

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 76/2016

APPLICATION NOS 224/2016, 1/2017 AND 49/2017

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

**BETWEEN ANGELA CLARKE-MORALES APPLICANT
AND SUNSWEPT JAMAICA COMPANY LIMITED RESPONDENT**

Lijyasu M Kandekore for the applicant

**Georgia Gibson-Henlin QC and Miss Stephanie Williams instructed by Henlin
Gibson Henlin for the respondent**

20, 21 March and 7 April 2017

ORAL JUDGMENT

PHILLIPS JA

[1] There were three applications before this court. They all arose from the decision of Batts J made in claim HCV 02378 of 2014, wherein he made findings in respect of a fixed date claim form filed by Sunswept Jamaica Company Limited (Sunswept) against the Registrar of Titles (the registrar) and Mrs Angela Clarke-Morales, with regard to the endorsement of caveat no 1683338 on the certificate of title registered at volume 695 folio 84 of the Register Book of Titles.

[2] The fixed date claim form sought the following orders:

- “1. An order compelling the Registrar to uphold and substantiate the grounds for her refusal to remove caveat 1683338 as set out in her reasons for refusal dated February 19, 2014.
2. A Declaration that the Registrar has acted in breach of Section 140 of the Registration of Titles Act by wrongly refusing to remove caveat 1683338.
3. A Declaration that the Registrar comply [sic] with Section 140 of the Registration of Titles Act and remove caveat 1683338.
4. Costs
5. Such further and other relief as this Honourable Court may deem just.”

[3] The registrar had contended that the wrong process had been used by Sunswept to challenge her endorsement of caveat no 1683338, and further, that she had no power under section 140 of the Registration of Titles Act (ROTA) to remove the said caveat, which had already been registered on the said title. Mrs Clarke-Morales contended that there was no claim being made against her so she ought not properly to have been made a party to the action.

[4] Batts J in his reasons for judgment set out some of the history to claim no HCV 02378 of 2014. He stated that in 1989, caveat no 102036 had been lodged against the said certificate of title registered at volume 695 folio 84 of the Register Book of Titles. The caveator, Miss Nadia Nadiak, claimed an equitable interest in the property based on: (i) having entered into a contract with Sunswept (the owner of the property); (ii) a promise of a share in the property, and (iii) having done substantial improvements to

the property. This caveat was warned after an attempt to register a mortgage on the property. Miss Nadiak filed a fixed date claim form HCV 04115 of 2010, and sought an injunction to prevent registration of the mortgage. This claim was later amended to include Mrs Clarke-Morales as one of the claimants. Both parties claimed to have been in open and undisturbed possession of the property in excess of 12 years and, pursuant to the Limitation of Actions Act, averred that the title to the said premises would have been extinguished. Sunswept, as the owner of the premises, was the defendant in HCV 04115 of 2010. Miss Nadiak and Mrs Clarke-Morales obtained injunctions in HCV 04115 of 2010, but these were later discharged by Campbell J.

[5] Mrs Clarke-Morales claimed by way of affidavit in support of the fixed date claim form in HCV 04115 of 2010, that she, as a friend and sister of Ms Nadiak, and at her request, based on her concern that the property was falling into great disrepair, undertook to oversee the property, pay taxes and utilities and maintain its general upkeep. Mrs Clarke-Morales lodged caveat no 1683338 on the said title in her own name. Sunswept discovered this caveat whilst preparing its case in HCV 04115 of 2010 and so it alleged through correspondence, that it had the right to have the caveat removed. It claimed that the caveats were lodged by the same entity protecting the same interest in respect of the same estate and ROTA did not permit renewal of the caveats. Having received the registrar's response pursuant to section 156 of ROTA (explaining that it could not remove the caveat pursuant to section 140 of ROTA and that the later caveat was not a renewal of the caveat lodged originally), Sunswept on 16 May 2014 filed suit HCV 02378 of 2014 against the registrar and Mrs Clarke-Morales.

[6] Both the registrar and Mrs Clarke-Morales filed applications on 2 December 2015 and 6 January 2016 respectively, to dismiss the claim on the basis that it had disclosed no cause of action or no reasonable grounds for bringing the claim. In his reasons for judgment, Batts J set out the regime under section 140 of ROTA for the removal of caveats. He also reviewed sections 156, 160 and 143 of ROTA. He concluded that Sunswept had not followed the correct formalities set out in ROTA and he indicated that the claim could have been dismissed on that reason alone. However, he said in an effort not to waste the courts time and resources, and on the basis that if the claim was dismissed for irregularities alone, the claim could be filed again by Sunswept, the learned judge examined the above provisions and facts in detail relative to the said applications, and he concluded that the case against the registrar and Mrs Clarke-Morales was without merit. The registrar, he said, could not remove a caveat under section 140 of ROTA, the caveat must be warned as set out in ROTA. Additionally, caveat no 1683338 was lodged by Mrs Clarke-Morales and was not a renewal of caveat no 102036 as it had not been lodged by the same person in respect of the same estate or interest.

[7] It was Mrs Clarke-Morales's specific contention before Batts J, which the court accepted, that she had filed caveat no 1683338 in her own right, in her own name, and not on behalf of anyone else, to protect substantial improvements effected to the said property by her, and thus the parties in respect of the two caveats being different, section 156 of ROTA was inapplicable. As a consequence on 15 June 2016, the learned

judge granted the application to dismiss the registrar and Mrs Clarke-Morales from the claim with costs. He gave his reasons dated 15 July 2016.

[8] On 4 August 2016, Sunswept filed notice and grounds of appeal. It was late. On 12 August 2016, Sunswept filed an application for extension of time to file the notice and grounds of appeal out of time. It was heard in the Court of Appeal on 22 November 2016, and the court granted an order that the notice and grounds of appeal filed 4 August 2016 was to stand in respect of Mrs Clarke-Morales only. On 30 November 2016, Sunswept filed an amended notice of appeal, which it claimed reflected the true and proper situation in the appeal that is without any specific reference to any claim with regard to the registrar.

[9] The following activities took place between December 2016 and March 2017 which have been gleaned from the procedural history filed by Mrs Clarke-Morales on 23 March 2017 and the chronology of events filed by Sunswept on 21 March 2017:

1. On the 2 December 2016, counsel for Mrs Clarke-Morales (Mr Lijyasu Kandekore) filed application no 224/2016 asking for an order striking out Sunswept's amended notice of appeal filed 30 November 2016. Mr Kandekore indicated that he had served the affidavit in support of this application on 6 December 2016, while counsel for Sunswept (Mrs Georgia Gibson Henlin QC) stated that service of the notice and affidavit had been effected on 10 January 2017.

2. On 5 December 2016, Sunswept filed the record of appeal which was served on the same day.
3. On 6 December 2016, Mr Kandekore wrote requesting that certain documents be included in the record of appeal.
4. On 21 December 2016, Mr Kandekore wrote to the registrar of the Court of Appeal advising her that Sunswept had not filed or served skeleton arguments, and requested that the registrar of the Court of Appeal take steps to dismiss the appeal.
5. On 23 December 2016, the registrar of the Court of Appeal advised Sunswept by registrar's notice that Sunswept was out of time and that Sunswept should take the necessary steps as warranted in furtherance of the appeal.
6. On 3 January 2017, Mr Kandekore filed application no 1/2017 to dismiss the appeal with affidavit in support. He stated that service of the notice and affidavit in support, was effected on Sunswept's attorneys on 10 January 2016. Mrs Gibson Henlin indicated that she had received the undated notice on 10 January 2017,

but had received the sealed notice on 13 February 2017.

7. On 9 February 2017, the order on the notice of application for extension of time to file notice and grounds of appeal was served on Mr Kandekore.
8. On 13 February 2017, the sealed notice of application no 224/2016 was served on Sunswept's attorneys.
9. On 7 March 2017, Sunswept filed a supplemental record of appeal and served it on Mr Kandekore.
10. On 13 March 2017 the following occurred:
 - (i) Application no 49/2017 to strike supplemental record of appeal with affidavit in support was filed. It was served on Sunswept on 14 March 2017.
 - (ii) "Skeleton Submissions of the Appeal" were filed by Sunswept and served on Mr Kandekore.
11. On 16 March 2017, the affidavit of Stephanie Williams was filed in response to the affidavit of Lijyasu Kandekore.
12. On 20 March 2017, Sunswept filed skeletal submissions in relation to all the notices and service

was effected in court during the proceedings on the same day.

I will now examine the three applications before us: application nos 224/2016, 1/2017 and 49/2017.

Application no 224/2016

[10] In application no 224/ 2016, Mrs Clarke-Morales sought:

- "a. An order striking out [Sunswept's] "Amended Notice of Appeal" filed herein on the 30th November, 2016;"

She also sought costs and attorney's costs.

[11] The grounds upon which Mrs Clarke-Morales sought that order are as follows:

- "a. This Court by order granted [Sunswept] an extension of time within which to appeal in terms of para. 1 of its Notice of Application filed 12th August, 2016, to wit, that [Sunswept's] Notice of Appeal filed on the 4th August, 2016 stands as filed;
- b. [Sunswept] has violated the order by filing a document entitled 'Amended Notice of Appeal' which is different from that Notice of Appeal filed on 4th August, 2016 and which was the only one authorized by the Court and which was already filed."

[12] The affidavit of Mr Kandekore in support of the application repeated the grounds as stated but claimed that the amended notice of appeal filed 30 November 2016, was an "unlawfully filed document" and it should be struck out. He relied on the affidavit of Miss Stephanie Williams, filed on 16 March 2017, wherein she deponed that at the hearing of Sunswept's application for extension of time, she as an associate attorney,

representing Sunswept, was present in court and heard Queen's Counsel, also representing Sunswept, inform the court that the notice and grounds of appeal would be amended to reflect that the appeal would continue only in relation to Mrs Clarke-Morales and not against the registrar (as ordered by the court). She indicated that that was the basis on which the notice and grounds of appeal had been amended and insisted that the only matters deleted from the grounds of appeal were those which referred to the registrar, and that no changes had been made in respect of the relief claimed or the grounds of appeal in relation to Mrs Clarke-Morales. She further deposed that Mrs Clarke-Morales would suffer no prejudice as a result of the amendments made.

[13] It is clear that this court on 22 November 2016, permitted the notice and grounds of appeal to stand but not as against the registrar. The appeal is therefore not proceeding against the registrar. So it seems only reasonable for Sunswept to file an amended notice and grounds of appeal on 30 November 2016, which properly reflected the parties to the appeal and the issues in controversy between them on appeal. Removal of references to the registrar could not therefore in any way prejudice Mrs Clarke-Morales, and any claim to that effect would fly in the face of common sense.

[14] Additionally, if there are other matters relative to the appeal between Sunswept and Mrs Clarke-Morales that are now in the amended document we are not of the view that that would offend the Court of Appeal Rules (CAR). Rule 1.12 of CAR states that an appellant may amend the grounds of appeal once without permission at any time within 21 days after receiving the notice under rule 2.5(1)(b) or (c) of CAR in the case of a civil appeal. However, under rule 2.5(4) of CAR, rule 2.5(1)(b) of CAR is inapplicable to

the instant case since no oral evidence has been taken. Batts J found that there was no reasonable cause of action against the registrar and Mrs Clarke-Morales, and dismissed the claim with costs. Consequently, this is not a procedural appeal because it decided the substantive issues between the parties. It would also appear in the circumstances of this case that there would not have been any transcript of the evidence. In these circumstances, no permission would have been required to file an amended notice and grounds of appeal since the time limited for doing so under rule 1.12 of CAR had not elapsed. The amended notice and grounds of appeal are therefore valid. This application must therefore fail.

Application no 1/2017

[15] In application no 1/2017, Mrs Clarke-Morales sought an order dismissing the appeal with costs and attorneys' costs. This application was made upon the following grounds:

- "a. This Court by order granted [Sunswept] an extension of time within which to appeal in terms of para.1 of its Notice of Application filed 12th August, 2016, to wit, that [Sunswept's] Notice of Appeal filed on the 4th August, 2016 stands as filed;
- b. [Sunswept] has failed to comply with the CAR by wilfully disregarding the provisions for filing skeleton arguments and other prescribed documents in a timely fashion or at all and [Sunswept] has in effect abandoned the Appeal;
- c. Such further and or other relief as is just and reasonable in all the circumstances."

[16] Mr Kandekore's position is that the skeleton arguments should have been filed within 21 days of the filing of the notice of appeal which is pursuant to rule 2.6(1) of CAR which would have been 21 days subsequent to 4 August 2016. Counsel submitted that he accepted that the order of the Court of Appeal, on 22 November 2016, did not make any reference to the filing of skeleton arguments and certainly did not give any specific date within which they were to be filed. Nonetheless, he relied on rule 2.20 of CAR permitting a party to apply to dismiss the appeal as the appellant had failed to comply with provisions related thereto in the rules. He maintained that since the skeleton submissions filed on the 13 March 2017 were wrongly filed, the appeal could not stand without the permission of the court which had not been requested or granted.

[17] Sunswept's contention through counsel was that the Court of Appeal had extended the time for filing the notice and grounds of appeal, but had not concomitantly granted an extension of time for filing skeleton arguments. It was submitted that the skeleton arguments could not have been filed prior to the order of the court on 22 November 2016, as until that date, the appeal had no efficacy. Subsequent to the order of the Court of Appeal, ordering the appeal to stand as properly filed, there was then a valid notice and grounds of appeal. The amended notice of appeal was duly filed on 30 November 2017, regularising Sunswept's then position as stated previously. Subsequent thereto, the record of appeal was filed on 5 December 2016. The supplemental record of appeal was filed on 7 March 2017 and the skeleton arguments were filed on 13 March 2017.

[18] Counsel submitted that the case management conference had not yet been held and it was at the case management conference when all applications ought to be filed in respect of any time periods which had not been met. An application to regularise the filing of skeleton submissions would therefore be properly made at that time. Filing a plethora of applications, Queen's Counsel submitted, only caused delay, and the filing of the applications before this court (namely 224/16, 1/2017 and 49/2017) could have been avoided by discussion between counsel. Queen's Counsel indicated that she had not been made aware that any problem existed that could not have been dealt with at the case management conference. She submitted further that Mrs Clarke-Morales was experiencing no prejudice, for as a consequence of Batts J's decision, her caveat remains extant resulting in serious prejudice to Sunswept as they are unable to use the subject property freely without restraint. Miss Stephanie Williams deponed in her affidavit in opposition to this application sworn to on 15 March 2017 at paragraph 23 that the numerous applications filed by Mrs Clarke-Morales "are inimical to the good order and the administration of justice in accordance with the overriding duty to dispose of matters expeditiously with limited costs". Counsel claimed that all relevant documents have been filed with respect to the conduct of the appeal, and all matters relative to the advancement of the appeal can be dealt with at the case management conference, particularly in relation to any applications for the extension of time. As a consequence, she submitted that application no 1/2017 ought to be dismissed with costs.

[19] Initially, Mr Kandekore indicated that he had been unaware that the document filed by Sunswept entitled "Skeleton Submissions of the Appellant" filed on 13 March 2017, were indeed Sunswept's "skeleton arguments" pursuant to rule 2.6 of CAR. Mrs Gibson-Henlin pointed out that the document entitled "Skeleton Submissions of the Appellant" filed on 13 March 2017 and served on Mr Kandekore's office on 14 March 2017, indeed represented the "skeleton arguments" to be filed under rule 2.6 of CAR.

[20] Pursuant to rule 2.6(1)(c) of CAR, the skeleton arguments ought to be filed within 21 days of the filing of the notice of appeal where no oral evidence has been taken in the matter. As a consequence, in this matter the skeleton arguments ought to have been filed within 21 days of the order of the Court of Appeal on 22 November 2016, although there was nothing preventing the skeleton arguments from being filed within 21 days of the notice of appeal filed on 4 August 2016. The application for extension of time made to this court could therefore have asked for both the notice of appeal and the skeleton arguments to stand. Be that as it may, 21 days from 22 November 2016, would be 14 December 2016, and so the filing of the submissions on 13 March 2017, would have been approximately three months late, and would have required permission from the court to extend the time to file and serve the said skeleton arguments.

[21] Whereas we accept that applications for extension of time and other procedural applications for the advancement of the process of the appeal can take place at a case management conference, there is no provision in CAR which states that all such applications ought only to be heard then. Indeed, rule 2.9(1) and (2) of CAR relating to

case management, focuses on the parties receiving directions to file statements of facts and issues, core bundles, written submissions and the time allotted for the hearing of the appeal. Nonetheless although the skeleton arguments are out of time, Mr Kandekore indicated graciously that he would be willing to withdraw application no 1/2017 to strike out the appeal on the basis that the document had now been filed. However, he later asked for the application to be reinstated with regard to the issue of costs. We do not consider that three months delay is sufficiently inordinate for this court to take the harsh and draconian approach to strike out the appeal. In any event, although Sunswept's skeleton arguments were indeed out of time, the application to strike out the appeal had been withdrawn, and so no consideration with regard to costs could be given.

Application no 49/2017

[22] Mrs Clarke-Morales sought the following orders in application 49/2017:

- "a. An order striking out from [Sunswept's] Supplemental Record of Appeal the affidavit of Nadia Nadiak-Parchment and the affidavit of Angela Clarke Morales contained in [Sunswept's] 'Supplemental Record of Appeal' filed herein on the 7th March, 2017; and
- b. An order directing [Sunswept] to include in the supplemental record of appeal all the documents requested to be so included by [Mrs Clarke-Morales]."

[23] The grounds upon which this application was filed are:

- "a. That the affidavit of Nadia Nadiak-Parchment and the affidavit of Angela Clarke-Morales are both from the Supreme Court case **Claim No. 2010 HCV 04115** are irrelevant to the appeal and did not form part of

the record before the Supreme Court when it considered [Mrs Clarke-Morales's] application to dismiss [Sunswept's] claim form and which is the subject of the instant appeal;

- b. [Sunswept] has wilfully refused to complete the record of appeal in accordance with the rules and as requested by [Mrs Clarke-Morales].

[24] Mr Kandekore's main contention was that the affidavits of Nadia Nadiak and Mrs Clarke-Morales were filed in claim no HCV 04115 of 2010, and were not before Batts J in the court below. They did not, he submitted, form a part of the record in that court, and should therefore be struck from the supplemental record of appeal. He indicated that Sunswept had not complied with the provisions in relation to appeals from the Supreme Court in civil appeals, particularly in respect of rule 2.7(2)(c) of CAR, in that they had failed to include documents that he had indicated he wished to have included in the record of the core bundle. He set out certain documents in paragraph 4 of his affidavit in support of this application, and referred to a letter that was attached to his affidavit, dated 4 December 2016, that he wrote to Mrs Gibson-Henlin, requesting that these documents be included in the core bundle.

[25] Mrs Gibson-Henlin had indicated that the documents that he wished to be included did not fall within rules 2.7(3)(i)-(v) of CAR. However, within the spirit of comity, she had included in the supplemental record most of the documents that he had requested. However, issues still remained with regard to the two affidavits that Mr Kandekore claimed had not formed a part of the record below. Mrs Gibson Henlin's contention was that the affidavits were relevant to the appeal, as they set out the position taken by Mrs Clarke-Morales and Miss Nadiak in the earlier suit, claim no HCV

04115 of 2010, which she submitted was inconsistent with the position they had taken subsequently before Batts J. The affidavit, she stated, had been "incorporated by reference".

[26] It appears that in this matter most of the documents referred to in the letter on 4 December 2016, and in the affidavit in support of this application have been included in the supplemental record of appeal and are no longer the subject of any complaint. However, the outstanding issues therefore relate to the affidavits of Miss Nadiak and Mrs Clarke-Morales. Neither of those two affidavits were placed before this court and as a consequence we would be left to speculate whether the affidavits are relevant to the appeal from Batts J's decision. In the reasons for judgment given by Batts J, he found that Mrs Clarke-Morales had an independent interest and had lodged a caveat protecting her own rights with regard to substantial sums that she claimed that she had expended on the property. The caveat that she had lodged, he stated, had not indicated that she had been acting on behalf of herself and Miss Nadiak. There is no indication in his reasons that there were conflicts between the affidavit evidence of these two affiants which would lead us to conclude that these affidavits may not have been before the learned judge. But we do not know. As a consequence, we are not minded to include them in the supplemental record of appeal particularly as no proper formalities have been conducted by Sunswept for the court to give any consideration as to whether or not they should be included therein. Accordingly, they are struck therefrom as no specific application had been to include them, and part 30 of the CPR does not embrace what Sunswept was seeking to do.

Conclusion

[27] In the light of all the above, Sunswept has succeeded on application no 224/2016, Mrs Clarke-Morales has succeeded somewhat on application no 49/2017 and application no 1/2017 has been withdrawn. As a consequence, on a thorough consideration of the parties' competing contentions on the respective applications, in the exercise of our discretion, we have decided that there shall be no order as to costs.