

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 111/89

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

MOTION

BETWEEN	ROBERT D. HONIBALL	APPELLANTS/PLAINTIFFS
AND	GEORGE A. BROWN	
AND	CHRISTIAN ALELE	RESPONDENT/APPLICANT

Dr. L.G. Barnett and Dennis Morrison for Appellants

Allan Wood for Respondent

April 8 and 29, 1991

CAREY P. (AG.):

This is an application for leave to appeal to Her Majesty in Council against a judgment of the Court dated 14th March, 1991 directing the Registrar of Titles (inter alia) to cancel a Certificate of Title issued to the appellants and the issue of a new Certificate to the respondent. Allied to that application was a prayer:

"That execution of the Judgment which is the subject matter of this appeal be stayed pending the Appeal upon such terms as shall be deemed just."

We heard arguments in respect of that order which the appellants sought, as it was not altogether clear whether this Court had any jurisdiction to entertain it.

The matter is governed by the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962. Paragraph 6 of that Order provides as follows:

"6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as her Majesty in Council shall think fit to make thereon."

Paragraph 5 is also relevant. It is in the following form:

"A single judge of the Court shall have power and jurisdiction -

- (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;
- (b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision."

The difficulty arises from the phrase in paragraph 6 (the judgment appealed from requires) "the appellant to pay money or do any act,". In the instant case, the appellant was neither required to pay money nor do any act.

We were referred to S.C.C.A. 51/83 - Issa v. Stannard & Others (unreported) delivered 16th April 1985 a judgment of White J.A. In that case after final leave had been granted, the appellant applied to a single judge of the Court that execution be stayed pending the appeal to the Privy Council. The order appealed from in that case required the Registrar of Titles to make endorsements on Certificates of Title. The single judge dismissed the summons on the basis that the appellant had not brought himself within paragraph 6 nor 5 (b) as he "would in effect be granting injunctive relief which is not what Rules 5 (b) and 6 were designed for."

I fear I do not find that case greatly helpful. In the first place seeing that the application was made to a single judge, it could only have been made pursuant to paragraph 5 which confers powers on a single judge to make orders which are reviewable by the full Court. It could not have been made under paragraph 6 which is wholly concerned with the powers of the Court to grant a stay where the judgment requires an appellant to pay money or do any act. Secondly, it is not clear to me why an order maintaining the status quo ante what the single judge referred to as "the granting of injunctive relief" was regarded as impermissible. Paragraphs 5 (b) speaks of - "giving such directions as the interests of justice or circumstances of the case require." I would have thought that it was in the interests of justice to ensure that if an appellant were to succeed in his appeal, that he would not have

gained a Pyrrhic victory. As was said in Wilson v. Church (NO. 2) [1879] 12 Ch. D. at pp. 458-459:

" when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory."

The view of White J.A. in the cited case, appears to be that a stay may only be granted where the appellant has been ordered to pay money or do an act. In the great majority of cases, the appellant appeals for the very reason that he has been ordered to pay money or do some act. In a sense therefore, the circumstances for the exercise of the Court's power under paragraph 6 are ample and comprehensive. It could not be the intention of the framers of this statutory instrument to except only those cases where the appellant had not been ordered to do any act but some official was given directions which adversely affected the interest of an appellant. There is nothing in paragraphs 5 and 6 when read together which on their true construction, could lead to the view that it was ever intended to restrict stays of execution to those cases where the judgment is for the payment of money or the performance of an act by the appellant.

In my view the Rules should be construed liberally rather than restrictively for the reason I have already adumbrated. It may well be that the draftsmen were unaware of the Jamaican context in which an official such as the Registrar of Titles can be directed to carry out orders which affect a defendant, as in the present case, the Registrar of Titles was ordered to cancel a Certificate of Title. Section 158 Registration of Titles Act:

"158 (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar

- (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
- (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,

and the Registrar shall give effect to that direction.

(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar

- (a) to cancel the certificate of title to the land and to issue a new Certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
- (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the Court or a judge."

In a sense, those acts are the appellant's acts, albeit performed by a statutory agent.

Dr. Barnett argued that Section 5 (b) could be invoked because its terms were wide enough to encompass a stay of proceedings. It seems to me from the scheme of the Order, that it was never intended to empower a single judge and the court on a review, to deal with stays of execution. Paragraph 6 is in my view sufficiently expansive to cover all the manifestation

of a judgment given against a party. It is specific to suspending or staying the carrying into effect of that judgment. Paragraph 5 is a general provision dealing with such applications as are not specifically dealt with elsewhere in the Order.

In my judgment the applicable rule is to be found in Paragraph 6 which entitled us to suspend the judgment.

DOWNER, J.A.

The important procedural point at issue in this application for leave to appeal to the Privy Council is whether this Court is empowered to grant a stay of execution in circumstances where an order was directed to the Registrar of Titles to cancel a certificate of title in the name of the appellant Brown, and to register it in the name of the respondent Alele.

If this Court is so empowered, it must be by Rule 6 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, Proclamations Rules and Regulations 1962 p. 464. Rule 6 reads:

"6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

The issue has arisen because Mr. Wood in his submission has contended that the appellant Brown "was not required to pay money or do any act" which would enable the court to direct "that the execution thereof be suspended pending the appeal." Such a reading of Rule 6 might lead to the absurd position whereby the Privy Council might be precluded from giving to Brown, if he succeeds on appeal, the relief this Court gave to Alele. It could not be the purpose of the rule to render a further appeal a nullity. In the case of Attorney General of Gambia v. N'Jie (1961) 2 All E.R. 504 the Privy Council

overruled a decision of the West African Court of Appeal where a literal reading was given to Rule 5 which corresponds to our Rule 3. There also the literal reading resulted in an absurd result and so was set aside.

In interpreting this rule, it is appropriate to ask what is its purpose? and how ought it to be interpreted in circumstances where instead of directing the court's order on the appellant Brown, as would have been the normal course when equitable relief is granted, the coercive order was directed to the Registrar of Titles to deprive the appellant Brown of the estate which was found to have been acquired by fraud? The Registrar was directed to carry out an administrative act on behalf of Brown. A comparable situation occurs even in jurisdictions where registration of titles is not compulsory. In England, conveyancing counsel appointed by statute will draft conveyances on the directions of the court which transfers property from one party to the other. The Registrar of Titles may be regarded as a "statutory agent" for the appellant and conveyancing counsel in England are akin to agents for the party against whom a coercive order is made to deliver up property to the party who has succeeded in the suit.

The relief sought by the appellant Brown is catered for in the second limb of the rule which provides that the court should have power to suspend the execution of the order where the judgment appealed from requires the appellant to pay money or do any act. The Registrar's act is in substance the act of the appellant Brown and it is to suspend the conveyance of the property to Alele pending the appeal to a higher court. In interpreting Rule 6 it must always be recalled that rules are general and it is necessary to arrive at just results in particular instances.

If regarding the Registrar's act as that of the appellant Brown is the fair and reasonable way to interpret Rule 6, we should expect to find that the rule also covers the situation where the judgment is carried into execution and provision ought to be made for an equally just result.

The first limb of the rule in that regard, stipulates that if Alele was the person in whose favour the judgment was given, that he ought, before execution of the judgment, to be made to enter into good and sufficient security to the satisfaction of the court, so that if the order of the Privy Council be that the property rightly belongs to Brown such an order could be carried out without prejudice to Brown. There was this alternative way therefore of dealing with the issue and where restitution was the relief granted by the court, the appropriate order on either alternative must provide that the land is not transferred or encumbered by a third party.

It is instructive to cite Rule 7 to show the wide range of options open to a court in requesting security. The rule reads:

"7. For the purposes of sections 4 and 6 of this Order, a person may provide security in any manner that the Court may approve in his case, and for the avoidance of doubts it is declared that such security may with the approval of the Court consist in whole or in part of a deposit of money."

Mr. Wood cited the case of Issa v. Stannard et al S.C.C.A. 51/83 a judgment in Chambers delivered by White, J.A. on the 16th April, 1985. A close reading of the judgment indicates that it is not as helpful as suggested. In the instant case, the application for stay has been rightly sought when there was an application for conditional leave. In Issa v. Stannard et al (supra) the timing was different and it is best to let White, J.A.

attest to this. Page 2 of his judgment reads -

" The order granting final leave to appeal was made on the 14th January, 1985, and the other requisite steps have been taken to enable the Appeal to be prosecuted expeditiously."

Moreover, the judgment seems to be based on a concession by Mr. Hylton who argued the case for the appellant. Here is how the learned judge put the concession at page 3 -

" Mr. Hylton argued that bearing in mind that Rule 6 of the Order in Council specifically limits itself to a judgment requiring the appellant to pay money or do any act, he would concede that in a situation in which the judgment requires the appellant to pay money or do any act if the appellant were to apply under Rule 5 (b) and not under Rule 6 the Court would have to consider whether the interest of justice and the circumstances of the case require the judge to make the order staying execution. On the other hand, where, as here, the judgment does not require the payment of money or the doing of any act by the appellant the appellant has no choice but to apply under Rule 5 (b) because he cannot bring himself within Rule 6."

In coming to his decision, White, J.A. said -

" It is my decision that the respondents have not brought themselves within the provisions of the relevant order. They are not appellants who have been ordered to do an act or pay money. The decision of the Court of Appeal being appealed from does not in any way impose upon them any duty which they must fulfil for the benefit of the successful party....."

There are two points which ought to be made about

Issa v. Stannard. Firstly, it was an application pursuant to Rule 5 which reads -

"5. A single judge of the Court shall have power and jurisdiction—

- (a) to hear and determine any application to the Court for leave to appeal

in any case where under any provision of law an appeal lies as of right from a decision of the Court;

- (b)generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision."

The first point is that it seems questionable that this court has any power to grant an order after final leave to appeal has been granted. In this case final leave was granted on 14th of January, 1985 and the refusal to grant a stay of execution was on 16th April, 1985. To my mind any stay after final leave to appeal would have to be made by petition to the Privy Council itself. So the decision to refuse a stay could have been supported on that ground. Rule 13 suggests that this approach is correct. It reads -

"13. An appellant who has obtained final leave to appeal shall prosecute his appeal in accordance with the Rules for the time being regulating the general practice and procedure in appeals to Her Majesty in Council."

Secondly, the analysis which permitted a stay of execution in the instant case seems applicable to Stannard v. Issa, had the application been made when conditional leave was sought, and it seems a stay could have been granted at any time before final leave was granted to the Privy Council. The decision of the Court of appeal was that Issa was granted the modification she had sought. Instead of making an order that the appellants

Stannard et al be granted a stay of execution to the registration of the modification, the Court applied section 7 of the Restrictive Covenants (Discharge and Modification) Act. It reads -

"7. Where the title to any land in respect of which any order is made under this Act is registered under the Registration of Titles Act, the Registrar of Titles shall forthwith, upon production to him of a certified copy of such order, enter an appropriate memorandum thereof upon the Register Book."
(Emphasis supplied)

In this instance also the Registrar of Titles would have been the "statutory agent" of Stannard et al so there would be compliance with Rule 6 that the judgment required the appellants to do an act.

It was in the light of the above principles and on the true construction of Rule 6 that a stay of execution was granted to the appellant Brown at the end of the hearing of this application.

GORDON J.A. (AG.)

I concurred in the decision of the court and I agree with the reasons of Carey P. (Ag.). I have nothing to add.