[2016] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 20/2016

BETWEEN	**HEATHER RODNEY & ERTHA SCOTT**	**APPLICANTS**
AND	**AUDREY DAWN PRINGLE (also known as TIFFANY SCOTT) & RUSSELL EMERSON REID**	**RESPONDENTS**

Cecil J Mitchell instructed by Cecil J Mitchell & Co for the applicants

Stuart Stimpson instructed by Hart Muirhead Fatta for the respondents

15 and 29 March 2016

IN CHAMBERS

MORRISON P

[1] This is an application for a stay of execution pending an appeal against a judgment of His Honour Mr Charles Pennycooke, given in the Resident Magistrate's Court for the Corporate Area holden at Sutton Street on 13 October 2015. The learned Resident Magistrate ordered that the applicants should vacate property known as 165 Constant Spring Road, Kingston 8, in the parish of Saint Andrew, registered at Volume 1265 Folio 913 of the Register Book of Titles ('the property'), no later than 31 January 2016.

[2] By notice of appeal filed on 26 October 2015, the applicants sought to appeal against the judgment and, on 26 January 2016, they also filed an application for stay of execution of the judgment until the hearing of the appeal. On 29 January 2016, having considered the application on paper, I made an order staying execution of the judgment until 4 February 2016, and that date was fixed for an *inter partes* hearing of the application for a stay. By and with the consent of the parties, the order granting a stay was subsequently extended more than once, the last such order having been made on 15 March 2016, when the application for a stay until the hearing of the appeal was finally heard. On that date, I reserved my decision to 24 March 2016 and on that date the matter was further adjourned to 29 March 2016.

[3] The matter arises in the following way.[1] The respondents were registered as proprietors of the property on 28 June 2005. The property was transferred to them by way of gift from their late father, Mr Stanley Reid. The applicants occupy a small house on the property and claim to have done so since 1989, when they were given permission to so occupy it by the late Mr Reid and Mrs Gloria Reid. The applicants say that, in reliance on a promise made to them during his lifetime by the late Mr Reid that the house would ultimately be theirs, and with the full knowledge and consent of the late Mr Reid, they spent money repairing and improving it over several years. They also say that they took care of the late Mr Reid after he fell ill and up to the time of his death. For some time after Mr Reid's death, the applicants say, they remained in

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[1] The above summary of the facts is based on the uncontradicted affidavit evidence filed in support of the application for a stay by Mr Cecil J Mitchell and Ms Heather Rodney on 26 January 2016.

undisturbed occupation of the house. But in 2015 the respondents gave them notice requiring them to vacate the house and, on 28 July 2015, commenced action against them for recovery of possession. In their particulars of claim, the respondents sought an order pursuant to section 89 of the Judicature (Resident Magistrates) Act (the Act).

[4] The respondents' claim was mentioned in the Sutton Street Resident Magistrate's Court on 21 August 2015. Although the applicants were actually present at court that day, it appears that, due to the press of the crowd, they did not hear when their names were called. As a result, the matter was set for default judgment to be taken on 13 October 2015. But, in the interim, the applicants retained Mr C J Mitchell, attorney-at-law, to represent them and, on 12 October 2015, Mr Mitchell duly caused a defence to be filed on their behalf. The defence was to the same general effect as the summary of the facts which I have given in paragraph [3] above. In those premises, the applicants assert that the respondents are estopped from requiring them to vacate the property.

[5] On 13 October 2015, the applicants, accompanied by Mr Mitchell, duly appeared before the learned Resident Magistrate at the Sutton Street Resident Magistrate's Court. Having drawn the court's attention to the defence which he had filed on the applicants' behalf, Mr Mitchell "applied to the Resident Magistrate that the matter should be set for trial". Mr Mitchell also stated[2] that, "Mr Stuart L. Stimpson the Attorney-at-Law who appeared for the [respondents] told the Court that even though the Defence had not yet been served on him he was quite prepared to have the case tried then and there".

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[2] See Mr Mitchell's affidavit, at paras 5 and 6

However, the learned Resident Magistrate declined either to accede to Mr Mitchell's application or to adopt the course proposed by Mr Stimpson. Instead, dealing with the matter summarily, without hearing any evidence, the learned Resident Magistrate concluded that there were no triable issues and ordered that the applicants vacate the property no later than 31 January 2016[3].

[6] The grounds of appeal filed on behalf of the applicants are as follows:

> "1. That the Learned Resident Magistrate erred in failing to take into account or at all the Defence filed by the Defendants/Appellants in answer to the claim brought against them.
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> 2. That the Learned Resident [sic] erred when he failed to consider the Defence filed herein by the Defendants/Appellants.
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> 3. That the Learned Resident Magistrate erred when he pronounced time and time again during the exchanges in Court between himself and the Attorney-a-Law [sic] for the Defendants/Appellants that only a written document could ever create an interest in land.
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> 4. That the Learned Resident Magistrate erred when in the exchange between himself and the Attorney-at-Law for the Defendants/appellants he pronounced that no equitable interest could arise in favour of the Defendants/Appellants although no hearing was held and the Defence filed by the Defendants/Appellants was not considered nor taken into account.
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> 5. That the Learned Resident Magistrate erred when he failed to cause the issues raised to be dealt with by way of trial and refused to have the matter set for a trial date.

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[3] See the Resident Magistrate's reasons for judgment.

6. That the Learned Resident Magistrate peremptorily and arbitrarily decided the issues raised in the case before him without hearing any evidence.

7. That the Learned Resident Magistrate erred when he declared that the mere presentation of the Registered Title ousted all other claims, equitable or otherwise.

8. That the Learned Resident Magistrate erred when he pronounced during the exchanges between himself and the Attorney-at-Law for the Defendants/appellants that neither proprietary nor promissory estoppel could arise in the case before him."

[7] In his submissions in support of the application for a stay pending appeal, Mr Mitchell's principal complaints were that the learned Resident Magistrate, rather than dealing with the matter summarily, ought at least to have heard some evidence to determine (i) the facts upon which the applicants' estoppel defence was based; and (ii) whether the applicants had acquired any interest in the property by which the respondents were bound.

[8] For the respondents, Mr Stimpson reminded me of the principles governing the exercise of the power given by the rules[4] to a single judge of this court to order a stay pending appeal; *viz*, that the applicant must show that "(i) the appeal has a real prospect of success and (ii) there is a minimal risk of injustice to one or both parties recovering or enforcing the judgment"[5]. Mr Stimpson also pointed out that the learned Resident Magistrate had the applicants' defence before him and was therefore fully

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[4] Court of Appeal Rules 2002, rule 2.11(1)(b)
[5] Per Phillips JA in **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44, para. [60].

entitled on the basis of it to make a determination that the defence had no real prospect of success. Mr Stimpson directed me to sections 89 and 187 of the Act, the one to demonstrate that, in an action against a person in possession of lands belonging to another without any right or title to possession, the court is empowered to make the order sought on proof of the plaintiff's title; and the other to make the point that, when a defendant appears at the hearing and admits the claim, the court may enter up judgment. Mr Stimpson accordingly submitted that there is an implied power in a Resident Magistrate to grant the equivalent of summary judgment in an appropriate case.

[9] Despite the force of Mr Stimpson's admirable submissions, I have come to the conclusion that this is a case in which I should exercise my discretion in favour of the grant of a stay. I accept that the evidence foreshadowed by the applicants in support of their estoppel claim may be scanty indeed. However, what the learned Resident Magistrate did (in an area of the law that is more often than not fact-sensitive) was to foreclose the applicants' case entirely without even hearing the evidence intended to be called on their behalf. In doing so, it seems to me that it may be strongly arguable that – albeit with the best of intentions – the learned Resident Magistrate did not afford the applicants the fair hearing of their dispute to which the Constitution entitles them.

[10] I therefore consider that the applicants do have an appeal with a real, as distinct from a fanciful, prospect of success and that the application has therefore met the required threshold for the grant of a stay. Given that the applicants have been in

occupation of the house on the property for a period in excesss of 25 years, it seems to me further that, on balance, to require them to vacate it before their appeal can be considered by this court, will expose them to a greater level of injustice than would be caused to the respondents by maintaining the status quo pending appeal.

[11] Accordingly, there will be a stay of execution of the order of the learned Resident Magistrate made on 13 October 2015, pending the hearing of this appeal. The costs of this application will be costs in the appeal and I will direct that the appeal is to be heard as a matter of urgency.