[2015] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 171/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

BETWEEN	**THE ADMINISTRATOR-GENERAL FOR JAMAICA**	**APPLICANT**
AND	**GLEN MUIR**	**RESPONDENT**

Miss Jacqueline Wilcott, Christopher Henry and Miss Marian Wallace for the applicant

Raphael Codlin and Miss Annishka Biggs instructed by Raphael Codlin & Co for the respondent

2 and 6 February 2015

PANTON P

[1] This is an application for permission to appeal. Its success depends on whether the court is of the view that an appeal will have a real chance of success: rule 1.8(9) of the Court of Appeal Rules.

[2] In the instant matter, a claim for specific performance of an agreement for sale of a parcel of land in Saint Elizabeth was filed in the Supreme Court on 17 January

2013. It was served on the following day on the wife of Mr Lumsden Ledgister, a private land developer who was the defendant in the suit. Mr Ledgister died on 3 February 2013 – that is, two days after the time limited for the filing of a defence.

[3] No defence has been filed. Neither has a default judgment been entered. However, more than a year later, on 12 May 2014, the respondent herein obtained an ex parte order from Morrison J declaring that he, the respondent, was the owner of the lot in question, and ordering that the applicant herein be served with the documents in the suit so as to facilitate the completion of the sale transaction. The learned judge made the order for the involvement of the applicant in the sale transaction subject to the applicant's right to apply to the court for her fee to be paid from Mr Ledgister's estate. Morrison J also ordered that the title registered in Mr Ledgister's name be cancelled, and a new one issued in the respondent's name.

[4] The applicant, having been duly served, went before Morrison J on 26 September 2014 seeking a variation or setting aside of his order. The learned judge would have none of it. Instead, he appointed the applicant "pursuant to Part 21.7 of the Civil Procedure Rules to apply for Letters of Administration in Estate Lumsden Ledgister, Deceased". He denied an application for leave to appeal – hence the present proceedings. We have not had the benefit of a note of any reasons the learned judge may have given for his decisions.

Submissions

[5] Miss Jacqueline Wilcott for the applicant views the orders of 12 May and 26 September 2014 as irregular, and wishes to be granted leave to appeal against them. She contends that the proceedings on 12 May 2014 were not "ex parte" as it was known that Mr Ledgister had died. An application, she submitted, ought to have been made for a representative party to be substituted. There not having been a proper party before Morrison J, the proceedings were void, she said. The subsequent order appointing the Administrator-General does not, she submitted, cure the defect.

[6] Mr Raphael Codlin, for the respondent argued that section 12 of the Administrator-General Act provides for the appointment of the Administrator-General where no relative of an intestate person has applied for administration. He submitted that it is the duty of the Administrator-General, and it should not be shirked. Consequently, he said, the orders of the learned judge should be interpreted as having been made in fulfillment of the law. He urged us to regard the order appointing the Administrator-General as validly made, and suggested that the other orders may be ignored.

Decision

[7] Where a claim form and particulars have been served, the next step is for the person served to file an acknowledgment of service and then a defence. If a defendant fails to do either, the claimant may then request that a default judgment be entered: rule 12.1 of the Civil Procedure Rules (CPR). That was not done in the instant case. Instead, the respondent applied for judgment to be entered on an ex parte basis long

after the respondent had become aware of the death of the defendant. Such a procedure seems flawed. A matter may not be adjudicated on in that manner. If a party dies while proceedings are in train, a substitute party has to be appointed to enable continued conduct of the matter. Rule 21.8 of the CPR provides thus:

> "(1) Where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.
>
> (2) An order under this rule may be made on or without an application."

Rule 21.7 makes specific provisions that where it appears that a deceased person was interested in civil proceedings, if the deceased has no personal representatives, the court may appoint someone for the purpose of the proceedings: rule 21.7(1). Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under the rule: rule 21.7(4).

[8] On the basis of these provisions of the CPR, it seems that the applicant has a real chance of success on appeal. As a result, I would grant the application as prayed in paragraph 5(a) of the notice of application for permission to appeal dated 2 October 2014 and order that costs of the application be costs in the appeal.

DUKHARAN JA

[9] I have read in draft the judgments of the learned President and my sister Sinclair-Haynes JA (Ag) and agree that the application should be granted as prayed in paragraph 5(a) of the notice of application for permission to appeal dated 2 October 2014 and that costs of the application should be costs in the appeal.

SINCLAIR-HAYNES JA (Ag)

[10] This is an application by the Administrator-General of Jamaica for leave to appeal the orders of Morrison J made on 12 May 2014 and 26 September 2014. The applicant also seeks leave to appeal the judge's denial of their oral application for leave to appeal against the said orders.

Background to the application

[11] On 17 January 2013, Mr Glen Muir (the respondent) instituted proceedings against Mr Lumsden Ledgister. He sought, among other things, the following reliefs: specific performance; transfer of property and damages for breach of agreement. This claim was served on Mr Ledgister's wife on 18 January 2013 in the radiology department of the [Hargreaves] Memorial Hospital whilst Mr Ledgister lay on a stretcher.

[12] The respondent claimed that he entered into an agreement with Mr Ledgister who was a private developer, to purchase land situated in the parish of Saint Elizabeth. According to him, he has performed his obligations under the contract by paying the

total purchase price and his half of the transfer costs. He said it was a term of the agreement that the land would be registered land.

[13] It is his evidence that he was put into possession in 2012 and he constructed a dwelling house on the property. Mr Ledgister has however failed to provide him with a registered title despite his repeated requests.

Consequently, on 12 May 2014, the respondent obtained the following orders:

> "1. That [sic] Glen Muir is the owner of all that parcel of land called Look Out, part of Friendship in the parish of Saint Elizabeth being the Lot numbered 29 on the plan deposited in the Office of Titles on the 15th day of May 2000 and being the land comprised in Certificate of Title registered at Volume 1330 Folio 727 of the Register Book of Titles.
>
> 2. That the Administrator-General of Jamaica be served with all documents in Suit No. 2013 HCV 00295, Muir v. Ledgister, and that sale be completed by the said Administrator General subject to this right to apply to the Court and that his fee be paid from the estate of the deceased, Lumsden Ledgister.
>
> 3. That the Registrar of Titles cancel the title registered at Volume 1330 Folio 727 and issue a new title for the said premises in the name of the Claimant Glen Muir.
>
> 4. Cost [sic] and Attorneys cost to the Claimant…"

[14] In his affidavit in support of his application, he explained the manner in which payment was made and exhibited his receipts. He however deponed that important documents including the signed agreement for sale were left at Mr Ledgister's office

because he had carriage of sale. Mr Ledgister is now deceased and cannot therefore transfer the property. Since Mr Ledgister's demise, he has also made several futile attempts to ascertain from a Ms Batchelor as to who is the administrator of his estate.

[15] Being aggrieved by the orders of Morrison J, the applicant applied to set aside and/or vary the learned judge's orders. This application was supported by an affidavit of the Administrator-General, Mrs Lona Brown.

[16] It is unclear why the application was made to the Supreme Court instead of a vesting application directed to the Registrar of Titles pursuant to section 155 of the Registration of Titles Act. Not only has the respondent evidence in writing of the sale, but he was also put in possession of the land. It would seem that the requirements of that section are satisfied. He has however chosen to invoke the jurisdiction of the Supreme Court and must comply with the procedural framework.

Applicant's complaints

[17] The Administrator-General complained that the orders were made in the absence of her department. The documents in the matter including the pleadings, applications, affidavits and Mr Ledgister's death certificate were only served on her department on 5 May 2014. The order in which Morrison J directed the department to deal with the property was also made without notifying the department of service or any other party. Her application to set aside the judge's order was pursuant to rule 11.16(1) and (3) of the Civil Procedure Rules (CPR) which states:

> "11.16 (1) A respondent to whom notice of an application was not given may apply to the court for any

order made on the application to be set aside or varied and for the application to be dealt with again.

(2) …

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."

[18] The applicants had not been served with any evidence indicating that a default judgment was entered (for failure to file an acknowledgement of service). She contended that there was no trial of the substantive claim. Further she has not been served with an application for a personal representative to be appointed in the estate of Mr Ledgister who died three weeks after the claim was filed. There was no evidence of an application for substitution of the deceased (Mr Ledgister). His wife was alive at the time. Mr Dalton Giles, the respondent's process server, averred in his affidavit of service that at the time Mr Ledgister was served, Mrs Ledgister was present. Mrs Brown depones that Mrs Ledgister was a fit and proper person to continue the matter. She groused that the respondent has not complied with rule 12.4 of the CPR.

[19] Additionally, no agreement for sale had been exhibited and no proper reason had been given for the lack thereof. There was also no application to the court for the receipts to stand as the memorandum of sale pursuant to the Statute of Frauds. In the absence of fraud, cancellation of the title was not required.

Mr Codlin's submissions on behalf of the respondent

[20] Mr Raphael Codlin argued that sufficient evidence was presented to the judge on which he properly acted. Mr Ledgister had died almost two years prior to the application. Four years have elapsed since the sale and the respondent is unable get his title. There was sufficient evidence before the learned judge to make the orders he made. He was provided with Mr Ledgister's death certificate. The receipts and a memorandum of sale were exhibited. He said no one has come forward to challenge the authenticity of his claim.

[21] He submitted that the Administrator-General is under a duty to apply for letters of administration in circumstances where no one has applied within the time specified. The administrator should have acted one year and nine months ago. He said that the office of the Administrator-General is under the supervision of the Supreme Court. The court therefore has the power to order the Administrator-General to act. He relied on sections 12 and 23 of the Administrator General's Act.

[22] It was his further submission that it was the clerk of court's duty to inform the Administrator-General's Department of the death of Mr Ledgister. Mr Codlin submitted that the applicant's appeal has no real prospect of success.

Ruling

[23] Rule 1.8 (9) of the Court of Appeal Rules, 2002 states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[24] An examination of the applicant's grounds of appeal provides the answer.

The grounds of appeal

"a. That the learned Judge erred in law by proceeding to hear a claim against a deceased Defendant, where no personal representative was previously appointed and/or no Grant of Administration issued in the Deceased Defendant's Estate.

b. That the learned Judge erred in law by proceeding on an action in personam where there existed no person in law, natural or artificial, against whom the claim could proceed and against whom and order could be made.

c. That the learned Judge erred in law in hearing the Claim without the Claimant first making a preliminary application for a representative party to stand in the place of the Deceased Defendant.

d. That the learned Judge erred in law in directing the Administrator-General for Jamaica to complete a sale, declared to exist on an irregular order.

e. That the learned Judge erred in law in finding that the subsequent granting of an Order pursuant to Part 21.7 of the Civil Procedure Rule for the Administrator-General for Jamaica to apply for Letters of Administration in Estate Lumsden Ledgister, Deceased, could cure the defect of the previous Order issued on the 12th day of May 2014.

f. That the learned Judge erred in law in denying the application of the Administrator-General for Jamaica to have the Order issued on the 12th day of May, 2014 set aside."

The law

[25] Mr Ledgister is dead. It is settled law that a claim cannot be brought against the dead. The action therefore lies against his estate. In the absence of a representative, the respondent ought to have applied to the court to have one appointed. Rule 21.7 of the CPR provides:

> "Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
>
> (2) A person may be appointed as a representative if that person –
>
> (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and
>
> (b) has no interest adverse to that of the estate of the deceased person.
>
> (3) ….
>
> (4) Until the court has appointed someone to represent the deceased person's estate, <u>the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule."</u>
>
> *(Emphasis mine)*

[26] The words of Arden LJ in **Piggott v Aulton** [2003] EWCA Civ 24 eloquently explains the law with respect to a deceased estate without representation:

> "The natural personality of the deceased came to an end on his death. His legal persona, that is the right to take

> possession of his property and the obligation to discharge his liabilities, could have passed to his personal representatives, as between whom and the deceased there would have been an identity of persona. But the deceased in this case had no personal representatives. Accordingly, the first action was brought against a person without legal personality."

The proper application should have been for the appointment of a representative.

[27] Section 12 of the Administrator-General's Act states:

> "12. The Administrator-General shall be entitled to, and it shall be his duty to apply for, letters of administration to the estates of all persons who shall die intestate without leaving a widower, widow, brother, sister, or any lineal ancestor or descendant, or leaving any such relative if no such relative shall take out letters of administration within three months, or within such longer or shorter time as the Court to which application for administration is made, or the Judge thereof may direct; and also to the estates of all persons who shall die leaving a will but leaving no executor, or no executor who will act, if no such relative as aforesaid of such deceased shall, within the time aforesaid, take out letters of administration to his estate. The Administrator-General shall be entitled to such letters of administration in all cases in which, if this Act had not been passed, letters of administration to the estates of such persons might have been granted to any administrator:
>
> > Provided that this section shall not apply to the estates of deceased persons for the administration of whose estates provision is made by law, nor to estates where the total value of the personal property does not exceed five thousand dollars, but it shall be lawful to appoint the Administrator-General, with his consent, administrator of any estate, not-withstanding that the total value of the personal property does not exceed five thousand dollars."

Section 23 provides:

> "23. Whenever it appears to the Supreme Court that there is good ground to believe that the Administrator-General is, or is likely to become, entitled to the administration of any estate, and that the property of such estate is likely to be damaged or diminished for want of a proper person to take charge thereof, before letters of administration or letters testamentary can be taken out, or while it is doubtful who will apply for and obtain letters of administration or letters of testamentary, it shall be lawful for the Supreme Court to authorize the Administrator-General to take possession of such property for such time, in such manner, and subject to such conditions, if any, as the Court may direct. The Administrator-General shall hold and deal with such property as may be directed by the Court from time to time until letters of administration or letters testamentary have been granted. The Administrator-General shall not be entitled to any commission in respect of such property unless he ultimately obtains the administration thereof, but he shall be entitled to be repaid out of such property all costs and expenses to which he may be put in respect thereof, and for applying to the Court if the Court thinks fit."

[28] Undoubtedly the Act imposes upon the Administrator-General the duty to act in the absence of an appointed legal representative of a deceased. It is manifest that an important consideration of the legislators for the inclusion of sections 12 and 23 is the recognition that a deceased's identity disappears at his death and so too his ability to commence or continue actions and deal with matters of importance and urgency.

[29] The Administrator-General ought to have been informed of the death of Mr Ledgister before the learned judge made the orders. Evidently, the proverbial horse was placed before the cart. Moreover, no acknowledgment of service was filed. The respondent has ignored rule 12.1 of the CPR which required an application for the

default judgment to be made where a defendant has failed to file an acknowledgment of service. In light of the foregoing, it seems that the applicant has a real chance of success on appeal.

[30] In the circumstances, the application ought to be granted as prayed in paragraph 5(a) of the notice of application for permission to appeal dated 2 October 2014. Costs of the application to be costs in the appeal.

PANTON P

ORDER

Application granted as prayed in paragraph 5(a) of the notice of application for permission to appeal dated 2 October 2014. Costs of the application to be costs in the appeal.