JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 59/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

BETWEEN	GRANVILLE GORDON	1ST DEFENDANT/APPELLANT
AND	ADELAIDE GORDON	2ND DEFENDANT/APPELLANT
AND	WILLIAM VICKERS	1ST PLAINTIFF/RESPONDENT
AND	LUCILLE VICKERS	2ND PLAINTIFF/RESPONDNET

Mr. Douglas Leys for appellants instructed by Myers, Fletcher & Gordon, Manton & Hart

Miss Hillary Phillips for respondents instructed by Perkins, Grant, Stewart, Phillips & Co.

February 5 and March 8, 1990

ROWE, P.:

The respondents brought an action against the appellants claiming possession of a parcel of land situate at Belmont in Westmoreland, an injunction restraining the defendants from remaining on the said lands, mesne profits and damages for trespass and conversion. It was alleged by the respondents that the Statement of Claim was served upon the appellants' attorney-at-law on the record. In default of defence, a default judgment was entered on May 13, 1988. The appellants sought to have the default judgment set aside on the ground of irregularity. On June 16, 1988, Langrin, J. dismissed the application, holding that the appellants had not satisfied him of the irregularity of the judgment. The appellants sought and obtained leave to appeal against this

Order. This appeal was not pursued.

By motion dated June 24, 1988 the appellants renewed their application to Strike out the default judgment of May 13, 1988. This application came before Harrison, J., who dismissed the application on the ground that Langrin, J., in a Court of Co-ordinate jurisdiction, had adjudicated on the issues raised and on the merits had dismissed the application. Again the appellants challenged the Order of the trial judge by Notice of Appeal dated September 9, 1988. Summons was issued by the Registrar to the parties to settle the Record of Appeal and this was done on October 13, 1988. Dr. Bernard Marshall instructed by B. E. Frankson & Company appeared for the appellants while Mrs. Denise Kitson represented the respondents.

On a perusal of the Supreme Court files, it was discovered on the settling of the Record that the Notice of Motion to set aside the default judgment and all subsequent proceedings dated July 19, 1988, the affidavit of Richard Brown sworn to on 15th July, 1988, the further affidavit of Donovan Foote sworn to on the 12th July, 1989 were not on the Supreme Court file. The Registrar nevertheless settled the Record and advised counsel to endeavour to assist the Supreme Court Registry to locate the missing documents. It is to be observed here that all the missing documents had been filed by the appellants' attorney-at-law.

Rule 30(1) of the Court of Appeal Rules, 1962, mandate that "the appellant shall within six weeks from the date when the appeal is brought or within such extended time as may be granted by the Court or a Judge, file the Record together with four copies thereof for the use of the Judges and the Registrar". Within this Rule the Record should have been filed on or before October 20, 1988. Nothing was done until June 22, 1989 when an application was made to a Judge

of this Court for an extension of time within which to file the Record. It came on for hearing on July 11, 1989 and was adjourned sine die as Dr. Marshall,who then appeared for the appellants,submitted that he was not briefed to deal with the objections taken by the respondents to such an extension. The application which was re-listed for October 17, 1989 was dismissed for want of prosecution as on that day the respondents were represented but not so the appellants.

A final effort was made on January 12, 1990 when a fresh Notice of Motion for extension of time was filed by the attorneys who now represent the appellants returnable for February 5, 1990. Upon hearing counsel for both sides we dismissed the application with costs to the respondents for the reasons contained herein.

The excuse proferred in the affidavits supporting the Notice of Motion, for the non-representation of the appellants on October 11, 1989 is that counsel who had been briefed to appear was delayed in the Court of Appeal and attended Chambers after the list had been completed and the adjournment taken for the day. The substantive cause of delay in filing the Record was said to be the inability of the Registry of the Supreme Court to locate the documents which were missing from the file and the tardiness of the Registrar of this Court in providing the appellant with a list of the documents to be included in the Record. It was submitted on the part of the appellants that they had a strong case on the merits and that in all the circumstances, the Court should grant the Motion. Mr. Leys relied upon a decision of Master Chambers in C.L. 1700/67 General Motors Corporation v. Canada West Indies Shipping Co. Ltd. - Essays on the Jamaica Legal System 1660-1973 - by H.V.T. Chambers page 65.

Section 258 of the Judicature (Civil Procedure Code) Act, enables a Court or Judge to set aside any judgment

obtained by default upon terms as to costs or otherwise. The discretion given by the section is wide and unfettered. Of a similar provision in R.S.C. Ord., 27 r. 15, Lord Atkin said in Evans v. Bartlam (1937) 2 All E.R. 646 at 650:

> "I agree that, both R.S.C., Ord. 13, r. 10, and R.S.C., Ord. 27, r. 15, give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion."

One such rule is that an application to set aside a default judgment should be supported by an affidavit of merits - Ramkissoon v. Olds Discount Co. Ltd. (1961-62) 4 W.I.R. 73; Evans v. Bartlam (supra). This rule is supportive of the guiding principle formulated by Lord Atkin in Evans v. Bartlam.

> "The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

Does this mean that a litigant can make repeated applications to the Court to set aside a default judgment, in the event that his first or subsequent application(s) have been refused?

In principle the character of the judgment will not change simply because an application to set it aside has failed. And that application may have failed for any number of reasons. In the General Motors Corporation v. Canada West Indies Shipping Co. Ltd. (supra), the first application failed due to the absence of an affidavit on the merits from a competent witness. It may fail because the Court is satisfied that the applicant has no arguable defence. In these two examples, if a second application to set aside the default

judgment was made, unless new material was available to the Court, in all likelihood, the discretion would be exercised in exactly the same way as in the earlier applications.

The question, however, is whether the Court would have jurisdiction to hear the second or subsequent application. In Vehicles and Supplies Ltd. et al v. The Minister of Foreign Affairs Trade and Industry S.C.C.A. 10/89, Carey, J.A., with whom Forte, J.A. expressly agreed, expressed the view that it was open to a judge to review ex-parte orders made by himself or any other judge of the Supreme Court. He relied upon the judgment of Lord Denning, M.R. in Becker v. Noel & Anor (1971) 1 W.L.R. 803 and continued:

> "It is plain, therefore, that a judge in the Supreme Court has an inherent jurisdiction to set aside or vary an order made ex parte but also where leave is given ex parte, he may also revoke it. He may do so where new matters are brought to his attention either with respect to the facts or the law. The true basis, therefore, of the exercise of this jurisdiction to review his own previous order, is the new material produced which shows that the situation has so drastically changed that he should dissolve his order."

I think that the reasoning of Carey, J.A. above, can be usefully applied in an endeavour to determine on what general lines a Court ought to exercise its discretion when called upon to decide a second or subsequent application to set aside a default judgment. Master Chambers in General Motors Corporation v. Canada West Indies Shipping Co. Ltd. (supra), was in no doubt that second and subsequent applications could be made to the Court to set aside a default judgment. He said:

> ".... the correct principles as gathered from all the cases on the subject ....., are that until the matter which caused the suit to come before the

> "Court in the first instance, i.e. until the subject matter of the suit, has been gone into by a court of competent jurisdiction, any judgment by default may be set aside if the proper application is made.
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> To put it another way, until the suit has been tried, the Court can always exercise its discretion whether or not to set aside a default judgment.
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> To put it another way, the Court may in the exercise of its discretion relieve the Defendant of the 'punishment' meted out to him for his, omission, tardiness, negligence or what have you, provided he begs, prays or pleads in the proper manner, whether it took him two or more occasions to beg or pray properly. ....."

In the light of the extensive width of the discretion with which the statute has clothed the judge in section 250 of the Civil Procedure Code, I am of the view that Master Chambers correctly decided that it is open to a defendant against whom a default judgment has been entered to make more than one application to have it set aside. This does not mean that the Court is powerless to curb an abuse of its process, nor does it mean that a defandant against whom a default judgment has been regularly entered can make repeated applications to have it set aside without adducing new relevant facts.

There is a discretionary power in this Court to enlarge the time within which an appellant must file the Record of Appeal - Rule 30(1) and Rule 9 of the Court of Appeal Rules, 1962. This discretion must be judicially exercised and with care so as to ensure that no injustice is done to any of the parties in the case - Wright v. Salmon (1964) 7 W.I.R. 50. It is intended that the Rules of Court should be scrupulously obeyed and that the time schedules provided should be maintained. Lord Guest in delivering the judgment of the Privy Council in Ratnam v. Cumarasamy (1964) 3 All E.R. 933 at 935 said:

> "The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

Applications for extension of time to file the Record of Appeal have been considered by this court on numerous occasions. In City Printery Ltd. v. Gleaner Co. Ltd. (1968) 10 J.L.R. 506, there was a lapse of two years between the filing of the Notice of Appeal and the application by the Respondent to have the appeal dismissed for want of prosecution, in that the Record of Appeal had not been filed. The Court held that the delay was inordinately long and was not excused by the solicitor's explanation that staff changes and a change of office had occasioned the delay. Reliance was placed upon the judgment of Lord Guest in the Ratnam (supra) case. Brown v. Neil (1972) 12 J.L.R. 669 concerned the extension of time for the filing of Notice and Grounds of Appeal. It was held that:

> "Where the Court of Appeal is moved to exercise its discretion in favour of an applicant in order to enable him to file notice and grounds of appeal out of time, it must be shown:
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> (i) that at all material times there was, in the applicant, a serious continuing intention to prosecute his appeal;
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> (ii) that his appeal is possessed of merit to which the court should pay heed; and
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> (iii) that the delay in moving the court is understandable and excusable."

These conditions, it was held, should be based on a sub-stratum of fact.

Nine months elapsed between the settling of the Record and this first application for the extension of time. It is wholly unacceptable for the applicant to say that his attorney was awaiting the list of documents to be included in the Record from the Registrar of this Court. It is equally unacceptable for the applicant to find cover in the shadow of the allegation that certain documents filed by him were not on the Court files. He had it within his power to file duplicate copies of the several affidavits. In all the circumstances, therefore, even if it could be said that there was merit in the appeal in the sense that Harrison, J. had jurisdiction to hear and determine the motion before him to set aside the default judgment, it is unlikely that he would have exercised his discretion in favour of the applicant. Exhibited to the affidavit of Mrs. Kitson sworn to on February 2, 1990, is a photocopy of an agreement signed by the applicants in which they acknowledged receipt of the full purchase price for the property, the subject matter of the litigation. A Court would be disinclined to grant relief in circumstances where the applicant appeared to have no arguable defence.

In our view, the delay in applying for the extension of time to file the Record is inexcusable. Additionally, the affidavit in support of the application is unmeritorious. Accordingly, the application to extend time within which to file the Record was refused with costs to the respondents to be agreed or taxed.