

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 39/89

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

|         |   |                        |
|---------|---|------------------------|
| BETWEEN | MERNA LEONIE MCCARTHY   | PLAINTIFF/APPELLANT    |
| AND     | MOTTA & OPPENHEIM   |                        |
| AND     | CAROL RAMSAY  |                        |
| AND     | ROBERT RAMSAY   |                        |
| AND     | TOWER MERCHANT & TRUST<br>BANK LIMITED (formerly<br>Tower Investments Ltd.) | DEFENDANTS/RESPONDENTS |

Dr. B. Marshall for appellant

Mrs. P. Benka-Coker and Miss S. Aitcheson  
for 1st, 2nd & 3rd respondents

Messrs. V. Chen and C. Samuda instructed  
by Clinton Hart & Co. for 4th respondent

July 24, 1989

ROWE P.:

This is an application by Merna Leonie McCarthy, the plaintiff/appellant against Motta & Oppenheim, Carol Ramsay, Robert Ramsay, and Tower Merchant and Trust Bank Limited (formerly Tower Investments Limited), the defendants/respondents for an order that all proceedings be stayed until the hearing of an appeal from an order of Malcolm J., made on the 4th May, 1989. We have had a look at the affidavit put in by Dr. Marshall in support of this motion and it seems that on the 4th May, the order made by Malcolm J., was one which granted to the plaintiff/appellant an interlocutory injunction restraining the fourth defendant/respondent, its

servants or agents from selling or otherwise disposing of a parcel of land at Cooper's Hill in Saint Andrew on the condition that the plaintiff/appellant pay to the fourth defendant/respondent a sum of very nearly \$800,000.00 and a further sum representing interest at the rate of \$426.89 per day within a period of thirty days from the date of that order. The amount of the interest was not quantified but it appears that one is dealing with figures very nearly in the million dollar margin. It appears from the affidavit of Dr. Marshall that the sums ordered were not paid and he has come to Court now on his Notice of Motion seeking to have a stay of execution of that order and at the same time to keep the Injunction open.

In the first place Mrs. Benka-Coker said she ought not to have been here at all in respect of the first three of the respondents because no order had been made in respect of them when the application for the Injunction was made. That is plainly correct and Dr. Marshall had to concede that he could do no less than pay them their costs of coming today, quite unnecessarily.

The next stage was a preliminary objection by Mr. Vincent Chen, who appeared for the fourth defendant/respondent, and he said that Dr. Marshall has not complied with the rules of Court which deal with stay of execution. We repeat, for emphasis, the rule relied upon by Mr. Chen and that is, firstly Rule 21 of the Court of Appeal Rules which says -

- "(1) Except so far as the Court below or the Court may otherwise direct -
- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;...."

and Rule 22(4) continuing the theme says -

"Wherever under the provisions of the Law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

There have been numerous instances where this Court has called to the attention of the profession that these Rules exist and must be complied with and where an application for stay of execution may be made,

either to the Court of Appeal or to the trial Court the application must first be made to the trial Court.

Mr. Chen has quite helpfully referred us to the decision of Shields and Graham, a decision of Swaby J.A. which was given in 1974 and reported at 12 J.L.R. at page 1497, where he expressly deals with the interpretation of these two Rules and concludes:

"Now that there is an appeal pending an application for stay of execution (or further stay of execution) may be made either to the Court below or to the Court of Appeal under Rule 21(1), and Rule 22(4) provides that where this is done, such application shall be made in the first instance to the Court below."

We are of that view and, as I said earlier, we have consistently taken the line that an application such as this must first be made to the Court below. The appellant/applicant having failed to apply to the Court below for a stay of execution, the preliminary objection is upheld and the Motion is refused with costs to the fourth defendant/respondant to be agreed or taxed.

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