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**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 33/2002**

**BEFORE: THE HON. MR. JUSTICE PANTON J.A.  
THE HON. MR. JUSTICE SMITH J.A.  
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)**

**BETWEEN KEITH O'CONNOR APPELLANT**

**A N D PAUL HAUFMAN PERCIVAL PICCOTT**

**A N D EUGENE ADOLPHUS PICCOTT RESPONDENTS**

**Mrs. Pamela Gayle and Mrs. Ingrid Lee Clarke-Bennett** instructed by  
Pamela Shoucair, Gayle & Co. for appellant

**Dr. Lloyd Barnett** instructed by **Miss Leila Parker** for respondents

**December 12 & 13, 2005 and April 7, 2006**

**PANTON, J.A.:**

I have read in draft the reasons for judgment written by Mrs. Justice  
McCalla J.A.(Ag.) and agree that the appeal should be dismissed.

**SMITH, J.A.**

I agree that the appeal should be dismissed.

**McCALLA, J.A. (Ag.)**

1. On March 22, 2001, Cooke J (as he then was), made the following  
orders:

- "1. Motion to set aside Order of Ellis J granted on the  
21<sup>st</sup> May, 1998 dismissed.

2. Motion misconceived a judge of co-ordinate jurisdiction cannot set aside a judgment on Motion decided on the merits.
3. Costs to the Plaintiffs to be agreed or taxed."

On February 21, 2002, Cooke J also dismissed a summons for stay of execution of the above Orders.

2. Keith O'Connor (the appellant) has filed Notice and Grounds of appeal in this Court, seeking to set aside the orders made by Cooke J. He also seeks a stay of execution of the judgment of Ellis J made on May 21 1998, until the trial of the matter. Ellis J had made an Order granting Specific Performance of an agreement to the respondents (the Piccotts) .

The grounds of appeal are as follows:

- "1. The learned trial judge erred in law when he declined to hear the Motion to Set Aside the Default Judgment granted on the 21<sup>st</sup> day of May, 1998 and for Leave to File a Defence out of time on the basis that he had no jurisdiction to re-hear a matter which had been heard by a Judge with concurrent jurisdiction.
2. This matter had never been heard on its merits and there is clear jurisdiction of the Court under the Judicature (Civil Procedure Code) Law to grant the Orders sought by the Appellant."
3. The record of appeal catalogues a series of events that preceded the application before Cooke J, many of which are unnecessary for the determination of this appeal. However, in order to facilitate an understanding of the circumstances in which the appeal is brought, I set

out hereunder the historical background which, if described as being unusual and complicated, would not be inaccurate.

4. In 1984, Keith O'Connor was the proprietor of 26C Silverdene Drive, Kingston 20, registered at Volume 968 Folio 681. Melbourne Silvera of the law firm Silvera and Silvera was his attorney-at-law.

5. On June 27, 1984 Melbourne Silvera and Paul Tomlinson executed an agreement for sale of the said property as vendors to the Piccotts. On that same day the Piccotts executed an agreement for sale to Maizie Hines.

On September 27, 1989, Keith O'Connor commenced legal action by way of Originating Summons against Melbourne Silvera.

6 The relevant paragraphs of the Originating Summons sought the following Declarations which read in part as follows:

"a. Where the Plaintiff's Attorney-at-Law and an employee of the said Attorney-at-Law **secretly purchased the Plaintiff's premises without advising him as to who are the purchasers** and to seek the advice of an independent Counsel that such purported sale was void, ALTERNATIVELY

b....

c. That the Defendants hand over all such documents pertaining to the said sale, forthwith to the Plaintiff.

d....

e. That the Defendants render to the Plaintiff a full and accurate statement of account of all receipts and payments made in respect of any transaction pertaining to the said premises Volume 968 Folio 681.

f...." (Emphasis supplied)

7. On May 22, 1990, Paul Harrison J (as he then was) granted the Declarations sought at paragraphs a, c & e (referred to at paragraph 6 above).

8. Subsequent to the above proceedings, Maizie Hines commenced payment of rent to Keith O'Connor. On May 4, 1993 Keith O'Connor entered into an agreement for sale of the premises to Maizie Hines.

9. In 1992 Paul Piccott sued Maizie Hines for rent in respect of the said premises and judgment was entered in her favour in 1995. In 1999 Paul Piccott was again unsuccessful in a suit filed against Maizie Hines for rent.

10. On May 2, 1997 the Piccotts commenced an action against Keith O'Connor for specific performance of a contract by which Keith O'Connor had agreed to sell unit no. 3 of 26 Silverdene Drive to them. Attorney-at-Law Garth Lyttle entered appearance for Mr. O'Connor.

11. On May 21, 1998 Ellis J heard the notice of motion filed in the above suit and gave judgment pursuant thereto for the Piccotts as follows:

"1. That the Plaintiffs be granted Specific Performance of the Agreement for Sale made between the parties that the property known as Unit 3 part of 26 Silverdene Drive in the housing

scheme known as the second phase of Three Oaks Gardens in the parish of St. Andrew be transferred to the Plaintiffs.

2. That the Defendant deliver up to the Plaintiffs or their attorney-at-law the relevant unencumbered duplicate Certificate of Title along with an Instrument of Transfer within thirty (30) days of this Order being made
3. ..."

He also made consequential Orders in the matter. Garth Lyttle represented the appellant at the hearing of the Motion.

12. On January 20, 2000 Maizie Hines filed a Writ of Summons against Keith O'Connor for specific performance of the agreement referred to at paragraph 8 above.

13. On March 7, 2000 Keith O'Connor filed a Motion to set aside the judgment of Ellis J and for leave to file a defence within 14 days.

14. On January 14, 2001 Keith O'Connor again filed a Motion to set aside the default judgment of Ellis J. and sought leave to file a defence within 14 days.

15. In August 2001 Maizie Hines obtained judgment in a suit filed by Paul Piccott in the Resident Magistrates Court for rent.

16. Mrs. Gayle in her written and oral submissions contended that Keith O'Connor is the registered proprietor of the property and as such he has:

- (a) Demanded and received rent from Paul Piccott in 1990.

- (b) Collected rent from Maizie Hines from 1990 to 1993 based on the order made by Harrison J.
- (c) Been approached by Paul Piccott requesting a sale of the property to him.
- d) Sold the property to Maizie Hines in 1993 and he will be unable to transfer the legal estate to her if he does not defend the matter.

She referred to several "defects" in the 1984 agreement for sale from Paul Tomlinson and Melbourne Silvera to the Piccotts.

17. Mrs. Gayle referred to a statement of account from Messrs. Silvera & Silvera addressed to Keith O'Connor that states in part:

"Paul Piccott

Rental 1/11/85 to 1/6/90 @ \$650.00 per month      \$33,600.00

Arrears at 1/6/90      18,850.00"

She said that this demonstrates that Paul Piccott was a tenant paying rent as opposed to "interest on balance of purchase price" in the case of Hilda Hall whose name appears on the same statement. She contends that an order for Specific Performance ought not to have been granted as the Piccotts had produced no evidence to demonstrate that they were ready, willing and able to complete the contract.

18. Mrs. Gayle also submitted that there had been no appeal from Harrison J's judgment and the issue of ownership had been determined by him. When Paul Piccott filed suit against Maizie Hines in the Resident

Magistrates' Court in 1999, he was aware that a previous suit filed by him against her for rent had been dismissed. From 1992 he has been aware that Keith O'Connor had sold the premises to Maizie Hines as the agreement for sale to Hines had been exhibited in the case tried in Resident Magistrates Court and no appeal was filed.

19. Mrs. Gayle asserted that there was a failure to disclose to Ellis J the full terms of the order which had been granted by Harrison J. She made detailed references to the Writ of Summons and the Statement of Claim filed in the proceedings before Ellis J.

She pointed out what she said were omissions, non-disclosures, and lack of particularity especially with regard to the amount paid on account of purchase price. The affidavit in support of the Notice of Motion for Specific Performance filed by Paul Piccott was vague, misleading and inaccurate in several respects.

All material necessary for the determination of the Motion had not been placed before Ellis J as mandated by Section 448 of the Judicature (Civil Procedure Code) Law (the Code) which governed the proceedings at that time. She contended that the agreement to which the suit for Specific Performance relates is dated June 27, 1984 and the Order was made in 1998. The Claim would therefore have been statute barred and the Order irregularly made. Further, the agreement was unstamped and

therefore inadmissible. She maintained that Keith O'Connor did not enter into any agreement for sale with the Piccotts or their Attorney at-Law in respect of his premises and he did not authorize Melbourne Silvera to act as his agent in respect of any such sale.

20. Mrs. Gayle cited the well known case of **Evans v Bartlam** [1937] AC 473 and the statement of Lord Atkin at page 480 to the effect that:

"The principle obviously is that unless and until the Court has pronounced a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

She urged that the defendant only had to show an arguable case (**Drayton Giftware Limited v Variland** [1989] 132 N.L.J. 558.) She said that even if the explanation for the delay is a lie it is no bar if the defendant has a triable issue (**Vann v Awford**, The Times, April 23, 1986). In addition, the court has an inherent jurisdiction to prevent an abuse of its process and where there has been a fraud in obtaining a judgment, the court will set it aside. She argued that the Piccotts' failure to disclose the details of the previous Court Order which declared the contract to be void and then subsequently commencing an action for Specific Performance on that same contract seven (7) years later, must be considered to be fraudulent.



Mrs. Gayle contended that having regard to the provisions of the Civil Procedure Rules 2002, (CPR) and the reasons given for delay, (impecuniosity, ignorance of the judgment and the likelihood of success) should move this Court to allow the appeal.

21. Dr. Lloyd Barnett in his submissions referred to the background of the matter. He said Keith O'Connor had sold four (4) units to four (4) purchasers including Paul Piccott and Silvera and Silvera had the carriage of sale.

On September 26, 1989, Keith O'Connor at paragraph 8 of an affidavit filed in the proceedings against Melbourne Silvera before Harrison J, had sworn:

"That about (4) four years ago Mr. Melbourne Silvera asked me to sign four (4) Agreement for Sale in respect of the said flats. This I did but he never deliver any of the Agreement for Sale to me."

He also referred to paragraph 3 of a supplemental affidavit, sworn to on 23<sup>rd</sup> April, 1990 by Keith O'Connor in the proceedings against Silvera which states in part:

"...that payment of any indebtedness to the bank was made from rent received from the four (4) apartments over the approximately six (6) years period and **monies received from the sale of the said apartments to four purchasers.**"(Emphasis added)

22. Dr. Barnett took issue with Mrs. Gayle's submission that Harrison J had declared the agreement for sale to the Piccotts void. He referred to the Order of Harrison J (at paragraph 6 above) and said that what was declared void was the sale of the appellant's property by Silvera to himself and Tomlinson in which Silvera sought to make a secret profit. Dr. Barnett referred to a letter dated 4<sup>th</sup> September, 1990 written by Keith O'Connor's attorney-at-law subsequent to the court proceedings before Harrison J. The material portions read as follows:

"4<sup>th</sup> September, 1990

Mr. Paul Picott

c/o Flat No. 3  
26 Silverdene Drive  
Kingston 20

Dear Sir,

Re: Propose(sic) Sale of Flat #3  
26 Silverdene Drive,  
Kingston 20, St. Andrew

You will recall that at our meeting at my office, I pointed out that there was a serious problem with the Title for the above premises as these lands belonging (sic) to Kingston and St. Andrew.

As a result of this encroachment, the Sub-division Plan has not been approved and consequently our client is not in a position to pass the title to you and is thereof inviting you to come in to discuss the matter with us, with a view **of returning to you your deposit.**

You will also recall that by our letter dated 21<sup>st</sup> June, 1990 we advised you that the sum of \$18,850.33 was owing to our client by way of arrears.

We now make a formal demand that within ten (10) days from the receipt of this letter you pay to our client, through us, the said sum of \$18,850.00

representing arrears of rent, failing which our instructions are to commence litigation against you without further notice.

Yours faithfully  
GARTH E. LYTTLE & CO.

Per: .....  
GARTH E. LYTTLE" (Emphasis supplied)

23. Dr. Barnett submitted that Keith O'Connor is estopped from saying that he did not sell all the units prior to 1993, the time when he purportedly entered into an agreement to sell to Maizie Hines. He was duly served with Notice of Motion, he entered an appearance but failed to file a defence to the Originating Summons for Specific Performance even though consent had been granted to file same out of time.

Dr. Barnett argued that Keith O'Connor was represented at the hearing of the Motion before Ellis J and he was entitled to be heard by virtue of section 61 of the Code which states:

"A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for filing his

defence, or for any other purpose, than if he had appeared according to the writ..."

He had made no application for extension of time to file a defence and had obtained no further time to do so.

24. Dr. Barnett continued that since Keith O'Connor appeared through his attorney-at-law who participated in the trial, the judgment of Ellis J was not given by default but on its merits. He argued that section 258 and section 354 of the Code which deal with default judgments could not be invoked to set aside Ellis J's judgment. Section 258 states:

"Any judgment by default, whether under this Title or under any other provisions of this Law, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit."

Section 354 states:

"Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."

Dr. Barnett urged that even if the judgment had been obtained by default, the appellant has been guilty of repeated, inordinate and inexcusable delays.

25. He cited the case of **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.**[1986] 2 Lloyds Law Reports 221. There, it was held that the defendants had deliberately allowed the plaintiffs' claim to go by

default and were not deserving of the court's exercise of its discretion in their favour.

26. At the time Cooke J heard the application to set aside the judgment that had been entered on the motion in the suit for Specific Performance against the appellant, the matter was governed by the Code. Appearance had been entered and Mr. O'Connor's attorney-at-law was present at the hearing of the Motion.

27. The question therefore arises as to whether or not Ellis J heard the Motion on its merits and whether Cooke J had wrongly exercised his discretion in refusing to set aside the judgment and extend the time to file a defence.

The principles which then governed applications to set aside a default judgment and extend the time to file a defence had been settled by numerous decisions of this Court which preceded the enactment of the CPR. In the case of **West Indies Sugar v Stanley Minnell** [1993] 30 JLR 542, this Court allowed an appeal against the Master's decision to grant an extension of time for the Plaintiff to file a statement of claim four (4) years after the service of the Writ of Summons.

Forte J.A. (as he then was) concluded (at page 546 of the judgment) that the long delay must give rise to a substantial risk that there could not be a fair trial.

28. In ***Port Services Limited v Mobay Undersea Tours Limited and Fireman's Fund Insurance Company*** SCCA No.18/01 (unreported)

delivered on March 11, 2002 at page 10, Panton J.A. said:

"For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure.

Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

29. In the instant case we have before us a situation where judgment was awarded in 1998 in favour of the Piccotts for Specific Performance of an agreement. In an affidavit sworn to by Keith O'Connor on 18<sup>th</sup> May, 1998 at paragraphs 20 and 21 he states as follows:

"20. That the First Plaintiff herein knew and have known from as far back as 1993 that the said property situate at 26C Silverdene Drive, Three Oaks, Kingston 20 in the parish of Saint Andrew did not belong to me as I personally informed him during the trial of the said Plaintiff No. 2887 of 1992 that I had sold same to Maisie Hines. Furthermore, sometime in 1993 during the trial it was revealed to the Court and the first Plaintiff herein that Maisie Hines had purchased the said property from me and the Agreement for Sale between Maisie Hines and myself and the receipt for the total purchase price were exhibited therein.

21. That at no time did I attend Court in suit No. C.L.P. 074 of 1997 which was for Specific Performance as I knew that I had never signed any document to sell my property to either Paul Piccott and/or Eugene Piccott and further I had informed Paul Piccott when he approached me to sell him the property that I had already sold same to Maisie Hines and in addition the Agreement for Sale and the receipt for \$240,000.00 representing the purchase price had been shown to the Court in the trial at the Half-Way Tree Resident Magistrates Court."

30. The appellant O'Connor contends that he has a good defence but these are the circumstances in which he seeks the Court's assistance:

- (a) He failed to file any defence to the Originating Summons brought by the Piccotts for Specific Performance. Consent had been given for him to do so out of time, and he failed to make any application to the court for extension of time prior to the hearing of the Motion.
- (b) Counsel represented him at the hearing of the Motion for judgment and the Order made pursuant thereto states that he was heard.
- (c ) He was entitled to be heard with regard to legal submissions even though he had not filed a defence.
- (a) The appellant had therefore taken a deliberate decision not to defend the matter.

Paragraph 21 of his affidavit referred to at paragraph 31 above makes no mention of impecuniosity or absence of knowledge of the Order for Specific Performance.

33. There is no doubt that Ellis J was seized with jurisdiction to hear the matter.

I am of the view that having regard to the circumstances outlined above, the matter was not decided on its merits. Although counsel appeared for the appellant at the hearing of the Motion, the matter could not have been decided on its merits as no defence had been filed. However, in my opinion, Cooke J was correct in exercising his discretion to refuse to set aside the judgment and extend the time to file a defence. The appellant had deliberately ignored the procedural requirements, having taken a decision not to defend the matter. He could not have been ignorant of the Order made by Ellis J as Counsel had represented him at the hearing of the Motion and subsequently wrote the letter referred to at paragraph 22. Thereafter, he took no steps, in a timely manner, to seek to set aside the Order.

31. Section 13.3 of the CPR now governs the procedure for setting aside default judgments and states as follows:

"Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;



(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim."

The requirements of the above-mentioned section are cumulative and in the circumstances outlined above, have not been satisfied. The CPR confers wide powers that enable the court to adopt a flexible approach depending on the circumstances of a particular case. Rule 1.2 states:

"The court must seek to give effect to the overriding objective when it-

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule."

32. Having considered all the circumstances, I see no basis on which this Court should exercise its discretion to assist the appellant to avoid the consequences of his deliberate inaction. It would not be in accordance with the overriding objective of the CPR which enables the court to deal with cases justly.

For these reasons, I would dismiss this appeal with costs granted to the respondents, to be taxed if not agreed.

**PANTON, J.A:**

**ORDER:**

Appeal dismissed. Costs to the respondents to be agreed or taxed.