[2012] JMSC CIVIL 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV-5519 of 2010

BETWEEN	FABIAN VALENTINE BOWES	CLAIMANT
A N D	PAULETTE YVONNE BOWES	DEFENDANT

Gordon Steer and Carl Dowding instructed by Pickersgill Dowding & Bayley Williams for the Claimant/Respondent

Simone Jarrett, Rose-Marie Duncan Ellis and Marjorie Duncan instructed by Duncan Ellis & Co. for the Defendant/Applicant

Heard: June 8, 2012, June 20, 2012 and September 21, 2012.

Cor: Rattray, J.

Notice of Appeal out of time – Application for leave to Extend Time to file Notice of Appeal – Factors to consider - Whether Court has jurisdiction to grant application

[1] The parties to these proceedings were married on the 1st July, 1995. During the course of their marriage, they acquired property at Lot 13 St. Louis Place, Caribbean Estate in the parish of St. Catherine being land comprised in Certificate of Title registered at Volume 1403 Folio 579 of the Register Book of Titles in or about 2007 . This property was used as their matrimonial home. A few years prior to their marriage, Paulette Bowes had purchased property in her own name located at Lot 173, 2 East Greater Portmore in the parish of St. Catherine being land comprised in Certificate of Title registered at Volume 1258 Folio 240 of the Register Book of Titles. Unfortunately, the glow of marital bliss did not last and a Decree Absolute was granted to Fabian Bowes in January, 2011 dissolving their marriage.

[2] By way of Fixed Date Claim Form filed on the 17th November, 2010 together with the supporting Affidavit, Fabian Bowes instituted legal proceedings against his wife claiming the following Orders;-

(a) That the Claimant and the Defendant own in the ratio 80% to 20% shares premises lot 13, St. Louis Place, Caribbean Estate, in the Parish of Saint Catherine, being the land comprised in Certificate of Title registered at Volume 1403 Folio 579 of the Register Book of Titles;

(b) That the Claimant and the Defendant own in the ratio 80% to 20% shares all the furniture, fixtures and equipment situate at premises lot 13, St. Louis Place, Caribbean Estate, St. Catherine;

(c) That the Claimant is entitled to occupational rental for the period 15th April, 2010, until this matter is adjudicated upon, he having been excluded from the Matrimonial Home by the Defendant from the 15th day of April, 2010;

(d) That the Claimant and the Defendant own in the ratio 65% to 35% shares lot 173, 2 East, Greater Portmore, in the Parish of Saint Catherine;

(e) That valuations be conducted by Messrs. D.C. Tavares & Finson, Real Estate Appraisers on (a) Premises lot 13, St. Louis Place, St. Catherine, (b) The furniture fixtures and equipment situate at lot 13, St. Louis Place, St. Catherine, and (c) Premises lot 173, 2 East Greater Portmore, St. Catherine;

(f) That the cost of the valuations be shared by the Claimant and the Defendant in equal shares;

(g) That the Claimant do purchase the Defendant's share in Premises lot 13, St. Louis Place, St. Catherine, together with the Defendant's share in the furniture fixtures and equipment situate thereat;

(h) That the Defendant do purchase the Claimant's share in premises lot 173, 2 East Greater Portmore, St. Catherine, failing which that the premises be put for sale on the open market;

(i) That the time allowed for the Claimant to purchase the Defendant's share in St. Louis Place and for the Defendant to

purchase the Claimant's share in lot 173, East, Greater Portmore shall be 120 days from the date of the making of the Orders herein;

(j) That lot 13, St. Louis Place, Caribbean Estate be valued by Messrs. D.C. Tavares & Finson to determine the market rental for the period 15th April, 2010 to this date. That the cost of this valuation be borne by the Defendant alone;

(k) That the legal firm of Pickersgill Dowding & Bayley Williams, Attorneys-at-Law do have carriage of sale of lot 13, St. Louis Place, and lot 173, 2 East, Greater Portmore;

(l) That the Registrar of the Supreme Court be empowered to sign any and all documents relating to the transfer of St. Louis Place, and the transfer of lot 173, 2 East, Greater Portmore, St. Catherine in the event that the Claimant and/or the Defendant cannot or will not sign;

(m) That the Defendant be condemned with the costs of these proceedings;

(n) Liberty to apply;

[3] Mrs. Bowes obtained legal representation and filed an Affidavit on the 6th May, 2011, setting out the basis of her opposition to the claim brought by her former husband. On the 9th May, 2011, the learned trial Judge set this matter down for trial in Chambers for one day, to be heard on the 4th October, 2011. He also gave directions for the conduct of the trial, including the time for the parties to respond to and file Affidavits, to file and serve Skeleton Submissions and he ordered the parties to attend for cross examination. However it was not until days before the trial that Mrs. Bowes was advised of the trial date.

[4] Paulette Bowes did not attend the hearing. She had been having some difficulties with her Attorney-at-Law on record of a financial nature, as a consequence of which, apart from the Affidavit filed on her behalf, the directions given by the Court pertaining to Mrs. Bowes were not complied with. She was unable to obtain her file from the Attorney in time for the trial and she had also been informed by the Attorney that

she would be removing herself from the record as Mrs. Bowes' legal representative. She believed at that time that she could not attend Court without legal representation.

[5] In her absence, and in the absence of any Attorney at Law acting on her behalf, the learned trial Judge on the 4th October, 2011 granted all the Orders sought by Fabian Bowes as set out in his Fixed Date Claim Form. This Order of the Court was served on Paulette Bowes on the 8th November, 2011. With the assistance of her present Attorneys at Law, Paulette Bowes was eventually able to obtain her file from her former Attorney at Law. An examination of the documents revealed that the file was incomplete and steps had to be taken to search at the Supreme Court Registry to ensure that all the Court documents were on file.

[6] On the 2nd April, and the 5th April, 2012 respectively, the new Attorneys at Law for Paulette Bowes filed applications to set aside the Ex Parte Order of the Court granted on the 4th October, 2011 and for a Stay of Execution of that Order. An Amended Notice of Application to Set Aside Court Order was filed on behalf of Mrs. Bowes on the 23rd April, 2012, seeking permission to enlarge the time for the making of the application to set aside the Ex Parte Order, in addition to the reliefs originally claimed. That amended application was refused on the 9th May, 2012.

[7] Notice of Appeal from the Order of the learned trial Judge made on the 4th October, 2011 was filed on behalf of Paulette Bowes on the 11th May, 2012. As the time for appealing the Ex Parte Order had passed, the Attorneys at law for Mrs. Bowes on the 11th May, 2012, also filed an Application to Extend Time within which to file Notice and Grounds of Appeal and for an Order that the Notice and Grounds of Appeal filed on that date be taken as filed. Subsequently, on the 31st May, 2012, her Attorneys also filed an Application for a Stay of Execution of the Ex Parte Order made on the 4th October, 2011.

[8] These are the applications now before this Court for consideration. There can be no question that the Order of the Court made on the 4th October, 2011, affected the life of Paulette Bowes. Her Counsel Ms. Jarrett submitted that the delay in filing the Notices of Application to Extend Time to Appeal and to Stay Proceedings occurred not because of Mrs. Bowes' failure to act, but because her client had filed an application to set aside that very Order of the Court. On that application being refused on the 9th May, 2011, the application seeking an extension of time within which to file an appeal was filed two (2) days later on the 11th May, 2012. That delay she argued, in all the circumstances of the case, was not inordinate or contumelious.

[9] Ms. Jarrett highlighted the fact that her client is currently unemployed and resides in the former matrimonial home. She further submitted that any delay in proceeding with the applications before the Court was attributed to the limited resources of Mrs. Bowes and the difficulties she faced in obtaining other legal representation and securing her file, after being notified of the Court Order.

[10] Counsel argued that her client had a real chance of success on appeal as the learned trial Judge erred in law and in fact when he granted the Orders complained of. She raised the issue of whether her client's Affidavit filed on the 6th May, 2011, in opposition to the claim was ever before the Court for the Judge's consideration when the Order was made. This query was based on a search of the Court file which revealed that that Affidavit was not on the file. Ms. Jarrett contended that the Court would not have legitimately come to the decision that it did, if the Affidavit evidence of her client had been before it.

[11] Counsel further contended that if that Affidavit was before the Court, there was no basis on which the learned trial Judge could have had good reason to come to the decision arrived at based on the issues raised in that Affidavit, as well as the exhibits attached thereto, which show her substantial financial contribution as regards both properties. With respect to the premises at lot 173, 2 East Greater Portmore, which is registered in her name alone and which the parties agreed

was acquired by Paulette Bowes before she met the Claimant, Ms. Jarrett in her written submissions referred to the Order of the Court awarding Fabian Bowes a 65% and her client a 35% interest in the said property. She stated that the Affidavit evidence of her client outlined in detail how the purchase price was paid and how the funds for the improvement were acquired and provided by Mrs. Bowes.

[12] As regards the property at lot 13, St. Louis Place, Caribbean Estate, which was the matrimonial home and the furniture, fixtures and equipment therein, in respect of which Mr. Bowes was awarded an 80% interest and Mrs. Bowes 20%, Ms. Jarrett relied on the provisions of the Property Rights of the Spouses Act as raising a presumption entitling her client to 50% of that property. She asserted that the Affidavit evidence of Mrs. Bowes clearly disclosed that she was a major contributor by way of her redundancy payment and other contributions to the acquisition of that property and its contents. Counsel argued that the learned Judge erred in law and in fact as the evidence before him properly construed could not support the Orders made.

[13] Ms. Jarrett went on to argue that Paulette Bowes would be severely prejudiced were the applications before the Court to be refused, as she is unemployed and has no resources to purchase the interest of Fabian Bowes as ordered by the Court, or to pay rent if forced to leave the matrimonial home. She contended that if the proceedings were to be stayed, any prejudice suffered by Mr. Bowes would be far less than that suffered by her client, as the status quo would be maintained and the legal issues raised by him protected pending the hearing of the appeal. The interests of justice she urged would be served by such a stay.

[14] Counsel for Fabian Bowes, Mr. Gordon Steer forcefully argued that the reliefs sought by Paulette Bowes in the applications before the Court ought to be refused. He referred to the length of time that had passed between the Order of the Court made on the 4th October, 2011, and the steps taken by Paulette Bowes in May, 2012, to apply to extend the

time within which to file an Appeal against that Order - some seven (7) months. He pointed out that that Order had been served personally on Mrs. Bowes on the 8th November, 2011. Mr. Steer further pointed out that the time for appealing the Judgment of the Court would have expired forty two (42) days after service of the Judgment on Mrs. Bowes, that is on or about the 21st December, 2011. He noted that the Application for Leave was filed on the 11th May, 2012, some five (5) months after the time permitted by the Rules of Court. Counsel was of the view that Mrs. Bowes was only spurred into action after she was served with documents pertaining to the transfer of the property at the end of March, 2012 as ordered by the Court.

[15] In his written submissions, Counsel Mr. Steer contended that this Court did not have the authority either to set aside the Judgment of the learned trial Judge, or to enlarge or extend the time for the filing of the Appeal. He cited as the authority for that proposition the Court of Appeal decision of **Western Publishers Ltd. v Cecelia Grant** SCCA No. 48 of 2003. Counsel relied on the dicta of Panton J.A. (as he then was) at page 6, paragraph 12 of that Judgment where the learned Judge of Appeal stated;-

> "Section 354 of the Judicature (Civil Procedure Code) Law… reads:
>
> > 'Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial.'
>
> This provision clearly means that a party, who is not present at the trial, may apply within ten days for the Court to set aside the judgment. Thereafter, the judgment is unimpeachable except by means of an appeal. If the time for filing an appeal had passed, then it would have been necessary to get leave from the Court of Appeal to file the appeal out of time"

As such, Mr. Steer submitted that as the time for appealing had passed, an application to extend the time to appeal would have had to be made to the Court of Appeal.

[16] Mr. Steer further contended that the Applicant would have to satisfy certain pre-conditions before an extension of time to file Notice and Grounds of Appeal or Leave to Appeal would be granted. One such condition he maintained is that Mrs. Bowes must satisfy the Court that she had a good reason for absenting herself from the proceedings. Her assertions that she did not believe that she could attend Court without an Attorney and that she was overwhelmed by the events and did not know what to do, were not good or sufficient reasons, he argued, for her absence. He further argued that by deliberately not attending Court due to false impressions or being impecunious were not good reasons recognised by the Court for a litigant's failure to attend.

[17] Counsel argued that the Applicant had no chance of succeeding in an appeal against the Judgment, as the time for setting it aside had passed. He further argued that if that Judgment is unimpeachable and cannot be set aside, the chances of success of the Applicant on an appeal are nil and therefore the Applications before the Court ought to be refused.

[18] In support of his contentions, Mr. Steer referred to the Court of Appeal decision of **Thelma Edwards v Robinson's Car Mart Ltd. and Lorenzo Archer** SCCA No. 81 of 2001, a case which also considered Section 354 of the Judicature (Civil Procedure) Code Law. He relied on the dicta of Langrin J.A. where he stated at page 6 of that Judgment;-

> "Since the defendant did not apply to set aside the judgment within the ten day period then there was no discretion on the part of the judge to set aside the judgment. On that basis alone the appeal should be allowed.
>
> The predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial. If the absence was deliberate and not

> due to accident or mistake, the court would be unlikely to allow a rehearing."

Counsel in his written submissions therefore argued "that it cannot be overly stressed that the predominant consideration before the Court is the reason why the applicant had absented herself and not that there is a defence on the merits."

[19] Mr. Steer went on to contend that Paulette Bowes had no real chance of success on appeal. He relied on the decision of the Court of Appeal in the case of **Paulette Bailey and Edward Bailey v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No. 103 of 2004, where the learned Judge refused an application for the variation of the Case Management timetable, but granted leave to appeal. This grant of leave was challenged in the Court of Appeal with the Appellants relying on Rule 1.8(9) of the Court of Appeal Rules which states:

> "The general rule is that provision to appeal will only be given if the Court or the Court below considers that an appeal will have a real chance of success."

After considering the issues in that case the Court of Appeal found that any appeal against the order of learned judge would have no real chance of success and granted the application to set aside the leave to appeal.

[20] Counsel further sought to rely on the case of **David Watson v Adolphus Sylvester Roper** SCCA No. 42 of 2005 for the proposition that the provisions of Rule 39.6 of the Civil Procedure Rules are cumulative, and that there is no residual discretion in the trial judge to set aside the judgment, if any of those conditions are not satisfied. By virtue of Rule 39.6, the absent party at a trial may apply to set aside any judgment or order made against him provided that:

(i) such application is made within 14 days after service of the judgment or order

(ii) the affidavit evidence disclosed a good reason for failing to attend the hearing, and

(iii) had the applicant attended some other order or judgment might have been made.

Mr. Steer therefore submitted that as the Judgment cannot be set aside, the prospects of succeeding on appeal would be nil, as the Court had no residual discretionary power to come to the Applicant's aid.

[21] As his final volley, Mr. Steer argued that as the time for appealing had long gone, the application to extend time to apply for leave to appeal ought to be made to the Court of Appeal.

[22] Ms. Jarrett in her reply contended that the cases cited by opposing Counsel were irrelevant, as they did not address the issue at hand. She argued that those cases focused on applications to set aside a judgment given in the absence of a party, while the applications before the Court were seeking permission to extend the time within which to appeal and for a stay of proceedings. She urged the Court to look at the evidence in its totality in order to consider whether the Applicant had a real chance of success.

[23] In an apparent response to Mr. Steer's contention that this application for an extension of time for leave to appeal ought to be made to the Court of Appeal, Ms. Jarrett cited Rule 1.8(1) of the Court of Appeal Rules. That Rule obliges a party who wishes to appeal, where such an appeal may only be made with the permission of the Court below or the Court of Appeal, to apply for permission within 14 days of the Order made. She further cited Rule 1.8 (2) which reads:

> Rule 1.8(2) – "Where the application for permission may be made to either court, the application must first be made to the court below."

Based on those provisions, she submitted that this application was properly before the Court. She therefore asked that the Orders sought by her client be granted.

[24] The Order complained of was made on the 4th October, 2011, in the absence of the Applicant and was served on her on the 8th November, 2011. Her attempts to set aside and stay execution of that Order failed when those Applications were refused by the Court on the 9th May, 2012. Two (2) days later on the 11th May, 2012, Paulette Bowes filed Notice and Grounds of Appeal in the Court of Appeal and at the same time applied in the Supreme Court for an extension of time within which to take that step. The first issue then is whether on the fact scenario of the present case, this Application ought to be granted.

[25] The Order made by the learned trial Judge on the 4th October, 2011 was in fact a final Order of the Court. There is therefore no need for a party to apply for permission to appeal within fourteen (14) days pursuant to Rule 1.8(1) of the Court of Appeal Rules, as suggested by Counsel Ms. Jarrett in her written submissions. Rule 1.11 sets out the requisite time frame within which a Notice of Appeal must be filed, depending on whether the proposed Appeal is a procedural one, or one where permission is required or in any other case, and reads as follows:

> "Rule 1.11(1) The notice of appeal must be filed at the registry...
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
> (b) where permission is required, within 14 days of the date when such permission was granted; or
> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant."

The relevant provision in those Rules, that is Rule 1.11(1)(c), clearly indicates that this Applicant had 42 days from the date the Judgment was served on her to file and serve any Notice of Appeal.

[26] I am satisfied with and accept Mr. Steer's contention that the time for filing Notice and Grounds of Appeal would have expired just before the end of December, 2011, and that the filing of the Notice of Appeal on

the 11th May, 2012 was approximately five (5) months after the time permitted by the Rules. I do not however agree with his assertion that this Court has no authority to extend the time for the filing of the Notice of Appeal or that such leave would have to be obtained from the Court of Appeal. Rule 1.11(2) of the Court of Appeal Rules speaks specifically to that issue where it states:

> Rule 1.11(2) "The Court below may extend the times set out in paragraph (1)."

[27] Counsel Mr. Steer in his oral and written submissions, opposing the applications before this Court placed heavy reliance on certain authorities including **Western Publishers Ltd. v Cecelia Grant**, **Thelma Edwards v Robinson's Car Mart Ltd. and Lorenzo Archer**, **Shocked and another v Goldschmidt and others** (1998) 1 All ER 372, and **David Watson v. Adolphus Sylvester Roper**(supra). All those cases however dealt with the issue of an application to set aside judgment given after a trial in the absence of the applicant, and the considerations that the Court ought to bear in mind when coming to its decision. Extracted from those cases is the principle on which Counsel Mr. Steer sought to rely, that is, "that the predominant consideration for the Court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial." per Langrin JA in the **Thelma Edwards** case. However that is not the issue before this Court. By placing repeated reliance on the dicta of the learned Judge of Appeal and on the aforementioned authorities, Mr. Steer mistakenly embraced a line of argument that had no relevance to the matter at hand. I accept Mrs. Jarrett's submission that Counsel for Fabian Bowes in his arguments advanced to oppose this application was "barking up the wrong tree".

[28] The focus of the Court's attention in this matter is to identify the relevant factors to bear in mind when considering whether or not to grant an extension of time to a party in default. The Court has always held firmly to the view that time limits prescribed by the Rules of Court "are not targets to be aimed at or expressions of pious hope but

requirements to be met." per Sir Thomas Bingham M.R. in **Costellou v Somerset County Council** (1993) 1 W.L.R 256 at 263; see also **Arawak Woodworking Establishment Limited v Jamaica Development Bank** Appl. No. 13 of 2010, per Harrison J.A. at paragraph 25. But that is not the end of the matter. The authorities show that the Court should take into account all the circumstances of the particular matter in order to determine what the overall justice of the case requires.

[29] In the case of **The Commissioners of Customs and Excise v. Eastwood Care Homes** (2001) EWHC Ch 456, when dealing with an application for extension of time to appeal, Lightman J. stated:

> "The position…it seems to me has been fundamentally changed…by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Part 1, namely to enable the Court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that **each application must be viewed by reference to the criterion of justice** (my emphasis) and in applying that criterion there are a number of other factors…which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effects of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties."

The principles outlined in the above cited case were applied in this jurisdiction in the Court of Appeal decision in **Fiesta Jamaica Limited v National Water Commission** SCCA No. 19 of 2009. I readily accept that that list may not be exhaustive. I am of the view however that regard ought to be had to those factors in attempting to determine what the justice of this case requires.

[30] In the present case, a delay of approximately five (5) months in filing the applications presently before this Court is not an insignificant period. However, the length of the delay should not be looked at in isolation. It ought in my mind to be viewed in conjunction with the steps, if any, that the Applicant had embarked upon as regards the Order complained of. Paulette Bowes faced certain representational difficulties and having eventually overcome same, pursued proceedings to challenge the Order of the 4th October, 2011. Those proceedings proved unsuccessful as her applications were refused on the 9th May, 2012. Shortly thereafter, in fact two (2) days later, the present Applications were filed. I do not find this to be a situation where the Applicant stood by idly after being aware that the Order was made against her. In the particular circumstances of the present case, I am of the view that the delay was not unreasonable.

[31] On the issue of whether Fabian Bowes would suffer any prejudice were the applications to be granted, there is no doubt that such an Order would cause a delay in his enforcing the Orders made in his favour. I am satisfied however that far less prejudice would accrue to Mr. Bowes, as there would still be in place a ruling in his favour pending the hearing of the appeal. If successful, the grant of these applications would only delay his right to enforce the Orders made in Mrs. Bowes' absence. On the other hand, a refusal of the Applications for Extension of Time and for a Stay of Execution, closes the access door to the Court for Paulette Bowes.

[32] As the issue of prejudice has had to be considered, the resources of the parties is another factor to be examined. The Applicant maintains that she is unemployed and has no resources to purchase Mr. Bowes' interest in lot 173, 2 East Greater Portmore, St. Catherine as declared by the Court, or to purchase another property or to pay rent. She fears that she faces eviction from the premises she has always known as her matrimonial home and alleges that she would be financially ruined were the Order to be executed. Fabian Bowes on the other hand is employed as a banker with a settled place of abode at Coral Way, New

Harbour Village, Old Harbour in the parish of St. Catherine, for at least the past two (2) years. If the Applicant were to be successful in the matters before this Court, the status quo would be maintained pending the hearing of the Appeal. I find that the issue of prejudice would operate more heavily against Paulette Bowes on the evidence before the Court.

[33] Finally, I accept Ms. Jarrett's submission that on the material before the Court, there is merit and a real chance of success in the proposed appeal by her client.

[34] In the circumstances, it is hereby ordered that;-

(a) The time within which to file Notice and Grounds of Appeal be extended to the 11th May, 2012.

(b) The Applicant's Notice and Grounds of Appeal filed on the 11th May, 2012 be taken as filed.

(c) The time be abridged for the hearing and determination of the Notice of Application to Stay Execution of the Court Order.

(d) There be a Stay of Execution of the Order of the Honourable Mr. Justice B. Morrison made on the 4th day of October, 2011, pending the hearing of the Appeal.

(e) Costs of these Applications awarded to the Respondent Fabian Bowes to be taxed if not agreed.