[2016] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 36/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN SHAWN MARIE SMITH APPELLANT

AND WINSTON PINNOCK RESPONDENT

Tamara A Greene instructed by Cecil R July, attorney-at-law for the applicant

Don Foote for the respondent

11, 15, 21 April and 1 July 2016

BROOKS JA

[1] I have read in draft the reasons for judgment written by Edwards JA (Ag), I agree that the time in which to appeal ought to be extended and that the appeal ought to be allowed, given the learned Resident Magistrate's errors in exercising his discretion concerning the transfer of the plaint for trial with the claim filed in the Supreme Court.

F WILLIAMS JA

[2] I too have read in draft the judgment of my sister Edwards JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

EDWARDS JA (AG)

[3] This is an appeal against the decision of the learned Resident Magistrate for the parish of Manchester exercising jurisdiction in the parish of St Elizabeth, given on 5 September 2014. On that date after hearing an oral application by the appellant, he refused to make an order to transfer the counterclaim in Plaint No 192/2013 filed by the respondent in that court, to the Supreme Court where the respondent had also filed similar claims in relation to the said property against both the appellant and her husband.

A brief history of the matter

[4] By Plaint No 163/2013, the respondent had filed an application in the Resident Magistrate's Court for an ex parte interim injunction with supporting affidavit against the husband of the appellant. He was granted an interim ex parte injunction by Her Honour Mrs Sonia Wint-Blair on 27 March 2013, restraining him, his servant and/or his agent or principal from entering upon the property situated at Lower Works Pen, Black River in the parish of St Elizabeth and from continuing to trespass on the said property. The interim ex parte injunction granted on 27 March 2013 expired on 10 April 2013 and an oral application was made for an interim injunction and/or an extension of the interim ex parte injunction granted on 27 March 2013. Both applications were struck out on 11 April 2013 and costs were awarded to the husband of the appellant.

[5] On 9 April 2013 the appellant filed an action against the respondent in Plaint No 192/2013 to recover damages in the sum of $1,584,800.00 for trespass and also sought an injunction restraining the respondent from continuing to build a wooden structure on

the said land and from continuing to trespass thereon. The appellant claimed to be the owner of the property which was registered at Volume 1466 Folio 410 of the Register Book of Titles. The respondent subsequently filed a special defence and counterclaim on the 16 April 2013. In his special defence he averred that the summons was barred by the statute of limitations and that the applicant's right and title were extinguished. He claimed in particular to be the owner of the property entitled to possession having been living there for 18 years unmolested. In his counterclaim he claimed the following:

(1) Damages of $250,000.00 for Trespass and/or Damage to Property.

(2) To be entitled as of right to possession of the said premises and the plaintiff's title (if any) is thereby barred/extinguished by adverse possession on the part of the Defendant.

(3) An injunction to restrain the plaintiff by himself, his servants or agents or otherwise however from continuing to trespass on my said property.

(4) Costs.

[6] The particulars of damages claimed were that on 22 day of March 2013 the appellant and others unknown broke his fence, entered his property and uprooted and destroyed and damaged his cultivation, valuable logwood trees, fruit trees and vegetation.

[7] On 25 April 2013 whilst Plaint No 192/2013 was still before the Resident Magistrate's Court the respondent filed a fixed date claim form bearing Claim No 2013 HCV 02562 in the Supreme Court against the appellant claiming:

a. An injunction

b. A declaration that he is entitled as of right to possession of the subject property.

c. That the appellant's title is barred by virtue of the Statue of Limitation.

d. Rectification.

[8] Subsequent to filing the claim in the Supreme Court the respondent sought and obtained an interim ex parte injunction against the appellant before McIntosh J on 26 April 2013. On the 7 June 2013 Batts J granted an interlocutory injunction to the respondent. The matter was subsequently set for hearing on 18 October 2013.

[9] On 1 July 2013 the respondent also filed a claim against the husband of the appellant in the Supreme Court in Claim No 2013 HCV 03855 for:

a. Damages for Trespass;

b. Injunction;

c. Declaration that the Claimant is entitled as of right to possession;

d. Cost and Attorney's cost.

On 3 July 2013 an interim ex parte injunction was granted by Daye J in that Claim.

[10] On 18 October 2013, Claim No 2013 HCV 03855 was consolidated with Claim No 2013 HCV 02562 and on 9 April 2014 the consolidated claims were set for trial for eight days from 29 June to 8 July 2015. On 29 June 2015 both claims were adjourned until 11 July 2016 for trial for five days.

[11] The result of all these actions is that proceedings involving a dispute over the same property were being taken in two different courts. On 16 July 2014 Plaint No 192/2013 filed in the Resident Magistrate's Court was withdrawn by the appellant's attorney-at-law in the court below in the absence of the respondent's attorney-at-law. Subsequently a notice of hearing dated 22 August 2014 was served on the appellant indicating that the respondent's counterclaim to Plaint No 192/2013 was set for trial on 5 September 2014.

[12] According to the learned Resident Magistrate's account of what took place in his reasons for ruling, when the matter came on for hearing in the Resident Magistrate's Court on 5 September 2014 enquiries were made by the court from counsel for the appellant as to why he had withdrawn the claim. The court was advised that since the respondent had filed a new claim in the Supreme Court, there would have been no point in continuing the claim before the Resident Magistrate's Court. Counsel for the appellant also submitted that the counterclaim ought properly to be transferred to the Supreme Court to join the claim subsisting there as it was for the same cause of action.

[13] The learned magistrate pointed out to counsel that although the claim had been withdrawn the counterclaim still subsisted. He also noted that the claim in the Supreme

Court was for a continuing trespass and as long as it continued it gave rise to a new cause of action and was therefore a different claim from that brought in the Supreme Court. He was then also concerned with whether he had jurisdiction based on section 96 of the Judicature (Resident Magistrates) Act (the Act) as it seemed to him to be a dispute as to title, in which case there would have to be evidence of the annual value of the property. He made the relevant enquiries of counsel in that regard. Counsel for the appellant made no verbal response and counsel for the respondent took the view that section 96 did not arise as it only applied to recovery of possession claims and this was a claim in trespass. The learned magistrate eventually ruled that section 96 of the Act was not applicable.

[14] He then went on to consider whether he should exercise his discretion to transfer under section 130 of the Act and determined ultimately that, he not only had jurisdiction but also that the Supreme Court was not the more suitable forum for the trial of the counterclaim. As a result he refused the appellant's application for the matter to be transferred to the Supreme Court and a trial date was set in the Resident Magistrate's Court for the counterclaim to be heard.

The late filing of the notice and grounds of appeal.

[15] Following upon the learned Resident Magistrate's refusal to transfer the counterclaim to the Supreme Court the appellant filed a notice of appeal on 25 September 2014, and security for costs was paid on 29 September 2014. The appellant filed three grounds of appeal challenging the learned resident magistrate's decision viz:

"1. The parties in Plaint # 192/2013 are the same as the parties in Claim #2013HCV/02562, the cause of action in Plaint # 192/2013 and Claim#2013HCV/02562 is essentially the same and the subject matter in Plaint #192/2013 and Claim # 2013HCV/02562 is the same, the Resident Magistrate should therefore adjourn the hearing in Plaint # 192/2013 or transfer the plaint to the High Court, for it to be consolidated with Claim # 2013HCV/02562 rather than have two hearings between the parties in two different courts which could lead to different outcomes in both courts, thereby bringing the justice system into ridicule.

2. The Supreme Court being a Court of Pleadings, is a Superior Court to the Resident Magistrate's Court, therefore Claim #2013HCV/02562 which is being heard in the Supreme Court should take precedent [sic] over Plaint #192/2013 which is being heard in the Resident Magistrate's Court.

3. Litigation should be kept to a minimum, and as far as possible, the courts should strive to prevent multiplicity of court actions concerning the same subject matter between the same parties."

[16] The appeal came on for hearing in this court and the court began to hear submissions from counsel for the appellant. At the end of counsel for the appellant's submissions counsel for the respondent asked for time to respond. This was granted and the hearing of the appeal was adjourned to 15 April 2016. On that date, counsel for the respondent sought and obtained permission to raise a point, which he admitted he should have taken as a point *in limine*. Counsel pointed out that the learned Resident Magistrate having given his decision on 5 September 2014, the time for filing the notice of appeal had expired by the time it was filed on 25 September 2014. The notice of appeal was, therefore, filed out of time. Counsel for the appellant conceded the point and requested

and was granted an adjournment to make a formal application for an extension of the time to file the notice of appeal.

The application for extension of time to file appeal

[17] A notice of application for court orders was filed on 18 April 2016 and served. In that application the appellant sought the following orders:

> "1. (a) The notice of appeal herein filed on September 25, 2014 and Grounds of Appeal filed on October 22, 2014 be permitted to stand.
>
> **OR ALTERNATIVELY**
>
> (b) That the time for filing the appeal be extended to September 25, 2014 and that the notice of appeal filed on September 25, 2014 be permitted to stand.
>
> 2. Any other relief or Order which is the Court deems fit."

[18] The appellant relied on the following grounds:

> "1. That the notice of appeal was filed out of time;
>
> 2. That the delay in bringing the application has not been inordinate and/or inexcusable;
>
> 3. That the delay has not caused any prejudice to the Respondent/Defendant;
>
> 4. That the Applicant has always showed [sic] an interest in appealing the decision of the Learned Judge and the failure to file the Notice of Appeal within the time specified for same was the result of a mistake by the Applicant's Attorney-at-Law on the record at the time;
>
> 5. That there is an arguable case for appeal;
>
> 6. That the Applicant has a good and reasonable chance of succeeding on the appeal."

[19] The application was supported by the affidavit of Mr Cecil July filed on 18 April 2016. In it he explained that the failure to file the notice of appeal on time was an oversight and a mistake. He further explained that the notice of appeal was filed on 25 September 2014 and consistent with his belief that the time had not elapsed he filed grounds of appeal on 22 October 2014. He also stated at paragraph 5 of his affidavit that the appellant had "an arguable case for an appeal and a good and reasonable chance of succeeding in this appeal ...". Further, that the delay of six days was not inordinate or inexcusable and has not caused any prejudice to the respondent.

[20] We heard the application and submissions from both counsel. At the end of the hearing, we granted the application and made the following orders:

i. the time for filing the notice of appeal herein is extended to 25 September 2014;

ii. the notice of appeal filed and served is allowed to stand as properly filed and served; and

iii. the costs in the application is reserved pending the decision on the appeal.

[21] Having heard the appeal we reserved judgment and promised to put our reasons for granting the application for extension of time and our decision on the substantive appeal in writing. This is a fulfillment of that promise.

The reasons for decision to extend time

[22] Counsel Ms Greene, on behalf of the appellant, conceded that the notice of appeal filed 25 September 2014 was not in compliance with section 256 of the Act, as that section requires that verbal notice of appeal be given in open court after judgment, or

alternatively a written notice of appeal is to be filed with the Clerk of the Courts and a copy served on the opposing side within 14 days after the date of judgment. It was not disputed that this timetable was not followed.

[23] Counsel argued however, that this was a fit case for the court to exercise its discretion and extend time. Counsel relied on the power of the court to extend time given to it by rule 1.7(2)(b) of the Court of Appeal Rules (CAR). This rule provides that the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the time for compliance had passed. Counsel also relied on rule 1.7(2)(n) to submit that this discretion to extend time may be exercised even though the appellant had already begun making submissions in the appeal. Rule 1.7(2)(n) provides that the court may take any steps or give any directions or orders for the purpose of managing the appeal and furthering the overriding objective. Counsel submitted that the overriding objective referred to in the CAR are the same overriding objective in rule 1.1 of the Civil Procedure Rules 2002.

[24] Counsel also pointed to the fact that there was authority given to the Court of Appeal by the Judicature (Appellate Jurisdiction) Act (JAJA) section 12(2) to extend the time to file or serve the notice of appeal at any time. Counsel also relied on the case of **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** SCCA No 12/1999 delivered 6 December 1999. Extrapolating the principles from **Leymon Strachan** counsel asked the court to consider the factors relevant to the grant or refusal of an application for an extension of time to file an appeal. These were: the length of the

delay, the reasons for the delay, whether there was an arguable case on appeal and the degree of prejudice to the other party if time was extended.

[25] With respect to the length of the delay she noted that it was not inordinate, being only six days out of time. She frankly admitted that the reason given in the affidavit of Mr July was not a good reason but argued that in keeping with the opinion of the court in **Leymon Strachan**, even if the court were to find that the explanation given was not a good one it should not reject the application for extension of time for that reason only. This, she argued, was in keeping with the overriding objective. Counsel also asked the court not to allow the appellant to suffer for the mistake of his attorney and cited to the court the approach taken in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865. Counsel also drew the court's attention to section 266 of the Act which authorizes the Court of Appeal to allow an appeal to be heard even though some formal requirement had not been met by the appellant through inadvertence, ignorance or necessity. Counsel also submitted that there was merit in the appeal and that the respondent had not suffered and would not suffer any prejudice if time were to be extended.

[26] Counsel for the respondent made no challenge to the court's discretion to extend time but he noted that the application could have been made to the learned Resident Magistrate much earlier. He sought to impugn the affidavit filed in support of the application that there was no good reason given in it for the delay and tried to convince the court that the reason given for the delay must conform to the wording in section 266 of the Act, that is, it must be due to inadvertence, ignorance or necessity. He argued that

since it did not fall into any of those categories it was unacceptable and ought not to be allowed.

[27] Counsel also noted that the application to transfer was an afterthought as the reason for the withdrawal of the claim was simply because there was no answer to the counterclaim. He asked the court not to consider **George Graham v Elvin Nash** (1990) 27 JLR 570 cited by the appellant as it was decided under the old rules and the court was being asked to substitute its own discretion for that of the learned Resident Magistrate. He argued that there was no merit in the appeal as it was futile. He pointed to section 253 of the Act which he says when read in conjunction with section 262, plainly shows that the learned Resident Magistrate's decision is final and cannot be challenged on appeal.

[28] He also submitted that there would be prejudice to the respondent because if the time was extended and the appeal was heard and decided in the appellant's favour, it would disrupt the timetable for trial in the Supreme Court, as a trial date had already been set. The counterclaim, he said, would have to go to case management and an application would have to be made for it to "join" the other cases as it was not automatic.

The Law

[29] Since counsel for the respondent submitted that the application to extend time could have been made to the learned Resident Magistrate much earlier, a diligent perusal of the Act and the Resident Magistrate's Court Rules was made to ascertain the root of such an authority in the Resident Magistrate to extend time. No such power was found in

the Act itself. However, by virtue of Order XXXVI rule 10 of the Resident Magistrate's Court Rules parties may by consent enlarge or abridge any of the times fixed by these rules or by statute for taking any steps or filing any document, or giving any notice in any action or matter. Where such consent cannot be obtained, either party may apply to the judge on notice to the non-consenting party for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until after the expiration of the time allowed or appointed.

[30] On a cursory reading of this rule it is questionable whether it would apply to appeals. I have found no case in which the power under Order XXXVI was ever used or tested at the appellate level. Happily, this court does not have to determine the issue one way or the other, since the appellant's explanation is one of mistake or oversight having regard to the fact that counsel thought he was still within the preset timetable and therefore, would not have needed to resort to any application for extension of time in the Resident Magistrate's Court. The issue of an application to the Resident Magistrate's Court for extension of time to file notice of appeal does not arise in this case.

[31] As to the powers of this court to extend time to file a notice of appeal in the Resident Magistrate's Court, this has been raised on appeal on several occasions. It ought now to be considered settled; however, since both parties have raised the purported power in section 266 of the Act, it is perhaps best to traverse the issue once again.

[32] In **Ralford Gordon v Angene Russell** [2012] JMCA App 6, Phillips JA conducted a careful, thorough and admirable review of the historical background of the power of the Court of Appeal to extend time to file appeals from the Resident Magistrate's Courts. In that case verbal notice had been given on 2 September 2010 after the appellant had been non-suited in the Resident Magistrate's Court for the parish of St Ann. Counsel lodged written notice and grounds of appeal on 14 September 2010. An amended notice of application was filed on 25 February 2011 seeking an extension of time to appeal and to pay the sums for the due prosecution of the appeal. It would appear that, although the original notice and grounds were filed in time, the payment for the due prosecution of the appeal had not been made and the documents which had been filed were subsequently returned to the attorney from the court's office. By the time the attorney understood the reason for the return of the documents the time for filing the appeal had expired.

[33] The issue that the court in **Ralford Gordon** had to grapple with was, whether the Court of Appeal could extend time to file notice and grounds of appeal as well as extend the time to pay the sum required for the due prosecution of the appeal. Phillips JA looked at sections 251, 256, 266 of the Act and section 12 of JAJA. Section 251 of the Act simply outlines the circumstances where the right of appeal in civil proceedings will arise.

[34] Section 256 sets out the timetable for: giving the notice of appeal, making the payment of the sums for the due prosecution of the appeal and the security for costs awarded against the appellant and for the due and faithful performance of the judgment and orders of the court of appeal, the reasons for judgment and the filing of the grounds

of appeal. A failure to file grounds of appeal in the time stipulated will, subject to section 266, result in the right to appeal ceasing and determining.

[35] Section 266 gives this court the power to hear an appeal from the Resident Magistrate's Court even if the appellant has not complied with any of the formalities prescribed by the Act. The section also provides that the provisions of the Act conferring a right of appeal in civil cases must be construed liberally in favour of such a right.

[36] With the exception of the case of **Aarons v Lindo** (1953) 6 JLR 205, this court of and its predecessor have taken a restrictive approach to section 266. In **Aarons v Lindo** the appellant was allowed to proceed with the appeal, although payment for the due prosecution of the appeal was two days late. The Court of Appeal treated that aspect of the section as a formality for which it could extend the time to allow payment to be made by virtue of the precursor to section 266 (section 269 of the Resident Magistrate's Law). That liberal interpretation remained for almost two decades until the early 1970's when along came the case of **Christian v Brown** (1972) 12 JLR 1039. That case decided that payment for the due prosecution of the appeal was not a formality but a condition precedent to the jurisdiction of the court and this court had no jurisdiction under section 266 to extend time to pay that sum.

[37] Later in the case of **Patterson and Nicely v Lynch** (1973) 12 JLR 1241 it was held that the payment for the due prosecution of the appeal was a condition precedent to jurisdiction and specifically declared **Aaron v Lindo** to be wrongly decided. However, see the dissenting judgment of Fox JA where he said that he saw no reason to depart from

the decision in **Aarons v Lindo**. Although, as noted by Phillips JA in **Ralford Gordon,** the payment for the due prosecution of the appeal had arisen for the specific determination of the former Court of Appeal in **Aarons v Lindo**, this court had determined in previous cases that the requirement to give notice of appeal and file and serve grounds of appeal at a particular time was a condition precedent and not a formality and this court had no power under section 266 to reset the timetable (see the cases cited in **Ralford Gordon** for a historical perspective). It had also been held that the payment of the sum for the security for costs of the appeal was also a condition precedent as well as, interestingly, the preparation and lodging of the written reasons for judgment by the magistrate. See **Willocks v Wilson** (1944) 4 JLR 217, **Welds v Montego Bay Ice Co Ltd and Smith** (1962) 5 WIR 56 for the former proposition and **Lorna Morgan v Gloria Reid and Richard Brown** (1991) 28 JLR 239 for the latter.

[38] At the time **Welds** was considered this court was deriving its power from the precursor to section 12 of JAJA which was section 11(2) of the Judicature (Appellate Jurisdiction) Law. At that time section 11(2) only granted power to the former court of appeal to extend time to give notice of appeal and to file grounds of appeal. So that the payment of the security for costs was still a condition precedent although the payment for due prosecution of the appeal remained a formality by virtue of the decision in **Aarons v Lindo**; but **Christian v Brown** and **Patterson and Nicely** put an end to that anomaly. By this time section 11(2) had been replaced by section 12(2) which extended the power to extend time for the payment for security for costs but made no mention of the payment of the sum for due prosecution of the appeal.

[39] Section 12 of JAJA provides for appeals to lie from the Resident Magistrate's Courts. Without rehashing the history of the development which resulted in what is now section 12(2) of the JAJA, since Phillips JA has so adequately delved into it in **Ralford Gordon**, suffice it to say, the legislature amended JAJA to give this court the power to extend the time to comply with the timetable under section 256. The result read as follows:

> "12 (1)….
>
> (2) Notwithstanding anything to the contrary the time within which-
>
> (a) notice of appeal may be given, or served
>
> (b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given
>
> (c) grounds of appeal may be filed or served,
>
> in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

[40] Unfortunately, the amendment comprised in section 12(2) did not solve all the issues. This is because the section does not specifically list the payment for the due prosecution of the appeal. Of course, this could have been because **Aaron v Lindo** stood unchallenged for almost 20 years. The first challenge to it was in **Christian v Brown** which held that, based on its omission from section 12(2) it could not be treated as a formality. In **Patterson and Nicely** the court held the view that the omission was deliberate and accepted that this was in all probability due to the decision in **Aaron v Lindo** but nevertheless held that the case was wrongly decided with respect to the interpretation of the payment being a formality.

[41] This court in both **Christian v Brown** and **Patterson v Nicely** took the view that the omission of the payment of the sum for due prosecution of the appeal from section 12(2) of JAJA, meant that the Court of Appeal, being a creature of statute, had no power to reset the timetable for that payment to be made and since that requirement was a condition precedent and not a formality, section 266 did not apply.

[42] This restricted approach to the right of appeal from the Resident Magistrate's Court raises the question what then was the purpose of section 266 in purporting to give the power to extend time to comply with formalities where no such formalities in fact existed in section 256. However, as noted by the court in **Ralford Gordon** that is a matter for the legislature to address.

[43] Having traced the history leading up to **Christian v Brown** and **Patterson and Nicely** this court in **Ralford Gordon** declined to depart from the decision in those cases. This means that all the obligations as to the timetable set out under section 256 have found safe harbour in section 12 of the JAJA, except the time for the payment for the due prosecution of the appeal. In the light of the approach the authorities have taken that each step in the process under section 256 is a condition precedent and not a formality, in my view, the relevance of section 266 is now in doubt.

[44] In response to the issues raised in the particular case of **Ralford Gordon** the court treated the notice as having not been filed, since it had been rejected by the Resident Magistrate's Court and extended the time to do so. Therefore, there was no necessity to extend the time to pay the sum for the due prosecution of the appeal, as by

virtue of the section, it is only required to be paid after the appeal was lodged. This was in keeping with the view of Phillips P (Ag) (as he then was) in giving judgment in **Welds** and Fox JA in **Patterson and Nicely.**

[45] The application of the decision in **Patterson and Nicely** means that this court has no power either under section 266 of the Act or section 12(2) of JAJA to extend time for the payment of the due prosecution of the appeal. Due to the potential hardship to applicants with meritorious appeals the Court of Appeal has had to, on occasion, distinguish **Patterson and Nicely**. I will refer to two such examples.

[46] The first is in **Ralford Gordon** itself where this court held that time could be extended where no notice of appeal had yet been filed prior to the application and the payment for the due prosecution of the appeal had not been made. The previous authorities were distinguished on that basis.

[47] In **Primrose Cohen v Rollington Sterling and Linval Sterling** [2014] JMCA App 6 an extension of time to file a notice appeal was considered by this court. In that case a default judgment had been entered against the appellant in the Resident Magistrate's Court in St Mary. The learned Resident Magistrate in that case refused to consider an application to set aside the default judgment. The appellant wished to appeal the orders but failed to file her appeal in the time allotted. The appellant applied to this court for an extension of time within which to appeal. The appellant relied on section 266 of the Act and section 12 of JAJA. The respondent relied on section 256 of the Act. The court considered section 186 of the Act, which allows a resident magistrate to set aside a

judgment given in the absence of a defendant, as well as section 256. The respondent in that case pointed out that the authorities showed that failure to pay the sums for the due prosecution of the appeal was fatal to the appeal. The court distinguished those authorities, where the appeals were filed in time but the payment for the due prosecution of the appeal was not paid, from the case before it. It applied **Ralford Gordon** where it was held that the time could be extended where the notice appeal had not yet been lodged. The court in **Primrose Cohen** found that the case of **Ralford Gordon** was applicable to the appeal and the appellant was entitled to an extension, if she met the other requirements.

[48] Based on section 12(2) of JAJA it would appear that despite the decision in **Patterson and Nicely**, the only time the court will now have no discretion to extend time, is when the parties have filed the notice of appeal on time but have failed to pay the sum for the due prosecution of the appeal.

[49] What does this mean for this appellant who had given notice of appeal already but out of time and had already made the payments for the due prosecution of the appeal? The filing and all that attended it would be invalid unless this court could extend the timetable. It follows from the authorities that this court could extend the time to the date on which the notice was filed and consequently the time at which the payments were to be made would automatically be extended as payment is at the time of the lodging of the notice of appeal. There would therefore be no need to extend the time for payment for the due prosecution of the appeal as that time would necessarily

automatically follow from the lodging of the notice of appeal. Once the applicant fulfilled the other requirements, this court could extend the time to file the notice of appeal.

[50] The requirements to be met for extension of time to be granted were considered in the case of **Leroy Powell and Another v Brooks and another** [2013] JMCA App 8. In that case the application was for extension of time to serve the notice of appeal. The respondent made an application to strike out the notice of appeal on the basis that it was not served. Counsel for the appellant sought and obtained an adjournment to file an application to extend the time to serve the notice of appeal. On hearing that application the court accepted that it had the discretion to extend the time to serve the notice of appeal under section 12(2) of JAJA, but struck out the notice of appeal on the respondent's application and refused the appellant's application for extension of time. In doing so the court considered the following factors; reasons for delay, the merits of the appeal and any possible prejudice to the respondent.

[51] In **JPS v Rose Marie Samuels** [2012] JMCA Civ 42 the principles in **Leymon Strachan** were outlined and applied where the court held that the start of any enquiry is that the rules must be complied with. However, the court has the discretion to extend time for compliance. In deciding whether or not to extend the time, the court will also consider the overriding objective.

[52] In the present case, it was the view of this court that the appellant met all the requirements for time to be extended. The delay of six days was not inordinate (see Lord Denning's views in the case of **Salter Rex & Co v Ghosh [1971]** 2 All ER 865); there

was merit in the appeal and there would be no prejudice to the respondent. This was therefore, an appropriate case for the exercise of the court's discretion to extend the time to file the notice of appeal to 25 September 2014 and to allow the notice of appeal filed on 25 September 2014 to stand as properly filed.

The appeal

[53] I now move on to the substantive appeal. Counsel for the respondent argued that the appeal should not be heard because by virtue of sections 253 and 262 of the Act, the learned Resident Magistrate's decision was final on the point and no appeal against it shall lie. It is necessary to consider whether those provisions have the meaning accorded to them by counsel because if he is correct, then the appellant's appeal must fail.

[54] Section 253 of the Act states:

> "No appeal shall lie in respect of the decision of a Court given upon any question as to the value of any real or personal property for the purpose of determining the question of the jurisdiction of the Court under this Act, nor shall any appeal lie against the decision of a Court on the ground that the proceedings might or should have been taken in some other Court."

[55] In the definition section of the Act any reference to "Court" means the Resident Magistrate's Court. The reference to "a Court" in section 253 is therefore a reference to the Resident Magistrate's Court. This section means therefore, that the Resident Magistrate's decision is final with regard to a finding as to the value of any real or personal property where such a finding is necessary to ground the jurisdiction of the court. The section also provides that there is no right of appeal against the Resident

Magistrate's decision in relation to the question of jurisdiction on the basis that the case should have been heard in a different Resident Magistrate's Court. Section 253 is therefore, not applicable to this appeal, which concerns the issue of whether the learned Resident Magistrate ought to have transferred a case to the Supreme Court that had been filed in Resident Magistrate's Court. That section therefore, does not prevent the hearing of this appeal.

[56] Counsel also argued that section 253 should be read with section 262 of the Act. Section 262 states:

> "No plaint lodged under this Act, and no judgment or order given or made by any Magistrate, and no cause or matter brought before or pending in a Court under this Act, shall be removed by appeal, motion, writ of error, *certiorari* or otherwise, into any other Court, save and except in the manner and according to the provisions herein mentioned; and no judgment or execution shall be stayed, delayed, or reversed, upon or by any writ of error or *supersede as* thereon."

[57] This section simply provides that neither this court nor the Supreme Court has the jurisdiction to remove a case from one Resident Magistrate Court to another except in the manner provided by the Act. Again this section does not affect the determination of the issues in this case.

[58] Both this court and the Resident Magistrate's Court are creatures of statute. This court's power to hear this appeal rests in the provisions of section 251 of the Act which states:

> "Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a

Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.

And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final.

Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:
Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which the Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties."

[59] This means therefore, that by virtue of that section this court has jurisdiction to hear this appeal from the order of the learned Resident Magistrate on a point of law as to whether he properly exercised the discretion granted to him by virtue of section 130 of the Act. Contrary to the submission made by counsel for the respondent sections 253 and 262 are not relevant to this appeal.

The decision impugned on appeal

[60] When the counterclaim came on for trial the learned Resident Magistrate enquired and was informed that the claim had been withdrawn because the respondent had filed a claim in the Supreme Court and therefore there was no point in continuing the claim in the Resident Magistrate's Court. Counsel for the appellant in the court below also seemed to have taken the mistaken view which he shared with the learned Resident Magistrate that once the claim was withdrawn the counterclaim would also "die". The learned Resident Magistrate ruled that, contrary to counsel's view, where a claim was withdrawn the counterclaim did not "die" as a result but still subsisted and therefore, in the instant case, the counterclaim was properly set for trial. Counsel for the appellant in the court below also submitted to the learned Resident Magistrate that since the counterclaim and the claims filed by the respondent in the Supreme Court were the same then the counterclaim should be transferred to join the claims filed in the Supreme Court. The learned Resident Magistrate ruled that the claim before him was a separate cause of action from that in Supreme Court and was therefore a discrete claim.

[61] In his reasons for decision the learned Resident Magistrate considered that the action in the Supreme Court was also to recover damages for trespass but was in relation to a continuing act of trespass by the appellant. He considered that it would therefore, as a matter of law, have been an action for a separate act of trespass from the act complained of in the suit before him. He also considered that there was no explanation as to why separate suits were filed in separate courts but that the claim filed in the Supreme Court Claim No 2013 HCV 02562 had the same parties in reversed roles, concerned the same land but the causes of action were legally different. He also considered that the secondary relief claimed by the respondent in his counterclaim was similar to that claimed in the Supreme Court and that although section 96 of the Act may be a possible obstacle to the claim he had jurisdiction to try the counterclaim. He refused the application for transfer.

Ground 1 and 3 - The failure to adjourn and failure to transfer

[62] Counsel for the appellant argued grounds 1 and 3 together. In the light of this court's ruling on grounds 1 and 3, it was not necessary to consider ground 2.

[63] In giving his written reasons for decision the learned magistrate saw the issues before him as:

i. What is the effect of a counterclaim in the magistrate's court?

ii. Was there any basis for mandatory transfer or cessation of the instant claim?

iii. If there was a matter of discretion pursuant to section 130 of the Act was the discretion properly exercised in the circumstance?

He decided all three issues in favour of the respondent and gave his reasons for doing so.

[64] Counsel for the appellant submitted that the learned magistrate erred when he failed to adjourn the hearing of the counterclaim in Plaint No 192/2013. Counsel relied on the discretion given to the learned magistrate in Order XIX rule 5 of the Resident Magistrate's Rules. This states:

> "Where at the trial it shall appear that an action for the same cause at the suit of the same plaintiff against the same defendant is pending in another Court of Record, the Judge shall order the trial to stand adjourned to a certain day, and unless before such day the action in such other Court has been discontinued, the action shall be struck out."

[65] Counsel argued that the parties are the same and the cause of action is essentially the same except in Claim No 2013 HCV02562 the claimant is seeking rectification in addition to the other remedies which were being sought in the Resident Magistrate's Court. Counsel argued that by virtue of Order X1X rule 5 the counterclaim should have been adjourned.

[66] Counsel also complained that learned Resident Magistrate failed to consider the decision in **Graham v Nash** and **Danny McNamee v Shields Enterprises Limited** [2010] JMCA Civ 37, as well as the decision in **Naldi Hynds v Felmando Haye** RMCA No 15/2006 judgment, delivered 20 February 2007, and failed to consider the fact that the Resident Magistrate's Court does not have the jurisdiction to grant declarations.

[67] It was also argued that the learned Resident Magistrate erred in law when he failed to transfer Plaint No 192/2013 to the Supreme Court to be consolidated with Claim No 2013 HCV 02562. Counsel for the respondent argued that the decision was within the discretion of the judge and should not be disturbed.

[68] Counsel for the appellant submitted that the learned Resident Magistrate failed to consider the relevance of the similarities in the claims before the Supreme Court and the counterclaim before him and the fact that the parties and the subject matter of the claims were the same but instead took into account irrelevant factors.

[69] Counsel argued that the learned Resident Magistrate failed to properly consider that his refusal to transfer could result in having two hearings between the same parties involving the same subject matter in two different courts. This, it was submitted, would lead to a multiplicity of court actions concerning the same subject matter between the same parties. Further, that there could be different outcomes in both courts resulting in a conflict in the decision of the magistrate and the Supreme Court, thereby bringing the justice system into ridicule. This situation, it was argued, may lead to a prolonging of the determination of the issues between the parties as they continue through two different courts at different times. It was also argued that the learned Resident Magistrate failed to consider that litigation should be kept at a minimum and the courts should, as far as possible, strive to save expense and prevent a multiplicity of court actions concerning the same subject matter between the parties.

Did the learned magistrate properly exercise his discretion?

[70] The learned Resident Magistrate, in his decision, referred to section 191 of the Act and Order X Rule 2 of the Resident Magistrate's Court Rules which gives a defendant in an action the right to set up a counterclaim and he correctly identified the law in relation to setting up a counterclaim. Order XIX rule 12 expressly states that where in any case in which a defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless proceed. In this regard the learned Resident Magistrate was correct and no issue arises as to that aspect of his decision in this appeal.

[71] In deciding on what he listed as "issue two" the learned Resident Magistrate took into account the instance where the transfer of civil cases to the Supreme Court was mandatory such as where jurisdiction is or will be exceeded whether in terms of monetary jurisdiction or subject matter jurisdiction. He also considered that the case before him was for trespass and not recovery of possession and that the value of the claim was within the monetary limit of the court. He expressed reservation, about his power to make the declaration sought by the respondent as to his right of possession and the effect of his adverse possession on the appellant's title.

[72] On the issue of the declaratory relief sought by the respondent he said in his reasons for decision at paragraphs 38 and 39 that:

> "...The court had reservations about its power to make such an Order. However, I likened the relief prayed in paragraph 2 of the prayer more as findings of fact as part and parcel of the entire claim. There have been many cases where the

> Resident Magistrate's Court has been called upon to pronounce on whether or not a title has been defeated by adverse possession. In the circumstances therefore, the Court is satisfied that this Order could be made. In addition, under section 199(e) of the **Judicature (Resident Magistrate's Court) Act** the Magistrate has wide powers to grant relief provided that the granting of the relief is within his jurisdiction." (Emphasis as in original)

[73] Suffice it to say, that neither under the Act nor the Resident Magistrate's Court Rules does the Resident Magistrate have the power to make such a declaration. Neither can the Resident Magistrate effectively grant the relief prayed by way of a finding of fact. In that regard the learned resident magistrate was wrong. I will, however, say more about that later when I come to consider his refusal to transfer pursuant to section 130 of the Act.

[74] Order XIX rule 5 was not argued before the learned Resident Magistrate neither was any strenuous reliance placed on it before us. However, although it was not a matter canvassed in the court below, the learned Resident Magistrate did consider it in his reasons. He held that the action in the Supreme Court though similar was not the same as that in the Resident Magistrate's Court; so that Order XIX rule 5 would not apply. Counsel for the appellant, argued however, that the learned Resident Magistrate erred in not adjourning the counterclaim because the parties were the same, the subject matter was the same, the cause of action was essentially the same and therefore by virtue of the rule, he should have adjourned the trial of the counterclaim. In my view however, the learned magistrate was correct in his application of order XIX rule 5 and cannot be faulted for not adjourning pursuant to that rule.

[75] The learned Resident Magistrate also considered whether this was a matter in which title was in dispute so as to affect his jurisdiction by virtue of section 96 of the Act. He found that section 96 was not applicable, as the claim was not for recovery of possession but for trespass. He took the view that the authorities were quite clear that section 96 was only relevant to claims for recovery of possession. Nevertheless he considered the case of **Naldi Hynds v Felmando Haye** where this court dealt with an appeal in relation to a claim for trespass under section 96. In that case it was held that the action raised a real dispute as to title and that the resident magistrate had no jurisdiction to try the case under section 96 where there was no evidence as to the annual value. Faced with that authority, the learned Resident Magistrate determined that there was insufficient evidence to determine if there was a bona fide dispute as to title. He said this was so because the appellant had withdrawn the plaint and had not yet stated the defence to the counterclaim.

[76] At paragraphs 42 to 44 of his reasons for ruling he said:

> "[42] Furthermore, section 96 of the Act would not apply in this case as it is not a claim for recovery of possession but for trespass. The authorities are quite clear that section 96 deals with claims for recovery of possession. However, subsequent to the decision on the 5th September 2014, the Court came across the decision in *Naldi Hynds v Felmando Haye* [sic] In that case, it was an action for trespass. The Learned President of the Court of Appeal, as he then was, stated that section 96 applied to cases where the cause of action is for trespass and not just actions for recovery of possession.
>
> [43] In that case, the learned Resident Magistrate, in an action for Trespass to Property, gave judgment to the Respondent for trespass to property as well as an injunction.

> The Court of Appeal overturned the decision of the learned Resident Magistrate on the basis that as the property was valued in excess of $75,000.00 at the time, she had no jurisdiction to try the case under s. 96 of the Act as there was a real dispute as to the title of the Plaintiff.
>
> [44] Whether there are two different schools of thought from the Court of Appeal on the causes of action to which s. 96 apply is not for this Court to decide. In either case, however, at this stage of the trial, there was not sufficient evidence to determine if there was a bona fide dispute as to title. The Plaintiff had withdrawn his claim and had not yet stated his defence to the Counterclaim. Whilst we can get an idea from the withdrawn claim on the file as to the likely defence to the counterclaim, at this stage there cannot be said to be a bona fide dispute".

[77] He cited the cases of **McNamee v Shields Ltd and Donald Cunningham et al v Howard Berry et al** [2012] JMCA Civ 34 and concluded that there was no mandatory requirement for cessation or transfer of the case. He also held that in the light of the different interpretations by this court he was "minded to lean towards the line of authorities which suggest that s. 96 applies to claims for recovery of possession".

[78] The learned Resident Magistrate's approach to this point is perhaps surprising for two reasons. Firstly, it is not true to say there are two different schools of thought emanating from this court. This court has never decided that section 96 only applied to recovery of possession claims. In both **McNamee v Shields** and **Cunningham v Berry** the court was dealing with appeals concerning a claim for recovery of possession and was focused on the distinction between sections 96 and 89. The court in both cases neither attempted to make nor made any pronouncements on any restriction placed on the

jurisdiction of the Resident Magistrate in relation to the cause of action that could be dealt with under section 96.

[79] Based on the wording of the section there is no restriction in relation to the causes of action to which it would apply. There is no basis for the view that the section is only applicable to actions for recovery of possession. The section empowers the court to make an order regarding possession in relation to the plaintiff, but there is nothing in the section that limits or restricts the type of matter in this regard. The restrictions are in relation to the nature of the dispute between the parties and the annual value of the property.

[80] The relevant part of section 96 of the Act provides that:

> "Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed five hundred thousand dollars, **any person claiming to be legally or equitably entitled to the possession thereof,** may lodge a plaint in the Court setting forth the nature and extent of his claim…" (Emphasis added)

[81] The second reason for finding the learned Resident Magistrate's approach surprising is that in the instant case, from an examination of the counterclaim, it is clear that there is a dispute as to title. The second relief claimed is a declaration for adverse possession and it is clear from this that the respondent was challenging the appellant's title to the land. A crucial issue for the court in determining the matter would be who was entitled to possession based on the title that they were claiming under. The respondent was asserting that he was the owner and challenging any other person's claim, including

the appellant, to possession or title, by way of adverse possession. In my view, section 96 would be applicable since the issue of title was in question and the only other issue would be whether or not the annual value of the property that is the subject of the dispute is within the jurisdiction of the Resident Magistrate's Court.

[82] In **McNamee v Shields**, Morrison JA (as he then was) in giving the judgment of the Court examined section 96 of the Act. In conducting his assessment of the section he examined the earlier cases and the principles enunciated in those cases as to the applicability of the section. In considering the principles laid down in the previous cases Morrison JA said:

> "In **Ivan Brown v Perris Bailey** (1974) 12 JLR 1338…... it was held that in order to bring the section into play, the bona fides of the defendant's intention is irrelevant in the absence of evidence of such a nature as to call into question the title of the plaintiff."

[83] He then went on to cite the following passage from the judgment of Graham-Perkins JA in **Ivan Brown v Perris Bailey**:

> "All the authorities show with unmistakable clarity that the true test is not merely a matter of bona fide intention, but rather **whether the evidence before the court, or the state of the pleadings, is of such a nature as to call into question the title, valid and recognisable in law or in equity, of someone to the subject matter in dispute**. If there is no such evidence the bona fides of a defendant's intention is quite irrelevant." (Emphasis added)

[84] Section 96 is therefore applicable as it was clear from the particulars of the counterclaim that the title to the land in dispute was in issue as the respondent's claim was based on adverse possession. This was clearly stated in the particulars of the

counterclaim and the second order sought was for a declaration that he was the owner by virtue of adverse possession. This was in fact a challenge to the title of the registered owner. Therefore, there is no question that the dispute as to title was made clear on the pleadings and did not require the Resident Magistrate to have the defence to the counter claim in order to determine this.

[85] Section 96 of the Act also states that the resident magistrate only has jurisdiction if the "annual value" of the property does not exceed $500,000.00. The authorities have held that this means that the plaintiff must lead evidence showing that the annual value of the land does not exceed the statutory limit in order to establish the Resident Magistrate's jurisdiction. In **Naldi Hynds v Felmando Haye** Harrison P described the requirement to satisfy the section in the following manner:

> "Under the provisions of section 96 of the Judicature (Resident Magistrate) Act, where the question of title arises, a Resident Magistrate is authorized to proceed to try the issue of title to the land to completion provided that the plaintiff provides evidence to the court that:
>
> > '... the annual value whereof does not exceed seventy-five thousand dollars ...'"

[86] The cases dealing with this section state that in order to establish the jurisdiction of the court the annual value must be pleaded or there must be evidence that the annual value is not in excess of the statutory amount, presently, $500,000.00. Therefore, if this was not stated or there is any question the Resident Magistrate must decline to exercise jurisdiction in the matter. There was no evidence before the court regarding the annual value of the property as it was not recorded in the counterclaim.

[87] In this case both counsel for the respondent and the learned Resident Magistrate took the view that the section was not applicable and so no information was sought or provided in relation to the annual value of the property. The authorities are clear, however, that where there is no information as to the annual value the resident magistrate does not have jurisdiction to hear the matter.

[88] That being said, it really is not necessary to say much more on the Resident Magistrate's ruling regarding section 96. I will say however, that a judge of an inferior court is bound to follow the decisions of the appellate court whether he agrees with it or not unless he is able to distinguish it on the facts from the case before him. In **Naldi Hynds v Felmando Haye** the claim was brought in trespass but the evidence was of "such a nature as to call in question the title, valid and recognisable in law or in equity, of someone to the subject-matter in dispute" and the court held that section 96 was applicable. The Court of Appeal not only referred to **Brown v Bailey** which was a claim for recovery of possession but also referred to the old case of **Marsh v Dewes** [1853] 17 Jur 558 which was a claim in trespass. In that case the learned judge considered the question of jurisdiction based on whether the case raised a bona fide dispute as to title. He refused to deny himself jurisdiction on the ground that the evidence was "too slight and inconclusive" and that there was no *bona fide* question of title to be tried. The English Court of Appeal held that he was wrong since a question of title arose and the question of the bona fides of the defendant's intention was irrelevant. In **Brown v Bailey** this court also considered and approved **Marsh v Dewes.** This court also

considered other cases where title was in dispute so as to oust the jurisdiction of the court, all of which were cases other than for recovery of possession.

[89] **Naldi Hynds v Felmando Haye** is a judgment of this court and the learned Resident Magistrate is bound by that decision and where he himself is in doubt of his jurisdiction it is inimical to good sense to refuse an application to transfer a matter to a court where undoubted jurisdiction lies. It behoves Resident Magistrates faced with the question of jurisdiction under section 96 to acquaint themselves not only with the case of **Brown v Bailey** but also **James Williams v Hylton Sinclair** (1976) 14 JLR 172 and to recall also that **Francis v Allen** (1956-60) 7 JLR 100 has been expressly overruled and **Brown v The Attorney General** (1968) 11 JLR 35 has been partially overruled by implication in the case of **Brown v Bailey**.

Transfer pursuant to section 130

[90] I will now turn to the refusal to transfer pursuant to section 130 of the Act. The section states that:

> "No action commenced in any Court under this Act shall be removed from the said Court into the Supreme Court by any writ or process, unless the debt or damage claimed shall exceed one hundred thousand dollars; and then only by leave of the Magistrate of the Court in which such action shall have been commenced, in any case which shall appear to the said Magistrate fit to be tried in the Supreme Court, and subject to any order of the Supreme Court upon such terms as he shall think fit."

[91] By virtue of this section the Resident Magistrate has the discretion to transfer the matter to the Supreme Court if it appears to him to be a case fit to be tried in the

Supreme Court. This court will not interfere with the exercise of this discretion unless he failed to consider relevant factors or considered factors which were irrelevant in arriving at his decision.

[92] The court must therefore assess the learned Resident Magistrate's stated reasons for refusing the appellant's application. In his reasons for ruling, the learned Resident Magistrate considered whether he had properly exercised his discretion under section 130 in refusing to transfer the counterclaim to the Supreme Court. In doing so he took account of the judgment of Carey JA in **Graham v Nash**. He distinguished that case from the instant case on the basis that unlike in **Graham v Nash** the instant case had the same parties in both courts. He noted that the counterclaim was filed first and was set for trial whereas he had no information before him as to the status of the case in the Supreme Court.

[93] He also went on to consider the indication by counsel for the respondent that he would withdraw paragraph 2 of the prayer regarding the declaration. He took the view that the respondent's real claim was for damage done to his crops, fence and other property on 22 March 2013, which in his view made the claim quite simple. He concluded that the claim would not be fit for trial in the Supreme Court. I will set out his reasons for so concluding in full. These were:

> "(a) the low claim for damages;
>
> (b) the relative simplicity of the question of liability;
>
> (c) the fact that the parties here are the same as in the Supreme Court action; and [sic]

(d) the fact that the question as to whether or not there was adverse possession and a defeat of the plaintiff's title is an issue that can be determined by the Resident Magistrate's Court;

(e) the costs to be saved by having this matter proceed faster and in the same parish where the litigants and the subject matter of the suit are located;

(f) that even though this is not a court of pleadings, the statement of defence and claim should be adequate and as though one is responding to pleadings in the Supreme Court [See Wallace v Whyte (1961) 3 WIR 521 at 523] so this would address any defects by the absence of written pleadings. Defects in pleading and other areas of concern can also be addressed under the Rules by interrogatories, requests to admit facts, requests for disclosure and so forth as are available in the Supreme Court;

(g) the fact that the suit in the Supreme Court may well be an abuse of process as it was filed by the Defendant to cover the same issues that he could have resolved in the instant claim."

[94] The learned Resident Magistrate then went on to consider the appellant's position as regards the withdrawal of her claim by her counsel and proceeded to find that although her situation was unfortunate, the refusal of the application was not unfair to her. It is difficult to see how the learned magistrate arrived at that conclusion since he did not seem to have given any regard to the possible injustice to the appellant, the registered proprietor, who had initiated a claim for possession but who had thought, wisely or unwisely, that since the respondent had brought the same claim against her in the Supreme Court it may be best to meet his claim there, where all the issues between them could be resolved.

[95] In order to determine whether the learned Resident Magistrate properly exercised his discretion it is also necessary, in the circumstances of this case, to consider what the respondent sought in his counterclaim. In the counterclaim he sought damages for trespass against the appellant for an incident which occurred on 22 March 2013, a declaration that he is entitled as of right to possession of the said premises and to bar or extinguish the appellant's title by adverse possession and an injunction to restrain the appellant from continuing to trespass on his property.

[96] It is also necessary to consider what he has claimed in the Supreme Court. In the Supreme Court he has claimed an injunction against the appellant to restrain her from recovery of possession without an order from the court, a declaration as to his right of possession of the said premises and that the appellant's title is barred or extinguished by his adverse possession, that her title be barred by the statute of limitation and her right and title be extinguished and rectification of the register to remove the appellant as the registered proprietor of the said lands. Paragraph 3 of the particulars of claim include the allegation of trespass and damage to the property on 22 March 2013 (the subject of the counterclaim in the magistrate's court) although there is no specific claim for damages for that act of trespass. In the claim against the appellant's husband filed also in the Supreme Court the averments with respect to trespass are for different days but the claim is the same for damages for trespass, injunction and a declaration as to the respondent's right of possession.

[97] In **Graham v Nash** Carey JA gave some guidance as to the approach to be taken when exercising a discretion under section 130. At pages 572 – 573 he said:

> "... the real question for decision, which was, on balance which was the better forum having regard to the parties, the issues to be determined and the jurisdiction of the court to deal with all those issues at one and the same time..."

[98] Carey JA also relied on the authoritative dictum in **Evans v Bartlam** (1937) 2 All ER 646 at 650. He held that:

> "The Resident Magistrate is required to exercise the discretion conferred on him by section 130 of the Act, judicially. This court can only interfere with the exercise of that discretion where he is shown to have relied on some wrong principle of law or incorrectly applied a correct principle or did not take into consideration relevant circumstances."

[99] In **McNamee v Shields**, Morrison JA, in dealing with an appeal from the decision of a Resident Magistrate in relation to an application pursuant to section 130 of the Act and for a stay of the proceedings of the matter in the Resident Magistrate's Court, reiterated this point by stating at paragraph [47] that:

> "It is therefore necessary to examine carefully the basis upon which the resident magistrate exercised her undoubted discretion in respect of the appellant's application that the matter before her should be transferred to the Supreme Court to join with Claim No. 2007 HCV00711 and for a stay of the proceedings before her to await the outcome of the Supreme Court action."

[100] In that case having considered the Resident Magistrate's reasons for refusing to transfer the case to the Supreme Court and refusing a stay of proceedings, Morrison JA found that she had taken into account irrelevant factors and failed to take into account relevant factors.

[101] In the instant case the learned Resident Magistrate's assessment of the applicability of **Graham v Nash** can only be described, with the greatest of respect to him, as somewhat flawed. Even though he cited the case in his reasons he failed to mention the principles on which he should rely or to which he should have regard in coming to his decision. He sought to distinguish that case from the instant one by looking at who were the parties and concluding that **Graham v Nash** involved a third party.

[102] However, all the parties in that case were before the Supreme Court and only one party was not before the Resident Magistrate's Court. The matter before the Resident Magistrate's Court was for special damages arising from the negligent driving of a motor vehicle. The actions in the Supreme Court were a personal injury claim by a passenger in one of the vehicles against the driver of the other motor vehicle and a third party claim for indemnity by that driver. The passenger had no case in the Resident Magistrate's Court. However, the reasoning in that case cannot have lesser or greater applicability to this case for that reason only, as the husband of the appellant has also been sued in the Supreme Court by the respondent but not in the Resident Magistrate Court. This authority, in my view, would have even greater force in this case where it involves the same parties, same subject matter and similar if not the same cause of action and the learned resident magistrate seems to have ignored his own concern in that regard, which he expressed at paragraph (g) of his conclusions.

[103] The learned Resident Magistrate recognised that he did not have jurisdiction to grant the declaration sought. However, he failed to give this fact the consideration and

prominence it deserved in deciding whether or not to transfer the counterclaim. In his reasons he said he likened that relief to a request for a finding by the court and that in any event Mr Foote, the respondent's attorney, had indicated that he would withdraw the paragraph seeking the declaratory order. At the time of the application, his decision and up to the hearing of this appeal that prayer had not been withdrawn.

[104] Therefore, at the time of his decision the learned Resident Magistrate ought to have treated with the issues that were before him, that is, what were the orders being sought and whether or not the court had jurisdiction to grant those orders. He erred, firstly, in treating with the matter as if the prayer had been withdrawn and secondly, failing to recognize that the effect and purpose of a declaratory order is different from a finding of a court in coming to its decision. The treatment of this issue was unsatisfactory and led the learned Resident Magistrate to fall into error; as he clearly did not have the jurisdiction to grant a declaration and this should have been uppermost in his mind in considering which was the better forum.

[105] In relation to the costs, the parties would be dealing with the same matters in two different courts and the costs associated with that includes the time being devoted to attending court in relation to two separate matters, which is certainly more costly. The learned Resident Magistrate did not give sufficient consideration to the effect on the due administration of justice. In dealing with the effect of the refusal to transfer the case to the Supreme Court Carey JA in **Graham v Nash** at page 572 said:

> "...It was in the interest of all parties involved in the motor vehicle accident to have the issue of liability and assessment

> of damages adjudicated upon, so far as possible in the same forum. There would be considerable savings in costs and in time. Plainly the assessment of personal injuries could only take place in the Supreme Court. The refusal of the Order by the Resident Magistrate would prolong the determination of the issues between the parties. In the one case, there would be hearings in two different courts at some protracted interval. In the other, there would be a determination in one court. I do not think there can be any advantage to be gained in the former and justice therefore is better served in the latter..."

The above quote from Carey JA is equally applicable to the circumstances of the instant case.

[106] Borrowing the words of Carey JA "it is in the interest of all the parties involved to have the issue of who is entitled to possession resolved in the same forum". The respondent's claim to possession is based further on his claim of adverse possession of the premises. The claim for trespass is a claim based on possession. The respondent has raised the issue of the appellant's title and has claimed that it is barred and/or extinguished by virtue of his adverse possession. The appellant has the right to raise as a defence to trespass, her right to possession and her registered title, if any. This is what is being challenged in the Supreme Court. The husband's right to possession would flow from a license under his wife's title.

[107] If the learned Resident Magistrate determines the issue of trespass in favour of the respondent he would have to determine that the respondent has the greater right to possession as against the appellant. The Supreme Court may make an adverse finding against the respondent in the claim in that forum. There is no advantage to be gained by

the respondent in having that claim continue in the Resident Magistrate's Court where he will be forced to abandon his claim for the declaration; or where the learned magistrate may fall into error in granting what he has no power to grant. Justice is better served for both parties if the issue as to title adverse or otherwise and damages for trespass be dealt with in the same forum.

[108] There is nothing to prevent the respondent amending his claim against the appellant filed in the Supreme Court to add a claim for damages as the trespass is already alleged in the particulars of claim. The claim for a declaration is not one which the Resident Magistrate can properly grant and though he says the attorney for the respondent had indicated he would abandon that aspect of the claim, that had not been done up to the time of the resident magistrate's ruling.

Conclusion

[109] The learned Resident Magistrate was required to balance the scales and determine whether, having regard to the fact that the parties are the same, the issues are the same, the subject matter of the dispute is the same, the real remedy sought in the counterclaim is the same, the fact that the respondent voluntarily filed suit in the Supreme Court and it was a forum of his choice and the fact that the Supreme Court had the jurisdiction to grant the declaration sought, the matter before him should be transferred to the Supreme Court. The learned Resident Magistrate erred when he failed to take account of these relevant considerations and transfer the counterclaim to the Supreme Court.

[110] It is perhaps only necessary in disposing of this case to end with the learned resident magistrate's reasons listed at (g) in paragraph [92] above. If he is correct then that is the best argument for an exercise of his discretion to transfer if he felt it was filed "by the defendant to cover the same issues that he could have resolved in the instant claim." However, as it turns out the learned Resident Magistrate is not correct in relation to the forum, because some of the issues cannot be resolved in the Resident Magistrate's Court in the counterclaim as framed.

[111] It is true that the claim for damages for trespass is within the jurisdiction of the Resident Magistrate. However, the prayer seeking a declaration as to the right of possession is not one within the power of the resident magistrate to make. The learned Resident Magistrate was required to consider which forum was the proper one in light of the parties, the issues to be determined and his jurisdiction to deal with those issues in a way which would bring finality to the matter. This he failed to do.

[112] The learned Resident Magistrate therefore applied the correct principles incorrectly and considered irrelevant factors in coming to his decision. In the light of this, this court is obliged to interfere with the ruling made by the resident magistrate in the exercise of his discretion under section 130 of the Act.

[113] I will only make one further point on the issue of costs. Since the appellant had to apply to this court for extension of time to file notice of appeal the respondent is entitled to costs in that application. The appellant is however, entitled to costs in the appeal. As I result, I am of the view that each party should bear their own costs.

BROOKS JA

ORDER

1. Appeal allowed.
2. Order of the learned Resident Magistrate is set aside.
3. Counterclaim in Plaint No 192/2013 is to be transferred into the Supreme Court.
4. Each party to bear their own costs in this appeal.