[2011] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 70/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE HARRISON JA
THE HON. MR JUSTICE MORRISON JA

BETWEEN	**WILBERT CHRISTOPHER**	**APPLICANT**
AND	**ALUMINA PARTNERS OF JAMAICA**	**RESPONDENT**

Applicant in person

Miss Anna Maria Gracie instructed by Rattray Patterson Rattray for the respondent

8, 9 November 2010 and 27 May 2011

PANTON, P

[1] This application before us is unusual. It is one which the applicant has described as a "notice of application to re-admit application to discharge order of single judge given on the 4th November 2008 by His Honour Justice Dukharan". In order to appreciate the nature of the application, it is necessary to set out the history of the proceedings so far as is relevant.

[2] The applicant filed claim no. 2006 HCV 03402. By that claim which was amended and filed on 18 May 2007, the applicant sought the sum of $250,000.00 "yearly from 1995 November for special damages" and $150,000.00

"for professional negligence as the defendant without the due process under… the Land Acquisition Act acted unprofessionally".

[3] The applicant claimed that in November 1995 the respondent took the original copy of his father's will from the second named executor Patrick Fletcher and entered into agreement with him as vendor without having the signed authorization of the land holders. The applicant also claimed that the respondent cut a "Haul road" through his property, thereby depriving him of access to his private property.

[4] The applicant filed an affidavit in support of his claim. The following is gathered from the affidavit:

(i) the applicant's father owned certain lands in the parish of Manchester;

(ii) in 1957/58, there was an exchange agreement between the respondent and the applicant's father in respect of some of the land owned by the latter;

(iii) in 1994 the applicant's father transferred certain property to three of his children, including the applicant who holds a three quarter acre plot for which he pays taxes;

(iv) in 1995, the applicant's father died;

(v) there is a will with named executors in respect of the applicant's father's estate;

(vi) in 2002 the respondent cut a road through the applicant's way of entry to his property;

(vii) the executors and the respondent have been trying to regularize the exchange referred to earlier; and

(viii) a dispute has developed between the applicant and the executors of his father's estate.

[5] On 12 May 2008, the matter came before Brooks J in the Supreme Court for a case management conference. The respondent submitted that the applicant had no standing to bring the claim as he was merely a beneficiary under the will of Leslie Christopher, and not an executor. Brooks J adjourned the matter for the applicant to apply to have the executor or personal representative of the estate of Leslie Christopher substituted as the claimant. The learned judge allowed the applicant until 20 June 2008 to make the application for the substitution. He also ordered that failure to apply within the stipulated time would render the claim struck out as disclosing no real prospect of success.

[6] The matter came on again on 15 September 2008 before Brooks J. In brief, but clear, reasons for judgment the learned judge said that the "proper party to bring the claim is either the Estate of Charles Christopher or the Estate of Leslie Christopher, either of which is the legal or beneficial owner of the land in question and/or the party to the agreement with the defendant for the

exchange of lands". In view of the applicant's non-compliance with the order of 12 May 2008, the learned judge duly struck out the claim as disclosing no cause of action. He also refused leave to appeal.

[7] On 1 October 2008, the applicant filed a notice of application to discharge the order refusing leave to appeal. On 14 October 2008, the matter came before Dukharan JA who adjourned it to allow for the exhibiting of the order of Brooks J. On 4 November 2008, the matter was listed for hearing before Dukharan JA who, having heard oral submissions from the parties, dismissed it.

[8] On 10 November 2008, the applicant filed motion no. 15/2008 it being a "notice of application to discharge order of single judge". The order that was sought to be discharged was that made by Dukharan JA on 4 November 2008. The registrar of this court set the matter for hearing on 8 December 2008. However, on 3 and 5 December 2008, the applicant filed separate notices withdrawing the application. On 14 April 2009, the applicant filed the instant notice for the withdrawn application to be considered and granted. In his supporting affidavit, he acknowledged that the hearing of motion no. 15/2008 had been scheduled for 8 December 2008. He said he had consulted an attorney-at-law on 1 December 2008 who advised him as to her fee, and the need for him to present her with certain documents relevant to the property. According to him, she advised him to withdraw the application and he did.

Eventually, a dispute developed between them in respect of fees and so the attorney-client relationship was terminated.

[9] Before us, in his oral presentation, the applicant said that he withdrew the motion on legal advice. He said that although he is a beneficiary under the will, he is challenging its authenticity. He does not have a title to the portion of land he is supposed to have received from his father, and his claim is for recovery of possession and damages.

[10] The first notice of withdrawal signed by the applicant and addressed to the registrar is dated 2 December 2008 and reads thus:

> "I, the undersign (sic) wishes (sic) to withdraw my application to discharge the order of a single judge motion no. 15/2008 that was set for hearing on the 8th December 2008. I have now secured the services of a competent and respected attorney-at-law who advise to (sic) me to discontinue this application, I have accepted. Her council (sic) Grateful for you (sic) cooperation."

The second notice of withdrawal is also signed by the applicant and is dated 4 December 2008. It is in the form provided in the Court of Appeal Rules and is addressed to the registrar of the court as well as the attorneys-at-law for the respondent. It reads:

> "TAKE NOTICE that the Appellant desires to and hereby withdraws his Application against the Respondent in the captioned Appeal."

[11] In considering the instant application, due thought has to be given to the effect of the two notices of withdrawal filed by the applicant with the Registrar of the Court of Appeal and served on the respondent. The Court of Appeal Rules make specific provision as regards the withdrawal of an appeal. Rule 2.19(1) reads thus:

> "An appellant may at any time file at the registry a notice of withdrawal of his or her notice of appeal in form A5."

And rule 2.19(4) provides:

> "Upon the filing of the notice –
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> (a) the appeal stands dismissed; and
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> (b) the appellant filing the appeal is liable for the costs of all relevant respondents to the appeal up to the date of service of the notice of withdrawal."

[12] There is no specific provision relating to applications. However, an application is a proceeding in the appeal. In this particular case, the application is in effect for permission to appeal. Its withdrawal has effectively put paid to the prospect of an appeal. Dukharan JA, the single judge of appeal, then dismissed the application for permission to appeal. The applicant sought to discharge the order of Dukharan JA. It is that application he withdrew. It is my view that upon the withdrawal of the application, the proceedings in this regard came to an end and the applicant, in the same way

an appellant would have been, is liable for the respondent's costs up to the date of the service of the notice of withdrawal.

[13] There is no provision in the rules for the recalling of a notice of withdrawal. However, assuming that it is possible to withdraw such a notice, it would be necessary for the party seeking such an order to prove for example that the notice of withdrawal was filed without his knowledge or consent, or fraudulently. In the instant case, the applicant personally filed the notice, and did so after he became aware of the date on which his application was to be heard. In his own words, he acted on the advice and counsel of a competent and respected attorney-at-law. There is clear indication that he addressed his mind to the situation and acted as he wished. In any event, even without professional legal advice, the applicant has demonstrated in his oral and written presentations a full understanding of the circumstances of his case and the processes of the court.

[14] In my view, he has not put forward a good reason for the court to disregard his notice of withdrawal. In the circumstances, it would be unfair to the respondent if we were to accede to the applicant's request and attempt to breathe new life into the application to discharge the order of Dukharan JA. It seems also that the court would be setting an "evil precedent" that would militate against the doctrine that there ought to be an end to litigation.

[15] The words of Brett, M.R. in the case **In re May** (1885) 28 Ch. D. 516 at 518 are apt. He said:

> "… it is one of the most fundamental doctrines of all Courts, that there must be an end of litigation..."

The learned judge was there dealing with another doctrine, that of "res judicata". However, that does not diminish the relevance of the point so far as the instant application is concerned. The doctrine that there must be an end of litigation received the approval of the Privy Council in an appeal from the High Court of Australia in the case ***Haystead and Ors v Commissioner of Taxation*** [1926] A.C. 155 at pages 165 to 166, Lord Shaw delivered himself thus:

> "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."

[16] This litigant has had the benefit of gratuitous advice as to the need for him to co-operate with the executor with a view to having the problems with his father's estate dealt with. He has not seen it fit to accept such advice. That is his right. However, on the basis of my understanding of the circumstances and the relevant legal principles, I would dismiss this application with an order that

the applicant is to pay the costs of the respondent, such costs to be agreed or taxed.

HARRISON JA

[17] I have read the draft judgment of my brother Panton P and agree with his reasoning and conclusion. I have nothing further to add.

MORRISON JA

[18] I too agree with the reasoning and conclusion of my brother Panton P and have nothing to add.

PANTON P

ORDER

Application dismissed. Costs to the respondent to be agreed or taxed.