[2023] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

APPLICATION NO COA2022APP00246

BETWEEN	**GEORGE SIMS**	**APPLICANT**
AND	**PAUL REID**	**RESPONDENT**

Miss Janeve Williams instructed by Nigel Jones & Company for the applicant

Ruel Woolcock instructed by Ruel Woolcock & Company for the respondent

13 and 14 March 2023

ORAL JUDGMENT

V HARRIS JA

Introduction and background

[1] The applicant, Mr George Sims, is seeking an extension of time to file notice and grounds of appeal.

[2] The applicant and his mother, Mrs Ione Sims, commenced proceedings against the respondent, Mr Paul Reid, in the Supreme Court. They alleged that the respondent fraudulently acquired property owned by Mr Joseph Sims ('the deceased'), who was Mrs Sims' husband, the applicant's father, and the respondent's uncle, at 17 Sunnyside Avenue, May Pen, in the parish of Clarendon, formerly comprised in certificate of title registered at volume 1161 folio 228 and now comprised in certificate of title registered at volume 1225 folio 885 of the Register Book of Titles ('the property'). The claim sought

orders for a declaration that the property belonged to the deceased's estate, a rescission and cancellation of the later title, as well as directions to the Registrar of Titles to issue a new certificate of title in the deceased's name.

[3] The property was initially owned by the deceased alone, but sometime in or around 1986, it was transferred to the deceased and the respondent as joint tenants. Upon the deceased's death, the respondent became the sole registered proprietor of the property. At the trial, a handwriting expert gave evidence that the signature on the instrument of transfer purporting to be that of the deceased was not his, based on comparisons the expert made between the deceased's signature on the certified copy of the marriage (duplicate) register dated 1958 and the instrument of transfer dated 18 June 1986. It was common ground that the deceased was ill before he got married, and the illness caused his hands to shake. It was also undisputed that he recovered from the illness. However, the appellant's case was that a residual effect of the deceased's illness was shaking hands. In contrast, the respondent's case was that he did not know of the deceased's hands shaking and, in the mid-1980s, when he was assisting the deceased, he never saw his hands shaking. It would appear that the handwriting expert was unaware of the deceased's illness and subsequent recovery when she rendered her opinion.

[4] The claim was heard by Palmer J ('the learned judge') over several days and, on 10 February 2021, he gave judgment for the respondent and awarded him costs, which were to be agreed or taxed.

The law

[5] The decision of Palmer J was a final judgment. Therefore, by virtue of rule 1.11(1)(c) of the Court of Appeal Rules ('CAR'), the appeal should have been filed within 42 days of the date of the judgment, that is, by 25 March 2021. This was not done. This court, however, is empowered by rule 1.7(2)(b) of CAR to extend the time within which an applicant must file their notice and grounds of appeal.

[6] It is now well settled that in considering an application for an extension of time, the court is to consider the length of and reason for the delay, whether there is an arguable case for an appeal, and the degree of prejudice to the other parties if time is extended (see **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999).

[7] Notwithstanding the absence of a good reason for the delay, the court may still grant an application for an extension of time, "as the overriding principle is that justice has to be done" (per Morrison JA (as he then was) in **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23 at para. [28] of the judgment applying **Leymon Strachan**). Each factor will now be considered in turn.

Discussion

Length of delay

[8] The application for extension of time was filed on 28 November 2022 and was amended on 7 December 2022. The length of the delay is, therefore, 20 months. The applicant and respondent agree that this period is inordinate. We, too, agree. However, it is recognised that delay by itself will not be fatal to an application for extension of time, but it "is not a minor element" in the determination of the application (see **Primrose Cohen v Rollington Sterling and Linval Sterling** [2014] JMCA App 6 ('**Cohen v Sterling**') per Brooks JA (as he then was) at paras. [20] and [21]).

Reason for delay

[9] The applicant, in his affidavit filed in support of the application on 28 November 2022, deposed that he received a copy of the judgment on 24 February 2021 from his attorneys, who represented him at trial, along with instructions that he had 42 days from the date of the judgment to file an appeal. He consulted and retained another attorney to file an appeal on or around 18 March 2021 ('the former attorney'). After that consultation, he primarily communicated with the former attorney's secretary and was

informed that the notice of appeal had been filed. However, in February 2022, he could not contact the former attorney's office. In October 2022, he came to Jamaica, and that was when he discovered that the former attorney had emigrated and the relevant documents for the appeal had not been filed. No explanation was provided for his inaction between February and October 2022, when he could not reach his former attorney. The applicant's explanation for the delay in filing the notice and grounds of appeal was that this was due to his former attorney's gross inadvertence and oversight.

[10] Counsel for the respondent has submitted that the applicant's explanation for the delay cannot be considered a good reason because he failed to explain the eight-month delay before he took steps to ascertain why he was unable to contact his former attorney.

[11] The applicant has not provided proof of his attempts to contact his former attorney, but we are prepared to accept that he would have done so, given the circumstances. We also note that the former attorney has not provided an affidavit giving a reason for his failure to file the notice and grounds of appeal. We acknowledge that this is due to his absence from the island and the applicant's inability to locate him. We have, therefore, accepted that the applicant had taken steps to file an appeal before the time to do so had elapsed, and it would not have been unreasonable for him to believe that his former attorney had done so. Additionally, since he resided overseas, the applicant could not have easily attended his former attorney's office to ascertain why he could no longer contact him or his secretary. In these circumstances, we are of the view that the applicant has provided a good reason for the delay.

Arguable case for appeal

[12] The applicant intends to challenge on appeal the learned judge's approach to the handwriting expert's evidence and his finding that the applicant's evidence was not credible. In the applicant's affidavit, as well as written submissions made on his behalf, there were no reasons or arguments advanced in relation to whether he has an arguable case on appeal. The court nonetheless invited counsel to make oral submissions in this regard. Counsel submitted that the learned judge fell into error when he found that the

applicant's evidence that he destroyed the letters that the deceased wrote to him because the handwriting was "crab toe" negatively impacted his credibility. She also submitted that the learned judge was wrong to have rejected the expert's opinion, which was uncontradicted, that the deceased's signature on the instrument of transfer was forged.

[13] On the other hand, the respondent's position is that there is no arguable case for appeal because the learned judge's decision was based on findings of fact, and there was sufficient evidence to support them.

[14] The authorities are pellucid that this court will not interfere with the findings of fact of a trial judge unless the evidence does not support the findings or it is clear that the trial judge did not make use of the advantage of having seen and heard the witnesses (see **Rayon Sinclair v Edward Bromfield** [2016] JMCA Civ 7, **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21).

[15] In our judgment, there is no arguable case for an appeal for the reasons set out below.

[16] Firstly, in respect of the expert's evidence, the learned judge, having considered the evidence and relevant authorities, correctly found that her testimony was to be assessed and given the appropriate weight in the context of the facts of the case. He also found that the expert made certain factual assumptions that resulted in her conclusions being faulty. In particular, the learned judge considered that the only known handwriting of the deceased that the expert accepted was his signature on the marriage register, which he signed in 1958 when his hands were shaking due to an illness. The expert rejected the deceased's signature on the certificate of enumeration dated 25 January 1975 as not being his because it differed from his signature on the marriage register. The learned judge accepted the evidence that the deceased had recovered from the illness that caused his hands to shake, which included the respondent's evidence that his hands no longer shook when he knew him. He found that this could have accounted for the

differences in his signatures on the respective documents. In our view, this finding will be difficult to impugn because not only was it supported by the evidence, but the learned judge adequately demonstrated how he had arrived at this conclusion in his analysis of the law and evidence.

[17] Secondly, the learned judge concluded that the applicant was not a credible witness based on several inconsistencies in his evidence, and not only because he claimed to have destroyed the letters from the deceased because of the poor quality of his handwriting. For example, the learned judge highlighted the applicant's testimony that when he emigrated, his mother remained with his father in Jamaica until his death in 1988. He pointed out that this aspect of the applicant's evidence was contradicted by his own witness, who testified that the applicant and his mother emigrated in the 1970s and that his mother left some years before he did. Also, the learned judge emphasised that in an affidavit that the applicant swore to in 2011, he averred that his mother emigrated at the same time he did, and she lived with him until 2011. It was entirely a matter for the learned judge to decide, having had the benefit of seeing and assessing the demeanour of the parties and their witnesses, the evidence and witnesses he found credible. In light of the learned judge's analysis of the evidence, we believe that the applicant will be hard-pressed to impugn the learned judge's findings of fact.

[18] The finding that the applicant has no arguable case on appeal is dispositive of the application (see **Cohen v Sterling** and **Christopher Edwards v Kevin Brooks and Dailia Byfield** [2020] JMCA App 49, authorities relied on by the respondent). Nevertheless, the issue of prejudice will be considered briefly. The applicant has not indicated what prejudice he would suffer if the application is refused, except that he was always desirous of appealing the learned judge's decision and had taken steps to do so. Although not advanced by the applicant, we recognise that the prejudice he would endure is that, as administrator of the deceased's estate, the estate would lose the property, if the application is refused. The applicant has posited that the respondent would suffer no prejudice if the application is granted because he has not pursued the "fruits" of his

judgment by taking steps to tax the costs he was awarded in the court below. However, the applicant has ignored that the crucial "fruits" of the judgment, which the respondent has enjoyed for over two years without being required to defend an appeal, are retaining title to and ownership of the property. It is also worth noting that he has been the registered owner of this property for at least 36 years (since 1986). Therefore, as it stands, when the respondent's position is balanced against that of the applicant, it would seem to us that the risk of prejudice would be greater for the respondent.

[19] In light of the foregoing, the order of the court is as follows:

1. The application for an extension of time to file notice and grounds of appeal is refused.

2. Costs to the respondent to be taxed if not agreed.