

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121/2018

APPLICATIONS NOS COA2019APP00051 AND COA2019APP00117

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA**

BETWEEN	HAROLD MILLER	APPELLANT
AND	CARLENE MILLER	RESPONDENT

Miss Lisamae Gordon and Miss Raynah Spence for the appellant instructed by Malcolm Gordon

Michael Hylton QC and Miss Melissa McLeod for the respondent instructed by Hylton Powell

23 and 24 September 2019

MORRISON P

[1] There are two applications before the court.

[2] In Application No COA2019APP00051, filed on 21 February 2019 (the first application), the respondent seeks orders (i) striking out the notice of appeal filed by the appellant on 12 December 2018; and (ii) ordering the appellant to pay the costs of the application and the appeal.

[3] The grounds of this application are that (i) the notice of appeal was filed out of time; (ii) the appellant has failed to file written submissions in support of his appeal; (iii) despite being notified by the registry of this court that the correct procedure has not been followed, the appellant has failed to comply with the rules or to take any steps to rectify his breaches of the rules; (iv) the appellant has been in sole possession of the parties' joint property for more than 10 years, without paying any part of the compensation ordered by this Honourable Court; and (v) it would be in the interest of the overriding objective and would save expense and the court's resources if the orders sought were granted.

[4] In Application No COA201900117, filed on 5 June 2019 (the second application), the appellant seeks an order extending the time for filing the notice of appeal to 12 December 2018, the date on which it was actually filed.

[5] The second application is supported by an affidavit sworn to by Miss Raynah Spence, one of the appellant's attorneys-at-law, in which it is stated that (i) the delay in filing the notice of appeal was not inordinate; (ii) the appellant's failure to file notice of appeal in time was not wilful; and (iii) since being advised by the Court of Appeal on 30 April 2019 that the appeal was out of time, "the correct steps have been taken to rectify the breaches".

[6] The relevant rules of the Court of Appeal Rules 2002 (the CAR) which are in play in relation to these applications are as follows: (i) rule 1.11(1)(b), which provides that, in cases in which permission to appeal is required as a precondition to filing notice of appeal,

notice of appeal must be filed within 14 days of the date on which permission to appeal is granted; (ii) rule 2.20(1), which provides that, where an appellant fails to comply with any of the rules, any other party may apply to the court to dismiss the appeal; (iii) rule 2.4(1), which provides that on a procedural appeal the appellant must file and serve written submissions in support of the appeal within 14 days of the filing of the notice of appeal; (iv) rule 1.11(2), which provides that the court may extend time for the filing of the notice of appeal; and (v) rule 1.7(2)(b), which provides that the court may extend time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

[7] In relation to an application for extension of time, the longstanding rule of this court, sanctioned by an unbroken line of authority, is that the court will consider the length of the delay; the proffered reasons for the delay; whether there is an arguable case for an appeal; and the degree of prejudice to the other party or parties if time is extended. However, the overriding principle is that justice has to be done, with the result that the court is not bound to refuse an application for extension of time in the absence of a good reason for the delay. In other words, the court's power to grant an extension of time is discretionary (see **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes**, (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999; **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23, paras [28]-[29]).

[8] Similar, if not identical, considerations arise on an application to strike out for want of prosecution (see **Ronham & Associates Ltd v Christopher Gayle and Mark Wright** [2010] JMCA App 17, paras [25]-[26]).

[9] With these principles in mind, the factual background to these applications may be shortly stated. On 17 July 2015, this court made various orders in contested matrimonial property proceedings in favour of the respondent. These orders were stayed pending an appeal by the appellant to the Privy Council. The Privy Council dismissed the appeal on 19 July 2017. Inconclusive discussions between the parties with a view to working out this court's orders in favour of the respondent led her to make two further applications in aid of execution of those orders to a judge of the Supreme Court. On 30 July 2018, the judge decided both applications in the respondent's favour and refused leave to appeal. However, on 15 November 2018, the appellant successfully moved this court for leave to appeal against the judge's orders. Accordingly, the appellant filed notice of a procedural appeal on 12 December 2018. But the appellant did not file any submissions in support of the appeal. On 18 December 2018, the Deputy Registrar of this court wrote to the appellant's attorneys-at-law to say that the notice of appeal was out of time and to invite the appellant to take steps to extend or enlarge time for this purpose. As we have indicated, the first application was filed on 21 February 2019 and the second on 5 June 2019.

[10] With the agreement of the parties, since a decision on the second application in favour of the appellant was potentially dispositive of the first, we heard submissions from

Miss Gordon for the appellant on the second application ahead of submissions from Mr Hylton QC for the respondent on the first.

[11] Miss Gordon told us that the filing of the notice of appeal on 12 December 2018 arose from a perceived ambiguity in the provisions of the CAR in respect of the time for filing an appeal in which permission to appeal is required. This ambiguity led the appellant's attorneys-at-law to consider mistakenly that the appeal was in fact filed in time. However, accepting as she now did that the notice of appeal was filed outside of the 14-day period limited by rule 1.11(1)(b) for the purpose, Miss Gordon submitted that the appellant had an appeal with a real prospect of success. In this regard, she relied on the fact that on 15 November 2018, on an application in respect of which the same criterion would have applied, this court granted him permission to appeal.

[12] In response to these submissions, Mr Hylton emphasised the very real prejudice to the respondent, who had been kept out of the property to which this court had found her entitled since 2015. He also directed our attention to the statement of P Harrison JA (as he then was) in **Strachan v Gleaner Co Ltd et al** that "[t]he reasons for the delay must be given by the applicant [for extension of time] and if his affidavit fails to disclose a sufficiently satisfactory one, the court is unlikely to exercise its discretion in his favour". In this case, it was submitted, there was no sufficient reason given for the delay in filing the notice of appeal and the omission to file submissions in support of the appeal and none had been stated. There was therefore no material upon which the court could properly grant an extension.

[13] On this basis, Mr Hylton submitted that the appellant's application for extension of time should be refused and the respondent's application to strike out the notice of appeal for failure to comply with the applicable rules should be granted.

[14] We agree with Mr Hylton. We note that, in the first place, despite the Deputy Registrar's letter of 18 December 2018 pointing out that the notice of appeal had been filed out of time, the application for extension of time was not filed until several months later – purely defensively, so to speak - when the appellant found himself confronted by an application to strike out the appeal for failure to comply with the rules. In these circumstances, as it seems to us, the appellant was under a clear duty to provide the court explicitly with some material to enable it to decide whether the delay should be excused.

[15] The affidavit of Miss Spence was singularly unhelpful in this regard, stating merely that "[t]he Appellant's failure to file the Notice of Appeal within the stipulated time was not wilful". The affidavit was completely silent on the only two additional matters which Miss Gordon urged on us on her feet, which were that she had misread the rules and that the Deputy Registrar's letter did not come to her attention until sometime late in May 2019.

[16] We therefore approach this application on the footing that the appellant has given no sufficient reason for the delay. However, we accept that it is nevertheless open to the court to exercise its discretion in the appellant's favour if he can show that he has an appeal with a reasonable prospect of success. But beyond the faint suggestion that the

appellant, having been granted permission to appeal, must be taken to have shown that he had a reasonable prospect of success, nothing at all has been placed before the court to enable us to make that assessment for ourselves. In this regard we bear in mind that, in any event, the appellant would need to show that the judge's exercise of her undoubted discretion to make the orders which she made was sufficiently flawed so as to warrant this court's interference with them. Then, when the question of the obvious prejudice to the respondent, who has been deprived of the fruits of her judgment for over four years, is added to this, it seems to us that the conclusion that this application must fail is inevitable.

[17] We therefore dismiss the application for extension of time. It follows from this, in our view, that the application to strike out the appeal must necessarily succeed and we will accordingly make the order sought by the respondent on the first application.

[18] On the question of costs, the respondent is clearly entitled to her costs on both applications.

[19] Accordingly, the orders of the court are as follows:

1. Application No COA201900117 filed on 5 June 2019 is refused, with costs to the respondent to be agreed or taxed.
2. Application No COA2019APP00051 filed on 21 February 2019 is granted, with costs to the respondent to be agreed or taxed.