IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 12 OF 2017

NESSIE ELINOR JONES Appellant

v

HOLY REDEEMER CREDIT UNION LTD Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

H E Elrington SC for the applicant.
M Balderamos Mahler for the respondent.

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20 June 2018 and 8 December 2020

SIR MANUEL SOSA P

[1] At the conclusion of the oral argument on 20 June 2018, the Court intimated that, for reasons to be given in writing at a later date, it was refusing the application of Nessie Elinor Jones ('the applicant') and ordering that Holy Redeemer Credit Union Limited ('the respondent') have its costs, to be agreed or taxed. The Court shall give such reasons below.

[2] The application (hereinafter 'the application') was for (i) the setting aside of what was described in the notice of motion as 'the Order made at Case Management'; (ii) extension of the time for preparing, filing and serving five copies of the record of appeal,

with an index; (iii) the settling of the record by a specified date; and (iv) the making of provision for costs thereof.

[3] A single affidavit was filed by each side. That filed on behalf of the applicant was one as to formal matters sworn on 30 August 2017 by Mr Erington SC, counsel for the applicant, himself whilst that filed on behalf of the respondent was sworn on 1 November 2017 by Mr Henry Charles Usher, a legal officer in its employment.

[4] The material background facts are not in dispute. The relevant judgment of the court below was delivered on 9 March 2017 by Arana J, as she then was. The corresponding judgment order was entered on 26 April 2017. A notice of appeal dated 16 May 2017 was filed by the applicant on 17 May 2017. Settlement of documents, which is required by the provisions of Order II, rule 8(1) of the Court of Appeal Rules ('the Rules'), was conducted by the then Registrar, viz Ms Registrar V Flowers, on 27 July 2017. The Registrar ordered the filing and service of a record of appeal. Neither strangely nor unreasonably, she noted that the time for such filing and service would expire on 17 August 2017. (Given the operation of law, in this case the law as set out in Order II, rule 13(1) of the Rules), she need not, strictly speaking, have referred to the expiration date in question at all.) The applicant failed to comply with the Registrar's order. (Indeed, the applicant never even went so far as to file the order of the Registrar at the Registry.) Instead of filing and serving a record of appeal by 17 August 2017, the applicant filed on 31 August 2017 a notice of motion ('the notice of motion') evincing her intention to make the application.

[5] It is as well to note at this point that Mr Elrington deposed in his affidavit that 'the settlement of the Record proceeded as if the Appeal raised questions of law and fact' and also that 'counsel for the parties unwittingly failed to spot this error and did not advise the learned Registrar so the record [was?] erroneously settled'. It was, and is, obvious that these matters were not common ground between the parties. There was nothing whatever before this Court at the hearing to indicate that the vague and unsatisfactory allegation that the pertinent settlement of documents proceeded as if the appeal raised questions

of law and fact was accepted by the respondent. And it was the firm position of the respondent at the hearing that, in fact, no error was committed at the settlement of documents and that, hence, there was no failure to spot any error.

[6] Mr Elrington conspicuously refrained from deposing in his affidavit as to any attempt on his part, successful or otherwise, to meet with the Registrar on the subject of the supposed error committed at the settlement of documents. But he made sure wholly inappropriately (given the absence of evidence thereof) to speak of such attempts in the notice of motion, under the sub-heading GROUNDS on page 2. It is not open to this Court to take any account of the bold, and bald, claim that such attempts were made.

[7] The rival submissions were in short compass. Mr Elrington's argument was essentially that, given the alleged common error of counsel at the settlement of documents, the applicant should be granted an extension of time within which to file a record of appeal containing a reduced number of documents, ie documents relevant only to the point of law which, as he claimed, was the sole concern of the applicant's appeal. Whilst advancing this argument, Mr Elrington was thunderously silent as to the reason or reasons why, if (as he asserted) he only became aware of the 'error' on the eve of the expiration date, he omitted to produce to the Court at least a substantially-completed record which might help to satisfy the Court that his office had thitherto been diligently working towards the beating of the deadline in question.

[8] For the respondent, Mrs Balderamos Mahler's main contention was that the applicant had not even come near to making an arguable case for an extension of time. On her argument, no error had been shown to have been committed by anyone at the settlement of documents. Moreover, the failure to file the record and other documents in compliance with the order orally pronounced by the Registrar and the Rules had not been explained by the giving of good and substantial reasons therefor. She referred to, amongst other cases, *Jamaat Al Muslimeen v Bernard and Others (No* 1*); Bernard and Others v Jamaat Al Muslimeen (No 1)* (1994) 46 WIR 382 and *National Commercial Bank*

of Trinidad and Tobago Ltd v Pouchet and Another (1999) 57 WIR 370 in support of her submissions in this regard.

Discussion

[9] The point already made by the second sentence of para **[7]**, above is difficult to overestimate. It is, besides, tentacular. It goes all the way to the inherent probability of the entire claim that it was only on 16 August 2017, the very eve of the pertinent expiration date, that it dawned upon the deponent concerned that an error had been committed at the settlement of documents. If the applicant and/or her attorney had been working on the preparation of a record of appeal up to 16 August 2017, as she and/or he should have been, why was the Court not shown, or even told of, the fruits of their labour thitherto? In the absence of an actual work in progress or affidavit evidence thereof, the naked and anaemic claim that it came to Mr Elrington out of the blue on 16 August 2017 that an error had been committed at the settlement of documents inevitably carries a hollow ring. Reticence as to the amount of progress one had made by 16 August 2017 towards completing the required record of appeal seems completely unnatural, nay inexplicable, in circumstances where, with one's back against the wall, so to speak, one is craving a critical extension of time from a court.

[10] Which brings me back to the adjective 'anaemic' employed in the immediately preceding paragraph to describe the claim of error advanced by Mr Elrington. This is, in my view, a fit adjective for the reason that the claim of error is manifestly unsound. Upon examination, the point raised by the sole ground of appeal is not a point of pure law, as Mr Elrington submits, but one of mixed law and fact. The ground reads as follows:

> 'The learned trial judge erred and was wrong in law in holding that the mortgage's (*sic*) power of sale had arisen and was exercisable, notwithstanding the fact that Section 43(2a) (*sic*) of Chapter 314 of the Credit Unions Act, Revised Edition 2011, read along with Section 43(4), specifically requires the mortgagee to enter into possession of the mortgaged property as a pre condition (*sic*) of his or her power

of sale under the mortgage arising. The fact (*sic*) admitted in evidence show that the mortgagee never complied with this provision of the law before purporting to exercise its power of sale.'

The second sentence of the above formulation of the ground makes it as plain as can be that the establishment thereof on appeal would require reference to 'the [facts] admitted in evidence' in the court below. The question whether the mortgagee in fact performed acts amounting in law to entry into possession would necessarily arise on appeal.

[11] The application thus quickly unravels, rendering it unnecessary to embark upon a full and in-depth analysis of the argument of the respondent. But respect for the industry of counsel for the respondent persuades me to deal at least briefly with her reliance on the authorities referred to above. I do so in the light of the decision of this Court in *Bruce (Deon) v The Chief Magistrate*, Civil Appeal No 15 of 2014 (judgment delivered on 22 June 2018), an appeal in which the later of the two cases from Trinidad and Tobago cited above was considered but not applied. In its judgment in *Bruce*, this Court having set out the provisions of Order II, rule 13(1), the very same rule breached by the applicant in the instant case and under which she has applied for an extension of time, said the following, at para **[9]**:

'It will be observed that these provisions, having (by the words therein which I have underlined) conferred on the Court the power to extend time, are silent as to, say, matters in respect of which the Court is to be satisfied before exercising such power. Conspicuously absent, in particular, not only from r 13(1) but from the Rules as a whole, is a provision such as was to be found in Ord 59, r 21(2) of the Rules of the Supreme Court formerly in force in Trinidad and Tobago, by which provision an application for extension of time within which to file the record of an appeal was required to be supported by an affidavit identifying "good and substantial reasons" therefor: see *National Commercial Bank of Trinidad and Tobago v Pouchet and Another* (1999) 57 WIR 370, at 375.'

[12] In *Bruce*, the Court also considered the advice rendered by the Judicial Committee of the Privy Council in *Ratnam v Cumarasamy*, Privy Council Appeal No 41 of 1962 (judgment delivered on 23 November 1964). Para **[31]** of the judgment of this Court reads as follows:

> 'As regards authorities from other jurisdictions, I know of only one, viz the oft-cited *Ratnam v Cumarasamy* … that can be of some assistance in the instant case, the main reason for this being that I have yet to come across a case, other than *Ratnam*, from another jurisdiction, in which an enabling rule similar in all material respects to our r 13(1) is shown, or seems, to exist or to have once existed in isolation, so to speak.'

[13] Then, at para **[37]**, at which conclusion was reached on the application for extension of time of Mr Bruce, the judgment of this Court reads in material part:

> 'Finally, I would respectfully decline the invitation of Ms Young to adopt the not unattractive (at first glance) formula from foreign decisions such as *National Commercial Bank*, none of which she in fact cited, to the effect that the applicant for extension has failed to provide good and substantial reasons for his default. Returning instead to *Ratnam*, as I earlier promised to do, I note that the broad and comprehensive language of Lord Guest, writing for the Board in that case, was that the "Court of Appeal [of the Supreme Court of the Federation of Malaya] were entitled to take the view that [the reasons for delay given in Mr Ratnam's affidavit] did not constitute material upon which they could exercise their discretion in favour of the appellant": see the 12th para of the judgment.'

The Court proceeded to hold that the reasons for delay and other matters urged upon it on behalf of Mr Bruce did not constitute material upon which it could exercise its discretion under rule 13(1) in his favour.

[14] In the present case, the effective implosion of the application already described at para **[11]**, above, placed the Court, in my respectful view, in a position very similar to that in which it found itself in *Bruce*. The outcome had to be the same. It was, at the conclusion of the hearing, and continues to be, my firm opinion that nothing properly urged upon the Court by counsel for the applicant constituted material upon which this Court could exercise its relevant discretion in favour of the applicant. It was for that reason that on 20 June 2018, I moved the refusal of the application and the order as to costs already set out at para **[1]**, above.

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SIR MANUEL SOSA P

DUCILLE JA

[15] I write to say that I have read the draft judgment of the Learned President and I agree with the reasoning and disposition of the matter and I cannot add anything further.

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DUCILLE JA