

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 7 of 2015

BETWEEN:

MERVYN HINDS

Intended Appellant

AND

ESTHER FREDERICK

Intended Respondent

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

2015: November 23

2016: May 12

Mr. Gregory P. Nicholls and Ms. Janice M. Brown for the Intended Appellant.

Mr. F. Albert Pollard and Mr. Philip A. McWatt for the Intended Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] Before this Court is an application for leave to file and serve a notice of appeal out of time against the decision of **Kentish J** (now retired) given on 15 May 2014.

Background to the Application

- [2] The intended appellant resides in the United Kingdom and is the executor and sole beneficiary under the will of Evelyn G. Gibbs (the Testatrix) dated 20 May 2002. He claims that he is entitled to possession of three parcels of land, lots 033, 026 and 049 at 2nd Avenue, Upper Carlton in the parish of St. James.
- [3] Sometime in 2004, the intended respondent began erecting a house on lot 033 at Upper Carlton, St. James. Then in 2005, the intended respondent dug a foundation on lot 049.
- [4] This action resulted in the intended appellant commencing proceedings in the High Court against the intended respondent by writ of summons filed on 7 March 2005 wherein the intended appellant claimed: (i) damages for trespass; (ii) possession of the three parcels of land and (iii) certain declaratory and injunctive relief.
- [5] In her defence the intended respondent denied that the intended appellant had any rights to possession of the land and put him to strict proof. She pleaded that her predecessors-in-title had been in continuous possession of the land since 1915 and that the intended appellant's predecessors-in-title were never in possession.
- [6] The trial began on 7 March 2007 and after a number of hearings the evidence was completed by 5 November 2013. It must be pointed out that at paragraphs 23 to 31 of the judgment the judge sets out in detail the

history of the action, including the adjournments given and the reasons for those adjournments.

- [7] During the hearing counsel for the intended appellant gave notice of his intention to amend the statement of claim. However no amendment was ever sought by counsel.
- [8] At the end of the trial, counsel for both parties were ordered to file written submissions by 10 January 2014. The matter was then adjourned to 29 January 2014 for consideration and/or clarification of any matters raised in the submissions.
- [9] Counsel for the intended respondent filed written submissions on 2 January 2014 but no written submissions were filed on behalf of the intended appellant. When the matter came on for hearing on 29 January 2014 neither the intended appellant nor his attorney-at-law was present.
- [10] The court made certain inquiries and received information which suggested that between December 2013 and January 2014 counsel for the intended appellant had admitted himself to hospital. Subsequent attempts by the clerk of the court to contact counsel were unsuccessful (see paras 33 and 34 of the judgment). There is no evidence that any communication was ever sent to the court by counsel for the intended appellant in this regard.
- [11] On 15 May 2014, the judge delivered a written decision in which she found that the intended appellant had failed to establish his title to any of

the three parcels of land at Upper Carlton, St. James. **Kentish J** dismissed the action and ordered costs to be paid to the intended respondent, such costs to be agreed or taxed.

The Application

- [12] By notice of application filed on 17 April 2015, the intended appellant sought leave to file and serve a notice of appeal out of time. The application is made pursuant to **rule 62.6(3)** of the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)** and is supported by the affidavits of the intended appellant filed on 17 April and 12 June 2015 respectively, and that of his attorney-at-law, Ms. Janice Brown, filed on 12 June 2015.
- [13] The intended appellant deposed that he travelled to Barbados between 2007 to 2013 to attend court hearings and give evidence. He was aware that his counsel had given notice of his intention to amend the statement of claim. He was present in November 2013 when the judge ordered the parties to file written submissions.
- [14] The intended appellant also deposed that he was not aware that his counsel did not appear when the matter came on for hearing on 27 January 2014 and that no written submissions were filed on his behalf.
- [15] According to the intended appellant, he had not heard from his attorney-at-law since his return to England in November 2013. It was sometime in early January 2015 that he received a letter advising him of a taxation hearing scheduled for 11 February 2015.

- [16] On receipt of that letter, he immediately tried to contact his attorney-at-law to ascertain the status of the matter and an explanation of what the letter meant. Having failed to reach counsel, the intended appellant made arrangements to return to Barbados. He arrived on 8 February 2015 and tried without success to meet with counsel. Information received suggested that counsel was either ill, not in practice or in the hospital.
- [17] The next day, the intended appellant engaged and met with new counsel who contacted counsel for the intended respondent. He was then informed that the judge had given her decision. Subsequently the intended appellant made a further visit to Barbados in April 2015 when he decided to appeal the decision and instructed counsel accordingly.

Submissions of Counsel

- [18] Mr. Nicholls, counsel for the intended appellant, acknowledged that it was necessary for the intended appellant to establish that special reasons exist in order for the Court to exercise its discretion to grant the intended appellant leave to file and serve a notice of appeal notwithstanding that the time prescribed by the **CPR** for so doing had expired. He cited **James Ifill v The Attorney General, Civil Appeal No. 3 of 2013 (Ifill)**.
- [19] Mr. Nicholls submitted that at the heart of this matter is the fact that counsel for the intended appellant became incapacitated at a critical moment of the trial when closing submissions were to be made. The intended appellant was not aware that a decision had been made against

his interest and this accounted for his failure to file the notice of appeal in time. This was therefore not a case where the intended appellant was dilatory in relation to his responsibility to pursue an appeal, but rather a case where he relied on his legal representative to do certain things which were not done.

[20] According to counsel, a matter of significant public importance has arisen in circumstances where an attorney-at-law becomes incapacitated and could not appear to make his final submissions to the court. In this regard, Mr. Nicholls submitted that the following questions which arise in this matter raise issues of significant public interest which need to be examined and clarified by the Court, namely:

"(i) whether the trial judge owed a duty to the intended appellant as a litigant to declare a mistrial when his legal counsel was incapacitated and did not appear at the trial to make closing arguments;

(ii) whether the failure of the proper officer of the court to comply with an order of the court to append certain foreclosure and title suit files onto the litigation file in the court below prevented a fair and proper judicial determination of the substantive dispute between the parties on the merits; and

(iii) whether the trial judge should declare a mistrial when there has been no compliance by the proper officer of the court to comply with an order of the court to append said files on the litigation file."

[21] Mr. Nicholls contended that a determination by this Court as to the extent of the duty and function of a trial judge and the proper officer of

the court when confronted with the issues adumbrated above will undeniably guide future courts and litigants and save time and expense.

[22] He submitted further that there will be no prejudice occasioned by the grant of the extension since the substantive issue in question was not determined by the trial judge during the course of the trial in the court below and it still remains unresolved.

[23] In resisting these contentions, Mr. McWatt, counsel for the intended respondent, submitted that the questions which counsel for the intended appellant contends raise issues of significant public importance are merely a reproduction of the proposed grounds of appeal.

[24] As to the delay, Mr. McWatt submitted that the intended appellant has not explained the delay between the delivery of the judge's decision and the filing of the application. He acknowledged that in **Ifill**, this Court stated that delay in and of itself is not determinative of the exercise of the **rule 62.6(3)** discretion. He noted, nevertheless, that it may be a factor to take into account in assessing whether the value of the determination on the merits because of the special reasons shown outweigh the value of the speed and the avoidance of expense in securing such determination.

[25] On the issue of prejudice, counsel submitted that the intended respondent had made an application to the High Court for title to the property by way of foreclosure proceedings which has been in abeyance pending the adjudication of the intended appellant's claim. Therefore, having waited

for a period stretching from 2005 when the proceedings were initiated to May 2014 when the decision was delivered, the intended respondent would suffer great prejudice if the intended appellant is granted leave.

[26] It was the further submission of Mr. McWatt that the intended appellant was trying to establish that (i) his lack of communication with his former counsel and (ii) his ignorance of when the judgment was delivered are reasons which constitute special reasons why he ought to be given leave at this late stage to pursue his appeal.

[27] In conclusion, Mr. McWatt submitted that no special reasons have been shown by the intended appellant to entitle him to the grant of leave.

Discussion

[28] As has been stated in **Ifill** and subsequent decisions of this Court, one of the cardinal principles of the **CPR** 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**". The stipulation of time limits for the filing of appeals in **rule 62.6(1)** is intended to ensure that appeals are filed promptly and litigation is concluded, for there is a public interest in the closure of litigation: per Arden L.J in **Smith v Brough [2005] EWCA Civ 261** at **para 34**. Non-compliance with those time limits can operate to defeat the objective of dealing with cases justly as mandated by **rule 1.1**.

[29] However, **rule 62.6(3)** gives the Court the discretion to extend the time for appealing "at any time for special reasons". This rule clearly places on an applicant the burden of showing that special reasons exist for the exercise of the discretion in his favour. At **paras 33** and **34** of **Ifill** this Court stated what amounts to special reasons as follows:

“[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. A necessary implication of this is that **rule 62.6(3)** “special reasons” must be construed strictly as only being satisfied where the value of determination on the merits of the substantive issue in question outweighs the speedy and inexpensive determination envisaged in **rule 62.6(1)** and **(2)**.”

[34] The upshot of the foregoing is that the only reasons that can amount to “special reasons” are those which relate to the considerations listed in **rule 1.1(2)**. So, as an example and we offer examples with trepidation, “special reasons” may be found under **rule 1.1(2)(c)(ii)** where we consider the issue in the appeal should, in the public interest, be examined by this Court or where clarification of the law is required. Another example where “special reasons” may be shown is under **rule 1.1(2)(b)**, that is, if the grant of an extension would have the effect of saving expense.”

[30] It has been argued by Mr. Nicholls that special reasons exist because:

- (i) the intended appellant was unaware that his attorney-at-law was absent on the date that closing arguments were to be made and that no written submissions were filed on his behalf;
- (ii) a matter of significant public interest has arisen in circumstances where an attorney-at-law becomes incapacitated and could not appear to make final

submissions to the court and this matter ought to be pronounced upon by the Court;

(iii) the trial judge, armed with the knowledge that counsel who argued the case was not present for the reasons given still proceeded with the matter instead of declaring a mistrial.

[31] In our judgment the intended appellant has not shown that special reasons exist in this case. We agree with counsel for the intended respondent that the reasons which have been proffered are in effect the grounds of the proposed appeal. The proposed grounds do not allege any errors of law or findings of fact on the part of the trial judge. It has not been alleged that any notification was ever sent to, or received by the trial judge in relation to counsel's absence from the proceedings. There is therefore no basis on which this Court can exercise its discretion in favour of the intended appellant.

Disposal

[32] The application is dismissed. The intended appellant shall pay costs to the intended respondent in the amount of \$2,500 on or before 30 June 2016.

Justice of Appeal

Justice of Appeal

Justice of Appeal