REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-00870

Between

EDWARD RAMPERSAD

HANIFFA KHAN RAMPERSAD

COURTNEY RAMPERSAD

ANJANIE RAMPERSAD

Claimants

And

SURESH RAMPERSAD

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: Wednesday July 21, 2021

Appearances:

Claimants: Mr. H. Ramnath

Defendant: Ms. R. Thomas

DECISION ON APPLICATION TO SET ASIDE

1. This is a decision on an application by the Defendant of January 20, 2020 to set aside the order of this court made April 12, 2019 and for an extension of time to file and serve a defence and counterclaim.

History of the claim and the order

2. By Claim Form and Statement of Case filed March 14, 2018, the Claimants sought a declaration that there exists a right of way in the form of a roadway 3.55 metres wide and 23.94 metres long. Their claim is that the said easement was acquired by way of necessity so that they are vested with a prescriptive right to use same. They also asked for an order that the Defendant remove his gate and fence located on the western and southern sides of the said roadway, a consequential injunction and damages for trespass.

3. Attempts were made to effect service on the Defendant by Ryan Ragbir, Marshal's Assistant 1 of the Supreme Court on three days namely, Friday May 18, 2018, Thursday May 24, 2018 and Tuesday June 5, 2018. On each occasion the Defendant was absent and the contact details were left with his brother Dhanraj Rampersad[1]. As a consequence, the Claimants applied for and on August 16, 2018 obtained an order that the life of the claim be extended and that service be effected by way of advertisement in a daily

[1] See affidavit of service of Ryan Ragbir sworn to and filed July 12, 2018.

newspaper of general circulation in Trinidad and Tobago once per week for two consecutive weeks[2].

4. No appearance or defence to the claim having been entered within the time set by the CPR, the Claimants applied by application of November 30, 2018 for judgment or alternatively that the matter be tried as undefended. The proceedings were served by advertisement as ordered as was set out in the affidavit of the Second Claimant filed November 30, 2018[3]. The court being of the view that the latter was the appropriate course, made a consequential order on January 9, 2019 that the claim be tried as an undefended claim on March 12, 2019, and that evidence be led by affidavits. The matter was eventually tried as an undefended claim on April 12, 2019 (as Attorney at Law for the Claimants was otherwise engaged at the Privy Council on the date originally set) and an order was made in terms of paragraphs b, c, d and e of the Claim Form and costs to be paid to the Claimants in the sum of $14,000.00. By letter of February 14, 2019, the Claimants served the Defendant with the affidavits filed for the trial and he was notified of the trial date. This was done by email.

<u>The grounds of the application to set aside</u>

5. The defendant deposed in his affidavit in support of his application that he went to the USA on March 10, 2018 and returned on May 2, 2018. Upon return he stayed at the home of his companion (presumably that means he did not stay at his home). He once again left for the USA on May 23, 2018 and returned on October 12, 2018. It is his evidence that he rarely stayed at his home as he was involved in flood relief at the time. No

[2] See affidavits of the Second Claimant filed November 30, 2018 and affidavit of Tishora Jaggernauth filed October 31, 2018.
[3] See paragraph 7 of the affidavit and exhibit "C".

member of his family or anyone else communicated to him that he had a pending matter before the court. It must be noted that his brother Dhanraj Rampersad has not disputed the sworn evidence of the process server that he communicated with him and provided his details to him for the Defendant to make contact so that on the evidence the court accepts the uncontested evidence of the Marshall on that issue.

6. He again left for the USA on March 23, 2019 and returned May 2, 2019. On June 12, 2019 he received the court's order made April 12, 2019. He therefore essentially says he was unaware of the proceedings.

The applicable rule

7. The challenged order was made upon trial therefore Part 40.3 CPR applies. That rule reads:

> (1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 7 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 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.

8. **Part 40.3 (2)** prescribes that the application be made within 7 days of the date on which the judgment or order was served and this is so for good reason in that there has to be a point at which there is finality of litigation. Further, the rule appears to be crafted in such a manner as to give effect to the primacy of orders made after trial hence the very narrow window of 7 days within which to make the setting aside application. In this case the evidence of the Defendant is that he received the court's order on June 12, 2019 however his application was not filed until January 20, 2020 some seven months after receipt. He has provided no explanation whatsoever for the protracted delay in so doing. His application is thus woefully out of time without a reasonable explanation and must be dismissed on that basis. However, the court will in any event consider the merits of the application.

<u>Good reason for failing to attend the hearing Part 40.3(3)(a)</u>

9. In the court's view there simply is no good reason for failing to attend the trial, the defendant having been notified by email and letter of the date of the trial and of the evidence filed. Short of simply saying that he was unaware of the matter in general form he has provided no reason in his affidavit filed January 20, 2020. In fact, he has not specifically denied receiving the letter that informed him of the date of trial. So in essence there having been good and proper service as ordered by the court, the fact that the Defendant may not have seen the advertisement does not derogate from the validity of service. Further, the evidence of the Marshall is that he left the relevant contact information with the brother of the defendant and there is no evidence from that brother that he did not receive such information from the Marshall.

It is likely that had the applicant attended some other judgment or order might have been given or made Part 40.3(3)(b)

10. With respect to this criteria, the Defendant has not satisfied the court that had he attended the court may have made another order. In fact, he failed manifestly to give any evidence about the merits of his case by way of facts or by the attachment of a draft defence. To compound matters in his submissions the Defendant accepts that he has put no such information before the court and offers to file same. This of course is unacceptable as it is the Defendant who has brought the application to set aside and so the burden lies upon him to satisfy the court on the said application. The application will therefore be dismissed on the basis that the Defendant has not satisfied any of the criteria set out in Part 40.3.

IRREGULARITY

Issue of non-service of the application for an undefended trial

11. The Defendant submitted that the order for the undefended trial is irregular as the application for same was not served on him. He has relied on the decision of this court in ***Frank Hosten v Serville Castillo*** CV2019-04601 in which the court stated the following:

> *4.A common issue that has arisen on both applications in an indirect manner but which is germane to the course the court must adopt is whether the order of the court imposing the sanction would have been irregular as the defendant was never served with the application for judgment in default. It is the claimants case on the application that an application can only be served when a date for the hearing of the application is given by the court and that they*

were awaiting a date in order to effect service of the application. On the face of the evidence before this court it is nonetheless clear that there was no service of the application for default judgment and the affidavit in support of the application on the defendant's attorney at law who was properly on record at the time.

5.The proposition put forward by the claimant in that regard is one without any legal basis. The CPR gives the power to the court to treat with an application without a hearing. It also prescribes that all applications must be served as soon as is practicable after the day on which it is first issued and at least seven (7) days before the court is to deal with the application. The rule is clear. The effect is that the application must be brought to the attention of the opposing party to the application no less than seven days before it is dealt with. It follows that whether a date has been given by the court or not a party is duty bound to serve the application as soon as is practicable after its issue. The fact that a date has not been given does not make it impracticable to serve an application. All that may be required thereafter is notice of the hearing where a date is subsequently given. That being said, the effect of the rule is that equally a date for a hearing may never be given if the application is being dealt with without a hearing so that the essential criteria of the rule is the service of the application so that the other party will be aware of the order being sought and be in a position to make representation to the court.

12. In the matters under consideration in that case were somewhat different in that an appearance had been entered for the Defendant by an Attorney at law so that effectively the Defendant was represented. Additionally, in

this case, the crucial factor is that the Defendant was in fact served with notice of the date of trial by way of letter and email so that he would have been provided with the opportunity to be heard by way of applying to the court himself to set aside the order for trial before the date of the trial. In that regard by virtue of the postal rule, the Defendant is deemed to have received the said letter by February 28, 2019 (CPR 6.5). To that end he has not denied receiving the said letter. In the court's view therefore ***Hosten*** is distinguishable.

13. The court therefore finds that the order for an undefended trial was not irregular. This is akin to the circumstance where originating documents are served but are completely ignored by a Defendant so that he plays no part whatsoever to the litigation against him. In such a case, the Claimants may apply to the Court Office for Judgment in default of appearance and there is no legal obligation to inform the Defendant that such an application has been made. The difference in this case is that the application was made to the court and the Defendant was given an adequate opportunity to be heard of he so desired before the undefended trial or at the undefended trial but he failed to avail himself of the opportunity.

14. The application of the Defendant of January 2020 is therefore dismissed and the Defendant shall pay the Claimants the costs of the application to be assessed by a Registrar in default of agreement.

Ricky Rahim

Judge