[2023] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV000137

BETWEEN	**JULIE ANNE THOMPSON-JAMES**	**APPELLANT**
AND	**MARCUS HASTINGS JAMES**	**RESPONDENT**

Written submissions filed by Hylton Powell Attorneys at law for the appellant

Written submissions filed by Legis Attorneys at law for the respondent

28 July 2023

Civil Procedure – orders on the court's own initiative – exercising the power to set and vacate trial dates in accordance with the overriding objective - powers of the judges of concurrent jurisdiction – academic appeal - section 6(1) of the Judicature (Supreme Court) Act - rules 26.1(2)(d) and 26.2(2) of the Civil Procedure Rules

PROCEDURAL APPEAL

(Considered by the court on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS P

[1] I have read the draft judgment of my learned sister, V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

V HARRIS JA

[2] The appellant, Mrs Julie Anne Thompson-James, filed a procedural appeal against the decision of K Anderson J ('the learned judge') made in the Supreme Court on 5 October 2022. I have reviewed the submissions of counsel in this matter, and it is my

view that the appeal should be dismissed. The reasons for my decision, which include a brief outline of the factual background, are set out below.

Background

[3] The parties got married on 1 December 2001, and separated in October 2021, with no reasonable likelihood of reconciliation. The appellant sought to invoke sections 11 and 13 of the Property Rights of Spouses Act ('PROSA') to address the disputes that arose in relation to the ownership of property they acquired during the course of their marriage.

[4] The appellant instituted proceedings by way of fixed date claim form, which was amended and filed on 18 February 2022 ('the claim'). She has sought, among other things, a declaration that she is entitled to a 50% interest in all assets acquired by and registered in the names of both her and the respondent, or either of them, during the course of their marriage.

[5] The appellant also sought a freezing order restraining the respondent from disposing of the assets in his name or held on his behalf, as well as from withdrawing or transferring any of the funds in his accounts or accounts in the names of Springhill Holdings Limited, Aeric Investments Limited, and any other account held on his behalf.

[6] At the case management conference on 24 February 2022, the parties agreed to an expedited trial to commence on 10 October 2022 for three days, and a pre-trial review on 22 September 2022. On 21 September 2022, one day before the pre-trial review, the respondent filed a notice of application for court orders without the supporting affidavit ('the application'). He sought an order, among other things, that counsel, Mr Michael Hylton KC and the law firm Hylton Powell, be restrained from representing the appellant in her claim against the respondent.

[7] The basis for that application was that the respondent had previously retained Mr Hylton and his firm in March 2014. That retainer, the respondent stated, concerned himself and the company whose majority shares are at the centre of the dispute. It was also contended that Mr Hylton and his firm were in possession of confidential information

that is or may be highly relevant to the claim and that, in respect of that information, the respondent had not consented to its disclosure or waived his rights. The respondent also asserted that he would be severely prejudiced if the orders sought were not granted.

[8] As a result of the absence of the affidavit in support of the application, the parties agreed that the hearing of the application should be set for 5 October 2022. It is that matter that came before the learned judge in chambers. Although the learned judge was provided with a bundle of documents for the application, he declined to proceed with the hearing because he had not received written submissions. Instead, he made the following orders:

> "1. The trial dates for this claim, being October 10-12, 2022, are vacated and if any new trial dates are to be scheduled, same shall be done in accordance with orders nos. 2 and 3 below.
>
> 2. The [respondent's] Application for court orders which was filed on September 21, 2022, is adjourned to be held before a Judge in chambers on April 12, 2023, at 2:00 pm for two (2) hours and upon this court having adjudicated upon that application, the Judge who has made that adjudication shall, if the application is denied, make an order after consulting with the Registrar, as to when the trial of this claim will be held.
>
> 3. If the [respondent's] said application is successful, then a further pre-trial review shall be scheduled by the Judge who adjudicated on that application and the same shall be scheduled once that adjudication has been made known to the parties.
>
> 4. As regards the [respondent's] said application, the [respondent] shall file and serve a bundle of submissions and authorities along with a list of authorities, by October 6, 2022.
>
> 5. As regards the [respondent's] said application, the [appellant] shall file and serve a bundle of submissions and authorities along with a list of authorities, by October 7, 2022.
>
> 6. No further affidavit evidence by either of the parties or on behalf of either of the parties shall be filed or relied on, by either of the parties other than such affidavit evidence as have already been filed and served, in respect of this claim.

7. No order as to costs of today.

8. The [respondent] shall file and serve this order."

[9] The appellant filed an application for permission to appeal the learned judge's decision on 14 October 2022. On 16 December 2022, she was granted permission to appeal orders 1 to 3.

The appeal

[10] On 23 December 2022, the appellant's notice and grounds of appeal were filed. It outlined the following grounds:

> "(a) The Learned Judge erred in failing and/or refusing to fix a trial date in circumstances where the claim was filed pursuant to the court's summary jurisdiction under the Property (Rights of Spouses) Act.
>
> (b) The Learned Judge erred in vacating the trial dates of October 10-12, 2022 of his own volition, in curcumstances where no such application was made by any party, where the parties had complied with case management orders, were ready for trial and where the Appellant opposed the making of the order.
>
> (c) The Learned Judge erred in failing and/or refusing to fix new trial dates in circumstances where the parties had already complied with all case management orders and were ready for trial.
>
> (d) The Learned Judge erred in failing and/or refusing to fix new trial dates in circumstances where the Respondent's failure to properly advance his application contributed to the delay in hearing the application.
>
> (e) In all the circumstances it was not in the interest of the overriding objective for the Learned Judge to fail and/or refuse to fix new trial dates and/or to schedule the hearing of the Respondent's application for the first day of the trial fixed for October 10, 2022.
>
> (f) The Learned Judge exceeded his powers and/or exercised his discretion incorrectly by adjourning a trial that was not

> before him, failing or refusing to set new trial dates and ordering that new trial dates should only be fixed by a court of co-ordinate jurisdiction in the circumstances of his order made on October 5, 2022."

[11] The appellant is seeking orders for the decision of the learned judge on 5 October 2022 to be set aside, and for the Registrar of the Supreme Court to fix a date for the trial of the claim and an urgent date for the hearing of the respondent's application.

The relevant law

[12] The Judicature (Supreme Court) Act ('the Act'), section 6(1) provides:

> "6.- (1) Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction."

[13] Rule 26.1(2)(d) and rule 26.2(2) of the Civil Procedure Rules ('the CPR'), state as follows:

> "26.1 (1)…
>
> (2) Except where these Rules provide otherwise, the court may -
>
> …
>
> (d) adjourn or bring forward a hearing to a specific date;
>
> …
>
> 26.2 (1)…
>
> (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
>
> …"

Submissions

[14] The appellant has distilled two issues from the six grounds of appeal for the purpose of their submissions. The issues identified are:

> "a. Whether the learned judge erred in vacating the trial dates and refusing to set new ones.
>
> b. Whether the learned judge erred in ordering that new trial dates can only be fixed after the Respondent's application is determined."

The appellant's submissions

[15] Counsel for the appellant contended that by vacating the trial dates and refusing to set new trial dates, the learned judge wrongfully exercised his discretion. She submitted further that the learned judge did not have regard or sufficient regard for the nature of the claim and the fact that it was filed pursuant to section 11 of PROSA (which allows it to be determined summarily). As a result of his orders, a new trial date cannot be set before the determination of the application, which counsel submitted, could be delayed for several reasons. Counsel also contended that the learned judge's orders could cause a significant delay, which would not be in keeping with the overriding objective. For those reasons, it was the appellant's position that the learned judge exercised his discretion without considering that to adjourn the trial *sine die* (with no appointed date for resumption) would defeat the statutory purpose of summarily determining such claims and severely prejudice the appellant. Counsel made the point as well that even if the respondent's application was successful, the appellant's claim would still proceed to trial. The learned judge, she said, did not consider this.

[16] Furthermore, counsel argued, the learned judge vacated the trial dates in circumstances where there was no application before him to do so, and he refused to hear submissions from the appellant's counsel. By doing so, he disregarded rule 26.2(2) of the CPR regarding the right of a party who would likely be affected by an order made on the court's own initiative to be given a reasonable opportunity to make representations. Counsel relied on the case of **The Attorney General of Jamaica v Abigaile Brown (by Next Friend Affia Scott)** [2021] JMCA Civ 50 in support of this submission.

[17] It was contended that the learned judge also failed to take into account all the relevant surrounding factors, such as the unduly prejudicial effect on the appellant and the very late filing by the respondent of the application without the requisite affidavit, before making the orders. Additionally, the parties had agreed to an adjournment of the application to the first trial date of 10 October 2022, by which time written submissions could have been filed. Counsel argued that this was especially so since all case management orders had been complied with and the matter could have proceeded to trial. Consequently, counsel posited, the approach of the learned judge was aberrant, and his orders should be set aside. Reliance was placed on the case of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[18] Counsel also referred to section 6(1) of the Act and made the point that a judge of concurrent jurisdiction has no power to bind or restrict the powers of another judge (support was sought from the case of **Strachan v The Gleaner Company Limited & Another** [2005] 1 WLR 3204). The learned judge's orders, however, prohibit another judge from exercising their case management powers to fix a trial date. Counsel argued that the learned judge had no power to do so, and as such, he exceeded his jurisdiction.

The respondent's submissions

[19] It is the respondent's position that the issue of whether the learned judge ought to have exercised his discretion differently in vacating the trial dates is academic. The reasons for that view were that the respondent acknowledged that the learned judge erred in restricting the powers of the judges of concurrent jurisdiction and that the appellant's application for permission to appeal was filed after the vacated trial dates had passed. Counsel for the respondent referred to the minute of order, in which the learned judge said:

> "Trial is adjourned because same cannot be scheduled unless the court knows what is [the Supreme] court's adjudication on the said application."

[20] Counsel argued that that portion confirms a legitimate justification for the learned judge's exercise of his discretion to vacate the trial dates and to refuse to set new trial dates until the application was heard, and it cannot be faulted. It was also the respondent's contention that an order (from this court) setting aside the order vacating the trial dates, which have long passed, would be an order made in vain.

[21] Counsel agreed that the learned judge was in error when he directed the judges of concurrent jurisdiction on how the matter was to be conducted. The portions of the orders that had that effect were highlighted by counsel, who contended that they could not stand. It was for that reason that the respondent did not resist the appellant's application for permission to appeal the decision. Accordingly, the respondent posited that this court should set aside the relevant portions of the learned judge's order and direct the Registrar of the Supreme Court to fix at least three days for the trial of the claim.

Disposition

[22] As has already been mentioned, the parties agreed to hear the application on 5 October 2022. The learned judge declined to proceed with the application in the absence of written submissions (as required by section 4.1(h) of the Supreme Court's Practice Direction No 8 of 2020). Consequently, in accordance with his case management powers (rule 26.1(2)(d) of the CPR), he vacated the trial dates of 10-12 October 2022, and adjourned the hearing of that application to 12 April 2023 (which date has now passed) before a Judge of the Supreme Court.

[23] It is the appellants' primary contention that the learned judge erred in not only vacating the trial dates but also refusing to set new dates. By the time the appellant was granted leave to pursue this appeal, and moreover, by the time this appeal came up for hearing, the trial dates had long passed. For that reason alone, as observed by counsel for the respondent, I find that this appeal is purely academic because the issues to be determined are no longer of any relevance. It is now well accepted that it would be an improper exercise of this court's resources to embark on such an academic exercise

(**Ainsbury v Millington** [1987] 1 WLR 379, **Sun Life Assurance Co of Canada v Jervis** [1944] AC 111, and **Attorney General of Jamaica v The Commissioner of Police and Machel Smith** [2020] JMCA Civ 67).

[24] While there are some matters of general importance raised in this appeal, I am of the view that they arose on a particular set of circumstances. Nevertheless, I will briefly address those issues. On account of the nature of the application (that is, a determination of whether there existed a conflict of interest prohibiting Mr Hylton and the firm Hylton Powell from representing the appellant in the claim), the learned judge's finding that the application must be heard before the trial of the substantive appeal cannot be faulted. However, mindful of the overriding objective to deal with matters justly by, among other things, "reducing delays and adjournments so that matters will be disposed of expeditiously" (see the Preface and Part 1 of the CPR), I take the point made by counsel for the appellant that it would have been a better use of the court's time and resources if the hearing of the application was adjourned to the first day of the trial. That would have provided sufficient time for the filing of the written submissions in keeping with Practice Direction No 8.

[25] The first day of the trial could have properly been utilised for the hearing of the application, especially in light of the parties' agreement to adjourn the application to that day. If the application was so adjourned and the respondent was unsuccessful, then the parties could have proceeded with the trial. If, however, the application was successful, appropriate orders could be made and earlier dates could be set for the trial. This approach would have been in keeping with the expeditious determination of the application and would have aided the summary nature of the claim (further to section 11 of PROSA). Additionally, the learned judge's refusal to set new trial dates, though well within his discretion, runs contrary to the overriding objective, in my view, since he could have set a provisional trial date for the hearing of the substantive claim.

[26] I also note that the parties did not apply to have the trial dates vacated but, instead, agreed that the application could be pursued on the first day of the trial. In

circumstances where the learned judge was minded to adjourn the application to April on his own initiative, he was required, in accordance with rule 26.2(2) of the CPR, to allow the parties (both of whom would be affected) a reasonable opportunity to make representations.

[27] The mandatory language of the orders also warrants some consideration. In the learned judge's order (set out at para. [8] above), there is repeated use of the direction "shall" in relation to how the case would subsequently be managed by other judges of the Supreme Court. By virtue of section 6(1) a judge of concurrent jurisdiction cannot bind another. Accordingly, where the orders of the learned judge sought to direct another judge on how to exercise their discretion in the management of the case, this was a grave error. I, therefore, agree that the learned judge would have exceeded his jurisdiction in so doing.

[28] For all of the above reasons, I am of the view that no judge mindful of his judicial duty would have made those orders (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1), and had this not been an academic pursuit, there would have been merit in this appeal. On account of the belated timing of this appeal, however, there would be no value in this court setting aside the orders of the learned judge or the offending portions of the orders. Moreover, the hearing of the application has now passed, so there would be no need for this court to direct the Registrar of the Supreme Court to set new trial dates for the hearing of the claim. In light of the above, it is my recommendation, as previously stated, that this appeal be dismissed.

Costs

[29] Initially, one of the orders sought by the appellant was for costs in this appeal to be awarded in her favour. Conversely, counsel for the respondent submitted that there was an additional issue for this court's consideration of whether the costs of this appeal should be awarded to the appellant.

[30] The basis of that latter contention, among other things, was that the respondent was not permitted to consent to an order that would override portions of the learned judge's decision. Consequently, the respondent consented to the appellant's application for permission to appeal the orders. In any event, the appellant had a viable alternative by virtue of the case management powers under rule 26.1(2)(d) of the CPR to bring the hearing forward to a specific date. In those circumstances, the appropriate costs order ought to be either "no order as to costs" or "each party is to bear their own costs of this appeal". Reliance was placed on the cases of **Sans Souci Limited v VRL Services Limited** [2012] UKSC 6 and **William Clarke v The Bank of Nova Scotia Jamaica Limited (Ruling on costs)** [2014] JMCA Civ 32 in support of these submissions.

[31] By way of supplemental submissions, counsel for the appellant indicated that, in the interests of an early resolution of the appeal, the appellant would agree with the respondent's submissions on the issue of costs and that there should be no order as to costs for this appeal.

[32] I too agree with counsel for the parties that the circumstances of this appeal are such that the appropriate order in relation to the costs in this matter should be no order as to costs.

DUNBAR-GREEN JA

[33] I too have read the draft judgment of my learned sister V Harris JA and agree with her reasoning and conclusion.

BROOKS P

ORDER

1. The appeal is dismissed.

2. No order as to costs.