COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
APPELLATE DIVISION
2020/APP/NO.00023

BETWEEN:

(1) KRANSTON ROGER KEY
(2) HARRY HARRIS
(3) SHARON RANDOLPH WHYLLY
(4) WENDALL MCCLOUD PEDICAN
(5) VERNAL LOUISE BROWN
(6) ANYA MICHELLE JASMINE

Intended Appellants

AND

WALTER CAPRON

Intended Respondent

Before: Mr. Justice Loren Klein
Appearances: Maria Daxon for the Plaintiffs
Brian Dorsett for the Respondent
Hearing date: 8 February 2021

RULING

KLEIN, J.

Magistrate's Act—Magistrate's Civil Appeal—Vacant Possession and Eviction Order—Intended Appellants claiming possessory interest in property—Vacant Possession Order Made July 2014—Notice of Appeal filed December 2020—Competency of Appeal—Failure to enter into Recognizance—Application for injunction/restraint of enforcement pending hearing of appeal—R.S.C. 1978, Ord 29 r. 1—Summons for injunction filed pursuant to Notice of Appeal—Irregularity—Res Judicata—Abuse of Process—Henderson v Henderson abuse—Magistrate's Rules of Court 1934—Schedule to Magistrate's Rules of Court

INTRODUCTION AND BACKGROUND

1. This Ruling concerns what can only be described as a hopeless attempt to resurrect a 2014 appeal from the decision of a senior Stipendiary and Circuit Magistrate ("the Magistrate") in which he granted the respondent an order for vacant possession of premises which the appellants claim to have occupied for long periods and in which they assert a possessory interest.

2. The Magistrate's decision was made 4 July 2014, but the writ of possession to enforce it was sealed 15 July 2014. It appears that further writs were sealed and issued on 25 October 2017

and the 27 of November 2020, although attempts at eviction pursuant to the writs for the most part proved futile. This was because the appellants filed multiple proceedings connected to the property dispute, including a Quieting Titles action (2014/CLE/qui/013039) ("QTA") and a Constitutional Action (2018/PUB/con/00038), pursuant to which they were able to obtain stays against enforcement, and also resisted any attempts to remove them during the periods when stays were not in effect. (This Ruling is being delivered simultaneously with the Ruling in the Constitutional proceedings, and should be read in conjunction with that.)

3. The current proceedings were commenced by Notice of Intention to Appeal ("NOIA") filed 4 December 2020, and a purported Notice of Appeal ("NOA") filed 17 December 2020. Standing in the way of the appeal, however, is the fact that the appellants initially appealed the Magistrate's Ruling on 29 July 2014, which was struck out by the Supreme Court on 2 July 2015, as the statutory condition requiring the entering into of a recognizance for the due prosecution of the appeal had not been complied with. On 27 June 2017, the Supreme Court refused an application to set aside its 2015 striking-out Order and reinstate the appeal, as the recognizance remained unsatisfied even at that date.

4. In addition to the purported appeal, counsel for the appellants filed a "summons" dated 17 December 2020, seeking an order pursuant to *R.S.C. Order 29, r. 1* staying the execution of the Order for vacant possession or enjoining the respondent and his agents from enforcing it pending the hearing and determination of the appeal. Not surprisingly, this application was challenged as a preliminary point by the intended respondent, on procedural and substantive grounds.

5. During the course of the hearing, I also indicated to counsel that the Court was of the preliminary view that the Notice of Appeal was incompetent, having regard to the fact that the Appeal had been twice rejected by the Supreme Court (albeit not on the merits) and that, in any event, the statutory conditions of the Magistrate's Act ("the Act") relating to appeals had not been complied with. This prompted counsel for the appellant to take the rather unusual step of indicating by letter to the Court, after the application for a stay had been heard, that after taking the matter under advisement, her instructions were to withdraw the summons and seek leave to apply for an extension of time in which to file the Notice of Appeal. For reasons that will be stated shortly, this was not allowed.

6. In the unique circumstances in which this appeal was attempted, I am constrained to find that it is incompetent and an abuse of the process of the Court. Therefore, there was nothing before the Court on which a claim for interlocutory relief or the automatic stay provisions attaching to magisterial appeals under the Act could fasten. I set out my brief reasons below.

The Notice of Appeal

7. The NOIA filed 4 December 2020 sets out some 12 grounds, which mirrored the grounds pursued in the 2014 appeal, and which are summarized (as well as redacted) at (i) to (vi) below. The NOA filed 17 December 2020 included an additional eight grounds (20 grounds in all),

summarized at (vii) to (x), and which were basically grounds taken from the 2018 Constitutional Motion. The grounds are summarized as follows:

(i) That the Magistrate "*erred in fact and law*" (this formulation is used throughout the grounds but not repeated in this summary) by failing to allow the appellants adequate representation on 4 July 2014, 25 October 2017, 14 November 2017, and 27 November 2020. (With the exception of the 4 July 2024, none of these dates involved a hearing before the Court, but were dates when writs for possession of land were issued or filed.)
(ii) That the Magistrate erred in failing to recognize that the case involved title to land and the Magistrate had no jurisdiction under s. 15 of the Act (as the value of the land was greater than $200.00), and under ss. 16(3), 17(2) of the *Limitation Act.*
(iii) That the Magistrate erred in failing to recognize the importance of the appellants' Quieting Title Action 2014/CLE/Qui/01309 and Public Law Action 2018/PUB/Con/00038.
(iv) That the Magistrate erred in deciding that the proceedings involved landlord and tenant issues where no evidence was presented to the Magistrate to prove that the appellants had ever been tenants.
(v) That the Magistrate erred in failing to recognize the legal importance of the fact that some appellants were in possession for more than 30 years and all had not paid rent for more than 20 years.
(vi) That the Magistrate erred in presuming to determine the legal ownership of the land, by seeking to determine how the appellants initially gained possession of the land.
(vii) That the Magistrate erred in failing to recognize that he was *functus officio* from the filing of the summons "to hear this matter".
(viii) That the Magistrate erred in failing to recognize that the appellants have the right to a fair trial and failed to recognize that the appellants' constitutional rights were "transgressed".
(ix) That the Magistrate erred in failing to inform the appellants of their right of appeal and the process for prosecuting such appeal.
(x) That the Magistrate erred in failing to recognize that an appeal had the effect of suspending the execution of a decision appealed from until it was heard and determined.

8. Although it unnecessary to treat with the grounds as a result of the conclusion I have come to regarding the Notice of Appeal, it is clear that in any event many (if not all) of them are misconceived and it is difficult to discern the errors of fact and/or law said to be raised by the grounds. I make the following observations by way of completeness only, and they are not relied on for the decision.

9. For example, the fundamental ground of appeal appears to be that the magistrate lacked jurisdiction to adjudicate the claim. In this regard, it is plain that section 52 of the Act provides that the Magistrate's court does not have jurisdiction "*to try summarily any case in which title to land or any interest therein is directly or incidentally in dispute*" (with the exception of claims to property valued $200.00 or less, s.15). However, the proviso to s. 52 provides for several exceptions to the lack of jurisdiction in a magistrate in relation to title to land as follows: (i) where the claim to such title is impossible in law; (ii) where the claim to the title is not set up in good

faith; (iii) where the act complained of was not done in assertion of title; and (iv) where the main point in the dispute is the correct position of the boundary line. Further, section 53(1) provides for the court to require the defendant to state the nature of his title, where he objects to the jurisdiction of a magisterial court on the ground that title to land or any interest therein is in dispute.

10. The true effect of these and similar provisions was noted in **Ex Parte Vaughan** [1866] L.R. 114, where Cockburn, CJ said [116]:

> "Where the title to property comes into question, no doubt the jurisdiction of justices is ousted, but that doctrine cannot apply to cases where the title is an essential element in the inquiry which the justices have to make."

11. However, this anterior inquiry only involves the Magistrate determining whether the factual and legal conditions exist that are a precondition to the grant of the relief which the party seeks. He is not being called on to adjudicate competing claims to title to the land.

12. Another ground was that there was no evidence that the appellants had ever been tenants. As indicated in the affidavit of Anthony Harris (filed 12 Marcy 2021) and that of Kranston Key (filed 24 October 2018), in response to a question from the Magistrate as to their right to be on the property, the applicants asserted a 12-year possessory interest. But in those very affidavits they averred that they had paid rent to the previous owner, at least up to 1999, and their grounds of appeal also challenged the ability of the respondent to recover arrears of rent. Faced with evidence of documentary title in the respondent, and the applicants' evidence that they entered the property as tenants and had paid rent to his predecessor in title, it plainly would have been open to the Magistrate to find that the applicants either were or had occupied the land under some form of tenancy arrangement. Thus, there could be no merit in that ground.

13. The next major ground, alleging lack of a fair hearing because their counsel was not present at the first hearing, was an impossible argument to make, in light of their admission that they were afforded a second hearing with their attorney present before the Magistrate perfected his Order and sealed a writ of possession thereto (see the detailed exposition of this point in the Ruling on the Constitutional claim).

14. But even standing back from the weaknesses in the grounds themselves, there were a number of developments which the applicants plainly should have appreciated had eroded the viability of the appeal at this point: for example, (i) the 2014 Appeal had been heard and twice refused by the Supreme Court (although on procedural grounds); (ii) the Quieting Titles action had been struck out; and (iii) the Court of Appeal dismissed the appellant's appeal against the discharge of an injunction granted pursuant to the Constitutional Motion, whose propriety the Court questioned.

ANALYSIS AND DISCUSSION

Preliminary Objections

15. As indicated, the appellants applied by summons for an injunction/restraint to prevent the enforcement of any of the writs of possessions sealed by the Magistrate. The intended respondent took two points *in limine*: (i) that the Appeal and the application for a stay were *res judicata* and in any event an abuse of process and both should be dismissed; and (ii) that the summons seeking a stay/injunction was procedurally improper, as there was no originating process before the court pursuant to which a summons for an interlocutory injunction could issue.

Res judicata/abuse of process

16. Firstly, the respondent submits that the Supreme Court on 2 July 2015 struck out the Magisterial appeal and refused to set it aside and restore leave when an application was again made for that purpose in June 2017. It is argued that the 2014 Appeal and the 2020 Appeal contain basically the same grounds. Further, at the date when the attempt to reinstate the Appeal was heard in 2017, the recognizance for the prosecution of the appeal remained outstanding, which is a condition-precedent to the hearing of the appeal. Therefore, although the appeal was not heard on its merits, it was considered twice by the Supreme Court and struck out, and is now caught by the doctrine of *res judicata*.

17. Secondly, the respondent claims that appellants have obtained a number of stays as a result of the appeals and other legal process filed in these proceedings, in circumstances which either smack of abuse or have been strategically used to thwart enforcement proceedings. For example, there was an automatic stay imposed under the Magistrate's Act in place from the filing of the appeal in July 2014 until it was dismissed on 27 June 2017.

18. On 22 December 2017, the appellants obtained an injunction *ex parte* made by Grant-Thompson J. staying the enforcement of the Order for Vacant Possession sealed 25 October 2017 (and filed 14 November 2017), pending the hearing of the Quieting Title Action. That injunction was discharged on 6 December 2018, after the appellants' counsel did not attend court on an adjourned date. Then, on 28 December 2018, K. Thompson J. stayed the 25 October 2017 Order for Vacant Possession, this time pursuant to a summons taken out under the appellants' constitutional motion. That was appealed to the Court of Appeal after Thompson J. set the injunction aside on 28 July 2020, and the Court of Appeal refused to reinstate the injunction, or interfere with the Judge's discretion in setting it aside. The Court of Appeal was critical of the circumstances in which the stays/injunctions had been obtained and indicated that the proposed appeal against the Quieting Title Action (which K. Thomson J. had struck out) did not have a reasonable prospect of success. It also cast doubt on the propriety of the Constitutional Motion.

19. The respondent says this pattern of pursuing parallel and numerous proceedings is an abuse of the process of the Court, and submits that the appellants have engaged in filing baseless actions simply for the purpose of providing some claim on which to ground an application for a stay/injunction against eviction.

Summons irregular

20. As to the summons, the respondent contends that the purported Notice of Appeal (for what it was worth) is not an originating process, and therefore cannot be used to undergird an application for injunctive relief. In this regard, *Ord. 29, r. 1* provides:

> "An application for the grant of an injunction may be made by any party to a cause or matter, whether or not a claim for the injunction was included in that party's writ, Originating summons, counterclaim or third party notice, as the case may be."

The respondent concedes that *Ord. 29* permits a stand-alone summons to be filed for the purpose of securing an injunction in a cause or action in advance of the filing of an originating document. However, he contends that the information in the summons is simply a replication of the grounds in the NOA, which has already been adjudicated by the Supreme Court, and therefore there is really no viable cause of action before the Court.

Appellants' submissions

21. The appellants' primary submission in support of its summons is that it had an "arguable case" on its appeal, relying on the case of **Trappers Company Limited v Licensing Authority Board** [2008] 2 BHS J. No. 33, where the Court granted a declaration to the effect that the appeal had the effect of suspending the execution of the decision appealed from pending the determination of the appeal (s. 56 of the Magistrate's Act). While the principle is correct, as is explained below, the appellants' reliance on it is completely misplaced based on the facts of this case.

Court conclusions

22. Before setting out my conclusions on this matter, it is necessary to refer to a few relevant provisions of the Magistrate's Act. Section 54 provides for an appeal from the decision of a stipendiary and circuit Magistrate to the Supreme Court in civil matters where the value exceeds $1.00. Section 55 provides for a Magistrate to inform a party of their right of appeal against an adverse decision and to indicate to such person what steps are necessary to pursue such an appeal. According to Section 56, an appeal has the effect of suspending the execution of the "decision" appealed from until the case is determined, and it also provides procedurally for notice of the intention to appeal to be served on the respondent within seven days of the Magistrate's decision. It further provides for an "aggrieved party" to apply to the appellate court (Supreme Court), on notice to the respondent, for an extension of time within which the notice of appeal may be served. Section 57 provides for an intended appellant within three days of the service of the notice of intention to appeal to enter into a recognizance for the due prosecution of the appeal and payment of any costs that may result from the proceedings.

23. Returning to the case, the appeal purports to be against the Magistrate's decision made 4 July 2014. Writs of possession in respect of the Order were sealed 15 October 2014, 25 October 2017 (filed 14 November 2017), and 27 November 2020 (filed 2 December 2020). I have not seen

the 27 November 2020 writ, but it is presumably in the same form as the 2015 and 2017 Orders, which are writs of possession for land in the form set out in the Schedule to the *Magistrates' Rules of Court 1934* (Rule 29(6)).

24. As far as I understand the position of counsel for the appellants, the current appeal seems to be predicated on the basis that the 27 November 2020 writ of possession (which was served 2 December 2020), was a new decision of the Magistrate for the purposes of an appeal. This is clearly erroneous. It is beyond the pale that the decision which was being appealed is the 4 July 2014 decision, and the later Orders were simply renewed writs of possession. Conceivably, legal action could be taken to resist the enforcement of one or more of the writs if there were proper grounds for doing so (for example, under the *Limitation Act*), but an appeal against the decision made in 2014 was not a viable course of action. But even using the date of the writ (or the date of service), the appeal filed 17 December 2020 would still have not complied with the timelines for magisterial appeals.

25. As noted, the respondent contended that the 2020 appeal was in substance the same appeal pursued in 2014 and was therefore *res judicata*. There is no need to descend into a detailed discussion as to whether the doctrine of *res judicata* applies in a strict sense, as that doctrine normally applies to decisions made on the merits and the appeal was never heard on the merits (see Lord Sumption's summary of the principles relating to *res judicata* in **Virgin Atlantic Airways v Zodiac Seats UK Ltd.** [2013] UKSC 46. However, there is a considerable degree of overlap between *res judicata* and the principle of *Henderson* abuse (**Henderson v Henderson** [1843-60] All ER Rep. 378), on which the respondent also relies, and which prevents parties from bringing the same proceedings that *could* have been litigated in earlier proceedings but for inadvertence or negligence. That certainly applies to the facts of this case, and this appeal would be caught by those principles, even if not strictly *res judicata*.

26. There is, however, an even more insuperable hurdle to the appeal. Inexplicably, by letter dated 7 December 2020, counsel for the respondent was still writing the Chief Magistrate (among others) requesting an appointment date to fix the recognizance prescribed by s. 57 of the Act, and the reference was in respect of Magistrate's Court Civil Appeal "*No. 00018 of 2014*". Thus, even at this point (2020) the recognizance had not been entered into in respect of the 2014 appeal, or for that matter the proposed 2020 appeal. The recognizance is a condition precedent to the hearing of an appeal (see **Walker v Delacombe** (1894) 63 L.J. 77), and in the absence of it the Supreme Court has no jurisdiction to hear the appeal. This is plainly not a competent appeal, and I would therefore strike it out (see, **Aviagents v Balstravest Investments Ltd.** [1966] 1 All ER 450).

27. Consequently, there is nothing on which a stay of execution can attach pursuant to s. 56 of the Magistrate's Act. Similarly, there is no process on which the stand-alone summons could fasten, as that sought a stay/restrain subject to the hearing and determination of "the appeal". That summons is clearly irregular and must also be dismissed.

28. As mentioned, counsel indicated to the Court an intention to withdraw that summons, although no application was filed for that purpose. In any event, the Court indicated that it would not have given leave for the discontinuance of that summons (even if an application had been made), as the matter was heard and it would have been an abuse for counsel to seek to "escape by the side door" from her application after the irregularities in the process had been pointed out. See, in this regard, **Gilham v Browning and Another** [1998] 2 All ER 68, where the court struck out as an abuse of process a notice of discontinuance by which the defendants had sought to escape from the first action, in a case where their counterclaim was "evidentially hopeless" in order to start a new action which would circumvent those evidential difficulties.

CONCLUSION AND DISPOSITION

29. In the circumstances, I am of the view that the purported Notice of Appeal is incompetent, and in any event it is caught by the doctrine of *res judicata* and/or an abuse of process of the Court and is struck out. Consequently, for the reasons given, the summons seeking a stay/restraint of enforcement is also dismissed.

30. Counsel for the respondent asked for costs to be personally awarded against counsel for the appellants. I decline to make that order, but I do order costs against the appellants to be assessed on an indemnity basis. The bringing of yet another attempt to open up the appeal against the Magistrate's decision six years after it was made and three years after the appeal was refused for the second time by the Supreme Court is plainly abusive and should be signified with a condign cost order.

Klein J.

2 May 2025