[2017] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 42/2015

APPLICATION NO 126/2016

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**SELBOURNE BLAKE**	**1ST APPELLANT**
AND	**ROHAN WARD**	**2ND APPELLANT**
AND	**ODEL EDWARDS**	**RESPONDENT**

Debayo Adedipe for the appellants

Respondent in person

24, 25 and 26 July 2017

BROOKS JA

[1] This is an application by Messrs Sylbourne Blake and Rohan Ward (together hereinafter referred to as "the applicants") for an extension of time in which to serve a notice of appeal. The judgment that they seek to appeal from was handed down on 27 January 2015 in the Supreme Court of Judicature of Jamaica. It arose from an assessment of damages in favour of Mr Odel Edwards. The assessment of damages was conducted pursuant to a previously secured default judgment against the applicants.

[2] The applicants contend that they were not given notice of the hearing of the assessment of damages and therefore the assessment ought to be set aside. Their notice of appeal was filed on 17 April 2015. It was filed in advance of their being served with the formal order on the judgment in June 2015. There was, therefore, no breach of the rule stipulating the time for filing notices of appeal according to the Court of Appeal Rules (CAR) at that time. The relevant rule, rule 1.11(1)(c), at the time stipulated that notices of appeal should be filed and served "within 42 days of the date when the order or judgment appealed against was served on the appellant". The rule has since been amended to stipulate that the 42 days runs from the date that the order or judgment was made.

[3] The present application has arisen because the notice of appeal was not served within the time specified by rule 1.11(1)(c) of the CAR. The notice was served by registered post on 19 September 2016.

[4] Two things may, however, be noted about this appeal. The first is that it is puzzling, given that the basis of the appeal was that the assessment was done in the absence of the applicants, that they did not apply in the Supreme Court to set it aside pursuant to rule 39.6 of the Civil Procedure Rules (CPR) or under the inherent jurisdiction of that court. The second matter of note is that the notice of appeal was filed over two years ago and the only substantive development since that time, is that on 15 November 2016, a single judge of this court granted "a stay of the final judgment herein pending the hearing of the appeal". That order is interpreted as being a stay of

execution of the judgment pending the hearing of the appeal. It will be referred to as such hereafter.

[5] As to the first matter, Mr Adedipe has submitted, on behalf of the applicants, that although rule 39.6 of the CPR stipulates that a "party who was not present at a trial at which a judgment was given or an order made in its absence may apply to set aside that judgment or order", the rule cannot preclude such a party from appealing from that judgment. He submitted that where such a party contends that it was not given notice of the hearing complained about, that party is entitled, as of right, to have the judgment set aside. Its right, he submitted, is a constitutional right, and it cannot be fettered by a procedural rule such as rule 39.6.

[6] As to the second point, Mr Adedipe pointed out that nothing further could be done to advance the appeal, in the absence of the notes of the proceedings in the court below. It is noted that those notes were only provided to this court on 18 July 2017.

[7] These submissions will be dealt with more fully below.

The authority to extend time

[8] The court is authorised, by rule 1.11(2) of the CAR, to extend the time stipulated for both the filing and the service of the notice of appeal. Where a notice of appeal is filed within time, the service of the notice out of time does not invalidate the notice of appeal (see **Hoip Gregory v Vincent Armstrong** [2012] JMCA App 21). There was therefore an existing appeal when the stay was granted. The court is also entitled to grant an extension of time in which to serve the notice of appeal.

The principles governing the application

[9] Unfortunately, Mr Edwards represented himself in this court. As a result the court did not have the benefit of full legal arguments from both sides in order to assist its deliberations. In cases of application for extension of time it is usual to follow the guidance provided in **Leymon Strachan v The Gleaner Company Ltd & Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No. 12/1999, judgment delivered 6 December 1999). Based on that guidance, the court would normally consider:

i. the length of the delay;

ii. the reasons for the delay;

iii. whether there is an arguable case for an appeal;

iv. the degree of prejudice to the other party if time is extended; and

v. the justice of the case.

[10] In this case however, it is unnecessary, indeed, it may be improper, to follow that procedure because of the convincing arguments advanced by Mr Adedipe.

[11] Learned counsel submitted that the applicants were entitled, as of right, to be notified of the hearing of the assessment of damages. He submitted that that was a constitutional right guaranteed by section 16(2) of the Constitution. That section stipulates that every person whose civil rights may be adversely affected by a decision of a court is entitled to have a fair hearing "within a reasonable time by an independent and impartial court".

[12] Learned counsel argued that so fundamental was that principle that it overshadowed (not his term) any procedural default by the applicants. In this case, he submitted, the order on the assessment of damages was a final order and therefore the applicants had been denied their constitutional right, which is guaranteed by section 16(2) of the Constitution. On that basis, he submitted the proposed appeal not only has a real prospect of success but that the applicants are entitled as of right to have the final judgment set aside. He relied on **Isaacs v Robertson** [1984] UKPC 22; [1985] 1 AC 97 in support of these submissions.

[13] It was along this vein that Mr Adedipe submitted that rule 39.6 of the CPR would amount to an abridgment of the applicants' constitutional right and therefore could not be applied in these circumstances. He submitted that where notice of a hearing has not been given, an applicant, in applying to set aside the order made at that hearing, should have no obligation to obey rule 39.6(3)(b) and satisfy a judge, that had he been present at the hearing, it is likely that some other order would have been made. The applicant, Mr Adedipe submitted, is entitled to have the order set aside as of right.

[14] We agree, somewhat, with Mr Adedipe on the former of these submissions. At page 5 of their Lordships judgment they stated that there was a category of orders which should be set aside without any reference to any rules of procedure. In delivering the judgment of the court, Lord Diplock said, in part:

> "...what [the cases] do support is the...proposition that there is a category of orders of [a court of unlimited jurisdiction] which a person affected by the order is entitled to apply to

> have set aside [as of right] in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the Rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make...."

Among the cases that fall under this principle, their Lordships held, were orders obtained in breach of natural justice. It would be fair to say that section 16(2) of the Constitution is intended in part to enforce this principle of natural justice.

[15] Mr Adedipe's latter submission is only partially correct. Where it is contended that an order made in the Supreme Court was made in breach of natural justice, for example, on the basis that they were not served with a notice of an assessment of damages, the party making that complaint is entitled to apply to a judge of the Supreme Court to set aside the order. It is true that rule 39(6) would not strictly apply, as the application would normally request the court to exercise its inherent jurisdiction to control its process and to see natural justice done. Nonetheless, the application should have been made in that court as the most effective way of having the order set aside. Their Lordships in **Robertson v Isaacs** explained which court it is that would have jurisdiction in such cases. Lord Diplock said, in part, at page 5:

> "The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. **If it is irregular it can be set aside by the court that made it upon application to that court**; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies." (Emphasis supplied)

Their Lordships did not say that in the case of an irregular order, the application can only be made to the court that made that order. It is undoubtable that an application to that court would be more time efficient and cost effective than an appeal from that order.

[16] In the era of the CPR, **David Watson v Adolphus Roper** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 42/2005, judgment delivered 18 November 2005 demonstrates that applications may be made in the Supreme Court for orders to be set aside on the basis that the applicants were not served with notice of the proceedings that led to the order being made.

[17] In the circumstances of this case, two factors support the application before this court. The first is that Mr Edwards has not contested the assertion by the applicants that they were not served with a notice of hearing of the assessment of damages. The second is that the learned judge, who conducted the assessment of damages, did not have a definitive note concerning the service of notice. The learned judge's note on the point merely stated that:

> "Relevant filings and notices served on the Defendants. [Although this is not noted, this is my standard practice.]" (Brackets as per original)

It is unfortunate that the learned judge did not make a note of this important aspect of the case. The allegations made by the applicants in this case demonstrate how critical it is for judges to make an appropriate note on this point.

[18] Based on those factors, if this application were granted and the appeal heard, this court would be obliged to grant the appeal. The judgment made by the Supreme Court was irregular and must be set aside. The application as a result ought to be granted. It was for those reasons that we enquired of the parties if they would agree for the hearing of the application to be treated as the hearing of the appeal and they agreed.

The orders to be made

[19] The question of the appropriate orders to be made, then becomes of immediate pertinence. If the appeal were to be allowed, the final judgment must necessarily be set aside. The execution which was made pursuant to that judgment would, as a consequence of the setting aside, become an irregular execution and must also be set aside.

[20] Rule 43.5 of the CPR stipulates for such a result. It states:

> "(1) The general rule is that if the court sets aside a judgment or order, any order made for the purpose of enforcing it ceases to have effect.
>
> (2) The court may however direct that an order remains in force."

[21] This is not a case where the execution by the bailiff should remain in force. The vehicles seized by the bailiff are likely to deteriorate if they remain in the bailiff's hands pending the hearing of the assessment of damages. They should be returned to Mr Blake. The learned editors of Halsbury's Laws of England Volume 17(1) Fourth Edition,

at paragraph 215, accurately state the method of dealing with situations such as exist in the present case. There they state, in part:

> "In the High Court, if the writ of execution is irregular or ought not to have been issued, the master of district judge will, in general, set it aside, and, if goods or money have been levied under it, order them to be restored, or if the party is in custody under it, order him to be discharged. Similarly, when an execution has been irregularly executed he will, as a rule, order such restoration or discharge."

Authority for that principle can be found in **Rhodes v Hull** (1857) 26 LJ Ex 265.

[22] No other execution is possible until a fresh judgment is delivered by the Supreme Court.

[23] Mr Edwards has complained that the case is taking too long to be completed. We agree. Had the applicants utilised the correct approach it is likely that the re-hearing of the assessment of damages would already have been done. They should, therefore, not have the costs of the appeal. The re-hearing of the assessment of damages should be ordered to be conducted as quickly as possible.

Order

[24] The orders are:

1. Application for extension of time to serve notice of appeal is granted.
2. The service of the notice of appeal made by registered post on 19 September 2016 shall stand as proper service of the notice of appeal.

3. The hearing of the application is treated as the hearing of the appeal.
4. The appeal is allowed.
5. The final judgment on assessment of damages in the court below is set aside.
6. The assessment of damages shall be set for re-hearing by the registrar of the Supreme Court as soon as possible before a different judge.
7. The execution of the judgment on assessment of damages is set aside.
8. The goods levied pursuant to that judgment shall be restored to the appellants forthwith.
9. There shall be no order as to costs