In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2013 No: 38

GARRY WILKINSON
-and-
JUDITH MARIE BURGESS
(as Executors of the estate of Nellie Wilkinson)

Appellants

-v-
GLORIA WOODS

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: February 13, 2014

Mr. Kai Musson, Cox Hallett Wilkinson Limited, for the Appellants
Mr. Henry Tucker, Appleby Global (Bermuda) Limited, for the Respondent

Introductory

1. This is an appeal by the administrators of the estate of Nellie Wilkinson against a decision of the Magistrates' Court (Worshipful Edward Bailey (Acting)) on November 2, 2012 when he declined to entertain applications by the Appellants under the Rent Increases (Domestic Premises) Act wherein they sought to recover arrears of rent and possession from the Respondent.

2. The matter has been subject to regrettable delays because although the decision was made in November 2012, the record was not prepared until December 3, 2013. The

delay in preparing the record is particularly surprising because the record only runs to 19 pages, including the Notice of Appeal which was received in the Magistrates' Court on March 20, 2013.[1]

3. The complaint of the Appellants is that, without hearing evidence, the Learned Magistrate effectively dismissed their application, and that he did so on a misconceived ground. The only note which exists of his decision is set out at page 14 of the record, and reads as follows:

> "*Action is on equity which these Courts do not have authority to deal with; refer parties take action under Partition Act*."

Findings: technical merits of appeal

4. Mr. Musson, for the Appellant, submitted that this note indicates that the Learned Magistrate acted on a misconceived basis. The true position, it was common ground on this appeal, is that the Respondent is not presently a joint owner under the Last Will and Testament of the deceased. She is entitled, when the estate is administered, to a beneficial interest by way of a joint ownership interest along with her siblings, in the property in which she present resides. And so it was, in my view, technically incorrect to suggest that at the time that the matter was before the Magistrates' Court that the Respondent was in fact a joint owner, and that the matter could more appropriately be dealt with under the Partition Act.

5. So, looking at the matter in purely technical terms, it can be said that the Learned Magistrate erred in deciding to decline jurisdiction on a legally incorrect basis and also, perhaps, in also failing to record sufficient reasons for his decision.

Findings: substantive merits of appeal

6. Mr. Tucker, for the Respondent, submitted that the Learned Magistrate's decision was in substance correct and could be justified on a variety of grounds. The principal grounds that he relied upon were two provisions in the Magistrates Act 1948; firstly section 17 and secondly section 15. He fairly conceded that the ability to rely on section 17 was not straightforward. Section 17 says:

> "*17 A court of summary jurisdiction shall not take cognizance —*

[1] The Notice of Intention to Appeal was stamped as received on November 6, 2012.

(a) of any action for any libel or slander, or for seduction, or malicious prosecution or false imprisonment; or

(b) of any action wherein the title to any corporeal or incorporeal hereditaments, or wherein the validity of any devise, bequest or limitation under any will or settlement, may be disputed."

7. Mr. Musson, emphasising the second part of subsection (b), fairly contended that there is no dispute about the "validity" of any devise or request under the will. But, it is perhaps arguable, that the question of title to the property is in dispute and in dispute in the following way.

8. The administrators of the estate sought possession of the property and the Respondent, having regard to her rights under the will, which was seemingly not placed before the Learned Magistrate, would have been entitled to contend that her relationship with the property was not as a tenant under the Rent Increases (Domestic Premises) Act 1978. But, instead, she had a right of occupation, which perhaps could be characterised as a license, under the seventh paragraph of the will which provides in sub-paragraph (b) as follows:

> "*(b) that should the said Gloria Louise Woods survive me and be without a home of her own, she should stay in occupation of one of my apartments at 'Beans' Rest' whilst she pays for one half of the maintenance of the property.*"

9. So the Magistrates' Court would not have been able to determine the Appellant's claim under the Rent Increases (Domestic premises) Act, without also considering whether or not there was a right of occupancy under a will. It is clear that the Supreme Court is given exclusive jurisdiction over matters relating to estates by the Administration of Estates Act 1974. And it is conceded that the proceedings were brought in the Magistrates' Court by the Appellants in their capacity as administrators of the estate. So, it is perhaps unsurprising that the Learned Magistrate felt intuitively, without fuller enquiry, that this was a matter that he should not exercise jurisdiction over.

10. That brings me to the other provision of the Magistrates Act, which Mr. Tucker relied upon for the Respondent, and that is section 15, which defines the civil jurisdiction of a court of summary jurisdiction and says this in the proviso:

> "*Provided that if the court of summary jurisdiction for any reason at any stage of the proceedings considers any cause or matter arising before it under the powers conferred by this subsection more suitable for argument in and disposal by the Supreme Court then the court of summary jurisdiction may decline the consideration or further consideration of such cause or matter.*"

11. It is not, I accept, clear from the very brief reasons recorded by the Learned Magistrate that this was the power which he was exercising in reaching the decision that he reached. But the substantive legal position is that he would have been entitled to decline jurisdiction on that ground and may well have had that provision in mind.

Findings: disposition of appeal

12. In summary, the position as I see it is as follows. The Appellants have demonstrated that the Learned Magistrate erred, in a very technical sense, in failing to record valid reasons for the decision that he made[2]. But the Respondent has demonstrated that the decision can be supported on other grounds. In these circumstances, the decision which I reach is that the appeal should be allowed on the grounds of an error of law, but that the Court should exercise its discretion not to set aside the decision of the Court below because it can be supported on other grounds[3].

13. As a practical matter, it does seem clear that the administrators are not in charge of an estate which is highly liquid and that they do have a legitimate interest in seeking to either recover sufficient monies from the Respondent and/or from other sources, to enable the estate to meet its obligations, or they will be compelled to sell the property. If it should be necessary for them to take such a course, it seems inevitable that they would have to seek directions from this Court to do so. Mr. Musson invited the Court to consider, in some way, giving directions allowing that to happen on an expedited basis. But, it seems to me that the proper thing for the administrators to do is to file a fresh application, seeking appropriate relief.

14. I was addressed on the issue of costs by Mr. Tucker, and I have not yet heard from Mr. Musson on the issue. But my provisional view is that the appropriate Order to make in all the circumstances, taking into account the fact that the Respondent's position has not been an entirely innocent one, is as follows. I bear in mind that, and it is admitted, she has been occupying the entire property without paying even a low rent, as was anticipated by the will, in respect of her occupation of one apartment.

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[2] Assuming the Learned Magistrate did not amplify orally the reasons recorded in writing, and based on the appeal record, the Appellants claim was dismissed without a hearing on grounds which were both legally and factually misconceived. Had the Magistrates' Court ascertained the true facts and applied the correct law, the same outcome should have ensued.

[3] The Civil Appeals Act 1971 provides in salient part as follows: "*14 (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just….(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*"

15. It seems to me that the Court should make no order as to costs so that each party will bear its own costs.

[After hearing counsel, the Court made no order as to the costs of the appeal]

Dated this 13th day of February, 2014 _____

IAN R.C. KAWALEY CJ