[2011] JMCA App 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 49/2009

APPLICATION NO 68/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN SARAH BROWN APPLICANT

AND ALFRED CHAMBERS RESPONDENT

Lawrence Haynes instructed by Miss Saverna Chambers for the applicant

Miss Audré Reynolds instructed by Bailey Terrelonge Allen for the respondent

2, 31 May; 24 June and 29 July 2011

HARRIS JA

[1] On 20 December 2010 this court made the following order:

"Appeal dismissed

a) The respondent Mrs. Sarah Brown shall quit and deliver up possession of all that parcel of land known as number 22 Cedar Valley Road, Kingston 6 in the parish of St. Andrew to the appellant Mr. Alfred Chambers on or before the 31st March 2011;

b) Judgment for the respondent in the sum $3,500.00 together with interest thereon as follows:

i. At the rate of 6% per annum from 9 April 1984 to 30 June 1999;

ii At the rate of 12% per annum from 1 July 1999 to 22 June 2006; and

iii At the rate of 6% per annum from 23 June 2006 to date;

c) Costs to the respondent both here and below, to be taxed if not agreed."

[2] On 30 March 2011, Mrs Brown made an application for the time within which to quit and deliver up possession of the property to be extended to four months. In paragraphs 7 to 14 of her affidavit in support of her application she states:

"7. That I have been living at this address since 1984 with my family. Presently, there are 11 family members living with me including some of my children and grandchildren.

8. I have been seeking alternate accommodation so as to honour the court order however I have been experiencing hardship in finding a suitable and affordable place to live.

9. That I am now aged 72 years old and I am unemployed.

10. That all the money I have worked and saved through the years have gone into this property.

11. That I was awarded cost in this court and the court below and I have been advised by my Attorney-At-Law and verily believe that these costs are expected to be substantial and that she has made an application for Taxation of the cost.

12. That I was also awarded Judgment in the sum of $3,500.00 with interest and that I have not yet received this money.

13. In light of the fact that I have to leave my house behind I am relying on the cost awarded by the court to assist me in finding suitable accommodation.

14. That in the circumstances I am requesting an extension of four (4) months within which to vacate the property. I verily believe that this is not unreasonable as at paragraph [45] of the Judgment His Lordship Mr. Justice Brooks stated that – 'I also find that the learned trial Judge was correct in finding that damages and not specific performance, was the appropriate remedy to which Mrs. Brown was entitled. In terms of a time for delivery up of possession, I do not consider six (6) months to be excessive'."

On 24 June, 2011 we refused the application and made no order as to costs.

[3] Mr Haynes submitted that on a natural reading of section 10 of the Judicature (Appellate Jurisdiction) Act, it appears to be wide enough in scope to embrace the application, as the application sought, does not require the alteration or interference with the substantive judgment. On a proper construction of the section, he argued, there is nothing on the face of it, which delimits the power of the court to extend time. The application, he contended, falls within the purview of an enforcement as an application for extension of time and in the circumstances of this case it is incidental to the enforcement of the judgment. The cases of ***Gamser v The Nominal Defendant*** 136 C.L.R 145 at

147 and ***Bailey v Marinoff*** 125 C.L.R. were cited by Mr Haynes in support of his submissions.

[4] Miss Reynolds argued that the power to amend, enforce and execute as stated in the section is with reference to an order of the Supreme Court and in relation to application, this court only has the power to amend these orders. This court, however, could amend where the words "liberty to apply" are expressed in an order or judgment, or in circumstances where a material change in circumstances occurs, she argued.

[5] The fundamental issue in this application is whether the court is empowered to extend time after a final judgment or order has been made. It is common ground that the pronouncement of the court on 20 December is a final order. As a general rule, once a judgment or order is perfected it brings litigation to an end. It follows therefore that a court cannot revisit an order which it has previously made. The extent of the court's jurisdiction does not go beyond that which is pronounced in its final order. Despite this, certain exceptional circumstances may arise which may cause the court to revisit a prior order. In the Australian case of ***Bailey v Marinoff***, Barwick CJ, speaking to the foregoing principles, at page 530 said:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion not promote the due

> administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court."

[6] At page 539 Gibbs J said :

> "It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it ***...*** The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court."

In ***Gamser v The Nominal Defendant***, in addressing the principle**,** Barwick C. J said:

> "I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it. It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation. However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand. In my opinion it is desirable that the Court of Appeal should have a discretion – however guardedly it might have to be exercised – to reopen its judgments in cases such as that in which the needs of justice require it. I agree, however, that

> the decision in ***Bailey v Marinoff*** (5) shows that the Court of Appeal lacks that inherent power."

[7] In civil proceedings, the scope of the power of this court, as prescribed by section 10 of the Judicature (Appellate Jurisdiction) Act, is to hear and determine appeals from judgments or orders of the Supreme Court and for the purposes of or incidental to the hearing and determination of the appeal and for the amendment, execution or enforcement of such orders or judgments. The section reads:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon…"

[8] Rule 1.7(2) (b) of the Court of Appeal Rules (COAR) empowers this court to extend time. It states:

> "1.7(2)(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension is made after the time for compliance has passed."

[9] The focus of the court's inquiry is whether in this case the court is at liberty to extend the time to permit the applicant to remain on the property beyond 31 March, 2011. First, the court should direct its attention to the

meaning of section 10 of the Act. In the ordinary course of construction of a statute, the court should ascribe such intention as is reasonably attributable to the legislature. The duty of the court therefore is to discover what was intended by the language of the statutory provision. This means that the court must examine the terms in which the relevant provision was framed and determine how the words were intended to operate. In taking into account the natural meaning of section 10, could it be so interpreted so as to mean that the court is empowered to re-open its judgments or final orders? We think not.

[10] What then was the intention of the drafters of the statutory provision? Section 10, among other things, empowers the court to amend, execute and enforce a judgment or an order. But does this extend to an enlargement of time after judgment has been entered? This gives rise to a further question, which is, what is the scope of the words "amendment," "execution" and "enforcement" within the context of section 10? Amendment means to make alteration, modify or adjust. Execution means, quite simply, "the process for enforcing or giving effect to the judgment of the court," per Lord Denning in ***Re Overseas Aviation Engineering*** (G.B) [1963] Ch 24. Enforcement means to put into execution a judgment. **See *Ex p Holden*** 32 L.J.C.P. 111

[11] Neither the COAR nor the Civil Procedure Rules (so far as is applicable to the powers of the Court of Appeal), authorizes this court to enforce or put into execution its final judgment or order. Under rule 1.12 of the COAR, this

court is empowered to alter or modify a notice of appeal by way of an amendment. This is clearly a process which would be done before judgment. Although the Civil Procedure Rules do not give this court the power to correct judgments or orders, the court, by virtue of its inherent jurisdiction may, correct a clerical error , or an error arising from an accidental slip or an omission arising in its judgment or order. Generally, that is the extent of the court's authority to amend after judgment. In construing section 10 , we are of the view that it could not have been the legislative intent to have permitted this court to interfere with its judgment once it has been delivered. It is plain that no other meaning could reasonably be attributed to it. To construe the section otherwise would undoubtedly run contrary to that which was contemplated by the legislature. On a true construction of section 10, this court is empowered to deal only with judgments or orders of the Supreme Court which are pending before it.

[12] Mr Haynes contended that the application falls within the purview of an enforcement of the judgment of this court and the Act facilitates the grant of an extension of time. However, it appears that he was unmindful of the fact that the application is the basis on which he sought the order. The application was made under rule 1.7 (2) (b) of the COAR. So then what limit, if any, is conferred on this court by rule 1.7 (2) (b) within the context of section 10 of the Act? The court may exercise its general powers under the Act and in accordance with such rules of court as are prescribed. The Act being the

dominant regulatory instrument, the rules are contingent upon its provisions. Clearly, the rules of court being subordinate, the Act must prevail. Rule 1.7 (2) (b) is limited in scope, it being restrictive in its application in granting an extension of time. The powers of the court can only be invoked prior to the determination of an appeal. The powers exercisable under the rule extend only to such matters which are pending before the court. Consequently, the rule could not have been intended to alter the express provisions of section 10 to permit the court to extend time after a final judgment has been pronounced.

[13] It follows therefore that an application for extension of time, being made after the determination of an appeal, cannot be interpreted as one which would fall within the scope of an amendment, execution or enforcement. This would clearly be inconsistent with the legislative intent. The powers of the court are circumscribed by the Act, that is, to hear, amend, execute and enforce matters pending before the court.

[14] The application, by its very nature, is effectively one for the variation of the judgment of the court and would clearly be inappropriate in the circumstances of this case. It cannot be denied that rule 1.7 (8) of the COAR provides the court with the ammunition to revoke or vary an order. However, this does mean that the court should do so simply at the behest of a party. The court will exercise its power to revisit a prior Judgment or order, upon a party being granted "liberty to apply". This facilitates the working out of such

Judgment or order. The grant of "liberty to apply" is not applicable to the variation of a judgment or order. See ***Cristel v Cristel*** [1951] 2 KB 725. However, there are instances in which the court will vary. It will do so where there has been some material change of circumstances since the judgment, or, where the court, in making an earlier order, had been misled as to the correct factual position before them - See ***Collier v Williams*** [2006] 1 WLR 1945. The matter under consideration is not a case in which there has been any change in the applicant's circumstances which would warrant her succeeding in invoking the court's jurisdiction. Nor is there any evidence showing that the court was misled in pronouncing its judgment. The facts upon which the applicant places reliance do not lend support for the order which she seeks.

[15] Neither ***Bailey nor Gamser*** assists Mr Haynes. Both are distinguishable from the present case. Bailey's case concerned the appellant's non compliance with an order of the court requiring the filing and service of appeal books before a certain date, failing which the appeal should stand dismissed for want of prosecution. The books were filed in time but not served until six days later. On appeal to the full court, that court, dismissing the appeal, held that:

> "It is not within the power of this court to vary that order. Once the appeal was dismissed that was the end of the matter."

An application subsequently made to a judge for an extension of time within which to lodge the relevant books was dismissed on the ground that the appeal having been dismissed by the full court, it could not be revived. On appeal to

the Court of Appeal it was ordered that the filing and the service of the appeal books had been effected and were deemed sufficient compliance with the court's order. By a majority, an appeal to the High Court was allowed for the reason that the Court of Appeal in making its order was unaware of the decision of the full court.

[16] In ***Gamser***, an action was brought by the plaintiff to recover damages for personal injuries. An award of $160,000.00 was made in his favour. The award was reduced to $125,000.00 by the court of appeal. The plaintiff appealed to the High Court and while the appeal was pending fresh evidence became available to show that the injuries of the plaintiff were more severe than were given at the trial. The appeal before the High Court was adjourned to facilitate the plaintiff making an application to the Court of Appeal with regard to the changed circumstances. The Court of Appeal dismissed an application for a new trial, or for a re-assessment of the damage, for want of jurisdiction. The plaintiff also appealed this order. The High Court heard both appeals simultaneously. In dismissing the application, it held that the Court of Appeal had no jurisdiction to re-open the case. The appeal was allowed and the order of the trial judge was restored.

[17] As can be readily observed, ***Bailey*** shows that an appeal ends at the time of its dismissal. The Court of Appeal erroneously made an order which would obviously have had to be set aside. In ***Gamser*** the appeal was allowed due to

the material change in the circumstances relating to the plaintiff's injuries. In the instant case, a final judgment has been delivered. The relief sought by the applicant is one which seeks to reopen that judgment. This, the court is not authorized to do. We are firmly of the view that the relief which the applicant seeks does not fall within the scope of any of the exceptional circumstances earlier mentioned which would permit the court to make an order in her favour.

[18] For the foregoing reasons we refused the application.