

building the house was \$70,000.00. It is also not disputed that the Defendant/Applicant had been paid \$67,500.00 for the work done. The house was, however, not completed. Other construction work on the property were also done by the Defendant/Applicant but not completed. Consequently the Claimant/Respondent had to engage other construction contractor to complete the work on his premises.

Consequently, the Claimant issued a Claim against the Defendant on 20th December, 2007 and served on the Defendant on 22nd January, 2008. The then Counsel for the Defendant Dr. Elson Kaseke filed acknowledgment of Service on 28th January, 2008. No defence was filed by 19th February, 2008. On 28 February, 2008 Default Judgment against the Defendant was issued for failure to file defence. That default judgment was served on Defendant's attorney on 5th March, 2008. It was not until 11th April, 2008 that his attorney advised him of the default judgment, from one month later. The Defendant then was given his file and proceeded to consult his present Attorneys, Messrs. Pitts & Elrington.

The application is brought pursuant to Rule 13.3(1) of CPR 2005. That provision as Counsel for the Claimant/Respondent submitted, requires three

conditions to be fulfilled before the Court can exercise its discretion to set aside a default judgment. The authority of *Kenrick -v- RBTT Bank Caribbean Ltd. (Formerly Caribbean Banking Ltd.)* (St. Vincent and The Grenadines) (Civil Appeal No. 3 of 2005) (13 October 2005) is in point.

The Defendant/Applicant's case in basic terms is that the failure to file defence was the fault of his former attorney. However, his present attorney had acted promptly to apply to set aside the default judgment, on the ground that he has a good defence.

The picture as demonstrated in the affidavits by both parties in this application together with the Statement of Claim of the Claimant and the Draft Defence attached to the application, in my view do not appear to give the defendant much support for the case he is presenting to the Court to set aside the default judgment.

First, the admissions in the Defence compounded the weakness in the defendant's case. Secondly, there was clearly lack of diligence on the part of the Defendant's former attorney to deal with the defendant's case as shown by the

affidavit evidence. I have to say that lack of diligence or tardiness on the part of attorneys cannot be “*a good explanation for failure to file a defence*” under Rule 13.3 (1)(b) of the CPR.

Having anxiously considered this case and the argument advanced on behalf of the Defendant/Applicant, unfortunately, the Defendant/Applicant is not able to meet the requirements of Rule 13.3(1) to enable this Court to exercise its discretion to set aside the default judgment attained by the claimants in this case.

The application to set aside that default judgment must be refused.

In the circumstances also, I do not think it would be right for him to pay costs even though his application is refused, since part of the difficulty he finds himself in is not of his making.

Application refused. No order as to costs.

Hon Justice Sir John Muria