

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2014/0012

BETWEEN:

CUTHBERT JAMES

Appellant

and

VIDA JAMES

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise E. Blenman
The Hon. Mr. Paul Webster, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

On written submissions:

Ms. Renee T. St. Rose for the Appellant
Mr. Ramón R. Raveneau for the Respondent

2014: August 11.

Interlocutory appeal – Application to call additional witnesses – Additional witness statements filed by appellant before formal application made for permission to do so – Whether learned judge precluded from considering merits of application by virtue of premature filing – Whether appellant could have filed additional statements without first applying for leave to do so – Rule 26.1(2)(w) of the Civil Procedure Rules 2000 – Whether learned judge considering witness application had effect of undermining master's decision

At a case management conference on 23rd September 2011, the appellant and respondent each requested permission to call more than four witnesses in these proceedings. The learned master refused the parties' requests and ordered that either party could call no more than four witnesses. However, the parties had the liberty to apply for further directions or orders on or before 10th February 2012. On this date, the appellant filed an application for an order that he be permitted to call three additional witnesses ("the witness

application") which meant that he intended to call a total of eight witnesses including himself. On 29th February 2012, well after the deadline allowed by the master's evidence directions, the respondent filed her witness statements. On 1st March 2012, the parties filed a consent application to extend the time for filing witness statements to accommodate the respondent's late filing.

The consent application and the witness application came up for hearing at the pre-trial review on 8th March 2012. The learned judge granted the consent application on that date, and subsequently, on 21st May 2012, she dismissed the witness application. The judge dismissed the witness application because she took the view that the filing of more statements than the master's order had allowed for, before seeking the court's permission to do so, seriously undermined the directions given by the master, and the appellant could not subsequently come back to the court to get approval for the unauthorised filing.

The appellant appealed the learned judge's decision to dismiss the witness application on the ground that the judge had a discretion to grant the application after the case management directions had been made by the learned master but she failed to take into consideration the factors relevant to such an application, which included: the importance of evidence to be given by the additional witnesses, potential prejudice to the appellant if the witnesses are not allowed, the absence of prejudice to the respondent if the extra witnesses were allowed, and the overriding objective to deal with cases justly.

Held: allowing the appeal, setting aside the learned judge's order and granting the appellant permission to call four additional witnesses, that:

1. The learned judge erred in holding that the premature filing of the additional witness statements was sufficient to have precluded her from considering the merits of the witness application. There was no formal application before the master regarding the number of witnesses. The parties merely indicated the number of witnesses that they wished to call and the master, without seeing the witness statements and knowing what each witness had to say about the issues in the case, directed that each party call no more than four witnesses. The additional witness statements were relevant to the issues in the case.
2. Rule 26.1(2)(w) of the Civil Procedure Rules 2000 gives a judge or master the broad power to deal with all case management issues including an application to call additional witnesses even when a master has already given a direction on the maximum number of witnesses to be called.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an interlocutory appeal from an order made by the trial judge on 21st May 2012 by which she ordered that:

- (1) Four of the witness summaries/statements filed by the appellant without leave of the court be struck out at the Pre-Trial Review.
- (2) The appellant is to inform the Court at the Pre-Trial Review which of the witness summaries/statements are to be struck out, failing which the court will make the choice.
- (3) The appellant's application filed 10th February 2012 to call three additional witnesses is struck out.
- (4) Costs of \$750.00 to the respondent to be paid on or before June 30th 2012.

[2] On 16th April 2014 the claimant was granted leave to appeal against the judge's order.

Background

[3] The appellant's claim is that the respondent holds a parcel of land with a dwelling house at New Village, Micoud, Saint Lucia registered as Parcel 1828B 313 on trust for him. The claim came up for case management before the master on 23rd September 2011. At the case management conference the appellant '... [asked] to call seven (7) witnesses'¹. It appears from the written submissions of the respondent that her counsel also asked for more than four witnesses. The master made the usual directions for the further prosecution of the case including the following directions regarding the evidence:

¹ See para. 5 of the respondent's affidavit opposing the witness application filed on 1st March 2012.

- (a) The claimant to call no more than four witnesses.
- (b) The defendant to call no more than four witnesses.
- (c) The parties to file and serve witness statements on or before the 18th January 2012.
- (d) Witness statements do stand as examination-in-chief. All witnesses are to attend the hearing for cross-examination unless the other side dispenses with such attendance by notice in writing. ("the evidence directions").

[4] The master also directed that either party could apply for further directions or orders on or before 10th February 2012 ("the liberty to apply provision").

[5] On 18th January 2012 the appellant filed one witness statement and seven witness summaries.

[6] On 10th February 2012, being the last day for making applications under the liberty to apply provision in the master's order, the appellant filed an application for an order that he be permitted to call three additional witnesses ("the witness application"). The appellant did not include himself in the four witnesses allowed by the master nor the three additional witnesses that he wanted to call. Therefore, his true position is that he would like to call four additional witnesses and a total of eight witnesses (including himself).

[7] The witness application does not state the authority under which it was made but based on the date of filing it may be inferred that it purports to be made under the liberty to apply provision in the master's order. This certainly is the position that counsel for the appellant, Ms. Renee St. Rose, took in her written submissions before this Court. The application is not supported by an affidavit. The appellant relies instead on the witness statements and summaries that he filed on 18th

January 2012 which he contends show that each witness deals with a point in issue in the claim.²

- [8] On 29th February 2012 the respondent filed her witness statements, nineteen days outside of the period allowed by the evidence directions. On 1st March 2012 the parties filed a consent application to extend the time for filing witness statements to 1st March 2012 to accommodate the respondent's late filing of her witness statements. The consent application is dated 27th February 2012 and is signed by the solicitors for the parties.
- [9] Also on 27th February 2012 the respondent swore an affidavit opposing the appellant's application to call three additional witnesses. The opposing affidavit was not filed until 1st March 2012 and was served on 6th March 2012, after the appellant had consented to the late filing of the respondent's witness statements. The effect of the appellant's consent given on 1st March is that the respondent did not have to apply for an extension of time to file her witness statements, and for relief from sanctions for breaching the deadline set by the evidence directions. Such an application could have been refused under the court's wide discretion in dealing with breaches of its orders, or, if there is good reason for the delay, granted on terms that the applicant (the respondent in this appeal) pay the costs of the application. On any view the respondent enjoyed a significant benefit from the appellant's consent to the late filing of her witness statements.
- [10] The consent application and the witness application came up for hearing at the pre-trial review on 8th March 2012. The learned judge granted the consent application and reserved her decision on the witness application. On 21st May 2012 the judge dismissed the witness application giving reasons for her decision. This appeal is against the judge's decision to dismiss the witness application.
- [11] The essence of the appellant's complaint is that the learned judge had a discretion to grant the application to call additional witnesses after the case management

² See para. 4 of the Notice of Application.

directions. However, she failed to take into consideration the factors that are relevant to such an application including the importance of the evidence to be given by the additional witnesses, potential prejudice to the appellant by not allowing the extra witnesses and the absence of prejudice to the respondent by allowing the extra witnesses, and the overriding objective to deal with cases justly. The judge should have considered all the factors and come to an appropriate conclusion in accordance with her duties under the Civil Procedure Rules 2000.

The Judge's Decision

[12] The learned judge gave a reserved oral decision which appears at Tab 9 of the appeal bundle of documents. At page 12 of the transcript of the decision she stated that:

“The Issue: The sole issue for the Court is whether in the face of the Master’s direction that the Claimant was to file four Witness Statements/Summaries, the Claimant could file eight Witness Statements/Summaries without further order granting leave to file the extra four before doing so and, thereafter, seek an order or direction confirming the filing of the extra Witness Statements/Summaries.”

The judge resolved this issue by finding that the appellant could have applied for an order to file additional evidence, and, if granted leave, file the additional statements. Instead, he filed eight witness statements and summaries and then applied to the court to sanction the unauthorised filing. He could not do this because it would have the effect of undermining the master’s order which has the same force as any other order made by the court. She therefore dismissed the appellant’s application and made the orders set out at paragraph 1 above.

[13] Counsel for the respondent submitted that the judge erred when she found that the sole issue was whether the appellant could have filed the additional statements without first applying for leave to do so. He said that this was a secondary issue and that:

“The most pivotal issue to be determined was whether the Appellant should be allowed, without new facts or circumstances arising, to approach the Judge to “undo” a decision which the Master had made on

the same issue, as if a direction of the Master was a “lesser legal creature” (Page 18, line 25 of the judgment) than an order.”³

He submitted further that the issue of witnesses was already dealt with by the master and that the procedure that the appellant should have adopted was to file an interlocutory appeal against the master's order.

[14] I do not agree with the respondent's submissions. There is no record of what actually happened at the case management conference. What is clear is that there were no formal applications before the master regarding the number of witnesses. The parties merely indicated the number of witnesses that they wished to call and the master, without seeing the witness statements and knowing what each witness had to say about the issues in the case, directed that each party call no more than four witnesses. At this stage the witness statements were not available, there was no disclosure of documents, and the master could not have known the details of the parties' submissions on the issues regarding the need to call the number of witnesses that they were proposing to call. The master was not in a position to properly assess the parties' positions on the number of witnesses that they wished to call at the trial and her direction to limit the number of witnesses to four for each party should not be seen as a final decision that can only be reviewed by the Court of Appeal on an interlocutory appeal.

[15] Rule 26.1(2)(w) gives a judge or master the broad power to:-

“take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.”

This rule is sufficiently wide to give the learned judge power to deal with all case management issues including an application to call additional witnesses even when the master has already given a direction on the maximum number of witnesses to be called. The learned judge said as much in giving her decision, but went on to find the appellant could not make the application after the unauthorised filing. The relevant portion of the transcript reads:-

³ Para. 2.8 of the respondent's written submissions filed on 20th May 2014.

"The Court, therefore, does not see as suggested by counsel for the Claimant that, Rules 29.4, and 11, are a bar to him first filing an Application, seeking a direction to file further Witness Statements. What the Claimant has done is to seriously undermine the direction of the Master that he only called four Witness Statements [sic] by filing eight Witness Statements/Summaries, and then coming to the Court to get the okay for his actions."⁴

It appears that but for the premature filing of the additional statements the judge would have been willing to entertain the application on the merits. Instead, she dismissed it without considering the content of the witness statements because of the improper filing. In this case the eight witness statements were filed on time but an unspecified four of them are improperly filed because of the limitation in the evidence directions. The learned judge found that the appellant, having filed the additional statements without authority, could not come back to the court to get approval for the unauthorised filing.

[16] We do not share the learned judge's view that the premature filing of the additional witness statements is sufficient to have precluded her from considering the merits of the witness application, including the contents of the witness statements and any other relevant circumstance.

[17] We have reviewed the witness statements and we are satisfied that they are relevant to the issues in the case. There is some repetition of evidence on the important issue of who the tenants of the house on the property paid rent to and acknowledged as the owner of the property, but this is a crucial issue in the case and the claimant should not be unduly restricted in how he presents this issue at the trial. The evidence of the surveyor, Ronald Polius, consists of one short paragraph but it confirms that he worked for and was paid by the claimant, a fact that could be important in the trial.

[18] The witness application is not supported by affidavit evidence which could have assisted the court on issues such as prejudice and fairness. But this is not fatal because it is apparent that the respondent has been aware of the claimant's

⁴ See p. 18 of the transcript of proceedings dated 21st May 2012.

intention to call eight witnesses since the beginning of March 2012, and he has had the witness statements for the same period. Further, we are still some distance away from the trial. It is the appellant who may suffer prejudice if he is not allowed to call up to one-half of his witnesses. There is also no injustice to the respondent who has had the benefit of a substantial concession from the appellant in respect of the late filing of her witness statements.

[19] Finally, that part of the learned judge's order that states that the court will chose the appellant's four witnesses if he does not, does not make good sense. It is not for the court to say to a litigant which witnesses he should call to prove his case.

Decision

[20] In all the circumstances the learned judge erred in not considering the witness application on the merits because it was filed prematurely, or that dealing with the application would have undermined the master's order. The judge enjoyed the advantage that the master did not have of being able to review the witness statements for relevance to the issues. Having now done so we are satisfied that the witness statements are relevant and the appellant should be allowed to call the four additional witnesses.

Order

[21] In all the circumstances it is ordered and declared as follows:

- (1) The appeal is allowed and the learned judge's order dated 21st May 2012 is set aside.
- (2) The appellant is granted permission to call four additional witnesses.

(3) The appellant will have his costs in the court below of \$750.00 and in this court of \$500.00.

Paul Webster, QC
Justice of Appeal [Ag]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise E. Blenman
Justice of Appeal