

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No.: SLUHCV2013/0474

BETWEEN:

**JN. BAPTISTE FANIS
ANGELA BRIGID FANIS**

Claimants

and

**TRIBANIUS ST. CROIX
also known as Tobbie St. Croix**

Defendant

**Before: Her Ladyship, the Honourable Justice Kimberly Cenac-Phulgence
(A JUDGE IN CHAMBERS)**

Appearances: Mr. Andie George of Counsel for the Claimants
Ms. Leandra Verneuil of Counsel for the Defendant

Present: 1st Claimant
Defendant

2020: November 11;
December 2.

RULING

Background

[1] **CENAC-PHULGENCE J:** By Order dated 26th June 2014, judgment was entered for the claimants in the following terms:

- (a) the defendant was to give the claimants vacant possession of the parcel of land registered in the Land Registry as Block 0845B Parcel 85 ("the Property") on or before 31st July 2014;

- (b) the defendant was to pay mesne profits at the rate of \$300.00 per month from 25th May 2012 until he vacated the Property;
- (c) the defendant was to pay interest at the rate of 6% per annum on all sums due to the claimants; and
- (d) the defendant was to pay costs in the sum of \$1,500.00 on or before 31st October 2014.

[2] The Order of 26th June 2014 included a penal notice and was served on the defendant on 25th September 2014. He failed to comply with the said Order; therefore, on 14th November 2018, the claimants filed an application for committal pursuant to Part 53 of the **Civil Procedure Rules 2000** ("CPR"). Several bench warrants were issued to secure the attendance of the defendant.

[3] On 15th July 2020, on a further hearing of the committal application, the Court made the following order:

"The Defendant is to vacate the property known as Block 0845B Parcel 85 situated at [C]ul-de-sac in the quarter of Castries and deliver up vacant possession to the claimant on or before 17th August, 2020 and in default thereof the defendant is committed to the Bordelais Correctional Facility for fourteen (14) days."

[4] The Order notes that present at the hearing on 15th July 2020 were the first claimant and the defendant; the defendant being unrepresented by counsel. This, notwithstanding that a notice of acting had been filed for the defendant on 13th July 2020. The Order also states, in the preamble, that counsel for the claimants advised that a writ of possession had been filed and that the defendant requested time to gather his belongings and vacate the property within one (1) month.

[5] On 23rd June 2020, the claimants had indeed filed a request for the issue of a writ of possession. In that request, the amount for which the writ is to issue is stated as \$81,876.90. The writ was signed by the Registrar of the High Court and dated 2nd September 2020.

The Applications

- [6] This Ruling concerns two applications filed by the defendant. The first application (“The Setting Aside Application”) was filed on 17th August 2020 and seeks an order (a) setting aside the Orders of Phillip J dated 27th May 2020 and 15th July 2020; (b) striking out the claimants’ application for committal; and (c) staying all further proceedings on the claimants’ application for a committal order, including enforcement of the committal order pending the determination of the application. The application is accompanied by an affidavit in support.
- [7] At the hearing of the application, it was agreed by counsel for the defendant, Ms. Leandra Verneuil (“Ms. Verneuil”) that the Order of 27th May 2020 simply adjourned the matter to 15th July 2020 and that there was no need for this order to be set aside when the grounds of the application concerned the substance of the Order of 15th July 2020.
- [8] The second application was an Opposition to Writ of Possession and Writ of Seizure and Sale of Moveables (“The Opposition”) filed on 15th September 2020 in response to the writ of possession filed on 23rd June 2020. It seeks an order (a) annulling and/or setting aside the writ of possession; (b) staying enforcement of the writ of possession; and (c) that the claimants declare whether they intend to admit or contest the Opposition and in default, the defendant shall have the right to be relieved from seizure with costs against the claimants.
- [9] At the hearing, Ms. Verneuil agreed that there was, in fact, no writ of seizure and sale of moveables filed by the claimants. Thus, she conceded that this aspect of the application was irrelevant. All that remains to be considered is opposition to the writ of possession.

The Setting Aside Application

- [10] The main ground of this application is that the Court lacked jurisdiction to make the 15th July 2020 Order for the following reasons:

- (a) The application for committal was made pursuant to CPR 45.4(1)(a) and CPR Part 53. However, article 905 of the **Code of Civil Procedure** ("CCP") provides that 'the court cannot award imprisonment for any cause other than those mentioned in articles 2134 and 2135 of the **Civil Code**' ("CC");
- (b) The procedure set out in CPR Part 53 can only be engaged where an enactment so authorizes the court to order committal. Article 905 of the CCP and articles 2133 – 2135 of the CC are the enabling enactment which confers jurisdiction on the court to order imprisonment in civil cases;
- (c) CPR Part 53 is not a free-standing power but rests on and is subject to the CC;
- (d) The procedure under CPR Part 53 is not open to a judgment creditor to enforce an order for possession of land;
- (e) The claimants erred in seeking to invoke the provisions of CPR Part 53 to enforce an order for possession;
- (f) Article 420 of the CCP provides that 'when a party condemned to surrender or restore an immovable refuses to do so within the delay prescribed, the plaintiff ...may obtain a writ of possession to eject him or her, and to be placed in possession' and therefore the claimants ought to have sought enforcement of the judgment by way of a writ of possession pursuant to CPR 45.4(1)(c).

[11] The first claimant filed a response to the application on 4th November 2020 in which he noted that the defendant did not appeal the Order of 26th June 2014, requiring him to give up vacant possession by 31st July 2014; and failed to comply with that Order, thereby placing himself in contempt of court. The defendant also failed to comply with the Order of 15th July 2020 requiring him to vacate the Property on or before 17th August 2020, in default of which he would be committed; and again, placed himself in contempt of court. He never appealed the Order of 15th July 2020 and instead has now applied to a court of concurrent jurisdiction to set aside that Order.

Discussion

- [12] CPR 45.4 provides:
- “(1) A judgment or order for the possession of land may be enforced by-
 - (a) **a committal order under Part 53; or**
 - (b) ...
 - (c) a writ of possession of land.
 - (2) An order for committal ... may be made only if the court has given judgment or made an order requiring possession of land to be given within a specified time or by a specified date.” (my emphasis)
- [13] Part 53 deals with the power of the court to commit a person to prison for failure to comply with an order requiring a person to do an act within a specified time or by a specified date, or not to do an act. CPR 53.2(1) provides that ‘if a judgment or order specifies the time or date by which an act must be done, the court may by order specify another time or date by which the act must be done.’
- [14] CPR 45.4 is pellucid. In respect of enforcement of an order for possession of land, a claimant has two options: obtaining an order committing the defendant to prison and/or a writ of possession to remove the defendant from the land. The avenue of an application for committal is only available where the order for possession specified a date for compliance and the defendant failed to obey the order. CPR 45.4 directs that an application for committal must be made in accordance with Part 53 and Part 53 is consistent with CPR 45.4 in that regard. This is sensible as an order for committal concerns the liberty of the subject and thus should be precise in its terms. The Order of 26th June 2014 stipulated a date for compliance, that date being 31st July 2014. Therefore, the only condition imposed by the CPR has been satisfied.
- [15] However, CPR 53.2(1) goes even further to give the Court the discretion to essentially extend the time for compliance with an order for possession upon a committal application. This is precisely what Phillip J did by his Order of 15th July 2020, when he acceded to the defendant’s request for an additional month to comply with the Order of 26th June 2014. Phillip J extended time for compliance

with the 2014 order for possession, despite the defendant having had some 6 years within which to comply, having persisted in disobeying the Court's order; and failing on more than one occasion to appear before the Court when required to do so. In the circumstances, the Order of 15th July 2020, which was in the nature of a suspended committal order, was more than reasonable.

- [16] Ms. Verneuil submitted that the **Code of Civil Procedure** and the **Civil Code** preclude the Court from enforcing an order for possession of land by committal, because the **Civil Code** lists the circumstances in which imprisonment may be awarded in civil cases, and failure to obey an order for possession of land is not among them. I do not agree. I am of the view that circumstances such as the present are encompassed by article 2134(13) of the **Civil Code** which states:

“2134. The persons liable to imprisonment are:

...

13. **A person guilty of contempt of any process or order of the Court or Judge** or for any fraudulent evasion of any payment or order of Court by preventing or obstructing the seizure of property or the sale of property taken in execution of such judgment or order.” (my emphasis)

- [17] This sub-paragraph of article 2134 of the **Civil Code** plainly permits the committal of a person who is in contempt of court and does not distinguish the nature of the order or nature of the breach thereof that must have led to the contempt. It matters not whether it is breach of an order for possession of land or some other order of the Court. It is trite that once a person disobeys an order of the Court, he or she finds himself or herself in contempt. Thus, it appears to me that the Court positively had jurisdiction to grant the Order of 15th July 2020.

- [18] Nonetheless, even if I were wrong as to the applicability of article 2134(13) of the **Civil Code**, the defendant's application would be bound to fail on the basis that the appropriate course was to have appealed the Order of 15th July 2020. The defendant's challenge to the Order is that the Court had no jurisdiction to make it. The challenge goes to the substance of the matter and connotes an error in law. It is therefore not an order that can properly be the subject of a set aside application

by a court of concurrent jurisdiction and this Court has no jurisdiction to set it aside.

- [19] In this regard, I rely on the Privy Council case of **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**.¹ That case concerned an appeal brought by the plaintiff in the action from a judgment of the Court of Appeal dismissing his appeal from the refusal of Smith J to set aside an earlier order of Walker J as being made without jurisdiction. There were two questions before the Board: (1) whether Walker J had jurisdiction to make the order he did; and (2) if he did not, whether Smith J had jurisdiction to set it aside. The Board found that Walker J had jurisdiction but went on to consider, whether, if he did not, his order could have been set aside by a judge of concurrent jurisdiction. As to the second question, the Board held:

“25. The distinction between orders which are often (though in their Lordships’ view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae*...

27. In the present case... the only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.

28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside...

32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has

¹ [2005] UKPC 33.

jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. **But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; no[r] does a judge of co-ordinate jurisdiction have power to correct it.**

33. In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. **As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside.**" (my emphasis)

[20] The Board in **Leymon Strachan** has made very clear that where an order of a judge of this Court is challenged by a party on the ground that he lacked jurisdiction, such order cannot be set aside by a judge of coordinate jurisdiction. The question of jurisdiction is a question of fact or law and any challenge to its correctness must be determined by the Court of Appeal. Unless and until the Court of Appeal makes such determination, the issue of jurisdiction is res judicata. Thus, whether or not Phillip J had jurisdiction to make the order he did, I am not in a position to grant the relief sought. The defendant, if dissatisfied with Phillip J's order ought to have appealed against it, which he did not do. Thus, the application to set aside the Oder of Phillip J dated 15th July 2020 is denied.

[21] The defendant also sought orders striking out the committal order and staying the committal proceedings. As the substantive application had already been dealt with by Phillip J, there is no basis on which the Court can now go back and strike out the committal application or stay the proceedings, which in any event is sought to be struck out. This aspect of the application is misconceived, and the relief sought at paragraphs 2 and 3 of the application is also refused.

The Opposition

[22] The grounds of the Opposition are that:

- (a) CPR 46.2(c) provides that a writ of execution may not be issued without permission if six years have elapsed since the judgment was entered. The writ of possession was issued out of the High Court on the 2nd September 2020 in respect of judgment dated 26th June 2014. Therefore, it has not been issued in compliance with CPR 46.2(c) since a period in excess of six years has elapsed since the date of judgment and the claimants have not obtained the Court's permission. The writ has therefore been irregularly issued and is a nullity.
- (b) The amount for which the writ of execution is to be levied exceeds the amount of the judgment. The writ of execution does not properly quantify the amount of the judgment that is due and owing at the time of issuance of same.

[23] In the claimants' response to the Opposition filed on 4th November 2020, the first claimant states that, contrary to what the defendant alleges, he was in fact aware of the claimants' application for the Court's permission to execute the order of 26th June 2014 requiring him to vacate the Property on or before 31st July 2014 as he was personally served a copy of this order on 25th September 2014. He also appeared in court on 15th July 2020 and requested that he be given one (1) month in which to vacate the Property. The claimants further state that at the time the writ of possession was issued, 6 years had not elapsed since the judgment was entered as the face of the writ clearly shows that it was issued on 23rd June 2020. The date of 2nd September 2020 represents the notification to the Sherriff to take possession. The claimants aver that the defendant is determined not to give up possession at all cost and is abusing the process of the court to delay giving up possession.

Discussion

- [24] Outside of any conditions prescribed by the CPR, a judgment debtor is required to satisfy any judgment against him fully, finally and immediately, failing which a judgment creditor is entitled to enforce his judgment as of right. This may be gathered from the provisions of the CPR. CPR 42.2 provides that a party who is notified of the terms of a judgment or order or is present in person or by their legal practitioner when the judgment or order is made is bound by the terms of the judgment or order. CPR 42.8 provides that a judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date; and CPR 42.9 states that a party must comply with a judgment or order immediately, unless the judgment or order specifies some other date for compliance or the court varies the time for compliance. CPR 43.2(1) provides that the general rule is that once a judgment or order has become enforceable, the court must issue an enforcement order if the judgment creditor files the appropriate request, with the qualification that if the Rules require permission to begin enforcement, the judgment creditor must first obtain that permission.
- [25] CPR 46.2 sets out the specific circumstances in which the Court's permission is required before a writ of execution, defined to include a writ of possession, may be issued. One of those circumstances is where '6 years have elapsed since the judgment was entered'. The provision is straightforward, and it is plain that if the judgment creditor seeks to enforce his judgment at any time before the period of 6 years elapses from the date of the judgment or order, he does not require the Court's permission and may do so as of right.
- [26] I have examined the face of the writ of possession and it is apparent that it was filed on 23rd June 2020, as evidenced by the seal of the High Court thereon. The order for possession was made on 26th June 2014. Thus, on the date the writ of possession was filed, 6 years had not yet elapsed. It was filed 3 days shy of 6 years. However, there can be no doubt that it was filed within the 6-year period in which no permission is required to enforce.

- [27] Ms. Verneuil has asked the Court to accept the date on which the Writ was signed by the Registrar, being 2nd September 2020, as the date on which it was issued and therefore that it was outside the 6-year period. I cannot accept this as correct.
- [28] I take the date the writ is issued to mean the date of filing of the writ and not the date the Registrar signs the writ, giving the Sheriff the requisite authority to execute. This is the only logical and practical conclusion as there must be clarity and certainty to the rules.
- [29] A judgment creditor can never know the number of days, weeks or months it will take the Registrar to peruse and sign the Writ, giving it effect. This is subject to innumerable variables and will vary from case to case. It would not be fair or just, for example, for one judgment creditor who files his writ one week before the 6-year period to be deemed out of time because the Registrar, for whatever reason, was unable to deal with his request within the week, whilst another judgment creditor who files his writ on the penultimate day of the 6-year period is deemed to have his writ issued within time because the Registrar was able to peruse and sign his writ on the same or following day. This scenario is a distinct possibility and reflects the injustice which could occur if interpretation of the rules is stretched and strained. The rule is unambiguous and must be given its plain and ordinary meaning.
- [30] A similar approach was taken in the case of **First Caribbean International Bank (Barbados) Limited v Praise and Worship Tabernacle Incorporated**² where it was held that the process cannot be dismantled in such a way as to draw a distinction between the filing of a praecipe and the issuing of a writ of seizure and sale of an immovable. The two are analogous.

² SLUHCv2009/0498, delivered 21st March 2018, unreported.

[31] In relation to the issue that the amount for which the writ of execution is to be levied exceeds the amount of the judgment, the first claimant in his affidavit in response to the application agreed that the amount stated on the writ is inaccurate and the result on an error. He agreed that true sum was \$41,688.90. This was confirmed by counsel for the claimant, Andie George ("Mr. George"), at the hearing. Thus, the true sum is not in issue. In any event, the sum being incorrect would not to my mind affect the validity of the writ of possession. The purpose of the writ is to have the defendant forcibly removed from the Property and not for payment of the sum stated therein.

[32] The writ of possession in the instant case was filed within 6 years of the Order of 26th June 2014; therefore, no permission was required to do so. The claimant's writ of possession was therefore regularly issued and stands.

Conclusion

[33] As a result of the foregoing, both applications are dismissed. I therefore make the following orders:

- (1) The application to set aside the Order of Philip J made on the 15th day of July 2020 is dismissed (and for the avoidance of doubt all relief sought therein is refused).
- (2) The Opposition to the Writ of Possession filed by the defendant on 15th September 2020 is dismissed.
- (3) Costs to the claimants on both applications in the sum of \$750.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar