

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Appeal No. P398/2017
Claim No. C.V. 2016-03171

BETWEEN

CAROL GEORGE

Appellant

AND

KEITH RAYMOND

Respondent

Before: C. Pemberton, J.A.

IN CHAMBERS

Appearances:

For the Appellant: Mr. M. Gayle instructed by Ms. S. Khan

For the Respondent: Mr. N. Ihezue

DATE OF DELIVERY: 16th July 2018

JUDGMENT

[1] The Appellant's premise for the Application for the Stay rests on the trial judge's failing to determine the matter in her favour on the basis that the trial judge erred in law and in fact.

[2] **BACKGROUND**

This matter arose out of a claim made by the Respondent/Claimant in an application for

- i. Possession;
- ii. Damages for trespassing;
- iii. Injunctive relief; and
- iv. Costs.

The Respondent/Claimant was successful on all counts in that the trial judge found as follows:

- i. That the Defendant was not in continuous undisturbed possession of the property for the requisite 16 year period;
- ii. The Defendant was not in sole exclusive possession of the property during the 9 years that she lived on the property; and
- iii. The Defendant's mother had no proprietary interest in the property after the death of Mr. Michael John.

[3] Based on these findings these were the Orders made:

1. *Possession is granted to the Claimant of ALL AND SINGULAR that piece or parcel of land situate at Light Pole No. 91 Pepper Hill Laventille Road, San Juan in the Ward of St. Anns forming part of the lands described in the First Schedule hereto comprising FIVE HUNDRED AND THIRTY-FOUR POINT ONE (543.1) SQUARE METRES (5,749 sq) FIVE THOUSAND SEVEN HUNDRED AND FORTY-NINE SQUARE FEET and bounded on the North partly by the pumphouse and partly by the Ravine, bounded on the South partly by Baldeosingh now Anjanie Maharajh and partly by Baldeosingh now Anjanie Maharajh, on the East by Pepper Hill and on the West by lands of Baldeosingh now Anjanie Maharajh (hereinafter called the said lands).*

2. *Damages for trespass to be assessed by a Master in Chambers on a date, time and place to be fixed by the Court Office.*
3. *The Defendant has no legal right and/or equitable right and/or interest in the said parcel of land.*
4. *The Defendant to vacate the said lands one month from the date of this Order.*
5. *The Defendant is restrained whether by herself, her servants and/or agents or otherwise howsoever from entering upon, remaining on or carrying on any activities on the said land after the date for vacating.*
6. *The Defendant do pay to the Claimant prescribed costs assessed in the sum of Fourteen Thousand Dollars (\$14,000.00).*

[4] On the Application filed 20th December, 2017, the Appellant applied for a stay of execution of the trial judge's order. The grounds of the Application and the evidence by way of affidavit in support, seem to coalesce around the classic requirements for a successful application for a stay.

- I. That there are good prospects of successfully prosecuting the appeal.
- II. That should the stay be refused, and the trial judge's order take effect:
 - a) Risk of prejudice to the Appellant outweigh risk of prejudice to the Respondent.
 - b) Monies paid under the judgment would not be easily recoverable in the event that the appeal is successful.
- III. That there are special circumstances justifying the stay of execution.

[5] In applications such as these, the onus is on the appellant to provide the court with material upon which the matter can be considered. In other words, it does not serve the appellant to simply regurgitate the requirements without providing sufficient evidence and reasons to support its case.

[6] What evidence has the Appellant supplied therefore to convince the Court that the requirements for the grant of a stay of execution have been fulfilled by her? To answer that, it may be prudent

to set out the relevant portions of the Affidavit. Before doing so, I should make the observation that many of the paragraphs contain the same information and relate to the same issues. I shall not engage in an exercise of repetition. It does not carry Ms. George far.

[7] **THE AFFIDAVIT**

Paragraphs 1 – 3 contain the formal parts of the narrative. We start at paragraph 4.

4. *My mother lived in the chattel house on the piece of land described at paragraph 1 of the Fixed Date Claim from filed on the 22nd September 2016 in the Court below, of which a true copy is now shown to me and hereto attached and marked “CG1”, herein after called “The Subject Lands”. It was assigned the reference CV 2016 – 03171.*

Paragraph 5 recites how her mother came into possession of the said lands. She acknowledges the fact that her mother’s Will has not been probated. In Paragraph 6, Ms. George describes the fact that her mother died Testate; her alleged mental capacity at the date of the execution of her Will; and included a copy of her mother’s medical records.

I shall continue,

Paragraph

7. *In or around the 15th October 2007 I entered into occupation of the chattel house on the subject lands. I did so because my mother’s health was deteriorating and she required assistance around the clock. In 2009 I got married. My then husband lived nearby and I moved in to cohabit with him, thought I used to regularly attend on my mother as her primary care giver and continuously spent nights there. Therefore I resided in both my matrimonial home and the chattel house on the subject lands.*
8. *I returned to live with my mother upon the breakdown of my marriage and to provide her with round the clock bed-care.*
9. *My mother’s state of health had deteriorated over the years and she died on the 16th September 2015 in the Port of Spain General Hospital.*
10. *I continued in occupation of the subject property following her death. I had and have nowhere else to go.*
11. *I am aware that the Claimant/Respondent lives at 2322 Michael Anthony Avenue, Phase 11a La-Horquetta, Arima with his immediate family. Prior to commencing the action in the Court below against me, he informed me that*

his intention was to sell the Subject Lands. Now produced, shown to me and hereto attached and marked "CG4" is a true copy of the letter sent to me by my brother in or around November 2015, informing me of his intention to sell the chattel house and the subject property.

12. ...

13. *I am advised and verily believe that the proposed Appeal stands a real prospect of success for the reasons set out in the draft Grounds of Appeal in the Applicant/Appellant's Notice of Appeal. A true copy of the Notice of Appeal is now produced, shown to me, hereto annexed and marked "CG5".*

14. *Furthermore, if this Honourable Court does not grant a stay of execution, I will be made homeless and I will have nowhere to store my items of personal property. I am therefore in fear of losing everything I own.*

15. *I am advised by my Attorney-at-Law, Sheriza Khan, that if my appeal is unsuccessful the Claimant/Respondent will be able to enjoy the fruits of his Judgment and recover possession of the Subject Lands from me, But that on the other hand, if the Appeal is successful and the stay of execution is not granted, I would not be able to easily enjoy the fruits of success on appeal. This is all the more the case since the Claimant/Respondent has expressly stated his intention is to dispose of the Subject Lands.*

16. ...

17. *The Order further stated that I have no legal right and/or equitable right and/or interest in the said parcel of land and the Order further compelled me to vacate the said land by 17th December, 2017.*

18. *The Honourable Madame Justice Mohammed further ordered an Injunction restraining me from entering upon, remaining on or carrying on any activities on the said premises.*

19. *The Court's ruling aforementioned will lead to financial distress for me because I spent considerable amounts of money on the upkeep and maintenance of the property, as well as the payment of all of the utility bills since the year 2007 to the current time.*

20. ...

21. ...

22. *I am advised and verily believe that for me to satisfy the terms of judgment as ordered would render the appeal, for which there is merit, otiose. This is compounded by the fact that should the judgment be carried out as ordered*

and I am successful on appeal the likelihood of me recovering funds spent to seek accommodation elsewhere would be negligible in the circumstances I would be left at a severe disadvantage.

23. *It would be a great injustice and detrimental to me having regard to the issues raised in the notice of Appeal, and this outweighs the Respondent's right, to enforce judgment as outlined in the said order immediately or prior to the determination of the said Appeal, if a Stay is not granted.*

24. *In all of the circumstances I pray aid that the Court grants the Appellant the reliefs requested herein.*

[8] The Respondent filed several affidavits in response, all addressing the Appellant's lack of prospects of success on the appeal, given the facts admitted and those found by the trial judge; the prejudice suffered by him in being kept from the judgment seat and the fact that there are no special circumstances warranting a stay of execution of the trial judge's order.

[9] Both Counsel complied with my directions to file and serve witness statements and authorities in a timely manner. Whilst I am grateful to them, I shall crave their indulgences not to set them out, but to refer them as part of my analysis of the Application.

[10] **ANALYSIS AND CONCLUSION**

The general rule is that the successful party is entitled to reap the fruits of judgment **upon pronouncement of same**. The unsuccessful party has a right to appeal but the appeal does not operate as a stay so as to suspend the trial judge's order. As Mr. Gayle pointed out correctly, the general rule therefore is that the unsuccessful party is **not** entitled to a stay of execution of a trial judge's order. That general rule however, is subject to the ability of the unsuccessful party to apply to the court use its discretion to grant a stay of the trial judge's order. The court will order therefore, that the enforcement of the order be suspended pending the outcome of any appeal.

[11] There are certain conditions which must be satisfied before a stay of execution may be granted. I have already outlined them at paragraph 4. I shall proceed to examine this Application, to assess whether I should exercise my discretion in the Applicant's favour.

[12] **GOOD PROSPECTS OF SUCCESS**

This involves examining the trial judge's decision/judgment and the grounds of appeal to determine the Appellant has a realistic prospect of success. The court is not required at this stage to hear the appeal. Its task is limited to determining, given the trial judge's fact finding and application of the law, whether an appeal court would uphold the trial judge's decision, in which case the stay will be refused; or would the appeal court find that the trial judge was plainly wrong, in which case the stay of execution would be granted.

[13] **THE TRIAL JUDGE'S DECISION**

The trial judge's order effected that possession of the disputed premises being granted to Mr. Raymond. The reason given by the court was that Ms. George had not established that she was entitled to possession of the property based on possession by her and her mother.

[14] Ms. George based her claim in adverse possession against the previous owner of the property. The trial judge examined the evidence led, in order to determine whether Ms. George had established the two essential elements of her claim:

- i. the fact of possession; and
- ii. the intention to possess.

In assessing the fact of possession, the trial judge addressed:

- i. the nature of the possession;
- ii. the length of time of the possession; and
- iii. the evidence exercising intention.

From the evidence led, Ms. George established that she was only in possession of the property since 2007, some 9 years before the action. Further, it appears from her admission in cross examination that her Attorney-at-Law explained the law of actual possession to her, but that she did not understand that she had to be in exclusive possession of the property for 16 years, formed a sufficient reason for the trial judge's decision.

[15] The trial judge also took into account Ms. George's witness evidence which confirmed her entry to the property in 2007, her removal in 2009 and her re-entry in sometime 2008 - 2009. In terms of exclusive possession Ms. George's own evidence was that Mr. Raymond and his son were in possession –with her mother's permission, since they paid her a rent over the period 2004 until 2006.

[16] Even if the Appellant tried to establish the requisite period of possession through her mother, Ms. George had to establish that her mother was holding adverse to the rights of the paper title owner or his successors in title. That it seems, was not part of the factual matrix before the court. At best, at the expiration of the statutory tenancy under the **LAND TENANTS (SECURITY OF TENURE) ACT¹**, even if it were to be found that as at 31st May 2012, (one year after the expiry of the statutory tenancy) that the mother, who was still alive at the time, began holding as a tenant at will, the requisite period would not have elapsed at the time. This action was initiated in the Court below. It is acknowledged that the time to establish a claim in adverse possession will stop running from the date of the filing of an action for possession.

[17] Since the fact of possession for the requisite period was not proved, the trial judge quite correctly, spent little time on the requirement of the intention to possess.

[18] To me, there was nothing advanced by Ms. George to encourage the trial judge to consider a case in promissory estoppel. The trial judge's approach to the evidence and the application of the law I think may not be open to successful scrutiny on an appeal. In other words there is little or no prospect of success on the appeal.

[19] **SPECIAL CIRCUMSTANCES JUSTIFYING A STAY**

The Affidavit filed by Ms. George in support of her application spoke at paragraph 14 of the prospect of her becoming homeless as the trial judge's order compels her to vacate the premises. That is stated without more. There is nothing for me to consider as a special circumstance justifying a stay of execution of the trial judge's order.

¹ LAWS OF TRINIDAD AND TOBAGO chap. 59:54.

[20] **WHAT IS THE PREJUDICE TO BE SUFFERED BY MS. GEORGE IF THE STAY IS NOT GRANTED?**

Ms. George has submitted a letter in which Mr. Raymond indicated that he wanted to sell the property. No other evidence of this desire has been proffered. The court would not act simply on a proposal of sale without more. There is not enough evidence to satisfy the requirement of prejudice.

[21] **WHAT IS THE PREJUDICE TO BE SUFFERED BY MR. RAYMOND IF THE STAY IS GRANTED?**

Simply put, no justifiable reason has been advanced to explain why Mr. Raymond should be kept from the judgment seat.

[22] **MONIES PAID UNDER JUDGMENT NOT EASILY RECOVERABLE IF APPEAL IS SUCCESSFUL**

The trial judge's order spoke to damages to be assessed by a Master in Chambers with respect to trespass. These damages are to be paid by Ms. George to Mr. Raymond. In the event that the appeal is successful, Ms. George has not advanced any evidence to show that were she to pay these monies under the judgment, they would not be recoverable from Mr. Raymond.

[23] **CONCLUSION**

I therefore can say that based on the above, the Application for a stay of execution of the trial judge's order of 26th April 2018 is without merit and stands dismissed

[24] **THE RESPONDENT'S APPLICATION TO STRIKE OUT THE APPEAL.**

According to Lord Carnwath the power of the court to strike out a notice of appeal without a full hearing "*is reserved for clear cases where the appeal is in effect unarguable*"². But only for the fact that Ms. George ought to be given an opportunity to be heard, her appeal does appear not destined for success.

² NATIONAL STADIUM PROJECT (GRENADA) CORPORATION v NH INTERNATIONAL (CARIBBEAN) LIMITED. [2015] UKPC 6, 12.

ORDER

- i. The Application filed on the 1st July, 2018 is hereby dismissed.
- ii. Costs to be paid by the Appellant to the Respondent assessed in the sum of Four Thousand Five Hundred (\$4,500.00).
- iii. The Application filed 15th February, 2018 by the Respondent seeking striking out of Appellant application is hereby adjourned for further consideration before the full Court on the hearing of the Appeal when the Respondent may renew the application.

/s/ CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE

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IN CHAMBERS

ERRATA

ORDER

- iv. ~~The Application filed on the 1st July, 2018 is hereby dismissed.~~
i. The Application filed on the 20th December, 2017 is hereby dismissed.

Dated this 19th day of July 2018

/s/ CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE