JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2021APP00241

BETWEEN	**ANIKA BROWN**	**APPLICANT**
AND	**MARLON PENNICOOKE**	**RESPONDENT**
AND	**THE ADMINISTRATOR-GENERAL FOR JAMAICA**	**INTERESTED PARTY**

Andrew Irving for the applicant

Neco Pagon for the respondent

Mrs Allia Leith-Palmer for the interested party

4 January 2022

IN CHAMBERS

MCDONALD-BISHOP JA

[1] On 6 November 2020, Her Honour Ms N Creary-Dixon, parish judge for the parish of Saint Catherine, entered judgment in default for Mr Marlon Pennicooke ('the respondent') against Miss Anika Brown ('the applicant). She ordered that the applicant quit and deliver up all of the premises located at Lot 81, 7 West, Greater Portmore in the parish of Saint Catherine ('the disputed property').

[2] The applicant's application before the Saint Catherine Parish Court for the default judgment to be set aside and for a stay of execution of the default judgment was refused by Her Honour Miss Harrison ('the learned parish judge'). On 10 December 2021, the applicant filed a notice of appeal challenging the decision of the learned parish judge.

[3] This is an application for a stay of execution of the default judgment pending the hearing and determination of the appeal in this matter or until further orders. The grounds of the application, as set out in the notice of application for court orders filed on 13 December 2021, are as follows:

> "a) The Applicant has good grounds of appeal with a prospect of success
>
> b) The Respondent's Attorney-at-Law had indicated that, in the absence of a stay, they intend to enforce the Order
>
> c) The Appellant [sic] will suffer irremediable harm if a stay is not granted
>
> d) If a stay is not granted it is likely to result in more injustice to the Appellant [sic] than to the Respondent" (absence of punctuations as in original)

[4] The application is supported by an affidavit sworn to on 13 December 2021 by the applicant in which she deposed, among other things, that the disputed property was owned by the respondent and Mr Marcel O'Neil Manahan as tenants-in-common. She deposed that the respondent has a 25% interest in the disputed property and Mr Manahan a 75% interest. The applicant stated that Mr Manahan was her common-law husband and that he died intestate on 13 September 2019, survived by her and their minor child. She averred that she was Mr Manahan's spouse and is entitled to a beneficial interest in and a right to possession of the disputed property. She intends to file a claim for declarations to that effect.

[5] The Administrator-General for Jamaica, who is now joined to these proceedings as an interested party, has since obtained letters of administration to administer the estate of Mr Manahan on behalf of the minor beneficiary. The Administrator-General has given her consent for the applicant to remain in the disputed property and supports the application for a stay of execution of the default judgment.

[6] The court notes that it has not benefited from any affidavit evidence from the respondent, although the respondent was served with the notice of the application and supporting affidavits.

[7] According to rule 2.10(1)(b) of the Court of Appeal Rules, 2002, a single judge may make orders for the stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal.

[8] This court has repeatedly restated the test to be applied in matters of this nature in numerous cases. Mr Irving, counsel for the applicant, relied on the case of **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 ('**Channus Block**') in support of his submissions. He submitted that the court has a discretion whether or not to grant a stay based on the following test:

a) The applicant must show that he has an appeal with some prospect of success; and

b) the court is to conduct a balancing exercise to determine the order that best accords with the interests of justice.

[9] In **Channus Block**, Morrison JA (as he then was) opined that:

> "[10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment delivered 2 December 2003, para [43]) 'absolute and unfettered'. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment. In deciding whether or not to grant a stay, this court has in recent times consistently applied the test formulated in **Hammond Suddard** and it is now well established that the applicant must show that he has an appeal with some prospect of success, and that he is likely to be exposed to ruin if called upon to pay the judgment. It is, in my view, essentially a balancing exercise, in which the courts seek to

> recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[10] Subsequent to Morrison JA's pronouncements in **Channus Block**, I, sitting as a single judge in **Sagicor Bank Jamaica Limited v YP Seaton and others** [2015] JMCA App 18, noted the development of the law relating to an application for a stay of execution. At paras [49] to [52] of that judgment, I stated that:

> "[49] It has been noted by the learned writers of Blackstone's Civil Practice 2004 at paragraph 71.38 that for many years the courts have acted on the principle stated in **Atkins v Great Western Railway** (1886) 2 TLR 400 that a stay may be granted where the appellant produces written evidence showing that if the judgment were to be paid, there would be no reasonable prospect of getting it back if the appeal were to succeed. HOWEVER, Staughton LJ in **Linotype-Hell Finance Ltd v Baker** [1993] 1 WLR 321 stated that that test was too stringent and that the stay could be granted if the appellant would face ruin without a stay provided the appeal had some prospect of success.
>
> [50] While the foregoing considerations may be relevant in determining whether to grant a stay, none of them is determinative. It is now accepted, on later authorities, that whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice (see **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258). **According to the authorities, the crucial question for the court is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay**.
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> [51] Some material questions identified by the authorities as having a bearing on this question of risk of injustice are as follows:
>
> (a) If a stay is refused, what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?

See **Hammond Suddard Solicitors v Agrichem International Holdings**; **Green v Wynlee Trading Ltd and Others** [2010] JMCA App 3 and Blackstone's Civil Practice 2004, paragraph 71.38.

[52] In **Green v Wynlee Trading**, it was pointed out by Morrison JA, after citing the dictum of Harrison JA in **Watersports Enterprises v Jamaica Grande Ltd and Others** SCCA No 110/2008, delivered 4 February 2009, that **it is a two-step process that the court should employ in determining whether to grant a stay of execution. The first phase of the process is to determine whether the appeal is one 'with some prospect of success' and the second is to consider 'whether the case is a fit one for the granting of a stay**.'" (Emphasis added)

[11] Additionally, in **Sewing Machine Rentals Ltd v Wilson & Another** [1976] 1 WLR 37, Megaw LJ stated at pages 39 – 40 that:

> "The court, as I see it and as has, I think, always been its practice, is prepared to take into account, on an application for a stay of execution on an appeal from the High Court or a county court, a view that it may form as to whether the appeal is one that is wholly unmeritorious or wholly unlikely to succeed."

[12] It is, therefore, clear that a single judge in exercising the discretion whether to grant a stay of execution must consider these two essential questions:

(1) whether the applicant has shown that he or she has an appeal with some prospect of success and not one that

is wholly unmeritorious or wholly unlikely to succeed; and

(2) whether the case is a fit one for the granting of a stay bearing in mind a consideration of whether there is a risk of injustice to one or other or both parties if a stay is granted or refused.

[13] With respect to the prospects of success, the applicant contends, in her affidavit, that she verily believes that she has a good prospect of success on appeal and a meritorious defence on the following bases:

> "a) That I am the mother of [the minor child] and she is in my custody, care and control
>
> b) That pursuant to the Instrument of Administration and the rules on intestacy [the minor child] has up to a 75% interest in the premises.
>
> c) That [the minor child] is a beneficiary in possession
>
> d) That I am seeking to remain in possession of 75% of the premises with my daughter under and pursuant to the interest of my daughter, [the minor child].
>
> e) Under the default judgment I was ordered to quit and deliver up all of the premises to the Respondent although he is the owner of 25% of the premises
>
> f) It is a triable issue as to whether the Respondent is entitled to recover possession of 100% of the premises especially since he has sought to recover possession of the premises from [the minor child].
>
> g) It is also a triable issue as to whether the claim for spouse could be tried at the same time as the recovery of possession" (punctuations as in original)

[14] Mr Irving relied on the case of **Arthur Badaloo v Mr and Mrs Neville Bryan** (1989) 26 JLR 372 to further argue that where a judgment is entered for more than what

the claimant is entitled, then that judgment is irregular and ought to be set aside as of right. He made the point, in parallel arguments to the court's reasoning in **Arthur Badaloo**, that in the instant case, the respondent was given an order to which he was not entitled since he was given the right to recover possession of 100% of the property when he is only entitled to possession of 25%. On that basis, counsel submitted that the default judgment is irregular and ought to have been set aside as of right by the learned parish judge.

[15] I do not have the benefit of the written reasons of the learned parish judge for refusing to set aside the default judgment. Therefore, I would exercise caution at this very preliminary stage and be slow to conclude that the applicant's appeal is "wholly unmeritorious or wholly unlikely to succeed". In any event, I have examined the issues raised by the applicant in her affidavit, whilst having regard to the certificate of title for the property and the applicant's affidavit evidence, against the background of the terms of the default judgment. Having done so, I conclude that the applicant has raised valid issues for consideration on appeal, which cannot be said to be without some prospects of success. Therefore, in my view, the applicant's appeal cannot be said to be wholly unmeritorious or unlikely to succeed, especially on the point that the default judgment may be found to be irregular by this court and should be set aside as of right.

[16] Accordingly, I find that the appeal has some prospects of success; so, the applicant succeeds on the first limb of the test.

[17] On the second limb, that is, whether this case is one fit for the grant of a stay, I have considered the applicant's affidavit evidence that she resides at the disputed property with her minor child, who is a beneficiary of the estate of Mr Manahan. The applicant also deposed in her affidavit:

> "24. That I operate a shop from the said premises and it is my only source of income to support myself and my daughter. I am not in a position to transfer the shop to another address. I will therefore suffer irremediable

harm if a stay is not granted. Further I have no where else to live or stay.

25. I have no objection to the Respondent occupying 25% of the premises. The Respondent will not therefore be prejudiced if a stay is granted. If a stay is not granted it is likely to result in more injustice to me than the Respondent."

[18] On this evidence, I am prepared to say that, without a stay, the applicant could be left without a place to live and without a source of income while having the care and control of the minor child who is the beneficiary under the estate of the deceased. In other words, if the application for a stay is refused and the applicant is called upon to vacate the property in accordance with the terms of the default judgment, before having the merits of her appeal determined, she could suffer irreparable hardship. Additionally, having not had the benefit of any affidavit evidence from the respondent, I cannot say that granting a stay is likely to result in more injustice to him than to the applicant. In arriving at this conclusion, I have duly considered all the matters to which the applicant has deposed as well as the law relating to the joint ownership of real property and the distribution of real property upon intestacy.

[19] I have, nevertheless, taken into account the respondent's indisputable right as a minority owner of the property and the need to also guard against any injustice to him. Therefore, I believe the respondent ought to be permitted to occupy a portion of the disputed property in keeping with his lawful interest in it. There is, in fact, no objection to this proposition from the applicant as she has indicated in her affidavit that she has no intention to deny him access to the property and that her only desire is to remain in possession of 75% of it.

[20] Mr Pagon, counsel for the respondent, similarly maintains that the respondent is not claiming possession of the entire property but rather his right to possess his 25% share, which is unidentifiable. Mr Pagon argued that if the stay is granted without conditions for access to the property by the respondent, then the respondent would be

ousted from the property, in which he has a lawful interest, to his prejudice. The court has taken these arguments into account in looking at where the balance of injustice lies.

[21] The court is not able to say what would amount to 25% of the property. However, based on what has been submitted, the court believes that the respondent would not be prejudiced if he were to occupy the portion he had previously occupied before he left the property. The applicant proposed at para. 17 of her affidavit that the respondent "can occupy one of three bedrooms on the premises".

[22] Considering everything, I conclude that the applicant has satisfied the test for a stay of execution of the default judgment to be granted pending the determination of the appeal. She has an appeal with some prospects of success, and I am satisfied that the risk of injustice would be more significant to her than to the respondent. The refusal of the stay would also affect third party rights to possession of the property. I am convinced that this is a fit case for a stay to be granted.

[23] I will, therefore, grant the orders sought on the notice of application for the stay of the default judgment with a stipulation that the respondent be permitted to occupy a portion of the disputed property in keeping with his minority interest.

[24] Accordingly, the orders are as follows:

1. There shall be a stay of the execution of default judgment entered by Her Honour Ms N Creary-Dixon, parish judge for the parish of Saint Catherine, on 6 November 2020, until the determination of the appeal or until further orders.

2. The respondent, Mr Marlon Pennicooke, is entitled and is permitted by the court to occupy a portion of the disputed property, to wit, one bedroom and one bathroom with other usually shared amenities, on or before 11 January 2022, until the determination of the appeal or until further orders.

3. Costs of the application shall be costs in the appeal.

4. The Administrator-General of Jamaica is to be joined as an interested party to the appeal as of the date hereof.

5. The applicant's attorney-at-law is to prepare, file and serve this order.