

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00089

APPLICATION NO COA 2019APP00187

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE BROWN JA (AG)**

**BETWEEN DESENTRIE ANTHONY ALLEN APPLICANT
AND DONAT ANGELA-MAY ALLEN RESPONDENT**

**Nelton Forsythe and Claudia Forsythe instructed by Forsythe & Forsythe for
the applicant**

Patrick Forrester instructed by Forrester Law for the respondent

12 and 14 April 2021

BROOKS P

[1] We heard this application on 12 April 2021 and, having considered the material and the submissions of counsel, we made the following orders:

- “1. The application for extension of time to apply for permission to appeal is granted.
2. The application for permission to appeal is refused.
3. Costs to the respondent to be taxed if not agreed.”

We promised at that time to put our reasons in writing. We now fulfil that promise.

[2] The applicant, Mr Desentrie Allen, and his former wife, Mrs Donat Allen, are the proprietors of four parcels of real property. The basis of Mr Allen's complaint before this court is that an order (the allotting order) was made in the Supreme Court, which, he asserts, allotted the properties unfairly, between Mrs Allen and himself. He asserts that the two more valuable properties were allotted to Mrs Allen and the two lesser to him. That order was made in his absence, and without him being represented by counsel. Importantly, he does not deny that his then attorneys-at-law were served with notice of the application, which resulted in the allotting order.

[3] He applied to the Supreme Court to have the allotting order set aside, but another judge of that court refused his application (the refusal order).

This application

[4] He has applied to this court for permission to appeal from the refusal order. Mr Allen's present application was filed after the time allotted for such applications. He is, therefore, also obliged to apply for an extension of the time in which to apply for permission to appeal.

[5] In assessing applications for permission to appeal, it is necessary to apply the principles set out by Panton JA, as he then was, in the case of **Leymon Strachan v The Gleaner Company Limited and Another** (unreported) Court of Appeal, Jamaica Motion No 12/1999, judgment delivered 6 December 1999. Panton JA stated, in part, at page 20 of that judgment:

"The legal position may therefore be summarised thus:

- (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
- (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
- (3) In exercising its discretion, the Court will consider-
 - (i) the length of the delay;
 - (ii) the reasons for the delay;
 - (iii) whether there is an arguable case for an appeal and; [sic]
 - (iv) the degree of prejudice to the other parties if time is extended.
- (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

Applying the principles

The length of the delay

[6] The allotting order was made on 24 July 2018. It was on 30 August 2018 that Mr Allen filed his application to set it aside. The refusal order was made on 10 July 2019. A purported notice of appeal against the refusal order, was filed on Mr Allen's behalf on 4 September 2019, but that filing was after the stipulated 14 days for such appeals. Mr Allen's attorneys-at-law, then filed an application for extension of time within which to file the notice of appeal. That application came on before this court on 20 January

2020. At that time, the court pointed out to counsel for Mr Allen that the application was not properly before it, because there was no indication that an application had been made, in the Supreme Court, for permission to appeal from the refusal order.

[7] On 24 January 2020, Mr Allen filed an application in the Supreme Court for permission to appeal. The application was heard and refused on 1 December 2020.

[8] Mr Allen's present application for permission to appeal was filed on 18 December 2020. In order to regularise his situation in this court, however, Mr Allen also needed to apply for an extension of time in which to apply for permission to appeal. He regularised his application on 12 April 2021 when the case came on for hearing. Although the present application was only properly filed in this court some 18 months after the refusal order, the delay is not as egregious as first appears. The process was beset by errors and systemic delay, but it is apparent that there was always an intention to pursue the appeal. The length of the delay, therefore, is not determinative of the application.

The reason for the delay

[9] The above outline of the lethargic process of bringing this application before the court shows that the delays were more due to the length of time that applications take to come on for hearing, than delay on the part of Mr Allen's attorneys-at-law. Further, the procedural errors that they made, should not be visited upon him.

The existence of an arguable appeal with a realistic prospect of success

[10] Curiously, no affidavits have been filed addressing the merits of the case. Mr Allen filed no affidavits. All the affidavits filed in this court in this case have been sworn to by Mr Nelton Forsythe, one of the attorneys-at-law representing Mr Allen. The affidavits all speak to the process of attempting to have the present application placed before the court. Accordingly, there is no evidence before the court which seeks to demonstrate any error that the learned judge of the Supreme Court made when she made the refusal order. Nonetheless, an examination of the grounds of appeal may assist this analysis.

[11] Mr Allen's proposed notice of appeal included the following grounds of appeal:

- "1) That the learned trial judge took into account matters that were immaterial and or irrelevant in coming to her conclusions.
- 2) That the learned trial judge misdirected herself in her consideration of the material/evidence before her.
- 3) That in misdirecting herself the learned trial judge came to erroneous and or improper findings of fact.
- 4) That [Mr Allen] has a good and arguable appeal against the findings of the Honourable Court.
- 5) That [Mr Allen] has applied to this Honourable Court as soon as is reasonably practicable after the decision/orders have been made.
- 6) [essentially a duplicate of ground 2].
- 7) [a repetition of ground 3]."

Mr Allen also filed a proposed supplemental ground of appeal which reads:

"That the learned Trial Judge erred in law when she refused and/or failed to take into consideration that the action

commenced by way of Claim Form, when in fact the matter should have been initiated by way of Fixed Date Claim, land being the subject matter of the claim.”

[12] These proposed grounds do not suggest any real prospect of success. Apart from grounds 4 and 5, which are not, properly speaking, grounds of appeal, the original grounds lack specificity. They seem to suggest that the learned judge who made the refusal order was making findings of fact in the case. If that is so then they are clearly misdirected. If the findings of fact, referred to, speak to the process by which the case came on before the learned judge who made the refusal order, there is nothing which indicates what error that judge made.

[13] The proposed supplemental ground of appeal, if directed at the judge who made the refusal order, is without merit. It is not correct to assert that Mrs Allen’s claim should have been initiated by way of a fixed date claim form. Learned counsel for Mr Allen submitted that rule 8.1 of the Civil Procedure Rules (the CPR) requires a fixed date claim form to be used in land cases. That assertion is inaccurate. Rule 8.1(4) of the CPR requires a fixed date claim form to be used in, as far as land matters are concerned, “in mortgage claims” and “in claims for possession of land”.

[14] This matter is clearly not a mortgage claim. The allotting order does not suggest that it is one for possession of land, either. Despite the fact that two of the orders in the allotting order speak to granting possession to Mrs Allen, the claim is for division of property. The allotting order suggests that it is enforcing an agreement, which the parties had made, and setting off a debt that Mr Allen purportedly owed to Mrs Allen. In

any event, the claim for the recovery of the debt owed by Mr Allen would allow for a single claim form to be used, despite the difference in the nature of the claims. Rule 8.3 of the CPR allows such a procedure. It states:

“A claimant may use a single claim form to include all, or any, other claims which can be conveniently disposed of in the same proceedings.”

There is, therefore, no merit demonstrated by any of these prospective grounds of appeal.

Prejudice to the respondent if the application is granted

[15] Approximately 33 months have passed since the allotting order was made. Mrs Allen has not filed any affidavit whatsoever, and so has not addressed the matter of prejudice. Accordingly, the court has no evidence of prejudice, particularly concerning the status or use of any of the properties involved in the dispute between the Allens. It is sufficient to say, however, that the length of time speaks for itself. If Mr Allen were to be granted leave to appeal, there would be further delay. The performance of his attorneys-at-law thus far does not imbue confidence that the appeal would be efficiently and quickly brought on for hearing. This would result in further prejudice to Mrs Allen in obtaining the fruits of her judgment.

The decision in the context of the administration of justice

[16] Apart from that guidance from Panton JA, there is also guidance from Lightman J in **Commissioners of Customs and Excise v Eastwood Care Homes** (2000) Times, 7 March, [2000] Lexis Citation 2473, which stresses the importance of the effects of delay on the administration of justice. That, and other cases, emphasise that

the effect that the delays, in a particular case, has on other cases, must also be taken into account. The best use of the resources of the court is one of the factors to be considered in the overriding objective, which is referred to in rule 1.1 of the CPR. In considering this factor, the time that this case has taken and the likelihood that it will take significantly more time, if permission to appeal were to be granted, is important. Additional time would negatively affect the other cases that this court has to consider.

[17] Considering the overall status of the matter, there is no justification for granting Mr Allen permission to appeal from the refusal order.

Conclusion

[18] It is for those reasons that the court made the orders set out at paragraph [1] above.

FRASER JA

[19] I have read, in draft, the judgment of Brooks P. His reasoning accords with my own reasons for agreeing to the order that is recorded in paragraph [1] of Brooks P's judgment.

BROWN JA (AG)

[20] I too have read the draft judgment of my brother Brooks P and agree that it accords with my own reasons for agreeing to the orders made herein.