JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 59 OF 2000

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

BETWEEN: **LORRAINE RAMSON** **DEFENDANT/APPELLANT**

AND: **HORACE JOHNSON** **FIRST PLAINTIFF/RESPONDENT**

AND: STEPHNEY VINCENT-JAMES **SECOND PLAINTIFF/RESPONDENT**

Ian Wilkinson and Miss Shawn Steadman instructed by Ian G. Wilkinson & Co. for Appellant
Garth McBean and Miss Shena Stubbs instructed by Dunn Cox for the Respondents.

March 24 and July 30, 2004

HARRISON J.A. (Ag.)

This is an appeal from a decision of the Honourable Mr. Justice Marsh, given on the 31st March 2000 in which he gave judgment for the respondents. On the 23rd day of March 2004, we dismissed the appeal and ordered costs to the respondents to be taxed, if not agreed. We now deliver our reasons for so doing.

The claim originated out of an action brought by the respondents in which they sought to prove a Will dated 2nd March 1987 as the true last Will and Testament made by Rudolph Anthony Vincent, deceased, while challenging the validity of a later Will dated 28th July 1993 and Codicil dated 8th December 1993 proffered by the appellant, they not having been executed in accordance with the provisions of the Wills Act (1840).

The writ of summons was filed on the 30th day of June 1994 but it was not until the 21st September 1998 that it came up for trial. Prior to the trial date the appellant's Attorneys at Law had filed a Notice dated 1st September 1998, requesting that certain statements of witnesses be admitted in evidence at the trial. The trial was adjourned however, on the application of the appellant's Attorney at Law, Mr. Rudolph Francis, on the basis that he was recently retained in the matter. In the circumstances, the Registrar of the Supreme Court was instructed by the learned trial judge to fix another date for trial during the current term.

On the 10th December, 1998 Mr. Rudolph Francis filed another Notice of Intention to apply to admit statements in evidence but a counter notice filed by the respondents on the said date required the witnesses to attend in person. The trial had already been fixed for the 14th December 1998 and since the witnesses were residing outside of the jurisdiction, it was too short a period of time between the service of the Notice and the trial date to bring the witnesses to Court. The appellant's expert witness was also not available for the 14th

December. When the matter came up for trial, the appellant applied for an adjournment but the application was refused.

The notes of evidence indicate that when Mr. Francis requested the adjournment he confessed to the Court that the appellant's case was in a "terrible state of un-preparedness". The notes of evidence also state as follows at page 3:

> "Mr. Francis asks Court to make note. Mr. Francis indicates that he cannot be part of the trial if not proceed. He thereafter left the Court – room".

The appellant remained in Court however, after her Attorney left and the trial commenced with the evidence of the first respondent, Horace Johnson being taken. The hearing was adjourned for continuation on the 15th December 1998 but on that date, the appellant was absent due to illness. A medical certificate was tendered on her behalf and the matter further adjourned for a date to be fixed by the Registrar.

The 13th July 1999 was fixed for continuation of the trial but, the appellant did not attend. Mr. Francis was present and the evidence in chief of the second respondent, Stephney Vincent-James, was taken. Mr. Francis then requested the Court to defer cross-examination of this witness and the adjournment was taken until the 14th July 1999. On that date, the testimony of Horace Johnson continued but Mr. Francis indicated to the Court, that he was not properly instructed to cross-examine Johnson. The matter was adjourned again and for a date to be fixed by the Registrar.

The trial resumed on July 26, 1999. The first respondent and her Attorney at Law, Mr. Garth McBean, were present. Mr. Norman Harrison, Attorney at Law then informed the Court that he held for Mr. Richard Rowe, Attorney at Law, who now appeared on behalf of the appellant. Mr. Rowe was however off the Island. In the circumstances, Mr. Harrison applied for an adjournment but the learned trial judge refused the application. The trial continued and two other witnesses testified on behalf of the respondents. The appellant, who was present, cross-examined these witnesses and the hearing was adjourned for continuation in the afternoon. On resumption, at 2:00 p:m, the appellant did not appear and no explanation was given for her absence. The matter was adjourned to the 14th March 2000, for continuation.

The trial continued on the 14th March 2000 but the appellant did not attend Court and neither was she represented. The respondents closed their case and Mr. Garth McBean made submissions on their behalf. Judgment was reserved and the matter adjourned to the 24th March 2000. The delivery of judgment was further adjourned until the 31st March 2000, when, the learned trial judge delivered an oral judgment. He gave judgment in favour of the respondents on both the Claim and Counterclaim. We do not have the benefit however, of a note of the oral judgment.

In our view three major questions arose for consideration in the appeal and they are:

1. Did the learned trial judge err when he refused to grant the applications for an adjournment?

2. Is it permissible for the Court to proceed with a trial that was in progress where the defendant has voluntarily withdrawn from the proceedings? and,

3. Should the learned trial judge satisfy himself that a defendant is notified of the continuation of a trial before proceeding with it in the absence of the defendant?

Mr. Wilkinson submitted in respect of the first question posed, that the learned trial judge ought to have accommodated Counsel for the appellant when the adjournments were sought. He submitted that at the stage when Mr. Francis left the Court, the defendant was without legal representation and she ought to have been afforded the necessary adjournment. He referred us to the cases of **Ward v James** [1965] 1 All E.R 563; **Priddle v Fisher and Sons** [1968] 3 All E.R 506 and **Aquila Williams v Winnifred Cooper** (1971) 12 JLR 298. He placed great reliance on certain dicta by Eccleston J.A in the latter case where His Lordship in delivering the judgment of the Court said inter alia, at page 301:

> "...yet, although the conduct of counsel or solicitor is to be deprecated and should be visited with sanctions, especially as there had been several adjournments it is the interest of the litigant that must be paramount and it is he that should not be made to suffer. I am for firm action by the learned resident magistrate, but not to the extent where the rights of a person who may have a legitimate claim are to be extinguished in a summary manner through no fault on his part. He sought and obtained legal assistance from the inception of the litigation and paid for it only to suffer disappointment when his need was greatest.
>
> Implicit in the situation for consideration by the learned resident magistrate should have been, what action

> would be most appropriate so that no injustice would be done to any of the parties? I am inclined to the view that an adjournment on terms would have been appropriate. I do not apprehend it would have caused such dislocation of the work of the court or inconvenience that could not have been ameliorated."

Mr. Wilkinson further submitted that the record of the trial has shown where the appellant could not adequately represent herself so she ought to have been allowed an opportunity to have Counsel present to assist her. In the circumstances, he submitted that since she was not given this opportunity, the learned trial judge erred in law and/or exercised his discretion wrongly, in failing to adjourn the matter on the 14th day of December 1998, at the request of her Attorney at Law.

What is said here is that the learned trial judge had a discretion in the matter as to whether or not to adjourn, and as a proper exercise of judicial discretion, he should have adjourned the trial. For our part, we cannot possibly agree with these submissions. There is we think, no doubt that where a trial judge refuses to adjourn a case, that is a sufficient judicial act that may be reviewed by the Court of Appeal but, it is certainly a matter prima facie entirely within the discretion of the trial judge. This Court would, therefore be very slow to interfere with any order made by the trial judge for refusing an adjournment.

It is our view that when all the facts are taken into consideration, the appellant was afforded adjournments on the basis of her lack of preparation or on the basis that she was not ready to proceed. We are further of the view, that

in the circumstances we ought not to disturb the discretion exercised by the learned trial judge.

The next question for consideration is whether or not the trial should have proceeded and concluded in the absence of the appellant? She was present for the trial on the 14th and 15th December 1998, 13th and 14th July 1999 and in the forenoon of the 26th July 1999. She did not return for the continuation of the trial in the afternoon session and no explanation or excuse was tendered by her or on her behalf. Notwithstanding her behaviour, the learned trial judge adjourned the trial to the 12th March 2000, eight months later. He further adjourned the matter to the 14th March 2000 but the appellant again, failed to appear or to offer any explanation for her absence.

In our view, the appellant had voluntarily absented herself from the continuation of the trial without any excuse or explanation and showed no intention to take any further part in the proceedings. The learned trial judge was therefore correct in our view, in exercising his discretion to proceed in her absence particularly having regard to the history of delay on her part. It is also worthy of note that up to the point when the appeal is heard, the appellant has not filed an affidavit explaining the reason for her withdrawal from the trial proceedings.

With regard to the third question posed, Mr. Wilkinson submitted that the learned trial judge ought not to have proceeded with the hearing of the matter in March 2000 without having been first satisfied that the appellant and/or her

Attorney at Law had been served with Notice of the trial dates. He submitted that the onus was on the plaintiffs to notify the defendant of the date when the matter would continue. He referred us to the case of **Cockle v Joyce** (1877) 7 Ch. D. 56. He submitted also that notice was particularly important since Mr. Francis had obtained an Order in the Supreme Court on the 16th December 1999, removing himself from the Record as representing the appellant. He further submitted that regardless of what transpired before the 14th day of March 2000, and whether or not the learned trial judge had exercised his discretion correctly in refusing to grant earlier applications for adjournments, it was imperative that he did not proceed unless there was proof that the appellant was properly notified of all the dates in March 2000.

We accept the arguments of Mr. McBean that there is no provision in the Rules of the Supreme Court with regard to notifying a party of a date where that party has removed himself or herself from a trial that is in progress. We are of the view that it was incumbent upon the appellant to have checked with the Registrar of the Supreme Court to ascertain what had transpired in the matter. Furthermore, it was announced in Court on the 26th July 1999, that Mr. Richard Rowe was now the Attorney in the matter. He ought to have informed himself as to the progress of the case on his return to the Island. We hold therefore, that there is no duty on the Court in the circumstances of this case to have notified the appellant of the date for continuation of the trial. In **Cockle v Joyce** (supra) the Court held that where an action is called on for trial and the plaintiff does not

appear, the defendant is not entitled to judgment unless he proves that notice of trial has been served upon him. We are of the view however, that Cockle's case is easily distinguished from the instant matter. Here, the appellant did appear at the trial but for reasons unknown, she decided not to participate any further in the trial. She has no one to blame but herself.

Mr. Wilkinson also complained that the learned trial judge had failed to give reasons for his decision, so the court was not in a position to say whether or not he had properly evaluated the material before him. He referred us to the cases of **The Attorney General and Another v Worldwide Purchasing Co. Ltd** (1977) 16 JLR 38 and **Flannery and Another v Halifax Estate Agencies Ltd.** (2000) 1 All E.R 373. The transcript of the proceedings in the instant case shows however, that the learned trial judge had given an oral judgment on the 31st March 2000. In our view, these cases we were referred to by Mr. Wilkinson cannot assist the appellant. We therefore agree with Mr. McBean that there is no basis for this complaint.

There was really no merit in the ground dealing with the admission of the Codicil in evidence by the respondents. It was a document which the appellant had intended to have admitted in evidence so it makes no difference that it was the respondents who tendered it.

Mr. Wilkinson had also submitted that the learned trial judge erred in law in failing to consider sufficiently or at all, the evidence of witnesses whose statements were contained in Notices filed by the appellant thereby depriving the

appellant of a fair trial. He further submitted that these Notices were properly filed pursuant to the provisions in the Evidence Act and due cognizance ought to have been taken of them. What seems to have escaped Mr. Wilkinson's attention is that a Counter Notice was served on the appellant requesting the presence of the makers of those statements to attend court. Furthermore, the appellant had ample opportunity over a period of sixteen (16) months to have secured the presence of the witnesses for Court. The appellant had also failed in our view to demonstrate that it was not reasonably practicable to secure their presence pursuant to the provisions of section 31E of the Evidence Act. We agree with the submissions made by Mr. McBean and also found no merit in this ground.

For these reasons, we dismissed the appeal with costs to the respondents.

FORTE, P.

I agree.

PANTON, J.A.

I agree.