**IN THE SENIOR COURTS OF BELIZE**

**IN THE HIGH COURT OF BELIZE**

**CLAIM No. CV 203 of 2022**

**BETWEEN**

**ISRAEL WILLIAMS**

Claimant/Applicant

**and**

**EVAN WILLIAMS**

First Defendant/Respondent

**ERMIN WILLIAMS**

Second Defendant/Respondent

**MARCELLA WILLIAMS**

Third Defendant/Respondent

**Appearances:**

Orson J. Elrington for the Claimant/ Applicant

John Nembhard for the Defendants/ Respondents

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2023: October 24;

2024: February 19.

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**JUDGMENT**

[1.] **Nabie J.**: This is an application to strike out the defence to the fixed date claim form.

[2.] For the reasons set out below, the defence is struck out.

**BACKGROUND**

[3.] The fixed date claim form and statement of claim were filed on 1st April 2022.

[4.] The claimant is seeking inter alia a declaration that he is entitled to the possession of a property located at Ranchito Village, Corozal "the property".

[5.] An acknowledgment of service was filed by each of the defendants on 26th July 2022 indicating an intention to defend the matter.

[6.] A defence was filed on 9th August 2022 on behalf of all three defendants but was not served. On 20th February 2023 the parties were before Chabot J. and it was ordered that the defendants had until the end of the business day to serve the defence or it would be struck out.

[7.] The defendants to date have not done so.

[8.] The claimant filed this application to strike out the defence to the fixed date claim form on 21st June 2023. The application seeks the following orders:

1. An Order striking out the Defendants' Defence for failure to comply with an Order of the Court dated on or about the 20th day of February 2023;
2. An Order striking out the Defendants' Defence for failure to serve on the Claimant on or before the 20th day of February 2023;
3. An Order striking out the Defendants' Defence for having no prospect of success;
4. An Order striking out the Defendants' Defence for being an abuse of process of the Court;
5. An Order striking out the Defendants' Defence for it is likely to obstruct the just disposal of the proceedings.
6. An Order striking out the Defendants' Defence for it raises no reasonable grounds for defending the claim;
7. Such further and/or other relief as the Court deems just.
8. Costs.

[9.] The Grounds of the Application are listed as follows:

The Defence was filed but not served on the claimant and is in breach of Rule 10.4, Service of Copy of Defence, of the Supreme Court (Civil Procedure) Rules 2005.

1. The Defendants were given multiple opportunities to correct the breach of the said rule and has (sic) failed to do so.
2. The Defendants therefore has (sic) no Defence to the Claim, no reasonable grounds for defending the claim and no prospect of success.
3. The Claimant now seeks the Court's powers to Grant the Default Judgment against the Defendants and to provide the terms of the said Judgment as prayed in the Fixed Date Claim Form.

[10.] This application is supported by the affidavit of the claimant filed on even date.

[11.] The claimant deposed that he is the legal owner of the property located at No. 115 Block No.7 in the Carolina/ Calcutta Registration section located at Ranchito Village, Corozal Town, Belize. He indicates he gave permission to the defendants who are his siblings to stay on the property as licensees on the condition that they maintain the house and property. He deposed that the defendants were not in compliance with the conditions and he sought to revoke the license and requested on several occasions that the defendants vacate the property as he wished to sell same. The claimant served the defendants with a letter to vacate the property on or about 11th March 2023. However, the defendants have remained in occupancy of the said property.

[12.] Thereafter, the claimant commenced these proceedings. He further states that he is aware a defence was filed on the 9th of August 2023. However, at a hearing on or about 20th February 2023 Chabot J ordered that the defence was to be served on or about 20th February 2023 failing which the defence would be struck out.

[13.] The application states that the defendants have no prospect of success, that here has been abuse of the process of the Court, there is no reasonable grounds for

defending the claim and that the defendants' defence is likely to obstruct the just disposal of the proceedings.

[14.] The defendants filed the First Affidavit of Evan Williams on their behalf on 23rd October 2023 in opposition to the claimant's application to strike out the defence. The first defendant deposed that after the defendants were served with the fixed date claim form on 17th June, 2022, he sought the services of attorney at law, Mr. Ronell Gonzalez who had conduct of the matter on behalf of all the defendants and that on or about July 2023, Mr. Gonzales indicated that he would no longer be able to deal with the matter and indicated that the defendants should find another attorney. Thereafter in August 2023, he retained the services of another attorney at law to deal with the matter, John Nembhard, who informed him that there was an application to strike out the defence. The defendants informed Mr. Nembhard that they were not aware of the procedures of the court and completely depended on Mr. Gonzalez to address these matters. The first defendant further stated that the claimant was not a sibling of the defendants but in fact their uncle. The defendants have known the property as their home for almost all their lives and have raised their children there. They have been in continuous and undisturbed possession of the property for in excess of twelve years. It is the defendants' evidence that they constructed buildings on the property without any contribution from the claimant and prior to the claimant's title document dated 2020. The defendants always believed that they were the owners of the property. They contend that they were never licensees of the claimant as he was never in the position to grant such; further that the "Notice of Trespass" dated 11th March 2022 was his one and only attempt to have the defendants vacate the property. The defendants continued to farm the property after the death of their father who was in occupation in excess of forty years. The defendants are of the view they have a case to defend and the striking out of the defence would displace fourteen individuals from their home and livelihood as they have planted over 500 fruit trees on which they depend to sustain themselves.

[15.] **ISSUES:**

(1) Whether the court should strike out the defendants' defence?

(2) Whether there should be summary judgment or judgment in default for the claimant?

**LAW**

[16.] **Civil Proceedings Rules 2005 (CPR)**

CPR 10.4 provides:

***"On filing a defence, the defendant must also serve a copy on every other party."***

CPR 15.3:

***"The court may give summary judgment in any type of proceedings except –***

***(b) proceedings by way of fixed date claim ;…."***

CPR *12.2:*

***"A claimant may not obtain default judgment where the claim –***

***(a) Is a fixed date claim;…."***

**CLAIMANT'S ARGUMENTS**

[17.] The claimant argues that the defendants are unable to rely on the fault of their attorney simply because they had in fact retained such an attorney to represent them and in so doing they are unable to say that they were not properly represented. The claimant further stated that the defendants were at each and every hearing and adjournment and even when their attorney was not present and that they heard each and every order and warning by the Honourable Court. They have still failed to serve the defence on the claimant.

[18.] Counsel then referred the court to CPR 26.5 which provides:

CPR 26.5:

*(1) This Rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with an "unless order" by the specified date.*

*(2) If the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for prescribed costs appropriate to the stage that the proceedings have reached,*

*(3) A party may obtain judgment under this Rule by filing a request for judgment.*

[19.] Counsel then asked the court to consider summary judgment and referenced CPR 26.5 (5) and 26(7) (2) :

*(5)Where the party wishing to obtain judgment is the claimant and the claim is for ---*

*(a) a specified sum of money;*

*(b) an amount of money to be decided by the court;*

*(c) delivery of goods where the claim form give the defendant the alternative of paying their value; or*

*(d) any combination of these remedies;*

*Judgment shall be in accordance with the terms of the statement of claim plus any interest and costs after giving credit for any payment that may have been made.*

*(6) Where the party wishing to obtain judgment is the claimant and the claim is for some other remedy, the judgment shall be such as the court considers that the claimant is entitled to.*

[20.] CPR 26(7)(2):

(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the Rule, direction or

order has effect unless the party in default applies for and obtains relief from the sanction, and Rule 26.9 shall not apply.

[21.] The claimant pointed out that there has been no application for relief from sanctions by the defendants.

[22.] The claimant argues that the Court should exercise its power and strike out the defence then treat the first hearing as summary trial. He referred to CPR 27.2(3) which reads:

> *The Court may, however, treat the first hearing as the trial of the claim if it is not defended hearing as the trial of the claim if it is not defended or if the court considers that the claim can be dealt with summarily.*

**DEFENDANTS' ARGUMENTS**

[23.] The defendants argue that the claimant is unable to get a default judgment or summary judgment as these proceedings have commenced by way of fixed date claim. Counsel then referred the court to the rules cited CPR 15.3 (b) and CPR 12.2(a) above and that as the matter commenced by way of fixed date claim there can be no summary judgment or judgment in default.

[24.] The defendants argued that by virtue of the very application before the Court, that the claimant is aware that the defence has been filed. Counsel for the defendant further pointed out that quite apart from relying on the defence not being served, the application points to numerous grounds in the defence that are a mere regurgitation of what is provided in the CPR, such as there is no prospect of success and that the defence is an abuse of the process of the Court. The other grounds stated are that the defence is likely to obstruct the just disposal of the proceedings and it raises no reasonable grounds. Counsel submitted that there was no evidence in support of those other grounds.

[25.] The defendants further argue that the claimant was aware through the portal that the defence was filed. Counsel went on to say that the hearing should be treated as a first hearing. He stated that the portal has no order that the defence is struck out if it is not served.

[26.] The defendants contend that the court should not take lightly striking out the defence which would mean that the defendants have no case to defend and may result in displacing fourteen persons off the property which they know as their home and from which they earn a livelihood.

## DISCUSSION

[27.] It is clear that a claimant is not entitled to summary judgment under CPR 15.3 nor default judgment under CPR12.2 respectively.

[28.] The claimant's submission with regard to getting judgment under CPR 26.5 and 26.7(2) are not viable as those rules deal with money judgments. In any event, certain requirements have not been met, thereby making those rules not useful in this application.

[29.] The CPR makes it clear that every defence filed must be served on every other party. Service is a critical step in the litigation process. It ought not to be treated with glibly, ignored or dismissed. However, the defendants' argument that the defence was made available through the portal is appealing, on the facts before me there has been no prejudice to the claimant in the circumstances. The very fact that there is an application to strike out is supportive of that, the evidence of the claimant is that he is aware that the defence was uploaded and has access to it. In fact, many of the grounds used by the claimant in the strike out application can only be derived from a consideration of the contents of the defence itself such as abuse of process, no reasonable prospect of success, no reasonable grounds to defend the matter and the defence is likely to obstruct the just disposal of the proceedings. I find no favour with those grounds, to

succeed on those grounds would require an examination of the defence. The claimant, therefore, cannot rely on the merit of the defence as this application is premised on lack of service. The claimant should only be allowed to use those grounds if there is consideration of the defence filed. The crux of the application is based dually on a breach of CPR 10.4 and the order of Chabot J. The claimant's only sustainable ground should therefore be the failure to serve the defence on the claimant. Unfortunately, the fact that the defence was uploaded on the system is no excuse for not serving the defence. The fact that this application is before the court and there is no prejudice as argued by the defendants do not put the defendants in any better position regarding the fact that they have not complied with CPR 10.4. and /or the Order of Chabot J. Counsel for the defendants' reliance on the non-existence of a written Order on the portal is rejected. This does not assist the defendants from satisfying the requirement to serve the defence.

[30.] It appears that the defendants are relying on the error of previous counsel to excuse the lack of compliance with the CPR in this matter.

[31.] In the matter of **Claudette Waldman v Kenroy Staine** Claim 82 of 2019, the conduct of the attorney was discussed. Arana J. stated as follows:

> "…….I find myself in agreement with the arguments raised by Mr. Arthurs. The Applicant / Defendant clearly states in his affidavit dated May 22, 2019 that he was served with this claim form on March 30, 2019. He says he was unable to retain his attorney until April 11, 2019 and his attorney went on vacation leave on around April 15, 2019. Mr. Bradley as his attorney wrote a letter to the court dated April 12, 2019 stating that this matter had been set for hearing on April 17, 2019 and asking for a date that this matter be further adjourned for a date after he returned from his vacation. This sequence of events shows that the failure to file a Defence within the period of days specified in the C.P.R. Rule 27 was clearly the fault of the Defendant's Attorney, as Mr. Bradley has rightly conceded. To date no Acknowledgement of Service has been filed for or on behalf of the Defendant in this claim; this failure constitutes yet another breach of the CPR in that Rule requires that an Acknowledgement of Service must be filed by the Defendant within days after he has been served with the Claim. While it is true that the court must strive to ensure that claims are dealt with justly in keeping with the overriding objective, justice is not merely for one party, in this case the Applicant/ Defendant. …..There is no evidence that the

> Applicant/Defendant has a good reason for non-compliance with the time lines set out in the CPR. I agree that the court would be condoning non-compliance with the requirements of the Rules of the Supreme Court if these applications for relief from sanctions and extension of time were to be granted……..The court is entitled to treat the first hearing of a claim as the trial of that claim where the defendant has failed to file a Defence. The Claimant has produced legal title to this property while the Defendant is seeking to establish prescriptive title to the property. It is clear that should this matter proceed to trial the likelihood of the Defendant succeeding in his Defence is minimal. On this basis, the application for Summary Judgment is granted to the Claimant and the application for relief from sanctions and extension of time to file a Defence is refused.

[32.] As in this case, I hold a similar view that the error of counsel does not excuse a breach of the CPR or the Order of Chabot J.. In fact sadly for the defendants are in the same predicament. The defendants' reliance on the actions of their attorney. In the present case, the defendants had been present at all the hearings.

[33.] In Claim No. 283 of 2017, **Maureen Hortence McKenzie and James Nathaniel McKenzie v Dennis McKenzie**, Justice Shoman at paragraph 6 and 7 stated:

> "6. The power of the court to strike out a Statement of Claim is provided for by Rule 26.3 (1) (a) (b) & (c) of the Civil Procedure Rules which provides as follows; "26.3 (1) In addition to any other powers under these Rules, the court may strike out a Statement of Claim or part of a Statement of Claim if it appears to the court –
>
> (a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;
> (b) that the Statement of Claim or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
> (c) that the Statement of Claim or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;"
>
> 7. The power given to the Court under this Rule is considered to be a "nuclear option" and ought not to be used except in the clearest of cases where a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. Where an arguable case is presented by a Claimant(s) or the case raises complex issues of fact or law, its use is inappropriate. The Defendant must satisfy the Court either that a party is barred or unable to prove allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground

for bringing or defending the case; or that it has no real prospect of succeeding at trial."

[34.] These are valid considerations a court must weigh when determining whether or not to strike out a statement of case/defence. Unfortunately, the circumstances of this case are that the defendants remain in breach of the Order of Chabot J.

[35.] In Claim No. 179 of 2009 **Marva Rochez v Clifford Williams**, Justice Sonya Young stated as follows:

> "11. A Counter Defendant simply does not have the same freedom enjoyed by an ordinary defendant. By way of comparison, neither does a defendant to a fixed date claim. A Claimant on a fixed date claim is precluded from applying for a default judgement by Rule 12.2(a). However, Rule 27.2(3) allows for the first hearing of the fixed date claim to be treated as a trial of the claim, if it is not defended. This is done through operation of the rule and not through any act of the Claimant.
> 12. In my view the counter defendant should have applied for an order extending the time for filing a defence and for permission to change his statement of case as it was being done after case management - Rule 20.1. Neither application had been made before the filing. Counsel for the counter defendant made an oral application to file out of time only when the court queried the late filing. He made no attempt to satisfy the court that the change was necessary because of some change in circumstances which became known after case management - the test laid down in Rule 20.1(3). Counsel, having placed himself on record long before the case management began, had more than ample opportunity to make the necessary applications. Further, "(a)n application made close to trial may be refused where its effect would be unfair on the other party (Calenti v North Middlesex NHS Trust (2001) LTL 10/4/2001)" Blackstone's Civil Practice 2013 (ibid) para 46.23.
> 13. "Where the problem is an error of procedure, the judge has to consider whether to cure 7 the irregularity, which may avoid a striking out order Firth v Everitt [2007] EWHC 1979 (Ch), LTL 25/9/2007" Blackstone's (ibid) paragraph 33.11. However, because there is a consequence to not filing a counter defence within the specified time frame, the court cannot invoke its general, power under Rule 26.9, to rectify such a procedural error.
> 14. The court therefore found that there was a failure to comply with the rules and the filing was, consequentially, invalid. Additionally, allowing the ridiculously late defence to the counterclaim would be extremely prejudicial to the Counter Claimant. The Counter Claimant would have had no time to reply and the witness statements already filed may not have addressed the issues raised in that defence. It would also require changing the trial date of an already inordinately delayed matter to accommodate full consideration of that defence

> and perhaps the filing of a reply by the Counter Claimant. So in the best interest of justice and with full appreciation of the overriding objectives, the court invalidated the filing of, and used its power under Rule 26.3 (1) (a) to strike out, the defence to the counterclaim."

[36.] I am of the view that the defendants are in breach of the CPR and the Order of Chabot J. The evidence of the defendants is that it came to their knowledge that there was a strike out application before the Court in August of 2023 and they then proceeded to file an affidavit in answer to this application. There was even a change of attorney. What is alarming is that since August, and upon the retention of new counsel, there has been no attempt to serve the defence and they have not made any application for relief from sanctions or for an extension of time. I have also considered that the defendants were present in court when the Order to serve was made by Chabot J. The error of counsel serves as no excuse for the defendants' breach. I have also considered the overriding objective and that both parties must be on equal footing but also that I am required to deal with matters justly. This is a consideration that must be given to both sides.

[37.] Based on the above considerations, the defence is hereby struck out.

[38.] CPR 26.5 and 26.7(2) as argued by the claimant is not relevant here as the nature of the claim is one for possession of property. Accordingly, judgment is not entered against the defendants.

[39.] As I have struck out the defence, the claim is now undefended and consideration may be given to CPR 27.2(3) which provides that that the first hearing of the fixed date claim may be treated as a trial of the claim if undefended or if the court considers that the claim can be treated summarily. However, I am not of either view given the nature of the matter. The claimant in my view is required to prove his case.

[40.] In accordance with CPR 27.2 (4), I will therefore set a date for the first hearing of the claim and make directions for its disposal.

**DISPOSAL**

[41.] It is hereby ordered that:

1) The defence is struck out with costs of the application to be in the cause.
2) The first hearing of the claim is fixed for 4th March 2024.

**NADINE NABIE**

High Court Judge