JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

APPLICATION NO COA2021APP00090

BETWEEN	**GARNETT DENNIS**	**APPLICANT**
AND	**NEWTON BARNES**	**1ST RESPONDENT**
AND	**SONIA BARNES**	**2ND RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett and Company for the applicant

Mark Paul Cowan instructed by Nunes, Scholefield Deleon and Co for the respondents

22 November and 17 December 2021

F WILLIAMS JA

[1] This is an application to vary or discharge the orders of D Fraser JA ('the learned judge') made on 16 July 2021. By those orders, the learned judge refused to further stay the execution of the judgment in the court below, pending determination of the applicant's appeal and refused an application for an order that there be no order for security for costs. The details of the learned judge's orders are as follows:

> "a. The interim stay of execution granted on 29 June 2021 until 13 July 2021 and extended 16 July 2021, is hereby discharged.
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> b. The application for a stay of execution of the judgment of Pettigrew- Collins J, in the matter of **Garnett Dennis v Newton Barnes and Sonia Barnes** [2021] JMSC Civ 89, until determination of the appeal, and that there be no order for security for costs, is refused.

c. Costs to the respondents to be taxed or agreed."

Background

[2] The applicant is the claimant in the court below, in a claim against the 1st and 2nd respondents (husband and wife, respectively) for declarations as to his ownership by adverse possession of properties registered at Volume 953, Folio 595 and Volume 868, Folio 76 of the Register Book of Titles. In summary, the applicant averred in his statement of case that he had been in undisturbed, continuous and exclusive possession of the said properties for over thirty years and that the respondents had become registered as proprietors by fraudulent means.

[3] He further averred that the respondents had bought the said properties with previous knowledge of his interest in them. Accordingly, he sought to be declared the owner of the properties, to have the titles re-issued in his name, and to restrain the respondents from interfering with his occupation of the properties.

[4] In their defence, the respondents denied the applicant's entitlement to ownership of the lands by way of adverse possession and also denied his claim alleging fraud. They averred that they had purchased the properties from Mr Ralford Campbell, the previous owner, and were registered on the certificate of title on 9 October 2015 by legitimate means. The respondents also counterclaimed for a declaration of their interest in the properties as sole owners and sought an injunction to restrain the applicant's interference with the land.

[5] On 18 May 2021, the claim and counterclaim proceeded to trial before Pettigrew Collins J ('the trial judge'). The trial judge considered whether, at the time the respondents had purchased the properties from the previous proprietor, Mr Campbell, his ownership of the properties had been extinguished in the appellant's favour by operation of the Limitation of Actions Act. After hearing and considering the evidence given in the trial, the trial judge rejected the applicant's evidence and that of his non-expert witnesses as being incredible. She found the 1st respondent to be credible and preferred the evidence of the respondents' expert witness over that of the applicant's. The trial judge refused to grant the declarations and injunction sought by the applicant and instead declared the respondents to be the lawful owners of the two registered

properties. She also declared the respondents to be owners of an unregistered parcel of land situated between the two properties. The trial judge also granted an injunction to prevent the applicant from continuing in occupation of the said properties. These were the exact terms of her orders, set out in paragraph [114] of her written judgment:

> "[114] The declarations, injunction and orders sought by the claimant in his Amended Claim Form are refused. The reliefs granted to the defendants based on the counterclaim are as follows:
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> I. A declaration that the defendants are legally and beneficially entitled to possession of the parcels of land registered at Volume 953 Folio 595 and Volume 868 Folio 76 of the Register Book of Titles as well as the unregistered parcel of land consisting of 0.220 acres or 0.089 hectares which is situated between the two registered parcels.
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> II. An injunction restraining the claimant whether by himself, his servants and/ or agents or otherwise howsoever from remaining on or continuing occupation of the said lands.
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> III. An injunction restraining the claimant whether by himself, his servants and/ or agents or otherwise howsoever from entering or using the said lands.
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> IV. Nominal damages awarded in the sum of $5000.00
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> V. Costs to the defendants to be taxed if not agreed."

The application for stay and no order for security for costs

[6] Displeased with the result of the trial, on 21 May 2021, the applicant appealed from the judgment of the trial judge. He also applied for a stay of execution of the judgment, pending determination of the appeal. In his application, he also requested that the court not make an order for security for costs against him. On 29 June 2021, the application came before Dunbar Green JA, who set the application to be further considered on 13 July 2021 and granted an interim stay of execution until that date.

[7] On 13 July 2021, the learned judge heard the application. In considering the applicant's prospect of success, he observed that the challenges to the judgment

raised by counsel for the applicant related to findings of facts made by the trial judge. He stated that, having examined the judgment, he found that the trial judge had clearly demonstrated her bases for rejecting the evidence of the applicant and his ordinary witnesses and cited excerpts from the judgment which went toward justifying her conclusion.

[8] In relation to the assessment by the trial judge of the expert evidence, the learned judge observed that the trial judge had indicated her reasons for preferring the respondents' expert witness' evidence. This was, inter alia, based on the fact that the expert witness had physically visited the property and conducted his analysis, his professional work going beyond that conducted by the appellant's expert, outlined in the expert report provided by Mr Ivan Powell, valuation surveyor, of CD Alexander Realty Limited.

[9] The learned judge also indicated that, having regard to the way the trial judge treated the witness statement of Mr Campbell, it was open to her to have attached to that evidence the weight she deemed fit. Moreover, he said, the trial judge properly disregarded portions of the statement which constituted hearsay. Additionally, he opined that the trial judge did not place any reliance on the witness statement of Ms Brown-Malcolm, who did not attend the trial and whose witness statement the respondents did not rely on. It appears that Ms Brown-Malcolm, had she attended the trial, would have given evidence of being the caretaker of the subject properties on behalf of the respondents.

[10] Additionally, the learned judge aptly identified the fact that there was no material before the trial court that supported the allegation that the sale price for the properties was evidence of a transfer procured by fraud. The learned judge also noted the absence of the notes of evidence but found that the detailed nature of the judgment provided a sufficient and proper basis on which to evaluate the applicant's prospects of success. The learned judge, having found that there was no prospect of success in the application, further found it unnecessary to give any consideration to the balance of the risks of injustice.

[11] In relation to the application for no order for security for costs, the learned judge described this as a pre-emptive but inappropriate application. He opined that the procedure in rule 2.11 of the Court of Appeal Rules ('the CAR') ought to be followed and the court provided with evidence on which to properly exercise the discretion required to be exercised in such an application. The learned judge thereafter proceeded to make the orders recited at paragraph [1] hereof, setting aside the interim stay and refusing to grant any further stay or to order that there be no order for security for costs.

Application to vary or discharge orders

[12] On 20 July 2021, the applicant applied to vary or discharge the learned judge's orders. That is the application now before the court for consideration. The grounds put forward in the application were that: there is merit in his appeal; the learned judge had erred in that he failed to consider that the judgment was unreasonable in light of the totality of the evidence; that the learned judge's conclusions were prejudicial to a fair hearing of the appeal and was made in the absence of the notes of evidence and that the learned judge had failed to take into account his intention to amend his grounds of appeal when the notes of evidence became available.

[13] The applicant relied on his affidavit filed on 20 July 2021, which contained a detailed exposition of his account of the evidence before the court below and the arguments in support of the application. The applicant also relied on his amended notice of appeal filed on 21 July 2021.

[14] The respondents replied to the applicant's averments through an affidavit sworn by the 1st respondent. They opposed the application on the primary bases that the appeal is without merit and that it would not be in the interests of justice to further deprive the respondents of the fruits of their judgment.

The appellant's submissions

[15] Mr Jarrett, for the applicant, relied on the case of **Sewing Machine Rentals Limited v Wilson and another** (1976) 1 WLR 37 to posit that the court ought not to embark on an analysis of the merits of the appeal but rather should form a view as

to whether the appeal is "wholly unmeritorious or wholly unlikely to succeed". It should grant the application unless it found the case to be wholly unlikely to succeed. Counsel further submitted that a stay may be granted where a refusal may render the appeal nugatory (referring to **Polini v Gray** (1879) 12 CH D 438). Counsel also averred that, in determining whether to grant a stay, the court should consider the risk of injustice to the parties.

[16] In seeking to demonstrate that there was merit in the appeal, counsel for the applicant submitted that, while the trial judge had properly stated the law of adverse possession, there were numerous errors in her application of the law to the facts of the case. These errors mainly related to her rejection of the applicant's evidence and that of his ordinary witnesses, her treatment of the witness statements of Ms Carol Brown-Malcolm and Mr Ralford Campbell and her acceptance of the respondents' expert witness' report.

[17] Counsel for the applicant also made reference to an award by the trial judge to the respondents of a portion of unregistered land, which did not form a part of their counter claim. In that regard, counsel placed reliance on the case of **Chattell v Daily Mail Publishing Company (Limited)** (1901) 18 TLR 165 ('**Chattell v Daily Mail**') to submit that a claimant cannot recover more than what he pleaded. Counsel also argued that the trial judge had erred in declining to visit the property and in her description of the main building on the property.

[18] In relation to the court's consideration of whether it should not order security for costs, counsel for the applicant contended that, by virtue of a letter sent by the respondents' attorneys-at-law requesting security for costs, it was open to the court to consider that issue. In support of this contention, counsel cited rule 2.12 of the CAR and noted that the threshold to be crossed for the grant of such an order to the respondents is a potentially high degree of success.

The respondents' submissions

[19] Counsel for the respondents submitted that the jurisdiction of the court to grant a stay of execution is set out in rule 2.11(1)(b) of the CAR. Additionally, counsel posited that this discretion must be properly exercised taking into account that a

successful litigant is entitled to the fruits of his judgment and that the applicant must demonstrate that good reason exists for the exercise of such a discretion in favour of the grant of that application.

[20] Among the several cases cited, counsel relied heavily on **Combi (Singapore) Pte Ltd v Siriam and another** (1997) EWCA 2162 to posit that the court should first be satisfied that there is merit in the appeal before it proceeded to attempt to balance the respective interests of the parties, in order to arrive at a fair result.

[21] Counsel noted that the gravamen of the challenge in the applicant's grounds of appeal (though the said grounds, he contended, being far from concise, fail to conform with rule 2.2(5) of the CAR) is an attack on the findings of fact of the trial judge and her rejection of the applicant's and his civilian witnesses' evidence. In light of that challenge, counsel posited that, in order to justify interference by the appellate court, it should be demonstrated that there is a mistake in the learned trial judge's evaluation of the evidence that sufficiently undermines her conclusions. In this case, however, counsel submitted that there was no such material mistake, as the findings of the trial judge were reasonable in light of the evidence and her assessment of the witnesses' credibility.

[22] In relation to the risk of injustice, counsel argued that the appeal was weak and as such, there would be a greater risk of injustice to the respondents if the stay was granted. Counsel also proffered the argument that the applicant's lack of likely success on the appeal would dictate that the order that there be no orders for security for costs, be refused. Counsel also informed the court that his notes do not indicate that an application for the court to visit the property was ever made.

Analysis

[23] As recognised by counsel on both sides, pursuant to rule 2.14(a) of the CAR, an appeal does not operate as a stay of proceedings. Additionally, good reason must be shown to exist for depriving a successful litigant of the fruits of his/her judgment. Therefore, a party desirous of obtaining a stay and who has filed an appeal must make an application for a stay, pending the hearing of the appeal. It is also accepted that the case of **Combi (Singapore) Pte Ltd v Siriam and another** reflects the current

view of the approach that should be taken by a court before which an application for a stay of execution is made. This approach requires that the applicant demonstrate to the court's satisfaction that the appeal has merit as a first step. If that is done, then the court goes on the consider the relative risks of injustice between the applicant and the respondent or respondents, as the case may be. It is clear from a reading of the judgment that the learned judge correctly had in mind the law in relation to the exercise of the court's discretion to grant a stay of proceedings. The same approach is demonstrated in relation to the law governing applications for security for costs.

[24] In our review of the matter, the learned judge conducted a proper consideration and analysis of the matters raised by the applicant. He correctly found that the main basis of the applicant's challenge to the judgment from the trial judge related to findings of fact which were set out at paragraphs [63] to [67] of her judgment as follows:

> "WITNESSES' CREDIBILITY
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> [63] Without any reservations or equivocation, my view of the claimant is that he was not at all a credible witness, and hence not a reliable one. He lacked candour and consistency in his evidence. On occasions when he apparently did not wish to respond to questions, he would feign a lack of understanding of what was being asked of him in circumstances where the question posed could not possibly have been infused with greater simplicity and clarity. He frequently responded by saying that this was his first time in court and that he is not accustomed to court proceedings.
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> [64] I do not recall any other instance during the course of any trial that I have had to direct a witness to respond to the question asked of him on as many occasions as I did to the claimant in this case. There were instances when the questions were repeated more than once and the claimant either indicated that he did not hear, or he did not understand. The court being convinced that he had heard and understood the questions asked of him, insisted that he responded without the question being repeated. In numerous instances, he responded in a manner that made it abundantly clear that he had heard and understood the question. On occasions when he had a response which supported his case, he evidently had no difficulty hearing

> or understanding the questions or suggestions put to him. The belligerence was evident in particular when the claimant was confronted with discrepancies or inconsistencies on his case. It became clear upon cross-examination of the claimant's witnesses that they were witnesses of convenience.
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> [65] To the extent that there was no other credible testimony or other evidence supporting the claimant's evidence, this court rejects his evidence.
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> [66] I have chosen in this case to set out in fair detail the evidence of the witnesses in this matter. My purpose for doing so is to demonstrate that the claimant did not present clear, coherent and cogent evidence in proof of his case, but rather, the evidence, as the defendant's Attorney-at-Law observed in closing submissions, was fraught with inconsistencies, in some instances concocted and or embellished. On the other hand, I found the first defendant to be refreshingly candid. I find on a balance of probabilities that he at no time deliberately lied to the court. The only minor aspect of his evidence that I did not accept was that relating to the existence of a storeroom and a pig pen on the property. His refusal to admit the existence of these structures was in my view due wholly to faulty recollection.
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> [67] It became apparent during the course of his evidence that Mr Langford [the respondents' expert witness] was quite incensed at the fact that a squatter could occupy land and as a consequence of such occupation, be able to oust the paper title holder. Notwithstanding his expression of disgust at such likelihood and his apparent abhorrence at the idea of squatting generally, I am firmly of the view that he placed squarely on the table his genuine observations, without regard for whose case his findings supported."

[25] In relation to these findings of fact and the general approach to the facts and the law in the trial in the court below, the learned judge had this to say at paragraph [33] of his judgment:

> "[33] The complaints of the applicant being largely fact based, he has failed to show that the conclusions on the facts, including assessments of witnesses' credibility arrived at by the LTJ are plainly wrong. Accordingly, he has

> been unable to demonstrate that his appeal has a real prospect of success. The application for an order that there be no security for costs is not in keeping with rule 2.11 of the CAR, which governs applications for security for costs, and is misconceived."

[26] Having reviewed the learned judge's judgment, we are satisfied that it is a fair and accurate assessment of the judgment of the trial judge. This assessment foreshadows an uphill task for the applicant in seeking to establish the errors which he contends were made by the trial judge. In light of that, it is apparent that the learned judge was correct in his assessment and finding of an absence of merit or a prospect of success in the appeal.

The request for no order to be made for security for costs

[27] In relation to the applicant's request that no order be made for security for costs, this is how the learned judge dealt with the issue:

> "[32] Curiously, the applicant in this matter also sought, apart from the stay, what can only be described as a pre-emptive order, barring the respondents from seeking an order for security for costs. Counsel for the applicant submitted that it was an attempt to save the court's time, as often applications for stay and security for costs 'go together'. With respect the application is wholly misconceived. If the court is to consider the question of security for costs, the procedure in rule 2.11 should be followed and the court furnished with evidence on the basis of which a sensible exercise of discretion can occur. It is not possible for a party's right to make an application, if so desired, to be stymied and abrogated in this fashion."

[28] The rule governing applications for security for costs is rule 2.11 of the CAR. That rule reads as follows:

> "**Security for costs of appeal**
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> 2.11 (1) The court or the single judge may order -
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> (a) an appellant; or

(b) a respondent who files a counter notice asking the court to vary or set aside an order of a lower court,

to give security for the costs occasioned by an appeal.

(2) No application for security may be made unless the applicant has made a prior written request for such security.

(3) In deciding whether to order a party to give security for the costs of the appeal, the court or the single judge must consider -

(a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and

(b) whether in all the circumstances it is just to make the order.

(4) On making an order for security for costs the court or the single judge must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

[29] The practice in and experience of this court, in accordance with this rule, is for an applicant for security for costs (usually the respondent in the appeal) to file and serve a notice of application, supported by affidavit, in seeking to have this court make an order that money be paid into court or into an account in order to secure at least some portion of the anticipated costs of the appeal. As the rule indicates, an applicant for security for costs, before applying to this court, must first make in writing a request for the payment of the anticipated costs of the appeal. That appears to have been done in this case; and apparently was the trigger for the applicant's making what might be regarded as something in the nature of an anticipatory counter strike, asking for an order that no security for costs be ordered. However, there was no application for security for costs before the court; and so, his request for the order was, at best, premature, the fact of a letter being written requesting such costs not being sufficient to put the matter properly before the court.

[30] On this issue, no error being discernible in the reasoning and approach of the learned judge, there is no merit in the applicant's contention. The applicant has failed to demonstrate any material error on the part of the learned judge, in relation to his judgment on the request for no orders as to security for costs which is sufficient to undermine his reasoning and conclusion. The learned judge was therefore correct in his assessment that the applicant had not demonstrated any prospect of success. His consequential refusal to go on to attempt to balance the risks of injustice was also the correct approach for him to have taken.

The unregistered property

[31] The only matter of concern in this application flows from one contention put forward in the amended notice of appeal: that being that the trial judge made a declaration in favour of the respondents concerning an unregistered parcel of land, which did not form part of the respondents' counterclaim.

[32] In relation to this aspect of the matter, the trial judge, at paragraph [5] of her judgment, made the following observation:

> "[5] There is, it appears, a third and unregistered parcel in respect of which no claim has been made. This information regarding the existence of the unregistered parcel comes from the report of the defendant's expert. That parcel of land consists of 0.220 acres or 0.089 hectares of land. The unregistered parcel is located between the two registered parcels and all three parcels were apparently owned by Mr. Ralford Campbell and sold together to the defendants."

[33] At the end of the judgment, the trial judge made, among others, the following order:

> "I. A declaration that the defendants are legally and beneficially entitled to possession of the parcels of land registered at Volume 953 Folio 595 and Volume 868 Folio 76 of the Register Book of Titles as well as the unregistered parcel of land consisting of 0.220 acres or 0.089 hectares which is situated between the two registered parcels."

[34] It was in respect of this issue that counsel for the applicant sought to place heavy reliance on the authority of **Chattell v Daily Mail**. In that case before the

English Court of Appeal, the headnote, which provides information on the case that is sufficient for this discussion, reads as follows:

> "In an action of libel the plaintiff claimed £1,000 damages. No defence was delivered, and interlocutory judgment was signed for the damages to be assessed in the Sheriff's Court. The jury returned a verdict for £2,500. The plaintiff, without applying to amend the statement of claim, signed judgment for this amount. Held, that the judgment was bad."

[35] The case of **Chattell v Daily Mail** has received consideration by this court in several cases, among them: (i) **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27; and (ii) **Super Plus Food Stores Ltd & Tikal Ltd v Continental Baking Company Ltd** [2014] JMCA Civ 33. In each of those cases, Harris JA and Brooks JA (as he then was), respectively, underlined the principle in **Chattell v Daily Mail**, that, without amendment, a judgment could not properly be entered for a sum in excess of the amount claimed.

[36] Counsel for the respondents acknowledged that the unregistered parcel of land was not land claimed by the respondents in their counterclaim. There is a lack of clarity, therefore, as to the reason of the trial judge for declaring the respondents to be legally and beneficially entitled to possession of the unregistered land. In paragraph [5] of her judgment set out above, the trial judge appears to have been of the view that "all three parcels were apparently owned by Mr. Ralford Campbell and sold together to the defendants". At paragraph [39] of the judgment the trial judge, in discussing the report of Mr Ivan Powell, the appellant's expert, observed: "In the report, the property was described as being comprised of two parcels of land". It is not exactly clear what was the thought process of the trial judge that informed the declaration in respect of the unregistered parcel. The issue is not treated with in the learned judge's judgment, although counsel for the applicant contends that the point was raised in written submissions made in the application to him. Having reviewed the respondents' counterclaim it is evident that the relief sought was in relation to the two registered properties registered at Volume 958, Folio 595 and Volume 868, Folio 76 of the Register Book of Titles. If the unregistered parcel was declared to be legally and beneficially owned by the respondents when they did not claim it, that obviously is a

matter that calls for some exploration when the appeal is heard, along the lines of the principle set out in **Chattell v Daily Mail** and other similar cases.

[37] One important distinction, however, between those three cases and the instant case, however, is that, unlike in those cases, in which the appellants were directly affected by the impugned judgment; in this case the appellant is not affected by that apparent error at all, as he, like the respondents, did not make a claim for adverse possession in relation to the unregistered property either.

[38] It would therefore seem that, on the face of it, the applicant may have some prospect of success on this issue. However, the apparent error in respect of the unregistered parcel would not prejudice the applicant, as (a matter just noted) he did not make a claim for adverse possession in relation to it. We therefore need not, in the circumstances of this case, consider balancing the risks of injustice. However, if we were to do so, in looking at the respective risks of injustice, neither the respondents nor the applicant would suffer any injustice if a stay was granted as, on the face of it, neither side has made a claim to the unregistered land. The injunctions ordered in respect of the unregistered land would therefore not affect the applicant in any way. Additionally, there could legally be no stay in respect of the first order of the trial judge, it being in nature declaratory, and thus carrying with it nothing to stay (see, for example, **Norman Washington Manley Bowen v Shahine Robinson & Anor** [2010] JMCA App 27).

[39] Accordingly, the application to vary or discharge the orders of the learned judge should be refused and costs should be awarded to the respondents to be agreed or taxed.

EDWARDS JA

[40] I have read in draft the judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

BROWN BECKFORD JA (AG)

[41] I too have read the draft judgment of F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

ORDER

Application to vary or discharge the orders of D Fraser JA refused. Costs to the respondents to be agreed or taxed.