

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA & BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2016/0169

BETWEEN:

EVERTON WELCH

Applicant

and

THE ATTORNEY GENERAL

Respondent

Appearances:

Dr. David Dorsett for the Applicant.

Ms Rachel Jones-Gittens for the Respondent.

2017: June 22

JUDGMENT

- [1] **Morley J:** This case concerns an application on 6th April 2016 for damages for reading a judgment on 27th May 2015 in the presence of the applicant's counsel, but not with the applicant personally present.

- [2] It is argued that the judgment handed down and read on 27th May 2015 is a nullity because the attendance of the applicant at his own criminal trial is a requirement of article 15 of the Constitution unless he consented to being absent.
- [3] This application is completely misconceived on the facts as presented.
- [4] It has not been shown that there was no consent to absence nor authority for counsel to act.
- [5] Consent is on record as given. This is because counsel Dr. Dorsett attended in person: moreover, because not robed, he also had counsel Jarid Hewlett hold for him before the court. No suggestion was made by counsel to the court that consent to absence had not been given. Counsel, by the very nature of being counsel acting on instructions, had authority to act for the applicant. It follows that, if nothing was said, the record shows that consent was given.
- [6] The contrary has not been offered by Dr. Dorsett in evidence in this application. Specifically, there has been no affidavit from Dr. Dorsett saying consent to absence had not been given and/or that he had no authority to act. If this application was ever to have proceeded correctly, to unseat the consent on record, privilege needs to be waived so that Dr. Dorsett can say he made a mistake and that he had no authority. On reading his affidavit, Crown counsel might then wish to cross-examine him as to whether what he says is true.
- [7] As to the evidence offered to contradict the court record, there is only an affidavit from the applicant dated 6th April 2016 saying at para 5.2: *'I did not consent to the trial continuing in my absence'*. I note he does not say that Dr. Dorsett had no authority to act.'

- [8] I note further that in his affidavit of 1st June 2015, ten months earlier, after learning the judgment, he instead complains about its substance, and he does not specifically say he did not consent to being absent and/or that Dr. Dorsett had no authority to act. The words ‘consent’ and ‘authority’ do not appear in paras 8, 9, and 12. Therefore, I find, in the circumstances, including that Dr. Dorsett has said nought, that the applicant saying now and specifically *‘I did not consent to the trial continuing in my absence’* is probably a late afterthought, so that it is probably not true that at the time, on 27th May 2015, there was no authority for Dr. Dorsett to appear in absence.
- [9] In addition, in his affidavit in reply of 29th July 2016, the applicant actually says at para 2:
- “I state that I am advised by my lawyer and do truly believe that action or inaction of an attorney representing an accused person...does give a court or a judge the liberty to proceed in the conduct of a criminal trial in a manner contrary to Section 15 (2) of the Constitution.”*
- [10] In any relationship between counsel and a client, consistent with the code of conduct pertaining to counsel, authority from the client to act in the best interests of a client will arise. The precise parameters of this authority may vary from case to case. It is well known that such parameters often include proceedings in absence. Dr. Dorsett is experienced counsel and unless he says differently, which he has not, the court can rely on him not to have acted outside his instructions.
- [11] As things stand, the court record shows that Dr. Dorsett had authority to appear for the absent applicant, and as he has said nothing to the contrary, so consent to absence is an un rebutted fact. In addition, and separately, I do not accept what the applicant has said in his affidavit of 6th

April 2016 that consent was absent, and I note he has nowhere said Dr. Dorsett had no authority to act. Further, and in any event, he accepts in his affidavit of 29th July 2016 that Dr. Dorsett's action gave the court liberty to proceed.

[12] If an application such as this were to be allowed, without any evidence from counsel, it would open the floodgates to appeals as afterthought by myriad applicants, on their word alone, bypassing the court ever being able to rely on counsel. In a sense, this application is like an application to vacate a plea, for which the discretion to vacate is to be 'sparingly exercised', per Blackstones Criminal Practice 2017 D12.96, particularly where someone had been represented by counsel.

[13] It is to be noted that Dr. Dorsett has continued to act, in what if the application were true (and presented differently) would be almost certainly a significant professional conflict of interest. If there is no conflict, it can only be because he had authority.

[14] I make no observations as to the legal merits of the application if it had proceeded further, nor as to what if any damages would conceivably be payable, nor as to whether this application is frivolous and vexatious.

[15] On its own facts, without need to examine the finer points of constitutional law, this application is dismissed, with costs to be paid by the applicant.

Iain Morley QC
High Court Judge

[SEAL]

By the Court

Registrar