[2021] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2021CV00042

APPLICATION NO COA2021APP00090

BETWEEN	**GARNETT DENNIS**	**APPLICANT**
AND	**NEWTON BARNES**	**1ST RESPONDENT**
AND	**SONIA BARNES**	**2ND RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett & Co for the applicant

Mrs Camille R Wignall-Davis instructed by Nunes Scholefield Deleon & Co for the respondents

13 and 16 July 2021

IN CHAMBERS

FRASER JA

Introduction

[1] This is an application for a stay of execution of the judgment of Pettigrew-Collins J, the learned trial judge ('LTJ') in the matter of **Garnett Dennis v Newton Barnes and Sonia Barnes** [2021] JMSC Civ 89, and that there be no order for security for costs.

[2] The application initially sought a "stay of proceedings" but was amended at the hearing to read "stay of execution of the judgment". The stay is sought pending the outcome of the appeal. The application also requested an order that costs be awarded to the applicant to be agreed or taxed. On 29 June 2021, a single judge of appeal granted

an "interim stay of execution of proceedings, until the *inter partes* hearing of the application on 13 July 2021".

[3] The terms of the judgment being appealed against are as follows:

> "a. A declaration that the [respondents] are legally and beneficially entitled to possession of the parcels of land registered at Volume 953 Folio 595 and Volume 868 Folio 76 of the Register Book of Titles as well as the unregistered parcel of land consisting of 0.220 acres or 0.089 hectares which is situated between the two registered parcels.
> b. An injunction restraining the [applicant] whether by himself, his servants and/or agents or otherwise howsoever from remaining on or continuing occupation of the said lands.
> c. An injunction restraining the [applicant] whether by himself, his servants and/or agents or otherwise howsoever from entering or using the said lands.
> d. Nominal damages awarded in the sum of $5,000.00.
> e. Costs to the [respondents] to be taxed if not agreed."

The relevant law

[4] Before proceeding to address the relevant law, it is important to point out that, in September 2015, amendments were made to the Court of Appeal Rules ('the CAR'), which included the deletion of rule 2.8, as it then existed, due to its inconsistency with sections 256 and 258 of the Judicature (Parish Court) Act. The numbering of the subsequent rules was impacted by that change, resulting in rules 2.9 through to 2.20 being amended to become rules 2.8 through to 2.19, respectively. Counsel in their submissions referred to the rules as they were prior to the 2015 amendments. As the current application was filed this year, the 2015 amendments to the CAR apply. The references to the CAR in this judgment are therefore to the rules as they currently stand, following the 2015 amendment.

[5] An appeal does not operate as a stay of execution or proceedings (see rule 2.13(a) of the CAR. That position is in keeping with the well settled principle "that there must be a good reason for depriving a claimant of the fruits of his judgment" (see **Winchester**

Cigarette Machinery Ltd v Payne and Another (No 2) Times Law Reports, 5 December 1993). However, pursuant to rule 2.10(1)(b) of the CAR, a single judge of the court has the power to grant a stay of execution. This was confirmed by Phillips JA in the case of **Joycelin Bailey v Durval Bailey** [2016] JMCA App 8 at paragraph [39].

[6] The principles to which a court should have regard in determining whether to grant a stay of execution are themselves now well established. In seeking to achieve a fair and just result, the first consideration is whether there is merit in the appeal. If there is no merit in the appeal no further investigation is necessary, the stay should be refused (see **Combi (Singapore) Pte Ltd v Siriam and another** [1997] EWCA 2162 and **James Wyllie & Others v David West & Others** [2012] JMCA App 41). The logic of that approach is self-evident, as it would not be fair or just to deny a respondent the fruits of his judgment, where the applicant has no real prospect of success on appeal.

[7] If, however, the court determines that there is merit in the appeal, the court should then embark on a balancing exercise to determine, as a matter of discretion, which approach adopted will carry a greater risk of injustice, or on the other hand, would be less likely to result in injustice (see **United General Insurance Company Limited v Marilyn Hamilton** [2018] JMCA App 5; **Caribbean Cement Company Limited v Freight Management Ltd** [2013] JMCA App 29; and **Effie Mignott v Nehemiah Rose & Yvette Rose** [2019] JMCA App 19).

[8] The balancing exercise is particularly critical where there is a risk of harm to one party or another, whichever order is made. In such circumstance, the balancing of alternatives by the court is aimed at deciding which of them is less likely to produce injustice (see Phillips JA in **Joycelin Bailey v Durval Bailey** at paragraph [40] quoting Phillips LJ in **Combi (Singapore) Pte Ltd v Sriram and another**. There is no longer any need to show as in **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 that, without a stay of execution the applicant would be ruined. In essence, all relevant factors having been considered, the court should make the order that "best accords with

the interest of justice" (see **Myrna Douglas & Jacqueline Brown v Easton Douglas** [2017] JMCA App 5).

Does the appeal have a real prospect of success?

The claim below

[9] The basis of the applicant's claim in the court below was, that, prior to the respondents' purchase of the parcels of land registered at Volume 953 Folio 595 and Volume 868 Folio 76 of the Register Book of Titles, as well as the unregistered parcel consisting of 0.220 acres or 0.089 hectares, situated between the two registered parcels, (together 'the property'), he had acquired the property by adverse possession.

[10] The LTJ however rejected the testimony of the claimant and his civilian witnesses, and stated at paragraph [107] of her judgment that:

> "In light of my rejection of the claimant's evidence as to the duration and extent of his activities upon the disputed land, there is no reliable evidence from which this court can conclude that the necessary elements, that is the factual possession and the animus possessendi [sic] which would be necessary to establish that he has acquired the right to a possessory title existed for the necessary period. It is the responsibility of the person who claims that he has acquired the right to a possessory title to demonstrate that he has been in undisturbed and exclusive possession for the relevant limitation period. The claimant has not done so to the required standard."

The submissions

Counsel for the applicant

[11] Counsel for the applicant submitted that the LTJ erred in not accepting that the applicant had proved his case on a balance of probabilities. Counsel argued that the LTJ's explanation of the law governing adverse possession cannot be faulted, but she erred in failing to apply the law to the true facts, from the evidence presented to her. Counsel indicated that some of the LTJ's findings of fact reflect the extent to which she had

prejudiced her mind to the evidence of the applicant and his witnesses. Counsel essentially took issue with all the LTJ's findings of fact and acceptance of evidence that were adverse to the applicant's case.

[12] Counsel quoted and highlighted large portions of the witness statements of the applicant and his witnesses and postulated that they should have been accepted by the LTJ. In relation to the sale price of the property, counsel advanced that it was clear that the bargain price for which the land was sold, took into account the applicant's interest in the property of which the 1st respondent as an experienced property developer must have been aware, when he agreed to purchase the property for that price.

[13] Counsel summarised his position by contending that the LTJ "erred in failing to carefully examine the evidence presented to her showing that the Appellant Mr. Garnett Dennis is entitled to the subject lands by way of adverse possession". Counsel maintained that there was real merit in the appeal and the applicant would be faced with real financial hardship and ruin if the stay was not granted as, "[h]is entire livelihood is tied up in the subject lands including his homes" (see **Linotype-Hell Finance Ltd v Baker**).

[14] In relation to the issue of security for costs, counsel pointed the court to rules 2.10(1)(a), and 2.11(3) of the CAR as well as the case of **Speedways Jamaica Limited v Shell Company (WI) Ltd v Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004. Counsel advanced that the applicant was not impecunious and he had spent the majority of his case making improvements to the property since 2008 to the benefit of the respondents as well as himself. He contended that in the circumstances awarding security for costs would amount to a denial of justice to the applicant.

Counsel for the respondents

[15] Counsel for the respondents submitted that the applicant's appeal has absolutely no merit or real prospect of success and hence there was no risk of injustice to the applicant if the stay was refused. Counsel noted that though the grounds of appeal were

not set out concisely in keeping with rule 2.2(5) of the CAR, the main complaint of the applicant related to her findings of fact that he had failed to establish to the requisite standard, the elements of his claim of adverse possession. Counsel cited a number of authorities in which it has been emphasised that an appellate court will not lightly disturb the findings of fact of a trial court (see **Effie Mignott v Nehemiah Rose & Yvette Rose** [2019] JMCA App 19; **Alan Deans v Patricia Deans; Patricia Deans v Alan Deans** [2021] JMCA App 6 ('**Deans v Deans**'); **Watt (or Thomas) v Thomas** [1947] AC 484; **Cebert Wright (Executor, Estate of Clarice Findlay) & Anor v Vecas Pennycooke & Others** [2015] JMCA App 5; **Maureen Beverly Simpson (Executor of Estate of Winnifred Simpson, Deceased) & Another v. Ronald Simpson & Another** [2021] JMCA Civ 31; and **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7).

[16] Counsel highlighted the findings of the LTJ in relation to both the applicant's civilian witnesses, as well as her treatment of the expert evidence adduced on behalf of the applicant, and submitted that in relation to expert evidence, it was within the remit of a trial judge to determine whether to accept the evidence and opinion of an expert (see **Cherry Dixon-Hall v Jamaica Grande Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 26/2007, judgment delivered November 21, 2008).

[17] Counsel submitted that, in the event the court was not persuaded that there was no merit in the appeal, the relative weakness of the appeal would still mean that, in balancing the interests of justice, there would be no injustice to the applicant if the stay was refused, as the appeal is evidently weak and unlikely to succeed. Counsel reiterated her earlier submission that successful litigants should not be lightly deprived of the fruits of their judgment.

[18] Regarding the request for an order that there be no security for costs, counsel argued that such an order would be premature and unjust in the circumstances as 1) the applicant is not entitled to a stay of execution in any event and hence the order sought

in relation to security for costs would therefore be inappropriate; and 2) based on the principles applicable to the court's exercise of its discretion to grant an order for security for costs under rule 2.11 of the CAR, the respondents are entitled to pursue such an application. Counsel also relied on the case of **Deans v Deans**.

[19] In summary, counsel submitted that the applicant's application should be wholly dismissed, with costs to the respondents.

Analysis

[20] The case of **Watt (or Thomas) v Thomas** has long been recognised as outlining the proper approach that should be adopted by an appellate court when reviewing findings of fact made by a trial court. The headnote reads:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

[21] The governing principle is that an appellate court will not lightly disturb a trial judge's findings of fact, unless it is satisfied that the judge is plainly wrong. The principle and the reasoning on which it is based was stated by Viscount Simon, at page 486, in this way:

> "[A]n appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has

> been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

[22] This court has applied that principle and accordingly exercised due deference to the advantage enjoyed by trial courts in the assessment of witnesses in several cases, a number of which were cited by counsel for the respondents. I, however, need only refer to the recent case of **Deans v Deans**, in which there was a similar challenge to the trial judge's assessment of witnesses as has been launched by counsel for the applicant in the instant case. **Deans v Deans** involved an application by the respondent for security for costs of the appeal and an application by the appellant for stay of taxation pending appeal. One of the issues in the application was the trial judge's assessment of the credibility of the witnesses. Straw JA considered the appellant's complaint that the trial judge had no basis to accept the respondent as more credible than a particular witness called by the appellant. Straw JA determined, from the reasons given in the judgment of the trial judge, that such a conclusion was open to that trial judge on the evidence before the court. Ultimately the learned judge of appeal concluded that the appellant had not demonstrated that there were specific features of the evidence or conclusions arrived at by the trial judge, from which there could be an arguable appeal.

[23] The challenges raised by counsel for the applicant, at their core, all relate to findings of fact made by the LTJ. In her submissions, counsel for the respondents helpfully summarised the areas of complaint. I adopt and set out counsel's summary with minor adjustments as follows:

> "[T]he contention is that the LTJ erred:
>
> i. in not accepting that the evidence presented on behalf of the applicant established on a balance of probabilities that the applicant had been in exclusive possession of the probabilities that he had been in exclusive possession of the subject property for a period exceeding twelve (12) years;
> ii. in not accepting the evidence of the [applicant] and his ordinary witnesses and/or in not appreciating certain aspects of the evidence of the [applicant] and his ordinary

witnesses;

iii. in accepting the evidence of the expert witness for the respondents including the google photographs in his report over that for the [applicant];

iv. in giving greater weight to the Witness Statement of the previous registered proprietor Ralford Campbell, deceased, than that of the [applicant];

v. in seeking to rely on evidence contained in the Witness Statement of Carol Brown-Malcolm although she failed to attend court; and

vi. in not recognizing that the transfer to the respondents in 2015 was a wrongful and fraudulent transfer because by 2015 the [applicant] was entitled to ownership of the subject property by adverse possession."

[24] In the instant case, Pettigrew-Collins J, in a very detailed judgment, outlined her reasons for accepting or rejecting particular witnesses. At paragraphs [62] to [66] she stated:

> "[62] Without any reservations or equivocation, my view of the [applicant] is that he was not at all a credible witness, and hence not a reliable one. He lacked candour and consistency in his evidence. On occasions when he apparently did not wish to respond to questions, he would feign a lack of understanding of what was being asked of him in circumstances where the question posed could not possibly have been infused with greater simplicity and clarity.
>
> [63] I do not recall any other instance during the course of any trial that I have had to direct a witness to respond to the question asked of him on as many occasions as I did to the [applicant] in this case. There were many instances when the questions were repeated more than once and the [applicant] either indicated that he did not hear, or he did not understand. The court being convinced that he had heard and understood the questions asked of him, insisted that he responded [sic] without the question being repeated. In numerous instances, he responded in a manner that made it abundantly clear that he had heard and understood the question. On occasions when he had a response which supported his case, he evidently had no difficulty hearing or understanding the questions or suggestions put to him. The belligerence was evident in particular when the [applicant] was confronted with discrepancies or inconsistencies on his case. It became clear upon cross-

> examination of the [applicant's] witnesses that they were witnesses of convenience.
>
> [64] The witness statements of the various witnesses for the [applicant] contained assertions in support of the [applicant's] supposed exclusive occupation and possession of the disputed property for an extended period. The evidence of the witnesses in cross examination in some instances directly contradicted the evidence in chief and in other instances witnesses, for example Mr. Mais stoutly denied making statements contained in his witness statement. To put it mildly and kindly, I will simply say that Mr. Mais is an unreliable and untruthful witness. My view of the other witnesses called by the [applicant] with the exception of Mr. Powell, is no different.
>
> [65] To the extent that there was no other credible testimony or other evidence supporting the [applicant's] evidence (with the exception of Mr. Powell), this court rejects their evidence.
>
> [66] I have chosen in this case to set out in fair detail, the evidence of the witnesses. My reason for doing so is to demonstrate that the [applicant] did not present clear, coherent and cogent evidence in proof of his case, but rather, the evidence, as the [respondents'] Attorneys-at-Law observed in closing submissions, was fraught with inconsistencies, in some instances concocted or embellished. On the other hand, I found the first respondent to be refreshingly candid. I find on a balance of probabilities that he at no time deliberately lied to the court."

[25] There, clearly demonstrated in her reasons, was the LTJ's basis for accepting or rejecting the evidence of the civilian witnesses which she did, and ultimately the justification for the evidence based conclusions she arrived at. The conclusions were also informed by her statement of the relevant law, which counsel for the applicant has conceded, the LTJ accurately recounted.

[26] Counsel for the applicant also took issue with the LTJ's assessment of the expert evidence. However, the LTJ clearly indicated that the reason she preferred the expert called by the respondents, was because he had physically visited the property and conducted an analysis, beyond that contained in the expert report on which the applicant relied. There is nothing in that analysis that can reasonably be said to be palpably wrong.

[27] Regarding the LTJ's assessment of the evidence contained in the witness statement of the deceased vendor, Ralford Campbell, it was entirely a matter for the LTJ as to what weight to attach to it. It was clear from her judgment that the LTJ disregarded aspects of that statement which contained information that Mr Campbell could not attest to first hand. The LTJ was also careful in her assessment of the evidence, as revealed in her judgment, not to place any reliance on the statement of Carol Brown-Malcolm who initially gave a witness statement but was not called at the trial. There is nothing in the approach of the LTJ in that regard that is open to being successfully impugned.

[28] Further, beyond conjecture and innuendo, there was no material placed before the trial court in support of the allegation that the bargain price paid for the property by the respondents was evidence that the transfer was procured by fraud. As is well known, fraud must be specifically pleaded and proved. It requires very cogent evidence and not mere insinuations to defeat a registered title.

[29] Having carefully and thoroughly reviewed the complaints raised by the applicant through his counsel, it is manifest that the multiplicity of errors attributed to the LTJ all fall within the province and purview of the LTJ's assessment of the facts. While the notes of evidence are not yet to hand, her canvass of the evidence in her judgment was detailed and provide a basis for evaluation whether the high threshold of rational dissonance has been met, to permit and require appellate interference. Plainly it has not. The LTJ's reasoning in support of the evidence she accepted or rejected and the conclusions dictated by that assessment, have not even been shown to be questionable, much less plainly unsound or palpably wrong. In the circumstances, I am constrained to hold that the applicant has failed to establish that his appeal has any real prospect of success. There is accordingly no basis on which a stay of execution until the determination of the appeal should be granted.

[30] The conclusion on the merits obviates the need to consider balancing the interests of the parties to determine which order is appropriate, as would have been the case if it

had been demonstrated that there was merit in the appeal. It is also my considered view that there is no need to go on to consider the balancing exercise, "in the event I am wrong on the merits", given how clear and established the authorities are concerning the limited circumstances in which the findings of a trial court may be disturbed.

The application that there be no order for security for costs

[31] Rule 2.11 of the CAR empowers the court or a single judge to order an appellant, or a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court, to give security for costs occasioned by an appeal. No application for security may be made unless the applicant has made a prior written request for such security. The rule also stipulates that in deciding whether to order a party to give security for the costs of the appeal, the court or single judge should consider: (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and (b) whether in all the circumstances it is just to make such an order.

[32] Curiously, the applicant in this matter also sought, apart from the stay, what can only be described as a pre-emptive order, barring the respondents from seeking an order for security for costs. Counsel for the applicant submitted that it was an attempt to save the court's time, as often applications for stay and security for costs "go together". With respect the application is wholly misconceived. If the court is to consider the question of security for costs, the procedure in rule 2.11 should be followed and the court furnished with evidence on the basis of which a sensible exercise of discretion can occur. It is not possible for a party's right to make an application, if so desired, to be stymied and abrogated in this fashion.

Conclusion

[33] The complaints of the applicant being largely fact based, he has failed to show that the conclusions on the facts, including assessments of witnesses' credibility arrived at by the LTJ are plainly wrong. Accordingly, he has been unable to demonstrate that his appeal has a real prospect of success. The application for an order that there be no

security for costs is not in keeping with rule 2.11 of the CAR, which governs applications for security for costs, and is misconceived.

[34] In light of the foregoing, the court makes the following orders:

a. The interim stay of execution granted on 29 June 2021 until 13 July 2021 and extended to 16 July 2021, is hereby discharged.

b. The application for a stay of execution of the judgment of Pettigrew-Collins J, in the matter of **Garnett Dennis v Newton Barnes and Sonia Barnes** [2021] JMSC Civ 89, until the determination of the appeal, and that there be no order for security for costs, is refused.

c. Costs to the respondents to be agreed or taxed.