

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 162 OF 2005

SUPREME COURT CIVIL APPEAL NO. 99 OF 2005

BEFORE: THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN: KINGSLEY THOMAS APPLICANT/APPELLANT

AND COLLIN INNIS RESPONDENT

IN CHAMBERS

**Mr. Jermaine Spence and Ms. Tenneshia Watkins instructed by
Vaccianna and Whittingham, Attorneys at Law for the Appellant**

**Mr. Ian G. Wilkinson instructed by Ian G. Wilkinson &
Co. for the Respondent.**

December 13, 2005 & February 14, 2006

K. HARRISON, J.A:

1. The Claimant/Respondent brought an action in the Supreme Court against the Appellant for defamation and sought damages in respect of a libel which arose out of an incident on the 1st December 1999. Pusey J (Ag.) gave judgment for the Respondent on the 20th April 2005, in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) with costs to be taxed if not agreed.

2. The Appellant/Applicant has appealed against the judgment and has applied for a stay of execution and all further proceedings on the judgment of the Learned Trial Judge until determination of the appeal. The Notice of Application for the stay of execution was accompanied by an Affidavit by the Appellant and which was filed in the Registry of the Court of Appeal on the 19th October 2005. Counsel for the Respondent has resisted the application. No response has been filed however by the Respondent.

3. At the hearing of the Application on the 13th December 2005, Mr. Wilkinson, Counsel for the Respondent, raised a point in *limine* which he argued would resolve the issue in favour of the Respondent. This preliminary point was that the Applicant has no audience before the Court of Appeal until he sought and was refused a stay by the Court below. Counsel rested his argument on authorities that pre-dated the Court of Appeal Rules 2002 (hereafter "COAR").

4. Under the old rules of the Court of Appeal there were two options open to an applicant for a stay of execution pending the hearing of the appeal namely: (a) under rule 21(1) the application must be made first to the court below and if refused to the Court of Appeal, constituted of three Judges of Appeal, and (b) under rule 33(1) to a single Judge of Appeal; the determination of this single Judge may be discharged or varied by the Court of Appeal.

5. Rule 2.11(1)(b) of the COAR 2002 makes it quite clear that a single Judge of the Court of Appeal may make orders for a stay of execution of any judgment or order against which an appeal has been made pending the determination of

the appeal. These Rules unlike the former contain no requirement that a stay must first be applied for in the Court below.

6. It is my view that although Rule 2.14(a) uses the words "except so far as the court below or a single judge directs", it does not mean however, that an applicant must first exhaust his remedies below before he seeks the assistance of the Court of Appeal.

7. I hold that the construction of the Rule in question contended for by the Respondent's Counsel is incorrect. Rule 2.11(1)(b) of the 2002 Rules contemplates that the single Judge of the Court of Appeal has the power to deal with an application staying the execution of a judgment. This preliminary objection therefore fails.

8. Having disposed of the preliminary point, the issue now, is whether this case is a proper one for the exercise of my discretion in ordering a stay of execution.

9. The case of ***Linotype-Hell Finance v Baker*** [1992] 4 All ER 887 is the modern authority on the circumstances in which a Court will exercise its discretion on the granting of a stay. The head note reads in part:

"Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay he will be ruined and that he has an appeal with some prospect of success."

10. For many years prior to the Linotype case 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. This principle was regarded by Staughton LJ, as too stringent a test in *Linotype-Hell* (supra). This did not mean however, that the court could not consider this factor as a criterion for deciding whether or not to grant a stay. In the instant case, the grounds supporting the application state inter alia:

“2. The defendant is wary that if the judgment sum and cost whether agreed or taxed are paid over to the Claimant and the Appeal filed herein is successful, there exists the possibility that the Defendant may not be able to recover or may experience difficulties in recovering the said sums from the Claimant in addition to any costs awarded to the Defendant.”

11. In exercising one’s discretion to grant a stay of execution, it will depend upon all the circumstances of the case. The essential factor is the risk of injustice. See the un-reported English case of ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 1915.

12. Having carefully considered the arguments and submissions of both Counsels in the matter, I am persuaded that the appeal before me is an arguable appeal. The Grounds of Appeal filed by the Appellant/Applicant raise a number of issues touching and concerning the defence of justification and reliance upon section 7 of the Defamation Act.

13. I am also influenced by the argument made by the Appellant/Applicant in respect of ground 2 of the Application. The risk of the Appellant being unable to

recover what has been paid to the Respondent if the judgment is enforced in the meantime, is a material factor one ought to bear in mind. I do not believe and I so hold that, it is fatal to one's application if he does not say, that without a stay of execution he will be ruined. In addition to Ground 2 (*supra*), the Appellant has stated that he has an appeal which has some prospect of success. These factors to my mind, are, legitimate reasons for granting a stay of execution.

14. In the exercise of my discretion, therefore, I hereby grant a stay of execution of the judgment of the learned trial Judge herein until the hearing of the appeal.