



[2020] JMSC Civ.214

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2008 HCV 03558**

<b>BETWEEN</b>	<b>SHARLTON GILROY</b>	<b>CLAIMANT/RESPONDENT</b>
<b>AND</b>	<b>FERNANDO HUDSON</b>	<b>DEFENDANT/APPLICANT</b>

**IN CHAMBERS**

Mr. S. Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Ms. Petrina Williams instructed by Zavia Mayne and Co. for the Defendant

Heard on the 28<sup>th</sup> of September 2020 and the 2<sup>nd</sup> of October 2020

Application to set aside order for sale of land - Rule 11.18 – Whether Judge of Co-ordinate jurisdiction can set aside order of other Judge

**CARR, J**

**Introduction**

[1] Mr. Fernando Hudson filed a notice of application for court orders on the 3rd of December 2018 seeking the following orders:

- a) That the orders of the Honourable Mr. Justice Evan Brown made on the 16<sup>th</sup> day of November 2018 in relation to ALL THAT PARCEL of land comprised in Lot 61 and 62 of the sub division of ALL THAT PARCEL of land known

as Congreve Park Pen and Naggo Head described in Hollar's Pen part of Port Henderson in the parish of Saint Catherine and comprised in the Certificate of Title registered Volume 1313 Folio 717 be set aside.

- b) Alternatively, there be a Stay of Execution of the Orders dated November 16, 2016 pending Appeal of the Orders of the Court dated November 16, 2018.
- c) Alternatively, the Order of the Court dated November 16, 2018 be varied to prevent the Claimant from recovering possession of the property from the Defendant without a current sale.
- d) That the time be abridged for the hearing of the Notice of Application.
- e) That the Claimant/Respondent be made to account for all payments made by the Defendant in satisfaction of the Judgment made by this Honourable Court on August 18, 2010.
- f) That costs of this application be borne by the Claimant/Respondent and,
- g) Such further and/or other relief as this Honourable Court deems fit.

**[2]** On the 14<sup>th</sup> of January 2019 a further amended notice of application for court orders was filed the amendments were with respect to the grounds on which the application was made:

- a) Pursuant to Rule 11.18 of the Civil Procedure Rules.
- b) Pursuant to Rule 46.2 (1) (c) of the Civil Procedure Rules, 2002 a Writ of Execution may not be issued without permission where six years have elapsed since judgment was entered.
- c) Permission of the Court was necessary for an Order for the sale of land dated the 16<sup>th</sup> of November 2018 as it is a Writ of execution within the

context of Rule 46.1 of the Civil Procedure Rules and six years would have passed since Judgment was entered on the 18<sup>th</sup> day of August 2010.

- d) The Court's permission was never sought nor was it obtained by the Claimant prior to the making of the Application for the sale of the property.
- e) Several payments have been made by the Defendant/Applicant to the Claimant/Respondent and to date the Claimant/Respondent has not accounted for the payments received.
- f) Pursuant to Rule 42.13 of the Civil Procedure Rules 2002 a Judgment Debtor may apply to the Court for a stay of execution on matters which have occurred since the date of the Judgment.
- g) If the Stay of Execution is not granted, the Defendant/Applicant will suffer irreparable harm, prejudice and loss.

## **Background**

**[3]** The matter has had a long history before the court and it will be useful to set out a brief chronology of the events in order to put this application into context. I have selected those that I consider to be relevant to these proceedings and the omission of others is not an indication of their level of importance.

**[4]** Judgment in default of appearance was entered on the 8<sup>th</sup> of August 2010 for the Claimant to recover the sum of \$21,800,000.00 plus interest at a rate of 6% per annum from the 15<sup>th</sup> of July 2008 to the 18<sup>th</sup> of August 2010.

**[5]** On the 1<sup>st</sup> of November 2013 the Court refused an application to stay execution of the judgment.

**[6]** A provisional Charging Order was made on the 8<sup>th</sup> of January 2014 in respect of property located at Lot 839 Eastney Close, Portsmouth Saint Catherine registered at

Volume 1165 Folio 830 and 20,000 ordinary shares in H2 Entertainment Complex Limited.

[7] Mr. Fernando Hudson pursued an application to set aside the default judgment and this was heard and determined in favour of Mr. Charlton Gilroy in a written judgment that was delivered on the 16<sup>th</sup> of June 2015.

[8] The judgment debt still not having been satisfied Mr. Gilroy made an application for the provisional charging order to be made final. This was done on the 7<sup>th</sup> of March 2016. The critical aspect of this order was that the land located at Lot 839 Eastney Close, Portsmouth Saint Catherine was to be sold in execution of part payment of the judgment debt.

[9] A second provisional charging order was obtained on the 2<sup>nd</sup> of May 2016, in respect of another property located at Lot 61 and 62 of the subdivision of all that parcel of land known as Congreve Park Pen and Naggo Head in Saint Catherine registered at Volume 1313 Folio 717.

[10] On the 16<sup>th</sup> of November 2018 an order was made by Brown, J for the sale of the land located at Congreve Park. As this is the order that is the subject of this application I will outline it in its entirety.

**“UPON THE NOTICE OF APPLICATION FOR SALE OF REALTY coming on for hearing this day and after hearing MR. SEAN KINGHORN AND MS. SERENA BYRON, Attorneys at Law instructed by Messrs. Kinghorn and Kinghorn, Attorneys at law for the Claimant, MS. PETRINA WILLIAMS, Attorney at Law instructed by Messrs. ZAVIA MAYNE & Company, Attorneys at law for the Defendant, and MS. JANIELLE ROSE, Attorney at law, instructed by Counsel, Ms. Analisa Chapman, the Claimant being present and the Defendant being absent the Court hereby Orders, that:**

- 1. All that parcel of land comprised in Lot 61 and 62 of the subdivision of ALL THAT PARCEL of land known as Congreve Park Pen and Naggo Head described in Hollar's Pen part of Port Henderson in the parish of Saint Catherine and comprised in Certificate of Title registered Volume 1313 Folio 717 (hereinafter referred as the property) BE SOLD in execution of part payment of the Judgment Debt of \$25,840,266.62 (plus applicable interest at date of payment and costs including outstanding unpaid costs by the Defendant / Judgment Debtor in respect of the matter herein that is together totaling as at the 28<sup>th</sup> of November 2016 is \$34,234,025.61 plus any applicable interest thereon until the date of payment.**
- 2. An Injunction is granted restraining the Defendant whether by himself, his servants and/or agents from selling, transferring, mortgaging, charging, or in any whatsoever encumbering or disposing of All that parcel of land comprised in Lot 61 and 62 of the subdivision of ALL THAT PARCEL of land known as Congreve Park Pen and Naggo Head described in Hollar's Pen part of Port Henderson in the parish of Saint Catherine and comprised in Certificate of Title registered Volume 1313 Folio 717 (hereinafter referred as the property) until further Order of this Honourable Court.**
- 3. The Judgement Creditor's Attorneys at law, Kinghorn & Kinghorn, Attorneys at law shall have Carriage of Sale of the said property and the proceeds of the sale of the property are to be paid to the said Attorney at law.**
- 4. A current valuation be carried out on the said property by Wilcain & Associates and that this valuation shall stand as the true value of the property.**
- 5. That the Judgement Debtor and / or his servant and/or agents shall deliver up possession of All that parcel of land comprised in Lot 61 and 62 of the subdivision of ALL THAT PARCEL of land known as Congreve Park Pen and Naggo Head described in Hollar's Pen part of Port Henderson in the parish of Saint Catherine and comprised in Certificate of Title registered Volume 1313 Folio 717;**

- 6. Pending delivery up of possession, the Judgement Debtor and any occupier of the Property are hereby restrained from doing or causing, permitting or suffering to be done any act, matter or thing which would or would likely to reduce the value of the property or which would or would likely interfere with the viewing conduct and sale of the property.**
- 7. The Judgement Debtor and any occupier of the property shall give full access to the Judgment Creditor's Attorneys at law and/or any person duly authorized by them to effect matters pertaining to the sale of the property.**
- 8. The sale of the property may be effected through private treaty by such licensed real estate agent as the Judgement Creditor shall determine, the commission for whom shall not exceed 5% of the sale price of the property plus general consumption tax thereon.**
- 9. In addition to the applicable fees payable to the Judgement Creditor's Attorneys at law and any real estate agent or real estate agency that is responsible for the sale of the property, the Judgement Creditor is entitled to deduct any and all costs, duties or taxes, expenses and any legal fees related to the sale of the Property as well as any taxes (whither through default or otherwise) or agreed legal costs that have not been paid by the Judgement Debtor in respect of the matter herein from the proceeds of sale.**
- 10. At the appropriate stage the Judgement Creditor's Attorneys shall prepare the Certificate of Sale of Land pursuant to Rule 55.7 of the Civil Procedure Rules 2002 which when duly stamped as a conveyance shall be a valid transfer of the Property to the relevant purchaser and shall be registered accordingly by the Registrar of Titles.**
- 11. Upon completion of the sale and upon the request of the Judgment Debtor's Attorneys at law, the Registrar of Titles shall duly issue a splinter title in respect of the abovementioned Lot 60 and 61 in the name of the Purchaser or in the alternative upon completion of the Conveyance to the relevant purchaser, the Registrar of Titles shall duly register the Purchaser's interest and ownership in respect of**

**Lot 60 and 61 on the parent title for the same registered at Volume 1313 Folio 717. Further the Judgement Debtor or the Purchaser (with the permission of the Judgement Debtor) shall be entitled to apply to have the relevant splinter title duly issued in respect of said Lot 60 and 61 and when so issued by the Registrar of Titles the said splinter title shall be duly issued in the name of the Purchaser.**

- 12. Where required the Judgement Debtor shall duly execute and return to the Judgement Creditor's Attorneys any applicable documents necessary to effect the sale of the property but in the event that he refuses to do so or is unavailable to do so then a Registrar of the Supreme Court of Judicature of Jamaica is empowered to and shall execute any such documents on behalf of the Judgement Debtor.**
- 13. Following completion of any sale of the Property and/or in the event that all sums related to the Judgment Creditor's charging order on the property the judgement creditor, through his Attorneys, shall be entitled to file a Notice of Withdrawal of Charging Order with this Honourable Court and with the Registrar of Titles Office, at which time they shall be deemed discharged. Solely upon receipt of the said Notice from the Judgement Creditor Attorneys at law, the Registrar of Titles shall note the discharge of the relevant charging order on the property.**
- 14. Any occupant of the property whether by tenancy or otherwise shall vacate the property within 60 days of the service of this Order or by or before the 31<sup>st</sup> of December 2018, whichever is earlier.**
- 15. Pending vacating the property pursuant to Order 14 herein, any occupant and/or tenant of the property shall pay rental and/or all rental to the Judgement Creditor's Attorneys at law.**
- 16. The Costs of this Application and related to proceedings necessary for the enforcement of the sale shall be borne by the Defendant.**
- 17. The Claimant's Attorneys at law are to prepare, file and serve these Orders."**

## **Submissions**

### **On behalf of the Respondent**

[11] Mr. Kinghorn representing Mr. Charlton Gilroy raised a preliminary objection. He submitted that the court had no jurisdiction to hear the application as it is a matter for the Court of Appeal. The Applicants he suggested could not ask the court to set aside an order of a Judge of co-ordinate jurisdiction in circumstances where there was a plenary hearing of the matter.

[12] He relied on a decision of the Honourable Chief Justice Mr. Bryan Sykes in the case of Gordon Stewart v. Noel Slowly [2016] JMSC Civ. 50 at paragraph 89;

*“Mr. Wildman next submitted that there was a breach of rule 17.4 of the CPR because no undertaking was given and there was no order from the judge exempting JTL from this requirement. It seems that this is a challenge to the manner in which Laing, J exercised his discretion. This court, of equal jurisdiction, cannot entertain that submission. The court has no power to review the exercise of the discretion of another Judge of the Supreme Court.”*

### **On behalf of the Applicant**

[13] Ms. Williams responded that her Notice of Application was based on Rule 11.18 (1). This was not an attempt by Mr. Hudson to interfere with the discretion of the court, rather it was strictly on the basis that he was absent at the hearing of the proceedings.

[14] Counsel submitted that despite being present at the hearing, she was not yet fully instructed in the matter and did not get an opportunity to be heard. Reliance was placed on the decision of the Honourable Mr. Justice K. Anderson in the matter of Beverley Crammer v. Lindford Campbell [2017] JMSC Civ. 212.

**[15]** The distinction she argued, had to be made between Rule 11.16 and Rule 11.18 (1). Counsel contended that the Crammer case referred to Without Notice Applications and so was not relevant to these proceedings what was important is that the Court should set aside the Order because her client was not present at the time of the hearing.

### **Analysis and Discussion**

**[16]** The main issues to be determined are as follows:

- (a) Whether Rule 11.18 (1) is relevant to these proceedings; and
- (b) Whether this is a final order.

### **Relevance of Rule 11.18 (1)**

**[17]** Rule 11.18 of the Civil Procedure Rules 2002 provides that:

*“(1) A party who was not present when an order was made may apply to set aside that order.”*

*(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*

*(3) The application to set aside the order must be supported by evidence on affidavit showing –*

*(a) a good reason for failing to attend the hearing; and*

*(b) that it is likely that had the applicant attended some other order might have been made.”*

**[18]** Rule 11.18 is preceded by Rule 11.17 which states:

*“Where the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of the third party.”*

**[19]** The preamble to the order made by Brown, J stated that the Defendant/Respondent was absent, however he was represented by Counsel. Further all the Attorneys- at- law were heard in the matter.

**[20]** There is a dispute between Mr. Kinghorn and Ms. Williams as to whether or not Ms. Williams was in fact heard. Ms. Williams contended that she was not permitted to be heard on the matter and Mr. Kinghorn said his recollection is otherwise.

**[21]** Rules 11.17 and 11.18 when taken together suggest a situation where one of the parties is absent and therefore did not participate in the proceedings. In these circumstances the order of a Judge could be set aside.

**[22]** That is not what took place in this case according to the Formal Order filed in the Courts. Although Mr. Hudson was not present he was represented by Counsel and the matter was dealt with by way of a hearing.

**[23]** Mr. Kinghorn, in his submissions argued that a hearing having occurred what Ms. Williams is asking this court to do is review the decision of another Judge. A review of the grounds relied on by Ms. Williams in support of her application to set aside the orders of Brown, J. reveal questions of jurisdiction and the exercise of the Judge's discretion.

**[24]** It was posited, that the permission of the court was necessary for the Order for the sale of land dated the 16<sup>th</sup> of November 2018, as it is a Writ of execution within the context of Rule 46.1 of the Civil Procedure Rules and six years would have passed since Judgment was entered on the 18<sup>th</sup> day of August 2010. Mr. Gilroy did not obtain the court's permission prior to the making of the Application for the sale of the property.

**[25]** This ground goes directly to the question of jurisdiction, did the court have the power to make such an order in light of the failure of the Claimant to seek permission prior to the application. Is a court of co-ordinate jurisdiction the proper forum for an application to set aside in a case where the suggestion is that a Judge did not have the jurisdiction to do so?

[26] The very issue was dealt with in the Privy Council decision of *Strachan v. The Gleaner Company Ltd. & Anor.* [2005] UKPC 33 at paragraph 35, it was held:

*“The Supreme Court of Jamaica, like the High Court in England, is a superior court of unlimited jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong; he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error, nor does a judge of co-ordinate jurisdiction have power to correct it.”*

[27] The learned Judge, having heard the matter, must have determined that he had the jurisdiction to proceed to hear the application. This court therefore does not have the power to set aside his decision.

[28] The other point raised in the grounds in support of the application was that, to date Mr. Hudson has not received an account for the payments made thus far in satisfaction of the judgment debt. The argument is that after the sale of the previous property as well as other items the judgment debt should have been substantially satisfied.

[29] This submission is clearly referring to the exercise of the Judge’s discretion. The questions that would have to be determined in a hearing of this application would focus on whether or not the Judge was privy to this information and whether or not he took it into consideration before making his decision. All of this entails a review of the Judge’s discretion which is outside the parameters of a court of co-ordinate jurisdiction. As per Chief Justice Sykes in the matter of *Gordon Stewart and Noel Sloley et al* at paragraph 85;

*“Laing, J. had the jurisdiction and the power to make the orders that he did. The question of how the discretion was exercised or whether the exercise of the discretion was in accordance with existing practice is a matter for an appeal and not for another judge of the same jurisdiction.”*

### **Whether this is a final order**

**[30]** The order for sale was made to satisfy an outstanding judgment debt. This is not an interlocutory proceeding. The case of *Salaman v. Warner* [1891] 1QB 734, looked at the distinction between a final order and an interlocutory one.

*“It held that a final order is one which looking at the application or proceedings, for whichever side the decision is given it will finally determine the matter in litigation.”*

Judgment having been entered for the Defendant, and all other attendant applications having been refused, this was an order for sale that finally determined the matter of enforcement of the judgment debt. The order was also perfected. This being a final order, I am not of the view that it can be set aside by a Judge of co-ordinate jurisdiction.

**[31]** For these reasons it is not accepted that this court has the jurisdiction to set aside the orders of Brown, J.

Order:

1. Preliminary point upheld. The court does not have the jurisdiction to set aside the order of the Honourable Mr. Justice Evan Brown made on the 16<sup>th</sup> of November 2018.
2. Costs to the Claimant/Respondent to be agreed or taxed.
3. The Claimant/Respondent’s Attorneys-at-law to prepare file and serve the orders herein.