[2015] JMCA App 48

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 140/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**ILENE WILLIAMS**	**APPLICANT**
AND	**WESLEY WILLIAMS**	**RESPONDENT**

Michael Thomas for the applicant

Ms Cheryl Richards instructed by Murray and Tucker for the respondent

14 and 17 December 2015

ORAL JUDGMENT

PHILLIPS JA

[1] Before the court is an amended notice of application for court orders dated 23 September 2015 and filed 25 September 2015. The applicant sought permission to appeal against the order made by Lindo J (Ag) (as she then was) on 15 July 2015. She made an order that costs of the adjourned hearing of 28 April 2015 in respect of the application for *inter alia* a new valuation to be conducted on the dwelling house at Thatchfield, Philadelphia in the parish of Saint Ann by a valuator to be appointed by the court, were awarded to the respondent/defendant to be agreed or taxed.

[2] The details of Lindo J's order made on 15 July 2015 are as follows:

“1. A Valuator to be appointed by the Registrar of the Supreme Court to carry out a value of the house situated at Thatchfield District in the parish of Saint Ann.

2. Costs of such valuation to be borne by the Claimant

3. Cost of the adjourned hearing on 28th April, 2015 is awarded to the Defendant to be agreed or taxed.

Leave to appeal the order relating to costs is refused.

4. Claimant’s Attorney to prepare, file and serve Formal Order.”

[3] The proposed grounds of appeal as summarized were stated thus:

a) Having regard to:

(i) the finding of the learned judge (made orally) that the first valuation carried out by Rodgers’ Real Estate Limited was not proper; and

(ii) the ruling granting the claimant’s application (which application was opposed by the respondent) that “a Valuator to be appointed by the Registrar of the Supreme Court to carry out a value of the house situated at Thatchfield District in the parish of Saint Ann”;

the learned judge erred in failing to observe and follow the general rule that the unsuccessful party should pay the costs, to be found at Part 64.6 (1) of the Civil Procedure Rules (CPR).

(b) The learned judge failed to give reasons for her decision thereby paying little or no regard to part 64.6(3) and (4) (b) (d) (ii) and (e) (iii).

(c) In granting costs as she did the learned judge erred in principle and in so doing “got it blatantly wrong”. (Counsel relied on the principle enunciated on **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188, a court of appeal judgment of the Eastern Caribbean States.)

[4] The applicant also sought a stay of execution of the taxation hearing pending the hearing of the appeal.

[5] No affidavits were filed in support of and/or in opposition to the application, so we are constrained to rely on the recitation of the background facts relevant to the application set out in the chronology stated in the written submissions of the applicant's counsel. In any event, in the main, counsel for the respondent had no objection to the same.

Background

[6] An amended fixed date claim form was filed on 30 May 2013 by the applicant against the respondent under the Property Rights of Spouses Act (PROSA). The applicant claimed, inter alia, a declaration that she was entitled to one-half interest in the matrimonial home at Thatchfield, Philadelphia in the parish of Saint Ann. On 8 January 2014, Cole-Smith J ordered, inter alia, that she was entitled to 40% of the value of the dwelling house on the property.

[7] The applicant and the respondent agreed that a valuation was to be conducted by Arthur Rodgers of Rodgers Realty, in Discovery Bay, Saint Ann. The valuation was carried out and the report made available to the applicant and her attorney. The applicant however rejected the report on the grounds that the reported value of $12,383,000.74 was inordinately low having regard to the size and quality of the house. The applicant requested details from the valuator in respect of the market value and evidence of the data which had been utilised in effecting the valuation. The valuator

provided the same by letter dated 18 March 2014. The applicant found the valuator's response to be entirely unsatisfactory and consequently filed a notice of application for court orders seeking *inter alia* an order that a new valuation be carried out in respect of the dwelling house and that a new valuator be appointed by the court.

[8] On 28 April 2015, Lindo J after hearing submissions from counsel representing each party, ordered inter alia that the matter "be part-heard to July 15, 2015 and that **the issue of costs for today's adjournment reserved**".

[9] On 15 July 2015, the court heard further submissions by both counsel, with the respondent maintaining his opposition to the application. The learned judge granted the order and also ordered that "cost of the adjourned hearing on 28th April, 2015 is awarded to the Defendant to be agreed or taxed".

[10] Counsel submitted that the judge had reasoned:

> "that the Court was not satisfied that Mr. Rodgers (Valuator) has provided a proper valuation. The only way justice can be served is for a new valuation to be done."

[11] As indicated, the applicant's application for leave to appeal the costs order was refused and it was therefore renewed before this court.

Applicant's submissions

[12] Counsel for the applicant submitted that the learned judge had erred by exercising her discretion to award costs without reference to the rules of court as required by section 28E of the Judicature Supreme Court Act (the Act). Counsel further

submitted that the judge erred, as in making the award for cost on the procedural application, she failed to observe or to be guided by the general rule stated in part 65.8(2) of the CPR namely that the court must order the unsuccessful party to pay the costs of the successful party. Counsel also argued that the learned judge in acting as she did failed to appreciate that the discretion she exercised was conferred on her by the Act itself and so should be exercised judicially. Additionally, counsel stated that the learned judge failed to mention any circumstance which could have justified her departing from the general rule.

[13] Costs, the applicant's counsel submitted, were reserved on 28 April 2015 when the matter was adjourned but were awarded to the respondent on 15 July 2015 when the matter was completed, without any explanation from the learned judge. No award was made on the application itself as no request had been made for costs in relation thereto. The application was granted in favour of the applicant on the basis that the judge found the valuation conducted by Rodgers Realty to be improper. Counsel submitted that although there are exceptions to the general rule that costs should be awarded to the successful party, there were no exceptions in this case and counsel argued further, there was no indication that the learned judge had found any of the exceptions to be applicable. In the circumstances, counsel submitted, the applicant was the successful party in the application for a new valuation, and therefore, Lindo J's decision on the application, to award costs to the unsuccessful party in respect of the adjourned hearing, without any explanation, was palpably wrong. Counsel thus urged

this court to intervene on the basis that the applicant's appeal would have a real chance of success.

[14] Mr Thomas contended that when challenging the exercise of a judge's discretion, the court should have regard to the principles cited in **Dayne Smith v William Hylton and Annmarie Hylton** [2014] JMCA App 35. He also urged this court to consider the dictum of Sir Vincent Floissac CJ in **Dufour and Others v Helenair Corporation Ltd and Others**, at pages 190-191 where he said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[15] Mr Thomas relied on the authorities of **Director of State Proceedings, Attorney General and Others v Administrator General of Jamaica** [2015] JMCA Civ 15 and **F & C Alternative Investments (Holdings) Ltd and others v Barthelemy and another** [2012] EWCA Civ 843 to show, as indicated that the general rule is that costs follow the event and so the unsuccessful party should pay the costs of the successful party. In reliance on **F & C Alternative Investments (Holdings) Ltd and others**, he further contended that where a judge purports to

deviate from this general principle, reasons must be stated for so doing. Since the learned judge deviated from this principle and failed to provide reasons for so doing, the learned judge erred in principle and was 'blatantly wrong'. Consequently, he submitted, the decision which flows from this error ought to be set aside.

Respondent's submissions

[16] Counsel for the respondent submitted that the proposed grounds of appeal have no real chance of success, and that the application should therefore be refused. Counsel argued that the learned judge had correctly exercised her discretion and had been appropriately guided by section 28E of the Act and the CPR. She stated that the judge had not erred in awarding costs to the respondent, and that rule 65.8(2) of the CPR did not state that the award of costs to a successful party is mandatory. Indeed, counsel contended that the CPR contemplates exceptions and posited that rule 65.8(3) of the CPR expressly reserves a discretion to the court to make exceptions after taking into account all the factors stated in rule 64.6(4) of the CPR. Counsel further contended that there was no obligation on the learned judge to state the factors that she had taken into account, and submitted that in the circumstances of this case, the learned judge had exercised her discretion judicially, in awarding costs to the respondent and had not erred in so doing.

[17] According to the respondent's counsel, it was well within Lindo J's purview to consider the fact that the applicant had previously consented to a valuation being conducted by Rodgers Realty in respect of the dwelling house at Thatchfield, but then had subsequently rejected that valuation as it was not to her satisfaction, and that the

applicant had thereafter made an application for the appointment of a different valuator in order to obtain a new valuation, that application having been made not at a case management conference, but at the completion of the application for division of property under PROSA and to reflect her disapproval of that conduct in her order as to costs. Counsel attempted to distinguish the cases cited by the applicant's counsel, particularly the **Director of State Proceedings, Attorney General and Ors v Administrator General of Jamaica** by saying that that case related specifically to quantification of costs awarded and not to the exercise of a judge's discretion to award costs. Counsel referred to **Dayne Smith v William Hylton and Annmarie Hylton** and **Dufour and Others v Helenair Corporation Limited and Others** in an effort to show that the judge had not exercised her discretion wrongly, and urged this court not to interfere with the order made by Lindo J since pursuant to rule 1.8(9) of the Court of Appeal Rules, 2002 (CAR) the applicant had not, on the basis of his submissions, satisfied this court that she had crossed the threshold and demonstrated that she had a real chance of success on appeal.

Analysis

[18] It is important to remember that although counsel for the applicant asked counsel for the respondent to agree to treat the application for leave to appeal as the appeal itself she steadfastly declined to do so. As a consequence therefore, the application before us remains an application for leave to appeal simpliciter. Such an application is governed by rules 1.8(1)(2) and (9) of the CAR which read as follows:

> Rule 1.8(1):
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> "Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."
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> Rule 1.8(2):
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> "Where the application for permission may be made to either court, the application must first be made to the court below."
>
> Rule 1.8(9):
>
> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[19] Permission to appeal was sought and refused in the court below and so the applicant has renewed his application for the same before us. Before we can grant permission to appeal we must be satisfied that the applicant's appeal will have a "real chance of success". The phrase "real chance of success" has been interpreted by Morrison JA (as he then was) in **Donovan Foote v Capital and Credit Merchant Bank Limited et al** [2012] JMCA App 14, at paragraph [41] to mean "...a real, and not a fanciful or unrealistic chance of success in the proposed appeal".

[20] We are mindful of the fact that the order made by Lindo J was an exercise of her discretion and that this court hesitates to interfere with the exercise of discretion of a judge in the court below save in respect of special circumstances. This has been stated in a number of cases coming out of this court such as **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, **Elita Flickenger v David Preble &**

Xtabi Resort Limited [2013] JMCA App 13 and **John Ledgister et al v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10. Counsel for the applicant relied on the judgment of Mangatal JA in **Dayne Smith v William Hylton and Annmarie Hylton** at paragraph [26] where she cited with approval the dictum of Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** who endorsed the principles in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 set out in the oft-cited speech of Lord Diplock where he said:

> "...[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it."

[21] The instant case concerns the issue of the discretion of the judge to order costs. The power of the court to grant costs in civil proceedings is derived from section 28E(1) of the Act which states that:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court."

Parts 64 and 65 of the CPR contain the relevant rules that govern the award of costs in civil proceedings. The provisions relevant to this application are rules 64.6 and rule 65.8(2) as follows:

> "64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances…"
>
> "65.8 (2) In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party."

[22] In **Duke St John-Paul Foote v University of Technology and Elaine Wallace** [2015] JMCA App 35, Application No 47/2015, Morrison JA (as he then was), referred to the respondents' submissions in that case, wherein they contended that as successful parties in the matter, they were entitled to an order for costs in their favour on the strength of rule 64.6(1) of the CPR. They also submitted that there were no special circumstances to warrant a deviation from the general rule. Morrison JA (as he then was), however, stated that there were several other factors to be considered in part 64 of the CPR when making a determination in respect to costs. At paragraph [4] of the judgment he said:

> "The general rule notwithstanding, rule 64.6(2) of the CPR expressly reserves a discretion to the court to make "no order as to costs". Rule 64.6(3) provides that, in deciding who should be liable to pay the costs of any proceedings, "the court must have regard to all the circumstances"; while rule 64.6(4) lists a number of factors to which the court

> must, in particular, have regard in deciding who should pay the costs. Among other things, these factors include the conduct of the parties before and during the proceedings (rule 64.6(4) (a)); the reasonableness of a party's pursuit of a particular allegation or issue (rule 64.6(4) (d)); and the manner in which a party has pursued his or her case, or a particular allegation or issue (rule 64.6(4) (e))."

[23] At this stage of the proceedings with no affidavit having been put before us, and no reasons from the learned judge, we are unable to say whether there are any special circumstances or otherwise, which would have aided the consideration of the learned trial judge to differ from the general rule. On the face of it therefore, the applicant would appear to have a real chance of success in showing that the learned judge apparently erred in doing so. In all the circumstances of the case, it is our opinion therefore that permission to appeal ought to be granted.

[24] In relation to the application for a stay of taxation, counsel for the applicant indicated that the bill of costs was filed on 2 September 2015, and that the points of dispute were filed subsequently. The notice of taxation had been filed and the parties are now awaiting a date for the hearing of the contested taxation. However counsel submitted that the taxation should be stayed pending the outcome of the application for permission to appeal, and the hearing of the appeal, in the event that the application for permission to appeal is successful, in order to prevent arming the respondent with a tax certificate and rendering the appeal nugatory. Counsel for the respondent indicated to the court, quite correctly, we might add, that the respondent would not be opposing the application for a stay of the taxation hearing once the application for permission to appeal was granted. Since we propose to grant permission

to appeal we would order a stay of the taxation hearing pending the outcome of the appeal.

Order

Application for permission to appeal is granted and the taxation hearing is stayed pending the outcome of the appeal. Costs of this application to the applicant to be taxed if not agreed.