[2022] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00034

APPLICATION NOS COA2022APP00063 & COA2022APP00076

BETWEEN	**DONALD JACKSON**	**APPLICANT**
AND	**HERMINE MCFARLANE**	**RESPONDENT**

Lemar Neale instructed by Nea/Lex for the applicant

Miss Jean Williams for the respondent

3 May and 16 June 2022

IN CHAMBERS (BY TELECONFERENCE)

FOSTER-PUSEY JA

Background

[1] The applicant, Mr Donald Jackson, seeks a stay of execution of two orders made by Nembhard J ('the learned judge'), one on 5 April 2019 and the other on 17 March 2022. On 18 March 2022 the applicant, having received leave to appeal from the learned judge, filed notice and grounds of appeal challenging the orders that the learned judge made on 17 March 2022.

[2] The matter stems from a dispute between the parties, who are brother and sister, in respect of the beneficial interest of each party in a property which was registered in their names as tenants-in-common, without any indication of the apportioned share of each party. The respondent has contended that she is the sole beneficial owner of the subject property, and therefore commenced proceedings in the Supreme Court against the applicant.

Proceedings in the court below

[3] By way of a fixed date claim form, filed on 5 June 2018, the respondent sought the following orders:

> "1. A Declaration that [the respondent] holds the entire beneficial interests [sic] (100%) in the property registered in the names HERMINE McFARLANE and DONALD JACKSON situated at Lot 12 West Avenue (Camperdown) also known as 1 West Camp Close, Kingston 8 in the parish of Saint Andrew registered at Volume 1053 Folio 469 of the Register Book of Titles more specifically described as follows:
>
> > **'All that parcel of land part of 'THE FIRS' CAMPERDOWN part of NUMBER TWELVE WEST AVENUE (CAMPERDOWN) in the Parish of SAINT ANDREW being the lot numbered TWELVE on the Plan of No. 12 West Avenue (Camperdown) aforesaid deposited in the Office of Titles on the 25th day of October, 1968 of the shape and dimensions and butting as appears by the Plan and being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 293.'**
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> 2. An order that a valuation for the property be conducted by an independent valuator to be agreed between the parties and that where the parties are unable to agree to a valuator the Registrar of the Supreme Court be authorized to appoint a valuator to value the said properties [sic].
>
> 3. That both parties share the cost of the valuator;
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> 4. That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all orders;
>
> 5. Liberty to apply;
>
> 6. Costs …"

[4] The first hearing was scheduled for several dates on which the applicant did not appear. On 7 December 2018, by registered post, counsel for the respondent served the notice of adjourned hearing filed on 7 December 2018 on the applicant, advising him that the matter was adjourned to 31 January 2019. Neither the applicant nor his attorney-at-law attended court on that date. Again, the matter was adjourned to 4 April 2019. When the matter came up for hearing on 4 April 2019, the applicant was again absent. The learned judge adjourned the hearing to 5 April 2019 for the respondent's attorney-at-law to prove that the applicant had been notified of the adjourned hearing which was scheduled for 4 April 2019.

[5] On 5 April 2019, counsel for the respondent filed an affidavit of service via email indicating that, on 2 April 2019, she sent a letter and an unperfected formal order filed on 7 March 2019 to the applicant's email address. The formal order gave notice that the first hearing was adjourned to 4 April 2019. On 5 April 2019, the learned judge, being satisfied that, at the very least the applicant would have been able to ascertain the contents of the unperfected formal order, made the following orders in the applicant's absence:

> "1. [The respondent], Hermine McFarlane holds the entire beneficial interest (100%) in the property registered in the names HERMINE McFARLANE and DONALD JACKSON situated at Lot 12 West Avenue (Camperdown) also known as 1 West Camp Close, Kingston 8 in the parish of Saint Andrew being the land comprised in Certificate of Title registered at Volume 1053 Folio 469 of the Register Book of Titles more specifically described as follows:
>
> > **'All that parcel of land part of 'THE FIRS' CAMPERDOWN part of NUMBER TWELVE WEST AVENUE (CAMPERDOWN) in the Parish of SAINT ANDREW being the lot numbered TWELVE on the Plan of No. 12 West Avenue (Camperdown) aforesaid deposited in the Office of Titles on the 25th day of October, 1968**

of the shape and dimensions and butting as appears by the Plan and being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 293.'

2. [The applicant], Donald Jackson holds no beneficial interest in the property registered in the names HERMINE McFARLANE and DONALD JACKSON situated at Lot 12 West Avenue (Camperdown) also known as 1 West Camp Close, Kingston 8 in the parish of Saint Andrew being the land comprised in Certificate of Title registered at Volume 1053 Folio 469 of the Register Book of Titles more specifically described as follows:

   'All that parcel of land part of 'THE FIRS' CAMPERDOWN part of NUMBER TWELVE WEST AVENUE (CAMPERDOWN) in the Parish of SAINT ANDREW being the lot numbered TWELVE on the Plan of No. 12 West Avenue (Camperdown) aforesaid deposited in the Office of Titles on the 25th day of October, 1968 of the shape and dimensions and butting as appears by the Plan and being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 293.'

3. That the Registrar of the Supreme Court is empowered to sign any and all documents to make effective the orders of the Court.

4. Liberty to apply.

5. Costs to [the respondent] to be taxed if not so agreed…"

[6] In light of these orders, the applicant, on 28 May 2019, filed a notice of application for court orders along with an affidavit in support seeking, among other things, to set aside the learned judge's orders. On 11 February 2022, the applicant filed an amended notice of application for court orders seeking to also stay proceedings in the Parish Court

for recovery of possession pending the outcome of the application. The applicant relied on the following grounds in support of his application:

> "1. Rule 39.6 of the Civil Procedure Rules, 2002 (as amended) provides that the court may set aside an order made in the absence of a party.
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> 2. [The applicant] has a good reason for failing to attend the hearing.
>
> 3. It is likely that had [the applicant] attended the hearing, some other order(s) might have been made.
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> 4. [The applicant] has a real prospect of successfully defending the claim.
>
> 5. Without a stay [the applicant] will be ruined."

[7] On 24 February 2022, the learned judge heard the amended notice of application for court orders and reserved her decision. On 17 March 2022 she ruled as follows:

> "(1) The Amended Notice of Application for Court Orders, which was filed on 11 February 2022, is refused;
>
> (2) The costs of the Amended Notice of Application for Court Orders, which was filed on 11 February 2022, are awarded to [the respondent] against [the applicant] and are to be taxed if not sooner agreed;
>
> 3. [The applicant] is granted Leave to Appeal…"

[8] Disgruntled with these orders, the applicant, on 18 March 2022, filed a notice of appeal with the grounds which appear below:

> "a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to set aside the order made on April 5, 2019 in the absence of [the applicant].
>
> b. The learned judge misdirected herself on the law when she found that service by electronic means could be effected under Rule 5.13 of the CPR pursuant to Rule

6.2(a) of the CPR. In so finding the learned judge failed to appreciate that:

i. the interplay between Rules 6.2(a) and 5.13 of the CPR does not permit a method of service which is dependent on the existence of a Practice Direction;

ii. service by electronic means could only be effected by a Practice Direction, a rule or an order of the Court, pursuant to Rule 6.2(d) of the CPR; and

iii. there is no Practice Direction, rule or order of the court which permitted service by electronic means on [the applicant].

c. The learned judge erred in disregarding or insufficiently regarding and/or demonstrating a misunderstanding of the totality of [the applicant's] evidence which caused her to derive an erroneous conclusion that [the applicant] did not have a good reason for failing to attend the hearing.

d. The learned judge erred in law in finding that [the applicant] has not satisfied the requirement of Rule 39.6(3)(b) of the CPR.

e. The learned judge erred in law in assessing [the applicant's] credibility solely on affidavit evidence without cross-examination."

[9] On the same date when the notice and grounds of appeal were filed in this court, the applicant also filed a notice of application for court orders seeking a stay of execution of the learned judge's orders that were made on 5 April 2019 and 17 March 2022. The application was supported by an affidavit of the applicant and an affidavit of urgency deponed by counsel for the applicant, Mr Neale. On 23 March 2022, a single judge of this court considered the application and made the following orders:

"1. Interim stay of execution granted until 3 May 2022.

2. Inter partes hearing fixed for 3 May 2022 at 2:15 pm.

3. Costs of the application to be costs in the appeal."

[10] On 3 May 2022, I heard the application and reserved my decision. I also made the following orders:

> "1. Interim stay of execution granted on 23 March 2022 until 3 May 2022 is further extended until the determination of this application.
>
> 2. Costs of the application is reserved."

In fulfilment of my promise to provide my decision and reasons, I now do so with apologies for the delay.

The applications

Relief from sanction

[11] It is important to note that there was, initially, another matter set before me for hearing. Counsel for the respondent, on 7 April 2022, filed a notice of application for relief from sanction. However, at the outset of the hearing, she withdrew the application. Counsel indicated that, having had discussions with counsel for the applicant, it was brought to her attention that the rules on which she was relying were no longer in force.

Stay of execution

[12] These are grounds on which the applicant has relied in support of the application for stay of execution:

> "1. **Rule 2.10(b) of the Court of Appeal Rules, 2002 (as amended) empowers a single judge to make an order for a stay of execution of any order against which an appeal has been made pending the determination of the appeal.**
>
> 2. On April 5, 2019, an order was made against the Applicant in his absence.
>
> 3. The order gives the Respondent the sole beneficial interest in the disputed property which is jointly owned by the Applicant and Respondent as tenants in

common. The disputed property is the subject matter of this appeal.

4. The Applicant applied to set aside the order made in his absence but the application was refused on March 17, 2022. The Applicant was granted leave to appeal but the learned judge did not entertain an application for a stay of execution pending appeal.

5. The Applicant has an arguable appeal with a real chance of success.

6. Without a stay, the Applicant will be ruined as the Respondent has commenced execution of the order by issuing proceedings for recovery of possession, which is currently being tried in the Corporate Area Parish Court.

7. The Respondent will not suffer any prejudice. Greater hardship will be caused to the Applicant as he is facing being evicted from the property where he resides, based on a formal [order] made in his absence." (Emphasis supplied)

[13] In light of the basis on which I have decided to refuse this application, I will not be outlining the details of the affidavits that were filed in support of the application.

Discussion

[14] As noted above, the notice and grounds of appeal filed by the applicant were in respect of the orders made on 17 March 2022. Rule 2.10(1)(b) empowers a single judge of appeal to make orders -

> "**for a stay of execution of any** judgment or **order against which an appeal has been made** pending the determination of the appeal." (Emphasis supplied)

[15] Bearing in mind that the applicant is appealing the orders made on 17 March 2022, I asked counsel for the applicant, Mr Neale, to highlight which of those orders was amenable to a stay of execution. Counsel frankly stated that the orders made on 17 March 2022 did not give rise to "staying anything".

[16] He went on to submit, however, that it was appropriate to apply for a stay of execution of the orders made on 5 April 2019, as the applicant could not file an appeal arising from them. This was due to the fact that he was required to first apply to set aside the orders made in his absence on that date, and his application, which was determined on 17 March 2022, did not succeed. In appealing the orders made on 17 March 2022, counsel argued, the applicant is 'indirectly appealing' the orders made on 5 April 2019.

[17] Counsel was asked whether consideration was given to applying for an injunction instead but responded that the approach which his client has taken accords with the approach successfully taken by counsel in **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30.

[18] Miss Williams, counsel for the respondent, did not make any submissions on this point.

[19] While Mr Neale has submitted that there is nothing in the order made on 17 March 2022 that can be stayed, this is not, strictly speaking, correct, as the order for costs could be stayed. It is clear, however, that that is not the order about which the applicant is concerned. The applicant is concerned about the orders made on 5 April 2019. As an aside, Mr Neale also conceded that the court cannot grant a stay of declaratory orders such as those made on 5 April 2019. Apart from the order for costs made on that date, it was only the order empowering the Registrar of the Supreme Court to sign any documents needed to make the orders of the court effective, that could be stayed.

[20] In my view, in light of the fact that the appeal that is pending before the court relates to the orders made on 17 March 2022, the application for a stay of execution of the orders made on 5 April 2019 is misconceived. I have read **Kenneth Boswell v Selnor Developments Limited** to which Mr Neale referred. In that matter Anderson J, on 3 November 2016, having refused a request for an adjournment, proceeded to make all the orders which the claimant had sought in its fixed date claim form. On 17 November 2016, Mr Boswell filed a notice of appeal challenging the orders Anderson J made,

contending, among other things, that the judge's refusal to grant an adjournment was unreasonable, unfair and an unjust exercise of his discretion. Mr Boswell also applied for a stay of execution of the 3 November 2016 orders, but Anderson J, on 18 January 2017, refused to grant such an order. Mr Boswell then filed a notice of application in this court asking that this court discharge or set aside Anderson J's order dismissing his application for a stay of execution of the orders made on 3 November 2016 as well as grant a stay of execution pending the appeal of the orders. Mr Neale is, therefore, incorrect when he asserts that the case at bar is similar to what occurred in **Kenneth Boswell v Selnor Developments Limited.** Specifically, it must be noted that Mr Boswell had appealed the orders in respect of which he sought a stay of execution

[21] I do not accept Mr Neale's submissions that the appeal of the orders made on 17 March 2022 is an 'indirect appeal' of the orders made on 5 April 2019. The application which arose for the learned judge's determination, on 17 March 2022, required different considerations from those that the learned judge would have taken into account on 5 April 2019, before making her orders. In any event, even if the view proffered by counsel for the applicant could be accepted, I do not believe the Court of Appeal Rules, 2002 (as amended) empower the stay of execution of an order which is not the direct subject of the appeal set for determination by the court.

[22] In light of all of the above, the application for stay of execution is refused. The interim stay of execution which was extended on 3 May 2022 until the determination of this application is discharged.

[23] Costs of this application to the respondent to be taxed if not agreed.