

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

RESIDENT MAGISTRATES' CIVIL APPEAL NO 15/2016

APPLICATION NO 124/2017

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

BETWEEN	RICHARD HALL	APPELLANT
AND	ZADA HALL	RESPONDENT

Ronald Paris instructed by Messrs Paris & Co for the appellant/applicant

George Traile instructed by Phillip Traile & Company for the respondent

12 July and 2 October 2017

MORRISON P

Background

[1] This is an appeal against the decision of Her Honour Mrs A Grainger who, on 23 October 2014, awarded judgment for the respondent in a case brought by the appellant against the respondent for recovery of possession of premises situated in Granville in the parish of Saint James.

[2] On 6 November 2014, the appellant filed the notice and grounds of appeal. The grounds of appeal filed were:

- “(a) The Learned Magistrate erred when she found that the Plaintiff/Appellant had purchased Spencer Brown’s house in order to make a gift of it to his father Edward Hall thereby making the said property part of the estate of Edward Hall upon his death to which the Defendant was entitled under the professionally prepared Will of Edward Hall.
- (b) The Appellant/Plaintiff reserved the right to add further grounds of appeal after the Learned Resident Magistrate files her Reasons for Decision.”

[3] On 25 April 2017, counsel for the respondent advised the court via letter, that the respondent was deceased and enclosed a copy of the death certificate.

Application for Court Orders for substitution of deceased respondent

[4] On 7 July 2017, the appellant filed an application seeking the “appointment of VALERIE WILLIAMS to represent the said Zada Hall deceased” in proceedings before the court. The grounds on which the application was made were that (i) Valerie Williams is a co-executor/beneficiary of the estate of Edward Hall, husband of Zada Hall, and as such has no interest adverse to the estates of Zada Hall and Edward Hall; (ii) the order is required to dispose of the appeal and none of the parties will be prejudiced; and (iii) Valerie Williams is deemed to have intimate knowledge of the facts relied on by Zada Hall at the trial and is competent to conduct proceedings on behalf of the estates of Edward Hall and Zada Hall.

[5] In the affidavit in support of the application sworn to by Mr Ronald Paris, attorney for the appellant, he deponed that he was aware of the death of the respondent and that counsel for the respondent, Mr George Traile “does not have any objection to this Application being made to substitute Valerie Williams the daughter of the deceased Zada Hall who also in her own right is one of the beneficiaries of the estate of Zada Hall’s deceased husband Edward Hall the father of the Appellant” and that “Valerie Williams attended court during the trial and also gave evidence thereat in support of Zada Hall’s defence to the Appellant’s claim”.

[6] The application came on for hearing before the court on 12 July 2017, when we heard submissions from Mr Paris and Mr Traile for the respondent. Mr Paris referred us to the case of **Duke and Another v Davis and Others** [1893] 2 QB 260, to highlight the effect of the death of a party on the survival of an appeal or any proceeding before the court and the need to obtain an order from the court conferring the right of survival on the executor or administrator of a deceased party. Without an order of the court, the appeal can go no further. In relation to the provisions of the Civil Procedure Rules (CPR), Mr Paris referred to Part 21 that empowers the Supreme Court to appoint someone to represent a deceased party even when the deceased party does not have any personal representatives. He pointed out, however, that Part 21 is not one of the parts of the CPR applicable to appeals to the Court of Appeal under rule 1.1(10) of the Court of Appeal Rules (CAR).

[7] Mr Traile supported the application and urged us to hold that the order sought could be made under the provisions of Part 21 of the CPR. Miss Valerie Williams, who was in court, also expressed her willingness to accept appointment as the representative of the respondent for the purposes of the appeal.

[8] The questions that arise for consideration of this court are:

- i) Can the appellant apply to this court to appoint a representative for the respondent for the purposes of the proceedings?
- ii) Does this court have the jurisdiction to hear the application and order the appointment of the representative for the estate of the respondent for the purposes of the proceedings?

Law and Analysis

[9] The law relating to the survival of an action against an individual who died during the proceedings before the court was addressed in the case of **Administrator-General for Jamaica v Glen Muir** [2016] JMCA Civ 47, where this court set aside the order of the judge in the court below appointing the Administrator-General as the representative of the estate of the deceased defendant, Mr Ledgister. In that case, in a judgment with which F Williams JA and Edwards JA (Ag) agreed, I pointed out (at paragraph [18]) that “an application should have been made for an order appointing a suitable person – such as, perhaps, Mr Ledgister’s widow, ... to conduct the proceedings on behalf of the estate”, as the circumstances of the case were not such as to attract the provisions of the Administrator-General Act. In relation to the law on the conduct of

proceedings after the death of one of the parties, I observed as follows (at paragraph [15]):

“[15] There is, of course, no question that, as section 2(1) the Law Reform (Miscellaneous Provisions) Act provides, ‘on the death of any person...all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate’. So in this case, upon the death of Mr Ledgister on 3 February 2013, the respondent’s subsisting action against him survived against his estate. But, as Arden LJ observed in **Piggott v Aulton, Deceased**, ‘[t]he natural personality of the deceased came to an end on his death’. In these circumstances, as Lord Diplock explained in **In re Amirteymour, deceased**, albeit in a somewhat different context –

‘...there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceedings can be obtained under Ord. 15, r. 7.’ ”

[10] Part 21 of the CPR sets out the procedures for and the power of the court in relation to the appointment of representatives in proceedings before the court. Rule 21.7 of the CPR sets out the procedure in relation to the appointment of a representative in proceedings against the estate of deceased persons. It states:

“21.7 (1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to

represent the deceased person's estate for the purpose of the proceedings.

- (2) A person may be appointed as a representative if that person -
 - (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and
 - (b) has no interest adverse to that of the estate of the deceased person.
- (3) The court may make such an order on or without an application.
- (4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.
- (5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate."

Rule 21.8 outlines the power of the court to give directions to enable proceedings to be carried on after a party's death:

- "(1) Where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.
- (2) An order under this rule may be made on or without an application."

[11] In summary, where a party to the proceedings is deceased, part 21 of the CPR states that a representative has to be appointed before the case can proceed. However, Part 21 of the CPR is not one of the parts that is applicable to appeals to the

Court of Appeal, as specified in rule 1.1(10) of the CAR. Regrettably, therefore, Part 21 of the CPR cannot provide a basis for the appointment by this court of a representative for the purpose of the proceedings before the court.

(i) Can the appellant apply to this court to appoint a representative for the respondent for the conduct of the proceedings?

[12] In **Administrator-General for Jamaica v Glen Muir**, I sought to explain (at paragraph [18]) that, upon the respondent becoming aware of Mr Ledgister's death, "no further step in the proceedings ought to have been taken by him, other than to apply for an order appointing someone to represent Mr Ledgister's estate for the purposes of the proceedings".

[13] In the instant case, it is the appellant who has applied to this court for the appointment of a representative for the deceased respondent. Based on the provisions of rules 21.7 and 21.8 of the CPR and **Administrator-General for Jamaica v Glen Muir**, it appears that this application is validly made. Also, based on the affidavit of Mr Paris, counsel for both parties to the appeal are *ad idem* on the proposed appointment of Ms Valerie Williams, daughter of the deceased respondent, as a representative for the purposes of the proceedings in the appeal.

(ii) *The jurisdiction of the Court of Appeal to make the order sought*

[14] The applicability of rules 21.7 and 21.8 of the CPR was explored in the case of **Tanya Ewers (Executrix of the estate of Mavis Williams) v Melrose Barton-Thelwell** [2017] JMCA Civ 26. In that case, the judge of the Supreme Court refused an

application by the appellant for an extension of time to file a defence on behalf of her mother who had died one year after filing the acknowledgment of service. The judge ruled that Ms Ewers had no basis on which to file a defence as she could not be properly treated as a defendant, and granted the respondent permission to enter judgment in the claim. Ms Ewers was granted permission by this court to file the notice and grounds of appeal on behalf of the estate of Ms Williams, in her capacity as representative of that estate and therefore appealed in that capacity. In addition to her contention that she should be allowed to file a defence on behalf of the estate, Ms Ewers contended that the judge ignored the provisions of rule 21.7 and 21.8 of the CPR that provide for the substitution of a personal representative for the estate of the deceased.

[15] Brooks JA highlighted that the judge had the power to appoint a representative of Ms Williams' estate on his own motion. At paragraph [24], Brooks JA had this to say:

"[24] ... As will be demonstrated below, a representative, which could be a named executor, first has to be appointed by the court to act for a deceased defendant, before that person can act on behalf of the estate of that defendant. Rule 21.7(4) requires the court to appoint a representative before the case can proceed. A second comment to be made at this stage is that, unfortunately, the learned judge did not seem to have fully appreciated that Ms Ewers was asking for permission to file the defence on behalf of Ms Williams' estate. ..."

At paragraph [25], Brooks JA added that:

"[25] Although there was no application before the learned judge for Ms Ewers to be appointed the representative of Ms Williams' estate, the learned judge was entitled under rules 21.7 and 21.8 of the CPR

to grant permission to Ms Ewers, or some other person, to represent Ms Williams' estate. The learned judge was entitled to do so of her own motion. ..."

[16] And further, at paragraph [26], Brooks JA explained that:

"[26] Assuming that the applicant satisfied the criteria for the extension of time to file a defence, the learned judge, at the time of appointing the representative, could also have granted an extension. If the latter order were not sought at that time the representative could have applied at a later date for an extension of time."

[17] At paragraph [27], Brooks JA addressed the respondent's contention that only a person who had previously been appointed the personal representative by grant of probate or letters of administration was entitled to file a defence on behalf of the estate of Ms Williams. He stated that:

"[27] ... Rule 21.7 of the CPR, dealing generally with the appointment of persons to represent the estates of deceased persons, does not require a person to be so appointed, to have previously been appointed as the personal representative of the deceased person. The practical thing for the learned judge to have done, in those circumstances, was to have exercised the powers granted by rules 21.7 and 21.8 of the CPR, so that the proceedings could have been carried on. The learned judge was in error not to have done so."

And at paragraph [28], he concluded that:

"[28] Ms Ewers, based on the content of her affidavits, her relationship to Ms Williams and her position of executrix named in the will, would have satisfied the requirements for representing the estate, as set out in rule 21.7 (2), quoted above."

[18] In **Tanya Ewers v Melrose Barton-Thelwell**, this court was in a position to exercise its discretion to appoint Ms Ewers as the representative of the estate of Ms Williams by virtue of rule 2.15(b)(b) of the CAR, which gives the Court of Appeal the power to “give any judgment or make any order which, in its opinion, ought to have been made by the court below”. Accordingly, as the appointment of Ms Ewers could have been made by the judge below of his own motion under rules 21.7 and 21.8 of the CPR so that the case could proceed, this court was likewise able to make the order.

[19] In this case, however, the trial of the claim was completed and the order made in favour of the respondent in the Resident Magistrate Court. The appeal was also filed before the respondent died. The application by the appellant to appoint a representative for the respondent is therefore being made to the Court of Appeal where the proceedings are at a standstill as the respondent is deceased. Counsel for the appellant is asking this court to exercise its power in keeping with the overriding objective to appoint Ms Valerie Williams as the representative of the estate of Ms Zada Hall so that the appeal can proceed.

[20] Despite the inapplicability of rules 21.7 and 21.8 of the CPR to this court, there is still rule 2.15(a) of the CAR, which gives this court the powers in rule 1.7 of the CAR, in addition to “all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26...”. Further, rule 2.15(b)(g) gives the court the power to “make any incidental decision pending the determination of an appeal or an application for permission to appeal”. Rule 2.15(b)(h) also gives the court the power to “make any

order or give any direction which is necessary to determine the real question in issue between the parties to the appeal". The application by the appellant could be viewed as an incidental decision that is necessary for the purposes of the proceedings in this court. In this regard, it seems to me that the court can exercise its discretion under the provisions of these rules to grant the order sought by the appellant.

Conclusion

[21] In the result, I would make an order appointing Ms Valerie Williams as the representative of the respondent, the late Mrs Zada Hall, for the purposes of this appeal. I would also direct the Registrar to relist the appeal for hearing by the court at the earliest convenient date.

F WILLIAMS JA

[22] I have read in draft the judgment of the learned President and I agree with his reasoning and conclusion. I have nothing useful to add.

P WILLIAMS JA

[23] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing further to add.

MORRISON P

ORDER

Application granted. Ms Valerie Williams is hereby appointed as the representative of the respondent, the late Mrs Zada Hall, for the purposes of this appeal. The registrar of

this court is directed to relist the appeal for hearing by the court at the earliest convenient date.