[2017] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 63/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN **JUDITH GRACE HAMILTON** **APPELLANT**

AND **RONALD NORMAN HAMILTON**

AUDREY ELAINE HAMILTON (Executors of the Estate of Monica Ellen Louise Hamilton, Dec'd) **RESPONDENTS**

Mrs Tana'ania Small Davis and Mikhail Jackson, instructed by Livingston Alexander & Levy for the appellant

Norman Hill QC and Raymond Samuels, instructed by Samuels Samuels for the respondents

28, 31 July 2014 and 31 March 2017

PANTON P

[1] On 31 July 2014, we made the following order in this matter:

> "The appeal is allowed. The order of Morrison J is set aside. Costs to the appellant to be agreed or taxed."

At the time of giving our decision, we gave brief oral reasons and encouraged the parties, being siblings, to try to heal the very sour relationship which existed between them at the time.

[2] The record of appeal shows that on 26 March 2013, Morrison J granted the following orders:

> "1. An Injunction restraining the Defendant Judith Grace Hamilton whether by herself, her servants, agents, friends, relatives, workmen or otherwise from obstructing, delaying, frustrating or howsoever otherwise preventing the sale of premises situate at no. 8 South Monterey Drive, Hope Pastures, Kingston 6 Post Office in the parish of St. Andrew pursuant to Clauses 3, 8 and 11 of Order of this Honourable Court on Fixed Date Claim Form herein dated the 4th day of August 2011.
>
> 2. Alternatively that the Defendant herein the said Judith Grace Hamilton be held in contempt of the said Clauses 3, 8 and 11 of the said Order of this Honourable Court dated the 4th day of August 2011.
>
> 3. An Injunction that the Defendant vacate the said property no. 8 Monterey Drive, Hope Pastures, Kingston 6 in the parish of St. Andrew on or before the 9th day of April 2013 at 12:00 noon.
>
> 4. Alternatively that the Defendant do abstain from resisting or otherwise willfully depriving the Claimants of their right to complete the contract of sale by giving the Purchasers vacant possession of the said premises situate at 8 South Monterey Drive Hope Pastures, Kingston 6 Post Office in the parish of St. Andrew forthwith.
>
> 5. That the Defendant do pay to the Executors Two-thirds of the rental of the said property 8 South Monterey Drive, Hope Pastures, Kingston 6 in the parish of St. Andrew at Ninety Thousand Dollars ($90,000.00) per month from the 1st day of June 2008 to the present time."

[3] This Order by Morrison J was based on the format of a notice of application for court orders filed on 14 March 2013 by the respondents herein. That application was made due to what the respondents claimed to be the prejudicial conduct of the

appellant which they felt was calculated to frustrate the court-ordered sale of the property in question.

The History

[4] The parties are children of the late Monica Ellen Louise Hamilton. They were named executors, and are beneficiaries, of her estate which includes the property known as no. 8 Monterey Drive, Hope Pastures, Saint Andrew. According to the respondents, the appellant has been uncooperative and antagonistic in respect of the execution of the duties that are involved in carrying out the mandate of their mother's will. Consequently, they successfully applied to the Supreme Court for the appellant to be removed as an executor. The order for her removal as such was made on 4 August 2011.

[5] On 30 November 2012, the respondents entered into an agreement for sale of this property to Louise Curtis-Forbes and Calvin Forbes, customs officers. Vacant possession was to be delivered upon completion. The transfer was signed by the parties on 1 February 2013. A notice to quit and deliver up possession dated 31 January 2013 was served on the appellant on 4 February 2013. The final date for the delivery up of possession was stated in the notice as 28 February 2013. In a letter dated 1 March 2013, the attorneys for the respondents threatened the appellant with contempt proceedings.

[6] During the period between the court-ordered sale and the service of the final notice to quit, the appellant wrote several letters to the trial judge, the registrar of the Supreme Court, the Honourable Chief Justice, the purchasers and the Commissioner of

Police. In those letters, she protested the sale of the property citing what some may describe as sentimental reasons; for example, she expressed distress at the fact that the house which had been in the family's ownership for over 50 years was being sold. She also mentioned her long period of caring for their late mother within those walls.

[7] On 16 April 2013, a writ of possession was issued by the Supreme Court. It was executed on 19 April 2013 by the bailiff of the Corporate Area Resident Magistrate's Court.

Matter of *note*

[8] There is no record of the proceedings before Morrison J; nor is there a note of his reasons for judgment. It is difficult to understand why there was no official record of the proceedings before the learned judge, apart from the fact that he issued the order that has been appealed. It is assumed that the learned judge must have said something when he made his order on 26 March 2013. If indeed he did say something, other than the bare announcement of the order he was making, it is assumed that counsel present did not find anything meaningful to record. Otherwise, it would have been produced for us to consider at the hearing of this appeal. The appellant, it should be noted, was unrepresented in those proceedings.

Grounds of appeal

[9] The grounds of appeal were listed as follows:

a. The learned trial judge failed to give any reasons for his decision as contained in the Order made on 26 March 2013.

b. The learned judge erred in exercising his discretion to proceed with a hearing of the Respondent's application which was filed on 14 March 2013 but served on the Appellant at 5:05 pm on Friday, 22 March 2013 bearing a hearing date of Tuesday 26 March 2013 at 10:30 am. In so doing, the learned judge failed to take into account the following relevant fact: that the Appellant had been severely short served with the Respondents' application by which they sought, *inter alia*, an injunction against her, a finding of contempt of court and an eviction from her residence of over fifty years. Had the learned judge properly considered the relevant factors he would not have exercised his discretion in the way that he did.

c. Further, in so far as the learned judge exercised a discretion to abridge the time and to conduct the hearing and grant the orders sought in the face of the short service, such exercise of discretion was made erroneously and the learned judge failed to take into account the highly relevant factor of the Appellant being unrepresented and must have taken into account matters that were not relevant. The Appellant will improve upon this ground of appeal at such time as the learned judge's reasons are received.

d. The learned judge erred in making a finding of contempt of court for breach of paragraphs 3, 8 and 11 of the Order made on 4 August 2011 in circumstances where (a) none of those paragraphs either required the Appellant to do an act or to refrain from doing an act, (b) the Order dated 4 August 2011 did not contain a Penal Notice as required by CPR 53 and (c) the Appellant had not been given any opportunity to provide a response to the allegations relevant to whether she had acted in contempt of court. The learned judge erred if he made the finding of based only [sic] on an unsubstantiated allegations [sic] of breach of paragraphs 3, 8 and 11 of the order of 4 August 2011 without any consideration of whether there was any default, and if so, whether such a default was a 'wilful disobedience of the order of the court and a measure of contumacy'. In making the finding of contempt, the learned judge erred in not affording the Appellant avenue to the principles of natural justice.

e. The order made for the Appellant to vacate the premises which are the subject of the suit on or before 9 April 2013 12 noon or within 14 days of the Order was unreasonable in all the circumstances whereby the Applicant/Defendant was not afforded any opportunity to give reasons as to whether and when she could realistically vacate the premises within the time frame insisted upon by the Respondents.

f. The learned judge erred in making an order for the Appellant to pay rent to the Respondents. As co-owners of the property there existed among them the unity of possession. By virtue of their co-ownership of the property they were jointly and severally entitled to possession and occupation of the property. Thus, the Appellant was fully entitled to continue occupation of the property and the mere non-occupation by the Respondents as co-tenants in common did not impose any liability upon the Appellant to pay rent, even though she may have occupied the whole of the property.

g. The learned judge erred in making an order that the Appellant/Defendant shall pay two thirds of the rental of the property being $90,000 per month from 1 June 2008 to the present time, when there was no evidence before him to support a finding that the rental value of the property was $90,000 per month."

The issues for determination

[10] In view of the fact that the appellant is no longer in possession, she having been evicted on 9 April 2013, and the new owners having been placed in possession, the main matters for consideration at the hearing of the appeal were (a) whether the learned judge should have conducted the hearing on such short notice; and (b) whether he should have ordered the appellant to pay rental of $90,000.00 from 1 June 2008.

The submissions

(a) Service of notice of hearing

[11] Mrs Small-Davis, on behalf of the appellant, in dealing with the short notice of hearing given to the appellant, pointed to the following facts:

a) The appellant was unrepresented;

b) The notice was served on Friday 22 March 2013 at 5:05 pm;

c) The hearing was scheduled for Tuesday 26 March 2013 at 10:30 am;

d) The appellant protested the short notice to the registrar and to the learned judge; and

e) The orders being sought included her removal from the premises forthwith as well as a finding of contempt of court.

Mrs Small-Davis submitted that although the relevant rule provided for the exercise of discretion by the learned judge, this was dependent on all the circumstances of the case and there were no demonstrated circumstances to prevent the appellant being allowed the time required by the rules.

[12] On the other hand, counsel for the respondents contended that the learned judge exercised his discretion properly when he abridged the time for service. Counsel submitted that the appellant was aware that the property had been sold and that the new owners required possession. Failure to deliver up possession was prejudicing the purchasers and significant costs would have been incurred by the respondents. Counsel submitted that the learned judge took into consideration the overriding objective, and exercised his discretion properly as "the case was not legally complex".

(b) Order for payment of rent

[13] Counsel for the appellant submitted that the appellant being a co-owner had unity of possession along with the respondents. Consequently, they were all jointly and severally entitled to possession and occupation of the property. She submitted that the fact that the respondents were not in occupation, did not mean that the appellant in occupation was obliged to pay rent. In any event, she said, there was no evidence of the rental value of the property on which the learned judge could have made an order for payment. The magnitude of the error is seen, she said, when it is considered that the appellant was being called on to pay $3,480,000.00 as rent.

[14] In response, counsel for the respondents submitted that the learned judge was correct. He cited in support the appellant's refusal to allow the valuation of the house, and her failure to vacate the premises when notified that the property was to be sold. Equity, he said, required the payment of rent "in order to treat with the terrible injustice and prejudice meted out to the respondents".

Decision

[15] Rule 11.11(1) of the Civil Procedure Rules governs the service of notices of application for court orders. It requires such notices to be served "as soon as practicable after the day on which it is issued;" and "at least 7 days before the court is to deal with the application". Where the period of notice is shorter than the 7 days required, "the court may nevertheless direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application" (Rule 11.11(3)).

[16] In the instant case, the application was served on Friday afternoon for court hearing on Tuesday morning. The applicant was given merely three days' notice, and two of those days were on the weekend. She complained that she had not been given sufficient time to prepare herself for the hearing, and protested the absence of what she termed "fair play". The respondents have contended that the learned judge was correct in abridging the time, and that this court should not interfere with the exercise of his discretion.

[17] As said earlier, the learned judge gave neither oral nor written reasons for his decision. Had he done so, he would no doubt have stated the circumstances that he considered which made it appropriate for him to ignore the appellant's plea for rule 11.11(1) to be observed. The learned judge not having given any reasons, there ought not to be any speculation as to what his reasons were. Nevertheless, it is obvious that he did not give sufficient importance to the fact that an order for contempt of court was being sought against the appellant. That in itself ought to have given the learned judge a moment for pause as an order for contempt of court is a very serious matter. It portends committal to prison or the confiscation of assets. In such circumstances, it was indeed unfair to have given the appellant only one working day to prepare for this hearing, when the rule provides for **at least** seven days' notice.

[18] The respondents' contention that the judge's decision was in keeping with the overriding objective is baffling. Rule 1.1 states that the overriding objective of the Civil Procedure Rules is the enabling of the court "to deal with cases justly". This involves:

a) Ensuring that the parties are on equal footing and are not prejudiced by their financial position;

b) Dealing with a case in ways which take into consideration matters such as the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party; and

c) Ensuring that each case is dealt with expeditiously and fairly.

In the instant case, there is no indication that the learned judge considered and applied these principles in respect of the interests of the appellant.

[19] As regards the order for the appellant to pay rental, there is of course nothing to indicate the reasoning of the judge in deciding that a co-owner should pay rent. Nor was there any evidence to indicate the basis on which the learned judge arrived at the monthly rate. The impression has been created that the respondents fixed a figure and placed it before the learned judge who uncritically accepted it and ordered thus. Adjudication of that nature can neither be recommended nor approved.

[20] It is accepted that the parties were tenants in common. A tenancy in common is defined as a "state of concurrent ownership by two or more persons, each having a distinct but 'undivided' share in the property. No one person is entitled to exclusive title or use, each being entitled to occupy the whole in common with the others" (Osborn's Concise Law Dictionary -11th edition).

[21] In **Jones (A E) v Jones (F W)** [1977] 1 WLR 438 at 441 H, Lord Denning MR dealt with the question of payment of rent by a tenant in common. He said:

> " First the claim for rent. It is quite plain that these two people were in equity tenants in common having a three-quarter and one-quarter share respectively. One was in occupation of the house. The other not. Now the common law said clearly that one tenant in common is not entitled to rent from another tenant in common, even though that other occupies the whole. That appears from *M'Mahon* v *Burchell* (1846) 2 Ph. 127, 134-135 *per* Lord Cottenham L.C., and *Henderson v Eason* (1851) 17 Q.B. 701, 720. Of course if one of the tenants let the premises at a rent to a stranger and received the rent, there would have to be an account, but the mere fact that one tenant was in possession and the other out of possession did not give the one that is out any claim for rent. It did not do so in the old days of legal tenants in common. Nor does it in modern times of equitable tenants in common. In *Bull v. Bull* [1955] 1 Q.B. 234, 239, I said:
>
> > '... the son, although he is the legal owner of the house, has no right to turn his mother out. She has an equitable interest which entitles her to remain in the house as tenant in common with him until the house is sold.'
>
> As between tenants in common, they are both equally entitled to occupation and one cannot claim rent from the other. Of course, if there was an ouster, that would be another matter: or if there was a letting to a stranger for rent that would be different, but there can be no claim for rent by one tenant in common against the other whether at law or in equity."

[22] In the instant case, the notice of application sought an order for the appellant to pay rent from 1 June 2008. The appellant had lived in that house rent free for many years during the latter part of which she was the caregiver for her mother who died on 1 February 2008. The grant of probate was made on 3 December 2009. So, when the respondents went before Morrison J, they were seeking rental from the appellant for the following periods:

a) The months before the grant of probate;

b) The time during which the appellant served as an executor; and

c) While there was no contract for sale in existence.

[23] In the circumstances, the learned judge was in error. Even if he was permitted to make an order for rent, it would have had to be confined to the period after the contract for sale was signed and the time for completion had arrived. Furthermore, there was no evidence as to what would have been a reasonable rent.

[24] The appellant was unfairly dealt with by the abridgment of the time for the hearing, and the conditions that would have allowed the court to make an order for payment of rental by this tenant in common did not exist. Consequently, the order of the learned judge had to be set aside.

[25] It is for the foregoing reasons that the order outlined in paragraph [1] herein was made. The order of Morrison J having been set aside, it follows that any monies withheld by the respondents from the appellant should have been released. The appellant had sought an order for interest to be paid to her. However, no submissions were addressed to us on the matter. In the circumstances, if the parties cannot agree on the rate of interest, an application may be made to the Court for that to be determined.