[2010] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/2010

APPLICATION NO. 129 /2010

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.
THE HON. MRS JUSTICE M^{C}INTOSH, J.A.

BETWEEN	**CITY OF KINGSTON CO-OPERATIVE CREDIT UNION LTD**	**APPLICANT**
AND	**BENTLEY ROSE**	**RESPONDENT**

Emile Leiba and Courtney Williams instructed by DunnCox for the Applicant

Leighton Miller instructed by Gayle Nelson & Co. for the Respondent

20 and 21 September 2010

HARRISON, J.A.

[1] This is an application filed by City of Kingston Co-operative Credit Union (the applicant) seeking to set aside an order made by Brooks, J.A. (Ag) on 31 March 2010 whereby he granted Mr Bentley Rose, the claimant in the court below (the appellant), an extension of time within which to file notice and grounds of appeal. The learned

judge further ordered that the notice of appeal filed on 3 March 2010 "is deemed to be properly filed."

[2] Briefly, the proceedings had its genesis in a claim commenced by the appellant on 25 April 2008 in the Supreme Court in which he sought a declaration from the court that he was not indebted to the applicant despite an arbitral award granted in favour of the applicant in arbitration proceedings. The appellant also claimed that he had suffered damages as a result of the applicant's efforts to enforce the arbitral award. On 30 December 2008, the applicant was served with a notice of application for summary judgment supported by an affidavit sworn to by Gayle Nelson, attorney-at-law, on behalf of the appellant. On 3 January 2009, the applicant filed a notice of application for court orders to strike out the appellant's claim. This application was supported by an affidavit sworn to by Indera Persuad, an attorney-at-law. The applicant sought inter alia, the following orders:

> "a. That the Claimant's [Appellant's] Statement of Case be struck out as an abuse of the court pursuant to C.P.R 26.3 (1)(b); and
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> b. That the Claimant's Statement of Case be struck out as it discloses no reasonable ground for bringing the Claim pursuant to C.P.R 26.3 (1) (c)."

[3] Both applications were placed before Mangatal, J. and on 15 January 2010, the learned judge made the following orders:

"a. The Claimant's statement of case be struck out as an abuse of the process of the court pursuant to C.P.R 26.3 (1) (b);

b. The Claimant's application for summary judgment filed November 10, 2008 is dismissed."

[4] We were informed by Mr Leiba, for the applicant, that an oral application was made by the appellant seeking permission to appeal but it was refused by Mangatal, J. Mr Miller for the appellant confirmed that this order was made on 15 January 2010.

[5] Subsequently, the appellant applied to the Court of Appeal for the following relief:

"a. That the Appellant be allowed an extension of time to file an appeal from the judgment of the Honourable Mrs. Justice Mangatal handed down on the 15 of January, 2010.

b. …"

[6] On 31 May 2010, the application was considered by the single judge, who made the order referred to in paragraph 1.

[7] On 9 July 2010, the applicant filed a notice of application for court orders in the Registry of the Court of Appeal and on 8 September 2010, an amended notice of application for court orders was filed. The application was made pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and Part 1.8 (1) of the Court of Appeal Rules 2002 and challenged the validity of the order of Brooks, J.A. (Ag), which

deemed the appellant's notice of appeal properly filed. The ground in support of the application states, inter alia:

> "The learned Justice of Appeal (Ag) erred in granting an extension of time to file an invalid Notice and Grounds of Appeal. The Notice and Grounds of Appeal are invalid as, pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and Part 1.8 (1) of the Court of Appeal Rules 2002, the Appellant/Claimant should first have obtained the leave of a Judge of the Court of Appeal before being permitted to file a Notice and Grounds of Appeal and that such Application for leave should have been submitted within 14 days of the order in respect of which permission to appeal is sought..."

[8] On 2 September 2010, the appellant filed a "Response to the Applicant's Notice of Application" in which he contended inter alia, that:

> "(a) Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and Part 1.8 (1) of the Court of Appeal Rules 2002 are inapplicable for the reason that the judgment sought to be appealed is not an interlocutory judgment or order in that the purport of the said judgment or order was to bring the proceedings to finality;
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> (b) That section 11 (1) (a) of the Judicature (Appellate Jurisdiction) Act clearly provides that "No appeal shall lie from an order allowing an extension of time for appealing from a judgment or order." That accordingly, the applicant's application is prohibited and therefore misconceived."

[9] Mr Leiba has submitted, both in his written and oral submissions, that it was necessary for the appellant to have secured permission to appeal prior to the filing of

his notice and grounds of appeal. He relied on the provisions of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ("the Act") which prescribes that:

> "11 - (1) No appeal shall lie –
>
> …
>
> (f) without the leave of the Judge or of the Court of Appeal from any **interlocutory** judgment or any interlocutory order given or made by a Judge except..." (emphasis supplied)

Certain exceptions follow, but they are in fact not relevant to the issue in this application.

[10] Mr Leiba submitted that any order made on an application to strike out an action or an application for summary judgment is interlocutory for the purposes of Section 11(1)(f) of the Act. Consequently, he submitted that the jurisdiction of this court cannot be invoked without the leave of the court below, which the appellant was denied, or the leave of this court itself. He also submitted that it was plain that the order of Mangatal, J. is interlocutory. This is so, he said, because the applications before her could not, regardless of whether the learned judge granted or refused the applications, finally determine the matter in litigation. In the circumstances, Mr Leiba submitted, leave to appeal must first be obtained before an appeal from the decision of the learned judge can be properly commenced. He submitted that the purported notice and grounds of

appeal filed by the appellant on 5 March 2010 is therefore not properly before this court and is a nullity.

[11] Mr Miller made a valiant attempt to respond to the submissions made by Mr Leiba but after some gentle persuasion by the court, he readily conceded that he could not successfully challenge the application. We must say that he was most gracious in his concession. Despite this concession, we do feel constrained nevertheless to say a few words with regard to the matter.

[12] Looking first at the question whether the order of Mangatal, J. was final or interlocutory, we are guided by what the authorities term the "application approach". Our court has consistently adopted this method in determining the status of orders or judgments which are subject to appeal.

[13] In **White v Brunton** [1984] 2 All ER 606 the English Court of Appeal held that: -

> "... in determining whether an order or judgment is interlocutory or final regard must be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, where an order made or judgment given on an application would finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal."

[14] In **Strachan v The Gleaner Company Anor** SCCA No. 54/1997 delivered 18 December 1998, this court followed "the application approach" laid down in **Brunton** . At page 11 of the judgment Patterson, J.A. stated:

> "Applying the "application approach" to the instant case, it seems plain that the order of Smith, J. was interlocutory. This is so because the motion before him could not, for whichever side the decision was given, finally determine the matter in litigation. The decision, if given for the plaintiff, would finally dispose of the matter between the parties, but if given for the defendants, the action would proceed to trial. In such a case, where the application could result in either a final decision or a continuation of the action, in my judgment, the order of dismissal is interlocutory..."

[15] The question which we have to determine is whether the order made by Mangatal, J. disposes of the rights of the parties because if it does, then it is a final order. We have given the matter serious consideration and it is our view that the application before Mangatal, J. was interlocutory in nature and whichever way it was decided could not have had the effect of terminating the proceedings. That being so, we have concluded that the decision was not 'final'. There is therefore merit in the submissions of Mr Leiba. It was incumbent on the appellant to have first obtained permission to appeal before seeking an extension of time to file the notice and grounds of appeal. The single judge was therefore in error in granting the order of 31 March 2010. The application to set aside that order therefore succeeds. There shall be costs to the applicant to be taxed if not agreed.