[2023] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA

PARISH COURT CIVIL APPEAL NO COA2021PCCV00042

BETWEEN ESTHER YVONNE SAILSMAN APPELLANT

AND LEONIE CUMMINGS RESPONDENT

Ms Akuna Noble and Ms Kelli-Ann Younger instructed by The Noble Firm for the appellant

Trevor Cuff instructed by Wilson & Franklyn, Attorneys-at-Law for the respondent

24 and 26 January 2023

ORAL JUDGMENT

STRAW JA

Background

[1] This appeal arises from the decision of Her Honour Ms Opal Smith, Senior Parish Court Judge (as she then was), made on 11 January 2021 in which she refused the appellant's application to set aside a default judgment that was entered against her on 22 September 2020.

[2] The respondent, Ms Leonie Cummings, along with her son Donald Phipps are the registered owners of property located at 14 Highland Close, Kingston 19 in the parish of Saint Andrew and registered at Volume 1001 Folio 597 of the Register Book of Titles ('the property'). By plaint filed on 4 March 2020, Ms Cummings sought to recover possession of the property, which was being occupied by the appellant, Ms Sailsman, who had failed to vacate the property, in keeping with a notice to quit that was served on her on 24 December 2019.

[3] The appellant, asserting that notice of the claim had not come to her attention until on or about 30 October 2020, sought by way of application filed on 2 December 2020, to have the default judgment set aside on the grounds that:

> "1. The Annual Value of the property … exceeds $500,000.00;
>
> 2. The Defendant has a real prospect of successfully defending the claim, and [sic]
>
> 3. The Defendant made the Application to set aside as soon as was reasonably practicable."

[4] At all material times, the parties proceeded on the basis that the default judgment was regularly obtained and this position was maintained before this court. In her affidavit in support of her application to set aside default judgment, the appellant detailed, among other things, that she had commenced proceedings in the Supreme Court in which she was asserting her right to ownership of the property on the basis of adverse possession. She exhibited the fixed date claim form and her affidavit in support, both filed in the Supreme Court on 12 November 2020.

[5] Further, she set out expressly in her affidavit in support of her application to set aside default judgment at paras. 9 and 10 that:

> "9. I am now the legal owner of [the property] having been in quite [sic], open, peaceful and undisturbed possession for in excess of twelve (12) years.
>
> 10. [Ms Cummings] has never visited the property, has never tried to assert her right until now, mor [sic] than twelve years after I entered the property in quite [sic], open, peaceful and undisturbed possession [sic]"

[6] In her affidavit filed in the Supreme Court, the appellant detailed her knowledge of the property since 1985 when her then spouse, Donald Phipps, co-owner of the property with Ms Cummings, his mother, exercised sole, undisturbed and continuous possession of the property. The appellant asserted that in 1995, she and Mr Phipps moved into the property, along with their children. In or around

2005, Mr Phipps was imprisoned and is, to date, serving concurrent custodial sentences. She remained on the property until about 2006, when she was asked by Ms Cummings to vacate the property, which she did for some three or four months. Having no other residence, however, she returned to the property in 2006 and remained in sole, undisturbed possession.

[7] The learned Senior Parish Court Judge, in refusing to set aside the default judgment, concluded that the appellant's assertion that she had been in quiet and undisturbed possession of the property for over 12 years, was insufficient to establish that she had a good defence with a real prospect of success. The learned Senior Parish Court Judge examined the circumstances of her occupation including the fact that the parties are "related" and that the appellant was fully aware of who the owners of the property were.

[8] The learned Senior Parish Court Judge concluded that at all material times during her occupation, the appellant was a licensee and therefore incapable of obtaining ownership of the property by way of adverse possession. As such, there was no *bona fide* dispute as to title to the property and therefore the annual value of the property (which was stated in the particulars of claim to be $540,000.00), was not relevant.

[9] The following are grounds of appeal that were filed:

> "(a) The learned judge erred in law in finding that in considering whether or not the Annual Value exceeded the jurisdiction of the court was not a good defence or reason to set aside Default Judgment entered on September 22, 2020 [sic].
>
> (b) The learned Parish Court judge erred in finding that the Appellant did not have a real prospect of successfully defending the claim under the Limitation of Actions Act.
>
> (c) The learned Parish Court Judge erred in finding that the Appellant did not have a real prospect of successfully defending the claim by way of propriety [sic] right.

> (d) The learned Parish Court Judge erred in finding that the reason given by the Appellant that, the summons never came to the Appellant's attention was tenuous and not a good reason to set aside the Default Judgment entered in September 22, 2020 [sic].
>
> (e) The learned Parish Court Judge erred in exercising her discretion not to grant the Appellant's Application to Set Aside Default Judgment."

Submissions

[10] In urging this court to overturn the decision of the learned Senior Parish Court Judge, Ms Noble argued that the appellant had demonstrated a defence having a real prospect of success on the basis of the Limitation of Actions Act, having regard to all the evidence. The learned Senior Parish Court Judge also erred in regard to her assessment of the prejudice to Ms Cummings, if the default judgment was to be set aside. Further, the court was not required at the stage of an application to set aside default judgment, to fully ventilate the case on its merits. The evidence demonstrated that the dispute fell squarely within section 96 of the Judicature (Parish Courts) Act ('JPCA') which prescribes a jurisdictional limit of $500,000.00 in relation to disputes concerning title to property. The property in question had a declared annual value in excess of this jurisdiction. The case should therefore have been struck out. Reliance was placed on the cases of **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24, **Swain v Hillman** [1999] EWCA Civ 3053, **Bennett and another v Pearson and another** (unreported) Supreme Court, Jamaica, Claim No CL 1994/B446, judgment delivered 25 November 2004, **Fullwood v Curchar** [2015] JMCA Civ 37 and **Robinson v Garvey** [2020] JMCA Civ 58.

[11] In opposing the appeal, Mr Cuff contended that the learned Senior Parish Court Judge was correct to find that an assertion of adverse possession was insufficient to establish a good defence and that whether a defence of adverse possession is established is a matter of evidence. He submitted that the appellant's

affidavit was devoid of evidence of physical possession and an intention to possess, save for proof of her payment of electricity bills.

[12] With respect to the fixed date claim form and affidavit in support that were filed in the Supreme Court (in which it was asserted that the appellant had re-entered the property from 2006), Mr Cuff contended that the affidavit was not sworn for the purposes of the Parish Court. Therefore, the learned Senior Parish Court Judge was entitled to put whatever weight she wished to those documents. Notably however, when asked by this court about the effect of the events which purportedly occurred in 2006, Mr Cuff indicated that he agreed with the submissions of Ms Noble, that the action of one joint tenant would bind the other. In that event, Mr Cuff stated that the action of Ms Cummings in withdrawing her consent to the appellant remaining on the property in 2006, would be binding on Mr Phipps. The appellant would therefore have re-entered the property without a licence. He nevertheless advanced that the evidence surrounding the events in 2006 was not properly before the learned Senior Parish Court Judge, as that assertion was set out in the appellant's affidavit filed in the Supreme Court and not in her affidavit filed in support of her application to set aside the default judgment.

[13] In refuting the submissions regarding the annual value of the property, Mr Cuff highlighted that the evidence put before the court did not raise a real doubt as to the ownership of the property. In the round, Mr Cuff maintained that the learned Senior Parish Court Judge examined the evidence and properly concluded that the appellant was a licensee. He relied on the cases of **Grimshaw v Dunbar** [1953] 1 All ER 350, **Boucher v Gayle** (1960) 2 WIR 457, **Evans v Bartlam** [1937] 2 All ER 646, **Rinke v Sara** 2008 ABQB 756 (CanLII), **JA Pye (Oxford) Ltd and others v Graham and another** [2002] UKHL 30, **Ramnarace v Lutchman** [2001] UKPC 25, **Sarju v Sarju and others** [2022] JMSC Civ 126, **Kwok Kin Kwok v Yao Juan** [2022] UKPC 52, **Robinson v Garvey** and **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

Discussion

[14] We would only interfere with the learned Senior Parish Court Judge's exercise of her discretion if it has been shown to be wrongly exercised; that it was based on a misunderstanding of the law or of the evidence or can be shown to be demonstrably wrong (see **Attorney General of Jamaica v John Mackay** at paras. [19] and [20]).

[15] From the reasons given by the learned Senior Parish Court Judge, it is apparent that the primary basis upon which she refused to set aside the default judgment was that the applicant had failed to put forward a good defence or to show that she had a case with a real prospect of success. In this regard, we reiterate the principles laid down in the case of **Boucher v Gayle**, in which this court enunciated the requirements for consideration where a judge of the Parish Court seeks to determine whether to set aside a default judgment. At page 459 Waddington J stated as follows:

> "The resident magistrate in exercising his discretion to refuse the application was guided by and endeavoured to apply the principles laid down in *Grimshaw v Dunbar* ([1953] 1 All ER 350, [1953] 1 QB 408, 97 Sol Jo 110, CA, 3rd Digest Supp.). He correctly stated the four matters which he ought to have considered in this case, namely:
>
> (1) the reason for the failure of the appellant to appear when the case was heard … ;
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> (2) whether there had been undue delay in making the application so as to prejudice the respondent;
>
> (3) whether the respondent would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened; and
>
> (4) whether the appellant's case was manifestly insupportable."

[16] At page 461 he stated further:

> "In *Grimshaw v Dunbar* … JENKINS LJ, says:

> 'There is a more debatable point, as I regard it, as to how far the learned judge should consider the prospects of success of the party applying for a new trial. **No doubt, the learned judge is entitled to satisfy himself that the party applying has a *bona fide* intention of defending the action and that there is some possibility of his doing so with success.** … I think that a new trial should seldom, if ever, be refused merely on the ground that the applicant's case appears a weak one…. Be that as it may, a party to an action is *prima facie* entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs, as was recognised in *Dick v Piller* … .'"

[17] Also, the proviso to section 186 of the JPCA states that the Parish Court Judge may set aside a default judgment and grant a new trial "on sufficient cause shown to him for that purpose". In the circumstances, it could be said that the appellant should only be required to show that she had a case that had some possibility of success as compared to a real prospect of success (see also, paras. [38] and [39] of **Fullwood v Curchar** where McDonald-Bishop JA (Ag) (as she then was), stated that the authorities establish that the burden of proof in a trial, is on the party with the paper title to prove that he or she has a title that has not been extinguished by the statute of limitations).

[18] Having reviewed the evidence that was put before the Parish Court, including the affidavit filed in the Supreme Court that was exhibited, we are unable to agree that the appellant failed to put forward a defence with some merit. We are not making a determination at this time as to any factual or legal issues including the issue as to whether Ms Cumming's actions would have bound her co-joint tenant. However, the circumstances detailed relating to the year 2006, which were not challenged by Ms Cummings, raise an arguable issue in law as to whether

Ms Cummings had revoked the appellant's right to use the property as a licensee, not only on her own behalf, but also on behalf of her fellow joint tenant; and that the appellant's subsequent re-entry was adverse to the rights of the registered proprietors. This subsequent occupation continued for a period in excess of twelve years.

[19] Therefore, the learned Senior Parish Court Judge would have been wrong to refuse the application on the basis that she did, especially as she was not then required to conduct a mini-trial. Consequently, the appellant would have raised a real and substantial issue as to title and the declared annual value of the property being $540,000.00, the Parish Court's jurisdiction would have been exceeded (see section 96 of JPCA and the case of **Robinson v Garvey**).

[20] We therefore make the following orders:

1. The appeal is allowed.

2. The judgment of Her Honour Ms Opal Smith refusing to set aside the default judgment entered on 22 September 2020, is set aside.

3. The default judgment entered against the appellant on 22 September 2020 is set aside.

4. Costs to the appellant in the sum of $50,000.00.