[2015] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 177/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**MICHAEL JUNIOR BAILEY**	**APPLICANT**
AND	**JENNIFER RENA ROXANE BAILEY**	**RESPONDENT**

Canute Brown instructed by Courtney Betty for the applicant

The respondent is unrepresented

16, 17 and 27 March 2015

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my sister Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

McDONALD-BISHOP JA (Ag)

[2] I too have read the draft reasons of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion. I have nothing useful to add.

SINCLAIR-HAYNES JA (AG)

[3] This is an application by Michael Bailey for permission to appeal against an order of Master Bertram Linton (Ag) of 12 December 2013, refusing him leave to substitute for personal service of a petition for divorce on the respondent, service by way of notice of proceedings by advertisement or otherwise as provided by the Civil Procedure Rules (CPR). The application was brought before her on the following grounds:

> "That the Respondent resides in Jamaica but her whereabouts are not known to the applicant.
>
> That it is likely that these proceedings will be brought to the attention of the Defendant if service is effected by publication of the proceedings in the Daily Gleaner Newspaper."

[4] Not only did she refuse the application, she also stated that leave to appeal was of right and therefore declined to exercise her jurisdiction to grant leave to appeal. We heard the application for leave to appeal on 17 March 2015 and gave our decision as follows:

> "(1) The application for permission to appeal dated 23 December 2013 is granted;
>
> (2) The hearing of the application is treated as the hearing of the appeal;
>
> (3) The appeal is allowed.
>
> (4) The order of the learned master made on the 10th December 2013 is set aside; and
>
> (4) Permission is granted to the appellant to substitute for personal service his Petition for Dissolution of Marriage presented to the Supreme Court on 17 June

> 2013 by service of Notice of the Petition by advertisement in a newspaper in circulation in Jamaica in a form and manner settled or approved by the Registrar's input."

The applicant will hereafter be referred to as appellant. We promised to put our reasons in writing. This is a fulfillment of that promise.

The evidence before the learned master

[5] The appellant's application was supported by an affidavit of 17 June 2013 in which he averred that the respondent removed herself and her belongings from their matrimonial home in St Ann in or about 15 March 2004. He has not heard from or seen her since. His several attempts to contact her through relatives and friends have proven futile and he now desires to move on with his life. He deponed that he was confident that notice of the proceedings would come to her attention because whilst they cohabited she was a regular reader of the Daily Gleaner Newspaper.

[6] The learned master was dissatisfied with the method of service sought and required the appellant to contact the respondent's relatives. Mr Courtney Betty, the appellant's attorney-at-law, has deponed that on 4 October 2013, the matter was adjourned to 12 December 2013 for the appellant to contact the respondent's relative. Consequently, the appellant provided the learned master with another affidavit. The affiant was Ms Jadeane Clarke who deponed to knowing the respondent in excess of 20 years.

[7] She stated that she had not seen the respondent for about five years. It was her evidence that on 30 October 2013, at about 9:30 am she visited Mrs Jolin, the respondent's mother, at her home in St Michael's District in St Ann's Bay. She told her that she wished to contact the respondent. Mrs Jolin told her "Miss I couldn't tell you that you know". She inquired of her whether the respondent was in Jamaica. She told her that she did not really know that. She informed Mrs Jolin that she had a divorce petition to deliver whereupon Mrs Jolin told her "I don't know anything about dem sitten deh".

[8] Mr Betty also provided a further affidavit in which he too stated that at the time of the filing of the petition, the respondent's whereabouts were unknown to the appellant. Both he and the appellant have made unsuccessful enquires as to the respondent's whereabouts as indicated above [paragraph 3].

The evidence on appeal

[9] Mr Betty, in an affidavit dated 23 December 2013, in support of the application for leave to appeal, deponed that on 12 December 2013, the learned master stated that the appellant's application should be amended for service to be effected on the respondent's mother. She also required a further affidavit. It is Mr Betty's evidence that he reminded the learned master that rule 76.8 allows for service to be effected by way of advertisement in the newspaper. The master nevertheless refused his application.

[10] Ms Judith Meeks, a clerk employed to Mr Betty deponed on 3 June 2014 that on 8 April 2014, she posted the notice of application for court orders and Mr Betty's affidavit in support of the said application to Mrs Jennifer Bailey. She exhibited the certificate of posting. It was her evidence that the said letter has not returned from the post office as unclaimed. On 10 June 2014, Ms Meeks deponed in a further affidavit that the said letter was in fact returned from the post office marked unclaimed. She exhibited the letter and envelope. A notice of hearing of the application was also sent to the respondent by the registrar of this court, which has not been returned as unclaimed. The respondent was however not present nor was she represented.

Grounds on which leave to appeal was sought

[11] In his application for leave to appeal, the appellant complained that the learned Master erred in refusing to exercise her discretion to grant permission to appeal on the basis that it was unnecessary. He relied on section 11 of the Judicature (Appellate Jurisdiction) Act. He also contended that he had a real prospect of succeeding on appeal. Consequent on the application being treated as the hearing of the appeal, the appellant argued the following grounds of appeal in which the following findings of fact and law are challenged:

> "a. That the evidence adduced in support of the Application was "insufficient" to enable the Court to permit the Applicant to effect service of the Petition by advertisement.
>
> b. That the proposed method of service is not likely to cause the Petition to come to the attention of the person to be

served, namely the Respondent or that the proposed method is not likely to bring the existence and nature of the proceedings to the attention of the Respondent."

3. The grounds of appeal are:

"a. The learned Master erred in law in finding that the evidence adduced in support of the Application was insufficient by failing to consider or attach any weight to the evidence :-

I. That the appellant and Respondent briefly cohabited following the marriage before she deserted the appellant and that he has not seen her or know of her whereabouts for upwards of seven years prior to the presentation of the Petition.

II. The appellant along with his attorney at law had made efforts to locate her and that a visit to the Respondent's mother by a third party did not yield any information as to her whereabouts to enable personal service to be effected or to substitute personal service by leaving the Petition with the Respondent's relative.

III. The fact that the parties union did not produce any children and that there is no property belonging to them or either of them that would compel contact between them as spouses.

c. The Learned Master erred in law in failing to apply the correct principles relevant to the

application, in that she focused on that part of the Civil Procedure Rules (Part 5.14(2) (b)) which is of general application, instead of Part 76.8(30) which makes specific provision for service by advertisement as a method of substituted service. The latter provision prevails, *leges posteriors priores contrarias abrogant*.

d. The Learned Master failed to consider the overriding objective enshrined in the Civil Procedure Rules, in particular that the Court is enjoined to deal with a case justly. Factors that she should have considered are, *inter alia*, the nature of the proceedings, the status rights and obligations of parties to a marriage, the consequences of her refusal of the application when it is demonstrated there is no other practicable means of effecting service of the Petition and that the Court will not assume jurisdiction to decree dissolution unless satisfied that the Petition has been served. The result of that failure is the effective denial of the Appellant's right to a fair hearing and a just determination of his Cause.

4. Orders sought:

"a. That the court allows this appeal and sets aside the order of the learned master

b. The Appellant humbly praise [sic] that the court is asked to exercise the power to make an order which, in its opinion, ought to have been made by the Supreme Court.

That the Court Orders that permission be granted to the Appellant to substitute for personal service his Petition for Dissolution of Marriage presented to the Supreme Court on the 17th of June 2013, by service of Notice of the Petition by advertisement in a newspaper in circulation in Jamaica, in a form and

manner settled or approved by the Registrar of the Supreme Court."

[12] Section 11 of the Judicature (Appellate) Jurisdiction Act expressly provides that leave is required either from the judge or the Court of Appeal.

Section 11(1)(f) reads:

> "No appeal shall lie-
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except-
>
> (i) where the liberty of the subject or the custody of infants is concerned;
>
> (ii) where an injunction or the appointment of a receiver is granted or refused
>
> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
>
> (iv) in the case of an order on a special case stated under the Arbitration Act;
>
> (v) in the case of a decision determining the claim of any creditor or the liability of any contributory, or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise;
>
> (vi) in such other cases, to be prescribed, as are in the opinion of the authority having power to make rules of court of the nature of final decisions."

[13] This case does not fall within any of the above stated exceptions. The learned master had the requisite authority to grant the application for leave to appeal. Section 11(2) states:

> " 'Judge' means Judge of the Supreme Court."

By virtue of section 8(1) of the Judicature (Supreme Court) Act, a master of the Supreme Court is conferred with the authority of a judge sitting in Chambers.

[14] This matter is an interlocutory one. Section 1.1(8) of the Court of Appeal Rules, 2002 "CAR" clearly provides:

> "1.1- (8) In these Rules –
>
> …
>
> '**court below'** means the court or tribunal from which the appeal is brought and includes, in the case of the Supreme Court, a master;
>
> …
>
> '**procedural appeal**' means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes-
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings:
>
> (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;"

Additionally rule 1.8 of the CAR makes it a pre-requisite to the filing of a notice of appeal from an interlocutory order, that the appellant must first seek permission of the court below and if not granted, apply to the court for the same.

[15] The learned master therefore erred in concluding that the appeal was as of right and that there was no need for her to exercise her discretion. The appellant filed the application to this court for permission to appeal within 14 days of the order being appealed against as required by the CAR.

Was the evidence insufficient?

[16] This court is of the view that ample evidence was adduced before the learned master that the respondent's whereabouts were unknown. The appellant's evidence is that he has not seen her in excess of seven years. Her mother was unhelpful in providing any information as to the respondent's whereabouts. Notice of the petition was duly posted and returned unclaimed.

[17] The appellant's evidence is that while they cohabited she was a regular reader of the Gleaner newspaper. Section 76.8 (2)(d) and (3)(a)(b) and (c) provides:

> "(2) An application for permission to substitute another form of service for personal service must be accompanied by an affidavit setting out:
>
> …
>
> (d) the reasons for believing that the proposed method of service is likely to cause the document to come to the attention of the person to be served;

(3) On an application for permission to substitute another form of service for personal service within the jurisdiction the Court may permit the applicant to effect service by:

(a) delivering the document to be served to a relative or other person connected to the party to be served, if satisfied that the document is reasonably likely to come to the attention of the party to be served;

(b) advertisement; or

(c) such other method as to the court is likely to bring the existence and nature of the proceedings to the attention of the party to be served."

[18] It is my view that in the circumstances, it is likely that publication in the said newspaper is reasonably likely to come to the attention of the respondent. Even if the respondent does not herself see the advertisement it is likely that her attention might be drawn to it by other readers.

[19] I am not satisfied that the respondent's mother is likely or is in a position to bring to the respondent's attention the documents, if service is effected on her as the learned master ordered. On Ms Clarke's evidence, her mother was utterly unhelpful in her responses. In fact, she told Miss Clarke that she did not know if the respondent was in Jamaica. As a consequence, the learned master ought to have ordered that service on the respondent could properly be effected by advertisement in the Gleaner.

[20] It should be pointed out that in acceding to counsel's request to treat the application for leave to appeal as the hearing of the appeal, this court considered the peculiar facts of this case. On the appellant evidence, the respondent had left the matrimonial home in excess of seven years; there is no issue as to property and there are no children involved. To encumber the court list with such a matter is not in keeping with the overriding objective of the court which is to deal with matters justly. In dealing with matters justly, rule 1.1 (2) of the CPR considers: the saving of expense; the dealing of matters expeditiously; and the allocation to each case an appropriate share of the court's resources in light of the demands of other cases.

[21] In the peculiar circumstances of this case, we made the orders as set out in paragraph [4].