THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P 178 of 2019

CLAIM NO. CV 2017-00269

BETWEEN

WAYNE LUM YOUNG

APPELLANT/DEFENDANT

AND

SCOTIA BANK OF TRINIDAD AND TOBAGO

RESPONDENT/CLAIMANT

BEFORE:

The Honourable Madam Justice of Appeal Charmaine A.J. Pemberton

IN CHAMBERS

APPEARANCES:

For the Appellant/Defendant: Mr Navindra Ramnanan

For the Respondent/Claimant: Mr K Garcia instructed by Ms Kavita Persad

Date of decision: September 10, 2020

[1] I took a long time to produce a judgment for which I sincerely apologise to the Parties and the Attorneys-at-Law. I have decided to write a decision in this matter in the absence of any reasons being or otherwise given by the trial judge made known to me by either party to this application.

[2] It is not the role of the Appeal Court to conduct a re-hearing of the application before the trial court save in the most extreme of circumstances. The Appeal Court's role is to assess whether the trial judge was plainly wrong or not plainly wrong in assessing facts, identifying relevant issues and law and application of that law to those facts so as to arrive at a viable conclusion, consistent with that exercise.

[3] One of the first steps is to be presented with the reasons and decision for the trial judge's order. There are two applications for my consideration. The first is the Applicant/Respondent's application ("the Bank") filed on 31 October 2019, in which the Bank seeks to strike out the Appellant's Notice of Appeal ("the Striking Out Application"). In the second application for my attention, ("the Directions Application"), the Appellant seeks the Court's directions for filing the manner in which the evidence given in the court below may be brought on appeal, the dates upon which Bundles and Skeleton Arguments are to be filed. Let me state quite clearly, the court's attention to the second application will be coloured by the outcome of the first application under consideration. In other words, if the first application succeeds, the second application will be otiose.

[4] **THE STRIKING OUT APPLICATION**

On 15 May 2019 the Applicant's Attorney-at-Law filed the Striking Out Application. The Attorney-at-Law deposed as follows:

> 9. On April 3, 2019, the Honourable … granted the Claimant/Respondent's Application for summary judgment ("**the Summary Order**"), with costs to be paid by the Fourth Defendant/Appellant to the Claimant/Respondent in the amount of $9,800.00. … The attached Order does not reflect all the terms of the Honourable …(Judge's order) and the Claimant/Respondent has made an application to have the attached Order amended to reflect all the reliefs granted by the Honourable Judge.
>
> 10. The Fourth Defendant/Appellant appealed the Summary Order by Notice of Appeal filed on May 15, 2019 ("the Notice of Appeal"). The Fourth Defendant/Appellant however, failed to file any application for leave to appeal and/or to obtain leave to appeal. No order granting leave to appeal was annexed to or accompanied the Notice of Appeal, as is required under Part 64.4(3) of the CPR.

[5] The Order referred to above at the material parts reads,

> **1. The Claimant is entitled to summary Judgment against the Fourth Named Defendant.**

(Emphasis mine)

[6] The deponent continues as follows:

> 11. I am advised by Counsel and verily believe that **section 38(2)** of the ***Supreme Court of Judicature Act*** Chap. 4:01, provides that *"No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from … (c) a final order of a Judge of the High Court made in summary proceeding…".* Consequently, any appeal of the Summary Order, which is the final order of the Honourable … made pursuant to an application for summary judgment

> under **Part 15** of the CPR, requires leave of either the Honourable … or the Honourable Court of Appeal, before any appeal may be filed.
>
> 12. Consequently, I am advised by Counsel and verily believe that as the Fourth Defendant/Appellant failed to obtain leave of the Honourable … or the Honourable Court of Appeal, the appeal herein is a nullity and the Notice of Appeal should be struck out as being *void ab initio*.

[7] There was no affidavit in response. The parties filed submissions. I am grateful for them. The three limbs of the application rest on grounds that the Applicant laid out concisely in submissions, and, which I adopt. They are,

> 1. The Notice of Appeal should be struck out since no leave was sought by or granted to the Appellant to take that step. The Notice of Appeal therefore was void *ab initio.*
>
> 2. The Application for an extension of time to grant such leave should not be granted considering all of the circumstances of the case.
>
> 3. In any event, the Appeal has no realistic prospect of success.

[8] The Striking out application is based on the premise that the summary judgment granted by the trial judge is a summary order, final in nature and granted in a summary proceeding. Once that is established as a summary proceeding, Section 38(2) of the SCJA will apply. On the strength of **LALLA v RAJKUMAR**, the Appellant must seek and be granted leave of the Court, whether trial or appeal, before setting about impugning the trial judge's

decision and order. Failure to do so would render the Notice of Appeal dated May 15, 2019 void *ab initio.*

[9] In response, the Appellant in applying the application test – stated *"if for instance the current application to strike out this matter was <u>not</u> successful, the present case would have continued"*. Counsel concluded that the order was not a final order and there was no need for leave to have been sought or obtained before an appeal could be filed.

[10] Some issues emerge from those arguments. They will necessarily be the nature of the summary application, the effect of its success or failure on the proceedings and the actual outcome of the application.

[11] **THE NATURE OF THE APPLICATION FOR SUMMARY JUDGMENT**

I shall not rehearse all of the arguments so ably put to the court by both Counsel. Suffice it to say that this case turned on the interpretation of documents before the court. These involved the following:

1. Deed of Mortgage registered as DE200902459071D001 and made between the Second defendant (not a party to the Appeal) and the Respondent in this appeal, the Bank, containing descriptions to properties referred to as "MR1" and "MR2"; and
2. Deed of Conveyance registered as DE201102081944 made between the second Defendant and the Appellant, treating with the same parcels of land.

[12] The problem is, the second deed, the Deed of Conveyance did not treat mention the existence of the Deed of Mortgage, the first deed mentioned above. As a result, there was no recognition of the encumbrance contained in the deed of mortgage and moreover of the Bank's title and interest in the property. Additionally, this was a breach therefore of the terms and conditions of the mortgage deed, in that the mortgagor did not have the Bank's prior consent to enter into the second transaction, the deed of conveyance.

[13] Based on the above, the Bank as mortgagee sought to have the second deed, the conveyance, declared null and void and of no effect. The Appellant defended that application but the trial judge, having examined the two documents, rejected their defence and gave a final order in the Bank's favour. The trial judge's decision was based on the reading and interpretation of documentary evidence, which is as objective as evidence can come. I therefore cannot agree with the Appellant's submissions as advanced. I am in agreement with the Bank that the trial judge's order was in the nature of a final order.

[14] The necessary effect of the success of this application was to bring an end to the proceedings. This is clear. The legal issue was in fact determinative of the proceedings. The effect of success on the application was fatal to the Appellant's continuation of his defence. I agree with Counsel for the Bank that if the Bank's application for summary judgment had failed the Bank, too would have suffered irredeemable defeat. The Bank's cause of action to declare the deed of conveyance void would have failed.

[15] **Section 38(2)** of the **SCJA** deals with matters of this nature. The legislators thought it best to demand that an unsuccessful party should seek leave of the court before filing an appeal against an order bringing finality to a case. This is legislative recognition of the time honoured principle that there must be finality in litigation.

[16] Having said so, the Appellant was obligated to seek and obtain leave either of the trial judge before filing the Notice of Appeal.

[17] **JURISDICTION OF THE COURT OF APPEAL**

Nelson JA in **LALLA & ORS v RAJKUMAR** put to rest any doubt that the Court of Appeal exercises a concurrent jurisdiction with the trial judge when it comes to granting leave to appeal.

[18] **EXERCISE OF THE COURT OF APPEAL'S DISCRETION TO GRANT LEAVE TO APPEAL**

The Appellant in his written submissions posed the issue: *"in the event that the court determines that leave is required then the court can grant the leave and extend the time for so doing provided that it is satisfied that the Appellant has a realistic prospect if success".* The submission on this issue relied on dicta from Smith JA in **GULF VIEW MEDICAL CENTER v LESTER GOETZ**. The issue up for discussion therefore is must the court exercise its discretion to grant to the Appellant an extension of time as requested?

[19] Part 26.1(d) empowers the court to extend or shorten the time for the compliance with rules in the CPR or orders of the court. Part 64.2(1)

provides that "*where an appeal may be made only with the leave of the judge",* the party wanting to appeal ***"must"*** apply for leave within 14 days "*of the grant of the order forming the basis of his appeal".* Part 26.2(1) empowers the court to strike out originating process.

[20] The nub of this matter though is whether on the facts as presented to this forum, taking into account the overriding objective of dealing with cases justly, does this appeal warrant the time, expense and resources to allow the Appellant the opportunity to pursue this appeal? This will be necessarily predicated on his prospects of success on appeal.

[21] As I said and noted at the start of this judgment, the trial judge's reasons for his decision were not forthcoming. I have no method to assess in any way whether the trial judge was plainly wrong to grant the Bank's order. I can however assess those prospects on the fact that the questions turn on issues of law and fact.

[22] The uncontroverted fact is that the deed of conveyance attempted to create an estate and title free from encumbrances in properties. The deed of conveyance made no reference to the obvious encumbrance held by the Bank. Searches are done retrospectively. Parties enter into financial arrangements in good faith. It is not expected that the mortgagor will deal with mortgaged property, even if he had a sizeable equity of redemption without recourse, actual or otherwise without recourse to the mortgagee's interest. The purchaser of property is strongly advised to do his own searches to discover encumbrances. It is passing strange that this Appellant would not have known of the prior encumbrance and still accept

the properties free from encumbrances without a murmur. Courts will rarely intervene in parties' private contractual arrangements. This is not one such rare occasion warranting the court's intervention.

[23] I do not think that any application of any law will favour the Appellant. His prospects of success on appeal are not good.

[24] In the circumstances, I shall not grant leave to extend the time to appeal the trial judge's decision.

[25] **CONCLUSION**

The application filed on October 31, 2019 by the Bank to strike out the Notice of Appeal filed on the May 15, 2019 is hereby granted. The Appellant will pay the Respondent's costs to be assessed if not agreed. There is no need to consider the Appellant's application for Directions filed on October 3, 2019, even though filed first, as it is now otiose. I shall make no order as to costs on that application.

ORDER:

1. **The Notice of Application filed on October 3, 2019 is otiose.**
2. **No Order as to costs.**
3. **The Notice of Application filed October 31, 2019 be and is hereby granted.**
4. **The Notice of Appeal filed on May 15, 2019 be and is hereby declared void *ab initio*.**

5. **The Appellant do pay the Respondent's costs to be assessed by a Registrar if not agreed.**

/s/ Charmaine Pemberton
Justice of Appeal