

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 91 OF 2009



BETWEEN:

DAWN CHANCE

Claimant

v

JAMES CHANCE

Defendant

Appearances: Mr. Emery Robertson, Snr., for the Claimant
Mr. Bertram Commissiong and Mira Commissiong, Q.C. for the Defendant

2011: 16th June

DECISION

- [1] **JOSEPH, Monica J:** Four notices of application to appeal to the Court of Appeal, are before the Court: the Defendant's notice of application to set aside a writ of execution: two notices of application for leave to appeal from a decision I delivered on 2nd February 2011, one from the Claimant, the other from the Defendant: a notice of application for leave to file an application for leave to cross appeal against the decision, out of time.

WRITTEN SUBMISSIONS

- [2] On 10th March 2011 the Court ordered that written submissions be filed by 21st March 2011. Those submissions were so filed but, unfortunately, the file only surfaced a few days ago, for which an apology is tendered.

BACKGROUND

- [3] Judgment in default was entered against the Defendant on 25th September 2009. A Writ of Execution was entered against him on 24th November 2009. The Defendant's vehicle TB856 was seized and taken by the Bailiff of the Court to the yard of the House of Parliament.

- [4] A decision was delivered on 2nd February 2011 setting aside the default judgment. On 22nd February 2011, the Defendant/husband filed a notice of application applying for an order that the writ of execution entered against him on 24th November 2009, be set aside. The grounds for that application are that the judgment in default was set aside on 2nd February 2011 that, in replying to a letter written on behalf of the Defendant, the Registrar informed on the "basis of her discussion with "Her Ladyship", this application was necessary".

- [5] On 25th February 2011 the Claimant/wife filed a notice of application for leave to appeal the decision of 2nd February 2011 and a stay of the judgment. On 8th March 2011 the Claimant/wife filed an affidavit opposing the application to set aside the writ of execution.

- [6] On 10th March 2011, the Defendant/husband filed a notice of application for leave to cross appeal the decision of 2nd February 2011. On 10th March 2011, the Court ordered that the parties file submissions with authorities on or before 21st March 2011.

- [7] On 21st March 2011 the Defendant filed a notice of application seeking leave to file an application for leave to cross appeal against the Judge's decision, out of time.

APPLICATION FOR LEAVE TO APPEAL

- [8] Counsel for the Claimant/wife made the following submissions: Both Parties to the judgment are seeking leave to appeal the judgment and it remains inconclusive as there is now in existence a judgment from Justice Bruce Lyle which the applicant is contending is

valid and there is a judgment setting aside the judgment of Justice Bruce-Lyle by Justice Joseph on which the Defendants are relying as being valid. The matter is inconclusive and “the status quo ante” ought to remain until there is a higher judicial pronouncement.

[9] Counsel for the Defendant/husband submitted: Both parties have now accepted that the orders setting aside the default judgment and for costs to the Claimant are interlocutory orders. CPR 2000 Part 62.2(1) provides that if an appeal may be made only with leave, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought.

[10] Decision delivered on 2nd February 2011 in open court to comply with Part 62.2(1) both parties should have applied for leave no later than the 17th February 2011. They did not and now seek leave of the Court to do so.

[11] The Defendant does not contest the Claimant’s application for leave to appeal (although no application is filed and no reasons are advanced for the tardiness of the application) provided that she does not contest the Defendants. Since both parties are in pari delicto in so far as it relates to the lateness of both applications for leave to appeal, it was submitted that leave be granted to both parties without any order for a costs in favour of either side.

[12] The Defendant says that his application for leave was not deliberately delayed. There was a genuine uncertainty in the procedure to be used and it is while researching the law and contents of the notice of appeal that the uncertainty was cleared up. The application for leave to appeal was made as soon as the error was discovered.

APPLICATION TO SET ASIDE WRIT OF EXECUTION

[13] Counsel for the Claimant/wife submissions: she has a valid judgment upon which execution was issued pursuant to the Court Order for payment forthwith in the sum of \$615,350.00 upon which order the Defendant has failed to comply and has not applied for a stay of execution of the judgment and upon which a valid execution was issued pursuant to CPR 42.8 and CPR 42.9.

- [14] No stay had been granted at the time of the judgment or has ever been applied for so execution can issue by Writ of Fieri Facias unless the sum realized is paid, CPR Part 2000 61.16(1).
- [15] Learned Counsel for the Defendant/husband submitted: that a writ of execution fieri facias (the writ) is nothing more than a procedure by which a judgment creditor may get in a money judgment through instructions issued to the bailiff of the High Court (in England to the Sheriff) to seize and sell goods belonging to the judgment debtor to satisfy the judgment debt. It follows therefore that if there is no judgment debt there can be no writ of fieri facias.
- [16] It was Learned Counsel's submission that when the judgment giving rise to the issue of the writ is no longer in existence, the writ also expires since the writ cannot exist in vacuo. When the judgment goes the writ also goes.
- [17] Counsel's submission was that it appears that in England it is the practice that, an application being made to set aside a default judgment, solicitor for Defendant serves notice on the sheriff who had been authorized to execute the writ to cease to sell goods of the judgment debtor and that all goods not sold should be returned to him, citing Atkins Court forms 2nd ed. Vol. 14 (2003) Form 41 p. 263, submit there has been no writ of execution in these proceedings since 2nd February 2011, the day decision was handed down in this matter.
- [18] Further it was submitted that CPR 2000 Part 13.6 is clear in its effect that upon the setting aside of a default judgment there is no residual authority under which steps can be taken. If this were not the case Part 13.6(1) would not be saying that, upon an order to set aside a default judgment being made, the Court must treat the hearing as a case management conference unless it is not possible to deal with the matter justly at that time.

- [19] Part 13.6 (2) requires the Court office to fix a date, time and place for a case management conference and give notice to the parties if it is not possible to deal with the matter justly at that time. Counsel argued these are all steps that would have been taken if the claim had taken its normal course and clearly shows that no authority is left to take any step e.g., to sell the goods taken under the writ in part satisfaction of the order for a cost made in the Claimant's favour on the setting aside of the default judgment. To enforce the cost order made in the Claimant's favour the Claimant must apply to do so pursuant to the order made and not under the order for the default judgment. Under the default judgment the Claimant was awarded \$2,000.00 costs.
- [20] Learned Counsel submitted further that the Claimant's objection to the setting aside of the writ cannot be maintained. According to the Court records the writ was issued on 24th November 2009 pursuant to Part 46.10(1) a writ of execution is valid for a period of 12 months beginning with the date of its issue and Part 46.10(2) prohibits the judgment creditor from taking any steps under it unless the Court has renewed it.
- [21] Part 46.11(1) permits the judgment creditor to apply for the renewal of a writ of execution, but pursuant to Part 46.11(2) the application for renewal must be made within the period for which the writ is valid. In this case the facts are that twelve months have passed since the writ was issued and no application was made to renew it within that twelve month period. Consequently there is really no writ in existence that the Claimant can act upon.

ALL APPLICATIONS MADE BY DEFENDANT

Submissions made by Counsel for the Claimant/wife in respect of all the applications made by the Defendant/husband

- [22] The Defendant has been in contempt of the Court and continues to do so without regard to the Court's order and ought not to be heard on his application. Reference is made to the case of **Isaacs v Robertson** 43 WIR 126 judgment of Lord Diplock. The Court must consider the degree of prejudice to the Claimant in that:
- a) There is a judgment which is a thing of value in the sum of \$615,350.00.
 - b) It has an order for costs which remains unsatisfied.

- c) That even if the Court made an order for prescribed costs which is being sought to be appealed, the Claimant is bound to obtain a costs order for setting aside which though not quantified at the time of the application must be considered.
- d) The vehicle which is seized is of very little value.
- e) The fact that the applicant has been very untruthful to the Court in these proceedings regarding his assets.
- f) That a Writ of Execution was issued within the period of 12 months and TB856 was lawfully seized.
- g) The costs order are still outstanding distinct and separate from the judgment sum and Part 43.4 provides that the costs orders can be enforced separately.
- h) That despite the provisions of CPR 43.5(1) which provides that: the general rule is that if the Court sets aside a judgment or order, any order made for the purpose of enforcing it ceases to have effect and Part 43.5(2) provides that the Court may however direct that an order remains in force.

[23] Further, Counsel submitted that it was a condition for setting aside the judgment that an order for a costs be made and a time was set for filing of the defence. It is submitted that no time having been fixed for the payment of any costs the Court would greatly err if it releases vehicle TB856 as it leaves the Claimant with no security for costs incurred to date and ordered to be paid by the Court.

[24] The Court ought to refuse the Defendant's application for the release of vehicle TB856.

THE LAW: APPEALS, WRIT OF EXECUTION

[25] CPR 2000: Part 62.2(1) reads: If an appeal may be made only with the leave of the Court below or the Court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. Part 62(3): An application for leave to appeal made to the Court may be considered by a single judge of the Court.

- [26] In the definition, Part 62(2) "court" means the Court of Appeal. "Court below" means the court or tribunal from which the appeal is brought.
- [27] I do not think that CPR Part 62.2(1) authorizes any court or tribunal to entertain an application for leave. What it does, it sets the timeframe within which an appeal application that requires leave, is to be made.
- [28] Where an appeal is made to the "court", the definition states that that court is the Court of Appeal, and by Part 62(3) a single judge of that court may hear the appeal. The authority to hear appeals is stated in Section 29 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act (Cap. 24):
- "Notwithstanding the provisions of any law or any rule of court to the contrary, an appeal shall lie as of right to the Court of Appeal or to any court replacing the same, from judgments or orders originating by summons in chambers and interlocutory judgments or orders of Judges of the High Court, whether adjudicated upon in chambers or in open court, and whether at first instance or on appeal, and the Court of Appeal shall have jurisdiction to hear and determine all such appeals."
- [29] That section provides that appeals in interlocutory orders are to be considered by the Court of Appeal. I do not think that this Court has the authority to entertain the applications for leave to appeal.

Writ of Execution

- [30] CPR 2000 Part 43.5(1) reads: The general rule is that if the court sets aside a judgment or order, any order made for the purpose of enforcing it ceases to have effect, 43.5(2) the court may however direct that an order remains in force.
- [31] The writ was issued before the application for setting aside the default judgment. What is the purpose of the paragraph (2) empowerment? That paragraph gives the Court a discretion to direct that an enforcement order remain in force. It is a holding position to enable any consequential matter to be dealt with justly.

[32] No application was made under that paragraph at the hearing of the setting aside of the default judgment for the continuation of the enforcement order.

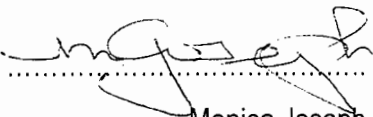
[33] There is an appeal challenging the order setting aside the default judgment. To deal with the points in the submissions relative to the writ of execution, at this stage of the proceedings would be tantamount to pronouncing on the validity of a judgment, which is for a higher court. Section 29 of the Eastern Caribbean Supreme Court has been referred to earlier. In accordance with Part 62.1(a) a stay of execution of judgment of 2nd February 2011 is granted.

CONCLUSION

[34] The applications by the parties for leave to appeal, the application for leave by the Defendant to apply out of time, and the application by the Defendant to set aside the writ of execution are not for this Court to decide.

[35] It is ordered:

1. The applications by the parties for leave to appeal are not entertained.
2. The application by the Defendant to set aside the writ of execution is not entertained.
3. No order as to costs.



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Monica Joseph

HIGH COURT JUDGE (ACTING)

3rd June 2011