

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 27 & 28 OF 2007

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

BETWEEN AMAUTO LIMITED

AND JAMAICAN REDEVELOPMENT FOUNDATION INC. RESPONDENT

Christopher Dunkley and Miss Daicia Welds instructed by Phillipson Partners for the appellant.

Mrs. Sandra Minott-Phillips and Emile Leiba instructed by Myers, Fletcher and Gordon for the respondent.

23rd, 26th September and 21st November, 2008

PANTON, P.

1. I have read the reasons for judgment written by Dukharan, J.A. and agree therewith, as well as with the order proposed. I have nothing to add.

HARRISON, J.A.

1. I agree with the reasons for judgment written by Dukharan, J.A. and have nothing further to add.

DUKHARAN, J.A.:

1. The appellant filed a Fixed Date Claim Form on the 19th of February, 2007 setting out several complaints against the respondent which included allegations of irregularity in respect of the mortgages upon which the respondent sought to rely in the exercise of its purported powers.
2. The appellant applied ex parte on the 20th February, 2007 before Marva McIntosh, J. and was granted an injunction for ten (10) days restraining the respondent whether by itself or its agents or servants from selling or offering for sale the appellant's property at 6A Norbrook Drive, Kingston 8, St. Andrew by public auction or private treaty.
3. At the inter partes hearing on the 1st of March, 2007 before Sykes, J. the appellant applied for an extension of the said injunction. However, Sykes, J. refused the application and discharged the injunction.
4. The appellant subsequently amended its Fixed Date Claim Form to include the request for an accounting. A renewed application before Morrison, J. (Ag.) for an injunction which included affidavits of Mr. David Wong Ken and Mr. Audley Harrisingh was refused.

5. On the 15th of March, 2007 Notice and Grounds of Appeal were filed. Subsequent to the filing of Notice and Grounds the property in question was sold with the net proceeds of sale in the hands of the respondent.

6. On the 17th of June, 2008 the appellant made an application before a single Judge of Appeal for an injunction restraining the respondent from dissipating the proceeds of sale pending the appeal. After hearing arguments the following orders were made:

“1. An injunction is hereby granted to prevent the respondent from dissipating the net Proceeds of Sale under Agreement for Sale dated 31st of January 2008 for a Purchase Price of US\$400,000.00 in respect of property registered at Volume 959 Folio 296 of the Register Book of Titles until the hearing of the appeal.

2. Costs to be costs in the Appeal”.

7. The main issue before this court is whether the application for injunction was properly refused in the court below, and if this court finds otherwise, what are the appropriate orders which may be made based on what is before us.

8. Mr. Dunkley for the appellant submitted that the transfer that gave the power of sale to the respondent as mortgagee was invalid because it had been done fraudulently. His basis for alleging fraud was that no authorization had been given to those who had effected the transfer. Mr. Wong Ken in his affidavit stated that the individuals who had signed as secretary and director on one of the instruments of transfer had not been validly appointed and accordingly had no authority to act on behalf of the mortgagee.

9. Mr. Leiba in response submitted that section 71 of the Registration of Titles Act is a bar to looking behind the transfer of a mortgage, save in the instance of fraud. He further submitted that the fraud alleged by the appellant has not been particularized and the Power of Sale has been properly exercised by the respondent.

10. After careful consideration of this matter, we are of the view that based on the allegations of the irregularities as contained in the Amended Fixed Date Claim Form there is a serious issue to be tried. We see no prejudice to the respondent if the matter were to proceed to trial.

11. Accordingly, the appeal is allowed. The matter is to be referred back to the Supreme Court for trial of the claim as it relates to the irregularities. The Order made by the single judge in Chambers on the 19th of June, 2008 is hereby extended and varied to read as follows:

- (1) Appeal allowed.
- (2) An injunction is hereby granted to prevent the respondent from dissipating the net proceeds of sale under Agreement for Sale dated 31st January 2008 in respect of property registered at Volume 959 Folio 296 of the Register Book of Titles until the trial of this matter. The said net proceeds of sale are to be held in an interest-bearing account in the joint names of the Attorneys-at law until further order of the court.
- (3) Trial of the Fixed Date Claim Form to proceed.

- (4) Costs to be costs in the cause.

PANTON, P.

ORDER

- (1) Appeal allowed.
- (2) An injunction is hereby granted to prevent the respondent from dissipating the net proceeds of sale under Agreement for Sale dated 31st January 2008 in respect of property registered at Volume 959 Folio 296 of the Register Book of Titles until the trial of this matter. The said net proceeds of sale are to be held in an interest-bearing account in the joint names of the Attorneys-at law until further order of the court.
- (3) Trial of the Fixed Date Claim Form to proceed.
- (4) Costs to be costs in the cause.