

NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 81/2005

**BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE COOKE, J. A.
THE HON. MRS. JUSTICE M^CCALLA, J. A. (AG.)**

BETWEEN	KEN'S SALES & MARKETING LTD	APPELLANT
AND	BEVERLEY LEVY	RESPONDENT

Carol Davis, Gillian Mullings and Audrey Reynolds for the Appellant

Dr. Lloyd Barnett instructed by Hugh C. Hart of Hart, Muirhead and Fatta for the Respondent

17th, 18th, 19th, 20th January and 7th April, 2006

SMITH, J.A:

I have had the benefit of reading in draft the judgments of Cooke J.A. and McCalla J.A. (Ag). I agree with their conclusion that the appeal should be allowed on the ground that the respondent, Mrs. Beverley Levy has no locus standi to make the application to set aside the order made by Campbell J.

In my view an examination of the order made by D. McIntosh J, which is set out in full in the judgment of Cooke J.A. is not necessary for the proper disposal of this appeal (indeed this order is not on appeal).

Accordingly, in my view, any statement made by this court concerning the validity or otherwise of D. McIntosh J's order would be obiter.

I will reserve my view on the effect of s.134 of the Registration of Titles Act on such an order, for another time.

COOKE, J. A.

1. This appeal is listed as Ken's Sales and Marketing Limited (Ken's Sales) v Beverley Levy. However, the latter was not a party to the foundation suit in which the former obtained judgment against Earl Levy and Trident Villas and Hotel Limited. This judgment, Ken's Sales sought to enforce by the sale of various parcels of land owned by the judgment debtors. To that end, on the 15th January, 2003 Ken's Sales successfully moved the court below for an order for sale of the various parcels of land mentioned above. That order by D. McIntosh, J. is now set out below:

"... It is hereby ordered that:

1. There be a sale of the lands registered in the name of the Defendant known as Trident Villas and Hotel, Port Antonio in the parish of Portland and contained in Certificates of Title registered at Volume 552 Folio 32, Volume 1339 Folio 969 (formerly registered at Volume 589 Folio 74), Volume 1157 Folio 129, Volume 1150 Folio 908, Volume 1214 Folio 709 and Volume 931 Folio 68 of the Register Book of Titles by public auction or if not by private treaty.
2. Such enquiries be made by the Registrar of the Supreme Court as may be necessary to determine:

- a) the estate and interests of the Defendant in the aforesaid premises;
 - b) whether any person other than the Defendant is entitled to any charge or interest in the said premises and the respective priorities thereof;
 - c) the exact amount due to the Plaintiff from the Defendant in respect of the Judgment Debt herein together with interest thereon and costs; and
 - d) for proper execution of the said Order for Sale.
3. The purchase monies from such sale be applied in satisfaction of all monies due under the Judgment entered herein on the 24th day of July, 2002 and incident to such sale, this application and order any enquiries held pursuant thereto.
 4. Pending such sale the aforesaid premises do stand charged with such payments.
 5. The costs of and incidental to this application be the Plaintiff's to be paid by the Defendant and taxed if not agreed."

In the Registrar's report done pursuant to this order at paragraph 2 (c) it is stated:

"Affidavit of Kenneth Biersay (the principal of Ken's Sales) indicates that the total amount of judgment due and owing is \$125,070,084.44 plus interest at 12% per annum."

2. It would seem that on the 14th May, 2003 there was an extension of the order of 15th January, 2003 for a further period of six months from the 11th April, 2003. The court has not seen this order but relies on the endorsements on the titles. Then on the 19th January, 2005 there was an order of the court below by Campbell, J. in these terms:

"1. That the time for leaving with the Registrar of Titles certificate of sale for entry on the register pursuant to Orders for Sale first made in the suit herein by this Honourable Court on 15th January, 2003 be extended until completion of the sale of the lands."

3. On the 3rd June, 2005 on an application by Beverley Levy (who is the wife of Earl Levy), Pusey, J. (Acting) set aside the order of the 19th January, 2005. The learned judge who set aside the order did not put his reasons in writing. The consensus is that the learned judge did so because the original defendants (Earl Levy and Trident Villas and Hotel Limited) were not served with notice of the application by Ken's Sales to extend time. In her affidavit, Beverley Levy sought and succeeded in establishing her right to make her application on the basis of paragraphs (5) and (6) of her affidavit which are now set out hereunder:

- "(5) With regard to Caveat 1190019 this Caveat secures a loan from me to the 1st Defendant in the amount of J\$6,567,736.50 together with interest thereon.
- (6) With regard to Caveat No. 1190018, this Caveat protects a charge over lands comprised in Certificates of Title registered at Volume 1157 Folio 129, Volume 1339 Folio 969, Volume 1157 Folio 129, Volume 1214 Folio 709 to secure a loan made by my company, Percy Junor Limited in the amount of US\$325,000 together with interest thereon."

This, she said, provided the basis for her intervention, as is permitted by rule 48.10(1) of the ***Civil Procedure Rules, 2002*** ("the Rules").

4. Ken's Sales now appeals against the order of Pusey, J. (Acting). The grounds of appeal were:

- "(ii) That the Learned Judge in Chambers erred in holding that the Application before the Honourable Mr. Justice Campbell ought to have been made inter partes.
- (iii) That the Learned Judge in Chambers erred in holding that the Applicant Beverley Levy had standing in the matter herein to make application to set aside the Order of the Honourable Mr. Justice Campbell.
- (iv) It is unlikely that had the Applicant attended, a different Order would have been made.
- (v) There was no prejudice to the Respondent occasioned by the Order of the Honourable Mr. Justice Campbell."

5. There is in existence an order of the court below dated 10th December, 2004 whereby the land, the subject of the order of sale was to be sold to a named purchaser. To that end, there is a signed agreement for sale, the deposit was paid and completion was to be 45 days from the 2nd March, 2005. A condition precedent to effecting the transfer was that all encumbrances of the relevant titles should be cleared. There has been no challenge to this order of the court. Ken's Sales is deeply concerned that because of alleged equitable interests which are being put forward as encumbrances on the land to be sold, either there will be difficulty in the execution of a sale of the said land or because of the possible determination of the ranking in the order of priorities of the alleged equitable interests it would scarcely benefit, if at all, from the

proceeds of sale. The affidavit of Carol Davis, counsel for Ken's Sales filed on the 16th June, 2005 demonstrates this apprehension. Paragraphs 5 and 6 of that affidavit are reproduced hereunder:

- "5. That initially my client did not intend to appeal the Order (of Pusey, J. (Acting)), but proposed to make an inter partes application in the matter herein. However, on Wednesday, 16th June, 2005, I obtained from Titles Office updated copies of the titles to the said lands, and Caveat No. 1360162 filed by Messrs. Hart Muirhead and Fatta, Attorneys-at-law on behalf of Pelican Securities Limited. From my perusal the said caveat in like form is on 5 of the 6 titles. I attach a copy of one of the titles endorsed with the caveat, and of the caveat 1361062 marked 'CD1' for identity.
6. From the documents it appears that on 1st June, 2005, while the Learned Judge was considering his decision with respect to the matter herein, the Defendant granted a further promissory note charged on the lands the subject of the application before the Court. The said promissory note and charge were prepared by Messrs. Hart Fatta and Muirhead, who were the Attorneys appearing before the Learned Judge in the application. Further on 3rd June, 2005, the very day on which the Learned Judge granted an Order preventing dealings, Mr. Hugh Hart, who was the Attorney-at-law appearing before the Judge in Chambers, filed a statutory declaration to support the lodging of the caveat by the said Pelican Securities Limited."

This promissory note was in the sum of US\$1,200,000.00. In alluding to the practical considerations, I know that perhaps, I have digressed somewhat, but I considered it necessary to do so for two reasons. Firstly, because law suits do not exist in a vacuum. Secondly, to state that I am now not concerned with

any question as to the ranking of the order of equitable interests, if such interests in fact exist.

6. In the presentation of arguments before the court there was debate as to the effect of the order of McIntosh J (*supra*) and the validity of subsequent orders which sought to extend that order. Let me state that a resolution of those issues would not affect the ultimate decision as to the outcome of this appeal. However, since so much energy was expended by counsel on both sides I feel obliged to make some comments on those issues. It is important to construe the order of D. McIntosh, J. made on the 15th January, 2003 and in particular paragraph 4 thereof (*supra*). This has to be done in the context of section 134 of the Registration of Titles Act ("the Act"). It is necessary to reproduce this section, which I may add does not lend itself to ready understanding.

"134. No execution registered prior to or after the commencement of this Act shall bind, charge or affect any land or any lease, mortgage or charge, but the Registrar, on being served with a copy of any writ or order of sale issued out of any court of competent jurisdiction, or of any judgment, decree or order of such court, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease, mortgage or charge, sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after any land, lease, mortgage or charge, so specified shall have been sold under any such writ, judgment, decree or order, the Registrar shall, on receiving a certificate of the sale thereof in such one of the Forms A, B, or C in the Twelfth Schedule hereto as the case requires (which certificate shall have the same effect as a transfer

made by the proprietor), enter such certificate in the Register Book; and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land, lease, mortgage or charge:

Provided always that until such service as aforesaid no sale or transfer under any such writ or order shall be valid as against a purchaser for valuable consideration, notwithstanding such writ or order had been actually issued at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the issuing of such writ or order.

Upon production to the Registrar of sufficient evidence of the satisfaction of any writ or order a copy whereof shall have been served as aforesaid, he shall make an entry in the Register Book of a memorandum to that effect, and on such entry being made such writ or order shall be deemed to be satisfied.

Every such writ or order shall cease to bind, charge or affect any land, lease, mortgage or charge, specified as aforesaid, unless a certificate of the sale under such writ shall be left for entry upon the register within three months from the day on which such copy was served, or such longer time as the court shall direct." (Emphasis mine)

7. In my analysis of this section the order for sale does not by itself consequentially place a charge on the land to be sold. Hence, apparently, there was the necessity for paragraph 4 of that order. In that paragraph "the premises were to stand charged" while "such sale" was "pending". The question now arises as to how much time is permitted for the sale under this order. The answer is compelling. It must be within three months as the court did not direct "such longer time" (s. 134 of the Act). Therefore, the charging

order in paragraph 4 had an existence only for the period allowed for the sale. It follows, accordingly, that the order for sale and the charging order in paragraph 4 had no effect after three months subsequent to the 15th January, 2003. That charging order in paragraph 4 survives only while the sale is pending. It was sought to argue that rule 26.1(2)(c) of the Rules could aid the appellant. This rule which is under the caption "The court's general powers of management" states that:

"(2) Except where these Rules provide otherwise, the court may –

- (a) transfer proceedings to the Family Court or a Resident Magistrate's Court;
- (b) consolidate proceedings;
- (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;..."

The reliance on this rule is misplaced. The order of the 15th January, 2003 was not pertinent to any power of management being exercised by the court. Further, the Rules cannot in any way intrude upon a statutory provision. In this case unless the court otherwise directs, the statutory period for the leaving of a certificate of sale for entry on the register is three months. This requirement is unequivocally imperative. The appellant was not oblivious to the force of section 134 of the Act, for, in making the application which resulted in the May 14, 2003 extension (*supra*), the ground relied on was that –

"The period of three months for the life of this order pursuant to section 134 of the Registration of Titles Act is not sufficient to make all the inquiries and to conclude a sale of the lands charged."

I agree with Dr. Barnett that the order of the 15th January by D. McIntosh, J. is incapable of extension in the manner contended by the appellant. Further, I disagree with the proposition by the appellant that the effect of paragraph 4 of the order of D. McIntosh, J. was to extend the order for sale until such sale was completed.

8. The Rules came into operation on the 1st January, 2003. Part 55 deals with "Sale of Land by Order of Court". In this Part is set out the regime as to the procedural requirements for such sale. The record does not indicate that the requisite procedure in Part 55 was followed. The order of D. McIntosh, J. was on the 15th January, 2003. On the contrary, the record indicates that Ken's Sales was still following section 621 of the ***Judicature (Civil Procedure Code) Law*** (now repealed), which had hitherto provided the procedure for the sale of land with a view to the satisfaction of a debt. I say this because this suit – CLK 009 of 2001 does not appear to be the original suit in this matter. There was CL K062 of 1996. In respect of that suit there were orders for sale by the court below for what appears to be the same debt. For whatever reason, CLK009 of 2001 came into being. This it would seem embraced a consolidation with K062. I note this because the orders for sale with respect to CLK009 are drafted in a similar manner as to those of K062. There is no

contention that the order of 15th January, 2003 was not in accordance with the Rules.

9. The previous paragraph is included in this opinion as background because of the stance of the respondent. Compendiously put – it is that on the grounds stated in paragraphs (5) and (6) of her affidavit (*supra*) she is an interested party (*sic*) under Rule 48.10(1) of the Rules. This is as follows:

“48.10 (1) An application to discharge or vary a final charging order may be made by

- (a) the judgment creditor;
- (b) the judgment debtor; or
- (c) any interested person ...”

As to interested persons, the Rules state:

“48.6 (1) The persons specified in paragraph (2) have an interest in the charging order proceedings as well as the judgment creditor and the judgment debtor and are referred to in this Part as **‘the interested persons’**.

(2) The interested persons are –

- (a) any person who owns the land, stock or assets to be charged jointly with the judgment debtor;
- (b) the company whose stock is to be charged;
- (c) any person who is responsible for keeping the register of stock for that company;
- (d) if the stock is held under a trust, the trustees or such of them as the court may direct;
- (e) if the stock is held by the judgment debtor as a trustee, such of the other trustees and beneficiaries as the court may direct;
- (f) if the stock is held in court, the registrar; and

- (g) any other person who has an interest in the personal property to be charged."

Part 48 of the Rules prescribes the procedure pertinent to charging orders. As already indicated and correctly submitted by Dr. Barnett there is a clear distinction between orders for sale and charging orders. Part 55 of the Rules deal specifically with orders for the sale of land. Part 48 deals with charging orders. In particular 48.11 sets out the procedure whereby there can be enforcement of a charging order by an order for sale. The order of Campbell, J. (*supra*) did not have as part of that order anything to do with charging the land. It was to extend the time for the certificate of sale to be left with the Registrar of Titles "until completion of the sale of lands". Since Part 48 is relevant to circumstances pertaining to the charging of land and since the order of Campbell, J. did not make any order charging the land; I fail to appreciate how Beverley Levy can have any standing on this issue which is pertinent only to the sale of land. Besides, even if it could be said (erroneously in my view) that the order of Campbell, J. necessarily amounted to a charging order Beverley Levy would not be an "interested person". I reject the submission that because she had an "equitable interest" in the land she was an "interested person". The categories previously set out in 48.6(2) do not include anyone with her alleged claim.

10. I would allow this appeal on ground 3 (iii) that Beverley Levy had no standing. In view of this decision it is unnecessary for me in the circumstances to discuss the other grounds. I would award costs to the appellant.

McCALLA, J.A. (Ag.):

1. In this appeal the appellant Ken's Sales and Marketing Ltd. is seeking an order to set aside an order of Pusey J (Ag) made on June 3, 2005 on the application of Beverley Levy the respondent.

The factual background against which that application was granted has been chronicled in the Judgment of Cooke JA. Having had the opportunity to read his judgment, I am in agreement with his conclusion that Mrs. Levy had no standing to make the application and the appeal should be allowed.

However, in light of the arguments advanced in respect of the validity of Orders made by D. McIntosh J and Campbell J, I wish to make a few comments.

2. In suit CLR 009 of 2001 Ken's Sales had successfully obtained judgment against Earl Levy and Trident Villas and Hotel Ltd. Thereafter, Ken's Sales instituted sale of land proceedings which culminated in an order made by McIntosh J on January 15, 2003 the material portions of which were to the effect that:

- "(1) There be a sale of the lands registered in the name of the Defendant known as Trident Villas and Hotel, Port Antonio in the parish of Portland and contained in Certificates of Title registered at ...
- (2) Such enquiries be made by the Registrar of the Supreme Court as may be necessary to determine:
- (a)...
 - (b)...
 - (c)...
 - (d)...
- (3) The purchase monies from such sale be applied in satisfaction of all monies due under the Judgment entered herein on the 24th day of July, 2002, and incident to such sale, this application and order any enquiries held pursuant thereto.
- (4) Pending such sale the aforesaid premises do stand charged with such payments.
- (5) ..."

(emphasis supplied)

3. On January 19, 2005, pursuant to a Notice of Application by Ken's Sales for Court orders, Campbell J made the following order:

"That the time for leaving with the Registrar of Titles Certificate of Sale for entry on the Register pursuant to Orders for Sale first made in the suit herein by the Honourable Court on the 15th January, 2003, be extended until completion of the sale of the lands."

It was the above order that Pusey J had set aside on June 3, 2005 on the application of Mrs. Levy, who had not been a party to the sale of land proceedings referred to at para. 2 herein.

4. Ken's Sales now appeals the decision of Pusey J that the ex parte order of Campbell J be set aside.

Prior to Campbell J's order of January 19, 2003, there had been an extension of the order made by McIntosh J for six (6) months from April 11, 2003, made pursuant to an application by Ken's Sales. Thereafter, the further application for extension was granted by Campbell J. Mrs. Davis contends that the order by Campbell J was properly made. She argued that in the alternative, paragraph 4 of McIntosh J's order dated January 15, 2003, is effective even if the applications for extension of time had not been properly made.

5. Dr. Barnett's position was that since there had been no application to enlarge the time for making the application before Campbell J, the order made by McIntosh J as extended, had, by virtue of the provisions of section 134 of the Registration of Titles Act, ceased to have any effect after the extension of six (6) months commencing on April 11, 2003. Thereafter it was not capable of being extended by Campbell J. He said that once the binding effect ceases, the charge cannot be resurrected so that when Campbell J made the order in January 19, 2005, there had been no charge in effect for a period of 15 months.

6. The order of January 15, 2003, by McIntosh J, must be considered in the light of section 134 of the Registration of Titles Act which reads:

"134. No execution registered prior to or after the commencement of this Act shall bind, charge or affect any land or any lease, mortgage or charge, but the Registrar, on being served with a copy of any writ or order of sale issued out of any court of competent jurisdiction, or of any judgment, decree or order of such court, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease, mortgage or charge, sought to be affected thereby, shall after marking upon such copy the time of service, enter the same in the Register Book, and after any land, lease, mortgage or charge, so specified shall have been sold under any such writ, judgment, decree or order, the Registrar shall, on receiving a certificate of the sale thereof in such one of the Forms A, B, or C in the Twelfth Schedule hereto as the case requires (which certificate shall have the same effect as a transfer made by the proprietor), enter such certificate in the Register Book; and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land, lease, mortgage or charge.

Provided always that until such service as aforesaid no sale or transfer under any such writ or order shall be valid as against a purchaser for valuable consideration, notwithstanding such writ or order had been actually issued at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the issuing of such writ or order.

Upon production to the Registrar of sufficient evidence of the satisfaction of any

writ or order a copy whereof shall have been served as aforesaid, he shall make an entry in the Register Book of a memorandum to that effect, and on such entry being made such writ or order shall be deemed to be satisfied.

Every such writ or order shall cease to bind, charge or affect any land, lease, mortgage or charge, specified as aforesaid, unless a certificate of the sale under such writ shall be left for entry upon the register within three months from the day on which such copy was served, or such longer time as the court shall direct."(emphasis supplied)

My understanding of the section is as follows:

- (a) No execution, which includes an Order for sale shall ipso facto bind, charge or affect any land.
- (b) In order to bind, charge or affect the land a copy of the Writ or Order of Sale issued out of any court or of any judgment, decree or order of such court accompanied by a prescribed statement must be served on the Registrar of Titles and the Registrar must then enter it on the Register.
- (c) Until such service on the Registrar a sale or transfer under the Order is not valid as against a bona fide purchaser for value even if that person had actual or constructive notice of the Writ or other court order.
- (d) After a sale has been effected, the Registrar on receiving a certificate of the sale, which is equivalent to a transfer must register the sale in favour of the purchaser.
- (e) The Writ or order for sale ceases to bind or charge the land unless a certificate of sale is left for entry upon the register within three months **or such longer time as prescribed by the court.**
- (f) Unless the prescribed time at (e) above is complied with the order for sale shall cease to bind the land.

To my mind if:

(i) no certificate of sale is lodged within three months and;

(ii) no longer period is prescribed by the court for doing so,

the consequences for such failure would be that the binding effect of the Order for Sale ceases.

7. Dr. Barnett contends that paragraph 4 of the order of McIntosh J did not stipulate a definite period binding the land. An order made "pending such sale" is not equivalent even to a general order which says "until sale." If paragraph 4 of the order had stated for example "six months" then that he said would have been a defined period. Dr. Barnett says paragraph 4 as it stands, is vague, indefinite and ineffective.

According to the arguments advanced by Dr. Barnett even if paragraph 4 of the order of McIntosh J could be interpreted as meaning that the land was charged until completion of the sale, Ken's Sales had subsequently obtained orders for extension of time for leaving the Certificate of Sale with the Registrar of Titles and must have done so in recognition that paragraph 4 was ineffective. Ken's Sales ought not to be permitted to repudiate the orders obtained on its own application.

8. It may well be that paragraph 4 of the order of McIntosh J had the effect of charging the lands the subject of paragraph 1 of that order, to await the outcome of a specific event, namely the sale of the lands referred to, in satisfaction of the judgment debt owed to Ken's

Sales. However, even if Dr. Barnett is correct in his submissions that paragraph 4 is too vague and indefinite to be of any effect, there has been no appeal from that Order by Earl Levy or Trident Villas and Hotel Limited. It was not contended that McIntosh J had no jurisdiction to make it.

9. With regard to the order made by Campbell J that order also stands as it has not been set aside or appealed from at the instance of Earl Levy and Trident Villas and Hotel Limited. In the circumstances I do not find it necessary to pronounce on the validity of those orders.

SMITH, J.A.:

ORDER:

Appeal allowed. Costs to the appellant to be agreed or taxed.