

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 25 & 52/2017

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA**

BETWEEN	CEFORD DAVIS	APPLICANT
AND	ONEIL ROPER	1ST RESPONDENT
AND	KENORA ROPER	2ND RESPONDENT

Gladstone Wilson for the applicant

Miss Jamila Thomas instructed by Lambie-Thomas & Co for the respondents

3 and 5 April 2017

MORRISON P

[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.

BROOKS JA

[1] Mr Ceford Davis has filed two separate applications before this court. In the first application, Mr Davis seeks a stay of execution of the orders made on 16 December 2016. In his second application, he seeks an order for the extension of time in which to

file a notice of appeal. The order that he seeks to appeal is one made on 23 September 2016. Both sets of orders were made by the learned parish judge for the parish of Saint Catherine, Her Honour Ms A McIntosh. An examination of the affidavits filed in support of his applications shows that he has already filed a notice of appeal. Some further explanation of the history of the matter is, therefore, required.

History

[2] Mr Davis was the occupier of premises known as 7 East Street in the parish of Saint Catherine. The premises are comprised in a certificate of title registered under the Registration of Titles Act. The registered proprietors of the premises are Mr Oneil and Mrs Kenora Roper (the Ropers). The Ropers acquired title to the property in December 2015. They purchased it from a person who was, then, Mr Davis' landlord. Mr Davis and the previous title holder had an agreement concerning Mr Davis' use of the premises and how that use was to have been paid for.

[3] In January 2016, the Ropers gave Mr Davis notice to quit the premises by 29 February 2016. He failed to leave, and they filed a plaint for recovery of possession. The plaint was decided by Her Honour Ms McIntosh on 23 September 2016. She did not order Mr Davis to vacate the property, but ruled that he was a monthly tenant and was obliged to pay the Ropers for his use and occupation of the property. A date was set for the assessment of the sum to be paid.

[4] On 16 December 2016, the learned Parish Judge assessed, at \$840,000.00, the sum due by Mr Davis to the Ropers for mesne profits for his occupation of the property.

On 8 February 2017 the Parish Court's bailiff went to the premises to effect a levy, in order to give effect to the orders of the learned Parish Judge.

[5] Mr Davis wishes to appeal from the ruling made in September 2016 and wishes a stay of the order made in December 2016, pending the outcome of the appeal.

[6] The Ropers have, since the decision in September, given Mr Davis a fresh notice to quit and filed a new plaint for recovery of possession. The learned Parish Judge has declined to hear the second plaint until the appeal filed by Mr Davis, against the September ruling, has been resolved.

The procedural issues

[7] Mr Davis filed a notice of appeal on 5 October 2016 which is within the 14 days stipulated for such filing by section 256 of the Judicature (Parish Court) Act (JPCA). He also paid on 5 October 2016, in accordance with section 256, the sum of \$5,000.00 being the sum required as the security for the due prosecution of the appeal.

[8] Mr Davis did not, however, timeously pay the further sum of \$15,000.00, required by section 256, as security for costs. That sum was not paid until 21 February 2017; some four months after the specified time.

[9] On 26 October 2016, he filed a document containing his grounds of appeal. He did so although he had not yet been provided with the learned Parish Judge's reasons for her decision. Those reasons, despite promises by the learned Parish Judge to do so, have not been provided up to the present time. Although no reasons for judgment have

been produced, the parties have been provided with handwritten notes of the proceedings in the Parish Court.

[10] It appears that, based on a ruling from a single judge of this court, Mr Davis sought to file, in the Parish Court, an amended notice of appeal and an amended grounds of appeal but these too were rejected by that court as being out of time.

[11] Mr Davis, through his attorney-at-law, states that his failure to pay the security for costs has apparently prevented or hampered the preparation of the record of appeal in the Parish Court.

[12] He asks that he be allowed an extension of time to file an amended notice of appeal and to comply with the provisions of section 256 of the JPCA so that his appeal can be prosecuted and heard.

[13] Mr Roper, in response to Mr Davis' applications has stated that Mr Davis' proposed appeal has no merit and, therefore, the application for extension of time should be refused. He also stated that granting any stay of execution would create very great hardship for the Ropers, as Mr Davis has refused to pay any rental, or even water rates, since the Ropers became the registered proprietors of the land in December 2015. Although not receiving any income from Mr Davis, the Ropers have had to be servicing the mortgage loan in respect of the premises.

Analysis

[14] The law in respect of applications for extension of time within which to file notices of appeal has been carefully assessed and set out in **Ralford Gordon v Angene Russell** [2012] JMCA App 6 and has been followed in this court since. The applicable principles may be set out thus:

- a. This court has the authority, by section 12(2) of the Judicature (Appellate Jurisdiction) Act, to extend the time for filing an appeal and for payment of the sum required for security for costs.
- b. The court does not, however, have the authority to extend the time for the payment of the sum for security for the prosecution of the appeal.
- c. Accordingly, if the notice of appeal were filed, but the security for the prosecution were not paid within time, the appeal was deemed lapsed and irrecoverable.
- d. If, however, the notice was not filed and the payment for the security for the prosecution of the appeal not made, the court could grant an extension of time for filing the notice of appeal, at which time the sum for the security for the due prosecution would become payable.

[15] In this case the sum for the security for the due prosecution of the appeal was paid at the time of lodging the original appeal. This court, therefore, has the authority

by section 266 of the JPCA to allow Mr Davis to amend the notice of appeal. It also, as mentioned before, has the authority to extend the time within which he may properly pay the sum for security for costs.

[16] There was a question of an incorrect section number having been placed in the heading of Mr Davis' notice of appeal. The heading stated, "Notice of Appeal under section 294 of the Judicature (Resident Magistrate [sic]) Act". The section number should have been section 251. Section 294 deals with appeals from decisions on cases tried on indictment or information. It does not apply in this case. The error could not be considered as fatal to the filing of the notice of appeal, which otherwise, correctly indicated the decision against which Mr Davis sought to appeal.

[17] The breach of section 256 was the failure to pay, within the stipulated time, the sum required for security of costs of the appeal. The court has the jurisdiction, in an appropriate case, to extend the time for that payment (**Ralford Gordon v Angene Russell**). The question to be resolved in Mr Davis' first application is whether the court should exercise its discretion in his favour.

[18] The principles governing the exercise of that discretion are set out in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** Motion No 12/1999, delivered on 6 December 1999. Among the matters that the court should consider in that exercise, are, the length of the delay, the reasons for the delay, whether there is an arguable case for an appeal and the degree of prejudice to the other party if time is extended.

[19] The appeal, it must be recalled, is against the Parish Judge's decision that Mr Davis is a monthly tenant, and that the court was entitled to proceed to assess the amount due to the Ropers for Mr Davis' occupation of the premises.

[20] Apart from the contents of a contract between Mr Davis and the former title holder, there is no evidence upon which this court could take even a preliminary position in respect of the correctness or otherwise of the learned Parish Judge's decision. What can be said from the contents of the contract is that they belie Mr Davis' claim that he is entitled to remain in the premises without paying any rental to the Ropers.

[21] The contract was made in 2008 and it allowed Mr Davis to remain on the premises without the payment of rent (due to a large capital expenditure he had made at the premises) for a period of three years and five months, after the completion of the work, which incurred the capital expenditure. That period was also the duration of the tenancy agreement. There is no evidence, before this court, that there was any adjustment to the amount of his expenditure or the period of the non-payment of rental. Mr Davis' defence, that was filed in the court below, indicated that he had "invested over Eight Million (J\$8M) dollars in refurbishing the said building" (paragraph 9).

[22] The period of three years and five months must have expired by the time that the Ropers acquired ownership of the title to the property. Mr Davis' defence, at paragraph 7, suggests that it had. It states:

“That the full effect of the tenancy agreement would have ended 3 years and 5 months after commencement, **and so the agreement would have rolled over beyond the stipulated term of years only left to be renewed after efflux [sic] of time.** So the rental agreement would have been in effect when the premises were sold to the [Ropers]”
(Emphasis supplied)

[23] It was, however, open to Mr Davis and the former title holder of the premises to renegotiate a new contract after the original contract had expired. There is no indication that that was done. In his defence, Mr Davis has shown nothing which indicates that he is entitled to remain in the premises without paying rental to the Ropers. He has therefore shown no basis for finding that his proposed appeal is likely to be successful.

[24] The contract also contemplated a maximum period of six months within which to terminate the agreement.

[25] Mr Wilson, on Mr Davis' behalf, submitted that the contract stipulated that the period of three years and five months would have commenced when the work was finished. He submitted that the period would have been extended based on the amount of money spent by Mr Davis. Learned counsel argued that Mr Davis spent well in excess of the sum originally contemplated by the contract. He argued that it is unclear when the period of three years and five months would have commenced and since it would

have been a longer period than that set out in the contract, the Ropers would have been bound, as successors in title, by the agreement when they acquired the premises. He cited **Strand Securities Ltd v Caswell and Another** [1965] 1 Ch 958 in support of his submissions. He submitted that the relevant terms of the Conveyancing Act of England, on which **Strand Securities Ltd v Caswell and Another** was based, are almost identical to the Conveyancing Act of this country.

[26] Miss Thomas, appearing for the Ropers, submitted that Mr Davis had failed to give a good explanation for the delay in paying the sum required for providing security for costs. She also submitted that Mr Davis' proposed appeal had no real prospect of success. Learned counsel argued that the agreement between Mr Davis and the previous title holder was such that the learned Parish Judge was entitled to reject Mr Davis' contention that he had a fixed term lease and to hold instead that he had a monthly tenancy.

[27] Learned counsel submitted that even if it were correct to say that Mr Davis had a fixed term lease, the period of that lease had expired, having been entered into in 2008. She submitted that upon its expiry Mr Davis would have become a tenant at will, or, at best, a monthly tenant. She pinned these submissions on the reference in the agreement to a "monthly rental". Miss Thomas relied on **Reid and Another v Johnson and Others** SCCA No 135/2007, delivered 3 April 2009, in support of her submissions on this point.

[28] In addition to her submissions in respect of the merit of the proposed appeal, Miss Thomas submitted that the balance of prejudice to the parties favoured the Ropers because of their ongoing obligations to service the mortgage loan. This, she said, was as Mr Roper deposed, causing the Ropers financial hardship, while Mr Davis continues to occupy the premises without paying anything for that occupation.

[29] Mr Wilson is not on good ground with his submissions concerning the Conveyancing Act. Section 2 of our Conveyancing Act states that nothing therein "shall apply to land brought under the operation of the Registration of Titles Act". Accordingly **Strand Securities Ltd v Caswell and Another**, which involved, in part, the transfer of leaseholds, does not apply to the present case.

[30] There is, however, the decision of **Life of Jamaica Limited v Broadway Import & Export Limited and Another** (1997) 34 JLR 526, in which this court, as stated in the headnote of the report, held, in part, that:

"(i) **occupation of land by a tenant is constructive notice to a purchaser of all the tenant's rights under its lease agreement and the omission to lodge a caveat will not of itself necessarily warrant postponement of a prior equitable interest** and if the holder of a later equitable interest knows at the time he acquires his interest that an earlier interest exists, that prior interest will not be postponed;" (Emphasis supplied)

[31] The case does not, however, provide the assistance that Mr Wilson seeks for Mr Davis. The facts of that case were very different from those in the present case. In **Life of Jamaica Limited v Broadway**, the tenant had an option to purchase the property,

which it sought to exercise in preference to a prospective purchaser. It had an interest in the property. Mr Davis does not have an interest in the premises in this case. A judge of the Supreme Court had ordered, to be removed, a caveat that Mr Davis had lodged against the title for the premises. In the wake of that removal, the premises were sold to the Ropers.

[32] Mr Davis has, nonetheless, maintained a case against the previous title holder, for “[r]estitution for and by reason of unjust enrichment”. His claim, if any there be, is against the previous title holder for damages for breach of contract.

[33] Based on the agreement made in 2008, and the term stipulated therein, and in the absence of any evidence indicating a renewal of the tenancy, the implications are that, at best, Mr Davis had a monthly tenancy, which could have been terminated by notice to quit. There is no obvious merit in his proposed appeal.

[34] In respect of the issue of prejudice, it is significant that, on one side of the balance, based on the history set out above, Mr Davis has been in possession of the premises for over 15 months without providing any income to the Ropers. They, in the meantime, on the evidence of Mr Roper, have had to be paying their loan commitments in respect of a mortgage given on the premises. The prejudice to them is significant.

[35] On the other side of the balance, although not incurring any outgoings in respect of his occupation of the premises, Mr Davis is pursuing the previous title holder for

damages in the Supreme Court. Mr Davis, therefore, has a potential remedy for any loss that he has suffered from any breach committed by the previous title holder.

[36] He has not stated that he would be prejudiced by making the payment of *mesne profits* ordered by the learned Parish Judge, nor has he provided any basis for any such finding. Indeed, he has not filed an affidavit himself. The only evidence provided on his behalf has been set out in affidavits sworn to by his attorney-at-law.

[37] In the circumstances, based on the absence of an appeal with a real prospect of success, and the balance of prejudice being in favour of the Ropers, this court should not exercise its discretion in favour of Mr Davis. There should be no extension of time granted to him to correct the procedural irregularities in prosecuting his appeal.

[38] Accordingly, in the absence of a pending appeal, there would also be no stay of execution of the order of the learned Parish Judge for the payment of monies due to the Ropers for mesne profits.

P WILLIAMS JA

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

MORRISON P

ORDER

1. Application for extension of time within which to appeal is refused.

2. Application for stay of execution pending appeal is refused.
3. Costs to the respondents in the sum of \$75,000.00.