

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Application No. 7 of 2011**

**BETWEEN:**

**VICTORINE PATRICIA GARVEY**

**Applicant**

**AND**

**PETER ATHELSTAN WILKINSON**

**Respondent**

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

**2015: April 2  
April 29**

**Mr. Clement E. Lashley, QC in association with Ms. Honor Chase for the Applicant**

**Mr. Ralph Thorne, QC for the Respondent**

**APPLICATION TO DISMISS APPEAL**

**THE APPLICATION**

[1] **MASON JA:** This Application to Dismiss Appeal was filed by the applicant on 9 January 2015. The application is asking that the respondent's Notice of Appeal dated 13 July 2011 be struck out and the appeal dismissed with costs for failure to prosecute the appeal pursuant to **Rule 62.11, 62.12(1) to (11) of the Supreme Court (Civil Procedure) Rules 2008 (CPR)**.

[2] The application is supported by an affidavit sworn by Mr. Clement E. Lashley, QC who had conduct of the proceedings before the High Court and now before this Court. The facts and circumstances of the application are set out in the affidavit as follows:

- “2. A written Judgment in the High Court Suit **No. 458 of 2008 Victorine Patricia Garvey Applicant and Peter Athelstan Wilkinson Respondent was delivered by Mr. Justice Chandler on the 1<sup>st</sup> July 2011.** That decision was in relation to the parties in these proceedings. The issue was the interest of the parties in respect of matrimonial property in a union other than a marriage. The gist of the judgment was, inter alia, as follows:
- (1) That the applicant and the respondent are entitled to a 50% share or interest in the chattel property at Danesbury, Black Rock, St. Michael.
  - (2) That the applicant is entitled to a 50% share in the net rents accrued from the property at Danesbury, Black Rock, St. Michael assessed at \$27,618.75.
  - (3) That the respondent do pay to the applicant a lump sum of \$75,000.00 representing her one half share or interest in the property situate at Bush Hall, St. Michael on or before the 30<sup>th</sup> day of September 2011.
  - (4) That the respondent do pay the applicant the said sum of \$27,618.75 representing her share of rents on or before the 30<sup>th</sup> day of September 2011.
3. On the 13<sup>th</sup> July 2011 the Respondent filed a Notice of Appeal in the said matter. Thereafter there was Notice of Appointment for the 28<sup>th</sup> July 2011. Attached also was the Appellant’s Draft Index of Appeal. There was no meeting for the settling of the record.
  4. Notwithstanding the filing of the above documents the Appellant has failed to prosecute the Appeal. Furthermore, since the filing of the Notice of Appeal, the Appellant died on the 28<sup>th</sup> August 2012.
  5. It is clear given the fact that the Appeal was filed three clear years and five months and there has been no compliance by the Appellant with Rule 62.11 and 62.12 of the Supreme Court (Civil Procedure) Rules 2008 that the Appellant has failed to prosecute the Appeal.
  6. In a related matter before the High Court by letter dated 24<sup>th</sup> November 2014 addressed to the Applicant’s Attorney-at-Law the Appellant refers to the Notice of Appeal. This letter is produced to me and marked “**CEL 1**”.
  7. Since the death of the Appellant, Letters Testamentary were granted to the Executrix Julia-Ann Clarke on the 18<sup>th</sup> December 2013. A copy of the Letters Testamentary is produced to me and marked “**CEL 2**”.

8. This application is being served on the Executrix the said Julia-Ann Clarke so that she may be apprised of the said application.
9. Any costs awarded to the Applicant, herein should be paid from the estate of the deceased Respondent, in the circumstances”.

[3] The application was served on counsel for the respondent, Mr. Ralph Thorne, QC, who also represented the respondent before the High Court. However, up to the date of this hearing there has been no acknowledgement of the proceedings nor affidavit filed in reply to the application. In consequence, the only evidence before this Court is that contained in the affidavit filed by Mr Lashley, QC.

#### **THE HEARING BEFORE THIS COURT**

[4] At the hearing before this Court, Mr. Lashley, QC applied for leave to amend the application. He conceded that this Court under **Rule 62.11, 62.12(1) to (11) of CPR** had no jurisdiction to dismiss an appeal for failure to prosecute an appeal as stated in the application. He submitted that it ought to have been filed under **section 61(1) (e) of the Supreme Court of Judicature Act Cap. 117A (Cap. 117A)** and/or the Court’s inherent jurisdiction.

[5] Without conceding that this Court had the jurisdiction claimed by Mr Lashley, QC, Mr Thorne, QC did not object to the amendment being granted. Accordingly, leave was granted.

[6] On the assumption that this Court had jurisdiction to do so, Mr Lashley, QC argued that the appeal ought to be struck out given the length of time which had elapsed since the filing of the Notice of Appeal – some 3 years and 5 months - and that there has been no application by the appellant/respondent for a stay of the proceedings nor for an extension

of time within which to prosecute the appeal. Counsel submitted that it would be an abuse of process to permit the matter to continue.

[7] In his reply Mr. Thorne, QC contended that this Court lacked jurisdiction to hear the matter. He submitted that **section 61 (1) (e)** of **Cap 117A** could not be invoked as that section appeared to be permitting the Court to make an order based on a judgment by the High Court. The general words in the provision could not therefore be interpreted as giving this Court the jurisdiction to dismiss an appeal for want of prosecution as contended by Mr. Lashley, QC.

[8] While accepting that the Court had an inherent jurisdiction, Mr Thorne, QC submitted that this was not a case in which this Court should exercise that jurisdiction.

[9] Mr. Thorne, QC challenged the competence of Mr. Lashley, QC to swear the affidavit and asserted that it would be a grave injustice to strike out the appeal at this stage, thereby depriving the appellant/respondent of the opportunity of having the case ventilated.

### **ISSUES BEFORE THIS COURT**

[10] It is clear from the submissions of counsel in this case that two issues arise for our determination. The first is whether this Court has jurisdiction to dismiss an appeal for failure to prosecute. The second is, assuming this Court has jurisdiction, how this jurisdiction should be exercised.

### **THE JURISDICTION ISSUE**

[11] **Part V** of **Cap. 117A** deals with the jurisdiction and powers of the Court of Appeal. **Section 61** sets out fully those powers and states that while the Court has in addition to

all other powers exercisable by it, it also has all the jurisdiction of the original court and may at **subsection (1) (e)**:

“(e) draw any inference of fact that might have been drawn, or give any judgment or make any order that might have been given or made by the original court, and make such further or other order as the case requires”.

[12] We agree with Mr. Thorne, QC that there is no jurisdiction under **section 61** of that Act which allows the Court to strike out an action. In consequence, this Court must consider whether it has an inherent jurisdiction so to do.

[13] It has been said that the inherent jurisdiction of the Court is a somewhat metaphysical concept; that it involves a judicial power of last resort that will be invoked to block certain types of conduct which are not regulated by statutes or rules of Court or even expressly permitted by them.

[14] It was stated by Lord Woolf in the case of **Taylor and another v Lawrence and another [2003] Q B 528** that the Court of Appeal was established with two principal objectives: the first to correct wrong decisions so as to ensure justice between litigants and the second to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents. In other words, in addition to its broad jurisdiction to hear appeals, the Court of Appeal is endowed with the implicit power to do what is necessary to achieve these two objectives. Lord Woolf noted that it is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. A court does not need to be given express power to decide upon the procedure which it wishes to adopt because such a power is implicit in its being required to determine appeals and by extension any application to it.

- [15] Lord Morris of Borth-y-Gest in **Connelly v Director of Public Prosecutions [1964] A C 1254** stated at **1301**:

“There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process”.

- [16] It is clear from these references that although the Court of Appeal has been established by statute and that its jurisdiction is to be determined by its relevant statutory authority, there resides within the bosom of the Court an inherent or implicit authority and jurisdiction to regulate its practice and procedure in order to achieve the purposes for which it was established and more particularly to ensure that public need for confidence in the administration of justice is maintained. Thus the fact that the Act and or the rules are silent on the question of striking out does not mean that the Court has no power to do so for as was stated by Lord Diplock in **Bremen Vulkan Schiffbau and Maschinen Fabrik v South India Shipping Corp. Ltd. [1981] AC 909 at 977**:

“The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an “inherent power” the exercise of which is within the “inherent jurisdiction” of the Court”.

- [17] It is clear from the abundance of authority that the Court of Appeal has inherent jurisdiction to control its proceedings and may strike out a notice of appeal where there has been failure and/or refusal to prosecute the appeal.

#### **EXERCISE OF JURISDICTION ISSUE**

- [18] The major submission of Mr. Thorne, QC in respect of this Court’s exercise of its inherent jurisdiction was that justice would not be seen to be done were the application to

be granted and the appeal struck out. But Mr Thorne, QC did not explain how this would be so in the overall circumstances of this case.

[19] It is our opinion that there is an impatient need to capture and maintain confidence in the administration of justice. This need which undergirds **CPR** is paramount and therefore makes it imperative that there should be a remedy for the apparent nonchalance to the application and the inordinate delay by the appellant/respondent of over 3 years in prosecuting the appeal. The Caribbean Court of Justice (CCJ) in **June Blackman aka June Gill v Elma Carmen Gittens-Blackman and Marcia Annette Gittens-Grant [2014] CCJ 17 (AJ)** upholding **Goodridge JA** in this Court and this Court in **James Ifill v The Attorney General and The Chief Personnel Officer Civil Appeal No. 8 of 2014** have pronounced against encouraging delinquency in the observation of timelines. We are of the view that the non-prosecution of the appeal compounded by the non-acknowledgement of the application and the neglect and/or refusal to attempt to answer the applicant's affidavit speak to less than due regard to the practice and procedure of this Court. The business of the Court would be entirely frustrated if the appellant/respondent were to be permitted to disobey its rules and procedure with impunity. It is noteworthy also that at no time was there oral application sought by counsel for the appellant/respondent for an extension of time within which to prosecute the appeal. Justice therefore demands that there be a remedy.

[20] In our judgment and contrary to Mr Thorne, QC's submission, to allow the action to continue would involve a substantial risk that justice would not be done. In the words of Lord Denning MR in **Allen v Sir Alfred McAlpine and Sons Ltd [1968] 2 Q B 229 at 245 (Allen)**: "The delay of justice is a denial of justice ... To put right this wrong, we

will in this court do all in our power to enforce expedition and, if need be, we will strike out actions where there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the court”.

### **Disposal**

[21] Following Lord Denning’s adumbration in **Allen** this Court will right the wrong of excessive delay by striking out the appeal and accordingly the application is hereby granted with costs to the applicant to be agreed or assessed and to be paid from the respondent’s estate.

**Justice of Appeal**

**Justice of Appeal**

**Justice of Appeal**