

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)**

SUIT NO: NEVHCV2013/0120

In the Matter of sections 3, 8 and 9 of the
Constitution of Saint Christopher and
Nevis.

And

In the matter of an application by the
Claimants Jovil Williams and Jason
Campbell for Declarations, Damages
and other relief alleging a breach of their
rights under Sections, 3, 8 & 9 of the
Constitution and for redress pursuant to
Section 18 of the Constitution.

BETWEEN:

**Jovil Williams – 1st Claimant
Jason Campbell – 2nd Claimant
and**

**The Attorney General of St. Christopher and Nevis- 1st Defendant
Chief of Police - 2nd Defendant**

APPEARANCES:

Ms. Angelina Gracy Sookoo for the Claimants.

Ms. Violet Williams and Mr. Philmore Warner for the Defendants.

JUDGMENT

2014: March 20

2014: April 7

[1] **WILLIAMS, J. (Ag):** By originating motion filed on the 8th November 2013 under Section 18 of the Constitution and Rule 56 of the CPR 2000 the Claimants claim against the Defendants for.

(a.) A Declaration that their fundamental right to protection of their personal privacy, the privacy of their property and from deprivation of property without compensation pursuant to Section 3 of the Constitution has been infringed.

(b.) A Declaration that the Claimants fundamental right that no property of any description shall be compulsorily taken possession of, and no interest on right over property of any description shall be compulsory acquired except for a public purpose and by or under provisions of a law pursuant to Section 8 of the Constitution has been infringed;

(c.) A Declaration that the Claimants fundamental right to protection from Arbitrary search or entry pursuant to Section 9 of the Constitution has been infringed.

(d.) Damages including aggravated and exemplary damages.

(e.) Costs.

[2] Under this originating motion the Claimants aver that their Constitutional rights to personal privacy, property and to protection from arbitrary search were infringed by Police Officers attached to the Charlestown Police Station, when the 2nd Claimant Jason Campbell was detained at the said Police Station in relation to an alleged robbery which had taken place on or about 28th to 29th April 2013.

- [3] The 2nd Claimant further avers that his Blackberry Bold smart phone was taken from him while in detention at the Charlestown Police Station, and the said phone contained and stored a sexually explicit video of the Claimants which was placed in the Public domain by the Police officers on duty.
- [4] The Claimants served on the Defendants on the 3rd of December 2013 the Originating Motion, Statement of Claim and Joint affidavits of the Claimants filed on the 8th November 2013.
- [5] The Motion was set down for hearing on the 18th December 2013, however due to fluctuations in the Court schedule the date was vacated.
- [6] The Defendants subsequently filed an application for Extension of Time and Relief from Sanctions on the 6th January 2014 and served the Claimants on the 8th January 2014. The Defendants had not by this time filed an Acknowledgment of Service or a Defence and their Application for an Extension of Time to file a Defence was filed three days after the time for filing a defence had expired as stated in Rule 10 of the CPR 2000.
- [7] The Application by the Defendants with a supporting Affidavit dated the 6th January 2014 was sworn to by Eshe Hendrickson, Crown Counsel and by order of Court dated the 31st January 2014 filed on the 6th February 2014, and entered on the 10th February 2014, under the Appearance Section it was stated that Crown Counsel Ms. Eshe Hendrickson appeared for the Applicants/Defendants.

- [8] On the 30th day of January 2014, the Claimants filed an Affidavit in response to the Application for extension of Time and Relief from Sanctions, which was served on the Defendant/Applicants on the 4th day of February 2014.
- [9] On the 12th day of February 2014, the Defendants/Applicants filed an Acknowledgment of Service, Affidavit in Response and Affidavit in Reply, and these documents were duly served on the Claimants on the 14th February 2014.
- [10] That initial application of the 6th January 2014 was filed by the Defendants pursuant to Rules 10.3 (9) 26.1 (2) (k) and 26.8 of the CPR 2000. The grounds stated in the application were that:
- (a.) Pursuant to Rule 10.3 and 26(1) (2) (k), the Court had Jurisdiction to grant the Application.
 - (b) Upon Service of the documents, the Defendants immediately made efforts to gain full instructions.
 - (c) That in the process of seeking these instructions, the Officers and in particular those involved in the alleged incident were requested to perform extra duties to assist with the Security Forces during the National Carnival Season which commenced in November 2013.
 - (d) As a matter of National Security, extra precautions had to be taken which required all officers of the Royal Saint Christopher Nevis Police Force to be on duty or standby.

- (e) During the month of December 2013 and early January 2014, there were National holidays by which the Office of the Attorney General was closed.
- (f) Counsel for the Applicants/Defendants have been unable to take full instructions in the matter.
- (g) Application for relief from sanctions is made promptly and within the deadline which the defence ought to have been filed.
- (h) The Applicants/ Defendants failure to file the documents was not intentional and was not unavoidable in the circumstances.
- (i) Granting the orders sought will not adversely prejudice the alleged Claimants.

[11] The Affidavit in Response by the Claimants to the Application for Extension of Time and Relief from Sanctions filed on the 30th January 2014 objected to the Application on the grounds that:

- (a) Time for filing the Defence was due on the 3rd January 2014.
- (b) All Carnival activities took place in St. Kitts and not Nevis.
- (c) The Affidavit in support of the Application was sworn to by the Solicitor on record in the matter and was therefore inadmissible.
- (d) The Claimants would suffer a disadvantage because the ability to obtain a Summary trial would be lost and the Trial Costs would be far greater in comparison to Summary trial costs.
- (e) No Draft defence was attached to the Application.
- (f) No good reason was given for the delay

(g) There is no requirement for Relief from Sanctions.

[12] The Court observes that at the hearing of this matter on the 31st January 2014 according to the Court order filed on the 6th February 2014 the Court gave directions for the Defendants to reply to the Affidavit in response and for the filing of submissions. At that hearing according to the said Court order the appearances as entered, stated that Ms. Eshe Hendrickson appeared for the Applicants.

[13] On the 12th February 2014, the Defendants filed an Affidavit in Reply sworn to by the said Eshe Hendrickson, Crown Counsel in which she deposes to the following:

(a) That there was a miscalculation of the date for filing the defence, but nevertheless there was no undue delay in making the application, as the application was filed three days after the time for filing the defence.

(b) That a defendant may file an Acknowledgment of Service notwithstanding the time for doing so had expired, provided that a Request for Judgment in default had not been made.

(c) That an Acknowledgment of service is not strictly required in civil proceedings of this kind.

(d) That there is one Police Force, and that members of that Force are rotated between the Federation.

(e) That the Assistant Commissioner of Police for swearing and signing the Affidavit in Response was involved in the Carnival activities, and then subsequently left the Jurisdiction for two weeks.

THE ISSUES

[14] The issues which the Court has to decide are:

(a) Whether the Application by the Defendants is properly before the Court and whether it is supported by admissible Affidavits pursuant to Rule 11.9 and Rule 30.3 of the CPR 2000.

(b) Whether the Application for Extension of Time by the Defendants is grounded in the Rules governing extension of Time under the CPR 2000.

(c) Whether the Defendants/Applicants should be granted relief from Sanctions.

(d) Whether the Claimants should be granted costs.

[15] By order of the Court dated the 31st January 2014 submissions were filed by both sides. The submissions on behalf of the Claimants relate to the issues as to;

(a) whether the Defendants application for an extension of Time and relief from sanctions is incurably bad and should be struck out,

(b) whether the application for an Extension of Time should be granted

(c) whether the Defendants should be granted relief from Sanctions.

[16] The submissions on behalf of the Defendants relate to the issues as to

- (a) whether there was undue delay in making the Application for an Extension of Time to file a Defence.
- (b) whether an acknowledgment of service is not strictly necessary in Civil Proceedings of this kind.
- (c) whether counsel having the conduct of a matter, and swearing to an Affidavit in the same manner can be considered an error which can be cured by the Court.
- (d) whether a Fixed Date Claim Form in a Constitutional Motion permits the entry of a Judgment in default of acknowledgment of service, or in default of defence or for an entry of a summary Judgment against the Crown.

SUBMISSIONS- ISSUE NUMBER ONE (1)

- [17] In the Submission on behalf of the Claimants/Applicants, Counsel advances the argument that “Rule 11.9 of the CPR 2000 states that evidence in support of an application must be contained in an Affidavit, and that the Affidavits before the Court are deposed to by one of the Crown Counsels with conduct of the matter and more importantly by Counsel who appeared in the matter.” Therefore according to the Submission, the swearing of these Affidavits by Counsel for the Defendants who had conduct of the matter makes the Application incurably bad.
- [18] On behalf of the Defendants, broad submissions are advanced with regard to the CPR 2000 on the power of the Court to extend or shorten the time for compliance with any rule or Practice Direction even after the time for compliance has passed.

The submission highlights rule 1.1 which defines the overriding objective of the CPR, and Rule 26.9 which speaks to applications for extensions of time and the criteria used by the Court in determining such applications.

[19] Counsel for the Claimants in her submission cites the Judgment in the case of **Casimir vs. Shillingford and Pinard (1) W.I.R 269** and the reasoning of A.M

Lewis CJ: where he stated that:

“ It was not proper (I cannot put it higher than that) for a Barrister who is going to appear in a cause to swear to an affidavit in the same cause, even if he swears it in his capacity as Solicitor.... It puts the Court which has to pronounce upon the acceptability of the Affidavit in an embarrassing position when the person who made this Affidavit as Solicitor appears before it in the same cause as Counsel, and it is more appropriate that either some other person, preferably the Party who desires to appeal should swear the Affidavit, or that if the circumstances are such that counsel has to swear it himself, then he should brief other counsel to argue the case before the Court.”

[20] In response to this issue, Counsel Eshe Hendrickson in a sworn Affidavit dated the 12th February 2014 at Paragraph 9 states that “where my name appears at the back of the documents served on the Claimant’s solicitors, this was in error. Further, that on the first Chamber hearing of the matter, Counsel Philmore Warner appeared on behalf of the Defendants. “

The submission of Violet Williams Counsel for the Defendants is that the principle enunciated in Casimir's case¹ and Richard Frederick's case did **not** apply to the current case at bar² since the Solicitor swearing the Affidavit in support of the Application to extend time to the Defendants did not appear as Counsel in the matter.

THE LAW

CONCLUSION

[21] I agree with Learned Counsel for the Claimants that the Affidavits sworn by Counsel Eshe Hendrickson and her appearance in the same cause as evidenced by the Court Order of Justice Ramdhani dated the 31st January 2014 render the Affidavits inadmissible before the Court. I adopt the reasoning on the well settled Law in the cases of Casimir vs. Shillingford and R. Frederick and Lucas Frederick vs. Comptroller of Customs and the Attorney General.

[22] I consider the statement by Crown Counsel Violet Williams in her oral submission to the Court on the 20th March 2014 that there was "an error" in the sworn Affidavits deposed to by Ms. Hendrickson as unacceptable, and not a good and substantial reason to satisfy the provisions of Part 30 of the CPR 2000. What Counsel is really seeking is an indulgence from the Court and a disregard

¹ (10) W.I.R

² HCVAP 2008/037

of the rules relating to Affidavits, and the Court cannot accede to this request to cure this procedural error.

[23] In the circumstances, the Affidavit of Eshe Hendrickson filed on the 6th January 2014 is struck off for the reasons cited above.

[24] Also in relation to the Affidavit in reply dated the 12th February 2014 sworn to by Crown Counsel Eshe Hendrickson, the defects in the Affidavit are quite apparent in Paragraphs (5) (6) (7) (8) (10) (11) (12) (13) and (14) and offends Part 30.3 (2) (11) of the CPR 2000, in that the Affidavit does **NOT** indicate the source of any matters of any Information or belief.

I refer to the case of **Delcine Thomas vs. Victor Wilkins ANVHCV2007/0530** and echo the words of Blenman J. at paragraphs 32 and 35. The learned Judge states “Affidavits should contain evidence that is relevant and necessary..... It is the Law that the Court in determining whether to strike out paragraphs of an Affidavit must examine the Affidavit in question with care and to determine whether any aspect of the Affidavit offends the rules of Evidence or Procedure. Should the Court come to the conclusion that the Affidavit offends either these two sets of rules, the offending paragraphs should be struck out.

[25] Therefore this Court agrees with the Submission of Counsel for the Claimants and considers the Affidavit of Counsel Eshe Hendrickson defective to the core and will deem the said paragraphs inadmissible. In the circumstances this would

result in an Affidavit that is devoid of facts and substance and in breach of Rule 11.9 of the CPR.

ISSUE NUMBER TWO (2)

[26] Whether the Defendants should be granted an Extension of Time within which to file their Defence.

In the written submissions of Counsel for the Defendants at page 5 the reasons for requesting the extension of time are:

- (1.) That the Officers in particular those involved in the alleged incident were requested to perform extra duties to assist with the Security Forces during the Carnival season which commenced in the month of November 2013.
- (2.) As a matter of National Security, extra precautions had to be taken which required all Officers of the Royal Saint Christopher and Nevis Police Force to be on duty or standby.
- (3.) That during the month of December 2013 and early January 2014, there were National holidays whereby the Office of the Attorney General was closed.
- (4.) That Counsel for the Applicants/ Defendants has been unable to take full instructions on the matter.

[27] In a further Affidavit in Reply by the Defendants/ Claimants dated 12th February 2014 at Paragraph 8, it states "that the Assistant Commissioner of Police who had responsibility for swearing and signing the Affidavit in response was very much involved in the organization of security details to ensure a crime free Carnival.

Therefore while the Carnival season and activities were taking place, he was unavailable. Shortly after he was out of the Jurisdiction for approximately two weeks. “

[28] As stated before the rule governing extension of time is found in Rule 26.1 (2) (k) of the CPR 2000. This rule states “Except where these rules provided otherwise, the Court may extend or shorten the time for compliance with any rule, practice, direction, order or direction of the Court even if the Application for an extension is made after the time for Compliance has passed.”

[29] While the CPR 2000 does not specify any criteria for granting an application for extension of time, Part 1.2 states that “The Court must seek to give effect to the overriding objective when it (a) exercises any discretion given to it by the Rules or (b) interprets any rule.

[30] The main thrust of the Defendants/Applicants application is that the Court can extend the time for filing a Defence and the following cases and dicta are cited to the Court. In **C.O Williams Construction (Saint Lucia) Limited and Inter-Island Dredging Co. Ltd HCVAP2011/017**, the Court of Appeal held that while the Court had a broad discretionary power under the CPR 26.9 to extend time, it ought not to be done in a vacuum, but it must be exercised judicially, in accordance with well established principles. Overall in the exercise of this discretion, the Court must seek to give effect to the overriding objective which is to ensure that Justice is done as between the Parties.

In John Cecil Rose vs. Anne Marie Uralis Rose Civil Appeal No. 19/2003, Byron C.J (as he then was) stated that “Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the Applicant for good and substantial reasons. The matters which the Court will consider are.

- (1.) The length of the delay
- (2.) The reasons for the delay
- (3.) The chances of the matter succeeding if the extension is granted and
- (4.) The degree of prejudice to the Respondent if the application is granted.

I agree with and adopt the reasoning of the learned Judges with regard to the exercise of the discretion of the Court.

THE LENGTH OF THE DELAY

- [31] 1. The Originating Motion was filed on the 8th of November 2013 by the Claimants and the Defence in the matter was due on the 3rd January 2014.
2. In this case, the Application for Extension of time and Relief from Sanctions was filed on the 6th day of January 2014 by the Defendants/Applicants, three days outside the time for filing a defence.
3. The Defendants/Applicants submit that the delay was not inordinate. While the Court agrees that this lapse of 3 days does not constitute inordinate delay on the part of the Defendants, however a delay existed under the CPR Part 10.

REASONS FOR THE DELAY

[32] In the supporting Affidavit of Eshe Hendrickson, Crown Counsel dated the 6th January 2014, paragraphs 3-8 gives the reasons for the delay. I restate those grounds for clearer analysis of the submission.

(1.) That in the process of seeking those instructions, the Officers and in particular those involved in the alleged incident were requested to perform extra duties to assist with the Security Forces during the National Carnival season which commenced in the month of November 2013.

(2.) That as a matter of National Security extra precautions had to be taken which required all Officers of the Royal St. Christopher and Nevis Police Force to be on duty or standby.

(3.) That during the month of December 2013 and early January 2014, there were National holidays whereby the Office of the Attorney-General was closed.

(4.) That Counsel for the Applicants/ Defendants has been unable to take full instructions in the matter.

(5.) That this application for relief from Sanction is made promptly and within the deadline within which the defence ought to have been filed.

(6.) That the Applicants/ Defendants failure to file the documents in time was not intentional and was unavoidable in the circumstances.

[33] Learned Counsel for the Claimants submits that the Defendants have failed to provide a good and substantial reason for the delay.

[34] The Court agrees with this submission from Learned Counsel for the Claimants and has difficulty in accepting the reasons for the delay in filing the Application. While the Court takes note of the different versions of the reasons for delay in the Affidavits of Crown Counsel Eshe Hendrickson dated the 6th January 2014 and the 12th February 2014, and also takes Judicial Notice of the Carnival season, it is loathe to accept the excuse that Officers involved in the incident could not be found to provide instructions to Counsel for the Defendants.

[35] If I may adopt the words of Chief Justice Lewis in Casimir vs. Shillingford-
“If the Court were to accept that pressure of work is a good and substantial reason for non-compliance with Rule 10.3 it would be tantamount to doing away with the rule, and it would open the way to a flood of applications by Solicitors who might not be diligent in the conduct of their clients’ business to apply for the indulgence of the Court.”

This Court agrees with the reasoning adumbrated in this case and holds further that the reasons provided for the delay are frivolous and vexatious.

Also under CPR 3.5, it states that Time does not run for the Long Vacation (i.e.) 1st August to 15th September therefore, the Court is open during the Christmas and Easter Vacation for Trial and Applications.

[36] It is my view that the Defendants had ample time to file and serve the Claimants with an Affidavit in Reply, and therefore cannot put forward the excuse that

because there is a period of frivolity, revelry and “bacchanal” in the country, that solicitors cannot conduct their business with due diligence.

[37] The Defendants also contend that they have usually complied with the relevant rules, practise directions, orders and directions of this Court.

However they concede the late filing of the Acknowledgment of Service.

Counsel argues that the CPR 2000 recognises public law proceedings as a peculiar specie of Civil Proceedings which fall outside of the ambit of the ordinary type of Civil Proceedings as contemplated by the Crown proceedings Act Cap 5.06 and Part 56 of the CPR. Counsel also cited the case of **Richard Frederick** to bolster the argument that the filing of an Acknowledgment of Service is not strictly required.

[38] The learned Justice Janice George-Creque Justice of Appeal (as she then was) at paragraph 17 of her Judgment with the **Richard Frederick case** clearly stated that a defendant may file an acknowledgment of service notwithstanding that the time for so doing has expired provided he does so before a request to enter Judgment is filed (CPR 9.3).

[39] The Court adopts and echoes this position and does not consider the late filing of the Acknowledgment of Service to be fatal to the Defendants case. Additionally the Court does not consider the late filings of the other submissions as fatal and prefers the approach as that reflected in **Carleen Pemberton vs. Mark Brantley HCVAP 2011/009 (SKN)** in considering applications for an extension of time.

CHANCES OF SUCCESS

[40] The Claimants have filed a Constitutional motion for breaches to their fundamental right to privacy and privacy of their property, protection of property and protection from arbitrary search. The Defendants defence is that the alleged actions of the Police Officers were not in any way connected to their duties they were authorised to perform and that they were not acting in the course of their duty and were on a “frolic of their own.”

The Claimants are claiming a declaratory order which is a discretionary remedy against Ultra vires action by Governmental authorities of all kinds including the Crown. Declarations are a suitable way to settle disputes with Governmental authorities, since it involves no immediate threat of compulsion, yet is none the less effective. The famous case of **Dyson vs. The Attorney-General (1911-12)** **1KB 410** is instructive and gives fair word to the action for a declaration as a defensive weapon against Executive power. The Claimants allege breaches of Executive Power of an Arm of the State, which is not an action grounded in Tort, and therefore the Defence that the Police Officers acted in an unauthorized manner and were on “a frolic of their own” would be relevant in a liability action grounded in Tort. The Defendants therefore cannot hang their defence in Tort, although unconstitutional action by servants of the Government could justify an award of exemplary or punitive damages.

The case of **The Attorney General vs. Craig Hartwill (Privy Council Appeal No. 70 of 2002) of the British Virgin Islands** is a case dealing with Tortious liability, and vicarious liability of a Police Officer in which Constitutional issues were not considered by their Lordships. I do not consider this submitted case relevant to the present case under consideration. I am of the view that for the reasons given, the Defendants chances of success are slim if not non-existent.

DEGREE OF PREJUDICE

[41] The Claimants in their submissions have stated that they would be prejudiced if the Defendants application is granted, in that the opportunity for Summary Trial would be lost. Also that a full Trial would result in more costs to them.

The Defendants contend that no prejudice has been caused to this Claimant, whereas a refusal of an Extension of time would deprive the Defendants of the opportunity to defend the Claim. The Defendants further contend that there has been no first hearing of the matter and no application for summary trial has yet been made.

[42] Part 27 (2) of the CPR 2000 is instructive on this issue and under Rule 27.3, the Court may treat the **First hearing** as the trial of the Claim if it is not defended or it considers that the Claim can be dealt with summarily. This contention by the Defendants is misguided, in that the matter has not had a **First hearing** and therefore an application for Summary trial cannot be considered or made at this stage, not until the First hearing of the substantive matter.

[43] The Defendants have submitted that a Defence can be filed without permission of the Court after the time for filing has expired and have relied on the Privy Council case of **The Attorney General vs. Keron Matthews [2011] WKPV 14.**

The Claimants have contended that the Defendants have not sought leave of the Court to file a Defence after the time has expired and should have attached a Draft Defence. Therefore they argue that the Defence is not properly before the Court.

[44] In that case of **The Attorney General vs. Keron Matthews** it was held that the Court has a discretion to extend the time for serving a Defence where an application for Default Judgment was made prior to the Defendants application for an extension of time to file a Defence. In that case, reliance was placed on the legal issue that the extension would cause no prejudice to the Claimant, whereas refusal of an extension would deprive the Defendant of the opportunity to defend the Claim.

[45] The granting of an extension of time is a discretion by the Court in acknowledgment of the overriding objective of the CPR in dealing with cases justly and expeditiously. While there has **not** been an inordinate delay in complying with the Timelines provided by the CPR 2000 because the Defence was filed 3 days after the time for so doing had elapsed, the reasons for the delay are spurious, and the issue that there was Carnival celebrations taking place which necessitated the presence of the witnesses to sign Affidavits and provide

instructions is wholly untenable. The Defendants application for relief from sanctions is also misguided as such an application is unnecessary in filing a defence. In my judgment there has not been advanced any acceptable reason for the delay. Further the Defendants have not shown that there would be a substantial miscarriage of Justice or any degree of Prejudice to them, to convince me that an exercise of the Court's discretion should be in their favour.

CONCLUSION

[46] The Application by the Defendants for an extension of time with supporting Affidavits is defective, incurably bad and cannot be remedied by the Court pursuant to its discretion under Part 1 of the CPR 2000. The Court is therefore not inclined to grant the extension of time to file and serve a Defence in this matter and would dismiss the Defendants Application for the reasons given therein.

ORDER

It is hereby ordered and declared as follows:

1. That the Defendants' application for an extension of time to file a defence is struck out for the reasons herein.
2. That the Application for Relief from Sanctions is struck out as being inapplicable.

3. The Defendants shall pay the Claimants costs in the sum of \$1500.00 within 21 days of this order.

Lorraine Williams
High Court Judge (AG)