

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 127/05

APPLICATION NO. 29/06

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**BETWEEN RICHARD SPENCE
LEONIE SPENCE APPLICANTS**

AND MAURICE HITCHINS 1st RESPONDENT

**AND AUDLEY HITCHINS 2nd RESPONDENT
(Administrator for the Estate
of Myrtle Joyce Stephenson)**

Christopher Dunkley and Miss Daicia Welds instructed by Wong Ken & Co. for the applicants

Mrs. Arlene Harrison-Henry for the first respondent

**Miss Marlene Uter instructed by Alton E. Morgan & Co.
for the second respondent**

March 16 & 19, April 3 and November 16, 2009

PANTON, P.

1. On April 3, 2009, we made the following order:

- "1. Application to discharge the order of Cooke, J.A. made on February 10, 2006, granted. Appeal No. 127/2005 reinstated. Registrar to schedule a case management conference and to list the appeal for hearing as soon as possible.

2. Costs of the application to the applicants to be agreed or taxed."

The following are the reasons for our decision.

2. The application before us was to review, vary or discharge an order of Cooke, J.A. and to stay the judgment of Brooks, J. pending the hearing of an appeal from the said judgment.

3. By an order made on February 10, 2006, Cooke, J.A. had struck out appeal no. 127/2005. Brooks, J. had on October 28, 2005, set aside an agreement for sale dated December 14, 1999, between Audley Hitchins on the one hand and Richard and Leonie Spence on the other in respect of property, specifically, 1D Bamboo Avenue, part of an estate being administered by Audley Hitchins. Brooks, J. had also ordered that any future agreement for sale in respect of the property was to be submitted to the Court for approval for it to be effective.

4. The judgment of Brooks, J. arose from a suit filed by Maurice Hitchins against Audley Hitchins, his brother. There is a note on the judgment that Mr. Wong Ken watched proceedings on behalf of an interested party. The fact of the matter is that the term "interested party" refers to the purchasers of the property. In his judgment, Brooks, J. said that the property was sold for a sum that is below its true value.

5. Reid, J. on December 7, 2005, ordered that the claim form be amended by adding the names of the applicants as intervening third parties for the purpose of bringing an appeal against the judgment of Brooks, J. He also stayed the judgment for a period of 28 days. Consequently, Civil Appeal No. 127/2005 was filed on December 8, 2005. On February 10, 2006, as said earlier, Cooke, J.A. ordered that the appeal filed pursuant to the order of Reid, J. be struck out. Since then, there has been a series of applications, but the matter has not yet been resolved.

6. In this application, the main contention of Mr. Dunkley for the applicants is that they are bona fide purchasers for value who have been prejudiced by the judgment of Brooks, J. They contend that the judge erred in failing to direct the parties to obtain expert evidence by way of report or otherwise so as to guide the court as to the state of the real estate market; and that they have carried out numerous improvements to the property for which there has been no accounting.

7. The respondents, on the other hand, contend that the applicants are abusing the process of the Court; that they ought to have intervened earlier, and that they have no prospect of success. Miss Uter described the efforts of the applicants as an affront to the overriding objective, and submitted that they are wasting the Court's time and resources. Mrs. Harrison-Henry placed great stress

on the tardiness of the applicants in bringing the proceedings, and expressed the view that there were no compelling circumstances which require that the applicants be facilitated at this late stage. Their lethargy has defeated them, she submitted. Notwithstanding the position adopted by Mrs. Harrison-Henry, the records do indicate that there was a period of time when her client was neither seen nor heard from.

8. There can be no doubt that the applicants are affected by the judgment of Brooks, J. They have a clear interest in the property, and it is only just and right that they should be heard in the appeal. Accordingly, notwithstanding their late entry into the proceedings, we granted the application and discharged the order of Cooke, J.A. This results in the restoration of the appeal, and we order that the matter be listed for hearing as soon as possible.