

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2013/0019

BETWEEN:

**AUGUSTIN SMITH
Represented by CLETUS SMITH**

Appellant

and

**[1] 1st NATIONAL BANK ST. LUCIA LIMITED
Formerly SAINT LUCIA COOPRATIVE BANK LIMITED
[2] DENNIS DOXILLY**

Respondents

Appearances:

Ms. Lydia B. Faisal for the Appellant
Ms. Sardia Cenac-Prospere for the 1st Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

2015: March 20.

Interlocutory appeal – Priority of claims filed by appellant and first respondent – Whether learned judge erred in determining first respondent’s claim before appellant’s claim – Whether first respondent’s claim ought to have been stayed pending determination of appellant’s claim

In 2004, the second respondent was registered as the owner of two parcels of land in Saint Lucia (“the disputed property”). In 2006, he obtained a loan from the first respondent (“the Bank”) which loan was secured by a hypothecary obligation over land registered in his name, including the disputed property.

In March 2011, the appellant filed a claim against the second respondent, in which he alleged that the second respondent had obtained title to the disputed property by fraud and that he (the appellant) had been in occupation of the said property since 1948 and was therefore entitled to title to it by prescription. On 13th April 2011, the appellant applied to the court for judgment to be entered on his claim pursuant to rule 12.10 of the Civil

Procedure Rules 2000 ("CPR 2000"), the second respondent having failed to file a defence. The hearing of this application was adjourned several times, on one occasion, to 27th March 2013, to permit the second respondent to retain counsel. The Bank also filed a claim against the second respondent, in May 2011, on the basis that he had defaulted on his loan payments, and in July 2011, it obtained judgment in default of acknowledgment of service.

On 23rd November 2011, the Bank applied for writs of execution for seizure and sale of the disputed property. The appellant subsequently filed a petition seeking leave to file an opposition to the sale of the disputed property and for a stay of the Bank's proceedings. On 28th November 2012, prior to dealing with the appellant's original claim for a determination of whether he had an interest in the disputed property, the learned judge dismissed the appellant's petition, on the basis that he had failed to demonstrate that he had an actual interest in the property so as to ground his opposition to the writs of execution for its seizure and sale.

The appellant appealed the learned judge's decision, contending, inter alia, that the Bank's claim ought not to have been dealt with before his claim was determined; it should have been stayed until that had been done.

Held: allowing the appeal, setting aside the decision of the learned judge, and granting a stay of the writs of execution for seizure and sale of the disputed property pending the determination of the appellant's application for judgment in default of filing a defence in claim SLUHCV2011/0221, that:

1. The appellant's application for judgment in default having been first in time, it should have been determined before the Bank's claim against the second respondent was allowed to proceed to the stage where a date was set for the sale of the disputed property. The effect of the learned judge's decision was to pave the way for the sale of the property before the appellant's application was determined, notwithstanding that he had engaged the process of the court before the Bank. The learned judge's failure to give the appellant's claim priority over the Bank's claim essentially resulted in a denial of justice to the appellant.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited SKBHCVAP2002/0006 (delivered 31st March 2003, unreported) followed.

2. The grant of a stay is discretionary. Therefore, an appellate court would only interfere with a judge's decision regarding a stay if, in exercising his/her discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to the relevant factors, and as a result of the error, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the present case, the learned judge failed to take into account or gave too little weight to relevant factors, one of these being that there was a great risk that the appellant would suffer injustice if the stay was not granted since the

disputed property could have been sold before the appellant's interest in the property was determined.

Dufour and Others v Helenair Corporation and Others (1996) 52 WIR 188 followed; **Marie Makhoul v Cicely Foster** ANUHCVP2009/0014 (delivered 26th August 2009, unreported) cited; **Courtesy Taxi Co-operative Society Ltd. v Lucien Joseph** SLUHCVP2008/0043 (delivered 18th May 2009, unreported) cited; and **Marguerite Desir et al v Sabina James Alcide** SLUHCVP2011/0030 (delivered 14th December 2011, unreported) cited.

JUDGMENT

- [1] **THOM JA:** This is an interlocutory appeal against the learned judge's decision dismissing the appellant's petition made pursuant to article 513 et seq of the **Code of Civil Procedure**¹ for leave to file an opposition to the sale of two parcels of land over which he claimed to have an overriding interest and for a stay of execution, and ordering him to pay the first respondent ("the Bank") costs in the sum of \$1,500.00.

Background

- [2] In 2004, the second respondent ("Mr. Doxilly") was registered as the owner of two parcels of land being Block 1841B Parcels 37 and 38 ("the disputed property"). In 2006, he obtained a loan from the Bank which was secured by a hypothecary obligation over certain land registered in his name including the disputed property.
- [3] On 2nd March 2011, the appellant² filed a claim against Mr. Doxilly in which he alleged that Mr. Doxilly obtained title to the disputed property by fraud and that he (Mr. Augustin Smith) had been in occupation of the said property from 1948 and was therefore entitled to title by prescription. While the Bank was not a party to the claim, a copy of the claim form was nonetheless served on the Bank.
- [4] Mr. Doxilly having failed to file a defence within the time stipulated by the **Civil Procedure Rules 2000** ("CPR 2000"), an application was made on 13th April 2011

¹ Cap. 243, Revised Laws of Saint Lucia 1957.

² Mr. Augustin Smith has since died and Mr. Cletus Smith has been appointed his representative by the court.

for judgment in default pursuant to rule 12.10 of CPR 2000. This application was adjourned on several occasions including on 7th November 2012 when the learned judge adjourned it to 27th March 2013 to permit Mr. Doxilly to retain counsel.

- [5] On 23rd May 2011 the Bank filed a claim against Mr. Doxilly he having failed to repay the loan. Judgment in default of acknowledgement of service was obtained on 26th July 2011 and application made on 23rd November 2011 for writs of execution for seizure and sale of the disputed property.
- [6] On 13th November 2012 the appellant filed a petition seeking leave to file an opposition to the sale of the disputed property and for a stay of the proceedings. In his affidavit in support he stated that he only became aware of the Bank's claim on or around 31st October 2012 when the Bank's counsel notified his counsel that the disputed property would be sold on 12th December 2012.
- [7] On 28th November 2012, the learned judge dismissed the appellant's petition on the basis that the appellant did not have an actual interest in the disputed property within the meaning of article 519 of the **Code of Civil Procedure**.
- [8] The appellant appealed the judge's decision on three grounds, being:
- (1) The learned judge did not fully appreciate the effect of the 1st respondent's failure to physically inspect the property (in accordance with section 28(g) of the **Land Registration Act**³) before it accepted that property as security from the 2nd respondent in exchange for a loan.
 - (2) The learned judge erred in failing to determine Augustin Smith's claim (SLUHCV2011/0221) before that of the 1st respondent (SLUHCV2011/0548) and in the circumstances, the learned judge should have stayed the Bank's proceedings until Augustin Smith's application had been determined.

³ Cap. 5.01, Revised Laws of Saint Lucia 2008.

(3) By dismissing the appellant's petition to oppose the sale of Block 1841B Parcels 37 and 38, the learned judge prematurely determined that the appellant did not have an actual interest in the land concerned, and indirectly pre-empted the appellant's application for judgment which was pending before her from April 2011, and before the 1st respondent had filed its claim against the 2nd respondent.

[9] This appeal raises two issues, firstly whether the learned judge should have granted a stay of the writs of execution and determine the appellant's application for judgment, and secondly, whether an overriding interest pursuant to section 28 of the **Land Registration Act** is an actual interest within the meaning of article 519 of the **Code of Civil Procedure**.

[10] In relation to the first issue, the appellant's contention is that his application for a declaration of his overriding interest preceded the Bank's claim against Mr. Doxilly. Therefore, the learned judge should have granted a stay of the Bank's writs of execution against Mr. Doxilly and determined the appellant's application in claim SLUHCV2011/0221 first, it being first in time and since the appellant was at risk of being dispossessed of his house and rights acquired under the **Land Registration Act**. Learned counsel for the appellant relied on the case of **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**⁴ where Saunders JA [Ag.] stated:

"The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the Bank."⁵

⁴ SKBHCVAP2002/0006 (delivered 31st March 2003, unreported).

⁵ At para. 18.

Learned counsel for the Bank made no submission on this issue but rather focused solely on the issue whether the appellant had an actual interest in the disputed property. The second respondent did not participate in this appeal.

Discussion

- [11] It is not disputed that the appellant's application was first in time. As in the **St. Kitts Nevis Anguilla National Bank** case, chronologically and logically, the appellant's application was first in time and should have been first determined. The failure of the learned judge to do so has resulted in a denial of justice to the appellant. The effect of the learned judge's decision is to pave the way for the sale of the disputed property before the appellant's application is determined, notwithstanding the appellant had engaged the process of the court before the Bank. The learned judge's reasons for dismissing the petition confirm that the appellant's application should have been heard first. The learned judge's reasons for the decision were as follows:

"On the facts as they stand, it is yet to be determined in law if Mr. Augustin Smith has a title by prescription pursuant to Article 2103A of the *Civil Code* on which prescription requires a declaration by the Court to Block 1841B Parcels 37 and 38 or in the alternative, it is yet to be determine[d] if pursuant to the Land Registration Act, section 28[(g)] if he has an overriding interest against the Defendant's claim to the said land. This being the situation, the Court is of the view that Mr. Augustin Smith by his representative, Mr. Cletus Smith has failed to demonstrate an actual interest so as to ground his opposition to the Writs of Execution for seizure and sale of Block 1841B Parcel 37 and 38."⁶

I will now consider whether the learned judge should have granted a stay.

- [12] The grant of a stay is discretionary. The principles which should guide the court in exercising the discretion have been stated by this court in several cases including the cases of **Marie Makhoul v Cicely Foster**,⁷ **Courtesy Taxi Co-operative Society Ltd. v Lucien Joseph**,⁸ and **Marguerite Desir et al v Sabina James**

⁶ p. 13, lines 12-20 of the Transcript of Proceedings dated 4th September 2013.

⁷ ANUHCVP2009/0014 (delivered 26th August 2009, unreported).

⁸ SLUHCVP2008/0043 (delivered 18th May 2009, unreported).

Alcide.⁹ This being an appeal against the exercise of the discretion of the learned judge, the appellate court would only interfere if in exercising the discretion the learned judge erred in principle either by failing to take into account or giving too little or too much weight to the relevant factors and as a result of the error, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.¹⁰

[13] It is apparent from the judgment that the learned judge failed to take into account or gave too little weight to the relevant factors, one of these being that there was a great risk of injustice to the appellant if the stay was not granted in that the disputed property could be sold before his interest in the said property is determined. On the other hand, the only prejudice the Bank would suffer is the possible delay in recovering the sums owed to it by Mr. Doxilly. In so doing, the learned judge erred in principle and her decision exceeded the generous ambit within which reasonable disagreement is possible and was blatantly wrong. In such circumstances an appellate court is required to exercise its own discretion. Having regard to the circumstances as mentioned above I find that this is an appropriate case for the appellate court to exercise its discretion and grant a stay of the writs of execution insofar as it relates to the disputed property.

[14] Having found that a stay should be granted it is not necessary for the court to determine the other issue raised in this appeal.

[15] It is ordered that:

(1) The appeal is allowed. The decision of the learned judge is set aside.

(2) A stay is granted of the writs of execution for seizure and sale of Block 1841B Parcels 37 and 38 pending the determination of the appellant's application in claim SLUHCV2011/0221.

⁹ SLUHCVP2011/0030 (delivered 14th December 2011, unreported).

¹⁰ Dufour and Others v Helenair Corporation and Others (1996) 52 WIR 188.

- (3) The appellant shall have his costs in the court below and costs of this appeal fixed at \$1,000.00, being two thirds of the costs awarded below pursuant to CPR 65.13.

Gertel Thom
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal