[2022] JMSC Civ. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV 01571

IN THE MATTER of all that parcel of land part of HAMPTON GREEN in the parish of Saint Catherine being the lot numbered SEVENTY ONE on the plan of part of Hampton Green aforesaid deposited in the Office of Titles on the 6th September 1960 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed, being part of the land comprised in Certificate of Title registered at Volume 366 Folio 5 and being all that parcel of land registered at Volume 967 Folio 458 of the Register Book of Titles.

BETWEEN	**CARLTON FRANCIS**	**APPLICANT**
AND	**BEATRICE EDWARDS**	**1ST RESPONDENT**
AND	**SYLVANUS EDWARDS**	**2ND RESPONDENT**
AND	**SHENIEL EDWARDS**	**3RD RESPONDENT**
AND	**LILIETH D LAMBIE-THOMAS & CO.**	**4TH RESPONDENT**

Mr. Anthony Williams and Mr. Junior Gonzales for the Claimant

Mr. Ludlow Black & Ms. Michelle Thompson instructed by H S Rose & Co. for the 1st, 2nd and 3rd Defendants

Ms. Judith Clarke, Ms. Jamiela Thomas and Ms. Yaniqueca McKenzie instructed by Lambie-Thomas & Co. for 4th Respondent.

Judgment delivered: February 21, 2022

How costs should be apportioned - Decision made partly in favour of the claimant, partly in favour of some of the defendants – Costs of defendant against whom claim need not have been brought.

Pettigrew Collins J

BACKGROUND

[1] On the 24th of April 2019, I gave judgment in the instant claim. There was no clear winner or loser based on my findings. I did not make any orders as to costs. The parties were invited to make oral or written submissions on costs.

[2] The claimant brought a claim seeking to recover possession of property in respect of which he was a registered joint tenant. The two other joint tenants, Mr. Osmond Brown and Mrs. Cecelia Brown who were husband and wife, had died. Mrs. Brown purported to devise the disputed property to the first defendant sometime after the death of her husband. Transfer documents had also been prepared by her with a view to transferring the property to herself and the third defendant but were not completely executed.

[3] The second and third defendants resisted the claimant's claim on the basis that the first defendant was the owner of the property and they occupied same with her consent. The first defendant counterclaimed and put forward defences which together gave rise to three issues. Those issues were whether the claimant held the property on trust on behalf of the Browns, whether the claimant's legal and beneficial interest in the property had been extinguished by virtue of the provisions of sections 3, 14 and 30 of the Limitation of Actions Act, and whether the joint tenancy had been severed by the execution of the transfer document by Mrs. Brown. Two of those three issues were decided in favour of the claimant and one in favour of the defendant. The court found that the execution of the transfer document operated to sever the joint tenancy. The end result was a declaration that the claimant was entitled to a 50% interest in the property.

[4] One finding relevant to the manner in which costs should be apportioned was that the claimant need not have joined the 4th defendant in the proceedings. My reason for so finding was that the 4th defendant in the circumstances acted as the attorneys at Law for the deceased Mrs. Brown and therefore came into possession of the duplicate certificate of title to the property on account of their lawyer client relationship.

[5] Even though the duplicate certificate of title on the face of it showed that the property was jointly held by Mrs Brown and the claimant, in circumstances where there arose a dispute as to the ownership of property subsequent to Mrs. Brown's death, the attorney at law was bound to act on the instructions of Mrs. Brown's executors. This is especially so when there was a claim that Mrs Brown had acquired the rights to a possessory title. The attorneys at law were in a fiduciary position as far as Mrs. Brown's estate was concerned. A resolution of the dispute between the claimant and the first, second and third defendants would have guided the conduct of the fourth defendant as it relates to the handling of the title.

[6] Written submissions were filed by the claimants in the matter on the 30th of April 2019 and which was brought to my attention on the 6th of June 2019, based on email record. As far as my checks revealed, no submissions were forthcoming from the other parties. The matter was thereafter in abeyance because of my oversight for which I apologize.

[7] It was brought to my attention (on the 18th of February 2022 when I received the file in order to deal with another application) that submissions had in fact been filed by the 4th defendant on the 7th of May 2019 and on behalf of the first, second and third defendants on the 8th of May 2019.

CLAIMANT'S SUBMISSIONS

[8] The claimant through his attorney at law Mr. Gonzales, outlined the relevant provisions of Rule 64 of the CPR which were referenced by me in the judgment in relation to the substantive claim. I will address the relevant provisions later.

[9] The claimant's attorney at law submitted that the claimant was successful on most of the issues. The claimant also adverted to matters which transpired prior to the commencement of the trial. He indicated that there were overtures to the first, second and third defendants to settle the matter but that the efforts were rejected.

[10] The claimant also contended that it was unreasonable for the defendants to pursue the point that the claimant held the property on trust for the Browns, as they had no knowledge of the circumstances of the purchase. He further contended that it was unreasonable to raise the claim of adverse possession. The claimant submitted that the first, second and third defendants should pay the costs of the claimant. The submission was further clarified by the statement that the costs should be apportioned in the ratio 80/20 or 70/30 in favour of the claimant as it relates to the first to third defendants.

[11] It was the claimant's further submission that having regard to the findings of the court that the fourth defendant ought not to have been made a party to the proceedings, it is the firm of Kinghorn and Kinghorn who initiated the claim on the claimant's behalf, who should be made to pay wasted costs. Reliance was placed on the case of **Sheneka Kennedy v New World Realtors Ltd**. [2017] JMSC Civ. 175 in support of this submission.

[12] The claimant adverted to the court's power pursuant to rule 64.13 (1) and (2) to order costs against an attorney at law where on account of an unreasonable, improper or negligent act, it would be unreasonable to expect the litigant to pay.

SUBMISSIONS FROM THE DEFENDANTS

Submissions by the 1st, 2nd and 3rd defendants

[13] It was submitted that the claimant did not succeed against the defendants in any of the orders sought by him in his claim and so he has wholly failed in his claim. It was pointed out that the claimant succeeded on two of the reliefs sought and the defendant was successful on two. According to these defendants, the first defendant was successful in her counterclaim and said that a counterclaim was necessary to protect her rights. Counsel claims that the second and third defendants were wholly successful as they did not bring any counterclaim. It is the overall position that the defendants were successful against the claimant.

[14] As to whether costs should be apportioned on account of a party being successful on some issues, it is the submission of these defendants that their failure to obtain judgment in their favour on all the declarations and reliefs sought should not automatically mean a reduction in costs.

[15] The reason advanced for this latter position is what was said in the case of **Straker v Tudor** (a firm (2007) EWCA Civ. 368 at paragraph 6 that:

> *"Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which lead to a different result include (a) failure to follow a pre-action protocol; (b) Whether a party has pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue and (d) Whether a successful party has exaggerated his claim in whole or in part."*

Fourth Defendant

[16] I do not find it necessary to reproduce most of the submissions made on behalf of the fourth defendant except to say that I am in agreement with the aspect of

the submissions to the effect that the claimant should pay the costs of the fourth defendant.

[17] The fourth defendant has also made submissions on behalf of the first, second and third defendants. It was observed that no declaration of interest was sought by the claimant and that it was the fourth defendant who sought this declaration. The submission continued that the court found in favour of the first defendant and consequently, the second and third defendant.

[18] It was also the fourth defendant's position that the court should consider making a wasted costs order against both the claimant's former and present attorneys at law.

THE PROVISIONS IN THE CIVIL PROCEDURE RULES

[19] Rules 64.3, 64.5, and 64.6 contain the applicable provisions. Rule 64.6 provides that if the court decides to make an order about the costs of any proceedings, the general rule is that the court must order the unsuccessful party to pay the costs of the successful party. It is also provided that the court may order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs. In order to decide who should pay costs, it is provided at rule 64.6 (4*) that the court must have regard to all the circumstances which include:*

(a) The conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 or 36;

(d) whether it was reasonable for a party:

(i) to pursue a particular allegation and/or

(ii) raise a particular issue

(e) the manner in which a party has pursued:

(i) that party's case;

(ii) a particular allegation or

(iii) a particular issue.

[20] Rule 64.6 (5) goes on to stipulate the type of orders that the court may make. This includes an order that a party may pay a proportion of another party's costs, a stated amount in respect of another party's costs, costs from or until a certain date only, costs incurred before proceedings have begun, costs relating to particular steps taken in the proceedings, costs limited to basic costs in accordance with rule 65.10 and interests on costs from or until a certain date, including a date before judgment.

ANALYSIS AND CONCLUSION

[21] Regarding information on the efforts to settle the matter prior to the commencement of the trial, it would have been helpful and necessary for the claimant to advance evidence in that regard and not simply make submissions on the matter. This court does not know the details of the proposed consent order or have any other admissible and necessary evidence as to efforts to settle the matter prior to the commencement of the trial. The attorney at law for the first to third defendants indicated in submissions that an offer to settle was made in June of 2017 but that the defendants rejected the offer. It was said that the offer was unreasonable. This court does not know if the offer made was a reasonable one. Counsel said that a second offer was made after several days of trial. The trial in fact lasted three days. Even if the court could rely on information outside of evidence, ultimately, there is insufficient information that would allow me to give full consideration as to whether this is a matter that should be taken into consideration.

[22] This court is of the view that an order should not be made against a firm of attorneys at law without an opportunity be given to the attorneys at law concerned to address the basis for the order. If for no other reason, an attorney at law usually acts on instructions.

[23] Without evidence to the contrary, this court could only infer that counsel from the firm Kinghorn and Kinghorn acted on instructions from the claimant in bringing the claim against the fourth defendant. Further, it is noted in this instance that Kinghorn and Kinghorn did not pursue this claim to its finality. It is therefore in my view, not appropriate for the court to simply invite the firm of Kinghorn and Kinghorn to make submissions in the matter as suggested by the claimant's present attorney at law. It was also open to the claimant's present attorney at law to discontinue the claim against the fourth defendant when he assumed conduct of the case and certainly before the matter proceeded to trial. Based on Mr Gonzales' own submissions, it was garnered that he had conduct of the matter at a point before the trial commenced as he spoke of overtures to the defendants to settle.

[24] The court disagrees that Kinghorn and Kinghorn, should without more, be held responsible for costs. In the case of **Sheneka Kennedy v New World Realtors** (supra) Harris J as she then was, observed at paragraph 36 of the judgment that the case was "characterized by a series of missteps and/or failures" on the part of counsel. As a consequence, she considered that it would be reasonable to ask counsel to show cause why she should not be made to pay wasted costs. She said at paragraph 60 of her judgment:

> *"Based on the exceptional nature of the instant case and the conduct of counsel for the defendant, the court is minded to make a wasted costs order pursuant to CPR 64.13. It seems that while it would be appropriate for the claimant to be awarded the costs of this application, it would be unreasonable to expect the defendant company to pay same. Having regard to CPR 64.14, the court hereby notifies [counsel] that it is minded to make such an order for the reasons contained in paragraphs [36] to [40] and [55] to [56]*

herein. [counsel] will be permitted to show cause why such an order should not be made, on the 9th of January, 2018 at 9:30 a.m. before me in Chambers 5."

[25] In that case, counsel had filed an acknowledgement of service in time but had filed the defence 15 days out of time and had not sought an extension of time within which to file the defence. Counsel thereafter made an application to set aside a default judgment which had been granted but did so on an erroneous basis. This error occasioned the filing of a new affidavit, which like the first affidavit, was inadequate in that it did not qualify as an affidavit of merit as was required. Counsel had also failed to seek an amendment to the application in order to reflect that it was an application to set aside a regularly obtained judgment. Further, the application to set aside was made well over a year after the defendant had been served with the judgment, although according to the judge's findings, the defendant had made efforts quite early to have the default judgment set aside by bringing the judgment to the attention of its attorney at law. There was evidence to support the position that the delay was the attorney's fault.

[26] In the cited case, it was very clearly and unmistakably demonstrated that counsel had been at fault. It has not been so demonstrated in the instant case.

[27] In addressing the question of the reasonableness or otherwise on the part of the first to third defendants in raising the issues that were addressed in the substantive claim, I find the case of **Crichton Automotive Limited v The Fair Trading Commission** [2017] JMCA Civ. 17 which was referred to by the claimant in his submissions to be quite instructive.

[28] In that case, P Williams JA observed that the Court of Appeal had previously interpreted the very provision in question which gave rise to one of the three issues raised by the Appellant. It is to be noted that in that case, the question was one of interpretation of a statute and therefore purely a question of law. In light of that fact, it would have been unreasonable for the appellant to have

raised the issue on appeal in circumstances where the very issue had been decided unanimously by a panel of judges.

[29] In relation to a second issue, the Court found that there was no basis upon which certain findings of fact of the learned trial judge leading to the decision that the appellant was liable, could be disturbed. Although the learned Judge of Appeal did not specifically so state, the factual findings of the trial judge that were questioned, were in relation to matters which were either relied on and accepted by the appellant or which were not contested by the appellant.

[30] In the instant case, the question of whether the provisions of the Limitation of Actions Act was applicable, and whether the property was held on trust, of necessity had to be decided based on an application of the law to facts found. In light of the need for findings of facts to have been made, it could not be said that it was unreasonable for the defendants to have raised the issues when the possibility of making findings of fact in favour of the defendants' position could not have been completely ruled out.

[31] I do not therefore share the view that it was unreasonable to have raised the defences. Clearly those defences were raised based on the stance of Mrs Brown as gleaned from the document she executed which though not complying which the requirements of Rule 30.4 of the CPR, was admitted in evidence on account of the fact that Mrs Brown was deceased.

[32] The two orders sought against the first, second and third defendants were for recovery of possession as well as for them to quit and vacate the property. It was in a sense a duplication of the order sought. One issue was raised. There was no need for any separate research and argument in order to resolve the claim brought by the claimant.

[33] Regarding the first to third defendants' submission that the claimant wholly failed in his claim, it should be noted that the fact that the court did not make an order for possession against the first, second and third defendants, does not mean that

they were entitled to remain in the property indefinitely to the exclusion of the claimant. Based on the outcome of the case, they had no greater right to possession and occupation of the disputed property than the claimant did after the death of Mrs Brown. The claimant was as much entitled to possession.

[34] There was need for consequential orders to deal with the respective interests as declared. No such order was sought then and none was made. The latter observation brings me to the submission that the third defendant succeeded on two of the four orders sought in the counterclaim. **That assertion is in fact inaccurate, since the court made no order to the effect that the third defendant as the duly appointed executor and beneficiary of Mrs Brown was entitled to possession of the disputed property.**

[35] The third defendant was also not successful in getting a declaration that the claimant's interest as noted on the Certificate of Title was superseded by her acquisition of proprietary rights. She however succeeded in establishing that the action of Mrs Brown severed the joint tenancy.

[36] The submission of the claimant that the first to third defendants succeeded on only one of the bases on which the claim was defended and the counterclaim brought is somewhat inaccurate in that the second and third defendants never really brought a counterclaim.

[37] It is in large measure the number of issues that had to be dealt with which dictated the amount of time required for preparation for trial and to a lesser extent, the number of days required for trial. However, the court is cognizant that those factors did not dictate the number of times that the case appeared on the list before the court prior to the commencement of trial.

[38] I am mindful of the submission that there is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. I do not regard the first to third defendants in a true sense to be the successful parties. As I indicated at the outset, there was no clear winner or loser as between the

claimant and the first to third defendants. As it turns out, none had a greater right to occupation and possession of the disputed property. In the circumstances, this is a matter where the outcome must to some degree be dictated by the issues based approach.

[39] I take account of the fact that the second and third defendants didn't really pursue a counterclaim. The costs should be apportioned as between the claimant and the first to third defendants in a manner that reflects the outcome.

[40] It is worth observing that the attorney at law from the fourth defendant who gave evidence in the matter was a relevant and a necessary witness (as distinct from being a party) on behalf of the first to third defendants. That fact however does not change the view that the fourth defendant is entitled to its costs which should be paid in full by the claimant.

[41] In all the circumstances, after giving a great deal of thought to the matter, I make the following orders on costs:

1. The fourth defendant is entitled to recover its costs from the claimant.

2. The claimant, the first, second and third defendants shall bear their own costs in both the claim and counter claim.

3. Costs of the fourth defendant to be taxed if not sooner agreed.