

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.11 OF 2005

BETWEEN:

VICTORIA ARTHEIN (nee Laville)

Appellant

and

THE DOMINICA AGRICULTURAL DEVELOPMENT COMPANY LTD.

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

Appearances:

Mr. McDonald Christopher for the Appellant/Applicant
Mr. Michael Bruney for the Respondent

2005: November 9

JUDGMENT

[1] **RAWLINS, J.A.:** The Appellant/Applicant, Ms. Arthein, applied, on 25th August 2005, by Notice under Part 62.2(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the Rules"), for leave to appeal against an Order which Tyrone Chong J (Ag.) made on the 30th November 2001. The application was for leave to appeal out of time and for other Orders. The Order of Chong J (Ag.) ordered Ms. Arthein to pull down and remove certain structures that were unlawfully built on the Respondent's land. He also ordered her to vacate the land and restrained her from re-entering it. He also ordered her to pay damages in the sum of \$10,000.00 and \$2,000.00 costs.

[2] It will be noted that Ms. Arthein's application was made about four years after the Judge's Order. By that time all damages and costs that the Judge ordered were fully paid. More specifically, Ms. Arthein application sought the following Orders:

- (1) An Order that leave to appeal out of time be granted.
- (2) An Order to stay the execution of Justice Chong's Order.
- (3) An Order to stay of proceedings in Suit No. DOM/HCV/2005/01110 pending determination of appeal.
- (4) An Order that Justice Chong's Order of 30th November 2001 be set aside.

[3] It is my view that this last-mentioned Order that Ms. Arthein seeks will be the object of the substantive appeal, if leave were to be granted to appeal out of time. It is therefore outside of the purview of this Court on an application such as this. In the premises, the application for this order is dismissed.

[4] The central ground of the appeal which Ms. Arthein intends to pursue, if leave were granted, is that the learned Judge erred in making the Order of 30th November 2001 based her admission of the whole claim as the Defendant. Ms. Arthein contends that the proceedings before the Judge were fatally flawed because of serious defects. According to her, the Acknowledgment of Service upon which the respondent company relied upon was irregular, and the letter of admission upon which the Judge purportedly entered Judgment against her did not originate from her. Ms. Arthein also stated that the Judge erred in making the Order in her absence. She asked this Court to note that the face of the Order shows that it was her husband who was present at the hearing. She contended that he had no standing in the case and no power of attorney to act on her behalf. She insisted that she had no notice of the hearing and the terms of the Order were not communicated to her, neither was she served with it. Consequently, she said, inasmuch as the Order was granted *ex-parte* and in the circumstances, when she was not even represented by a legal practitioner, the Order was a nullity.

- [5] Ms. Arthein further stated that the Judge erred in law by granting to the respondent company a remedy in trespass after the expiration of six years from the date on which the cause of action accrued. She insisted that the Judge made a wrong decision by granting the mandatory injunction and by making the declarations that he made without having regard to evidence and the circumstances of the case. She contended that in such cases a court should not have proceeded to hear the Claim *ex-parte*.
- [6] For its part, the respondent company conceded that by the time the Order was served, the damages that the Judge awarded were already paid. The company informed me that, in any event, it has taken no steps to enforce the Order for injunctive relief. The company said that, in fact, since the Order, the parties have engaged in negotiations with a view to it (the company) granting a lease of the subject premises to Ms. Arthein. The company also reminded me that Ms. Arthein had already paid the costs that were awarded.
- [7] On 8th September 2005 the company applied for an Order to strike out Ms. Arthein's application. The company also sought an Order that Ms. Arthein should pay the costs of both applications. The company stated various grounds for its application. These include its contentions that there has been an inordinate delay in applying for leave to appeal out of time and that Ms. Arthein has given no justifiable explanation for the delay, and, additionally, that the application is frivolous and vexatious and an abuse of the process of the Court.
- [8] The company insisted that Ms. Arthein's application is based on the false allegation that she was not served with the Order of the Judge although there is an Affidavit deposed by one Michael Valentine in which he stated that he delivered the Order to Ms. Arthein in person on the 27th December 2001. I accept this as authentic evidence that Ms. Arthein was served with the Order on this date, notwithstanding the allegation that was made on her behalf that she was only served with it on 18th August 2005. As learned Counsel for the company

observed, if in fact she was served on this latter date, there was no need to apply for leave to appeal out of time. This is because the time to file the Notice of Appeal would not have expired when she filed her application.

[9] The basic principles for granting leave to appeal out of time were stated by this Court, since the Rules came into effect in 2000, in the case of **Quillen v Harney, Westward & Riegels No. 1** (2001) 58 WIR 143. They have been re-stated on numerous occasions since that case. The first consideration is the length of the delay in making the application. An application will not be granted if the delay is inordinate. The second consideration is whether the applicant gives adequate reasons or explanation for the delay. In the third place, the Court should consider whether there is a realistic chance of the applicant prevailing on the appeal, and, in the fourth place the Court should consider the degree of prejudice that the respondent might suffer if it were to grant the application.

[10] In this case, there is no doubt that there has been an inordinate delay in bringing this application for leave to appeal out of time. It is almost four years since the Order against which she is seeking leave to appeal was made. Additionally, the reasons, which she has advanced for the delay do not, in my view, amount to a justifiable explanation for the delay. Further, her actions over the period since the Order was made have, in effect, cured any defect in the Order and validated it. There is the evidence that the damages and costs that the Judge ordered were paid. There is the evidence that the parties had in fact entered into negotiations for a new lease of the same property in relation to which the Order was made. The company has not pursued the Order for injunctive relief. In the circumstances, the chances of success on the appeal are almost non-existent and, in fact, an appeal would work substantial prejudice against the respondent company. It is my further view that the circumstances of this case amount to an abuse of the process of the Court. I shall therefore refuse the application for leave to appeal out of time.

- [11] In relation to the stay of execution of the Order of the Judge, this falls away because I have refused leave to appeal out of time. In any case there would have been no ground on which to grant it, given that the damages and costs were paid and the respondent company is not pursuing the injunction.
- [12] As far as the application for an Order to stay Claim No. DOM/HCV/2005/0110 is concerned, that Claim is solely within the jurisdiction of the High Court. It is not within the jurisdiction of this Court. This Court made no Order in this Claim. The High Court made no Order which is before this Court. This Court has no legal basis or jurisdiction to stay those proceedings and the application to stay these proceedings is therefore dismissed.
- [13] Earlier in this Judgment, I stated that the Order which Ms. Arthein sought to set aside the Order of the Judge was not within my purview on this application. Even outside of this, the application for that Order would also have fallen away based on my dismissal of the application for leave to appeal out of time. The application for the stay of the Order would have been dismissed, consequentially.

Order

- [14] Based on the foregoing, the following is the Order on these applications:
- (1) The application which the intended appellant made on 25th August 2005 against the Order of His Lordship the Hon. Justice Tyrone Chong, dated 30th November 2001, for leave to appeal out of time; for a stay of the execution of the Order; to stay the proceedings in Claim No. DOM/HCV/2005/0110 and to set aside Justice Chong's Order is dismissed.
 - (2) Consequentially, the application filed by the respondent on 8th September 2005 to strike out the Appellant's application is granted.
 - (3) The Appellant/Applicant shall pay the costs in these applications

to the Respondent in the sum of \$3,000.00.

Hugh A. Rawlins
Justice of Appeal