



[2016] JMSC Civ. 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV04876

BETWEEN	ALBERT GORDON	CLAIMANT
AND	VALERIE ENGLISH	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

IN CHAMBERS

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn Attorneys-at-law;

Mr. Patrick Peterkin instructed by PeterMc & Associates for the First Defendant

Ms. Marlene Chisholm instructed by the Director of State Proceedings for the 2nd Defendant

HEARD: 12 July and 11 November 2016.

Trespass to land – Irregularly issued warrant - whether person on whose behalf a warrant of possession was issued or bailiff can be liable in trespass

Negligence- Whether Clerk of Court can be liable in negligence or otherwise for irregularly issued warrant - whether the Attorney General can be liable for the action of a Clerk of Court in issuing an irregular warrant-Whether breach of a consent order without more is a cause of action

LAING, J

[1] The Claimant Albert Gordon ("Mr. Gordon"), claims damages for Trespass, Unlawful Eviction and Breach of Court Order. Mr. Gordon's case is that on or about September 10th 2008, the Bailiff for the Resident Magistrate's Court of St. Catherine unlawfully evicted him from property situated at Ewarton in the parish of St. Catherine ("The Property"). The warrant of possession ("the Warrant") which authorized this eviction was issued at the request of the 1st Defendant Valerie English ("Ms. English") by the Clerk of Courts of the Resident Magistrate's Court in St. Catherine ("the Clerk") Mr. Gordon argues that the Warrant was issued without proper consideration of an Order of the Resident Magistrate's Court made on the 17th day of March 2008 ("the Order"). This Order was in accordance with a consent judgment agreed between the parties and entered on March 17th 2008 (the "Consent Judgment").

Background:

[2] Ms. English on or about 9th December 2006, commenced proceedings against Mr. Gordon in the St Catherine resident Magistrate Court by the filing of a plaint claiming recovery of possession of the Property. In Response Mr. Gordon filed a Plaint in the same Court, claiming damages for trespass and asserted that Ms. English had no right to the Property as he had purchased the Property from her mother, Evelyn English. The parties eventually reached a settlement evidenced by the Consent Judgment.

[3] The Consent Judgment contained the following provisions:-

- (i) *The parties hereby consent to the extension of the jurisdiction of the court to deal with this matter in its entirety.*
- (ii) *The Defendant (Valerie English) shall repay to the Claimant, (Albert Gordon) the sum of \$750,000.00 along with interest at the rate of 8% from the 11th day of June 2001 to the date of payment.*

- (iii) *The value of all economic trees on the property the subject matter of this Complaint shall be valued by Mr. A.C. Barrett or a RADA Officer.*
- (iv) *The cost of the said Valuation Report shall be borne equally by the parties.*
- (v) *The sum of \$750,000.00 along with interest as set out in paragraph 2 and the assessed value of the economic trees as set out in paragraph 3 shall be paid by the Defendant (Valerie English) to the Plaintiff (Albert Gordon) within 3 months of the date of this Order.*
- (vi) *The Defendant shall vacate the property the subject of this Complaint within eight (8) weeks of receiving the sum due and owing as set out in paragraph 5.*
- (vii) *The sum of \$40,000.00 representing lease payments from 2001-2008 at a yearly lease of \$50,000.00 shall be deducted from the sum due and owing to the Plaintiff by the Defendant.*
- (viii) *Liberty to Apply*

[4] In partial compliance with the Consent Judgment Ms. English paid to Mr. Gordon's attorney \$750,000.00 and \$418, 785.75. However, for reasons which are not material to this judgment, the provision in the Consent Judgment for the determination of the economic value of all the trees on the Property and sharing the cost of the valuation report with the Claimant was not satisfied. There was correspondence between the parties aimed at achieving a valuation or a variation of the Consent Judgment but this bore no fruit.

[5] Subsequently, in what is arguably a breach of the Consent Judgment, in or about September 2008, Ms. English made an application to the Clerk of Court for a warrant of possession which was issued. On September 10th 2008, the Bailiff entered upon the Property and evicted Mr. Gordon.

[6] The 1st Defendant alleged that the issuing of the warrant was done lawfully because she was not in breach of the Court Order. The 1st Defendant alleges that the Claimant was in breach of the Consent judgment as he had chopped

down all of the economic trees on the Property and there was nothing left to be valued.

- [7] The 2nd Defendant alleges that the Clerk signed and issued the Warrant in performance of the duty created under the **Judicature (Resident Magistrates) Act 1928**. Further, it was argued that the Clerk was protected by sections 61 and 62 of the **Judicature (Resident Magistrates) Act 1928**.

Whether the Clerk can be liable in negligence or otherwise

- [8] Section 33 of the **Judicature (Resident Magistrates) Act 1928** lays down the duties of a Clerk to, *inter alia*, issue summons, warrants and writs, however there is no provision regarding the manner in which this should be done. Section 33 provides:-

“The Clerk of each Court, or in his absence an Assistant Clerk, shall issue all summonses, warrants, precepts and writs of execution, and shall register all orders and judgments of the Court, and shall do such other business as the Magistrate shall direct, or the rules made under this Act prescribe.”

It is clear from the evidence that the Clerk did not do any proper checks before issuing the warrant. Had he done so he would have discovered that the Court did not on the 17th day of March 2008 order that Mr. Gordon should give Ms. English possession of the Property as she asserted in her affidavit in support of application for a warrant for recovery of possession. This failure resulted in the warrant being irregular issued since a necessary precondition was not met.

- [9] Sections 61 and 62 of the **Judicature (Resident Magistrates) Act 1928** both indicate that an action can be brought for an irregularity in the issuing of a warrant. More specifically, section 61 protects an officer executing any warrant (such as a bailiff) while declaring that an aggrieved party may bring an action for special damage against a party guilty of such irregularity. Section 61 provides as follows:

“No officer of a Court in executing any warrant of protection any Court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it; but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof :

Provided that in such action he shall recover no costs unless the damages awarded shall exceed four dollars.”

- [10] For reasons which will be addressed subsequently, it is in my view not necessary to determine responsible for an irregularity in the issuing of the Warrant. Section 62 provides as follows:

“No action shall be brought against any Bailiff, or against any person acting by order and in aid of any bailiff, for anything done in obedience to any warrant under the hand of the Clerk of Courts and the seal of the Court, until demand has been made ...

...any action shall be brought against such Bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the Clerk of the Courts which signed or sealed the said warrant a defendant, then, on proof of such warrant at the trial of such action, the jury shall give their verdict or, if there be no jury, the Court shall give judgment for the defendant or defendants, notwithstanding any defect of jurisdiction or other irregularity in the said warrant.

And if such action shall be brought jointly against such Clerk and such Bailiff or person acting in his aid as aforesaid, then, on proof of such warrant, the jury shall find or, if there be no jury, the Court shall give judgment for such Bailiff, or for such person so acting as aforesaid, notwithstanding such defect or irregularity as aforesaid; and if the verdict or judgment shall be given against the Clerk, in such case the plaintiff shall recover his costs against him, to be taxed in such manner as to include such costs as the plaintiff is liable to pay to the co-defendant for whom such verdict shall be found as aforesaid.

“Bailiff” in this section shall include Assistant Bailiff and additional Bailiff.”

- [11] This section confirms that an action can in fact be brought against a Clerk of Court, with the relief limited to costs. Therefore, the person occupying the post of Clerk of Courts does not have an absolute immunity from suit in respect of the issuing of warrants.

[12] Section 3(5) of the **Crown Proceedings Act** provides as follows:

“No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.”

In the case of **Kirvek Management and Consulting Services Ltd v Attorney General of Trinidad and Tobago (Trinidad and Tobago) [2002] UKPC 43 (25 July 2002)**, the claimant brought an action against the Crown based on the fact that the assistant registrar at the San Fernando Sub-Registry of the High Court of Trinidad and Tobago had failed to honour the Claimant’s request that a sum of \$250,000.00, which was the subject of a payment in, be placed in an interest-bearing account. This resulted in the Claimant receiving back this sum without any interest thereon on the settlement of the claim. The assistant registrar’s explanation for not having placed the money in an interest-bearing account was that the order of the court directing the payment in had not directed that the money be placed in an interest-bearing account.

[13] One of the grounds the defence of the State was a reliance on section 4(6) of the **State Liability and Proceedings Act** (c. 8:02) which is in materially the same terms as section 3(5) of the **Crown Proceedings Act**. The Court in considering how section 4 (6) should be construed examined firstly the meaning of the words “*in connection with the judicial process*” as follows:

24. *“That leaves the section 4(6) point. What meaning should be attributed to the words “... in connection with the execution of judicial process”? The same words in the same context are to be found in section 2(5) of the Crown Proceedings Act 1947. In Welsh v Chief Constable of the Merseyside Police [1993] 1 All ER 692 Tudor Evans J said that section 2(5) was “directed to the immunity of judicial and not of administrative functions” (page 699).*

25. *In New Zealand section 6(5) of the Crown Proceedings Act 1950 is in the same terms as section 2(5) of the English 1947 Act and section 4(6) of the Trinidad and Tobago Act. In Seatrans (Fiji) Ltd v Attorney-General [1986] 2 NZLR 240 Hillyer J said that –*

“The act of paying money in the possession of the Registrar into an interest-bearing account ... is neither a responsibility of a judicial nature, nor would it be in connection with the execution of judicial process ... It seems to me that there is no judicial element involved, nor was the payment into an interest-bearing account an execution. Those terms are appropriate to sitting in judgment, or to such matters as the enforcement against another person of an order made by the court. Here, the only person involved was the Registrar himself, and no element within the meaning of subsection (5) was involved.” (page 244)

- [14] The Court then examined the meaning of the word “execution” in the context of the section as follows:

29. *In their Lordships’ opinion the word “execution” in section 4(6) contemplates something done for the purpose of carrying out a court order: see Simpson v Attorney-General [Baigent’s case] [1994] 3 NZLR 667 where Cooke P, referring to a search warrant, said –*

“... the warrant was judicial process, being issued out of a court and being granted by a person required to consider the application judicially ...” (p 674).

In Vol 17 of Halsbury’s Laws of England (4th Ed) at para 401 “execution” is described as signifying “in its widest sense ... the enforcement of or giving effect to the judgments or orders of courts of justice”. And in In re Overseas Aviation Engineering (GB) Ltd [1963] Ch 24, Lord Denning MR said at p 39 -

“Execution means, quite simply, the process of enforcing or giving effect to the judgment of the court ...”

- [15] There does not appear to be any dissonance between sections 61 and 62 of the **Judicature Resident Magistrates Court Act** and section 3(5) of the **Crown Proceedings Act**. The former addresses suits against a clerk of courts in that capacity, while the Crown Proceedings Act restricts the right of a claimant to sue the Crown by virtue of this section, in respect of certain acts and omissions of a clerk of courts (although the clerk of courts himself may be separately liable to suit).
- [16] In applying the analysis of the Privy Council in **Kirvek**, one is led to the inescapable conclusion that the issuing of the Warrant of Possession by the Clerk was a discharge of “responsibilities of a judicial nature vested in him, or

any responsibilities which he has in connection with the execution of judicial process” (emphasis supplied). The Warrant issued by the Clerk was “*judicial process, being issued out of a court and being granted by a person required to consider the application judicially*”. It was for the purpose of execution which was the process of enforcing or giving effect to a judgment of the court, and in particular the Consent Judgment. Accordingly the Claim against the 2nd Defendant, to the extent that that it is based on the conduct of the Clerk cannot succeed, even if the Clerk was responsible for issuing an irregular warrant.

Whether the 2nd Defendant can be liable for the conduct of the Bailiff?

- [17] The Claimant in his amended particulars of claim asserted that at all material times the Clerk and the Bailiff acted or purported to act as servants and/or agents of the Crown in relation to their actions complained of in this claim. As noted earlier, Section 61 of the **Judicature (Resident Magistrates) Act 1928** provides that no officer of a Court in executing any warrant and any person at whose instance a warrant has been executed shall not be liable in trespass for any irregularity or informality in a warrant but the person aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof.
- [18] There is also additional authority to support a finding that the 2nd defendant would not be liable for the action of the Bailiff in the facts under consideration. In the case of **Sunrose Limited v Othneil Martin and Felix Mitchell Claim No. C.L.S. 195 of 2001** a Bailiff was held not to be liable for the execution of warrants of possession as he had simply been acting under what appeared to be a lawful warrant.
- [19] **Sunrose** was applied in **Girlena Wilson v Delroy Campbell, David Giscombe, Al Cheung Lee and SivWai Kin Albert Claim No. 2007 HCV 02615** in which Mangatal J in stated as follows:-

*“In Sunrose, at the request of a landlord, a writ of possession had been issued against his tenant the Claimant Sunrose. The writ of possession was executed by the bailiff for the Parish of Manchester. The claim by Sunrose was to recover in trespass from the landlord and the bailiff for compensation for alleged losses. Brooks J. applied the time-honoured principle that bailiffs, and officers of the court, who are carrying out the orders of the court are immune from liability for the actions taken in obedience to those orders unless they act in excess of the authority given by the order or writ. My learned brother judge also held that the bailiff is not the agent of the landlord who seeks to recover possession, unless the bailiff, at the landlord’s request takes some action outside the scope of the writ of possession. Reference was made to *Barclays Bank Ltd. v. Roberts* [1954] 3 All E.R. 107, where, as Brooks J. summarized, the sheriff acted on the advice of the landlord’s solicitors in evicting a sub-tenant who was subsequently proved to be in lawful occupation of the premises. It was held that the sheriff’s officers had acted in accordance with the writ of possession and did nothing beyond what they were authorized to do by the court. It was further held that the advice of the solicitors did not make the sheriff’s officers the agent of the landlord and therefore the landlord was not liable for the wrongful eviction.”*

[20] Accordingly, there being no basis for a claim against the Bailiff. To the extent that the claim against the 2Nd Defendant the Attorney General is based on the conduct of the Bailiff, it cannot not succeed.

Whether the 1st Defendant is liable

[21] The cases of **Sunrose** and **Girlina Wilson** referred to above also demonstrate that, the mere execution of the Warrant, which appeared on its face to be lawful, by the Bailiff similarly, would not create liability on the part of the 1st Defendant as the Bailiff was not acting on the authority of the 1st Defendant, but under the authority of the Court which had issued the warrant. For this reason, in these circumstances the Claim against the 1st Defendant cannot be successfully maintained.

Whether breach of Court order is an appropriate cause of action?

[22] The Claimant has also averred that as a result of the Breach of the court order the Claimant has suffered loss and damage. Breach of the court order does not appear to be an independent cause of action on which the Claimant can rely on

these facts. However, such a breach, if proved, can be used to ground an application in the Supreme Court for contempt, for breach of court order. This was done in the case of **Margaret Gardner v Rivington Gardner [2012] JMSC Civ. 160**.

Conclusion

[23] For the reasons stated above the Court finds that the Claimant has not proved its case on a balance of probabilities and accordingly judgment is awarded to the Defendants. Costs of the claim is also awarded to the Defendants to be taxed if not agreed