[2017] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 197/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

IN THE MATTER of the Intestates' Estates and Property Charges Act

AND

IN THE MATTER of a claim by SHARON ALLEN to be declared the lawful common law spouse of Ranford Patterson, deceased, intestate.

Debayo Adedipe instructed by Owen S Crosbie & Co for the applicant

Canute Brown instructed by Brown Godfrey & Morgan for the respondent

6, 7 and 9 March 2017

ORAL JUDGMENT

BROOKS JA

[1] In this application, Ms Ranique Patterson seeks permission to appeal against an order, which was made on 21 October 2016, by K Anderson J. The learned judge refused her application to set aside an order made by Campbell J on 13 May 2015. The

latter order was made in Ms Patterson's absence. Ms Patterson complains that Anderson J erred in deciding that he had no jurisdiction to set aside Campbell J's order. She says that he also failed to recognise that she had not been given notice of the application on which Campbell J made his order. In the circumstances, she wishes for Anderson J's order to be set aside.

[2] Learned counsel who appeared on behalf of the respective parties agreed for the hearing of the application to be treated as the hearing of the appeal. On that basis, despite several deficiencies in the documentation provided, we heard full arguments from counsel on the relevant issues.

Background to the application

[3] The background to Ms Patterson's application is that she had filed a plaint, in the Parish Court for the parish of Manchester, seeking recovery of possession of premises from Ms Sharon Allen. Ms Allen resisted the claim and while the claim was in progress in the parish court, Ms Allen filed a fixed date claim in the Supreme Court. In her fixed date claim, Ms Allen sought an order declaring that she was the spouse of Mr Ranford Patterson, deceased. Mr Patterson was Ms Patterson's father and the previous owner of the premises in question.

[4] It is apparent from the papers presented to this court that Ms Allen's claim was set for trial in chambers in the Supreme Court on 11 May 2015 and that Ms Allen was ordered to serve Ms Patterson and her siblings with the claim form and the other documents in the proceedings. It appears that Mr Patterson had died intestate and

therefore the Administrator General was also ordered to be served with all the relevant documents.

[5] Ms Patterson's attorney-at-law (not counsel who appeared before us for her) was served with the claim form and the order setting the date for trial and, by that means, was aware of the trial date. It appears from a letter that he wrote to the Registrar of the Supreme Court on 6 May 2015, that he had, prior to the date of his letter, not only filed an application to strike out Ms Allen's claim, but had been served with an application for an order permitting her to amend her claim. He stated in that letter that the application, with which he had been served, did not bear a date when it was to have been heard. He indicated that he had no objection to Ms Allen's application to amend her claim, subject to a minor amendment. He asked that the application, which he had filed, be adjourned without a date.

[6] The claim came on before Campbell J on 11 May 2015. Ms Allen was present and represented by counsel. Counsel was also present on behalf of the Administrator General. Ms Patterson was, however, neither present nor represented by counsel. In her absence, Campbell J made a number of orders. They are:

> "i. That the proceedings in the [Parish Court] for the parish of Manchester...between Ranique Patterson vs. [sic] Sharon Allen be stayed pending the determination of the Claim herein;
>
> ii. That [Ms Allen] gives the usual Undertaking as to Damages;

iii. That [Ms Allen] is permitted to Amend the Claim herein to include a Claim under the Property (Rights of Spouses) Act;

iv. That [Ms Allen's] Attorneys-at-Law to [sic] prepare, file and serve this Order;

v. That Costs be Costs in the Claim"

Two things should be particularly noted about the contents of the formal order from Campbell J. The first, is that he stated that there were two applications before him. Both had been filed on 21 April 2015. The second, is that he said that he had "been informed that the interested party, Ranique Patterson was served with the **Applications**" (emphasis supplied). The pluralisation of the last word in the preceding sentence is important because it suggests that Ms Patterson would have been a respondent to both the applications to which the learned judge referred. It is unlikely, therefore, that her application to strike out the claim was before the learned judge.

The application before Anderson J

[7] Ms Patterson was aggrieved by the orders that Campbell J had made. She promptly filed an application for those orders to be set aside, under and by virtue of rule 26.9 of the Civil Procedure Rules (CPR). The kernel of her application was that, because she had not been served with notice of the applications before him, the orders were invalid.

[8] By the time her application came on for hearing, Campbell J had proceeded on pre-retirement leave. He was, therefore, not available to hear it. The application came on before Anderson J, who made the order mentioned above and refused her leave to

appeal. It was in those circumstances that Ms Patterson came before this court to renew her application for permission to appeal.

Ms Patterson's complaint

[9] Mr Adedipe, on Ms Patterson's behalf, submitted that Anderson J was wrong to have refused her application to set aside the orders made by Campbell J. Learned counsel argued that the hearing before Campbell J, having been conducted without notice to Ms Patterson, constituted a breach of her constitutional right to a fair hearing. That right, learned counsel submitted, is guaranteed by section 16(2) of the Constitution. The section is a part of the Charter of Fundamental Rights and Freedoms in the Constitution.

[10] Learned counsel argued that Ms Patterson is entitled to have the order, made pursuant to that hearing, set aside as a matter of right. He argued that the court has an inherent jurisdiction to set aside orders that are made in such circumstances.

[11] When asked whether Ms Patterson had complied with rule 11.18 (3) of the CPR, dealing with applications to set aside orders made in a party's absence, Mr Adedipe candidly conceded that she had not satisfied all the requirements of that rule. He submitted, however, that rule 11.18(3) did not apply in circumstances where a party had not been served with notice of the hearing. In such cases, learned counsel submitted, it was the provisions of the Constitution, rule 11.16 of the CPR and the inherent jurisdiction of the court that bore sway.

[12] He pointed out that Ms Patterson was entitled to notice, as an earlier order of the Supreme Court (made by Batts J) had directed that she be served with the claim form and all other process in the case. Mr Adedipe submitted that it is clear that Campbell J had required proof of service, but had only been "informed" that Ms Patterson had been served. That "information", learned counsel submitted, was insufficient in the circumstances.

[13] Mr Adedipe submitted that Anderson J also erred in deciding that he did not have the jurisdiction to set aside the decision of a judge, who exercised equal jurisdiction to his. Anderson J, ought to have realised, learned counsel argued, that, as Campbell J was unavailable at the time, any other judge of the Supreme Court could have dealt with the application.

[14] Learned counsel relied, for support, on **Grafton Isaacs v Emery Robertson** [1984] UKPC 22, **Kenneth Mason v Desnoes and Geddes Limited** (1990) 27 JLR 156, **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 and **Natasha Richards and Another v Errol Brown and Another** [2016] JMFC Full 05.

Ms Allen's response

[15] Mr Brown, on Ms Allen's behalf, submitted that the material before Anderson J demonstrated that Ms Patterson's attorney-at-law was well aware of the date of the hearing. He said that the case had been set for trial on that date, and therefore it was clear that notice had been given to Ms Patterson. She however failed to attend as was

required. In the circumstances, learned counsel submitted, Campbell J was entitled to make the orders that he did and Anderson J was correct in refusing to set those orders aside.

[16] Mr Brown did not take issue with any of the principles of law that Mr Adedipe pointed out. Mr Brown submitted that those principles were not applicable to this case. He argued that Campbell J did not make an order on a without notice application.

Analysis

[17] There is no issue joined between the parties that Ms Patterson was entitled to notice of the application to be heard by Campbell J. **National Commercial Bank Jamaica Limited v Olint Corp Limited** demonstrates the general need for respondents to be notified of applications that would affect their interests. The issue joined between the respective submissions of counsel is whether Campbell J had sufficient proof of service to entitle him to have made the orders that he did.

[18] It would seem that he did not. The proof of service given to Campbell J was inadequate. The letter written by the attorney-at-law for Ms Patterson indicated that Ms Patterson had been served with at least one notice of application for court orders. That notice indicated that Ms Allen was seeking to amend her fixed date claim form. Indications from both Ms Patterson's affidavit (filed in the Supreme Court on 21 May 2015) and her attorney-at-law's letter reveal that the notice that had been served did not state when the application would have been heard. Although Ms Patterson, in paragraph 7 of her affidavit, spoke to discussions in the parish court about

"applications" by Ms Allen, there is no evidence that the application for the stay of the proceedings in the parish court was served or, if it was served, that it had a date of hearing indicated on its face.

[19] Whereas it is true that Ms Patterson was made aware, through her attorney-at-law, of the date for hearing, she would have been entitled to assume that, at worst, Ms Allen's application to amend the fixed date claim was the only order that was likely to have been made. Had the amendment been granted, the trial would not have proceeded, as the amended claim form would have had to have been served. Nonetheless, we view her attorney-at-law's absenting himself from the hearing as being disrespectful to the Supreme Court. The matter had been set for trial before that court, and it was his responsibility to have been present to represent her interest. Had he attended, there would have been no uncertainty as to whether or not Ms Patterson had been served with the application for the stay of proceedings in the parish court.

[20] In the circumstances, there was sufficient material to support Ms Patterson's application to set aside the order on the basis that she had not been served with the application to stay the proceedings in the parish court. There was certainly no material to dispute her assertion that she had not been served. On those bases, she was entitled to apply to have the orders set aside, but not pursuant to rule 26.9 of the CPR, as was stated in the application.

[21] The next issue is to determine which provision governed Ms Patterson's application. Two provisions need to be examined, namely, rules 11.16 and 11.18 of the

CPR. Those rules deal with parties, who are absent when applications are heard, in both the cases of their being served with notice of the application, and otherwise, state:

> "**Applications to set aside or vary order made on application made without notice**
>
> 11.16 (1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
>
> (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
>
> (3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.
>
> **Power of the court to proceed in the absence of party**
>
> 11.17 Where the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.
>
> **Application to set aside or vary order made in the absence of party**
>
> 11.18 (1) A party who was not present when an order was made may apply to set aside that order.
>
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
>
> (3) The application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made."

[22] A reading of those rules suggests that rule 11.16 applies to respondents who were not served with notice of an application or who were not deemed served with such a notice. Rule 11.18(1) is stated in broad neutral terms in that it speaks to a party (not necessarily a respondent), who was not present at the hearing. It would seem, however, that rule 11.18, coming as it does after rules 11.16 and 11.17, does not apply to respondents, to whom rule 11.16 refers. Rule 11.16 deals with a specific circumstance, while rule 11.18 applies more generally.

[23] Mr Adedipe is correct in his submission that a party who was not served with a notice of application, should not, in applying to set aside the order made in their absence, have to show that it is likely that some other order might have been made if they were present at the hearing. Such a requirement could be considered a fetter or an abridgment of the constitutional right to be heard.

[24] The difference between rules 11.16 and 11.18 would seem to be analogous to the difference between rules 13.2 and 13.3 of the CPR. Whereas 13.2 stipulates that the court must set aside a default judgment that was wrongly entered in certain circumstances (which circumstances undoubtedly include non-service of the claim

form), rule 13.3 requires the defendant, who is applying to set aside a default judgment that was not wrongly entered, to justify that result.

[25] It is rule 11.16(1) and (2) that applies in this case.

[26] On the issue of jurisdiction, it must also be said that **Mason v Desnoes and Geddes Limited** and **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33 demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order.

[27] Based on that reasoning, Anderson J did err in ruling that he had no jurisdiction to set aside the order made by Campbell J. The order made by Anderson J should therefore be set aside. This court cannot consider Ms Patterson's application to set aside Campbell J's order. It does not have all the relevant information. Her application should be set before another judge of the Supreme Court for hearing and deliberation.

Costs of the proceedings before Anderson J

[28] Normally when an appeal is successful, the victor is awarded costs in the proceedings in the court below, as well as the costs of the appeal. Whereas, Ms Patterson should have the costs of the appeal, she should not be awarded the costs before Anderson J. Her attorney-at-law absenting himself from the hearing before Campbell J is undoubtedly the major, if not the only, reason for the application having to have been made before Anderson J. Ms Allen should not be required to pay for that transgression.

ORDER

i. Application for permission to appeal is granted.

ii. The hearing of the application is treated as the hearing of the appeal.

iii. The appeal is allowed.

iv. The order of Anderson J made on 21 October 2016 is hereby set aside.

v. The application by Ms Ranique Patterson to set aside the judgment of Campbell J, made on 13 May 2015, should be set for hearing as soon as possible before a judge of the Supreme Court, other than Anderson J.

vi. Costs of the appeal to the Ms Patterson to be agreed or taxed.

vii. No order as to costs in respect of the application before Anderson J