[2023] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00054

BETWEEN	**ROSE MARIE WALSH**	**APPELLANT**
AND	**CLIVE MORGAN (Administrator of Estate of Yvonne Iona Robinson, deceased)**	**RESPONDENT**

Written submissions filed by Lorenzo J Eccleston for the appellant

Written submissions filed by Kevin A Williams and Gordon McFarlane instructed by Grant, Stewart, Phillips & Co for the respondent

24 April and 12 May 2023

Civil Procedure –notice of application for extension of time to file affidavit – affidavit filed after time limited by order of the court – considerations to be applied

PROCEDURAL APPEAL

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

BROOKS P

[1] I have read, in draft, the judgment of Laing JA (Ag) and I agree with his reasoning and conclusion.

D FRASER JA

[2] I, too, have read, in draft, the judgment of Laing JA (Ag). I agree and have nothing to add.

LAING JA (AG)

[3] This is an appeal by Rose Marie Walsh, the claimant in the court below ('the appellant'), from the decision of Wong-Small J (Ag) ('the learned judge'), in which the learned judge granted an extension of time for the respondent, the defendant in the court below, to file affidavit evidence.

The background

[4] By an amended fixed date claim form, filed on 18 November 2020, the appellant sought a number of reliefs in respect of a parcel of land ('the property'), which the appellant asserts was purchased by herself and her deceased mother Yvonne Iona Robinson. The bases of her claim are that she contributed towards the purchase price of the property, that her name was registered as a joint proprietor on the certificate of title as a tenant in common, and that she had exclusive, undisturbed possession of the property since 1988, or alternatively, since 2008 when her mother died intestate.

[5] From the submission of both parties, it is gleaned that an affidavit in response, challenging the appellant's claim, was filed by the respondent along with an application for the appellant to make payments of rent for her occupation of the premises. On 4 May 2021, at the first hearing of the fixed date claim form, orders were made by Lawrence-Grainger J, which included the setting of 26 and 27 April 2022 as hearing dates, and 23 March 2022 as the date for the pre-trial review. Orders were also made permitting the defendant to file a further affidavit and for the claimant to file an affidavit in reply on or before 9 July 2021. All affiants were required to attend the trial for cross-examination unless advised otherwise in writing by counsel. The order which provides the genesis for this appeal is an order restricting the filing of any further affidavit after 30 September 2021, without the court's permission.

[6] On the 23 March 2022, the date of the hearing of the pre-trial review, the respondent filed and served on the respondent, an affidavit of counsel, Mrs Denise Kitson QC (now King's Counsel) ('the Kitson affidavit'). This filing and service was contrary to the 30 September 2021 deadline stated in the order of Lawrence-Grainger J. At the pre-

trial review before Master K Anderson, counsel representing the respondent made oral submissions aimed at regularising the filing and service of the Kitson affidavit. That attempt was unsuccessful as Master Anderson and counsel for the appellant both indicated that they had not yet seen the Kitson affidavit.

[7] On 30 March 2022 a formal application was filed by the respondent requesting an extension of time to file affidavit evidence, and that the Kitson affidavit filed and served out of time, stand as properly filed and served in time ('the application'). The appellant did not respond to the Kitson affidavit or file an affidavit in response to the application. The application was heard on 25 April 2022, a day before the trial was scheduled to commence by Wong Small J (Ag), who granted the application and also granted the appellant leave to appeal after hearing the submissions of counsel.

[8] On 26 April 2022 the claim came on for trial but was adjourned by K Anderson J for reasons wholly unconnected with the Kitson affidavit or the orders of Wong-Small J (Ag).

[9] The appellant filed a notice of appeal on 9 May 2022 which contained 18 grounds of appeal, particularised from a to r. I have not found it necessary to reproduce those grounds, which in my respectful view, can be accurately encapsulated in three issues the resolution of which will effectively determine the appeal. These can succinctly be stated as follows:

(i) Whether the learned judge erred in granting the extension of time for the filing of the Kitson affidavit;

(ii) whether the proper application by the respondent ought to have been an application for relief from sanction; and

(iii) whether the learned judge erred by not adjourning the date fixed for the commencement of the trial of the claim, it being the day

immediately following the date of the order granting the extension of time for the filing of the Kitson affidavit.

The submissions

[10] The appellant has submitted that because an application for relief from sanction was the proper course for the respondent to have adopted, the application for an extension of time was inappropriate. However, it was highlighted by the appellant that the Kitson affidavit was filed on 23 March 2022 and the application filed on 30 March 2022, represented a delay of approximately six months, which was, in the circumstances, inordinate.

[11] It was also submitted by the appellant that the reason for the delay was not a good one, since the delay arose because the respondent waited in excess of six years to do its due diligence and to obtain the information which is comprised in the Kitson affidavit.

[12] Additionally, it was advanced by the appellant that the degree of prejudice to her was obvious and irreparable given that the trial was set to commence the following day.

[13] In response, it was submitted by the respondent that the learned judge considered the delay in the application, but having regard to the explanation for the delay, she properly exercised her discretion to grant the extension. It was submitted that the reason for the delay, in essence, was that there were difficulties faced in obtaining relevant documents from the stamp office as a result of, among other things, inefficiencies arising due to the Covid-19 pandemic. It was further submitted that whereas the issue of prejudice was raised before Wong-Small J (Ag) by the appellant, when pressed by the learned judge to articulate the nature of the prejudice, counsel for the appellant was unable to do so.

Discussion and analysis

[14] This appeal must be considered in the context of the prescribed ambit within which this court must operate in conducting a review of the learned judge's decision. The test as laid down in the case of **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 has been followed in numerous decisions of this court, including **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where at para. [20] Morrison JA (as he then was) stated that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[15] It is appreciated that the learned judge below did not provide written reasons for her decision, nevertheless, it is open to this court to determine whether on an objective assessment, the decision, without reasons, demonstrates a proper exercise of the learned judge's discretion (see **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25, at para. [47]). The principal issue in this appeal is whether it was plainly wrong for the learned master to have granted an extension of time for the respondents to file the Kitson affidavit.

<u>The granting of an extension of time</u>

[16] In order to determine if the learned judge erred in exercising her discretion by extending the time for the respondent to file the Kitson affidavit, this court must look at the test to be applied in granting an extension of time to file documents in the courts. This test can be gleaned from the well-known and utilised case of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes**, (unreported), Court of Appeal, Jamaica Motion No 12/1999, judgment delivered 6 December 1999. That case dealt with the issue

of granting an extension of time to seek leave to appeal, however, the factors stated therein are applicable to an application to file a defence out of time (see **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4) and are also of general application to cases such as the one at bar, which involves the filing of an affidavit. Those factors are, the length of the delay, the reason for the delay, whether there is an arguable case; and the degree of prejudice to the other party if time is extended.

[17] The authorities have established that the court should have regard to the overriding principle of justice being done and the overall impact of a refusal or a grant of the application should be considered. Accordingly, each case will turn on its own peculiar facts and a rigid formula will not be applied to these considerations (see the observations of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** All England Official Transcripts (1997-2008) delivered 18 January 2000).

[18] The authorities also have established that the lack of a good reason and/or an undue delay before the filing of an application for an extension of time, does not necessarily lead to a refusal of an application for an extension of time.

The length of the delay

[19] The deadline for filing affidavit evidence was 30 September 2021 and the Kitson affidavit was filed on 23 April 2022. The application was filed on 30 March 2022. What may be considered an unreasonable delay will depend on the circumstances of each case. In this case, the length of the delay cannot be considered in a vacuum divorced from the reason for the delay. When those reasons are considered, (which will be done below), they place the length of the delay in context and has caused me to conclude that the delay was not inordinate.

The reason for the delay

[20] The reason for the failure to file the Kitson affidavit within the ordered deadline is addressed in the affidavit of Gordon Alexander McFarlane which was filed on 4 April 2022.

He explains that the main reason was that the transaction for the sale of the property was done in 1988. As a consequence of the age of this transaction, including the associated mortgage, Mrs Kitson who had conduct of the transaction on behalf of the vendor at that material time, needed complete copies of the instrument of transfer and the mortgage to ensure the accuracy of the assertions made in her affidavit. However, despite repeated searches between October 2020 and March 2022, at the Office of Titles and the law firm to which King's Counsel belongs, these documents could not be located initially.

[21] Mr Morgan averred that, whereas a copy of the incomplete instrument of transfer had already been exhibited to the defendant's affidavit filed on 9 October 2020, Mrs Kitson wished, by viewing a complete copy of the instrument of transfer, to confirm that she witnessed the appellant and her deceased's mother's signature contained therein. Additionally, Mrs Kitson was also desirous of obtaining a copy of the mortgage deed notwithstanding the fact that evidence of the mortgage was present on the certificate of title. Unfortunately, the Covid- 19 pandemic caused a delay in obtaining the documents because it affected the operations within the Office of Titles. Complete copies of these documents only became available to King's Counsel during the second week of March 2022 when they were located at the Office of Titles.

Whether there is an arguable case

[22] In the context of this appeal, this consideration is not prominent. The appellant did not contend that the respondent does not have an arguable defence. However, I am of the view that what is of importance is the relevance of the information contained in the Kitson affidavit.

[23] Mrs Kitson chronicles her involvement in the transaction for the sale of the property and her interaction with the appellant and her mother. They did not have counsel acting for them as purchasers. She identified the circumstances which led to her acting in a limited capacity for the appellant's mother only. This was in relation to the instructions by the appellant's mother for the preparation of a declaration of trust in respect of the

property, the effect of which was that the appellant declared that she held her interest on behalf of her mother. This declaration was subsequently executed by the appellant.

[24] One plank of the claim by the appellant, is that she was owed a duty by the firm to which Ms Kitson belonged at the time (the precursor to her current firm), to ensure that she obtained independent legal advice and that she be advised of the content and effect of the documents she was executing in 1988, especially the declaration of trust. The evidence in the Kitson affidavit relating to this point is therefore relevant and will be of assistance in the court's determination of this issue. Accordingly, this is a factor which could have weighed in favour of granting the application. Additionally, since the appellant's mother is now deceased, it appears that Mrs Kitson is the only surviving person who is in a position to speak to the circumstances surrounding the creation, and execution of the declaration of trust. For these reasons the interests of justice lean in favour of the admission of her evidence.

Was there prejudice to the appellant?

[25] The Kitson affidavit was filed five weeks prior to the date fixed for the trial of the claim. The issues which fell for the court's determination were already framed by the appellant. There was ample time and opportunity for the appellant to peruse it and to respond to any new matters which might have arisen therein. There was also sufficient time to make an application for an extension of time to file this evidence if the appellant deemed it to be necessary. She did not exercise that option. Mrs Kitson, as an affiant, was also required to attend the trial to be cross examined and her credibility could be tested in the usual course.

[26] The issues already having been framed and the points of dispute identified, the appellant has not demonstrated the prejudice which was faced by her as a consequence of the learned judge granting the application. In these circumstances, I do not see any merit in the written submissions of counsel for the appellant that the prejudice to the appellant was "blatantly obvious and irreparable*…".*

Should the learned judge have adjourned the trial?

[27] Consequent upon the order granting the application, if the appellant was of the view that the learned judge's order would prejudice her conduct of the trial, there was the option for the appellant to make an application to the learned judge for an adjournment of the trial, which was fixed for the following day. The appellant did not make such an application. In the absence of an application, it was not unreasonable for the learned judge to have refrained from making such an order of her own volition. In any event, the appellant also had the opportunity to make such an application before K Anderson J when the trial came on for hearing. Accordingly, there is no basis for the complaint that the learned judge should have ordered an adjournment of the trial. As things unfolded, there was an adjournment of the trial by the judge for his own reasons which enured to the appellant's benefit. Accordingly, such an application would have been academic. This adjournment has enured to the benefit of the appellant and undergirds my conclusion that there was no prejudice to the appellant by the extension of time.

[28] In the premises, having regard to all the factors and the overriding objective of dealing with cases justly, I have concluded that the learned judge did not improperly exercise her discretion in extending time for the filing of the affidavit evidence.

Whether the proper application was considered by the learned judge

[29] Counsel for the applicant has argued that an application for relief from sanction ought to have been filed by the respondent as would have been necessary in the case of a failure to file a witness statement. This court notes that the written submissions of counsel for both parties suggest that the orders of Lawrence-Grainger J, did not impose any sanction for failure to file an affidavit by the stipulated deadline. There was a provision for additional affidavit evidence, conditional upon the court's permission being obtained. The requisite application was made to obtain the court's permission for an extension of time; albeit after the deadline had passed. However, the Supreme Court of Jamaica Civil Procedure Rules (2002) ('CPR') permits such an application pursuant to rule 26(c) and the court granted the extension at the hearing of the application. Additionally,

the CPR does not prescribe a sanction for the failure to file affidavit evidence in time. For this reason, rule 26(c) would be the operative rule and not rules 26.7 and 26.8 as has been submitted by counsel for the appellant.

Conclusion

[30] In the premises, I have concluded that there is no basis upon which this court can find that the learned judge erred in the exercise of her discretion by extending the time for the filing of Mrs Kitson's affidavit evidence, and in not ordering an adjournment of the trial. Accordingly, I am of the opinion that there is no merit in the appeal.

BROOKS P

ORDER

1. The appeal is dismissed.
2. Costs to the respondent to be agreed or taxed.