THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P001 of 2019

CLAIM NO. 2014 - 01776

BETWEEN

JEAN HUNTE

APPELLANT

AND

RODNEY JAGLAL

DASSIE JAGLAL

RESPONDENTS

BEFORE:

The Honourable Madam Justice of Appeal C. Pemberton

IN CHAMBERS

APPEARANCES:

For the Appellant/Applicant: **Mr S Saunders**

For the Respondents: **Mr G Raphael instructed by Ms L Chunilal**

DATE OF DECISION: August 12, 2019

[1] Ms Hunte, the Appellant filed this application on January 22, 2019 for a stay of execution the orders of the Trial Judge handed down on December 10, 2018. She did not meet with success at trial and is of the view that her appeal stands a good prospect of success, that the risk of prejudice if the

stay is not granted lay with her and that there were special circumstances justifying the grant of the stay. I agree with Ms Hunte on her reasons save for the requirement of the existence of special circumstances to warrant the grant of the stay. I therefore grant the Order prayed for the grant of the stay of execution for the following reasons.

BACKGROUND

[2] Ms Hunte, the Appellant and the Jaglals the Respondents occupy adjacent parcels of land in central Trinidad. This case between them turns on the existence of a passage way on certain lands. At the time of filing this action, the title to the land to be served, (the dominant tenement) resided in the Jaglals. The title to the land on which the passage way existed, (the servient tenement or the land that provided the pathway), was occupied by Ms Hunte, one of the intended beneficiaries under her mother's Intestacy. At the time of writing, there was no indication whether Ms Hunte's bequest had fructified.

[3] The Jaglals filed an action against Ms Hunte seeking several reliefs culminating in their right to use the pathway under contention without restriction. They were successful at trial. The Trial Judge made the following findings and orders:

- That as a matter of law the "*legal principle"* of non-derogation from grant applied. As a result the following finding of fact were:
    - That the grant by Ms Hunte's predecessor in title imposed an obligation on her as the grantor as well as on her successors not to deprive the

Claimants and their successors of the enjoyment of the benefit. The Judge did not believe that the grant was limited to the purpose of collecting water.

- That although **not** strenuously argued, the Claimant did not abandon the use of the right of way by using alternative routes. "*The Claimant's as well as the Defendants therefore having established an easement and the Defendant having admitted to disturbing it, the Claimants are entitled to Judgment".*[1]
- That the fact that the dimensions of the path were not established did not debar the relief sort by the Jaglals.
- That Ms Hunte had "…c*learly indicated a motive for the deliberate blocking of the way and this establishes a significant degree of malice."*
- That Ms Hunte's actions by building the wall in 1999 resulted in the substantial interference with the Claimant getting to the public road.

[4] These findings found expression in the orders made at trial, to wit:

a) The Defendant is ordered within 28 days to remove the concrete wall on her western boundary an all that portion of the wire-fence on the eastern boundary which was erected sometime in or about 1999, so as to allow a clear path running outside of the Defendant's southern boundary and up to the boundary wall of Shayam Mohammed from the Caroni Savannah Road to Lot A which is described on the Deed No. DE8552 of 1999.

[1] Paragraph 12 of the Judge's Reasons dated December 10, 2018

b) *The Defendant is further ordered to remove any plants or shrubs or other items deposited along the said path. In default the Claimants by themselves, their servants/agents are entitled to remove same at the expiration of 28 clear days.*

c) *The Court declares that the Defendant is not entitled to restrict, prevent, or otherwise interfere with the Claimants', their invitees', licencees', servants' or guests' use of the enjoyment of the said path to allow access whether by foot or such other convenient or means as it is reasonable permissible.*

d) *The Defendant is to pay the Claimants nominal damages for trespass assessed in the sum of twenty five thousand dollars, ($25,000.00).*

e) *The Defendant is to pay the Claimants cists if the action. The barriers which are to be removed are those which are reflected on the plan of 20th July 1999, marked in red.*

f) *The Defendant is to pay the Claimants' costs on the prescribed scale.*

[5] The classic requirements for success in this application of this nature are,[2]

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:

[2] **NATIONAL STADIUM (GRENADA) LTD. V N.H INTERNATIONAL (CARIBBEAN) LTD. AND OTHERS** Civ. Appeal 48 of 2011 per Weekes J.A.

a. Risk of prejudice to the Appellant outweighs 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.

In applications such as these, the onus is on the appellant/applicant to provide the court with evidence upon which the matter can be considered.

[6] The application came up for my consideration on April 29, 2019 at which time I reserved. I apologise profusely for the untimely delivery of this decision. Further, both Counsel are assured that I read and digested their submissions. I shall refer to them as the need arises for me to do so.

GOOD PROSPECT OF SUCCESS

[7] My consideration of this matter was severely hampered by the lack of notes of evidence speaking to cross-examination of the witnesses. I simply go on the case as pleaded.

[8] According to the Jaglals in their amended statement of claim at paragraphs 3 and 4,

> *3. From the Claimants' parcel of land there is a way **eight feet wide running south of the lands of the Claimants and the lands of the Defendant** (coloured blue on the said plan) and **leading to the Caroni Savannah Road**.*

4. *Sometime during the year **1999 the Defendant erected a concrete** wall at the entrance of the said way where it meets the said Caroni Savannah Road. The Defendant also erected a wire fence along her eastern boundary extending across the said way forcing the Claimants their servants and/or agents to make a track through the lands of Elizabeth Francis which led to John Peter Road. The said track has been blocked in **April 2013** by Elizabeth Francis and as a result the Claimants no longer have the use of same.*

[9] Due to this blockage by Ms Hunte, the Jaglals, aver at paragraph 5 that they "*have been prevented ... from gaining access to (the) Caroni Savannah Roa*d" and further they have been "*prevented … from exercising their right of way*…". They sought certain declarations and reliefs from Ms Hunte.

[10] In her defence, Ms Hunte denied the existence of a trace eight feet wide running to the south of her property leading to Caroni Savannah Road. She knew the Jaglals' predecessors to use a path to the east of their property to gain access to John Peter Road. They did not use Caroni Savannah Road. At paragraph 7 however, Ms Hunte stated that,

> "*as a 'neighbourly gesture' her mother allowed Tom Jaglal, father of the first Claimant, a pedestrian path access or walkway about three feet wide at the southern boundary of her land to access Caroni Savannah Road at the west of her property **so that he could collect water for use by his family from the standpipe which was located nearby on that road***."

Paragraph 8 states:-

> "***The Defendant has never attempted to prevent*** **the Claimants from having access to the Caroni Savannah Road by way of the passage to the east of her property. The said wire fence complained of was erected by the Defendant's mother about thirty five years ago before she gave permission to Tom Jaglal to use a pedestrian path or walkway along the southern boundary of her property**. *The first Claimant's family always had access to the Caroni Savannah Road alongside the fence."*

[11] The Judge in her Reasons at paragraphs 9 and 10 states,

> 9. *The Defendant clearly accepted the responsibility for the erection of the barriers on both ends and sort to justify her actions. It was because of an alleged bad behavior on the part of Claimants. She felt their conduct entitled her to "revoke the licenses" to pass which she had previously extended to them, the Claimants, as children to their parent.*
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> 10. *At no time did the Defendant either on her pleading or on her evidence, grant a license to the Claimants. There was therefore no question of her revoking such. The Claimants' claimed and the Defendant accepted that for about 35 years until the barriers were erected by her in 1999 they were able to access the Caroni Savannah Road. The Defendant claimed on her Defence and confirmed on the evidence, that it was her mother at the material time the legal owner, who had granted the Claimants' predecessors a right to pass over her lands from their property to the road. The erection of the southern wire fence left a path outside which allowed*

the Claimants access and alongside the fence. This appeared to recognize the grant of what the law treats as an easement by the mother, though as the authorities say, strictly speaking it is not.

[12] Mr. Saunders noted that from the pleaded case there was no assertion or averment of the nature and type of right of way that was interfered with that is, whether by estoppel or statue or of necessity. The Trial Judge, Counsel asserted failed to deal with that issue or to point to any evidence led at the trial to establish that finding. Instead, at paragraph 10 of the Reasons, the Trial Judge found that the Defendant did not grant a license to the Claimant, that she confirmed on the evidence that it was her mother who had granted the Claimant's predecessors a "right" to pass over her property. The Judge took into account that the erection of the southern wire fence left a path that allowed the Claimant access alongside the fence. The judge concluded "*This appeared to recognize the grant of what the law treats as an easement by the mother, though as the authorities say strictly speaking it is not*." Mr Saunders is of the view that the judge fell into error of both law and fact.

[13] Mr Raphael on the other hand, agreed with the learned Trial Judge when she stated that leaving the path "*appeared to recognize the grant of what the law treats as an easement by the mother, because the right of way claimed by the Respondents and admitted by the Appellant is in law an easement* ". This view, Counsel asserts was based in part on Section 2 of the **PRESCRIPTION ORDINANCE**[3]. Mr. Raphael found support for his position in distinguishing the **GARDNER** decision[4]**.** He posited that a right

[3] Ch 5 No 8 **LAWS OF TRINIDAD AND TOBAGO**
[4] **GARDNER v HODGSON'S KINGSTON BREWERY CO LTD [1903] AC 229, 238 – 239 (HL)**

enjoyed by oral permission which is renewed every year cannot be regarded as an easement by user. Mr Raphael further posited that the "*authorities also suggest that user which was at first permissive may become user as of right if the circumstances indicate that the original permission is no longer relied upon".*[5] However, once the owner gives permission at the beginning of the user, and this permission was not relied upon for successive user, the user may acquire the characteristics of an easement. Mr Raphael also found comfort on the facts, which Counsel stated *"made it clear that because the Appellant's mother had since in or about 1969 fenced out of her land the said right of way the Respondent's predecessors no longer relied upon permission of the Appellant's mother to use the way".* This would therefore entitle the Respondents to an easement both at common law and under the **PRESCRIPTION ACT**.

ROLE OF THE COURT OF APPEAL WHEN HEARING AND DETERMINING APPLICATIONS FOR STAYS OF EXECUTION

[14] When assessing whether a stay should be granted, it must be remembered that the appeal court is loath to interfere with the Trial Judge's findings of fact. The appeal court will not overturn those findings unless he was plainly wrong. That is a very high threshold. It does not matter if an appeal court may hold a different view of the facts, so long as the view held by the trial judge could be maintainable on the pleadings and evidence led at the trial. Further, on an application for a stay of a trial judge's order, an appeal court must be careful not to treat the hearing as a mini trial. The appeal court's role is simply to assess whether the grounds of appeal have good prospects of success.

[5] See **GAVED v MARTYN (1865) 19 C.B. (N.S.) 732.**

[15] Having said that, where, however, the trial judge may have fallen into error in the identification of the relevant law or having identified same correctly, a trial judge misses the cue in the application of that law, it is the duty of the Court of Appeal to intervene. On this premise, an application for a stay of the trial judge's order will meet with success.

ANALYSIS AND CONCLUSION

FINDINGS OF FACT

[16] It is noteworthy that the Jaglals's evidence through their witness statements did not find their way onto the trial bundle. Mr Jaglal's sister Mrs Gulsin Popan provided the evidence in this case. I make the following observations on an examination of that witness statement, bearing in mind that the burden lay on the Jaglals to prove their right and entitlement to use the pathway:

- That she had no knowledge of how the fence and path leading to the Caroni Savannah Road originated;
- That Ms Hunte gave them water in 1999 to hold rituals when their mother died;
- That Ms Hunte erected a fence which obstructed their use of the pathway leading to Caroni Savannah Road;
- That the fence was erected in 1999;
- That they were forced to make a track through other lands leading them to John Peter Road;
- That that access was now blocked.

Further Ms Popan led no evidence as to the access path to the said property before that user was granted by Ms Hunte's mother. It is interesting to note though that Ms Popan testified that "*… I continued to maintain the said parcel of land by cutting the grass thereon regularly.* ***The***

neighbor who lives on the northern side of the Defendant gave us walk through access through his parcel of land".

[17] Given my concern when dealing with a trial judge's findings of fact, I am of the view that these facts on their own may not support the trial judge's findings. The trial judge's analysis seemed to concentrate on Ms Hunte's alleged failings in her evidence instead of an analysis of the Jaglal's evidence to ascertain whether they had discharged their burden of proof. One of the main task which the Jaglals faced was to prove that Ms. Hunte's actions interfered with their access to their parcel of land, a crucial part of their case. The fact that there was access through an alternative route was not considered by the trial judge.

[18] I think that an appeal court may be persuaded that the trial judge's findings of fact are unsupported by the evidence lead at the trial and that the Jaglals did not discharge their burden to prove their case. From that aspect, there is a good prospect of success on the appeal.

FINDINGS OF LAW

[19] On the question of the law, Mr. Raphael sought to justify the Trial Judge's conclusion by reference to the **PRESCRIPTION ORDINANCE** and the **GARDNER** and **GAVED** cases. This reliance resided solely with Counsel since neither the **ORDINANCE** nor the principles and reasoning expounded in the **GARDNER** and **GAVED** cases featured in the Trial Judge's Reasons. The Trial Judge clearly said at paragraph 11 that in the circumstances of the case at bar the legal principle of non-derogation applied. The law of easements was woven into that scenario to justify the conclusion.

[20] I am unsure of the applicability of the legal principle of non-derogation from grant to this matter. As far as I am aware although there is a general rule that a grantor must not derogate from his grant, this rule will be applicable providing certain factual bases are established. Megarry and Wade expresses,[6]

> *Derogation. "A person who sells or lets land, knowing that the purchaser intends to use it for a particular purpose, may not do anything which hampers the use of the purchaser's land for the purpose which both parties contemplated at the time of the transaction. A grantor may not derogate from his grant."*

To me neither the pleadings nor what was presented as the evidence led by the Jaglals or any other evidence that the Judge relied upon can support a factual matrix for the application of this principle.

[21] At the heart of this matter is a non - recognition of the true nature of an easement / right of way, when not granted expressly by deed but one which may arise out of necessity as compared to a mere license to pass and repass. That was the crux of this case. The "rights" which purportedly exist as easements must do so for the better enjoyment of **land** qua land[7]. That is the defence tendered by Ms Hunte at paragraph 7 of her Defence, that the path was used by for the family's convenience and that the property was serviced by access on another road way . In other words, the family's enjoyment of their plot of land as land was not dependent on access to the Caroni Savannah Road, which is the basis of their case. In fact,

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[6] See **R.E. MEGARRY AND H. W. R. WADE** p. 820

[7] See **R.E. MEGARRY AND H. W. R. WADE** p. 805 "*It was therefore said that easements...(are) rights appurtenant to corporeal hereditaments, or in other words, that an easement was **not** an object of property in itself, but was a privilege which **could** be obtained **for the benefit of corporeal land"***

it was admitted by Mrs Popan that they were given foot access through another route to an undisclosed road.

[22] Did the trial judge consider that evidence? Could that evidence have established what the trial judge referred to "*the grant of what the law treats as an easement"*? It would seem that the Trial Judge categorically rejected any pleading, which spoke to the enjoyment of the use of the path as one personal to the users. This can form therefore a basis for concluding that there is a good prospect of success on an appeal.

[23] There are other aspects of the Trial Judge's Reasons that can be questioned by an appeal court. There is no need for me however to go any further. I can say that from my perspective, there is a good prospect of success on this appeal on the questions of law and the application of law to the Trial Judge's findings of fact.

RISK OF INJUSTICE/PREJUDICE

[24] This has been recognized as a very important consideration in the exercise of discretion to grant or withhold a stay of execution of a trial judge's order pending the hearing and determination of an appeal. Weekes J.A. (as she then was) addressed this head in this way, *"At the end of the day a successful litigant is entitled to the fruits of its success unless the applicant (for a stay or injunction) can show that in the particular circumstances of the case there is a risk of injustice to it if the Respondent is allowed to access those fruits…".*[8] There is no dispute that in assessing this head that it is important whether it is determined that there are good prospects of success at appeal.

[8] See *infra* f.n. 2 **para. 45.**

EVIDENCE AND SUBMISSIONS

[25] Ms Hunte alleges that her security will be compromised severely if she is to obey the order to remove her wall and fence. In addition, the Jaglals are not currently in occupation of the parcel of land and have no immediate use of the path under contention. Ms Hunte asserted that the *"risk of prejudice"* to her far outweighs any to the Jaglals. Mr Raphael was not swayed by this assertion. Counsel countered that *"that was the situation for the thirty-five years before the Appellant chose to fence off the right of way and deprive the Respondents and their predecessors of their right which they enjoyed for many years".*

ANALYSIS

[26] The claim form gives the Jaglals' address as one out of this State. There is no affidavit evidence that that is not so, neither is there any evidence led by the Jaglals in opposition to this application. Given the present social and security considerations and concerns facing the nation at this time, I can and do take judicial notice of them in the exercise of my discretion. I am ever so cognizant of the changes in our society over the last five years and moreso over the last thirty-five years. It would be remiss of me in the performance of my duties, not to take this serious issue of personal safety and security into consideration. There is no evidence to contradict Ms Hunte's assertion. It is clear to me that the risk of injustice should a stay not be granted lies with Ms Hunte. In the exercise of my discretion I am minded to agree that this requirement for the grant of the stay of execution is satisfied.

MONIES PAID

[27] There is no evidence for my consideration.

SPECIAL CIRCUMSTANCES

[28] Mr. Saunders alluded to several aspects of the law, which in Counsel's mind need clarification to fortify Ms Hunte's application for a stay of execution of the trial judge's order. Mr Raphael was unmoved by this aspect of Counsel's submissions. I am inclined to agree with Mr Saunders that pronouncements from the Court of Appeal will serve to clear up misconceptions in this area. As to whether this amounts to special circumstances in this regard, I am guided by Weekes J.A. (as she then was) in the **NH CASE.** The learned Justice of Appeal opined "*A special circumstance must be something further than prospect of success, that goes to the justice of the situation such as to be a factor that the court must consider in its balancing exercise".* [9] Taking that to be the test, I do not think that clarification of the law will provide a sufficient basis to ground the application.

CONCLUSION AND DECISION

[29] All in all, Ms Hunte has satisfied me that there is a good prospect of success on the appeal and that the risk of prejudice swings heavily in her favour. Despite the lack of special circumstances to warrant the grant of the stay, there are good reason and sufficient reasons advanced to grant a stay and execution of the Trial Judge's Order pending the hearing and determination of the Appeal. I do so.

ORDER

1. **That the execution and all further proceedings on the Order of the Honourable Trial Judge dated 10th December 2018 in this action be and are hereby stayed pending the hearing and determination of the**

[9] See *infra* f.n. 2 **para. 59.**

Appeal therefrom of which Notice was filed and served on 3rd January 2019.

2. **That the costs of this application abide by the result of the appeal.**

/s/ CHARMAINE PEMBERTON
JUSTICE OF APPEAL