JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2023APP00134

BETWEEN	**NETRICIA MILLER**	**APPLICANT**
AND	**SHAWN MILLER**	**RESPONDENT**

Hugh Wildman and Duke Foote instructed by Hugh Wildman and Company for the applicant

Mrs Daniella Gentles-Silvera KC and Miss Kathryn Williams instructed by Livingston Alexander and Levy for the respondent

11 and 15 March 2024

Civil procedure – Supreme Court – Application to set aside order made in absence of party – Application filed more than 14 days after order served on the absent party – Rule 39.6 of the Civil Procedure Rules, 2002 – Application for permission to appeal – Whether proposed appeal has a real chance of success – Rule 1.8(7) of the Court of Appeal Rules, 2002

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is an application for permission to appeal the order of O Smith J (Ag) ('the learned judge') made in the Supreme Court on 24 March 2023 refusing an application brought by Ms Netricia Miller, the applicant, to set aside the order of Carr J made on 1 March 2022. Carr J had made an order in favour of the respondent, Shawn Miller, in the absence of the applicant, who failed to attend the trial of the claim. The applicant had applied to set aside the order pursuant to rule 39.6 of the Civil Procedure Rules, 2002 ('the CPR').

[2] On 21 June 2023, Mason J (Ag) refused permission to appeal the learned judge's order.

[3] The renewed application for permission to appeal is before this court by way of a notice of application for permission to appeal filed on 27 June 2023 and amended with the leave of this court on 11 March 2024. Prior to the granting of the amendment, we also granted, without objection, an extension of time for the renewed application for permission to appeal to be brought before this court because the 14-day time limit for applying to this court would have expired while the application before the Supreme Court was pending.

[4] The application emanated from these circumstances. The applicant and respondent are siblings. When the proceedings commenced in the Supreme Court, they were the joint proprietors of a parcel of registered land located in Greater Portmore in the parish of Saint Catherine ('the property'). The respondent filed a claim in the Supreme Court seeking a declaration that he is entitled to 100% (or alternatively 80%) interest in the property and consequential orders that the claimed interest be transferred to him.

[5] Three dates were set for the trial of the claim in the Supreme Court. However, the first and second trial dates were aborted due to the applicant's absence and other factors. On the second date, Stamp J adjourned the trial to 1 and 3 March 2022 and ordered the in-person attendance of all affiants (including the applicant) at the trial for cross-examination. The evidence shows that Stamp J's order was served on the applicant by affixing it to the entrance of her house and on her motor vehicle. There is also evidence that the contents of Stamp J's order were brought to the applicant's attention via email from the Supreme Court registry and counsel for the respondent.

[6] On 1 March 2022, the third trial date, the claim came before Carr J. Neither the applicant nor a representative was present at the hearing. Attempts by the court to contact the applicant by phone proved futile. Carr J proceeded to determine the claim in the applicant's absence. At the end of the hearing, she declared that the respondent was

entitled to 100% interest in the property and made consequential orders for the transfer of the property to the respondent.

[7] Carr J's formal order was filed on 3 March 2022 and served on the applicant at her workplace on 8 March 2022. The applicant had provided her workplace as her address for service, on her acknowledgement of service.

[8] Having been made aware of the order against her, the applicant applied to the court to have the order set aside pursuant to section 39.6, which reads:

> "(1) A party who was not present at a trial at which a judgment was given or an order was made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended, some other judgment or order might have been given or made."

[9] The learned judge refused to set aside the order for reasons she expressed in a comprehensive written decision. In summary, those reasons were:

(i) Rule 39.6 required the applicant to make the application to set aside Carr J's order within 14 days after the date on which the order was served on the applicant; and to show, by evidence, that she had a good reason for failing to attend the trial, and that it is likely that, had she attended the trial, some other order might have been made. The requirements of the rule are cumulative, and there is no residual discretion for a judge to set aside the order if any of the requirements are not satisfied.

(ii) Carr J's formal order was properly served at the applicant's workplace on 8 March 2022. Her workplace was the address for service stated in her acknowledgement of service. Therefore, the applicant had 14 days after that date to file her set-aside application. The applicant, however, filed her application to set aside on 1 April 2022, eight days after the time required by the rules. She neither sought nor obtained an extension of time to file the set-aside application.

(iii) The applicant's statement that there was a delay in Carr J's formal order being brought to her attention was not explained in her evidence. She did not indicate in her evidence the date the formal order came to her attention. As such, the only date which ought to be considered is 8 March 2022. There was no scope to argue that the 14-day time limit should run from any other date. Therefore, given that the application was made out of time, the court had no jurisdiction to grant the application. However, even if the court had jurisdiction, the applicant would have failed to fulfil the requirements of the rules for Carr J's order to be set aside for the following reasons:

    a. Regarding the requirement that she show a good reason for her absence, the applicant's explanation was that the COVID-19 pandemic caused concerns for her to leave her 10-year-old child with a stranger or unattended. Having been served with the order of Stamp J for her attendance, the applicant knew of the trial date more than one month before the final trial date. She had more than enough time to make arrangements for the care of her child before the new trial date.

b. The unchallenged evidence is that the applicant was aware of the orders and decided not to attend the trial. She was reminded by counsel for the respondent of the trial date and indicated that she was unable to attend for personal reasons. She was then advised by the court of her obligation to adhere to the order of Stamp J. Furthermore, the restrictions of the COVID-19 pandemic had abated by the trial date, and in-person trials had resumed at the Supreme Court. The applicant did not raise special health concerns for herself or her child. In the circumstances, the applicant's absence was deliberate and for no good reason.

c. Regarding the third requirement, which is that the applicant must show that a different order would have been made had she attended, the applicant also failed to satisfy this requirement. In her affidavit in response to the fixed-date claim form, the applicant provided no documentary proof to dispute the respondent's claim for 100% interest in the property. Therefore, there was no basis on the evidence to conclude that a different order would have been made had the applicant been present.

[10] The applicant now seeks to challenge the learned judge's findings and conclusions. The applicant contended that she has a real chance of successfully appealing the learned judge's refusal of her application. In her view, she has passed the threshold for the grant of permission to appeal under rule 1.8(7) of the Court of Appeal Rules, 2002 ('CAR'). This rule provides that, as a general rule, permission to appeal in civil cases will only be given if the court considers that an appeal will have a real chance of success.

[11] In strenuous opposition to the application for permission to appeal, the respondent, through his attorneys-at-law, maintained that the learned judge was correct to refuse the application to set aside Carr J's order for the reasons she gave and that permission to appeal should be refused as the applicant has no real chance of succeeding on appeal.

[12] Having considered the parties' written and oral submissions within the context of the applicable law and rules of procedure, we agree with the respondent that the applicant has no real chance of successfully appealing the learned judge's refusal to set aside the order. The applicant would have an insurmountable hurdle in convincing the court, on appeal, that the learned judge erred in her approach and in her ultimate decision for reasons that will now be outlined.

[13] As the learned judge appreciated, rule 39.6 of the CPR stipulates three conjunctive and mandatory conditions to be satisfied before an order given in a party's absence may be set aside. This court has concluded that there is no residual jurisdiction to set aside an order made in the absence of a party where the three conditions are not met. Therefore, a failure to establish one of the three conditions listed in the rule will inevitably result in the refusal of an application made pursuant to rule 39.6 of the CPR (see **Joscelyn Massop v Temar Morrison (by his mother and next friend Audrey White)** [2012] JMCA Civ 56 ('**Massop v Morrison**') and **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19).

[14] Regarding the time limit for the application to be brought, the learned judge correctly concluded that the application was filed outside the 14 days stipulated by rule 39.6. The uncontroverted evidence in the court below is that Carr J's order was served on 8 March 2022 at the address for service provided by the applicant in the acknowledgement of service she filed at the commencement of the proceedings. The set-aside application, having been filed on 1 April 2022, was clearly out of time, as the learned judge concluded.

[15] Counsel for the applicant, Mr Wildman, sought to invoke section 16(2)(b) of the Disaster Risk Management (Enforcement Measures) (No 4) Order 2022 ('the DRM Order'), which provides that, during the period from 25 February to 17 March 2022, employees who had no suitable arrangements available to care for their child "may request the employer's permission to work from home". Mr Wildman argued that the DRM Order was in force when Carr J's order was made and served. He contended that the DRM Order, and, in particular, section 16(2)(b), having been enacted after the CPR, should be construed as overriding, suspending and/or relaxing the strict operation of the 14-day requirement for filing a set-aside application under rule 39.6 of the CPR.

[16] Learned King's Counsel for the respondent, Mrs Gentles-Silvera, submitted, and Mr Wildman conceded, that section 16(2)(b) of the DRM Order was not raised before the learned judge. Therefore, in fairness to the learned judge, it cannot be said that she incorrectly exercised her discretion to refuse the applicant's set-aside application by failing to have regard to that legislative instrument. In any event, Mrs Gentles-Silvera contended, that the wording and purport of the DRM Order do not support Mr Wildman's argument. Section 16(2)(b) of the DRM Order simply enabled an employee to seek the permission of their employer to work from home in specified circumstances.

[17] We agree with learned King's Counsel. Section 16(2)(b) does not, in any way, seek to address any matter other than the power of employers to grant permission to employees to work from home during the COVID-19 pandemic in certain circumstances. There is no express wording in, or reasonably necessary interpretation of, section 16(2)(b) which can be taken to broadly impact the obligations of parties in civil proceedings to comply with time limits prescribed by the CPR. Therefore, section 16(2)(b) of the DRM Order was irrelevant to the proceedings in the court below, as it is in these proceedings, and cannot be taken as having altered the applicant's obligation to file her set-aside application within 14 days of being served with the order of Carr J, as required by rule 39.6.

[18] The fact of the matter is that the applicant, having been served with the formal order of Carr J on 8 March 2023, at the address stipulated in her acknowledgement of service, was required by rule 39.6 to file her set-aside application within 14 days of that date. This, she failed to do as the learned judge rightly concluded. In the circumstances, an extension of time should have been sought and obtained before filing the set-aside application. This, too, was not done.

[19] Having regard to this court's previous decisions, the ineluctable conclusion which flows from the failure of the applicant to comply with the requisite time limit for the filing of her set-aside application (and to obtain an extension of time after the time for filing the application had expired) is that the learned judge had no discretion to set aside Carr J's order (see **Massop v Morrison** at paras. [14] and [15]; **Thelma Edward v Robinson's Car Mart Ltd and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 81/2000, judgment delivered 19 March 2001 at page 6; and **Mills v Lawson and Skyers** (1990) 27 JLR 196).

[20] The requirements of rule 39.6 must be cumulatively satisfied. Therefore, our agreement with the learned judge's conclusion that she had no jurisdiction to grant the set-aside application because it was out of time is, without more, determinative of the application for permission to appeal. On that basis alone, it is evident that the applicant has no real prospect of successfully arguing that the learned judge erred when she refused the application to set aside Carr J's order. The application for permission to appeal must, inevitably, fail.

[21] In all these premises, this court does not need to consider whether the learned judge appropriately exercised her discretion under rule 39.6 of the CPR by considering whether the applicant had successfully satisfied the other conditions for the grant of the application.

[22] Accordingly, we make the following orders:

(1) The amended application for permission to appeal the decision of O Smith J (Ag) made on 24 March 2023 is refused.

(2) Costs of the application to the respondent to be agreed or taxed.