[2016] JMSC Civ 54

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2013 HCV 05351

BETWEEN	**OLIVINE DALEY-EDWARDS**	**1ST APPLICANT**
AND	**LLOYD EDWARDS**	**2ND APPLICANT**
AND	**RESIDENT MAGISTRATE FOR PARISH OF ST. CATHERINE HER HONOUR MRS. S. WOLFE-REECE**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**MERCELLA PEARSON**	**INTERESTED PARTY**

IN CHAMBERS

Ms. Zara M. Lewis instructed by Rogers and Associates Law Offices for the Applicants.

Ms. Lisa White instructed by the Attorney General's Chambers for the Respondents.

Mr. Ravil F. Golding instructed by Lyn-Cook, Golding & Company, Attorneys-ay-Law for the Interested Party.

Heard: 15th October 2013 and 28th April 2016.

Administrative Law – Judicial Review – Application for leave to apply for Judicial Review – Order of Certiorari to remove to Supreme Court and to quash the Formal Order of the Learned Magistrate – Order of Possession – Eviction from premises – Warrant of Possession - Order of Mandamus to restore Possession – Declaration that Formal Order was obtained by frauds and/ or illegally – Injunction – Damages.

CAMPBELL J;

[1] The applicants, Olivine Daley-Edwards and Lloyd Edwards are aggrieved by an Order of the 1st respondent, Her Honour Mrs. Simone Woolf-Reece, Resident Magistrate for the parish of St. Catherine. On 19th July 2013, Her Honour, granted possession of the premises, 455 Morningside Drive, Old Harbour, St. Catherine, resulting in the applicants being evicted from their home of forty (40) years. The 2nd respondent is joined pursuant to the provisions of the **Crown Proceedings Act**, 1959. The Interested Party had filed a pliant in the Resident Magistrates' Court, seeking recovery of possession of the said premises.

[2] The applicants and their family members were evicted from the premises at 455 Morningside Drive, Old Harbour, St. Catherine by the Bailiff for St. Catherine executing a warrant for possession pursuant to plaint 588/13 filed by the Interested Party. The applicants contend they were never served with summonses to attend court, and take issue with the assertions in the Bailiff's Affidavit of Service. According to the applicants, the first time they became aware of the proceedings was on 17th August 2013, when they were served with the 1st respondent's Formal Order, that they should give up the property on or before 16th August 2013, which in the event, was the day before they were served with the Formal Order.

[3] An Attorney-at-Law retained by the applicants advised them that on his appearance in the Resident Magistrates' Court, the file was not available. On 24th August 2013, the Bailiff attended at the applicants' home and executed a warrant

of possession. There is no issue that the premises is subject of a suit in the Supreme Court in the estate of Thelma Kelsada Moncrieffe to determine the issues concerning the administration of the estate and the entitlements of the parties to the assets of the estate.

[4] There have been several actions between the applicants and the Interested Party. The first, a pliant filed in 2001 and issued by the Interested Party to recover possession of the premises. In that matter, the parties each produced a Will purporting to be the last Will and Testament of the testatrix. The applicants contended then, that although the Will, produced by the Interested Party was later in time, its execution was disputed, because according to applicants, the testatrix was in the opinion of medical expertise suffering from Alzheimer Disease which would render her mentally incapable.

[5] In March 2007, the applicants were made aware that the Grant of Administration was made in the matter of the Estate of Thelma Kelsada Moncrieffe in favour of the Interested Party. The 1st applicant then commenced an action in the Supreme Court. This resulted in the Resident Magistrate discontinuing the matter in that court.

[6] The applicants seek judicial review of the Order of the learned Resident Magistrate, for St. Catherine, made on 19th July 2013, entering judgment in default of appearance of the applicants. The 1st respondent had issued summonses for the applicants to appear on their plaint seeking recovery of possession of the property in which the applicants were in occupation. In granting the Order, the learned Resident Magistrate had before her an Affidavit of Service of the Bailiff attesting to the services of the relevant summonses on the applicants.

[7] Warrant of possession, was subsequently issued and executed, resulting in the applicants being evicted from the premises. The applicants contended that the remedy of setting aside the default judgment was open to them, when it did come

to their attention. The Notice of Application for Leave to Apply for Judicial Review, filed 30th September 2013, indicates that the Order was communicated to the applicants' Attorney-at-Law before the warrant was executed. (*See paragraph 16 of the grounds which is unchallenged).*

[8] The Court was advised that the Resident Magistrate had refused to set aside the Order. It was contended that once the Bailiff executed the warrant, the Resident Magistrate was functus officio.

[9] The applicants are now seeking;

a. Certiorari to bring into the Supreme Court and quash the Order of the Resident Magistrate dated 19th July 2013, granting possession of the said property to the Interested Party;

b. An Order of Mandamus to oblige the Interested Party to restore possession of the property to the Applicants;

c. A Declaration that the Order of the Resident Magistrate was obtained by fraud and/or illegally;

d. An Injunction that the interested Party be restrained from bringing any further action to recover possession of the property in the Resident Magistrates' Court of St. Catherine until the Claim No. 2009 HCV 01281, Olivine Daley Edwards v Marcella Pearson is determined; and

e. An Order that the time for service of the Application for Leave to Apply for Judicial Review be abridged.

[10] The applicants referred the court to Part 56.1(d) of the **Civil Procedure Rules (CPR)** which provides;

> *"…where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department."*

[11] The applicants are aggrieved by the Formal Order, and that the Clerk of Court, of the Resident Magistrates' Court has refused to accept, the application to set aside the Order of the Learned Resident Magistrate on the ground that once the Bailiff of the Resident Magistrates' Court has executed the warrant of possession, the Resident Magistrate has become functus officio, and cannot set aside the Order.

[12] The Formal Order dated 19th July 2013, was received on 17th August 2013, at which time the fourteen (14) days to file an appeal had expired. The applicants had been unaware of the Order.

[13] Mr. Ravil Golding, for the Interested Party argued that the Resident Magistrate had an Affidavit of Service, before her. That this is a matter in private law, not public law. That mandamus cannot be issued against a private individual. He concluded that the two remedies open to the applicants were; (i) an application to set aside the default judgment, to which they were no time limit (ii) and an appeal of the Resident Magistrate's decision not to set aside the default judgment.

[14] It was submitted by the Attorney General that there was no complaint of excess of jurisdiction. Further, if there is an error of law it is a matter for appeal.

Analysis

[15] The Resident Magistrate is empowered to proceed to hearing or trial of any matter, upon it being proved, on a preponderance of the evidence that the summons was served. Section 186 of the **Judicature (Resident Magistrates) Act**, 1928 provides as follows ;

> *"If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was*

issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Magistrate, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:

> ***Provided always, that the Magistrate in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose****." [Emphasis Supplied]*

[16] In the matter of **Clynice Spence v Her Hon. Mrs. Sonya Wint Blair** [2015] JMSC Civ. 98, an application for judicial review and for certiorari to issue was made to quash the decision of the learned Resident Magistrate and to recuse herself from hearing a matter, in which both parties had no objection to her continuing. Anderson J, said, at paragraph 35 and 36 inter alia;

> *"[35] The ruling of a Resident Magistrate is amenable via certiorari, only if the Magistrate had either acted in excess of jurisdiction, or without jurisdiction. As such, if the Magistrate has allegedly erred in law and a challenge to that Magistrate's decision, is mounted on the basis of that alleged error of law, that challenge can only properly be mounted by means of an appeal. A judicial review court and a judicial review process, are not the appropriate forum and means respectively, for the pursuit of such a challenge. In that regard See;* ***Brown and Others v Resident Magistrate, Spanish Town Resident Magistrate's Court, St. Catherine*** *– [1995] 48 W.I.R. 232.*

> *[36] The claimant herein, having mounted her judicial review challenge on the ground that the learned Senior Resident Magistrate erred in law, ought to have mounted her challenge by way of an appeal, if statute so permitted. Even if statute does not so permit though, this would not entitle the claimant to challenge the learned Senior Resident Magistrate's decision, by means of judicial review."*

[17] However, the nub of the applicants' complaint is that the applicants were denied a hearing to set aside a default judgment on the basis that the learned Resident Magistrate had no authority to do so. In oral submissions on behalf of the applicants, counsel submitted that the Clerk of Court, as Registrar, refused to accept the application to set aside the default judgment on the ground that the Bailiff having executed the Order for Possession, the Resident Magistrate was functus officio.

[18] The proviso to Section 186 of the **Judicature (Resident Magistrates) Act**, empowers the Resident Magistrate to set aside the default judgment and any consequent execution on that judgment *on sufficient cause being shown to him.* The Act therefore provides an express right for the applicant to be heard, even where as here, there has been execution of the judgment.

[19] In **Cohen (Primrose) v Sterling (Rollington) and Anor** [2014] JMCA App 6, Ms. Cohen, counsel for the applicant had complained about, *the refusal of the Resident Magistrate to hear an application for the setting aside of a default judgment*, on the basis that, the warrant of possession having been executed, the court's authority was spent. After an examination of the proviso to Section 186 of the **Judicature (Resident Magistrates) Act**, the Court of Appeal found at paragraph 13;

> *"The effect of the proviso would support the merits of Ms Cohen's complaint against the refusal of the learned Resident Magistrate to set aside the default judgment."*

[20] It was therefore open to the learned Resident Magistrate to set aside the Order of Possession, although it had been executed by the Bailiff. Even if the decision of the learned Resident Magistrate, in refusing to set aside the default judgment was wrong in law, the remedy lies in an appeal and not in judicial review.

[21] In **R v Epping and Harlow General Commissioners, ex parte Goldstraw** [1983] 3 All ER 257, the Court had an application for leave to apply for judicial review of a decision of the Tax Commissioners, when they declined to reopen a decision they had reached in the applicant's absence. The applicant's counsel had earlier withdrawn from the matter, so he was unrepresented when the determinations were made.

[22] The matter came back before the Commissioners for the matter of interest to be dealt with and the applicant urged the Commissioners to reopen the earlier hearing. The Clerk advised the Commissioners not to do so. The court found that the advice of the clerk was correct. The relevant legislation expressed that the determination of the Commissioners was final and conclusive.

[23] Neither were the Commissioners advised that the applicant was unable to attend court due to illness, as the legislation allowed. The court opined that the applicant could have proceeded by way of asking the Commissioners to state a case. The Court relied on the cardinal principle, that where alternative remedies exist, it loathes to exercise its supervisory function.

[24] Unlike the Clerk in **Ex. parte Goldstraw**, the advice of the Clerk of Court was incorrect, and it was still open to the learned Resident Magistrate to set aside the default judgment. No application to hear the matter was made before the Resident Magistrate. The decision was that of the Clerk; there is no evidence before the court that this was brought to the attention of the Resident Magistrate.

[25] Judicial review is a remedy of last resort, where there is an alternative remedy available which is effective and convenient as here, judicial review will not be available to launch a collateral attack. Part 56(3)(d) of the **CPR** states;

> *"(3) The application must state -*
>
> > *d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued."*

[26] In **Gifford v Governor of HMP and Anor.** [2014] EWHC 911 (Admin), CO/1333/2013, Coulson J, said at paragraph 37;

> *"More recently, the courts have stressed that judicial review is generally a last resort. In **Kay and others v Lambeth London Borough Council** [2006] UKHL 10, [2006] 2 AC 465, [2006] 4 All ER 128, Lord Bingham of Cornhill said at para 30 that "if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review." Judicial review is not a power to be used "where a satisfactory alternative remedy has been provided by Parliament" (See para 71 of the judgment of Lord Phillips of Worth Matravers in **R (Cart) v Upper Tribunal** [2011] UKSC 28, [2012] 1 AC 663, [2011] 4 All ER 127)."*

[27] The applicants have failed to comply with the statutory procedure for instituting an appeal as provided for in Section 256 of the **Judicature (Resident Magistrates) Act**, which required that in the absence of the appeal being taken at the pronouncement of the judgment; (1) A written notice should be lodged with the Clerk of Courts, and; (2) a copy served upon the other party, or his Attorney-at-Law within fourteen (14) days after the date of the judgment; (2a) At the time of taking or lodging the appeal, the appellant should lodge the sum of $600.00 in court; and (3) within fourteen (14) days of the taking and lodging of the appeal, give security in the sum of $600.00 for the costs and due performance of the judgment.

[28] The applicants had neither, taken or lodged an appeal. They also failed to make any payments to secure costs and the due performance of the award. It was held in **Cohen (Primrose) v Rollington**, a decision of the Court of Appeal, that a failure to make the payment was fatal to the appeal. It further ruled that the Court had no authority to extend the time for payment of the sum. The Court of Appeal, however held, that the court could extend the time in which to file an appeal from the Resident Magistrates' Court to that court. No appeal has been filed in this matter.

[29] The application for judicial review must fail, because the applicants are unable to mount an arguable ground for judicial review which has any realistic prospect of success. The applicants are unable to demonstrate that the Resident Magistrate has acted in excess of jurisdiction. Lord Diplock's, classical formulation in **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374, at 410 is apposite. He said;

> *"Judicial review has I think developed to a stage today when without reiterating any aspects of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I call "illegality; the second "irrationality" and the third "procedural impropriety..."*

Further, the applicants have a statutory alternative remedy, by way of appeal, pursuant to Section 256 of the **Judicature (Resident Magistrates) Act**, which has not been pursued. As such the application for leave to apply for judicial review is refused.