on the 28th January 2019 and it was delivered to the stated address on the 30th January 2019¹⁰. It is noted that based on the affidavit of Mr John the

¹⁰It is noted that the affidavit of service filed on behalf of Mr John states that the documents were couriered on the 8th January 2019 which clearly is a mistake as the proceedings were commenced on the 18th January 2019 and leave to serve out of the jurisdiction was made on even date and granted on the 25th January 2019. Further a review of the Fed Ex documents exhibited to the affidavit of service shows that the documents were in fact couriered on the 28th January 2019.

documents were served to a mailing service in Washington and not personally on Mrs John. Mrs John was served with the Petition along with a bundle of other documents relating to the custody application brought by Mr John here in Dominica. The time for Mrs John to have filed her answer would have been 29 days from the 30th January 2019 give or take a few days. This would have taken us to the end of February 2019.

[35] It is the initial finding of this court that this application taking all the circumstances of this case into consideration is a timely one and that there is no inordinate lengthy time lapse between the time within which Mrs John was required to file her answer and when she sought this court's leave to do so out of time. This court embraces the school of thought that too rigid an approach to lapse of time may cause injustice. One ought to look at the surrounding circumstances and facts attendant to each case in making a conclusion as it regards timeliness.

[36] The court has a clear discretion which must be guided by certain considerations such as all the circumstances of case, the interest of the administration of justice, the promptitude of the application, the proposed answer and the merits of the applicant's case.

[37] In **Lawlor –v- Lawlor**¹¹ it was held that permission to file an answer out of time should be given unless the answer in question amounted to an abuse of process.

[38] In **Day –v- Day**¹² the test applied in that case for leave to file an answer in divorce proceedings out of time was that the application for leave should have been granted if there are substantial grounds for the belief that the decree would have been obtained contrary to the justice of the case.

[39] The test as applied in **Nash –v- Nash**¹³ and applied in **Mitchell –v- Mitchell**¹⁴ was that the applicant should satisfy the court that he has a case which he wishes to put forward and which, if accepted, might well lead to a different result. The learned judges in **Nash** opined that the court is not bound to accept the applicant's affidavit at its face value, but on the other hand (the court)

¹¹ [1995] 1 FLR269

¹² [1979] 2 ALL E R 187

¹³ [1968] P. 597

¹⁴ [1983] 3 ALL E R 621

should not attempt to make any such investigation of its truth as this would be more appropriate at the hearing of the suit.¹⁵

[40] In the **Nash** case the court found that the husband's affidavit was sufficient to show that he had a case which he wanted to put before the court and which, if accepted might well lead to a different result.

[41] I am satisfied that considering all the circumstances of this case thus far, the failure by Mrs John to file her answer within time can be excused. This court accepts that in the case at bar it is necessary for me to be satisfied that Mrs John has a case to be put forward which if accepted would lead to a different result.

[42] The Court upon full ventilation of the evidence may find as a matter of fact that it is Mr John whose behaviour was such that it was unreasonable for Mrs John to live with and of course the court can find that indeed it was Mrs John's behaviour that was unreasonable not allowing Mr John to live with her.

[43] In this court's view it would be unconscionable and unfair to prevent Mrs John from being able to present her case to the court. That Mrs John is an attorney at law admitted to practice here in Dominica and was at all material times represented by counsel is of no real moment as we are all aware of the old adage often attributed to Abraham Lincoln that "He who has himself as his own lawyer has a fool for a client", she was entitled to retain counsel and take advice from her counsel. This court could only infer that when there was a change in representation there was a change in advice and strategy, which is acceptable.

[44] I am also satisfied that no prejudice or injustice will be visited on Mr John if Mrs John is granted leave to file her answer in the proposed terms.

[45] I am satisfied that the explanation proffered by the respondent as to why there is the need to grant her leave to file her answer out of time. I do not believe that there will be any necessary or prolonged delay if Mrs John is permitted so to do.

¹⁵ See paragraph 26 above

[46] Consequently Mrs John is granted leave to file and serve her answer out of time within 7 days hereof. There after the matter will take its normal course.

[47] There is no order as to costs.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar