JAMAICA

IN THE COURTOF APPEAL

SUPREME COURT CIVIL APPEAL NO: 50 OF 2007

MOTION NO: 9/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN:	GEORGE BROWN (Sued in his capacity as the Referee of Titles)	APPELLANT
AND	ROY DINHAM (Executor of Estate Imogene Walker, Deceased)	RESPONDENT

Mr. Debayo Adedipe for the Appellant

Mr. Allan Wood, instructed by Mrs. Suzanne Risden-Foster of Livingston, Alexander & Levy, for the Respondent

July 9, 13 and December 20, 2007

PANTON, P.

I agree with the reasons that have been written by my learned sister, Hazel Harris, J.A., and have nothing to add.

HARRIS, J.A:

On July 9, 2007, we heard these applications and on July 13, 2007, we made the following decision:

> "The application of the respondent Roy Dinham is granted. The notice of appeal and grounds of appeal filed herein on the 3rd May, 2007, are struck out. Costs to the respondent to be agreed or taxed."

We promised then to put our reasons in writing, and this we now fulfil.

Before us were two applications. The first was by the respondent seeking to strike out the Notice and Grounds of Appeal challenging a Consent Order of Morrison, J (Ag.) made in favour of the respondent on March 30, 2007. The second was by the appellant for a Stay of Execution of that Order, pending the hearing of the appeal.

A brief history of the events on which the appeal is grounded is important. On February 16, 2005 the respondent, executor of the last Will and Testament of one Imogene Walker, deceased, submitted an application to the Registrar of Titles for lands at Blue Hole in the parish of Portland, to be brought under the operation of the Registration of Titles Law. These lands form an asset of Imogene Walker's estate and were devised to several beneficiaries. Probate of her last Will and Testament was granted to the respondent on July 25, 1973.

On February 27, 2005 the Referee of Titles ("Referee") wrote to the respondent, advising him that the application was refused. At the respondent's request, the Referee furnished him with reasons for the refusal.

On August 4, 2006 the respondent commenced a suit by way of a Fixed Date Claim Form together with a Summons issued pursuant to section 156 of the Registration of Titles Act, seeking the following:

> "(a) That pursuant to the Summons issued herein by the Supreme Court to the Referee of Titles that the Referee of Titles and the Registrar of Titles appear before a Judge on the date and time stated in the aforesaid Summons to substantiate and uphold the Grounds of Refusal dated 22nd May (sic)2006.
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> (b) That the Court determines whether the Grounds of Refusal were justified and determines the matter as an issue of law.
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> (c) That the Court direct the Referee of Titles to issue a Certificate of Title in respect of the said lands known as "Mission" and "Land" being part of Blue Hole in the parish of Portland containing by survey, Eight Thousand Four Hundred and Three Square Metres Six Hundredths of a Square Metre and, being the land delineated on plan bearing Survey Department Examination Number 304377, in the name of the Applicant, Roy Dinham as executor of Estate Imogene Walker, deceased, there being no valid basis in law for the Grounds of Refusal.
>
> (d) That the costs and expenses attendant upon these proceedings be borne by the Referee of Titles and/or the Registrar of Titles".

On February 14, 2006 the claim came up for hearing before Morrison, J. (Ag.) and during the course of submissions the appellant's then attorney-at-law, the Director of State Proceedings, through Mrs. Simone Mayhew, informed the learned Trial Judge that there was no factual basis upon which opposition could be sustained against the claim.

As a consequence, an Order was formulated in the following terms:

"IT IS HEREBY ORDERED THAT:

1. That the Referee of Titles is directed to issue a Certificate of Title in respect of the lands known as "Mission" and "Land" being part of Blue Hole in the parish of Portland containing by survey, Eight Thousand Four Hundred and Three Square Metres Six Hundredths of a Square Metre and being the land delineated on plan bearing Survey Department Examination Number 304377, in the name of the Applicant, Roy Dinham as executor of Estate Imogene Walker (deceased) there being no valid basis in law for the Grounds of Refusal.

2. Costs and reasonable expenses incurred by the Applicant to be borne by the Referee of Titles, to be taxed if not agreed".

A duly perfected Order was served on the Director of State Proceedings and the Registrar of Titles by way of a letter dated March 8, 2007.

On March 8, 2007 the Registrar of Titles wrote to the respondent's attorney-at-law stating as follows:

"**Re Claim No. HCV 02851/2006**
Roy Dinham v. Referee of Titles and Registrar of Titles

Your letter of 26th February 2007 refers.

We have reviewed the Order of the Court and we find that it would be difficult to comply with same.

The Order should have stated that the Referee of Titles "is directed to issue provisional approval in respect of the lands ..." under Section 31 of the Registration of Titles Act.

The Referee of Titles has no jurisdiction to issue a Certificate of Title".

On March 29, 2007 the respondent filed a Notice of Application for Court Orders under liberty to apply, seeking an amendment to the Order of February 14, 2007 in order to comply with the directive of the Registrar of Titles. On March 30, 2007 a Consent Order was made by Morrison, J (Ag.) in the following terms:

> "IT IS HEREBY ORDERED BY CONSENT THAT:
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> 1. The Order on Fixed Date Claim Form made on the 14th February, 2007 is hereby amended at paragraph 1 thereof as follows:
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> > That the Referee of Titles is directed to provisionally approve the application to register Title filed by the Applicant, and that all further necessary consequential steps be taken in accordance with the Registration of Titles Act with a view to the issue of a Certificate of Title in respect of the said lands known as "Mission" and "Land" being part of Blue Hole in the parish of Portland containing by survey, Eight Thousand Four Hundred and Three Square Metres Six Hundreths of a Square Metre and, being the land delineated on plan bearing Survey Department Examination Number 304377, in the name of the Applicant, Roy Dinham as executor of Estate Imogene Walker, deceased, there being no valid basis in law for the Grounds of Refusal."
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> 2. There be no order as to costs in respect of this application".

On March 15, 2007 the Solicitor General wrote to the appellant informing him that an appeal in the matter was likely to be futile and an appeal would not be pursued. On March 19, 2007 the appellant responded, informing the Attorney General that he had retained his own legal representative and requested that

documents submitted to his department be returned to him for transmission to his attorney-at-law.

On March 20, 2007 the following documents were returned to him:

> "1. Summons Issued Pursuant to Section 156 of the Registration of Titles Act, dated August 4, 2006;
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> 2. Fixed Date Claim Form, dated August 4, 2006;
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> 3. Affidavit of Roy Dinham In (sic) Support (sic) of Fixed Date Claim Form and Summons to Referee of Titles, dated August 4, 2006 with Exhibits attached".

On April 12, 2007 a Notice of Change of attorneys-at-law was filed and served denoting that Mr. Debayo A. Adedipe was the appellant's new attorney-at-law. On May 3, 2007 Notice and Grounds of Appeal were filed.

The following are the grounds of appeal on which the appellant intends to rely at the hearing of the appeal:

> "I) The learned trial Judge erred in law in entertaining the application made and in granting the order amending the original order because the Court had no power to make a subsequent order fundamentally amending the order made on February 14, 2007, particularly where the order sought was not included in the Fixed Date Claim Form nor mentioned in the supporting affidavit.
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> II) the purported consent order was improperly obtained/obtained without the authority or consent of the Appellant because:
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> > a) he had terminated the instructions of the Attorney General/Director of State Proceedings by letter dated March 19, 2007 after he/they indicated that he/they would not take up the Appellant's instructions to file an appeal against the order made on February 14, 2007

b) the Director of State Proceedings/The Attorney general (sic) had, by letter dated March 20, 2007 returned his file to him

c) on the dates that the Application was made and the order granted the Director of State Proceedings was not the Appellant's Attorney-at-law and had no authority to bind him

III) The learned trial Judge erred in law in failing to recognize that the application for title was objectionable in form because it did not reflect or recognize the interest of the beneficiaries under the will and they clearly did not consent to the application for registered title.

IV. The learned Judge erred in law in awarding costs against the Appellant, especially having regard to section 156 of the Registration of Titles Act, there being no evidence that the Appellant had acted other than in good faith".

Rule 1.13 (a) of the Court of Appeal Rules 2002 ("CAR") empowers the Court to strike out a Notice of Appeal. It reads that:

" The Court may -

(a) strike out the whole or part of a notice of appeal or counter-notice;

(b) . . .

(c) . . .".

Under section 11-(1) (e) of the Judicature Appellate Jurisdiction Law an appeal from a consent order is only permissible by leave of the court. The section provides:

"**11**-(1) No appeal shall lie -

(e) without the leave of the Judge making the order or of the Court of Appeal from an order made with the

consent of the parties or as to costs only where such costs by law are left to the discretion of the court;

(f) . . .".

It was Mr. Wood's submission that the Orders granted on February 14, and March 30, 2007 were Consent Orders. An appeal from the Order of March 30, could not lie unless permission had been granted, he argued. He further submitted that the learned judge, not being *functus officio,* was empowered to have varied the Order of February 14, so as to facilitate its execution. In support of this submission, he cited the case of ***Causwell and Another v Clacken and Another*** S.C.C. A. 129 of 2002. (unreported)

Mr. Adedipe argued that the learned judge had fallen into error in granting the Orders. The Order of February 14 was not a Consent Order, he contended, nor was it in accordance with the relief sought under the Fixed Date Claim Form. He further argued that the Order of February 14, was separate and distinct from that of March 30 and could not have been corrected.

The critical question arising is whether the learned judge was seized of jurisdiction to have entertained and approved the Order of March 30. First, it is necessary to determine whether the Order of February 14 can be construed as a Consent Order. The fact that an order is silent as to whether it was made by consent does not necessarily mean that the parties thereto had not agreed to its terms and conditions. What is of importance is the nature of the Order, taking into account all the circumstances surrounding its making. The circumstances or

nature of an Order may render it expedient to seek the court's assistance in working out the rights of a party as pronounced. All orders of the court may inherently carry with them liberty to apply to the court. See ***Fritz v Hobson*** (1880) 14 Ch. D 542.

Generally, a final order or judgment expressly reserves liberty to a party to apply to the court where the necessity for a subsequent application is envisaged. However, the absence of an express reservation of liberty to apply on the face of the Order does not render the court powerless in amending that Order on an application if the purpose of the application is for the facilitation of the execution of the Order.

The respondent, being dissatisfied with the grounds on which his application was refused, sought the court's intervention. At the hearing of the Notice of Application for Court Orders on February 14, the applicant's attorney-at-law in her commendable display of sagacity, refrained from proceeding with what would have been a futile exercise. She clearly acknowledged that the Referee's grounds for refusing the respondent's application, was contrary to law and therefore unjustifiable. Her concession is demonstrative of her willingness to agree to the Order.

Where it is evident that parties intended at the material time to enter into an agreement, the court will grant approval and give effect to it. It would have been the intention of the parties to agree to the terms of the Order of February

14, which were subsequently approved by the learned judge. There can be no doubt that the Order of February 14, was a consent Order.

What was the effect, of the Order of March 30? Could it have varied the February Order? In ***Causwell and Another v Clacken and Another*** (supra), Smith, J.A. in his examination of the scope and extent of the court's powers to vary a Consent Order at page 15 said:

> "A Consent Order has all the attributes of an order made after a contest save that the parties cannot appeal without leave. It is not in dispute that generally a judge may not change a final order once it is perfected and entered. There are, of course, a few exceptions, for example the correction of a clerical error, or the clarification of the judgment, or a variation to facilitate the working out of the order. The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud."

The purpose and intent of the Consent Order of February 14 was to sanction the respondent's acquisition of the requisite Certificate of Title. This could not have been achieved by that Order as it erroneously directed the Referee of Titles to issue the Certificate of Title. This, he is not permitted to do under the Registration of Titles Act. The Registrar of Titles, in her wisdom, recognized that the Order of February, as framed, had been inefficacious and therefore could not have been implemented. Her requisition to the respondent speaks to the necessity for an amendment to the Order.

It is plain and obvious that the direction to the Referee to issue the Certificate of Title would not bring into operation the desired effect of the February 14, Order. The enforceability of that Order could only have been attained by its amendment or variation. The variation would have had to be a requirement so as not to render the Order meaningless. As a consequence, the validity and effectiveness of the Order of March 30, remains unassailable.

It was further contended by Mr. Adedipe that the Consent Order of March 30, was made without the appellant's consent, as, at the time of the making of the Order, he had determined the Director of State Proceeding's retainer.

On March 15, 2007 the Solicitor General wrote to the appellant informing him that the pursuit of an appeal would have been ineffectual. On March 19, the appellant informed the Attorney General that he had retained a new attorney-at-law and requested the return of documents submitted by him for transmission to his attorney-at-law. These documents were returned to him under cover of the letter of March 20, 2007.

Up to March 30, when the Notice of Application for the variation of the February Order came on for hearing, a Notice of Change of Attorney-at-Law had not been filed.

The Notice of Change of Attorney-at-Law was filed on April 12, 2007. On March 30, 2007 the Director of State Proceedings was still on the records as

appearing for the appellant. There was nothing before the learned judge on that date to indicate that anyone other than the Director of State Proceedings represented the appellant. All acts done by the Director of State Proceedings would have been taken as having been done on behalf of the appellant with his express or ostensible authority. He therefore has no valid ground for complaint in this regard.

A Consent Order having been made on March 30, the respondent required leave to appeal in obedience to the provision of Section 11 (i) (e) of the Judicature Appellate Jurisdiction Law. No leave had been granted. Consequently, the notice and grounds of appeal cannot stand.

The Order of March 30, directs that the costs and reasonable expenses incurred by the Referee respondent be paid by the Referee. Mr. Adedipe contended that the learned judge erred in awarding costs against the Referee personally.

Mr. Adedipe's complaint cannot be addressed in that there is no appeal before this court. He could however, seek clarification of the Order as to costs in the Court below.

On the basis of the foregoing reasons, I agreed that the notice and grounds of appeal should be struck out with costs to the respondent to be agreed or taxed.

DUKHARAN, J.A. (Ag.)

I agree.