[2023] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO 74/2012

MOTION NO COA2022MT00015

BETWEEN	**FAYE DEMERCADO**	**APPLICANT**
AND	**KEVIN DEMERCADO (Representative of the Estate of Tyrone Owen DeMercado)**	**RESPONDENT**

Rudolph Smellie for the applicant

Keith Bishop instructed by Bishop & Partners for the respondent

17 and 18 April 2023

ORAL JUDGMENT

BROOKS P

[1] On 13 May 2016, this court delivered a judgment ('the 2016 judgment') allowing an appeal by Mr Tyrone DeMercado against a judgment that was handed down in the Supreme Court on 11 May 2012 in favour of Mrs Faye Marie DeMercado. The DeMercados were divorced, and the litigation was a dispute over real property acquired during their marriage. The 2016 judgment set aside the lower court's decision and remitted the case to the Supreme Court for hearing.

[2] It appears that after the case was returned to the Supreme Court, Mr Tyrone Demercado, unfortunately, died and Mr Kevin DeMercado became the representative of Mr Tyrone DeMercado's estate. The case has languished in the Supreme Court, involving only interlocutory proceedings. In November 2021, Mrs DeMercado applied to this court to set aside the 2016 judgment and make other orders, which, if her application were granted, would have resulted in a judgment in her favour. The basis of the application was that this court had made an error in the 2016 judgment, having misunderstood and misquoted a House of Lords decision, **JA Pye (Oxford) Ltd and another v Graham and another** - [2002] 3 All ER 865, on which it relied in the 2016 judgment.

[3] On 21 October 2022, this court delivered a judgment ('the 2022 judgment'), refusing Mrs DeMercado's application. She has now applied to be granted conditional leave to appeal to His Majesty in Council from the 2022 judgment. She has not explicitly stated in the application whether she seeks that leave pursuant to section 110(1) or 110(2) of the Constitution of Jamaica but, her counsel, Mr Smellie, asserted in oral submissions that the "matter in dispute between the parties is a value which is upwards of $1,000.00". Mrs DeMercado, he said, is relying on section 110(1)(a) of the Constitution.

[4] Sections 110 (1) and (2) state:

> "110.–(1) An appeal shall lie from decisions of the Court of Appeal to [His] Majesty in Council **as of right** in the following cases-
>
> (a) Where the matter in dispute on the appeal to [His] Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, **final decisions in any civil proceedings**;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to [His] Majesty in Council **with the leave of the Court of Appeal** in the following cases-

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of **its great general or public importance or otherwise, ought to be submitted to [His] Majesty in Council**, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament." (Emphasis supplied)

[5] The panel that handed down the 2022 judgment did not give any reasons for its decision, although, even with this abbreviated history, it is not hard to divine that it would have felt unable to set aside the 2016 judgment, as that would have been a matter for an appeal.

[6] The question for this court is whether leave to appeal from the 2022 judgment can be granted. Does it satisfy the requirements of section 110(1)(a) of the Constitution? It is to be noted that the requirements of section 110(1)(a) of the Constitution are cumulative, that is, all elements must be satisfied (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, SCCA No 118/2008, judgment delivered 18 December 2009).

[7] Whereas the 2022 judgment is in a civil case, and it may be said that the subject matter involves "indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards" (see **Tam Mei Kam v HSBC International**

Trustee Limited (in the capacity as the sole executor and trustee named in the Purported Will of the Deceased dated 3rd December 2003) and others (unreported), Court of Appeal of Hong Kong Appeal No CACV 200/2008 (judgment delivered 7 October 2010) in para. 25 citing **China Field Ltd v Appeal Tribunal (Buildings) (No.1)** [2009] 2 HKLRD 135), the other requirement of the section has not been satisfied, as the 2022 judgment is not a final decision.

[8] It has long been decided that this court uses the "application test" for determining whether a decision is a final decision (see **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, at paras. [19] - [22]). **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** concerned an application for leave to appeal to the Privy Council. It appears, however, that the principle is not as well-known as the court had apprehended. The principle is, therefore, repeated, for the benefit of litigants and counsel, by quoting the following from that case:

> "[19] The third basic principle raised by the instant case concerns the determination of what constitutes a 'final decision'. This court has accepted that, what is known as the 'application test', is the appropriate test for determining what constitutes a final decision in civil proceedings. One of the clearest explanations of the application test is contained in the judgment of Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, when he stated at page 735:
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> > 'The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.'
>
> [20] That approach has been accepted, in a number of judgments of this court, as being the applicable test. The

cases utilising, with approval, the above quote, include **Strachan v The Gleaner Company Ltd and Another** SCCA No 54/1997 (delivered 18 December 1998). It was also, more recently, approved in the oral judgment of Panton P in **Willowood Lakes Ltd v The Board of Trustees of The Kingston Port Workers Superannuation Fund** SCCA No 98/2009 and Motion No 12/2009 (delivered 30 October 2009).

[21] In **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, although not dealing with a case involving section 110(1), Morrison JA considered the question of whether or not an order for summary judgment was a final decision. After having examined the various authorities on the question of what constituted a final decision, Morrison JA stated at paragraph [23] of his judgment:

> 'Summary judgment in fact seems to me to provide a classic example of the operation of the application principle, since if it is refused, the judge's order would clearly be interlocutory and so, equally, where it is granted, the judge's order remains interlocutory.'

[22] The fact that the summary judgment in **Jamaica Public Service** required the subsequent assessment of damages, does not affect the principle enunciated by Morrison JA, that an order for summary judgment is an interlocutory order, based on the application test set out in **Salaman v Warner and Others**. In applying that principle to the instant case, it may be concluded that although the value involved in exceeds the sum of $1,000.00, it would not qualify for an appeal as of right under section 110(1)(a) of the Constitution, as it does not concern a final decision in the claim. It is to be noted that the applicants' counter-claim, although it may be considered a separate claim, is yet to be tried."

Mr Bishop, appearing for Mr Kevin DeMercado, pointed out that the "application test" was also applied in **HDX 9000 INC v Price Waterhouse (a firm)** [2016] JMCA App 25. In that case F Williams JA pointed out, in para [15], that the "application test" was the settled approach.

[9] The principle demonstrated in that extract from **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** is as applicable to this case as it was to **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited**. The fact is that, based on the application that was before this court in 2022, the case would not have come to finality regardless of the outcome of that application (as it plainly did not with the order of the court). Mrs DeMercado's relisted application stated, in part:

> "1. That the [2016 judgment] be declared as having been based on the accidental slip/error/misconception by the court that Lord Browne-Wilkinson had made certain statements as to the law governing adverse possession, when he had not.
> 2. That such accidental slip/error/misconception be declared as having given rise to a [judgment] herein which was substantially flawed and which the court did not intend to make.
> 3. That the said [judgment]/order having been reviewed and corrected to accord with the [judgment]/order, which, but for the said misconception, the court would have made and really intended to make, is hereby revised to hold that the appeal is dismissed and McIntosh J's [judgment] that 'there is insurmountable evidence of adverse possession for a period of about 30 years', is upheld."

[10] Since the application cannot satisfy section 110(1)(a) of the Constitution, leave to appeal to His Majesty in Council, "as of right", must fail.

[11] It must also be said, out of an abundance of caution, that the application would also fail to satisfy section 110(2) of the Constitution as the question involved in the appeal is not one that, by reason of "great general or public importance or otherwise, ought to be submitted to [His] Majesty in Council". The principle involved in the 2022 judgment is not in doubt. A court is not entitled to correct or amend its decision once it has been made final. In **Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia; The Montan** [1985] 1 All ER 520 guidance is given on page 526 as to the court's approach to having second thoughts on any matter:

> "It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first thoughts or intentions which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly **or misconstrues or misappreciates the law**, the resulting award or judgment will be erroneous but it cannot be corrected…**The remedy is to appeal, if a right of appeal exists**. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or judge later accepts as having been erroneous." (Emphasis supplied)

This court is not accepting that there was any error in the 2016 judgment, **Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia; The Montan** is cited only for the principle that the court that considered the 2022 application did not have the jurisdiction to grant the order which Mrs DeMercado sought.

[12] If Mrs DeMercado was of the view that the 2016 judgment was erroneous, she should have applied for leave to appeal from it to Her Majesty in Council (as the monarch was then Queen Elizabeth II). Having failed to use that method, she could not have, over six years later, succeeded in having this court overturn its own decision, by a finding in her favour on the 2022 application. There is therefore no basis on which this court should grant leave pursuant to section 110(2) of the Constitution.

[13] Having failed to satisfy either subsection (1) or (2) of section 110 of the Constitution, Mrs DeMercado's application for leave to appeal to His Majesty in Council must fail.

[14] Finally, it is noted that the bundle for this application was filed on 14 April 2023 in breach of the practice direction stipulating the time for filing. This breach is committed despite the practice direction promising the imposition of sanctions for such breaches.

[15] Mr Bishop also complained that the notice of motion was not served on him until the morning of the hearing. That is also in breach of the authority which stipulates that although the notice of motion need not be served within 21 days of the judgment appealed from, the copy of the motion should be served as soon as possible after the original has been filed in court (see para. [17] of **Exclusive Holiday of Elegance Limited v ASE Metals NV** [2014] JMCA App 2).

[16] In light of the disobedience mentioned above, costs should be awarded in favour of the estate of Mr Tyrone DeMercado on an indemnity basis.

Order

[17] Based on the above reasoning the orders are:

(1) The application for leave to appeal to His Majesty in Council is refused.

(2) Costs to the respondent on an indemnity basis to be agreed or taxed.