JAMAICA

IN THE COURT OF APPEAL

MOTION IN SUPREME COURT CIVIL APPEAL NOS: 58 & 59/91

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	LYLE BARNES	PLAINTIFF/APPELLANT
AND	JOSCELYN BENNETT DALTON BARNES MICHAEL BARNES	DEFENDANTS/RESPONDENTS
BETWEEN	JOSCELYN BENNETT DALTON BARNES MICHAEL BARNES	DEFENDANTS/RESPONDENTS
AND	LYLE BARNES	PLAINTIFF/APPELLANT

Berthan Macaulay, Q.C. & Horace Edwards, Q.C. for Appellant

Dennis Goffe for Respondents

November 21 & December 20, 1991

GORDON, J.A.

On 26th July 1991 Orr, J., entered judgment in the consolidated actions awarding the respondents $3,221,985 in damages. By consent, a conditional order was made staying execution of the judgment. That order having expired, the appellant sought to have the stay of execution continued and in pursuance thereof has had a number of appearances before this Court and the Court below. On 28th October 1991 Langrin, J., dismissed an application by motion for a stay of execution and in the purported exercise of a right claimed to be given by Rule 33 of the Judicature Court of Appeal Rules, the appellant sought to move this Court to stay the execution of the judgment pending the hearing of the appeal. On 21st November 1991 we heard submissions and dismissed the motion with costs to the respondents. We promised then to place on record our reasons for so doing and this promise we now fulfil.

Mr. Goffe objected to the application in limine. He submitted that the application must or ought to be made first to a single judge. This Court, he said, had in an earlier application ruled that there was but one jurisdiction in the Court not two. The purpose of the rules, he said, are clearly stated in section 4 (2) of the Rules of Court Act and under Rule 33 (1) of the Court of Appeal Rules (1962), the application should be made to a single judge with this Court having a power given by Rule 33 (2) to review the single judge's decision. The respondent, he submitted, had the right of review and leap-frogging would deny him that right.

The second objection taken was that the second application was made by an appellant who had breached the rules and the third objection was that in so far as the application seeks to stay execution of a writ of seizure and sale by the bailiff of St. Andrew, that writ was not a "proceeding" which can be stayed.

Mr. Macaulay responding to the first objection, submitted that there were two stages of original jurisdiction:

(1) The Supreme Court

(2) The single Judge of Appeal

The power of this Court to review under Rule 33 is the same power it has under Rule 21. In the Court of Appeal, he said, there are two jurisdictions (a) an original jurisdiction and (b) a review jurisdiction re stay. This latter submission, he based on the dicta of Rowe, P., delivered on 28th October 1991 in prior proceeding in this case. He further submitted:

> "The jurisdiction which the Court of Appeal can exercise under rule 21 is limited only by the fact that rule 22 (4) requires prior application to the Court below. Rule 21 does not require a prior application to be made to a single Judge of the Court

> "of Appeal before it can exercise original jurisdiction. So to read rule 21, would be importing into the rule, words of a condition which are not contained in that rule nor implied in them."

The application before the Court, he submitted, invoked the original jurisdiction of the Court.

Applications to this Court for a stay of execution fall under the provisions of Rule 33 of the Court of Appeal Rules 1962. The relevant provisions are:

> "33. (1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for -
>
> (a) ...
> (b) ...
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

Reference to Rules 21 and 22 (4) are of no relevance save insofar as Rule 22 (4) requires that, before an application can be made to this Court for a stay of execution, there must have been a prior application to the Court below. Dismissal or refusal of this prior application would then be the basis for application to this Court under Rule 33.

In his judgment in a previous application in this case, similarly captioned, and delivered on 28th October 1991 Rowe, P., said:

> "We are of the view that whether an application for a stay of execution is made to the Court itself or to a single Judge of Court under the Court of Appeal Rules, 1962, the Court or Judge is governed by the provisions

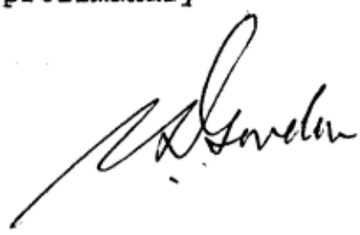
> "of Rules 21 (1) (a) and 22 (4) which require that such an application should first be made to the Court below."

Mr. Macaulay would have this statement construed as saying that there are two jurisdictions given to this Court under Rule 33 and that he was before us by virtue of our original jurisdiction under this rule. It is convenient to observe that Rules 21 and 22 are similar in content to Rules 16 and 17 of the 1883 Rules of the Supreme Court (England), but Rule 33 has no parallel in the English rules. One cannot therefore, in interpreting the import of Rule 33, derive any assistance from the English rules or cases. The Rules are made pursuant to section 4 (1) of the Judicature (Rules of Court) Act and the purpose of the Rules is stated in section 4 (2):

> "(2) Rules of court may make provision for all or any of the following matters -
>
> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the Supreme Court respectively in all causes and matters whatsoever in or with respect to which those Courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the offices of the Supreme Court) and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications, appeals or references which under any law or enactment may or are to be made to the Court of Appeal or the Supreme Court or any Judge of such respective Court, shall be made."

The procedure and practice to be followed in this application are stated in Rule 33 (supra). Under this rule there is a tiered procedure. First, a hearing by a single Judge of Appeal, Rule 33 (1) (c) followed by a review by the Court, Rule 33 (2). The statement of Rowe, P., (supra) cannot be interpreted to mean that the Court of Appeal is given original jurisdiction to hear an application for stay of execution. It has jurisdiction to hear such an application by way of review. This, the statement recognizes, but this jurisdiction is invoked only after one has prayed in aid Rule 33 (1) (c).

The law therefore is that the Court below has jurisdiction to entertain an application for a stay of execution and, application must first be made to that Court, when an appeal is pending: Rule 21 (1) (a) and 22 (4). Thereafter, application must be made to a single Judge of Appeal - Rule 33 (1) (c); followed by ultimate resort to the Court of Appeal for review - Rule 33 (2). The objection of the respondent succeeds on the first ground, as the application made to this Court is impermissible. For the reasons advanced, I do not consider it necessary to deal with the other grounds of the preliminary objection.



CAREY P. (AG.):

I agree, but out of deference to the arguments of counsel, I add a few comments of my own.

The decision of this Court in the unreported case involving the same parties delivered 28th October in my opinion laid down two principles:

> (i) an application for a stay of execution cannot be made ex parte;
>
> (ii) before an application for stay can be made to this Court, a prior application must be made to the Court below.

It did not and could not decide that an application for a stay of execution has an option to make an application "to the Court itself or to a single Judge of the Court." Any statement made therein in that regard is mere obiter. That was not a matter before the Court nor did it arise as a necessary implication from anything said in that judgment.

Rule 21(1) of the Court of Appeal Rules 1962 provides as follows:

> "(1) Except so far as the Court below or the Court may otherwise direct -
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal."

I accept that by this rule, power is given to the Court itself to make orders respecting stays of execution. That accords with Cropper v. Smith [1883] 24 Ch. D. 305 where a similar rule of the English Supreme Court was being considered. But in England, there is no rule similar to our rule 33(1)(c) which provides that such applications should be made before a single Judge of the Court

subject to a review by the full Court. Rule 33 states (so far as is material):

> "(1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for -
>
> ...
>
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
>
> ...
>
> and may hear, determine and make orders on any other interlocutory application.
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

Rules 21(1) and 33(1)(c) must be read together. It seems to me clear beyond peradventure that the procedures in each jurisdiction must for that reason differ. The co-ordinate or original jurisdiction undoubtedly given to this Court by virtue of Rule 21(1) is exercised by a single Judge of the Court with the full Court exercising a review function.

Mr. Macaulay relied strongly on the following passage in Barnes v. Bennett & Ors. (supra) at p. 6:

> "We are of the view that whether an application for a stay of execution is made to the Court itself or to a single Judge of Court under the Court of Appeal Rules, 1962, the Court or Judge is governed by the provisions of Rules 21(1)(a) and 22(4) which require that such an application should first be made to the Court below."

That statement, he argued, allowed an appellant to elect whether he applied to the Court itself or a single Judge of the Court. I would not dissent to the view that such an impression could be created if that extract is divorced from its context. But a careful reading

and a similar analysis of that decision, as a whole makes it abundantly clear that no such rule was being laid down. If the relevant rules were interpreted in the manner contended for by Mr. Macaulay, Q.C., it could lead to absurd situations. Mr. Goffe gave an illustration of two appellants in the same case, each applying, one to the full Court and the other to the single Judge and from him a review by the full Court. In the case of the application made to the full Court, a respondent would be deprived of any opportunity for a review. But apart from that consideration, the possibility of differing decisions exists. Any interpretation that is capable of leading to such a result, cannot be considered reasonable.

In my judgment, the Court of Appeal Rules, in clear language provide the mechanics for an application for a stay of execution to be made viz. by Rule 33(1)(c) and no other: that application is to a single Judge of the Court.

FORTE J.A.:

I agree.