Trespass to Land

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**IN THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2018-01091

BETWEEN

**ERNA BREWSTER**

AND

**DWAYNE RICHARDSON**

First Named Defendant

**OMROY BARKER**

Second Named Defendant.

Submissions in Reply to the submissions in support of the application made by the Claimant.

1. The Honorable Madam Justice Joan Charles made an order on 19th February, 2019, as follows:

1. The Defendants to file an Affidavit in Reply on or before 7th March, 2019

2. The Claimant to file brief submissions in support of the application on or before 29th of March, 2019

3. The Defendant to file and serve submissions in Reply on or before 29th April, 2019.

The Claimant made an application for extension of time for compliance to file witness statements on 12th of February, 2019. This is due to non compliance of the order made by the Honourable Madame Justice Joan Charles on 16th of October, 2018,

1. The Parties to file and exchange Witness Statements on or before 14th of January, 2019.

The Defendant file his Witness Statements on January 14th , 2019.

1. The Claimant later amended his application and filed amended notice of application on February, 22nd 2019 and he did not obtain any leave from the Court before he filed the amended notice of application.
2. The application filed on 12th February, 2019 did not ask for relief from sanctions but rather mentioned he is applying to the Honourable Court pursuant to Parts 26.1 (d) and (o), as well as part 26.6 (2) and 26.7 (1) (2) and (3) of the Civil Proceedings Rules 1998 (as amended) (CPR).

3. the Claimant filed his submissions on March 7th , 2019. These submissions are in reply to those submissions.

4. In his Summary of Procedural History, He indicated that there is no need to make an application for relief of sanctions. He also quoted in his paragraph 10 the case of Trincan v Schnake,

“in my opinion, in an application for an extension of time made before a sanction is imposed the strict requirement of Part 26.7 does not apply. In such a situation the court has to exercise its general discretion in determining whether or not to grant an extension of time.

1. Hence this clearly indicates that the Claimant is relying on the application for extension of time and he is not seeking relief from sanctions. Probably the Claimant is of the opinion there are no sanctions attached in complying with the Judge’s order made on 16th October, 2018.
2. As per Rule 26.6 (1) Where the Court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
   1. Where a party has failed to comply with any of these Rules, a direction or any court order, any he sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.
3. Again as per Rule 29.13 (1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.
   1. The court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief under rule 26.7.

This has been reiterated in the case of Attorney General v Keron Matthews [2011] UKPC 38 paragraph 15 clearly defines the circumstances where a relief from sanctions application is made and where the extension of time application is made.

“ Examples of such rules are to be found in rule 29.13 (1) ( which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits. (2) the court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief from rule 26.7 earlier.”

1. Either the Claimant made an application for extension of time or application for relief from sanctions is a point of issue. If he made an application for extension of time he clearly did not comply with Rule 29.13. From his submissions it would seem like he is making an application for extension of time.
2. In the case of Lincoln Richardson and Elgeen Roberts-Mitchell in page 7 line 38 the Chief Justice Archie did reiterate the rule 26 (7) plays a part. Moreover, this is a procedural appeal and the Case of AG v Keron Matthews [2011] UKPC 38 is a privy council case.
3. Hence it is time and time again reiterated that Rule 26 (7) should be considered before the general objective need be considered.

The importance of Rule 26 (7) has been reiterated in In the case of Rawti Roopnarine v Harripersad Kissoo, the court of appeal considering the effect of Part 26.7 (3) held that this rule established threshold requirements. The court must be satisfied that the applicant has fulfilled the threshold requirements. Only when the court is satisfied that there has been compliance with the threshold repuirements, would the Court proceed to consider the discretionary factors at Part 26.7 (40. Justice of Appeal Mendonca state:

“Rule 26.7.(3) establishes a threshold test. In other words the three (3) conditions stipulated in that rule must all be satisfied before the court may grant relief. If any of the conditions are not satisfied the court cannot grant relief.” Rawti Roopnarine v Harripersad Kissoo civ.App. No. 52/12 at paragraph 15 of the judgment.

1. In the Attorney General of Trinidad and Tobago v Miguel Regis Civil appeal no. 79 of 2011 it was noted:

46. Nothing is further from the truth than to assert that Part 26.7 somehow removes judicial discretion. Such a suggestion is rather dis ingenuous. In fact, as has been indicated above, at every level of consideration in Part 26.7 there is necessity for the exercise of judicial evaluation, analysis and discretion. The fact of a threshold does not remove judicial discretion or force judges to ‘ mechanistically apply rules to shut litigants out’. All threshold does is to structure the weighing and balancing of values and consequently the exercise of judicial discretion. This structuring (weighing and balancing) of values is a normative act designed to assign to values their appropriate place at this time in the scheme of Part 26.7. It is purposeful. It does not negate the exercise of Judicial discretion, though it does regular it.

12. This clearly states even though the Judges have the discretion of any thing and nothing can negate and In my view should be respected for all purposes, 26.7 however would regulate that discretion.

13. The Claimant made an application for extension of time and not relief from sanctions, he however did state that Rule 26.7 should also be considered and he gave explanations of Promtitude, Intentionality, good explanation.

14. **Promptitude.**

In the Matter of Trincan Oil limited and Keith Schnake civ. **No 91 of 2009**

In paragraph, 22, the Honorable Judge states, Part 26.7.(1) is mandatory. It requires that an application for relief from any sanction imposed must be made promptly. Promtitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact. “Prompt’ must be considered in relation to the date when the sanction was imposed. “

If Rule 26.7 and Rule 29.13 were taken together the sanction would have been imposed on the date the order was make which is January 14th and the application for extension was made on February, 12th. Firstly , if the Claimant is merely making an application for extension , it would mean that the application for relief is not yet made, upto this date. Which is already 3 months past the date of sanctions. Secondly if the application for relief was made on the amended date of the application which is February, 22ndor the date of the original application which is February 12 it was also a delay of 4 weeks. By any extension it was not made promptly.

15. The application was not supported with any evidence none whatsoever. The Claimant’s attorney mentions that the witness statements were ready by January 4th but there is not evidence to back that. Also he had a volume of cases , and again he did not give the details.

16 Then he did delve on the threshold requirements.

**26.7 (a) Intentionality**

The Attorney at Law for the Claimant stated it was clearly the intention of the Claimant to file her witness statement within the time limit. However, it was not done because of the Attorney at Law for the Claimant . This clearly was the indication though the Claimant had the intention, the Attorney at Law did not have the intention.

In the Matter of Trincan Oil Limited and Keith Schnake, Honorable Justice P. Jamadar, stated in paragraph 49. “Senior Counsel for the Appelant has accepted that to a large measure the responsibility for the errors and failures in this case lie with the Appelant’s attorneys. However, he has contended that when there is no fault or culpability in a party then the fault or failure of its attorneys cannot be held against the party for the purposes of the criteria in Part 26.7, CPR 1998. He cites Part 26.7(4)(b) which states:

(4) In considering whether to grant relief the court must have regard to-

(b) whether the failure to comply was due to the party or his attorney.

(Para 50) He also prayed in aid the Overriding Objective of the CPR, 1998 which is that the “Objective of these rules is to enable the court to deal with cases justly.” And argued that the consideration stated at Part 26.7 (4) (b) must be read into the Part 26.7 (3) criteria.( Para 51) I disagree.

In Rawti also called Rawti Roopnarine and ors and Harripersad also Harripersad Kissoo and ors, in paragraph 34, there was a mention of the difference between Attorney at Law’s fault and the fault of the Claimant.

“ Para.34 The Judge’s explanation for concluding that the explanation was not good turned on two (2) things. First he considered that it was the fault of the clerk. He was the agent of the attorney at law. The fault of the clerk was therefore the fault of the attorney at law, and consistent with this court saying that the fault by attorneys at law will not constitute a good explanation for non compliance with the rules of the Court that could not be a good explanation.”

The Claimant has to take the consequences of his Attorney at law. If the Attorney at law lacks the intention, the it is the same as the Claimant do not have the intention. Since the Attorney at law is the agent of his Client, he was acting under apparent authority, and so the actual authority.

17. As per the Attorney at Law’s for the claimant’s statements , the document was ready by 4th of January, but yet he did not file it until February 12th. What it needs to be noted is that , even though the document was ready, it was not signed by the Claimant. The Claimant was present in the court when the order was made, or ought to have the notice of the Order and hence ought to have the knowledge, that the order ought to be complied. Hence she also has the knowledge that the Order was not complied by 12th of January, 2019. Ignorance of law was never an excuse. The order was made on 10th of October, 2018. The present order to file and exchange witness statements was the third in number. The date is 14th of January, 2019 some 3 months after the order is made. By that time the order would have been sent to the Attorney’s office. Even for the argument sake, it was not sent, any diligent Attorney would have enquired about why the order did not reach him and would have make arrangements to get it.

18. It was understandable that one would have made a mistake in noting the dates in the same month, because, 3 could look like 8, 9 or even 6. 2 could look like 4 etc. But it is not understandable the January could be mis noted as February. The Spelling is completely different and the way it is pronounced would be different.

Hence it is clear that the Attorney at Law or the Claimant did not have the intention to file it even though it was complete and ready by 4th of January. Hence the Claimant lacked intentionality. More over taking the Judge’s decision mentioned above, 26.7 (3) and 26.7 (4) are distinct and the Attorney’s fault is as much as the Claimant’s fault.

**Part 26.7 (3) Good Explanation.**

The Explanation for not filing in time, was that the Attorney at law did not realize that the correct date for filing and exchanging the Witness Statement was the 14th of January. He admits he was at fault. He then went to state, quoting Rawti Roopnarine and another vs Harripersad Kissoon and others civil appeal No. 52 of 2012. This is a case where the Witness Statements were filed on time and by mistake did not servethe third witness statement. Which is completely different to the present matter. The witness statements were not filed, and there was no attempt to serve them. The Honorable Judge stated when considering the explanation for the breach, it must not be subjected to such scrutiny as to required a standard of perfection. This was undoubtedly would apply to that particular case.

However at paragraph 32

In the AG v Universal Projects Limited [2011] UKPC 37, the Privy council rejected a submission that a good explanation is one which properly explained how the breach came about, but which may involve an element of fault, such as inefficiency or error in good faith. The Privy Council in its judgment stated ( at para.23)

“ To describe a good explanation as one which “Properly” explains how the breach came simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.”

19.As could be seen by the Claimant’s explanation, her Attorney at law, had an oversight of the dates/dates mixed. He noted the date as 14th of February, 2019 instead of January 14th of January, 2019. He could not provide any other explanation other than he made a mistake in noting the dates or it has been an oversight of the dates.

The order was given on 10th of October, 2018. The order that the parties to file and exchange Witness Statements is the third order in the list. If the Claimant could comply with the preceding two orders , and also with the fourth order, but conveniently made an error with the third is some how not a very believable statement. The order would have been sent to the Attorney at law’s office by that time. There would not be a mistake in the printed order. Even if the order did not reach the Attorney’s office, it would be a good administrative practice to get the order from the court within 4 to 6 weeks the order was made.

20. Even though I agree when considering the explanation for the breach it must not be subjected to such scrutiny so as to require a standard of perfection, I certainly do not agree with the explanation, that it was just an oversight on the part of the applicant, without giving a proper explanation what caused the oversight. If that is so, in my view the thresh hold of good explanation would be passed by any body to the extent it does not have a purpose in the Rules anymore. Hence In my view the Claimant did not pass the threshold test

21**. Part 26.7 (3) the Party in default has generally complied with all other relevant rules, practice directions, orders and directions.**

Through out the history of filing of this matter, the claimant either had to amend his statements, did not file as per the court forms, or filed in forms which is not needed/ or would’ve needed if he filed other documents properly. This caused the Defendant to come to his attorney’s office more times that was needed.

22. 1. The Claimant filed the Fixed Date Claim Form on April, 4th 2018. He was claiming for certain reliefs , and part of those reliefs was the payment for the Attorney at Law’s fees. The costs would be what the court award, but the fees of the Attorney at law was never in the Rule book. The Costs may include the Attorney at Law’s fees. This was amended on May 29th 2018.

2. The Claimant replied to the Defence and included in that document, he filed defence to counter claim. Even though the Defendants never filed the Counter claim. Moreover, it was stated as a Counter Claim. Which caused a lot of confusion to the Defendants and their Attorney at law. Paragraph 6 and 10 were corrected with a ink pen, without initialing it nor without obtaining the court’s permission. Hence, invalidating the document.

3. The Claimant filed the list of documents but did not include the certificate that the duty of filing the documents was explained to her and she complies with the duty. Hence, the Claimant, has to file notice of application to correct an omission. The costs of that application has still not been discussed. However, this continuous filing of documents again and again for the mistakes, certainly would incur the wasted costs, because the Attorney at law is put under burden to peruse two documents every time instead of one document. Instead of pursuing that application he filed another application under, CPR 30.3 (3) and (4); 30.6 (a) (iv). Where the owners of the statements could not be called as witnesses as they would not have recollection of the matters. It is not clear whether the Claimant is using this application to by pass the need of filing the list of documents. Since they are the same documents used in the list of documents and they are not statements but rather, receipts etc and could be filed as list of documents to be disclosed. Since they are receipts any prudent business man would have a record and hence would have re collection.

23. Hence In my view the Claimant did not comply with the relevant rules, because the documents were not filed as per the rules, practice directions, orders and directions.

24. As explained earlier these three tests puts forward a threshold and if the applicant fails in any of the tests he would failed to proceed further and would not have satisfied the test. As explained above, in my view the Claimant did not satisfy the threshold test.

25. **Rule 26.7 (4)** comes into operation once the Claimant could satisfy the Rule 26.7 (3) threshold test. However, the discretion of the courts were never taken away.

**26. Rule 26.7(4) (a) the interests of the administration Justice.**

This would essentially depend on the facts of the matter. Whether the filing of the Witness Statements would make grave harm to the interests of the party. Even though the Claimant claims she is the proprietor or grantor ( not grantee) no where in her documents filed so far did she show any proof that she is the proprietor. As it is evident from the documents filed she was given a permission to stay in the property same as the Defendant no 1. She is pursuing to evict the Defendant, causing him injustice to enjoy the property given by his grandmother, Juliet Burke. The Defendant could show the proof in his documents filed so far.

2. The parties have reconciled and times did say the issue in the building built by the Defendant, nor the damages. The issue is essentially no. 4 of the claim that is sought.

3. The Defendants never intended to disturb the peaceable enjoyment of the Claimant’s property but rather pursuing their interest in enjoying their peaceable enjoyment of property which was granted by his grandmother, Juliet Burke.

4 The Matter never had a good prospect of success. The essential evidence that the Claimant was the proprietor was never given in any of the document.

**27. Rule 26.7 (4) (b) whether the failure to comply was due to the party of his attorney.**

Even though the Attorney at law admits it is his fault and not the Claimant’s fault, as mentioned earlier, the in the matter of In Rawti also called Rawti Roopnarine and ors and Harripersad also Harripersad Kissoo and ors, in paragraph 34, there was a mention of the difference between Attorney at Law’s fault and the fault of the Claimant.

It was explained by the Honorable Judge that the fault of the Attorney at Law is consisted with the fault of the Party. Moreover, as explained it is also the failure of the Claimant, since the statement was not signed by her until 12 of February, 2019, six weeks past the deadline. The Claimant was present in the court the Order was made , and ought to have noted the dates.

28. **Rule 27.(4) whether the failure to comply has been or can be remedied within a reasonable time**

**E**ven though witness statement was settled on 4th of January, 2019 it was not signed until February, 12th 2019. It has not been remedied yet. It was not even clear whether the Claimant filed application for relief from sanctions as required by Rule 29.13 of the CPR or merely asking for extension of time. If the Claimant is not asking for relief from sanctions, the Claimant is yet to make an application for relief from sanctions and if so the failure to comply cannot be remedied within a reasonable time.

29. **Rule 26.7 (4) (d) Whether the trial date or any likely date can still be met it relief is granted**

If the Claimant filed her witness statements the trial date would have been fixed by now. Since the Claimant has to make an application for relief from Sanctions as per Rule 29.13. The Sanction is imposed as soon as the Court order is not complied within the time specified by the court. As per Rule 29.13 (2) the party has to show a good reason for not seeking relief under Rule 26.7,hence even though the Court may still give permission the applicant would still have to make an application under 26.7 or should have good reason for not doing so. Hence the application should be made either under the 26.7 or under 29.13 showing good reason. If an application need to be made naturally that application would have to decided by the Court before the trial date could be given. Hence, the trial date would not have been fixed for this reason. Naturally that would cause the trial date to be delayed. Because it is a Rule, it is not up to the Defendant to object or not. It is the discretion of Court. Moreover the Defendant is in his rights to object if the objection is not unreasonable. Since the Claimant could not show proper cause for the failure, the Defendant’s objection in my view is not unreasonable.

**30. Overriding Objective:**

**1.**It is very unfair, on the Part of the Claimant to say that if the Defendants did not Object there would not have been expences involved. The Defendants merely upholding their rights. It was entirely up to the general discretion of the Court to allow an application. Moreover, it was the rule that states the application for relief from sanctions should be made by the defaulter. The Claimant ought to be aware that it is the Claimant who defaulted. If he did not default in the first place, none of this delay or the expenses would have incurred. The Claimant could not show good explanation.. Hence the unnecessary expense if due to the part of the Claimant intentionally flouting the rules and blaming others for the expenses.

2. Rule 1.1 (2) (c) dealing with cases in ways which are proportionate to-

(i) amount of money involved. (ii) the importance of the case (iii) the complexity of the issues and the financial position of the parties.

The Parties who would lose money in this matter are the defendants. The Defendants never objected to the Claimant living in the premises. Moreover, the Second Defendant never trespassed on to the premises, and it was clear from the statement of claim that the second defendant was pursued for the damages and not for any claim touching the land. The Claimant never included a certificate of value in her statement of claim. The damages she is pursuing is not more than $15,000 and hence the claim against the second defendant ought to be struck out of lack of Jurisdiction

The issues in this matter are not very complex. It was a family dispute and the parties have reconciled their differences . The matter ought to have settled , but for the objection of the attorney at Law for the Claimant’s objection of not agreeing for the claim no. 4 in the Claim form.

The parties are not well with their financial position. The Second Defendant is a man of straw. A mere laborer, who would do small constructions. The First Defendant works in WASA albeit a small job.

Conclusion.

The Claimant did not pass the 26.7 (3) threshold test. And even considering the 26.7 (4) the Claimant did not satisfy the reason why this application should be granted.

The Objection to the application was not unreasonable hence the costs should be borne by the application if successful, or the Claimant should pay the costs of the Defendant is unsuccessful.

I, Christopher Ross Gidla, Attorney at law of Gidla and Associates, 99 A Duke Street, Port of Spain, in the Island of Trinidad herein verily believe that the facts stated above are true to the best of my knowledge, information and belief.

Christopher Ross Gida

Attorney at law for the Defendants.

Dated this 29th of April, 2019

**Christopher Gidla**

**Attorney at law for the Defendants**

**Sources**

1. **Statute**

**Civil Proceedings Rule (1998)**

**Civil Law:**

**1.The Attorney General vs Keron Matthews Privy council appeal no. 0068 of 2010**

**2. The Attorney General v Universal Projects Limited**

**3. The Court of Appeal of Trinidad and Tobago in the case of Trincan oil limited vs Keith Schnake civ appeal no. 91 of 2009**

**4. Ag of Trinidad and Tobago vs Miguel Regis civ appeal no. 79 of 2011**