JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/2003

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.(Ag.)

BETWEEN **WESTERN PUBLISHERS LTD** **APPELLANT**

AND **CECELIA GRANT** **RESPONDENT**

H. Charles Johnson, instructed by H. Charles Johnson & Co. for the Appellant.

C. Dennis Morrison, Q.C., instructed by DunnCox for the Respondent

April 16 and 17, 2007

PANTON, J.A.

1. This is an appeal against the judgment of Marjorie Cole-Smith, J. made on June 4, 2003, wherein she dismissed the appellant's application for an order to extend the time within which to hear the motion and also to set aside the judgment.

2. In order to understand the matter, it is necessary to set out its history. On July 5, 1993, the respondent filed an action for libel against the appellant. On July 9, 1993, the writ of summons and statement of claim were sent by registered post to the appellant. Up to October 7, 1993, the appellant had done nothing in respect of the proceedings so interlocutory judgment in default of

appearance was entered on that date. On November 27, 1993, an order was made setting aside this judgment, and the record shows that a defence was filed.

3. In October, 1994, the respondent filed a certificate of readiness. The case, it appears, languished in the registry of the Supreme Court for nearly five years until August 23, 1999, when the Registrar wrote to the parties to advise them that the action had been fixed for trial during the week commencing September 27, 1999. On that day, notwithstanding the time that had already passed, the appellant requested the Court to adjourn the matter sine die. The Court obliged. The respondent later wrote to the appellant seeking cooperation to approach the Registrar for "as early a trial date as is possible".

4. Eventually, the matter was listed for hearing during the week November 5, 2001. The normal practice is for this list to be placed on the notice board at the Supreme Court. Unfortunately, the case, though placed on this list, bore a caption indicating October 29, 2001. Of course, anyone looking on the list, particularly someone involved or interested in the case, would have realized that October 29 had already passed, and that the caption October 29 appearing on the list for November 5 was an error. At the very least, an interested party would have thought it advisable and necessary to clarify the matter with the Registrar.

5. The matter was not taken on November 5 but was adjourned to November 9, when evidence was taken and judgment entered in favour of the respondent for $800,000 plus costs. Final judgment was filed on November 19, 2001. A praecipe for writ of seizure and sale was filed on February 12, 2002, and issued on March 18, 2002.

6. A notice of motion was filed on February 28, 2002, to set aside this judgment. The motion sought an order that:

> "(i) the execution of the Default Judgment obtained herein by the Plaintiff on the 9th day of November, 2001, be stayed
>
> (ii) the said Default Judgment obtained be set aside."

The notice of motion was supported by an affidavit of the appellant's attorney-at-law stating that the appellant had not been informed of the trial date, and that there was an arguable defence as the words complained of did not mean that which the respondent was alleging. Further, that the publication was not made out of "malevolence or spite towards the plaintiff".

7. The matter came before Beckford, J. on January 30, 2003, and she ordered that the motion to set aside the judgment be dismissed. That order has not been the subject of an appeal. Instead, the appellant filed another motion seeking extension of time within which to hear the motion and also to set aside the judgment.

8. This was the application that came before Marjorie Cole-Smith, J. who ruled that the matter had been already litigated (presumably by Beckford, J.). In her judgment Cole-Smith, J. pointed out that the appellant had not brought itself under section 354 of the Judicature (Civil Procedure Code) Law or Rule 39(6) of the Civil Procedure Rules 2002.

9. In challenging this decision, the appellant relied on two grounds of appeal, namely:

> "(a) The Appellant/Defendant is entitled to an Enlargement of Time:
>
> (b) The Order of the learned Judge is erroneous due to her reliance of (sic) the Affidavit of Yolande Whitely."

10. Yolande Whitely, an attorney-at-law who is an associate with the firm DunnCox had filed an affidavit on May 6, 2003, wherein she stated that which had transpired before Beckford, J. Paragraph 3 of that affidavit reads thus:

> "That at the said hearing the Honourable Mrs. Justice Kay Beckford made the following points:
>
> (i) The Defendant via his Attorney had a duty to check the Court List every week for its matter;
>
> (ii) A certificate of Readiness had been filed by the Plaintiff which should have put the Defendant on alert;
>
> (iii) The fact that there may have been a typographical error on the Court List did not relieve the Defendant of its duty his Attorney should have conducted inquiries at the Registry;

(iv) Asked why there was a delay between the date of the Judgment and the Motion to set it aside;

(v) The letter submitted by the Defendant's Attorney did not show that the parties were in constant contact as alleged by the said Defendant's Attorney;

(vi) Explained to the Defendant's Attorney the difference between a Default Judgment and Judgment entered at trial in the absence of a party, pointing out that he was relying on the incorrect authority;

(vii) The Defendant was at fault;

(viii) Actions are fixed for the whole week so the fact that the matter was determined on a Friday was of no moment;

(ix) The Claimant was not required to advise the Defendant of the date as this information was published by the Court;

(x) The way in which the application was done was incorrect. The rules of the Judicature (Civil Procedure Code) Law require the application to set aside to be done within a certain time period;

(xi) The time must be enlarged first and then take the appropriate steps;

(xii) The matter was now improperly before the Court and is dismissed."

11. In his submissions before us, Mr. H. Charles Johnson, on behalf of the appellant, said that the proceedings before Beckford, J. was a nullity, and that Cole-Smith, J. was obliged to hear the application without reference to what Beckford, J. had done. Cole-Smith, J., he said, was in error in relying on the

affidavit placed before her by Yolande Whitely. He further said that Cole-Smith, J. had failed to deal with the application properly, as she should have dealt with the matter on its merits. Mr. Dennis Morrison, Q.C. in response submitted that there is no question of Beckford, J.'s order being a nullity, and that if a party was aggrieved by it, the proper course was to file an appeal.

12. Section 354 of the Judicature (Civil Procedure Code) Law, referred to above, reads:

> "Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."

This provision clearly means that a party who is not present at the trial, may apply within ten days for the Court to set aside the judgment. Thereafter, the judgment is unimpeachable except by means of an appeal. If the time for filing an appeal had passed, then it would have been necessary to get leave from the Court of Appeal to file the appeal out of time. The presentation of another application before another judge for an extension of time, and to make a fresh application to set aside the judgment was not an option that was open to the appellant.

13. We agree with Mr. Morrison that the situation is not unlike that which occurred in **Leymon Strachan v The Gleaner Co. Ltd. and Dudley Stokes** (P.C. Appeal No. 22 of 2004 – delivered the 25th July, 2005). In that case,

Walker, J. had set aside a default judgment and given the defendants leave to file and serve a defence. This order was made after there had been an assessment of damages before Bingham, J. and a jury. The order of Walker, J. was not appealed. Instead, the appellant **Strachan** applied to Smith, J. (a judge of co-ordinate jurisdiction) to set aside the order of Walker, J. on the basis that the latter had no jurisdiction to make the order. This Court (Panton, J.A., Cooke, J.A. (Ag), Langrin, J.A. (dissenting) dismissed the appeal on the ground that Smith, J. had no jurisdiction to entertain the application, and that Walker, J. had acted within his jurisdiction. The Privy Council noted in paragraph 32 of its judgment:

> "But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it."

In the circumstances, we find that Cole-Smith, J. had no authority to embark on the course suggested by the appellant. Beckford, J., having dismissed the application to set aside the judgment, had made an order which could not be reversed by Cole-Smith, J. That order could only be reversed on appeal. In any event, Cole-Smith, J. had no jurisdiction to enlarge the ten day period specified in the Judicature (Civil Procedure Code) Law.

14. The orders sought in the amended notice of application at page 79 of the record are refused. The appeal is dismissed. Costs of the appeal are awarded to the respondent, such costs to be agreed or taxed.

HARRIS, J.A.

I agree.

DUKHARAN, J.A. (Ag.)

I agree.

PANTON, P.

ORDER

The appeal is dismissed. The orders sought in the amended notice of application at page 79 of the record are refused. Costs of the appeal are awarded to the respondent, such costs to be agreed or taxed.