[2013] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 87/2012

BETWEEN	**L D**	**APPLICANT**
AND	**E F**	**RESPONDENT**

Dale Staple & Miss Danielle Archer instructed by Kinghorn & Kinghorn for the applicant

Mrs Judith Cooper-Bachelor instructed by Chambers Bunny & Steer for the respondent

29 August and 10 September 2013

IN CHAMBERS

HARRIS P (AG)

[1] This is an application by the applicant for a stay of execution of an order of His Honour Mr C A Pennycooke, judge of the Family Court, made on 9 August 2013.

[2] The applicant and the respondent lived in a common law union. The applicant states the period of their cohabitation to be from 2004 to 3 April 2013. On 1 May 2013, on an ex parte application by the respondent, under section 4 (1) of the Domestic Violence Act, an interim protection order was made against the applicant which prohibited her from: entering or remaining in the residence at 1 Capricorn Terrace, Smokey Vale, Kingston 19; or molesting the respondent by the use of abusive

language; or indulging in inappropriate behaviour towards the respondent; or damaging any property owned by him, or available for his use or enjoyment.

[3] On 7 May 2013, the applicant made an application for the order of 1 May to be discharged. That application was refused by the learned judge. The order of 1 May was varied and interim orders were made as follows:

> "Order made on the 1st day of May, 2013 is varied for the Respondent to remain in the premises until the 15th day of May, 2013 upon which date a conclusion can be taken as to the accommodation of the Respondent.
>
> Dated this 7th day of May, 2013
>
> C.A. Pennycooke (Mr.)
> Judge, Family Court
> Kingston & St. Andrew
>
> The Applicant is ordered to pay not more than Eighty Thousand Dollars ($80,000.00) per month for rental for child's accommodation with the mother as mother will have to leave the premises plus the security deposit; payments are to be made to the Respondent. The cost of removal is to be borne by the Applicant.
>
> Dated this 7th day of May, 2013
>
> C.A. Pennycooke (Mr.)
> Judge, Family Court
> Kingston & St. Andrew
>
> **Paternity admitted. By Consent**, the Applicant is ordered to pay the sum of Twenty Five Thousand Dollars ($25,000.00) per month for the maintenance of his child …, plus all medical expenses and all medical expenses. [sic] Effective on the 31st day of May, 2013. Until further orders, the first payment to

be made not before the 8th day of May, 2013. Payments are to be made to the Respondent. The parties are to attend counselling.

Signed: [E F]
Signed: [L D]"

[4] On 9 August 2013, a further order was made. It reads:

"The Court, having heard an Application made by E F for a Protection Order under the Domestic Violence Act, 1995 with amendment in 2004 and upon hearing from Applicant in respect of the conduct of Respondent;

[L D] toward [E F]

And the Respondent being present

IT IS HEREBY ORDERED that a Protection Order is granted under Section 4(1)(a), and (e) (iv & v) of the Domestic Violence Act prohibiting the Respondent from:

a. entering or remaining in the household residence of the Applicant located at 1 Capricorn Terrace, Smokey Vale, Kingston 19 by 4:00 pm the 9th August, 2013;

b. Molesting the Applicant by:

iv. using abusive language to or behaving towards the Applicant in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of the Applicant; or

v. Damaging any property owned by or available for the use or enjoyment of the Applicant, or any property in the care and custody or situated at the residence of the Applicant."

> **Applicant to pay $80,000 per month as rental for Respondent for 1 year. Payment to be made to Respondent's account. Applicant to pay the removal expenses of the Respondent. Applicant to pay $25,000 per month for maintenance of child of the parties that is Madison plus all educational expenses and all medical expenses for said child for 1 year. Payment to be made to Respondent's account."**

It was further ordered as follows:

> **"This Order takes effect on the 30th day of August, 2013 and Expires on the 29th day of August 2014."**

[5] In an affidavit in support of her application, the applicant averred that she was physically abused by the respondent on 13 April 2013, as a result of which, she sustained serious injuries. She also asserted that the respondent had threatened to shoot her. Reference was made by her to a meeting, on 26 April 2013, between the parties and their attorneys to discuss the impasse between them, at which time, she "understood [E F] to be saying that he wanted me out of our property and that I was entitled to nothing". An arrangement was made by the respective attorneys for the parties to proceed to counselling.

[6] At paragraphs 13 to 18 of her affidavit, she said :

> "13. That I was surprised to have received this Order (the order of 1 May) in light of what had been transpiring since the Respondent had attacked me on the 13th April 2013. On the same day that the Order was served on

me, the Respondent slept at our home. In fact, he tried desperately to come into my bed and was requesting that I have sexual intercourse with him. I refused and kept my bedroom door locked.

14. On the 7th May 2013, I made an application to the Court for the Order to be discharged. I exhibit hereto identified by the mark **'L.D.5'** a copy of the said Affidavit I put before the Court to have the Order discharged. The Court refused my Application but varied the Order. I exhibit hereto identified by the mark **'L.D. 6'** a copy of the said Order.

15. That on the 15th May 2013, the matter was again dealt with in Court and the Order of the Court was extended to the 31st May 2013. On the 31st day of May 2013, a plenary hearing into the Respondent's Application for a Protection and Occupation Order was heard. By this time the Respondent had stopped sleeping at the home but would come there often. He came for example to feed the dogs and do other things around the home. There was no further altercation between us.

16. That the plenary hearing of this matter continued until August 9, 2013 when His Honour Mr. Pennycooke made an Order that I vacate our home among other Orders. The Occupation Order that the learned trial Judge granted was made at approximately 1:00 p.m. that day. The learned judge ordered that I vacate the said premises by 4:00 p.m. the same day.

17. That my Attorney-at-law at that point applied for a stay of execution and alerted the Court to the fact that I would be appealing the Order. The learned Judge refused the stay of the Order.

18. That the effect of the Order of the Court was that I, and our 3 year old daughter, had to vacate our home within the next 3 hours of the Order being made. The immediate effect of the Order is that we now have nowhere to go. I am presently staying with a friend and our 3 year old daughter, … is staying with my relatives. Severe displacement has therefore occurred in our lives by the making of this Order."

[7] In an affidavit in response to that of the applicant, the respondent denied that the applicant was his spouse as their relationship had been completely broken down. He also stated that the applicant, in defiance of the order of the court, has refused to vacate the property and had stated in court that she is prepared to go to prison as she would not be leaving the house. The house is incomplete and the learned judge found that it is not secure.

[8] It was further averred by him that in the past he was attacked by the applicant and the attack which prompted the application was one in which he was injured and had to receive stitches.

Submissions

[9] Mr Staple submitted that it is impossible for the applicant to comply with the order within a period of four hours as it would have been difficult for her to have found suitable accommodation within such a short time and in addition, arrangements would have to be made to find a suitable school for the child. The applicant's affidavit shows that she is entitled to share in the property and if she remains in it, she would

be better able to exercise right of ownership over it, including and not limited to securing the physical assets therein, he argued.

[10] A critical factor to be considered in the making of an occupational order, he contended, is whether a party who asserts the right to ownership would be unduly prejudiced by the making of the order. The respondent, he argued, was not living at the premises at the time of the order and the fact that the applicant has nowhere to go, greater hardship would be caused to her than to the respondent. In all the circumstances, he submitted, the applicant has a real prospect of success of her appeal and a stay of execution of the order should be granted.

[11] Mrs Cooper-Bachelor, in response, stated that the respondent has been living on the property since 9 August 2013. The application before the family court, she argued, was for a protection order which was granted. The applicant's application before the family court , she argued, was to vary or discharge the ex parte order prohibiting her from remaining on the property or using obscene language or damaging any property owned by the respondent and no counter notice of appeal has been filed by the applicant for the respondent to leave the property, she submitted. It was counsel's further submission that given the history of the matter, it would be unwise to allow the applicant back into the house as the respondent is afraid of her while she is not afraid of him.

Analysis

[12] The court is endowed with discretionary power to order or refuse a stay of execution of a judgment. Although such right is unfettered, an applicant for a stay must show that in the circumstances of the case, there is a risk of him or her suffering injustice if the stay is not granted. Lord Staughton, in **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 propounded the test in granting a stay to be two fold: (a) an applicant must show that he has some prospect of success of his appeal and that (b) without a stay he would be ruined. There are, however, recent decisions, in which the courts have adopted a broad approach in considering a stay of execution. This new approach recommends the interests of justice as an important ingredient in ordering or refusing a stay. In **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, Clarke LJ, suggests that, in granting or refusing a stay, the court should adopt a balancing exercise within the context of the interests of justice. At paragraph 22, he said in part:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"

[13] Phillips LJ in **Combi (Singapore) Pte Limited v Sriram Ramnath and Sun Limited** [FC 297/6273 delivered on 23 July 1997] pronounced the approach to be one which best harmonizes with the interest of justice. At page 4 he said:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[14] This court, has in several cases, approved the principle that the interests of justice is a fundamental determinative factor in granting or refusing a stay - see: **Watersports Enterprises Ltd v Jamaica Grande Limited & Others** SCCA 110/2008 delivered 4 February 2009; **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA 99/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Ltd v Digicel (Jamaica Ltd)** SCCA 148/2009 delivered 16 December 2009.

[15] The evidentiary material placed before the court by the applicant must be such as to justify an order for a stay. In considering the stay the risks involved must be

weighed up so as to ascertain which party would be more likely to suffer harm if a stay is granted.

[16] As earlier indicated, the learned judge made a protection order under section 4 (1)(a), e (iv) and (v) of the Domestic Violence Act. The relevant provisions, for the purpose of this application, are, section 4(1) (a), e (iv) and (v) and section 4 (2).

[17] Section 4 (1) (a), e (iv) and (v) provides:

> "4 –(1) Application may be made to the Court for a protection order to prohibit the respondent -
>
> (a) from entering or remaining in the household residence of any prescribed person; or
>
> (b) from entering or remaining in any area specified in the order being an area in which the household residence of the prescribed person is located; or
>
> (c) from entering the place of work or education of any prescribed person; or
>
> (d) from entering or remaining in any particular place; or
>
> (e) from molesting a prescribed person by –
>
> (i) watching or besetting the household residence, place of work or education of a prescribed person;
>
> (ii) following or waylaying the prescribed person in any place;
>
> (iii) making persistent telephone calls to a prescribed person;

(iv) using abusive language to or behaving towards a prescribed person in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of the prescribed person; or

(v) damaging any property owned by, or available for the use or enjoyment of, the prescribed person, or any property in the care or custody or situated at the residence of the prescribed person."

[18] Section 4 (2) reads:

> "4 – (2) On hearing an application under subsection (1), the Court may make a protection order if it is satisfied that –
>
> (a) the respondent has used or threatened to use, violence against, or caused physical or mental injury to, a prescribed person and is likely to do so again; or
>
> (b) having regard to all circumstances, the order is necessary for the protection of a prescribed person."

[19] The crux of the applicant's contention is that an occupation order has been made by the learned judge and she has a right to remain in the house, as she is entitled to participate in its ownership. In paragraph 19 of her affidavit, she made reference to a number of reasons to support her contention that she has a good arguable appeal, among which, are: that the learned judge failed to take into account that the occupational order would cause irreparable prejudice to the child and her and that he failed to consider that there is a pending application by her before the Supreme

Court for a declaration that she was entitled to a share in the property. In my view, the applicant's entitlement to a share of the property, if any, would not have been an issue before the learned judge, as the question of property rights would not have been a matter for the learned judge's consideration on the respondent's application.

[20] As shown, the interim order made on 1 May 2013 arose out of an application by the respondent for a protection order which had its genesis in an attack by the applicant on him, causing him to sustain injuries.

[21] Before the learned judge, on 7 May 2013, were two applications: the respondent's pending application of 1 May for the protection order and the applicant's application for the discharge of the protection order granted to the respondent. The learned judge made a protection order in favour of the respondent as well as an order for the respondent to pay a sum not exceeding $80,000.00 monthly for the rental of accommodation for the child. In addition, a consent order was entered for the child's maintenance. On 9 August, the orders made originated from the application for the protection order and were substantially the same as those made on 7 May. Further, the order in respect of the maintenance of the child entered by the consent of the parties on 7 May, was merely formalized on 9 August. The issue therefore, is not whether the applicant has a right to a share in the property and is entitled to remain in the house but whether, in light of the evidence of her attack upon the respondent resulting in his receipt of injury, the applicant should be excluded from the house. The respondent now lives in the house. He indicated that he is fearful of the applicant and that they cannot co-exist peacefully living in the same house. It could be argued that

in keeping with the evidence as it relates to the respondent's protection, and in light of the extent of his injury which caused him to receive stitches, the applicant should be excluded from the house. It could also be argued that the order made for the payment of a monthly rental for the child's accommodation was for the benefit of the child, not the applicant. This order would fall within the purview of section 4 (5) of the Act, under which the judge, in keeping with the Maintenance Act, in the exercise of his discretion, could have made for the support of the child. Clearly, the order for the accommodation cannot be classified as an occupation order. It follows that there is nothing in the protection order to show that an occupation order was made.

[22] The applicant has wrongly interpreted the purpose and effect of the protection order. Her submission that she is seriously prejudiced by that order, which, obviously, she regards as an occupational order, is undoubtedly misconceived. There is nothing to show that the learned judge was involved in making an occupational order. He was engaged in giving consideration to an application under section 4 of the Act for the protection order and not an application for an occupational order under section 7.

[23] The order made is essentially one for the protection of the respondent from any further attack or interference by the applicant. The respondent has asserted that he is afraid of the applicant as she had attacked him on an occasion previous to 1 May 2013. Although there is also evidence from the applicant expressing her fear of the respondent, provision has been made for him to pay the rental for the child's accommodation, from which the applicant would also be a beneficiary. Arguably, the

applicant can acquire suitable accommodation for a rental up to $80,000.00 monthly. It was incumbent on her to have sought to secure accommodation from 7 May when she failed to have the interim protection order discharged. It being likely that she could have obtained suitable accommodation for the child as well as school for her, prior to 9 August, she cannot now justifiably complain that the time fixed by the order of 9 August for her to vacate the property is too short .

[24] The respondent is now in occupation of the house. There is hostility between the parties. Even if the respondent was not living at the house he would have access to it. It is not only surprising but also incomprehensible that the applicant wishes to remain in the house, despite her complaint of being fearful of the respondent. In all the circumstances, a stay of execution ought not to be granted.

[25] In passing, it is of worth to mention that although provision has been made for the applicant to secure rented accommodation for the child which expires in a year, on the expiration of the year, it is certainly open to the applicant to take such steps as are necessary to obtain a further order for the child's support.

[26] The application is refused. Costs are awarded to the respondent.