

SAINT LUCIA

MAGISTERIAL COURT SUIT NO: 59/2008

CLAIM NO: SLUHCV 2010/0285

**IN THE MATTER OF SECTION 11 OF THE EASTERN CARIBBEAN SUPREME COURT (SAINT LUCIA)
ACT CAP.2.01 OF THE REVISED LAWS OF SAINT LUCIA**

AND

**IN THE MATTER OF SECTION 23 OF THE DOMESTIC VIOLENCE (SUMMARY PROCEEDINGS) ACT
CAP. 4.04 OF THE REVISED LAWS OF SAINT LUCIA**

AND

IN THE MATTER OF PARTS 2.2 AND 62.3 OF THE CIVIL PROCEDURE RULES 2000

BETWEEN

PATRICK MORILLE

INTENDED APPELLANT/APPLICANT

AND

HERMIA ROSELINE MORILLE

RESPONDENT

Appearances:

Mr. Horace Fraser for the Intended Appellant/Applicant

Mrs. Esther Greene Ernest for the Respondent

**2010: MAY 5th
OCTOBER 27th.**

RULING

[1] **WILKINSON J.:** The Applicant filed a notice of application on 9th April 2010. Therein he sought the following order:

1. Leave be granted to him extending time to file an appeal against the decision of the Magistrate sitting in the Family Court dated 23rd January 2009.
2. The Order of the Magistrate dated 23rd January 2009 awarding financial support against him in favour of his former wife be stayed until the hearing and determination of the appeal.
3. There be no order as to costs.

[2] The grounds of the application are:

1. The Applicant filed an application Claim No: SLUHCV 2009/0220 dated 2nd March 2009, wherein he sought leave of the High Court to file a claim for judicial review against the decision of the Magistrate dated 23rd January 2009, which was pending before the court prior to 31st July 2009.
2. On 31st July 2009, the Applicant filed a notice of discontinuance in relation to the said claim for judicial review to instead pursue an appeal against the decision of the Magistrate.
3. The Applicant's decision in seeking to pursue an appeal was premised on the fact that new judicial thinking suggested that a distinction had to be made between whether a decision of a magistrate was administrative or judicial, in determining which procedure to adopt. Since the decision of the Magistrate was judicial, the applicant was in the wrong court in accordance with the Court of Appeal ruling in **Kim Gustave's** case, an oral decision pronounced at June, 2009.
4. The reasons for not filing an appeal against the decision within the time specified by the Domestic Violence (Summary Proceedings) Act¹ and the consequential delay in making an application for an extension of time to file an appeal was premised on the Court of Appeal's new approach to judicial review against magisterial decisions.
5. The proposed appeal raises matters of public and constitutional importance concerning the powers of a magistrate sitting in the Family Court.

¹ Chap 4.04 of the Revised Laws December 2001

6. The proposed appeal has a reasonable prospect of success.

Issues

- [3] 1. Whether the Court has the power to extend the time within which the Applicant can file his appeal in the High Court.
2. Whether there has been delay by the Applicant in filing his application for an extension of time to file his appeal pursuant to section 23 of the Domestic Violence (Summary Proceedings) Act.
3. Whether if the Court should find that it can grant or ought to grant the Applicant an extension of time to file his appeal, there would be a risk of injustice in granting a stay of execution of the Magistrate's order.

The Applicant's evidence

- [4] In the Applicant's affidavit in support of the application, he deposed that at he had made an application on 7th January 2009 for revocation of an occupation order so that the application could be heard on 16th January 2009, the returnable date for the further hearing of the occupation order. On 20th January 2009, the Magistrate gave a written decision revoking the occupation order but did so on condition that she would make an order for support of the Respondent, and their child, "so that an appropriate place can be located and leased for their use".
- [5] At 23rd January 2009, the applicant was ordered by the Magistrate to pay the sum of \$1,200.00 to the Respondent every month starting 31st January 2009 until the ancillary matters in their divorce were settled at the High Court. The Magistrate at the time expressly said in open court that she was acting pursuant to section 8 of the Domestic Violence (Summary Proceedings) Act.
- [6] The order of the Magistrate read as follows:
- "Pursuant to Section 8(2) of the Domestic Violence (Summary Proceedings) Act, it was adjudged and ordered by the said Court sitting at Castries on the 23rd day of January 2009, that the Defendant Mr. Patrick Morille pay the sum of \$1,200.00 monthly to Mrs. Hermia Morille.

Based....

The Court is aware of the fact that rental property is not necessarily cheap, especially when looking at a safe and secure environment and \$1,200.00 would be a sufficient contribution towards expenses as well as rent for the minor child and Mrs. Morille. Mr. Morille is to pay this amount monthly until the Ancillary Matters are dealt with by the High Court and he is to start paying this amount by the 31st January 2009.

This said adjudication was consequent on conviction in respect of a charge against the Defendant that OF DOMESTIC VIOLENCE.”

- [7] On 2nd March 2009, he filed an application in the High Court for leave to file a claim for judicial review against the Magistrate’s decision after giving one month’s notice of intention to prosecute to the Attorney-General. On 31st July 2009 his attorney-at-law filed a discontinuance of that suit and advised him that he needed to pursue an appeal against the Magistrate’s decision. On 7th August 2009, he filed an application before the Court of Appeal seeking leave to file an appeal out of time and the Court of Appeal heard the application on 22nd March 2010. The Court of Appeal dismissed his application on the ground that the Court had no immediate appellate jurisdiction under the Domestic Violence (Summary Proceedings) Act.
- [8] He also deposed that the reason for not filing an appeal against the decision of the Magistrate within the time specified by the Domestic Violence (Summary Proceedings) Act and the consequential delay in making the application for an extension of time to file the appeal was because of the Court of Appeal’s new approach to judicial review against magisterial decisions.
- [9] He was advised by his attorney-at-law that the Magistrate acted in excess of her jurisdiction in making the order or alternatively if she acted intra vires her powers, the power purportedly conferred upon her by section 8 of the Domestic Violence (Summary Proceedings) Act was contrary to the Divorce Act 1973, and was therefore unconstitutional.
- [10] He further deposed that he had settled the question of financial maintenance with his wife in late 2008 by giving her 3 buses which she operates for hire. He estimates her income from the buses to be approximately \$11,600.00. This fact was brought to the attention of the Magistrate before she made her order. It was a fact that the Respondent did not make an application for financial support and to him this was a clear indication that she did not intend to make one.

[11] He had deposed to his income and expenses in an affidavit of means to support his application for variation or revocation of the occupation order. He operated 4 buses, owned a truck, and a jeep. The truck was no longer in operation. He had a monthly income of approximately \$11,342.00 and expenses of approximately \$13,158.91, and so suffered a net loss of approximately \$1,816.91.

The Respondent's evidence

[12] The Respondent filed an affidavit at 21st April, 2010 in response to the Applicant's. She deposed that the Magistrate on 23rd January 2009, made the order that she be paid \$1200.00 every month beginning 31st January 2009, until the ancillary relief in the divorce was decided. She was informed by her counsel that the Magistrate had the power to attach to the occupation order conditions including financial support. The effect of the Magistrate's order was to exclude her from the matrimonial home and as a consequence she was forced to seek alternative accommodation until the ancillary matters in the divorce were settled.

[13] She also deposed that the Applicant had never paid her the money ordered by the Magistrate. She was made aware by her counsel that the Applicant had filed an application for leave to file judicial review proceedings but she was never served with those proceedings, and she subsequently learnt that he had discontinued his application for leave for judicial review.

[14] Over one year has elapsed since the Magistrate's order and she was informed by her counsel that the Applicant had only twenty-eight days to appeal to the High Court. There was no provision in the Act for an extension of time once the twenty-eight days had elapsed. Further the Civil Procedure Rules 2000 were not applicable.

[15] She has been deprived of the fruits of the order. The Applicant and herself were scheduled to appear before the High Court for the hearing of ancillary matters on 28th June, 2010 and there was no order made prior to this date for ancillary matters. She continued to suffer financial hardship as she continued to try to keep the minor child of the marriage and who was preparing for secondary school entrance exams in surroundings close to that to which she was used to. She has been surviving on the goodness and generosity of others as her income is not sufficient to meet her expenses.

[16] She is informed by her counsel that the Magistrate acted within her powers under the Act.

The Law

[17] The Domestic Violence (Summary Proceedings) Act is stated in the long title as being an Act to provide protection by means of summary proceedings in cases involving domestic violence and for related matters. The Act provides:

“ 2. INTERPRETATION

In this Act -

“ ‘court’ means the Family Court or a court of summary jurisdiction:

‘occupation order’ means an order, made under section 7 and includes an interim order made under that section;’

8. EFFECT OF ORDER

- (1) Where an occupation order is made, the specified person to whose benefit it is made is entitled, to the exclusion of the respondent, personally to occupy the household residence to which that order relates.
- (2) The conditions attached to an occupation order may include such arrangements as may be necessary for the financial support of the member of the household where appropriate.

23 APPEALS

- (1) Any person aggrieved by –
 - (a) an order by the court; or
 - (b) the refusal of the court to make an order,may within 28 days after the decision of the court, appeal to the High Court,
- (2) Except where the court which makes an order under this Act otherwise directs, the operation of such order shall not be suspended by virtue of an appeal under this section, and every order may be enforced in the same manner and in all respects as if no appeal under this section were pending.

[18] The provision that appeal is to the High Court is in line with the District Courts Act which exercises summary jurisdiction. Section 11 states:

“Section 11 APPEAL FROM A DISTRICT COURT

Subject to the conditions and limitations set out in the Code of Civil Procedure and the Criminal Code an appeal shall lie to the High Court from any judgment, decision, or order of a district court in the exercise of its criminal or civil jurisdiction, except from any order –

- (a) for the adjournment of any cause or matter;

- (b) in respect of an indictable offence;
- (c) for the remand of any person to prison; or
- (d) for the bail of any person in custody.”

[19] Appeals from the Magistrate’s Court to the High Court are to be carried out pursuant to the Civil Procedure Rules 2000 Part 60 and therein it is stated:

“60.1 (1) This Part deals with appeals to the High Court from any tribunal or person under any enactment other than an appeal by way of case stated.

(2) In this Part -

...;

“decision” means the award, decision, determination or order appealed against; and

(3) This Part takes effect subject to any provisions in the relevant enactment.”

[20] Appeals before the Court of Appeal are to be carried out pursuant to the Civil Procedure Rules 2000 Part 62. Part 62 provides:

62.1.(1) This Part deals with appeals to the Court of Appeal from -

- (a) a Magistrate's or District Court;
 - (b) a tribunal; or
 - (c) the High Court;
- not being

(i) appeals by way of case stated on a question of law for determination by the court; nor

(ii) appeals or applications to the court for which other provisions is made by these Rules

62.14 (1) Parts 25 to 27 so far as relevant apply to management of an appeal case as they do to case management of a trial.

62.20 (1) In relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26.”

[21] The case management powers referred are:

“26.1.(1) The list of powers in this rule is in addition to any powers given to the court by any other rule, practice directions or any enactment.

(2) Except where these rules provide otherwise, the court may –

(a) ...;

(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;”

[22] Both counsel referred the Court to amongst other cases **The Nevis Island Administration v. La Copropriete Du Navire J31 et al²**, **Paget Lake v. LIAT (1974) LTD.³**, **Richard Frederick v. Owen Joseph et al.⁴** and **Dominica Agricultural and Industrial Development Bank v. Mavis Williams.⁵** A common thread running through these cases is that the appellant in each case took deliberate and decisive actions to vary from the course prescribed by Part 62 of the Civil Procedure Rules 2000 for filing an appeal and or pursuing their appeal or an order relative to their appeal and therefore found themselves seeking extensions of time to pursue their appeals and stay of enforcement of the high court judgments. Behavior not unlike that of the Applicant where the rules for appeal are prescribed at section 23 of the Domestic Violence (Summary Proceedings) Act.

[23] As I interpret the cases referred, the power of the Court of Appeal to consider an application for an extension of time is derived from Part 62.14(1) which provides for case management pursuant to Parts 25 to 27. This is reiterated by Barrow J.A in **The Nevis Island Administration v. La Copropriete Du Navire J31⁶** where the applicants for over six months persisted with the view that they did not need leave to appeal the decision of Baptiste J. (as he then was) given on 12th April 2005 striking out their claim against the defendants, and it was only when Rawlins J.A (as he then was) on 29th December 2005 struck out their purported Notice of Appeal as a nullity, for having been filed without first obtaining leave to appeal, the applicants sought an extension of time within which to apply for leave to appeal. Barrow J.A. said:

“The argument in favour of relying on the criteria laid down in rule 26.8 recognizes that there is no express sanction expressed for failing to apply for leave to appeal in time, in the way for example, that failure to file a witness statement is visited with the sanction that the witness shall not be called. in my judgment that the criteria prescribed in rule 26.8 should be applied....

The starting point in applying the criteria set out in rule 26.8 is the promptitude of the application for relief from sanction.⁷.....”

² Civil Appeal No. 7 of 2005 (Saint Christopher and Nevis)

³ Civil Appeal No. 4 of 2003 (Antigua and Barbuda)

⁴ Civil Appeal No. 32 of 2005 (Saint Lucia)

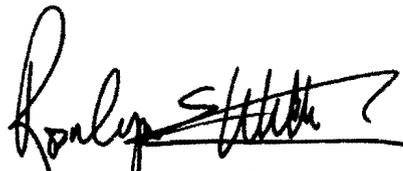
⁵ Civil Appeal No. 20 of 2005 (Dominica)

⁶ Ibid

⁷ Ibid

Conclusion:

- [24] Part 60 which deals strictly with appeals to the High Court does not give the High Court any power similar to that given to the Court of Appeal at Part 62.14 (1) to pursue case management, and which could include an application for an extension of time to pursue the appeal. This being the situation, the Court would be acting outside of the power granted to it by Part 60 to entertain such an application and by section 28 of the Domestic Violence (Summary of Procedure) Act. I find that the court has no power to entertain the application.
- [25] Having decided that the High Court does not by either section 28 or Part 60 have the power to pursue case management pursuant to Parts 25 to 27, and hear an application for an extension of time to file an appeal, the other issues arising die a natural death.
- [26] It is ordered that that the application filed April 9th 2010 be struck out with costs to the Claimant in the sum of \$1,000.00.


Rosalyn E. Wilkinson
High Court Judge