[2014] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 66/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**PRIMROSE COHEN**	**APPLICANT**
AND	**ROLLINGTON STERLING**	**1ST RESPONDENT**
AND	**LINVAL STERLING**	**2ND RESPONDENT**

Carlton Williams instructed by Williams McKoy and Palmer for the applicant

William McCalla instructed by Robinson Phillips and Whitehorne for the respondents

14, 29 November 2013 and 7 March 2014

MORRISON JA

[1] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[2] I have read, in draft, the judgment of Brooks JA and agree that his reasoning and conclusion form the basis for our decision to dismiss Miss Cohen's application.

BROOKS JA

[3] On 14 November 2013, we heard Ms Primrose Cohen's application for an extension of the time allowed for filing an appeal. On 29 November 2013 we refused the application with costs to the respondents, Messrs Rollington Sterling and Linval Sterling, and promised to put our reasons in writing at a later date. We now fulfil that promise.

[4] Ms Cohen is aggrieved by an order made in her absence on 19 March 2012 by the learned Resident Magistrate for the parish of Saint Mary. It will be referred to hereafter as "the default judgment". The default judgment was that Ms Cohen should quit and deliver up to the Sterlings, by 31 May 2012, possession of premises at lot 65 Tremelsworth Land Settlement in the parish of Saint Mary (the premises). Ms Cohen is also aggrieved by the learned Resident Magistrate's refusal to consider an application to set aside the default judgment. She wishes to appeal against both the default judgment and against the learned Resident Magistrate's refusal to set it aside. She however did not file a notice of appeal within the stipulated time. Before assessing her application to this court, to extend the time within which to appeal, the background facts will be outlined.

Background facts

[5] Ms Cohen asserts that since she was a child she has been living at the premises with her parents and other family members. The property was apparently originally

owned by Mr Arthur Douglas. Mr Arthur Douglas died and devised the property in his will to his son Mr Morris Douglas.

[6] The Sterlings claim to have purchased the property from Mr Morris Douglas and filed their claim against Ms Cohen for possession of the premises. When the claim was first before the court Ms Cohen was present and stated her defence to it. She informed the learned Resident Magistrate that she disputed the Sterlings' title and claim to possession. She asserted then, that she had "been paying lease to Mr Morris Douglas who is the owner of the property". The case was thereafter set for trial. It was subsequently adjourned on several occasions without the trial being commenced. Ms Cohen did not attend on 19 March 2012 and the matter proceeded in her absence.

[7] Ms Cohen did not deliver up possession as ordered by the learned Resident Magistrate, and on 11 June 2012 the court's bailiff evicted her from the premises, placing her belongings outside. This was done pursuant to a warrant of possession issued by the Resident Magistrate's Court for the parish of Saint Mary. Despite that official action, Ms Cohen re-entered the premises after the bailiff had left. There is a dispute of fact as to who it was that physically replaced the items in the house, but it appears that Ms Cohen did resume occupation of the premises.

[8] Ms Cohen applied to the Resident Magistrate's Court for the default judgment to be set aside. She asserted that she was ill on the day that it was handed down. The application came on for hearing on 9 July 2012. The learned Resident Magistrate

refused to hear it, however, on the basis that, the warrant of possession having been executed, the court's authority was spent.

[9] The Sterlings then made an application to have Ms Cohen committed to prison for her re-occupation of the premises, but up to the date of our decision that application had not been heard and Ms Cohen was still in possession thereof. The application had been adjourned on several occasions while Ms Cohen pursued a related claim in the Supreme Court. That claim was eventually withdrawn on the basis that the relief sought therein was misconceived.

[10] It was after that withdrawal that Ms Cohen sought to pursue the present application before this court. She filed the application on 26 June 2013.

The submissions in outline

[11] Mr Williams submitted on Ms Cohen's behalf that this court is authorised by section 266 of the Judicature (Resident Magistrates) Act and section 12 of the Judicature (Appellate Jurisdiction) Act to grant the extension of time. He argued that Ms Cohen's delay in filing the present application was not out of wilful disregard for the rules of the court but, instead, was born of impecuniosity in the first instance and, thereafter, of mistake as to the correct course to be pursued to have the judgment set aside. He pointed to the claim that Ms Cohen had pursued in the Supreme Court as evidence that she was not sleeping on her rights but was always interested in pursuing them. Learned counsel argued that the justice of the case required Ms Cohen to be granted permission to appeal the decisions of the learned Resident Magistrate.

[12] Mr McCalla on behalf of the Sterlings submitted that the reliance on section 266 and section 12, mentioned above, was misplaced. Learned counsel relied heavily on section 256 of the Judicature (Resident Magistrates) Act, which addresses the payment of the security for the costs of an appeal. He submitted that previous decisions of this court had established that in the absence of the payment, within the prescribed time, of the sum stipulated for securing the costs of the appeal, this court ought not to grant permission to appeal. He further argued that the court had also established that it could not extend the time within which to pay the sum for the security for costs. He relied, for support of those submissions, on the cases of **Wilbert Christopher v Attorney General of Jamaica** RMCA Motion No 26/2001 (delivered 9 November 2001) and **Patterson and Nicely v Lynch** (1973) 12 JLR 1241. In the absence of that payment, Mr McCalla submitted, the present application must fail.

The analysis

[13] The assessment of this application requires the court to examine and apply three sections of the Judicature (Resident Magistrates) Act and section 12 of the Judicature (Appellate Jurisdiction) Act. The first section from the former Act is section 186, which allows a Resident Magistrate to set aside a judgment given in the absence of a defendant. It states:

> "186. If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial

> of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:
>
> **Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon**, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose." (Emphasis supplied)

It will be noted that the proviso to the section allows the Resident Magistrate to set aside the judgment as well as any execution of that judgment. The effect of the proviso would support the merits of Ms Cohen's complaint against the refusal of the learned Resident Magistrate to set aside the default judgment.

[14] The second section that is relevant to these proceedings is section 256. The relevant portion states:

> "256. The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then **a written notice of appeal shall be lodged with the Clerk of the Courts, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of six hundred dollars as security for the due prosecution of the appeal**, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of six thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
>
> Such last-mentioned security shall be given either by deposit of money in the Court, or by the party appealing entering

> into a bond, with two sureties to be approved by the respondent, or, in case of dispute, by the Clerk of the Courts with an appeal to the Magistrate. No stamp duty shall be payable on such bond...." (Emphasis supplied)

[15] Mr Williams quite properly pointed out that the **Christopher** and **Patterson and Nicely** cases may be distinguished from the present case in that the appellant in each of those decided cases had lodged appeals within the stipulated time, but had failed to pay the security sum. This court ruled in each case that the failure to make the payment was fatal to the respective appeals. It further ruled that it had no authority to extend the time for payment of the sum.

[16] The decision of this court in **Ralford Gordon v Angene Russell** [2012] JMCA App 5, does however, assist the present analysis. In that case, it was held that the court could extend the time to file an appeal from the Resident Magistrate's Court if no notice of appeal had been lodged prior to the application being made. The **Christopher** and **Patterson and Nicely** cases were considered and distinguished on the basis mentioned by Mr Williams. The circumstances in **Ralford Gordon** would, however, be applicable to Ms Cohen's case. The result would be that this court is entitled to extend the time to appeal if Ms Cohen fulfils the other requirements for such applications.

[17] The third relevant section is section 266. It guides this court on its assessment of applications for orders to correct omissions (including failure to file the notice of appeal in time) by prospective appellants. The section states as follows:

> "266. The provisions of this Act conferring **a right of appeal in civil causes and matters shall be construed liberally in favour of such right**; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed **it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from, inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment**, order or proceedings appealed from." (Emphasis supplied)

[18] Section 12(1) of the Judicature (Appellate Jurisdiction) Act stipulates that an appeal shall lie to this court from a decision of the Resident Magistrates' Courts. Section 12(2) complements section 266, cited above. It allows this court to extend the time, prescribed elsewhere, for the filing of a notice of appeal, for the filing of the grounds of appeal or for the payment of the security for costs. Section 12(2) states:

> (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**. (Emphasis supplied)

[19] Having determined that this court is authorised to extend the time for Ms Cohen to file a notice of appeal, it is now to be determined whether it should do so bearing in

mind the guidance provided by section 266 and provided by the principles established by the case law on the point. The which case has, recently, often been cited in respect of assessing applications such as Ms Cohen's, is **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999). Panton JA (as he then was) stated the relevant principles at page 20 of the judgment in that case. He said:

> "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;
>
> (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."

Ms Cohen's application shall be assessed along these lines.

a. The length of the delay

[20] It cannot be denied that Ms Cohen's delay in making this application has been lengthy. It was filed 15 months after the date of the default judgment and approximately a year after the learned Resident Magistrate's refusal to set aside the default judgment. Ms Cohen was aware that she had failed to attend court on the date that the default judgment was delivered and yet she did nothing about the matter until the bailiff had executed the warrant of possession. It is true, however, that delay, by itself, will not be fatal to her application.

[21] Delay, nonetheless, is not a minor element in its assessment. The year that it took her to make this application must be considered inordinate and must be held against her in this assessment.

b. The reasons for the delay

[22] Ms Cohen proffered two reasons for her tardy application. In her affidavit in support of her application, she stated that "impecuniosity" prevented her from taking any step prior to the execution of the warrant of possession. Her second reason was that she was seeking the assistance of the Supreme Court in, among other things, reviewing the Resident Magistrate's refusal to set aside the default judgment. Mr Williams argued that, although Ms Cohen was represented by counsel in that claim, the error in that procedure was understandable and the correction of the situation was certainly beyond the abilities of a layman.

[23] Although impecuniosity has been accepted by this court as a good reason for delay in some circumstances, that reason would not readily assist a litigant in Resident Magistrates' Courts' proceedings. In that court a litigant is entitled to have the assistance of the clerk of that court in relation to the procedure to be adopted. Ms Cohen's foray in the Supreme Court, although misguided, may, however, be held in her favour in this application for extension of time. It shows a diligence in pursuing her claim.

c. The merits of the defence

[24] Ms Cohen's defence is somewhat convoluted. She asserts that she is not the occupier of the premises which are the subject of the default judgment. In her affidavit in support of her application, she contends that it is her father, Mr Winston Cohen, who has occupied the premises without hindrance or permission for in excess of 12 years, and has been paying taxes for the property. According to her, it is mostly his items of furniture that were in the house and it is he who put them back in the house after the warrant of possession had been executed. This conflicts with her defence stated to the learned Resident Magistrate that the owner of the property is Mr Morris Douglas.

[25] Ms Cohen, in her affidavit filed on 26 June 2013, asserted that she has been living there with her parents since she was a child. She admitted to them having paid rental to Mr Morris Douglas for some time.

[26] In light of that situation it does not seem that Ms Cohen has a right to remain in those premises. It may, therefore, be futile to allow her to seek to set aside this

judgment. On one version she claims to be there with the permission of her father who is the true occupier. On another version she asserts Mr Morris Douglas' title. She has no claim of right of her own. On her account, any contest as to ownership must be between the Sterlings and her father or between the Sterlings and Mr Morris Douglas. It is to be noted that the Sterlings in supporting their claim to have purchased the premises from Mr Morris Douglas, have exhibited a copy of their stamped agreement for the sale by him to them.

d. The degree of prejudice

[27] The Sterlings have had a judgment in their favour since March 2012. They are undoubtedly prejudiced by the delay in reaping the benefit of their judgment. They may yet have to face a contest, initiated by Mr Winston Cohen or Mr Morris Douglas, as to ownership of the land, but that does not affect this application. They should be allowed to take possession in accordance with the default judgment.

[28] On the contrary, Ms Cohen will be obliged to remove from the property, from which she was properly evicted in June 2012. The disobedience of the court's process should not be countenanced.

e. The justice of the case

[29] The principle of dealing with the case justly requires a conclusion that this application ought to be rejected. The delay in the application, the fact that Ms Cohen is not claiming title to the property and her untenable position of having re-entered the

property after the execution of the warrant of possession all militate against her application.

Conclusion

[30] Ms Cohen has failed to satisfy the criteria which have been established for granting an extension of time in which to file a notice of appeal. The reasons for so finding are as follows:

1. her lengthy delay in filing her application;
2. the fact that she has no claim to title to the property;
3. the fact that she re-entered the property in defiance of the process of the court; and
4. the prejudice to the Sterlings who have had a judgment in their favour for almost two years.

As a result, her application could not have succeeded.

[31] It is for those reasons that I agreed with the orders set out at paragraph [3] above.