JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 4 OF 2005

BEFORE:	**THE HON. MR. JUSTICE SMITH, J.A.** **THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)**	
BETWEEN	**AMYBELLE SMITH**	**APPELLANT**
AND	**NOEL SMITH**	**RESPONDENT**

Mr. Debayo Adedipe instructed by Clarke, Nembhard & Co. for the Appellant.

Mrs. Janet Taylor instructed by Cecil July for the Respondent.

March 22, 2006 and April 24, 2009

SMITH, J.A.

I have read the judgment of Harrison, J.A. I agree with his reasoning and conclusion. There is nothing further I wish to add.

HARRISON, J.A.

1. This is an appeal from a judgment of Her Honour Miss Marlene Malahoo, Resident Magistrate for the parish of St. Elizabeth. On September 8, 2004 she awarded damages in the sum of $70,400.00 in favour of the plaintiff Noel Smith (the respondent) against the defendant Amybelle Smith (the appellant) for destruction of a

quantity of pumpkin and pepper crops. On March 22, 2006 we dismissed the appeal and ordered costs in the amount of $15,000.00 to the respondent. We had promised then to put our reasons in writing for dismissing the appeal but regrettably this was not done due to an oversight. We unreservedly apologize for the delay and now seek to fulfill our promise.

2. The facts are relatively straightforward. The plaintiff, a farmer, cultivated pumpkins and peppers on his farm at Burnt Savannah, St. Elizabeth. On April 25, 2000 he visited the farm and saw the defendant enter his property and there destroy vines bearing pumpkins and pepper plants. He made a report to the police and thereafter got Mr. Powell, a valuator, to do a valuation of the crops destroyed. The defendant was served with notice of the valuation but did not attend the valuation on the appointed date. The plaintiff thereafter filed a plaint against the defendant in the Black River Resident Magistrate's Court and claimed damages for Malicious Destruction of Property.

3. The defendant in her defence denied destroying the crops and asserted that the crops were planted on a roadway over which she had a right of way. She stated that while she was using that right of way she tripped over some pumpkin vines, which she pulled out and threw in the adjoining land. She had counterclaimed against the respondent in trespass and for wrongful obstruction of the right of way. These allegations were denied by the plaintiff.

4. The matter came up for trial on September 8, 2004. Mr. Paul Nembhard, the Attorney-at-law for the defendant was absent due to illness. Mr. Samuel Smith who

held for Mr. Nembhard requested an adjournment but this application was refused by the learned Resident Magistrate. The trial proceeded with Mr. Smith defending the appellant but she was unsuccessful. The learned Resident Magistrate stated in her reasons for judgment, that she had accepted the evidence of the respondent. The appellant on the other hand, did not impress her as a witness of truth. In respect of the counterclaim, the learned Resident Magistrate found that no right of way had existed in the area cultivated by the respondent.

5. The defendant was dissatisfied with the judgment and filed Notice of Appeal in the Black River Resident Magistrate's Court. The original ground of appeal which was filed on September 21, 2004 complained that the judgment of the learned Resident Magistrate was not "supported by the evidence". Leave was sought and was granted for the appellant to argue a further ground of appeal which read that the application for an adjournment was wrongly refused because:

(i) there was valid reason for Counsel's absence

(ii) there was inadequate time for Counsel who held to familiarize himself with the case or prepare for a trial;

(iii) the interests of justice required that an adjournment be granted.

(iv) that the Appellant did not get a fair hearing as a result of the adjournment being refused

(v) the Appellant was denied the services of counsel of her choice as a result of the adjournment being refused.

6. The submissions of Mr. Adedipe for the appellant were indeed brief but to the point. He submitted that if there was any difficulty or disadvantage which the respondent would have suffered as a result of the adjournment being granted, he could have been compensated with an order for costs. He argued that Mr. Smith who was holding for Mr. Nembhard was not in possession of a file, witness statements or full instructions so he was at a disadvantage to proceed to trial. He submitted however, that although Mr. Smith was handicapped he nevertheless endeavoured to assist the appellant since it was Mr. Nembhard's request of Counsel that he "should protect him". Mr. Adedipe referred to and relied on the cases of **Perkins v Irvine** 34 JLR 396; **Dunkley (Errol) and Robinson (Beresford) v R** (1994) 45 WIR 318 as well as on section 20(2) of The Constitution of Jamaica.

7. Mr. Adedipe submitted on one hand that in all the circumstances the learned Resident Magistrate had wrongly exercised her discretion. He argued that the appeal ought to be allowed and the case remitted to the Resident Magistrate's Court for a re-trial to take place.

8. Mrs. Janet Taylor, for the respondent submitted on the other hand, that the chronology of events had revealed an interesting background leading up to the trial date in September 2004. She submitted that it would appear that the appellant was not keen in prosecuting the case. According to her, there were a series of adjournments and that it was against that background and knowledge of the case, that the learned Resident Magistrate exercised her discretion in refusing to grant an adjournment. She

further submitted that the appellant was given assistance by both Mr. Smith and the learned Resident Magistrate so the appellant could not say in those circumstances that "justice was not done".

9. This appeal concerns the exercise of a judge's discretion in refusing an application for the adjournment of a trial. It is beyond dispute that this Court has the jurisdiction to entertain such an appeal - see **Re Yates' Settlement Trusts** [1954] 1 All ER 619. However, since any adjournment was prima facie entirely within the discretion of the trial Judge, the Court of Appeal would be reluctant to interfere with the exercise of that discretion - see **Maxwell v Keun** [1928] 1 KB 645. The authorities have made it abundantly clear that this Court will only interfere where it is shown that:

> the Judge has failed to take into consideration relevant factors; or
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> the Judge has taken into consideration irrelevant or extraneous matters to the prejudice of the appellant; or
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> the judge has misdirected himself on the relevant law and facts; or
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> the decision of the Judge is palpably unreasonable or unfair.

10. In **Donald Panton and Others v Financial Institutions Services Limited** Supreme Court Civil Appeal 6/06 delivered April 7, 2006 Harrison P., stated inter alia:

> "A trial judge, in the exercise of his discretion must give effect to all the circumstances peculiar to the particular case in order to achieve justice in deciding whether he should grant the adjournment or not".

11. In the instant case, the record reveals that the first trial date was fixed for May 16, 2001. There were several adjournments noted on the plaint but the reasons for the adjournments were not recorded. Counsel on both sides were helpful to the Court and gave the Court the benefit of their notes as to what had transpired on various dates. A list is provided hereunder:

- May 16, 2001 the Attorneys representing the parties were present but the defendant was absent.
- September 19, 2001 the defendant was absent but the matter was not reached.
- October 3, 2001 the defendant was absent.
- December 12, 2001 Counsel for the Defendant was absent.
- March 13, 2002 Counsel for Defendant was absent.
- May 22, 2002 the matter was not reached.
- October 23, 2002 all of the parties were present but the matter was not reached.
- January 29, 2003 the parties were present but the matter was not reached.
- April 23, 2003 all present.
- July 9, 2003 Defendant's Counsel was absent.
- September 10, 2003 Defendant's Counsel was late but the matter was not reached.
- November 5, 2003 all were present but the matter was not reached.
- February 11, 2004 matter fixed for trial.

- May 12, 2004 all were present but Mr. Cecil July for the plaintiff applied for an adjournment.

- September 8, 2004 an application was made by the defence for an adjournment but the Resident Magistrate refused to grant the adjournment and proceeded to trial.

12. Mr. Samuel Smith, the Attorney-at-law who had held for Mr. Nembhard on September 8, 2004 swore in his affidavit of June 7, 2005 that he had received a message from Mr. Nembhard that he was ill and was unable to attend court on the trial date. However, he did not state when he received that message. The affidavits of both Mr. Nembhard and Mr. Smith have also not stated whether this illness was a sudden one or for how long before the trial date he had fallen ill. Mr. Smith has stated however, that quite apart from seeking an adjournment, Mr. Nembhard had requested that he should do what he could in order "to protect his client and himself". Paragraphs 5 – 7 of Mr. Smith's affidavit state as follows:

> "5. When the matter came on for hearing I advised the Court that Mr. Nembhard was ill and unable to attend Court. I sought an adjournment on his behalf.
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> 6. The Court refused to grant the adjournment and said that the case must go on. I had no file and no prior knowledge of the case and I so indicated to the Court.
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> 7. When I realized that the case was in fact going to start I gathered what information I could and sought to assist the defendant in the best way that I could in all the circumstances of the case".

13. It is not clear from Mr. Smith's affidavit whether the Court had granted him a short adjournment. We have gathered nonetheless from paragraph 7 of his affidavit

(supra) that he had received instructions from the appellant and had given her assistance "in the best way" that he could. Certainly these instructions could not have been received whilst the case was in progress. If one were to use the notes of evidence as a guide, it could be said that Mr. Smith's handling of the matter on behalf of the appellant was quite commendable. The record showed that it was not simply a matter of him asking one or two questions in cross-examination and then he took his seat. In our judgment Counsel had done what was simply requested of him by Mr. Nembhard, that is, if the adjournment was not granted, to "protect" the client and her Counsel. Mr. Nembhard would no doubt have known the history of the adjournments so he was simply alerting Mr. Smith to protect him just in case the trial had to go on.

14. Mr. Adedipe had relied on the cases of **Perkins v Irving** (supra) and **Dunkley and Robinson v Regina** (supra) but we are of the view, that those decisions are not helpful since their facts are clearly distinguishable.

15. We have examined other cases on the issue of adjournments and have found the case of **Ntukidem et al v Oko et al** [I989] LRC (Const) 395 most useful. The facts of that case reveal that over a period of approximately two years, the hearing of the matter was adjourned on several occasions. On each occasion except one, the appellants were always present and represented by counsel. On the day before the date for hearing the appellant's counsel was unable to get a flight. This fact was not known to the appellants. An application for adjournment was refused. The appeal was allowed on the ground that the Court's refusal to grant an adjournment was wrong in that the

record of events did not support the contention that it was unfair to adjourn the hearing or that the appellants had been given ample opportunity to bring counsel to court. In the instant case the adjournments were caused mainly by the absence of the appellant on some occasions as well as the absence of her Attorney on three occasions.

16. There is also the case of **Hare v Pollard** [1997] EWCA Civ. 1872 where the English Court of Appeal had declined to set aside a refusal of the trial judge to grant an adjournment at a late hour, two weeks before the trial date, and although the refusal would prejudice the plaintiff applying for the adjournment. The Court was of the view that parties were entitled to expect that the trial of the cases would be expedited since adjournments and vacating of trial dates prejudice not only the party not in default but other litigants and disrupted the administration of justice.

17. Finally, there is the case of **Royal Bank of Scotland v Harvey Craig** Court of Appeal of England (Civil Division) delivered September 17, 1997 (unreported). In that case the defendant through no fault of his was left without counsel. Counsel had returned the brief shortly before the trial was set to commence. The defendant's application for an adjournment on the ground that his Counsel who was so well acquainted with the case was unavailable was refused. On appeal Evans LJ stated that he would not think it right to interfere with the judgment unless he was satisfied that there were relevant matters which either were not referred to by the judge or which were wrongly discounted by him.

18. It is our view that the chronology of events highlighted above, fully justify the learned Resident Magistrate's refusal to have further adjourned the trial. The learned Resident Magistrate would no doubt have been faced with the fact that the case was first fixed for trial on January 10, 2001 and after three years there was still no finality in the matter. The Court in **Ntukidem et al** (supra) had emphasized the importance of the trial date, and the importance of making co-operative approaches to the other side and to the Court in good time, if there is any difficulty in meeting the trial date because something unforeseen had occurred.

19. In our judgment the appellant has not shown that the learned Resident Magistrate was plainly wrong in refusing the application for the adjournment. In **Cowen v AMI Healthcare Group plc** [I998] EWCA Civ. 1803 the English Court of Appeal observed that:

> "The interests of justice require an overall view, not only of (the defendant's) interests but also of the plaintiff's interests, the interests of other litigants and the interests of the court in its rules being complied with and getting trials on speedily."

20. We therefore cannot agree with Mr. Adedipe that the learned Resident Magistrate had failed to consider the principles relevant to a proper exercise of judicial discretion in this matter. It was for these reasons why we made the order dismissing the appeal.

Harris, J.A.

I too agree.

ORDER

SMITH, J.A.:

Appeal dismissed. Costs fixed at $15,000 to the respondent.