BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 6 of 2012

BETWEEN

JUNE BLACKMAN also known as JUNE GILL	**INTENDED APPELLANT**

AND

ELMA CARMEN GITTENS-BLACKMAN	**FIRST INTENDED RESPONDENT**
MARCIA ANNETTE GITTENS-GRANT	**SECOND INTENDED RESPONDENT**

Before: The Hon. Madam Justice Sandra P. Mason, The Hon. Mr. Justice Andrew D. Burgess and The Hon. Madam Justice Kaye C. Goodridge, Justices of Appeal.

2012: November 1
2014: May 15

Mr. Ezra E. Alleyne, Attorney-at-Law for the Intended Appellant.
Ms. Nicole C. Roachford and Ms. Tracelyn Rollock, Attorneys-at-Law for the Intended Respondents.

DECISION

Introduction

[1] **GOODRIDGE JA:** This is an application under **rule 62.6(3)** of the **Supreme Court (Civil Procedure) Rules 2008** (the **CPR**) for an extension

of time to appeal against the judgment of **Crane-Scott J** given in favour of the intended respondents, and for a stay of execution of that judgment.

[2] At the conclusion of the hearing of this matter, the Court refused to grant the extension or the stay, and indicated that written reasons would be provided at a later date. The parties were ordered to file written submissions on the issue of costs. Only the intended respondents have complied with the Court's order. The reasons for our refusal to extend the time for filing an appeal or to grant the stay and our decision on the issue of costs are now set out below.

The Background

[3] In 2009 the intended respondents, who are the widow, the second wife, and the only daughter of the deceased Geoffrey Garrett Blackman (Mr. Blackman), sought a declaration that they were the sole owners of property situate at Lots 31 and 32 Coverley in the parish of Christ Church (the Property). The Property was purchased in 1979 by Mr. Blackman and his former wife Kharis Blackman (Kharis) as joint tenants. They resided at the Property with the intended appellant, who is the daughter of Kharis (but not the deceased) until they emigrated to the United States of America in 1983, leaving the intended appellant residing there.

[4] In 1989 Mr. Blackman and Kharis were divorced in the United States of America, but no application was ever filed, either in Barbados or in the United States of America, for settlement of the matrimonial property. Kharis returned to Barbados and continued to reside at the Property with the intended appellant.

[5] In November 1990 Kharis's attorney-at-law wrote to Mr. Blackman in New York informing him that Kharis wanted to have the title to the Property fully transferred to her and inquiring whether he would consent to the transfer. In reply, Mr. Blackman's New York attorney-at-law indicated that Mr. Blackman was willing to convey his half interest provided that the consideration for the same was one-half of its fair market value. No further action was taken by either party with respect to the transfer, nor were there any other steps to sever the joint tenancy.

[6] Kharis died on 28 January 1993 and on 2 March 1996 the first intended respondent and Mr. Blackman were married. Mr. Blackman subsequently served a Notice to Quit in January 1997 on the intended appellant, who refused to leave the Property.

[7] Mr. Blackman died intestate on 20 July 1999. The intended respondents obtained a grant of letters of administration and requested the intended

appellant to deliver up possession. On her refusal to vacate the Property, the intended respondents then sought the assistance of the court.

[8] On 20 December 2011 **Crane-Scott J** (i) declared that the intended respondents were entitled to possession of the Property and that the intended appellant was in unlawful possession and occupation thereof; (ii) ordered the intended appellant to deliver up possession on or before 30 June 2012; and (iii) awarded the intended respondents their costs.

The Application

[9] The intended appellant filed her application for leave to appeal out of time on 19 June 2012, some eleven days before the date by which she had been ordered to vacate the Property.

[10] In her affidavit in support of the application, the intended appellant deposed that she received a call from her attorney-at-law who was out of the island, informing her that there was a court hearing but she was unable to attend. On her attorney-at-law's return to Barbados, she made several attempts to find out what happened, but she was told that he "did not yet know". Eventually she was informed that she had lost the case and a meeting took place to discuss the way forward.

[11] The intended appellant also deposed at paragraph 5 of her affidavit that she never received any documents "in respect of any Order, Judgment or

Decision from the Court or from the Claimants' Attorney-at-law". It was further stated that her daughter became embroiled in an altercation with her boyfriend which led to the daughter being charged with murder, and this event added to the immediate stress and dislocation of her affairs. With some financial assistance from a friend, she was able to retain a new attorney-at-law and it was then that she discovered the full implications of the court's decision.

The Submissions of Counsel on the Application

The Intended Appellant's Submissions

[12] Mr. Ezra Alleyne, counsel for the intended appellant, submitted that the pertinent issue for the Court was whether the Court's discretion should be exercised in favour of the intended appellant, as the **CPR** provides a timetable for the conduct of litigation which, prima facie, must be obeyed.

[13] Counsel stated that extensions of time for filing an appeal are governed by **rule 62.6** of the **CPR**. He submitted that the Court's general power to extend time for compliance with a rule is contained in **rule 26.1(2) (b)**, and the Court must take into account the overriding objective in **rule 1.1(2)** in deciding how to exercise that power. It was noted by counsel that the **CPR** does not specify particular conditions that must be considered by the Court in determining whether to grant or refuse such an application.

[14] Mr. Alleyne also submitted that the English Civil Procedure Rules 1998 and Practice Directions address more specifically the factors which must be considered in these circumstances.

[15] It was counsel's further submission that the Court of Appeal of Jamaica followed the English authorities and he referred to the case of **Strachan v The Gleaner Ltd JM 1999 CA 72**, where that court was of the view that the applicant needed to show good reasons for his delay in order to induce the court to grant the extension of time.

[16] Counsel then referred to the case of **Sayers v Clarke [2002] 3 All E.R 490 (Sayers)** which listed eight factors which the court should consider. He submitted that when the Court had regard to the affidavit of the intended appellant outlining the reasons for her delay, there was sufficient material to persuade the Court to grant the extension.

[17] As a subsidiary issue, Mr. Alleyne submitted that while the intended appellant does not dispute that she is bound by the judgment, neither she nor her attorney-at-law was served with the order or judgment of the court. The intended respondents did not comply with **rule 42** and it is for this reason that the intended appellant seeks leave for an extension of time to file an appeal.

The Intended Respondents' Submissions

[18] In response, Ms. Roachford, counsel for the intended respondents, submitted that the special reasons of which a proposed appellant must satisfy the court in order to be granted an extension must be more than normal reasons. She agreed with Mr. Alleyne's submission that the **CPR**, while providing for relief from sanctions at **rule 26.3**, do not provide a checklist as to what factors the court should consider in determining the issue of an extension. Counsel referred to Part 3.9 of the English Civil Procedure Rules 1998 which set out certain factors which were applied in the case of **Sayers** and followed by the Eastern Caribbean Court of Appeal in the case of **The Nevis Island Administration v La Copropriete Du Navire Civil Appeal No. 7 of 2005 (unreported).** She submitted that **Sayers** may be "useful as guidance in our Courts in the determination of the relevant factors for consideration".

[19] Ms. Roachford next turned her attention to the contention of the intended appellant that she had not been served with a copy of any order, judgment or decision. Counsel stated that the intended appellant's attorney-at-law had been informed of the court's decision on 20 December 2011 and had been served with an electronic copy of the judgment as early as 3 January 2012. Therefore the intended appellant was in a position, if not to file an appeal, at

least to file an application for an extension of time similar to that which is now before the Court.

[20] Counsel pointed out that the first intended respondent is eighty-eight years of age and the second intended respondent sixty-five years of age and they are both seeking to put their affairs in order prior to either of them dying. Therefore, if the Court were to grant the intended appellant the relief sought, it would be lengthening the process in a case where the intended appellant has no chance of success on appeal.

[21] Ms. Roachford further submitted that if the Court were to apply the **Sayers** factors to the facts of this case, the reasons advanced by the intended appellant would not amount to special reasons and she would fail in her bid for an extension of time. The application for an extension of time and a stay should therefore be denied and costs awarded to the intended respondents.

The Time Limits for Filing Notices of Appeal

[22] A person who wishes to appeal a judgment of a court must file a notice of appeal within the time limits prescribed by **rule 62.6** of the **CPR**. **Rule 62.6** provides:-

> "**62.6 (1)** The notice of appeal must be filed at the Registry
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> (a) in the case of a procedural appeal, within 14 days of the date on which the decision appealed against was made;

(b) where leave is required, within 14 days of the date when leave was granted; or

(c) in the case of any other appeal within 28 days of the date when the order or judgment appealed against was made or given, or any later date fixed by the court below.

(2) Any of the times stated in sub-rule (1) may be extended by the court or a judge (the judge, if minded to refuse, shall, or for any other reason may, refer the question to the court) pursuant to an application upon notice filed within the relevant time.

(3) Notwithstanding anything in this rule, the court or a judge (the judge, if minded to refuse, shall, or for any other reason, may refer the question to the court) may at any time for special reasons give leave to file and serve a notice of appeal."

[23] The intended appellant did not file her notice of appeal within 28 days as required by **rule 62.6(1)(c)**, and the time for appealing expired on 17 January 2012. Nor did she seek an extension of time by way of application filed within that time period. Her only recourse was to bring this application for an extension on the basis that there are special reasons which would allow the Court to act in her favour. The application was first made to a single judge who, being minded to refuse leave, referred the question to the Court.

Special Reasons

[24] There is no definition of "special reasons" in the **CPR**. We refer to this Court's recent decision in **Civil Appeal No. 3 of 2013 James Ifill v The Attorney General et al** (date of decision 17 April 2014) where **Burgess JA** expressed this Court's opinion as to the manner in which the phrase "special reasons" ought to be interpreted. We consider it necessary to repeat the relevant paragraphs of that decision here:

> "[31]…In our view, the basic approach of this Court to "special reasons" should be to follow the CPR lead and eschew attempting any judicial delimitation of the expression. In particular…this Court should avoid as far as possible creating a check-list or rigid formula of what amounts to "special reasons" and similarly, to making reference to any other judge-made lists or formula…The overriding objective of our CPR is to enable the court to deal with cases justly and this objective must not be strangled by the tentacles of judicial decisions or by rigid judicial formula.
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> [32] Consistent with the observation in the foregoing paragraph, it is our view that the "special reasons" requirement in rule 62.6(3) should be understood and applied against the backdrop of the overarching purpose of the time limit rules introduced by rule 62.6. This purpose is to replace the mischief of the *laissez faire* approach to time limits for appealing encouraged by the pre-CPR civil procedure regime by a new litigation culture of compliance with the time stipulations in rule 62.6. Non-compliance with those time limits, we would add, can operate to defeat the objective of dealing with cases justly mandated in rule 1.1.
>
> [33] Viewing "special reasons" through the prism of the mischief with which rule 62.6 was introduced to deal leads

> inevitably to a presumption in every case that adherence to the time limits specified in rule 62.6(1) and (2) is the rule and that rebuttal of that presumption pursuant to rule 62.6(3) is the exception."

Discussion

[25] The overriding objective of the **CPR** is to enable the courts to deal with cases justly and a court must take into account the matters set out in **rule 1.1(2)**. Parties are required to assist the courts in furthering this objective. This means that parties are under an obligation to adhere to any time limits prescribed, including those for the filing of a notice of appeal. Courts no longer treat non-compliance lightly, and a litigant will pay the ultimate price unless he or she can convince a court to exercise its discretion to forgive non-compliance.

[26] Both counsel have submitted that the factors set out in **Sayers** should be applied in this case. Those submissions, however, fail to take account of the fact that our rule is unlike that in the English CPR. **Rule 62.6(3)** is unique. This Court finds no assistance from the principle enunciated in **Sayers**.

[27] Counsel for the intended appellant proferred a number of reasons for her failure to comply with the statutory requirements and submitted that these reasons are compelling enough for this Court to find that special reasons exist. These may be summarised as follows:

(i) she never received any order, judgment or decision from the court or from the intended respondents' attorney-at-law;

(ii) there was delay in ascertaining the outcome of the case; and

(iii) her daughter was charged with murder.

[28] It is convenient to deal with the first two reasons together. **Rule 42.5** requires a party having carriage of the order to ensure that it is drawn up, and **rule 42.6** provides that every party to any proceedings must be served with the order or judgment. Where a party is represented by an attorney-at-law, service may be effected on the attorney-at-law. There is no evidence that an order was drawn up.

[29] The intended appellant's attorney-at-law was informed by way of electronic mail of the court's decision on the same day that it was given and a copy of the judgment was provided on 3 January 2012. **Rule 42.2** provides that a party is bound by the terms of the judgment or order, whether or not the judgment or order is served, where that party either is present whether in person or by a legal practitioner when the judgment is given or the order is made, or is notified of the terms of the judgment or order by telephone, fax, e-mail or otherwise.

[30] In addition, the e-mail from the intended appellant's former attorney-at-law dated 3 January 2012 referred to a meeting which had been scheduled with the intended appellant later that week and his promise to revert to counsel shortly "with regards to your clients taking possession of the property". While it appears that there was not strict compliance with **rules 42.5** and **42.6**, there is no doubt that the intended appellant became aware of the court's decision within a reasonable time.

[31] With regard to the matter of the intended appellant's daughter being charged with murder, we observe that this occurred in March 2012, sometime after the time for filing an appeal under **rule 62.6(1)(c)** had expired. In fact the intended appellant's affidavit is devoid of specific dates for the occurrences which she seeks to rely upon in explaining the delay which occurred after the expiration of the period within which she ought to have filed her appeal.

[32] Can it therefore be said that the intended appellant has provided reasons which could be regarded as special reasons such as would persuade this Court to exercise its discretion to grant her an extension of time in which to file an appeal in accordance with **rule 62.6 (3)**? Taking all the matters into account, we find that the intended appellant has not provided special reasons.

[33] In the circumstances, the intended appellant's application for leave to file a notice of appeal and for a stay of execution is refused.

The Issue of Costs

[34] We turn now to consider whether costs ought to be awarded to the intended respondents for successfully resisting the application.

[35] In her written submissions on the issue of costs, Ms. Roachford submitted that the Court ought to exercise its discretion under **section 85** of **the Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** and order the intended appellant to pay the costs of the intended respondents, as the intended respondents were successful in every aspect of the matter before the High Court and the need to file for leave to appeal was as a result of the intended appellant's failure to file a timely application.

[36] In relation to quantification of the costs, counsel submitted that the matter before the Court was not an appeal to a higher court in respect of a decision of a lower court. Rather, it was original to the jurisdiction of the Court. Therefore the costs ought not to be limited to two-thirds of the amount as provided for by **rule 65.3**.

[37] It was also counsel's submission that to determine costs on the basis of the application being an interlocutory application would be inappropriate, since the application could not have been filed in the High Court but rather had to

be and was filed in the Court of Appeal. The application was neither a continuance of the High Court proceedings nor an appeal. She contended that the matter did not fall within the scope of **rule 65.11**.

[38] The final submission was that the correct method of calculation is under prescribed costs. The value of the claim should be the value of the property which was the subject matter of the claim. Counsel indicated that the intended appellant's claim was for one-half of the Property, which, according to the land tax notice for 2012-2013 attached to her written submissions was valued at $660,900.

Discussion

[39] **Rule 64.6(1)** of the **CPR** provides that, in exercising its discretion under **section 85** of **Cap. 117A**, the general rule is that the Court will order the unsuccessful party to pay the costs of the successful party. There is also a discretion to make no order as to costs, or, in an exceptional case, to order a successful party to pay all or part of the costs of an unsuccessful party - **rule 64.6(2)**. The Court must have regard to all the circumstances when deciding who should be liable to pay costs and must consider the factors set out in **rule 64.6(5)**.

[40] As stated earlier, the intended appellant's counsel did not file any written submissions on the issue of costs. However, at the hearing, counsel

submitted that the Court should not make any order as to costs, having regard to all the circumstances and given the impecuniosity of the intended appellant.

[41] The intended appellant was not successful in her application to this Court. No evidence was placed before the Court regarding the intended appellant's alleged impecuniosity. We are therefore of the view, having considered the factors under **rule 64.6(5)** of the **CPR**, that there is no reason why this Court should depart from the general rule that the unsuccessful party should pay the costs of the successful party. It is therefore the decision of this Court that the intended appellant shall pay the costs of the intended respondents.

Quantification of Costs

[42] Having determined that the intended respondents are entitled to costs, we next turn our attention to the manner in which those costs ought to be quantified.

[43] The matter which engaged the attention of this Court was an application, not an appeal. Therefore **rule 65.13** which deals with the costs of an appeal is not applicable.

[44] In **Griffiths v Niccolls & Edghill (Construction) Ltd., Civil Appeal No. 8 of 2010** (date of decision 3 July 2013) this Court, in determining the meaning of the word "application", referred to **rule 11.1** which states that an

application for a court order is one made "before, during or after the course of proceedings". An application for an extension of time to file a notice of appeal after the expiry of the relevant time period must be made prior to the commencement of the appeal proceedings - thus it is essentially a procedural application.

[45] **Rule 65.11** deals with the assessment of costs of procedural applications. It is useful to set out that rule here -

> "**Assessed costs of procedural applications**
>
> **65.11**(1) On determining any interlocutory application except at a case management conference, pretrial review or the trial, the court must
>
> (a) decide which party, if any, should pay the costs of the application;
>
> (b) assess the amount of such costs; and
>
> (c) direct when such costs are to be paid.
>
> (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.
>
> (3) The court must however take account of all the circumstances including the factors set out in rule 64.6(5) but where the application is one that could reasonably have been made at a case management conference or pre-trial review, the court will order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party, the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing

(a) the disbursements incurred;

(b) the attorney-at-law's fees incurred; and

(c) how that party's attorney-at-law's costs are calculated.

(6) The statement under sub-rule (5) must comply with any relevant practice direction.

(7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the principal application unless the court considers that there are special circumstances of the case justifying a higher amount."

[46] A similar rule exists in **rule 65.11** of the Eastern Caribbean Civil Procedure Rules (EC CPR). However, at **rule 65.11(3)(b)** of the EC CPR, an application to extend the time specified for doing any act under the rules or an order or direction of the court is specifically characterised as a procedural application. This sub-rule is absent from our **CPR**.

[47] We consider it useful to set out the observations which Barrow JA made in **Norgulf Holdings Limited & Incomeborts Limited v Michael Wilson &**

Partners Limited, Civil Appeal No. 8 of 2007 (date of decision 29 October 2007) **(Norgulf)** in relation to **rule 65.11** of the EC CPR. At paragraphs [6] and [7] he said:

> "[6] A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining <u>any</u> application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2), similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party.
>
> [7] Even paragraph (3), which mentions certain specific types of procedural applications - to amend a statement of case, to extend time, to be relieved from sanctions, or an application that could reasonably have been made at a case management conference or pre-trial review - has as its major premise the operation of a well-known requirement that is applicable to applications generally. That requirement is that the court, in deciding which party, if any, should pay costs, must take into account all the circumstances of the case. The circumstances to be taken into account include the factors set out in rule 64.6(6)…"

[48] We are of the view that, while **rule 65.11(1)(a)** of the **CPR** does not refer to "any application" as is found in the EC CPR, the application of the **Norgulf** principles would not conflict with the underlying purpose of the provision. According to Barrow JA, the factors at **rule 65.11(1)** must be

considered when dealing with applications in general (provided they are not made at case management or trial). We consider that **rule 65.11** ought to be applied in this case, and that **Norgulf** is persuasive authority for the assessment of similar applications under our **CPR**, whether procedural and/or interlocutory.

[49] For the sake of completeness, we observe that **rule 65.12** provides in part:

> "(1) This rule applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings, other than a procedural application.
>
> (2) Where the assessment relates to part of court proceedings, it must be carried out by the judge, Master or Registrar hearing the proceedings."

[50] It was Ms. Roachford's contention that costs should be determined on the basis of the prescribed costs regime, using the value of the Property which is stated to be $660,900 and it is on this basis that she quantified the costs. The intended appellant claimed to be entitled to a 50% interest that is to say $330,450. Counsel submitted that if the Court utilised Appendix C and was unwilling to allow prescribed costs up to and including trial, to award costs up to and including the case management conference would be appropriate. Costs would be calculated at 55 % of the prescribed costs based on a value of $333,450.

[51] The difficulty with this proposition is that the claim was not for a monetary sum. It was for an order for possession of property, which was resisted by the intended appellant. No value was ever placed on the claim in the court below.

[52] With regard to **rule 65.11(4)**, the statement furnished by Ms. Roachford dealt only with how the costs should be calculated. No representations were made with respect to the time spent preparing for and attending the hearing. However, we have considered the material which was placed before the Court by counsel for the intended respondents, and have arrived at a figure which we believe to be fair in the circumstances.

[53] According to **rule 65.11(7)** above, the costs allowed may not exceed one-tenth of the amount of the prescribed costs appropriate to the principal application unless special circumstances exist to justify a higher amount. We note however, that **Crane-Scott J** awarded the intended respondents costs, to be assessed by the Registrar, if not agreed, and there is no information before us as to those costs. In our opinion, an award of costs in the amount of $4,000 would be fair and reasonable.

Disposal

[54] The application for an extension of time in which to file an appeal and for a stay is dismissed. The intended appellant is ordered to pay the intended respondents' costs of the application which have been assessed at $4,000.

Justice of Appeal

Justice of Appeal

Justice of Appeal