ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

RULING ON A SUBMISSION THAT SERVICE WAS IRREGULAR

CITATION: Rebecca Lampkin v. Barbara Harris

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 444 of 2011

DELIVERED ON: 24th January 2013

CORAM: Her Worship Magistrate Nalini Singh

St. George West County

Port of Spain Petty Civil Court Judge

REPRESENTATION:

Ms. Debbie Jurawan for Rebecca Lampkin

Mr. Sterling John for Barbara Harris

TABLE OF CONTENTS

1.0 CHRONOLOGY

1.1 On the 6th December 2011 proceedings for damages for breach of contract were commenced by the issue of an Ordinary Summons dated the 6th December 2011.

1.2 The Ordinary Summons was endorsed as being served. The exact wording of the endorsement is as follows:

> "This Summons was served on the above-named Defendant Ms. Barbara Harris by leaving the same personally by me the undersigned (Bailiff of the Petty Civil Court Port of Spain) on the 26th day of January 2012 at 10:40 AM… Summons was served at the given address Romain Lands Morvant LP 166/4.
>
> N.B. The Defendant was at home on 26/1/12 at 10:10 AM her name was called and she ran inside and refused to come outside. Three attempts were made and after her refusal to come outside the Ordinary Summons was left on the compound as close as possible to the Defendant's entrance to her home".

The Ordinary Summons summoned the Defendant to appear at the Port of Spain Petty Civil Court on Monday the 30th January 2012 at 9AM.

1.3 On the 30th January 2012 there was no response to the purported service. After a due consideration of **Section 15 of the Petty Civil Courts Rules Chap 4:21** which provides that:

> "Service of any summons or other process of Court may be proved by endorsement on a copy of the same under the hand and description of the person making the service, showing the day, place, time, and mode of service, and every

such endorsement shall be taken as *prima facie* evidence of the truth of the facts stated therein"

the Defendant was presumed by the Court to have been sufficiently served all things considered. An *ex parte* trial commenced and concluded and judgment was awarded to the Claimant. The Court found that the Claimant had made out its case against the Defendant on a balance of probabilities and the Defendant was accordingly ordered to pay to the Claimant the sum of $1410.00.

1.4 On the 12th March 2012 the Claimant swore to an affidavit to obtain a Judgment Summons to serve on the Defendant and same was duly issued to the Claimant on the 12th March 2012.

1.5 Carrying on with the narrative, on the 21st June 2012, the Defendant received the Judgment Summons which gave the Defendant notice to appear in the Port of Spain Petty Civil Court on the 28th June 2012.

1.6 On the 28th June 2012 the Claimant and the Defendant appeared in Court. Naturally enough both the Claimant and the Defendant then retained counsel. The Defendant instructed Mr. Sterling John and the Claimant instructed Ms. Debbie Jurawan. This led to the application which was made on the 15th October 2012 by the Defendant to have the judgment set aside.

2.0 THE APPLICATION TO SET ASIDE JUDGMENT

2.1 The application to set aside the judgment was made on the basis that the Ordinary Summons was not properly served on the Defendant and therefore the judgment that had been obtained was irregular.

2.2 THE AFFIDAVIT OF THE DEFENDANT

2.2.1 The evidence to found this application was set out in an affidavit under the hand of the Defendant. The facts deposed to by the Defendant on affidavit dated and filed on the 17th July 2012 are set out below:

> "…I was never served nor were attempts made to serve the summons on me and I was only made aware of the action commenced against me when I received the Judgment via mail on or before June 21st 2012.
>
> Had I been duly served efforts would have been made to submit a Defence... .
>
> I did not neglect to file a defence in this matter as I was not aware that an action was commenced against me nor was I aware of attempts being made to serve the summons on me".

2.3 THE AFFIDAVIT OF THE BAILIFF

2.3.1 The evidence coming from the Bailiff contradicts this assertion. According to an affidavit dated and filed on the 16th November 2012, under the hand of Wendell Burke; a Bailiff

employed by the Judiciary of Trinidad and Tobago and posted at the Port of Spain Petty Civil Court:

> "On the 26th day of January, 2012 at 10:10 am I visited Romain Land, Mon Repos, Morvant with the intention of serving the Ordinary Summons aforesaid on the Defendant and I was directed by the two residents in the area who affirmed that there was a Barbara Harris residing at the aforesaid premises and who then directed me as to the location of her house. After receiving the said instructions, I approached the house. I called at the bottom gate. While calling a gentleman in the house adjacent to the Defendant's house called out 'Ms. Barbara somebody in front to you'. I then made my way towards the front of the house.
>
> While approaching, I observed a short middle age woman walking towards the front yard of the house. I then called out to her, 'Ms. Harris, good morning, Ms. Harris' and she ran through the garage portion of the house. I kept calling out to her and she refused to come out. I then contacted the Plaintiff via telephone. I had a conversation with her and she gave me a description of the Defendant as 'she is a negro lady, short, mature and she drives a red Nissan X-Trail PBW 2696, sometimes her husband does drive it'. I told her what transpired and she told me 'once the car in the yard she is there, she living upstairs'. I observed the red Nissan X-Trail PBW 2696 parked to the front. I called out to the Defendant and she was standing to the back of the garage hiding and peeping. She again refused to come out. I then walked away from the house and went to my car that was parked a little way off and sat for about five minutes, after which time I

approached the house seeing the Defendant outside at the front after which time I again called out to Ms. Harris waving the Ordinary Summons 444/2011 and the Defendant ran back inside. I stood outside the gate for a while calling but no response was given. I made an attempt to walk away and I observed a car pulled in front of the house and a young lady went into one of the apartments downstairs of the said house.

A little while after, a gentleman came out of the apartment downstairs of the said house and I enquired of him as to the whereabouts of Ms. Harris.

His response was, 'I live downstairs. I don't see her and I don't know if she's home'.

I further enquired about the vehicle parked in front the garage of the house and he told me 'it belongs to Ms. Harris'…. .

I asked him if I can come into the yard and he pointed to a latch on the gate and told me 'the gate open'. I then proceeded to open the gate and I entered the said yard. I also observed the vehicle PBW 2696 red Nissan X-Trail parked approximately 3-4 feet away from the entrance to the garage of the house and gently raised up the wiper blade of the said vehicle and I placed the Ordinary Summons 444/2011 under it and I vacated the said premises…".

3.0 THE ISSUES

3.1 In the circumstances as I have related then, the issues which arise for determination by me, are:

1. Whether I have jurisdiction to set aside a judgment previously granted by this Court as constituted after having embarked upon an *ex parte* trial.
2. Whether in light of the presumption of regularity of service provision i.e. **section 15 of the Petty Civil Courts Rules Chap. 4:21,** the matter of service is open to challenge.
3. If the matter of service is open to challenge, whether the Defendant must prove that service was not effected.
4. Whether I can decide this matter solely on affidavit evidence.
5. Whether the Ordinary Summons was properly served on the Defendant.

4.0 THE LAW

1. Whether I have jurisdiction to set aside a judgment previously granted by this Court as constituted after having embarked upon an ex parte trial.

Void Judgment

4.1.1 If service was not properly effected it seems to me that the judgment will be an irregular judgment. In these circumstances, *prima facie,* the Defendant will be entitled *ex debito justitiae* to have the irregular judgment set aside. This much is made clear in the Privy Council case from Jamaica of **Marsh v. Marsh [1945] AC 271 at pg. 284** where Lord Goddard made the point that:

> "A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable.

Anlaby v. Proetorius and *Smurthwaite v. Hannay* are leading examples of the former, while *Fry v. Moore* may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v. Moore* there has been a defect in the service but the writ had come to the knowledge of the defendant (emphasis mine)".

4.1.2 In the case of a defendant who has not been properly served and the plaintiff thereafter obtains judgment as was the case in *Marsh v. Marsh (supra)*, the fundamental defect in question would be that the right to be heard is barred. This in my view is "a failure of natural justice"[1] – a point which was clearly made in **Dorothy Enez Derrick v. Affif Najjar and The Attorney General of Trinidad and Tobago (1976) 28 WIR 340 at page 341 per Phillips J.A.** Applying the test in *Marsh v. Marsh (supra)*, to such a situation, the defendant would be entitled to entirely "ignore" the judgment or at the very least "get it set aside".

[1] The law is that Courts are obligated to grant standing and allow individuals and entities to be alerted to and be heard in respect of potentially adverse decisions: **Annetts v. McCann (1990) 170 CLR 596, 589-600 per Mason CJ** and **Mahon v. Air New Zealand Ltd [1984] AC 808, 820 per The Court.**

4.1.3 It is noted that this approach was taken from as far back as 1888 in the case of **Anlaby v. Proetorius (1888) 20 Q.B.D 764.** In this case the plaintiff had obtained judgment before the time limited for appearance by the defendant had expired. The Court of Appeal concluded that where a plaintiff had obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. At page 771, Lopes L.J. said: "(t)o obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled *ex debito justitiae* to have it set aside". Additionally, Fry L.J made the point at page 768 that:

> "(i)n such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiae*, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass...".

4.1.4 There is also the 1894 case of **Hughes v. Justin [1894] 1 Q.B 667** where judgment in default of appearance was entered for the amount of a liquidated demand endorsed on the writ of summons. After the writ was served, the dispute between the parties was compromised and the defendant paid the agreed sum leaving only the costs outstanding. Judgment which was entered for the debt and costs was therefore wrong. At page 670 Lopes L.J. stated emphatically that "…the defendant had a right, as pointed out in *Anlaby v. Praeorius* to have the irregular judgment set aside, and that must be done…".

4.1.5 Similarly in **Muir v. Jenks [1913] 2 K.B 412** where default judgment had been entered for an amount which was excessive, at page 471, Buckley L.J. said this: "it seems to me the defendant is entitled to say 'This is a wrong judgment, set it aside'."

4.1.6 I have also had regard to the learning in the case of **Lazard Bros & Co v. Midland Bank Ltd [1932] 1 K.B. 617 at page 637** where Scrutton L.J. made the point that:

> "Persons applying *ex parte* to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application. A series of cases to this effect will be found in Kerr on Injunctions, 6th ed., p. 661, note (r). A very recent case is that of *Rex v. Kensington Income Tax Commissioners*, in which Cozens-Hardy L.J. especially mentions the case of applications *ex parte* to serve writs out of the jurisdiction as coming within the rule".

4.1.7 The case of **Craig v. Kanseen [1942] 1All ER 108** which was adopted by our Court of Appeal in 1960 in **Harracksingh v. Aziz (1960) 2 W.I.R. 485** however, dealt specifically with the situation of judgment being obtained where the Defendant was not properly served. It was held that where a summons in proceedings which could not be *ex parte* was not served and the court proceeded *ex parte* the order was a nullity and the defendant was entitled to have it set aside. Lopes L.J. made the point at page 113 that:

> "In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea

that an order can validly be made against a man who has no notification of any intention to apply for it is one which has never been adopted in England".

4.1.8 On the authority of these cases I conclude that if there is improper service judgment obtained in the matter would be irregular.

Revisiting

4.1.9 The issue which therefore confronts this Court is if the Defendant was not properly served, an irregular judgment was entered and must therefore be set aside, *could this* Court as constituted, set aside that judgment if it was previously granted by the same court after having embarked upon an *ex parte trial*.

4.1.10 This point is settled in two cases to which I now refer. One is the Court of Appeal decision of **Republic Bank Limited v. Homad Maharaj, Kowsil Maharaj and Jassodra Maharaj Civ. App. 136 of 2006.** The facts of this case are that judgments in default of a defence were entered against all three respondents on the 2nd May 1989. What followed after was that in May/June 2004, the respondents sought to set aside the default judgments and so they swore to respective affidavits wherein they set up a defence and stated that they were not served and were therefore unaware of the proceedings in court. On the 3rd November 2006 the default judgments were set aside by Best J. This procedure was appealed by the appellant on the 17th November 2006 and the point which was taken at the Court of Appeal was that since Best J. had made an original decision in the matter, he should not have then gone on to deal with the issue of non-service because at that stage, he was already *functus* concerning the issue of non-service.

The Panel comprising Archie C.J., Warner J.A., and Kangaloo J.A. did not agree and relied upon the case of **Taylor v. Williamsons (A Firm) [2003] C.P. Rep. 20.**

4.1.11 On the facts of *Taylor v. Williamsons (A Firm) (supra)* a considerable amount of evidence had been taken in a matter when a point was taken by counsel for the defendant which had the potential of causing the claimant's case to be dismissed by the judge. Before allowing counsel to completely ventilate the point of law, the learned judge circulated a draft judgment in which he found favor with the point raised by counsel for the defendant and accordingly purported to dismiss the matter. An application was then made by counsel for the claimant that the learned judge should recuse himself or order a retrial. The learned trial judge did neither and proceeded to recall his draft judgment and have the point fully ventilated. He then arrived at the same conclusion as before. The point taken on appeal was that the learned judge could not again reconsider his judgment on the merits. The appeal was dismissed. And it was against this backdrop that the point was made by **Ward L.J. at para. 43** and in turn cited by our Court of Appeal at page 3 of *Republic Bank Limited v. Homad Maharaj, Kowsil Maharaj and Jassodra Maharaj (supra)* that:

> "…judges frequently revisit judgments, whether delivered orally or handed down in writing. They do so, or may do so, when requested to review the decision. They do so in circumstances which are not limited to cases where there is fresh material placed before the court for reconsideration. Judges also do so simply because they are invited to change their minds on points actually addressed to them and referred to in the judgment or to consider matters which it is submitted the judge overlooked in coming to a decision (emphasis mine)".

4.1.12 The second case which settles the matter is *Craig v. Kanseen (supra).* On the facts of this case, the judgment in an action was dated 12th January 1937. On the 18th January 1940 an order was made giving the respondent/plaintiff leave to proceed. The summons upon which this order was made was not served upon the appellant/defendant. The affidavit in support of the summons stated that the copy of the summons had been posted to the appellant/defendant's place of business and residence, but that was not the address for service given in the action. Upon an application to a master, the order was set aside as irregular, but on appeal to the judge in chambers, the master's decision was reversed on the ground that the order should have been challenged on an appeal and not by an application to set aside. It was held that if proceedings which must be *inter partes* was taken *ex parte* this had the effect of making the order a nullity which was therefore something which a person affected by it was entitled to have set aside *ex debito justitiae.* The Court of Appeal then went on to specifically state that the court in its inherent jurisdiction can set aside its own order and an appeal was not necessary.

4.1.13 This being the position in law I conclude that a court does have jurisdiction to set aside a judgment it previously granted if same was granted on the incorrect premise that a defendant had been served.

Inherent Jurisdiction

4.1.14 In so doing I bear in mind the guidance set out in the matter of **Raja v. Van Hoogstraten [2000] 1 W.L.R. 1143** where the point was made by the court that under the court's inherent jurisdiction to regulate the conduct of civil litigation, a party affected by an order made without notice is entitled to have it set aside *ex debito justitiae,* in the sense that the court exercises its

discretion in accordance with settled practice of setting aside such an order unless the right has been lost by, for example, waiver or estoppel, rather than in accordance with a more general consideration of what is required by the interests of justice having regard to all the circumstances of the case. The court in that matter went on to state that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction. There being no rules specifically governing this situation it is open to a court to rely on its inherent jurisdiction to set aside a void judgment which was given *ex parte* in the absence of valid service on a defendant.

4.1.15 Of binding force is the case of **Isaacs v. Robertson [1985] AC 97** where in handing down the judgment of the Privy Council, Lord Diplock said that there is a category of orders of a court of unlimited jurisdiction which a person affected:

> "is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make."

Lord Diplock noted that judges had refrained from laying down a comprehensive definition of defects that bring an order into the category "that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice"[2].

[2] Equally illuminating is the article entitled "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 LQR 120, where at page 128 the late Professor Martin Dockray said that the RSC may limit the inherent powers of

4.1.16 In short a court has the inherent jurisdiction to set aside any judgment which is granted *ex debito justitiae.*

Inherent jurisdiction of the Judge of the Petty Civil Court

4.1.17 That said, it must be appreciated these authorities do not specifically refer to the inherent jurisdiction of a judge presiding in a court of inferior record. The authorities on this however are unequivocal. It was usefully summarized by Borins Co. Ct. J. in the Canadian case of **Burbank v. O'Flaherty 2 C.P.C.3, 13 OR (2d) 769** as follows:

> "59 There is one final issue which has caused me some concern. Does the County Court, a creature of statute, possess inherent jurisdiction? It is trite to say that because it is an inferior Court created by statute, a County Court possesses only that jurisdiction expressly conferred by The County Courts Act. However, it would appear that there is authority to support the proposition that a County Court has inherent power over its own process to prevent its abuse…
>
> 61 In *Evans v. Bartlam*, [1937] A.C. 473 (H.L.), a decision concerned with setting aside a default judgment, the oft-quoted passage of Lord Atkin is found at p. 480: 'The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure'.

---

the court where there is a conflict between them. Thus "the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Supreme Court". This statement was supported by cases such as **Moore v. Assignment Courier Ltd. [1977] 1 W.L.R. 638 at 644 f -645 b and Langley v. North West Water Authority [1991] 1 W.L.R. 667 at 709 d.**

62 With respect to the inherent jurisdiction of a County Court in *Norman v. Mathews* (1916), 32 T.L.R. 303 at 304, affirmed 32 T.L.R. 369 (C.A.) Lush J., on an appeal from a County Court is reported to have said: '... had the County Court Judge jurisdiction to stay or strike out the action as frivolous and vexatious?' As to that, he thought the County Court Judge had the same power as a Judge of the High Court: *Reichel v. McGrath* [14 App. Cas. 665], *Metropolitan Bank v. Pooley*, 10 App. Cas., at p. 214; section 164 of The County Courts Act, 1888…

64 In *Royal Typewriter Agency v. Perry*, [1928] 3 W.W.R. 173, 40 B.C.R. 222, [1928] 4 D.L.R. 383 (C.A.), Martin J.A., stated at p. 384: '... any Court of Record at least, as is the County Court, has inherent jurisdiction to prevent its procedure from being abused and its records 'defiled' as the expression is — and may do so upon the motion even of a stranger or *ex mero motu* ... (Authorities omitted).

65 In *Mason v. Ryan* (1884), 10 V.L.R. (L.) 335 the Full Court was considering an appeal from a County Court. After reviewing the authorities, Higinbotham J., stated at p. 340: 'But I think that the [County] Court, although (having a limited jurisdiction only) it has no jurisdiction beyond what the Legislature has given it ... still has an inherent power to prevent the abuse of and to correct irregularities in and frauds upon its own procedure and rules, and for that purpose to set aside proceedings which it may find to be void or irregular'.

66 A County Court Judge, with a jury, had heard a case over which the Court lacked jurisdiction and, on motion, a County Court Judge had set aside the verdict. The unsuccessful appeal was from the result of a motion. A similar view was reached by the same Court in *Edgar v. Freeman*, [1915] V.L.R. 16.

67 Finally, in *Aucoin v. Chaisson* (1913), 13 E.L.R. 504 (N.S.), McGillivray Co.Ct.J., had before him a motion to set aside a judgment by default after it had been fully paid and satisfied. He dealt with his jurisdiction to hear the motion at p. 508: '... I am of opinion that I have power and jurisdiction to set aside the judgment herein, ... to correct an abuse of the process of this Court. By virtue of its inherent jurisdiction the Court is empowered to do so. The power of the Court which exists in virtue of its control over its own records is a power inherent in all Courts of general jurisdiction. This principle was enunciated in *Reichel v. McGrath*, 14 App. Cas. 665. It is also laid down as a principle deduced from the decisions of the Courts, both in America and in England, that 'his inherent power exsists in virtue of the control of the Courts over its own records, and is inherent in all Courts of general jurisdiction'. Encyc. Pl. & Prac., vol. 19, p. 139'".

4.1.18 In light of the above I am of the view that I have an inherent jurisdiction to exercise and therefore can revisit a judgment I previously granted if service on the Defendant was irregular in the first place. I therefore conclude that the Petty Civil Court is the proper forum for this application.

2. ***Whether in light of the presumption of regularity of service provision i.e. section 15 of the Petty Civil Courts Rules Chap. 4:21 the matter of service is open to challenge.***

4.2.1 Section 15 of the Petty Civil Courts Rules Chap. 4:21 states that once a Summons is endorsed to include information pertaining to:

a. the day
b. the place
c. the time, and
d. the mode of service

this endorsement shall be taken as *prima facie* evidence of the truth of those facts stated therein.

4.2.2 Briggs C.J. in the case of **Veena Khiamal Nanwani & Another Administrators of the Estate of Khiamal Lalchand Nanwani v. The Commissioner of Estate Duty [1976] HKLR 74 at page 92** defined prima facie evidence as this: "*prima facie* evidence is not the same thing as proof; rather is it evidence which, if uncontradicted and believed, would establish the… claim". I have also had regard to that which is enumerated by the Supreme Court of Canada in **R v. Proudlock [1979] 1 S.CR. 525 at page** where the court quoted with approval the definition of *prima facie* evidence found in Jowitt's Dictionary of English Law as:

> "*Prima facie* evidence, that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed by the jury unless rebutted or the contrary proved; conclusive evidence, on the other hand, is that which excludes or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established".

4.2.3 This leads me to the inescapable conclusion that the term "*prima facie* evidence of the truth" is capable of being displaced.

4.2.4 Additionally, the learning in the unreported Nigerian Court of Appeal decision of **Chief Leo Degreant Mgbenwelu v. Augustine N. Ojumba Appeal No. CA/P/H/273/2002** which was cited with approval in the case of *Republic Bank Limited v. Homad Maharaj, Kowsil Maharaj and Jassodra Maharaj (supra)* takes the matter further by making the point that the affidavit of service creates a presumption of service which can in fact be rebutted by the Defendant.

4.2.5 On this basis I conclude that the presumption of service which is created by **section 15 of the Petty Civil Courts Rules Chap. 4:21** is open to challenge.

3. If the matter of service is open to challenge, whether the Defendant must prove that service was not effected.

4.3.1 Having concluded that the presumption of service is open to challenge, the next question is this. How can this be done? Again, the case of *Republic Bank Limited v. Homad Maharaj, Kowsil Maharaj and Jassodra Maharaj (supra)* is instructive. This is because it was argued that the appellant had to disprove the respondents' contention that they were not served. The learned Court of Appeal rejected this submission by stating unequivocally that the presumption of service must be rebutted by the defendant showing that it was not served and in the absence of proof from the defendant the court would be left with no other option but to accept as correct and true the affidavit of service as proof of service of the writ.

4.3.2 On this basis I conclude that if the Defendant now wished to challenge proper service of the Ordinary Summons the burden is on him to prove to the Court that it was not properly served.

4. Whether I can decide this matter solely on affidavit evidence.

4.4.1 The point was made by Kangaloo J.A in *Republic Bank Limited v. Homad Maharaj, Kowsil Maharaj and Jassodra Maharaj (supra[3])* at page 4 that in practice the usual course of challenging proper service would be by cross examination of the process server. His Lordship then cited the local case of **The Agricultural Development Bank of Trinidad and Tobago v. Kelvin Boodoo & Alfred Boodoo HCA No. 1099 of 1986** as an illustration of this point. I therefore consider myself bound to adopt this procedure and not determine this matter on affidavit evidence alone.

5. Whether the Ordinary Summons was properly served on the Defendant.

Law on Service of the Ordinary Summons

4.5.1 Having said all of this I turn now to the relevant law on service of process. These are of course contained in the **Petty Civil Courts Rules Chap. 4:21.** It is unnecessary to have recourse to **Part 5 of the Civil Proceedings Rules 1998** via **Rule 69 of the Petty Civil Court Rules** as **the Petty Civil Courts Rules Chap. 4:21** contains provisions governing service of originating documents so there is no need to apply **Part 5 of the Civil Proceedings Rules 1998** *mutatis mutandis.* This notwithstanding, it is to be noted that the concept of personal service of

[3] This has in turn been referred to as recently as July 2012 in the matter of **Dexter Brown v. Lomas Dass CV 2011-03614 at para. 6** and again in September 2012 in the matter of **Delora Buckradee (as Administrator Pendente Lite of the Estate of Selwyn Buckradee) v. Winston Buckradee Naidoo & Winston Buckradee Naidoo (As Executor of the Estate of Moonsie Naidoo) CV 2011-00962.**

originating documents is a concept that has been retained in the **Civil Proceedings Rules 1998.** Indeed **Part 5(1) of the Civil Proceedings Rules 1998** states that as a general rule the claim form must be served personally and **Part 5(3)(a) of the Civil Proceedings Rules 1998** clarifies that personal service upon an individual occurs when the document is handed to or left with the person to be served.

4.5.2 The general provisions relating to proper service in so far as are applicable to this Court is to be found in relevant part at **sections 6(1)** and **section 14(h) of the Petty Civil Courts Rules Chap. 4:21**.

Personal Service

4.5.3 According to **section 6(1) of the Petty Civil Courts Rules Chap. 4:21**:

> "An Ordinary Summons shall be served upon the defendant in the case of suits entered in the Port-of-Spain Court at least three clear days, and in the case of suits entered in any other Court at least eight clear days, previous to the day named in the summons for the hearing thereof, and the delivery of the summons to the defendant in person or by leaving the same at the residence of the defendant with some person apparently not less than sixteen years of age and actually residing thereat shall be deemed good service and no misnomer or inaccurate description of any person or place in any such summons shall void the same provided that the person or place is therein described so as to be commonly known" (emphasis mine).

A reading of this section suggests that for an Ordinary Summons to be deemed properly served, it will be sufficient for same to be served personally upon the Defendant.

4.5.4 It appears that our legislation embodies the common law requirement of personal service of originating documents which was established in the early nineteenth century case of **Goggs v. Lord Huntingtower (1884) 12 M. & W. 503.** On the facts of this case the process server went three times to the defendant's residence for the purpose of serving him with a copy of a writ. On his third visit he was informed by the defendant's servant, who answered from over the garden-wall of the defendant's house that the defendant was not at home. The process server then told the defendant's servant that he would leave a copy of the writ with her for her master. She then put a basket over the garden-wall with a string attached to it, for the purpose of receiving the copy. The process server then placed a true copy of the writ into the basket, and requested that the defendant's servant give it to her master. She promised to do same. Immediately after this occurred the process server heard the defendant say to his servant: "Take it back, I won't have it". Subsequently the process server saw the defendant's servant and she told him that she had given the copy of the writ to her master. It was contended that this was sufficient service since it clearly appeared that the writ had come to the hands of the defendant. The Court did not find favor with this argument. Indeed it was said by Alderson B. at pages 504-504 that "service means serving the defendant with a copy of the process, and shewing him the original if he desires it". Parke B. settled the matter by stating at page 504 that "in future, there shall be no equivalent for personal service".

4.5.5. On the facts of this case personal service was not effected on the Defendant. This is not in dispute. The law provides exceptions to the personal service rule and one of these exceptions is embodied in **Section 14(h) of the Petty Civil Courts Rules Chap. 4:21** to which recourse was had by the Bailiff.

Where the defendant's conduct makes personal service impossible

4.5.6 Section 14(h) of the Petty Civil Courts Rules Chap. 4:21 provides that:

> "where the bailiff or the person seeking to effect the service is prevented by violence or threats or other conduct of the defendant, or of any other person, from personally serving a summons or other process, it shall be sufficient for him to leave the same as near to the defendant as practicable" (emphasis mine).

This suggests that if the defendant through his own conduct, renders personal service impossible, the only concession to practicality is that it will be proper service for the Ordinary Summons to be left as near to the defendant as practicable.

4.5.7 In this regard as well, our legislation can be said to mirror the common law and specifically the principle that if the conduct of the defendant renders service impossible, it is not necessary to confer the defendant with actual corporeal possession of the originating document. According to the monograph which is titled **"Service of Documents in High Court and County Court Proceedings" by Anthony Radevsky**[4] there are numerous, mostly nineteenth century authorities on what amounts to good personal service in the event that the defendant refuses to accept personal service. Of the picturesque cases cited therein, one of the more pertinent ones

[4] Radevsky, A. *"Service of Documents in High Court and County Court Proceedings"* (Great Britain: Oyez Longman, 1982) at pg. 6.

was **Thomson v. Pheney (1832) 1 DPC 441** where it was found to be unnecessary to leave an originating document in the actual corporeal possession of the defendant when he made same impossible. The point was then made that it would be sufficient to inform the defendant of the nature of the document and then throw it down in the presence of the defendant.

4.5.8 On the facts of the matter before me it was contended that firstly, the Bailiff located the Defendant and the Defendant was in essence hiding from the Bailiff so he could not actually hand her the summons. It was suggested that the Bailiff in these circumstances, was left with no choice but to resort to the provisions of **Section 14(h) of the Petty Civil Courts Rules Chap. 4:21** and leave the summons as near to the Defendant as practicable.

Evidence of the identity of the Defendant

4.5.9 The evidence which emerged from the evidence in chief and cross examination of the Bailiff was that the person he attempted to serve the Ordinary Summons to on the 26th January 2012 was the same person who was seated in Court and referred to as the Defendant in this matter. According to him, he had her under his observation for two blocks of time that day.

4.5.10 On the first sighting the Bailiff told the Court that he had the Defendant under his observation for ten seconds. He had a view of the side of her face during which time nothing obstructed this view and the lighting conditions were good as it was a sunny day. During this sighting the Defendant was some 25-30 meters away from him. The Bailiff estimated that this distance would have been from the corner of St. Vincent Street and Duke Street to the "first

driveway" into the Port of Spain Magistrates Court on St. Vincent Street. The Court was fully cognizant of the distance involved with reference to these landmarks.

4.5.11 The second sighting of the Defendant occurred when she ran off in the direction of a garage and stood peeping for intervals over the course of 1-2 minutes from the back of a garage door located at the back of that garage. According to the Bailiff although the garage was "a little dark" the Defendant was standing outside a door to the back of that garage and at that location there was good lighting which allowed him to get a full frontal view of the Defendant. He said that the only thing that obstructed him was the door from which the Defendant was peeping. In any event according to the Bailiff, when the Defendant did look out he was able to see her face. At this point the Defendant was 35 meters from the Bailiff.

4.5.12 The Bailiff concluded that although he had never seen the Defendant before that day and never saw her after the 26th January 2012 until the day he returned to the same premises to serve her with the judgment summons, he was certain that the person he attempted to serve on the 26th January 2012 was the Defendant in the matter.

*Having considered this evidence I find that the person the Bailiff attempted to serve on the 26th January 2012 was indeed the Defendant in this matter.

Evidence that the Defendant was evading personal service

4.5.13 On the evidence of the Bailiff, when he saw the Defendant he turned to her and told her "good morning Ms. Harris" at which point the Defendant ran away from him and went into a

nearby garage. According to the Bailiff he returned to his vehicle and waited some five minutes before he attempted to make contact with the Defendant for a second time. On his evidence that attempt proved futile as well because the Defendant again eluded service by running away from the Bailiff for a second time and this time stood at a distance peeping at him for about 2 minutes. Additionally, the Bailiff told the Court that even though he was waving the Ordinary Summons at the Defendant whilst she was peeping from afar, she never came forward to accept service of it.

*Having considered this evidence I find that the Bailiff was prevented by the conduct of the Defendant on the 26th January 2012, from effecting personal service of the Ordinary Summons in this matter.

4.5.14 This in turn raises the consideration of whether, on the facts advanced to support sufficient service, the summons was placed as near as possible to the Defendant.

Left as near to the Defendant as practicable

4.5.15 On the matter of "leaving", the case law suggests that once the intended recipient has been given a sufficient degree of possession of the document to enable him to exercise dominion over it for any period of time however brief, the document has been left with him. Authority for this proposition can be found in the case of **Nottingham Building Society v. Peter Bennett & Co (unrep., English Court of Appeal, 14 February 1997) , per Waite LJ.**

4.5.16 If the Bailiff is to be believed, the Ordinary Summons was left under the wiper blade of the Defendant's vehicle which at the material time was parked in close proximity to the Defendant: on the facts which came out at the hearing, some three meters away from the entrance to the garage into which the Defendant was said to have ran upon seeing the Bailiff. Further this vehicle was located on the Defendant's enclosed premises.

4.5.17 The Defendant stated that by January 2012 she had already sold that vehicle although title in the vehicle was not transferred until June 2012. She said that until that time the vehicle was simply parked in her premises but she never used it. She stated further that her nephew would come in his car to take her around when she needed to be conveyed to different locations. The Defendant stated further that two of her tenants also had access to the area in which the vehicle was parked. Additionally she never received any summons nor did she see any document under the wiper of the said vehicle. The Court noted that the Defendant never called the person to whom, the vehicle was sold nor did she call her nephew as a witness.

*I find that the Ordinary Summons was in fact left as near as practicable to the Defendant.

5.0 FINDINGS OF THE COURT

5.1 I have resolved the issue in this application by weighing the affidavit of Service against the affidavit of the Defendant and, giving due consideration to the evidence which emerged in the *viva voche* testimony of the Bailiff of the Court and the Defendant. I have also taken into account the submissions advanced by counsel and the law as set out above.

5.2 I have reached the clear conclusion that the Bailiff's evidence that he attempted to serve the defendant but was prevented by her conduct from so doing and was therefore forced to leave it as close to her as practicable is true and accurate. His evidence was cogent and compelling and this was not shaken in cross examination.

5.3 I regret to say that I have formed the view that this part of the Defendant's evidence is untrue. Indeed this was apparent in her testimony under cross examination.

5.4 Further, I see no reason why the Bailiff should be either telling lies (which was not suggested) or mistaken as to what happened. On the other hand, the Defendant does have a motive for misrepresenting the position.

5.5 For these reasons I have found on a balance of probabilities that:

1. The Bailiff of the Court found the right person i.e. the Defendant.
2. The Defendant's own conduct prevented personal service.
3. By reason thereof the Bailiff of the Court was correct in law to have recourse to the process of leaving the Ordinary Summons as near to the Defendant as practicable as contemplated by **Section 14(h) of the Petty Civil Courts Act Chap. 4:21**.
4. The PBW 2696 red Nissan X-Trail belonged to the Defendant.
5. This vehicle was in close proximity to the Defendant at all material times.
6. By securing the Ordinary Summons under the wiper blade of the said vehicle the Bailiff of the Court left the said document as close to the Defendant as practicable.

5.6 Accordingly, in my judgment, it follows as night follows day, that I am prepared on the material before me as well as the submissions made by counsel to find as a fact, on the balance of probabilities -and I regard the balance as coming very firmly down in favour of this conclusion, that the Ordinary Summons was properly served upon the Defendant. Given that finding of fact, which I feel able to make on the material before me as well as the submissions advanced by counsel, it is clear in my judgment, that service was effected in accordance with the provisions of **sections 6(1)** and **section 14(h) of the Petty Civil Courts Rules Chap. 4:21** and so the judgment obtained was regular**.**

6.0 ORDER OF THE COURT

6.1 The Defendant is not entitled to have the *ex parte* judgment set aside *ex debito justitiae* and the application is accordingly refused.

6.2 I order that these costs be in the cause of the action.

6.3 Finally, I thank counsel for their assistance.

……

Her Worship Magistrate Nalini Singh

Petty Civil Court Judge