

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2006/0696

BETWEEN:

KENNY D. ANTHONY

Claimant

AND

RICHARD FREDERICK

Defendant

Appearances:

Mr. Anthony Astaphan Q.C. in association with Mr. Peter Foster and Ms. Rene St. Rose for the Claimant

Ms. Carol Gedeon-Clovis and Mr. Alvin St. Clair for Defendant

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2007: MAY 7, 16, 30
JUNE 5
.....

DECISION

MASON J:

[1] This is an application by the Defendant for the setting aside of a default judgment on the ground that the Claim Form not having been served on him, the judgment was wrongly entered.

Chronology

- [2] The substantive action was begun by Claim Form and Statement of Claim filed on 5th September 2006 for damages for defamation, an injunction to restrain the Defendant from publishing or causing to be published words defamatory of the Claimant, interest and costs.
- [2] An Affidavit of Service filed on 18th October 2006 on behalf of Police Constable Monero attested that he went to Helen Television Service where he served the relevant documents on the Defendant by handing the documents over to the Defendant who he knows personally.
- [3] On 19th October 2006 a second Affidavit of Service was filed, this time by Jasmine Stay, Executive Secretary to Counsel for the Claimant. That Affidavit which purports to be in accordance with Parts 5.12 and 5.13 CPR, states that the documents were faxed to the office of the Defendant.
- [4] A default judgment was entered in favour of the Claimant on 23rd October 2006 in accordance with Part 12.1 (b) and 12.4 CPR viz no acknowledgement of service having been filed by the Defendant and the time for so doing having expired.
- [5] The case was subsequently listed for assessment of damages on 22nd March, 2007 but on 20th March, the Defendant filed the present application.

Affidavits

[6] In his Affidavit in support of the Application the Defendant referred to a television programme in which the Claimant made “threats to sue” the Defendant.

The Defendant continues:

After a press conference held by Dr. Kenny Anthony, I received a letter from Peter Foster & Associates indicating an intention to sue me on behalf of the Claimant.

Some weeks later, about 11:00 p.m., I was in the William Peter Boulevard when I was approached by a young man whom I know to be the clerk of Peter Foster & Associates.

He told me that he had some documents for me. I told him that I was willing to accept the documents providing that he was prepared to sign a document which would state that I had been served after 11:00 p.m. on the date concerned.

He indicated that he was not prepared to sign anything after which he began to speak to someone on his mobile phone and we went our separate ways.

Sometime in October 2006, I read on the front page of the Voice Newspaper, that the Claim Form in this matter had been served on me on Friday the 6th day of October 2006, and that the case was in “motion”.

Out of an abundance of prudence, I wrote a letter to Mr. Peter Foster, indicating that I had not been served with the documents as had been alleged in the newspaper. In fact in my letter, I had stated categorically and unequivocally that NO ONE had handed me any documents or had even spoken to me about any such documents.

The letter was served on the Chambers of Peter Foster & Associates on November 1st 2006. “RF2”.

I received no response to this letter and rather than effecting service upon me, judgment was entered in default against me in the matter

[7] The letter referred to by the Defendant at paragraph 14 of the Affidavit reads as follows:

1st November, 2006

***Mr. Peter Foster
Chambers
Castries***

Dear Sir:

RE: KENNY ANTHONY VS RICHARD FREDERICK

I am indeed flabbergasted at media reports, more specifically a number of newspaper articles, that I was served by one of your agents, documents in relation to the matter at caption.

Through the media reports, I was able to discern that I was allegedly served on the morning of Friday October 6th 2006.

Let me state categorically that NO ONE whatsoever, either SPOKE TO ME in relation to these documents or HANDED ME any documents whatsoever. I would be quite interested in knowing the individual who seemingly has made such an assertion.

Let me state further that contrary to ALL media reports, I have NOT been evading service. As a matter of fact, I was willing to accept service from your clerk at almost 11:00 p.m., had he been willing to sign a document stating clearly the time of service. His refusal was the only reason why I did not accept service.

I am ready, willing and able to defend this action and have every intention of reciprocating.

As and when I can be served, I am willing to accept service.

Be guided accordingly.

Yours faithfully,

.....

RICHARD FREDERICK

[8] The Defendant filed a Supplementary Affidavit on 4th April 2007 in which he categorically denied that Police Constable Monero ever spoke to him in relation to any documents or that Police Constable Monero handed him any documents. The Defendant also stated that he did not give to Police Constable Monero the keys to his vehicle, that he did not ask him to move his vehicle nor did he give him permission to go into his vehicle. The Defendant also denied noticing any documents which Police Constable Monero claimed to have put in his vehicle while it was at the Helen Television Station. He did not have any reason to specifically notice the documents in his vehicle because this was during the election campaign and there was a lot of “election campaign paraphernalia” in the vehicle at the time.

[9] On 26th April 2007 Police Constable Monero filed a second Affidavit to relate the circumstances of his service of the documents on the Defendant. He states that on or about 5th October 2007 he was enlisted by another police officer to assist in service of the documents on the Defendant who he had known from childhood. He attested to being

aware that the Defendant together with another attorney at law conducted a talk show at the Helen Television Studio every Friday morning at 9 o'clock; to going in his car on Friday 6th October 2006 with the other police officer to the television studio and waiting in the lobby for the Defendant.

[10] Police Constable Monero states at paragraph 8 of his Affidavit:

“When Richard Frederick arrived, he parked exactly in front of my car and I was in the lobby. I could see him from there. He came out of the vehicle and walked towards me in the lobby. I had the Claim Form, Statement of Claim and Prescribed Forms filed on 5th September 2006 in my hand. I told Richard Frederick I had the documents from Peter Foster’s Office to serve him. I told him, the Prime Minister is accusing you of fraudulent statements.

[11] Then at paragraph 9 he continues:

Without stopping he looked at me and said he has no time as he is late for the show. I told him that he should not do what he is doing as that is not how our party operates. I told him we face our problems and face the bull by the horn and deal with it. If there are statements made by the Prime Minister he should answer them. He turned around and looked at me and said “Our Party?”. I said “Yes that is not how the flambeau operates”. I told him “If Kenny Anthony is accusing you of saying things, show him you are not afraid of him and face him in court”. At that time he stopped and was facing

me. I told him "here are the documents from Kenny Anthony and if you prepare your documents against him I will serve it for you". At that I handed him the documents. He did not take the documents and said "I will have time to see you" and walked away. I noticed that the program had started.

[12] According to the Affidavit of Police Constable Monero, he left the building and went back towards his own car which he states was being blocked by the Defendant's vehicle. He went back to the building and with the assistance of another person retrieved the keys to the Defendant's vehicle and shifted the vehicles.

[13] Then Police Constable Monero states:

12. *"I still had the Claim Form, Statement of Claim and Prescribed Forms in my hand and I wrote in the back of the documents, "Prepare your documents and I will serve them for you". Then I wrote my name and telephone number on the back of the documents. I got out of the vehicle and placed the said documents on the driver's seat of the vehicle".*

13. *At the time there were no other documents on the driver's seat or passenger's seat. I secured the vehicle and went back into the Studio.*

14. *A guy was standing by the door of the Studio where the recording was taking place. I gave him the keys and watched as he gave them to Mr. St. Clair who then gave it back to Richard Frederick. I watched Richard Frederick take his keys and I left.*
22. *Further, Richard Frederick would have seen when I brought the keys back to him and when I asked for the keys for the vehicle. Richard Frederick would not have just thrown away the documents on his seat without looking at them. It was on the driver's seat*

[14] It should be noted here that filed as an exhibit was a copy of the front page of the 7th October, 2006 issue of the **Voice** newspaper. The headline on that page read **"RICHARD VS KENNY IN COURT"**. In the article written by Victor Marquis it began

"Finally, Saint Lucia's Prime Minister and the MP for Castries Central will have their day in court. The latter has been served with the necessary preliminary legal documents in the case filed against him by the former".

And later stated:

"The Voice is reliably informed that the Statement of Claim and Claim Form were both served on Mr. Frederick yesterday (Friday) morning by agents acting on behalf of the Prime Minister's lawyer, Mr. Peter Foster"

[15] There was filed on 4th May 2007 the Affidavit of one Cornelius Daniel who swore that he had been engaged by the office of Counsel for the Claimant to serve the relevant documents on the Defendant whom he knew, having had some cause previously to serve him with documents. Mr. Daniel stated that he had tried on many occasions to serve the present documents on the Defendant but was told that he was unavailable and when he attended at the Defendant's office he was told that he was not in. Having tried for many weeks he engaged the services of Police Constable La Feuille to whom he gave one copy of the documents.

[16] Mr. Daniel then states:

“Soon after the claim form was filed, I was driving in the city of Castries and I noticed Richard Frederick outside the Cimpex Building on the William Peter Boulevard. I telephoned a Solicitor of Peter I. Foster & Associates and advised that I had located Richard Frederick. I was instructed to proceed with service. I drove to the Boulevard and approached Richard Frederick and informed him that I had documents to serve on him filed by Kenny Anthony, the Prime Minister. Richard Frederick took a step back from me and told me he is not taking the document at this hour I handed the documents to him and he told me he would not take the document unless I wrote the time of service on the documents. I took my cell phone out and called a Solicitor of Peter I. Foster & Associates and as soon as I told her I was with Richard Frederick, he ran away. He ran into his vehicle and I told

her he was running. She said to run after him and I ran and he jumped into his vehicle and drove away.

Cross Examination

- [17] Both the Defendant and Police Constable Monero were tendered for cross examination by respective Counsel.
- [18] Under cross examination the Defendant admitted that when he was approached in the William Peter Boulevard by the agent from the officers of Peter Foster, attorney at law that he was prepared to accept service of the documents only if the agent wrote down the time that the documents were being served. He also admitted that he would only have asked him that because he knew or had been informed by the agent that he had documents that he wanted to serve on him. The Defendant stated that he had made the request of the process server because he knew that documents ought to be served between 6:00 a.m. and 6:00 p.m. and because it was 11:00 p.m. he wanted to leave little room for doubt in case the time of service became contentious.
- [19] The Defendant could not recall whether in September 2006 he had a Ms. Joseph working in his law office, he could not recall going to his law office during the course of the election campaign. He stated that no one in his office brought the faxed documents to his attention, that in his office, documents are not systematically brought to his attention via a filing system.

[20] The Defendant admitted that when he learnt from the article in the **Voice** Newspaper that service had been effected on him he wrote to Mr. Foster, attorney at law for the Claimant. This he said he did out of an abundance of caution and out of courtesy. But he did not see any need nor any reason for him to check the Court Registry to find out the correct state of the proceedings. However when he became aware of the Default Judgment, he immediately embarked upon a search regarding the Affidavit of Service because he knew that in order to obtain judgment in default, the Applicant must satisfy the Court that there was service.

[21] The Defendant denied Police Constable Monero's reported conversation at the television studio between himself and Police Constable Monero and stated that he did not speak to Police Constable. Monero for more than a couple of seconds, that he was late getting to the studio.

[22] With respect to the documents purportedly left on the driver's seat of the vehicle, the Defendant stated that if the documents "stood out", he would have noticed them but that there were "loads" of documents in his vehicle and he did not see those documents. He also denied giving the keys to his vehicle to Police Constable Monero and stated that he did not know who had moved his vehicle.

[23] Under cross examination Police Constable Monero admitted that when he proffered the documents to the Defendant that although he looked at them, the Defendant did not touch them but walked away. Police Constable Monero accepted that it would have been proper service if he had dropped the documents at the Defendant's feet. When it was

suggested to him that he did not do this because he intended to serve the Defendant some other time, the witness was adamant that he had already served the Defendant. The officer admitted that the Defendant never asked him to put the documents in his vehicle nor did he tell the Defendant that he was putting the documents in his vehicle. He also admitted that when the Defendant walked away from him, he (Police Constable Monero) was still in possession of the documents but he insisted that although the physical documents were not left with the Defendant, knowledge of the contents of the documents was left with him and so he considered the Defendant had been served.

Submissions

For Claimant

- [24] Counsel for the Claimant made reference to Part 5.3 CPR and the method regarding personal service. He stated that “handing” and “leaving with” do not mean the same thing; that one can hand something without leaving it with the person and in the present case where Police Constable Monero handed the Defendant that document and he refused to take it, that under the CPR constitutes personal service.
- [25] Counsel is of the view that Police Constable Monero satisfied both limbs of the test under the CPR because according to the legal authorities, leaving with the person to be served would mean leaving or placing under his control, possession or custody. Counsel suggested that it has not been disputed that the Defendant exercised dominion and control over his vehicle because on his evidence, he admitted receiving back his keys.

- [26] Counsel referred to paragraph 15.22 of Blackstone's Civil Practice 2006 in which the meaning of "personal service" was discussed and the principle that service will be effected if the individual to be served is informed of what the document is and it is left as nearly as possible in his possession or control.
- [27] Counsel cited the case of Nottingham Building Society v Peter Bennett & Co (a Firm) 1977 Times Law Reports in which it was held that once a document which is to be served on an individual had been handed to that individual and the individual knows what it is, the document is served and it makes no difference that the individual gives it back to the process server. He submitted that it does not mean that on every occasion that a person handed the document that person must touch it and hand it back, that once it is handed to him, he knows what it is, he refuses to accept it, and in the present case, this being the second such occasion, the Court is entitled to draw the reference that the Defendant knew what it was and he was therefore served.
- [28] Counsel next cited the case of Kenneth Allison Ltd v A. E. Limehouse & Co (1991) **3NLR 671.**
- [29] Counsel opined that the Defendant being an officer of the court, an attorney at law, and given the previous attempts to serve him and the faxing of the documents to him, that personal service was effected when Police Constable Monero told the Defendant what the documents were and handed them to him despite the Defendant's deliberate decision not to accept them. Counsel further submitted that leaving the documents on the front seat of

the vehicle driven by and under the control of the Defendant is evidence which the court could consider.

For the Defendant

[30] Counsel for the Defendant also referred to paragraph 15.22 of Blackstone's and submitted that where the individual to be served is uncooperative, leaving the document as nearly as possible in possession or control of the individual means exactly what it says, the document must be left as nearly as possible to the individual, his person.

[31] Counsel's view is that there is no legal authority which said that a Defendant ought to make himself available for service and whether or not the Defendant is a Parliamentarian or a lawyer, the law must be applied to him as it would to a "regular Joe" so that if service is defective on a "regular Joe" it cannot be classed as effective purely because a person is an officer of the court. Because the Defendant said there were no documents in his vehicle and the officer said there were is the reason why personal service is very important. Counsel suggested that the Claimant has not proven service on the Defendant, all that it has been sought to prove is that the Defendant evaded service and the Rules made provision for alternative methods of service where the Claim Form cannot be served personally on an individual. Personal service is effected by leaving the documents with the person himself and not in the person's vehicle.

[32] Counsel argued that Police Constable Monero's two (2) Affidavits were conflicting: in one Affidavit he says he handed the documents to the Defendant while in the other he says

that he put them in the vehicle. The Affidavits in Counsel's opinion did not comply with Part 5.5 (1) (d) CPR.

- [33] Counsel also referred the Court to the 1971 edition of Civil Procedure (White Book) at paragraph 65/2/1 with respect to the manner of effecting personal service.

Findings

- [34] ***The function of service is primarily to bring to the attention of the person to be served the fact that he is being sued and particular language is required if something short of that is to constitute service.***

Per Russell LJ in **R v London County Quarter Sessions Appeals exparte Rossi (1956)**
2 WLR 800.

- [35] In our jurisdiction, the rule regarding service of a claim form is plain and unqualified. Part 5.1 CPR 2000 states unequivocally that the claim form must be served personally. Then Part 5.3 provides:

A claim form is served personally on an individual by handing it to or leaving it with the person to be served.

- [36] The Court therefore has to determine whether what transpired at the Helen Television Studio satisfies the terms “handing it to” and “leaving it with”.

[37] The evidence in this case reveals two (2) distinct attempts to serve the Defendant with the documents: one by the agent of Counsel for the Claimant and the other by Police Constable Monero.

[38] I should state at this juncture that I have been unable to discover any authority for the Defendant's assertion with respect to the time restriction on service of documents. Even if the custom or practice has become established - whether for reasons of convenience or propriety - for service of documents not to be effected outside of the hours of 6:00 a.m. and 6:00 p.m., the Defendant as a senior Attorney at law ought to have been aware of it being merely a practice. For this reason I am not convinced of the Defendant's sincerity when he tried to ensure that the agent record the time of service of the documents. It is my conviction that it was merely a ploy to evade service. I also do not believe that he was "willing to accept service" as he stated in his letter to Counsel for the Claimant. His actions and behaviour belied that stated intention. Although the Defendant does not have to make himself available for service, had he been "willing to accept service" as he stated, he might have indicated his whereabouts at a particular time thus permitting service to be effected on him, instead of stating "as and when I can be served", thus evincing the implication of "you've got to catch me first". In addition he was not being entirely truthful when he states in that letter that "no one whatsoever" had spoken to him in relation to the documents or had handed him any. It is true that the assertions in that letter relate to the purported service by Police Constable Monero, however in his Affidavit in support of the Application, he admits the encounter with the agent from the office of Counsel for the Claimant which would therefore give the lie to his denial of knowledge of the attempts at service on him. I

am firmly of the view that the Defendant being fully conscious of the rule that service must be affected **personally** on him, did his utmost not to be adequately served.

[39] I accept Police Constable Monero's statement that he told the Defendant of the documents which he wished to serve on him but by Police Constable Monero's own admission, the Defendant did not take the documents nor did he even appear to regard them:

“Without stopping he looked at me and said he has no time as he is late for the show..... He turned around and looked at me.....At that time he had stopped and was facing me. I told him here are the documents..... At that time I handed him the documents. He did not take the documentsand walked away”.

[40] In the case of Kenneth Allison Ltd (supra) cited by Counsel for the Claimant, Lord Bridge of Harwich stated:

There is abundant authority for the proposition that personal service requires that the document be handed to the person to be served or, if he will not accept it, that he be told what the document contains and the document be left with or near him

Likewise Lord Goff of Chieveley in the same case:

Prima facie the process server must hand the relevant document to the person upon whom it has to be served. The only concession to practicality is that, if that person will not accept the document, the process server may tell him what the document contains and leave it with him or near him.

[41] It is reasonable to assume that the Defendant knew what the documents were given the fact that Police Constable Monero was dressed in his police uniform when he went to the television studio and that the Defendant knew that the Claimant had been trying to serve him. However and especially for that reason I believe the Defendant's version of his encounter with Police Constable Monero i.e. that being late for his television show, he spoke with Police Constable Monero for only a few seconds and did not in fact indulge in the long conversation reported by Police Constable Monero in his Affidavit. For given the Defendant's previous conduct in evading service, he would have gladly used his lateness for the show to tell Police Constable Monero "I will have time to see you".

[42] After the Defendant's refusal to acknowledge the documents, Police Constable Monero walked away with the documents, having not left them with or near the Defendant, not having thrown them at the Defendant's feet as suggested by Counsel for the Defendant that he ought to have done.

If the person served will not take the copy, he (the process server) should tell him what it contains and leave it as nearly in his possession or control as he can: White Book, op cit. paragraph 65/2/1.

[43] I am satisfied that Police Constable Monero did not indicate to the Defendant what his intentions were with respect to the documents i.e. that he intended leaving them in the Defendant's vehicle for the simple reason that I do not believe that Police Constable Monero at that stage on leaving the presence of the Defendant, knew himself what he intended to do with the documents. It is my view that Police Constable Monero on realizing that he missed the opportunity of giving the documents to the Defendant seized the chance when he had to remove the Defendant's vehicle of placing them on the driver's seat and thus convinced and satisfied himself that he had effected personal service.

[44] Counsel for the Claimant argued that the documents having been left on the front seat of the vehicle driven by and under the dominion and control of the Defendant, he ought to have seen them and so could be considered served. Attractive though this submission may be and however tempted the Court may be to accept it, it nevertheless must be rejected. Looking at the evidence we see that the Defendant is in the television studio, the keys to his vehicle are requested and handed over, his vehicle is entered and moved, the keys are eventually handed back to him. Up to that point, the Defendant is unaware of anything that might have occurred with the vehicle. It is true that he had and exercised the ultimate dominion and control over his vehicle but it cannot be said that he did so at what could be termed the crucial moment.

[45] There was no obligation on the Defendant to observe or accept the presence of the documents in his vehicle. Police Constable Monero admitted that he had not alerted the Defendant to the fact that he intended to put them there or that he had in fact placed them

there. Had he done so the alternative requirement of the rule viz leaving it with the person to be served would have been satisfied and Counsel for the Claimant's contentions would be acceptable to the Court.

[46] Quoting again from the White Book (op. cit):

The copy of the writ must be left with and not merely shown to the Defendant (Worley v Glover 1730 2 Stra. 877) even though he refuses to take it. Where the person serving brought it away the service was held under the circumstances to be defective (Pigeon v Bruce (1818) 8 Taunt. 410)

[47] Counsel for the Claimant in citing the Nottingham Building Society case (supra) suggested that it is not every instance that the person being served must touch the document and hand it back. I however cannot agree with that contention. How else would he have exercised control over the document as the legal authorities seem to suggest that the Defendant must do in order for there to be personal service.

[48] In the Nottingham Building Society case the person to be served was a Solicitor who was handed the writ by the process server, he took it, he looked at it and immediately returned it to the process server. It was held that there will be good personal service where the intended recipient, having knowledge of the nature of the document, exercises dominion over it, however briefly but immediately returned it to the process server.

Counsel cited the part of Waite L J's judgment which dealt with the meaning of "leave".

The Concise Oxford Dictionary of Current English (9th edition 1995) gave as the primary meaning of the transitive verb “to leave”: “cause to or let remain; depart without taking...”

There appeared to be a difference between those two nuances of meaning. One described a mere letting remain, the other an element of departure with a leaving behind.

The term “leaving” in Order 65, rule 2, was to be regarded in the former sense.

Once the intended recipient, assuming him to have knowledge of its nature, had been given a sufficient opportunity of possession of the document to enable him to exercise dominion over it for any period of time, however brief, the document had been left with him within the sense intended by the rule.

- [49] While one cannot argue with the reasoning of Waite LJ with respect to the definition, it does not help our present situation for unlike the Solicitor in that case, the Defendant in the present case although he could have been assumed to have knowledge of the nature of the documents neither looked at nor touched the documents. He walked away from the process server.

[50] With the support of the authorities I have come to the conclusion that the term “hand to” connotes some element of physical contact with the documents and not that they are merely shown to or offered without the Defendant touching them. The alternative term to that “leaving it with” is satisfied where in the event that the Defendant refuses to touch the documents, they can be left near his person and even if left in his vehicle, it certainly cannot be without his knowledge.

[51] Therefore it cannot be said that the documents in the present case were personally served on the Defendant and I so find. Not to effect personal service as required by the CPR would operate to deprive the Defendant of his right to notice of the action against him.

It is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given notice of the proceedings so as to enable him to appear and defend them. The law ...insists...that the Defendant should be served personally so as to be sure that he knows of the proceedings against him. Where an order has been obtained irregularly without proper service, the quarter sessions can themselves set it aside: per Denning LJ in R. v London County Quarter Sessions Appeals ex parte Rossi (supra)

[52] Thus the stipulation laid down in Part 5.3 CPR not having been satisfied – handed to or left with – the judgment was in fact wrongly entered and the court must set it aside.

[53] Before concluding I must state that while on one hand I accept Counsel for the Defendant's argument that the Defendant should for the purpose of service be treated like "a regular Joe", I cannot but remark on his lamentable behaviour in the inordinate and egregious lengths to which he went to evade service. The Defendant being an attorney at law must be ever mindful of his duties as set out in schedule 3 of the Legal Profession Act, at which time he cannot be considered "a regular Joe".

Order

[54] The Order of the Court will be as follows:

- 1. Default judgment entered on 23rd October 2006 is hereby set aside**
- 2. Defendant must within 28 days of this decision file and serve his defence**
- 3. No order as to costs.**

SANDRA MASON Q.C.

High Court Judge