[2011] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 199/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**WILBERT CHRISTOPHER**	**APPLICANT**
A N D	**HELENE COLEY NICHOLSON**	**RESPONDENT**

Applicant in person

Ravil Golding instructed by Lyn-Cook, Golding & Co for the respondent

25 July and 18 November 2011

PANTON P

[1] I have read in draft the reasons for judgment of my learned brother Morrison JA. I agree with his reasoning and conclusion and have nothing further to add.

MORRISON JA

[2] On 25 July 2011, the court dismissed this application for an order discharging an order made by Cooke JA on 10 November 2009. These are my reasons for concurring in that decision.

[3] In early December 2008, the applicant consulted the respondent, who is an attorney-at-law in private practice, for professional advice. The applicant paid the respondent an initial consultation fee of $4,500.00, but a dispute then arose between them as regards the terms of the respondent's representation of the applicant thereafter. The applicant demanded the return of the $4,500.00, but the respondent refused (on grounds which are not now relevant) to make any refund.

[4] As a result, the applicant commenced an action against the respondent to recover this amount in the Corporate Area Resident Magistrate's Court at Sutton Street. This matter was set for trial on 5 August 2009. However, by the time the applicant arrived at court at 10:30 that morning, the matter had already been dealt with in his absence by the learned Resident Magistrate, who dismissed the applicant's claim for want of prosecution. The court had also, it appears, adjourned for the day. On 4 September 2009, the applicant filed an application to this court for enlargement of time within which to file an appeal from this decision. When this application was referred to Harris JA as the single judge in chambers, she directed that the application be placed before a judge in chambers for an *inter partes* hearing.

[5] By this means, the application therefore came before Cooke JA in chambers on 10 November 2009, at which time the applicant was present, but the respondent was neither present nor represented. Cooke JA dismissed the application, apparently on the ground that the appeal was premature, in that the applicant ought to have made an application to the Resident's Magistrate Court to set aside the order made in his

absence on 5 August 2009 dismissing the action against the respondent for want of prosecution.

[6] Before us, the applicant's grounds for seeking to discharge Cooke JA's order were that Cooke JA (a) had on 10 November 2009 ruled in the respondent's favour in her absence; (b) had refused to allow him to make a submission to the court; and (c) failed to comply with Harris JA's order that the matter be placed before a judge in chambers for an *inter partes* hearing.

[7] In an affidavit sworn to on 17 November 2009 and filed in support of the application, the applicant complained that Cooke JA acted "in conflict of the decision of [Harris JA]". The affidavit was silent as to the factual basis upon which an extension of time was being sought, although in a document headed "Point of Note", which was filed in this court on 31 January 2011, the applicant sought to advance a number of complaints. Firstly, the applicant contended, the decision of the learned Resident Magistrate who originally set his matter for trial on 5 August 2009, at a time "when the court would be on recess", and not in "the small claim court", was unjust. Secondly, that the decision of the learned Resident Magistrate "to struck [sic] out the claim at 10 am on the morning of the 5th August 2010 is unjust as the appellant was not given time to arrive for the trial as he had arrive at 10 30/am and was told that the court was closed for the day". And thirdly, that "the clerk of the court refusal to accept the appellant [sic] deposit for the security of cost for the notice of appeal was an abuse of her power and office as the matter should have gone before the senior RM".

[8] Mr Ravil Golding for the respondent contented himself with a couple of simple points, firstly, that no good reason had been put forward by the applicant for the failure to file his appeal from the order of the Resident Magistrate in time, and secondly, that there was, in any event, no merit in the applicant's substantive claim.

[9] In my view, Mr Golding was plainly correct in both these submissions. In ***Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes*** (Motion No. 12/1999, judgment delivered 6 December 1999), this court held that on an application for extension of time to file an appeal, the applicant will generally be expected to show (i) some satisfactory reason for the delay, and (ii) that there is some substance in the intended appeal (see per Harrison JA, as he then was, at pages 5 – 7 and Panton JA, as he then was, at page 17). In order to succeed on his application before Cooke JA, therefore, the applicant was required to show that he had a good explanation for not having filed the appeal within time and that he had an appeal that had some chance of success.

[10] I am clearly of the view that neither of these criteria was satisfied in this case and that Cooke JA was correct to dismiss the application for leave to appeal out of time. As regards the first, the only hint in the material placed before the court by the applicant of the circumstances in which he came to miss the deadline for filing his appeal from the decision of the Resident Magistrate is to be found in the laconic reference in his "Point of Note" to "the clerk of court refusal to accept the appellant deposit for the security of cost for the notice of appeal". I have been completely unable to extract anything meaningful from this statement and certainly nothing by way of an

explanation for the filing of the appeal out of time in the first place. As regards the second criterion, the applicant's position strikes me as equally unpromising. By his own account, the applicant arrived half an hour late for court on 5 August 2009 and, in the absence of any reason having been advanced by him to suggest that the Resident Magistrate exceeded her authority or misused her discretion in deciding to strike out the claim for want of prosecution, it seems to me that an appeal from that decision would be bound to fail.

[11] For completeness, I should add that, in my view, nothing at all turns on the three grounds of challenge to Cooke JA's decision which were put forward by the applicant (see para. [5] above). In the first place, there is no rule of either law or practice that precludes a court from ruling in favour of a party who is absent from the hearing at which the ruling is made; secondly, there is nothing on the record to suggest that the applicant was in any way deprived of an opportunity to advance anything that he wished to put forward at the hearing before Cooke JA; and thirdly, Harris JA's order that the matter be placed before a judge in chambers for an *inter partes* hearing could in no way fetter or circumscribe the full discretion of the judge who actually heard the application to deal with the matter as best as he thought appropriate in all the circumstances of the case.

[12] I would accordingly dismiss this application, with costs to the respondent, fixed at $15,000.00.

HIBBERT JA (Ag.)

[13] I too have read the reasons for judgment of Morrison JA and I agree with his reasoning and conclusion.