[2022] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO 79/2005

BETWEEN	**ARLINGTON GAYLE**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST RESPONDENT**
AND	**CONSTABLE LLOYD HENRY**	**2ND RESPONDENT**

Carlton Melbourne for appellant

Ms Kamau Ruddock instructed by the Director of State Proceedings for the respondents

14 and 20 December 2022

ORAL JUDGMENT

LAING JA (AG)

Background

[1] On 3 December 2003, both the appellant (the claimant in the court below) and his counsel failed to attend a case management conference that had been fixed for the claim. By an order of the same date, the claim was struck out under rule 27.8(5) of the Civil Procedure Rules ('the CPR').

[2] By notice of application filed on 16 December 2003 ('the application'), the appellant sought the following orders:

> "1. That the Order made on the 3rd December, 2003 at Case Management Conference that this matter be struck out

under rule 27.8(5)(a) of the Civil Procedure Rules 2002 as a result of the Claimant or his attorney not attending or represented at the said Case Management be set aside.

2. That the matter be restored to the Cause [list] and the Case Management Lists and that the Case Management procedure be applied to the matter.

3. That a date for Case Management Conference be set in this matter.

4. That this court grant such Order as it deems fit or expedient in the circumstances."

The grounds on which the appellant sought the orders were as follows:

"a) That the [appellant's] attorney was ill on the date set for Case Management Conference and could not attend court, or make contact with the Claimant to attend court or to instruct another attorney to represent the Claimant in court.

b) That had the [appellant] or his attorney attend [sic] or was represented in court the matter would not have been struck out under rule 27.8(5)(a) of the aforesaid rules and is likely that an Order giving some or all of the directions under rule 27.9 or Order under 27.10 would have been made instead."

[3] The evidence in support of the application was in the form of an affidavit sworn to by counsel Mr Carlton Melbourne on 16 December 2003. Counsel also subsequently swore to an affidavit on 22 February 2005 in which he explained his efforts to have the application heard promptly.

[4] The evidence of counsel was that the matter was set for case management conference on 3 December 2003 at 2:00 pm at the Supreme Court, King Street Kingston ('the CMC'). On 2 December 2003 his secretary became ill with the flu and had to leave the office early. He became ill with the flu on the night of 2 December 2003 and had severe pains, fever, headaches and could hardly walk.

[5] Early on the morning of Wednesday, 3 December 2003, he took a heavy dose of medication which caused him to become very dizzy, nervous, sleepy and disoriented. He slept for several hours and when he awoke it was minutes after 2:00 pm. He then tried to contact several attorneys to attend court on his behalf, but was unsuccessful. He also tried, unsuccessfully, to contact the Attorney General's Chambers and did not get to speak to the attorney who was involved in the case.

[6] At some minutes to 3:00 pm, he took a taxi to try to reach his office in order to get the appellant's telephone number from the file, because he intended to ask him to try and get to court. Counsel also intended to try to contact an attorney to attend court for him. Counsel averred that he did not reach the office and had to turn back because he was feeling too ill. As a result of this illness, he could not go to his office until 11 December 2003.

[7] Counsel explained that the failure to attend the CMC was due to his illness and not due to disrespect to the court. Additionally, it was not due to the fact that the appellant is not interested in pursuing and completing the case, since he had demonstrated this by his efforts to expedite the matter. Counsel noted that having been advised that the case management conference was fixed for the 3 December 2003, he had written to the registrar of the Supreme Court seeking an earlier date in an attempt to get the CMC heard as quickly as possible. He also wrote to the Attorney General's Chambers seeking a meeting to work out the terms of the order that would have been requested at the CMC.

[8] On 17 May 2005 L Pusey J (Ag) (as he then was), having heard the application, made the following order:

> "1. Application to set aside order made at the Case Management Conference on the 3rd day of December, 2003 refused."

[9] On 24 June 2005 the appellant filed a notice of appeal challenging the decision of L Pusey J (Ag). He challenged the following findings of fact of L Pusey J (Ag), namely:

"a. That both appellant and his attorney should attend the hearing of the 3rd December, 2003 case management conference;

and

b. That the appellant did not show good reasons for his absence from the Case Management Conference held on 3rd December 2003 in the affidavits filed in support of the Application to set aside the said Order of 3 December, 2003"

The submissions

[10] The appellant's submissions in support of his appeal, as advanced by Mr Melbourne, were based on two main grounds. Firstly, that rules 27.8(1) and (2) of the CPR do not require that both the litigant and his attorney be present at the CMC. Secondly, that pursuant to rule 27.8(5)(a) of the CPR the court is permitted to strike out the claim only if it is satisfied that notice of the hearing was served on the absent party. Implicit in this rule, it was argued, is a requirement that the notice of the CMC must be served on the claimant personally by the court, and not only on his attorney. Additionally, it was submitted that the notice of appointment for case management conference should be addressed to the claimant and should bear his name at the bottom, in addition to that of his attorney. Counsel argued that, in the absence of proof of service by the court on the appellant, the learned judge could not have been satisfied of proper service and accordingly he did not have the power to strike out the claim.

[11] In response, Ms Kamau Ruddock, representing the respondents, submitted that rules 27.8(1) and (2) of the CPR are clear in their terms and provide that the attendance of the litigant and his attorney at the CMC is mandatory, although expressed to be the general rule. Counsel highlighted that the word "must" is used in both paragraphs. It was acknowledged that rule 27.8(3) of the CPR provides for the attendance of a party to be dispensed with. However, it was noted by counsel that, in this case, there was no request that attendance be waived and no order made to that effect. Accordingly, attendance on 3 December 2003 of the appellant and his attorney-at-law at the CMC was mandatory.

[12] It was postulated that the intention behind the mandatory wording of the paragraphs, was to enable the court to deal with the claim justly in the presence of the proper parties, particularly where important decisions need to be made.

[13] In supporting the correctness of the order striking out the claim, reliance was placed on rule 27.8(4) of the CPR which provides, among other things, that, at the CMC, the court may exercise any of its wide ranging powers under Part 26 of the CPR. These include, in particular, rule 26.3(1)(a) of the CPR, which provides that the judge may strike out a statement of case or part of a statement of case if it appears to the court that there has been non-compliance with a rule or practice.

[14] It was further submitted that, in the instant case, the claim had been filed from 1988 and had languished before the court. The learned judge would, therefore, have had the power to make a decision that would result in no additional waste of judicial time.

[15] Ms Ruddock articulated the position that there had been due compliance with rule 27.8(5) of the CPR by service on Mr Melbourne, who was counsel representing the claimant, since that is what was required under the CPR in respect of a litigant who was represented by counsel. Counsel submitted that, moreover, there was no requirement in the CPR for personal service on the claimant by the court in these circumstances.

[16] In respect of the application to set aside the order, it was submitted by Ms Ruddock that, having regard to rule 11.18(3) of the CPR, the appellant and his attorney-at-law were obliged to provide good reasons why they were both absent from the CMC. However, there was a failure to provide such reasons because, whereas the supporting affidavit sworn to by Mr Melbourne stated that he was ill and tried to get in touch with his client the appellant, in order for the appellant to attend, Mr Melbourne gave no reason as to why the appellant himself was absent.

[17] It was further submitted that the appellant ought to have been ready to proceed with his application and to meet the threshold of providing good reasons for his absence

from the CMC. Accordingly, there was no reason for further time to have been given by L Pusey J (Ag) for him to file additional affidavits in support of the application to set aside.

Analysis

[18] A useful starting point is an examination of the provisions of rule 27.8 of the CPR, which is reproduced hereunder:

> "27.8 (1) Where a party is represented by an attorney-at-law, that attorney-at-law or another attorney-at-law who is fully authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review.
>
> (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) must attend the case management conference.
>
> (3) However the court may dispense with the attendance of a party or representative.
>
> (4) Where the case management conference or pre-trial review is not attended by the attorney-at-law and the party or a representative the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 (Case management - the court's powers) or Part 64 (Costs).
>
> (5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then –
>
> > (a) if the claimant does not attend, the court may strike out the claim; and
> >
> > (b) if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.
>
> (6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial."

[19] We agree with the submissions of Ms Ruddock that rules 27.8(1) and (2) of the CPR are mandatory. For that reason, since the attendance of the appellant and/or his attorney Mr Melbourne was not excused or dispensed with pursuant to rule 27.8(3) of the CPR, they were both required to be in attendance at the case management conference on 3 December 2003.

[20] We do not find any merit in the submission of Mr Melbourne that rule 27.8(5) of the CPR is to be construed as importing a requirement that the appellant should have been served by the court in addition to service on Mr Melbourne, the attorney appearing on the record as his legal representative. In our opinion, counsel's submission on this point ignores the importance of rule 3.11 of the CPR which provides for the service of documents. The obvious intention of this provision is to provide a clear line of communication to a litigant and where the address for service is that of the litigant's attorney at law, service of documents on the attorney is service on the litigant for purposes of legal proceedings. That rule is patently clear and is in the following terms:

> "3.11 (1) Every statement of case must contain an address within the jurisdiction at which the party filing the statement of case will accept service of documents.
>
> (2) That address for service must also state –
>
> > (a) (if given by an attorney-at-law), the name or reference (if any) of the person who is dealing with the matter;
> >
> > and
> >
> > (b) the telephone number and (if applicable) the FAX number of the attorney-at-law filing the document or of the party if in person.
>
> (3) A party must notify the court and all other parties immediately if the address for service is changed and any document sent to the original address before notice of such change is received by the party serving the documents is regarded as validly served."

[21] The submission of Mr Melbourne on this point is also unsound, because, it posits that the court having been provided with counsel's address as the address for service of the appellant, would nevertheless face the unreasonable burden of ascertaining an alternative address of the appellant at which he should be served. Furthermore, the court would be saddled with the additional burden of having to prove service to the satisfaction of the judge at the CMC.

[22] Mr Melbourne admits having been served with the notice of the CMC and on this basis we find that the learned judge was duly empowered pursuant to rule 27.8(4) of the CPR to exercise his case management powers and to strike out the claim, in the exercise of his discretion. The original suit number indicates that the claim was filed in 1988. Fifteen years would therefore have elapsed and the claim was still at the case management stage. This is an important factor which the judge would have been entitled to consider in determining how the absence of the claimant and his attorney should have been treated.

[23] We are of the view that there was nothing wrong in principle with the decision of the judge to have struck out the claim.

[24] L Pusey J (Ag) in considering the application to set aside the order striking out the claim had the evidence of Mr Melbourne to assess. We do not find it necessary to comment on counsel's evidence of his sudden illness on the day before and on the day of the hearing. However, we find it to be very significant that by letter to the registrar of the Supreme Court, dated 29 July 2003, Mr Melbourne referenced the CMC date of 3 December 2003 and requested that it be set for an earlier date. From at least as early as the date of this letter, he was aware of the CMC date. In an exchange with the court, Counsel stated that he "would not say" that he did not have contact with his client between the date of the letter and the date of the CMC.

[25] Counsel in his affidavit in support of the application did not explain why the appellant was not present on 3 December 2003. He averred that on the day of the CMC he was trying to contact the appellant to tell him to attend. He did not assert that he had advised the appellant on an earlier date to do so. In the absence of any explanation as to why the appellant did not attend the CMC, we find that it was quite open to L Pusey J (Ag) to refuse the application to set aside the order.

[26] Accordingly, we do not find that there is any merit in the appeal and we make the following orders:

1. The appeal is dismissed.
2. Costs to the respondents to be agreed or taxed.