[2009] CCJ 6 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL
OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Application No AL 7 of 2008
GY Civil Appeal No 55 of 2004

In the Matter of a Petition by CHAMANLALL MUKHTIYAR and DHANDAI MUKHTIYAR for a Declaration of Title

BETWEEN

CHAMANLALL MUKHTIYAR
DHANDAI MUKHTIYAR **APPLICANTS**

AND

POONARDAI SUKHU
HARDEO BALGOBIN
RAJENDRA BALGOBIN
ROHAN BALGOBIN **RESPONDENTS**

Before the Right Honourable and the Honourables	**Mr Justice M de la Bastide, President**
	Mr Justice R Nelson, JCCJ
	Mr Justice D Pollard, JCCJ
	Mr Justice A Saunders, JCCJ
	Mr Justice J Wit, JCCJ

Appearances

Mr K A Juman-Yassin for the Applicants

Mr Rajendra Poonai, Mr Roopnarine Satram and Mr Chandraprakesh Satram for the Respondents

JUDGMENT
Delivered orally by the President
The Right Honourable Mr Justice Michael de la Bastide

on the 9th day of February 2009

JUDGMENT

[1] This is an Application for special leave to Appeal out of time to this Court from a decision of the Court of Appeal of Guyana. The decision against which it is sought to appeal, was given as long ago as the 30th June 2006. That decision was on a procedural point. The Court of Appeal held, in accordance with what was then a well established rule of practice in Guyana, that the appeal which the Applicants had filed against the decision of a Commissioner of Title could not be pursued because the attorney who was acting for the Applicants had not filed an authorization by his client to pursue the appeal on their behalf. As a result the appeal was dismissed without a hearing on the merits.

[2] That decision was not challenged by an appeal to this Court within the time prescribed. No doubt, that would have been the end of the proceedings but for the fact that in March 2007 this Court gave judgment in the case of **Watson v Fernandes** [2007] CCJ 1 (AJ). In that judgment, we held that the practice that had been followed in Guyana of requiring a written authorization of the attorney who was pursuing an appeal on an appellant's behalf, was misconceived and that there was in fact no such requirement. It was sufficient if the attorney who signed the notice of appeal and who appeared at the hearing of the appeal, in fact had the authority of the appellant to perform these services.

[3] Following that decision in **Watson v Fernandes**, the Applicants in these proceedings made an application by motion on the 15th June 2007 to the Court of Appeal, asking the Court of Appeal to review its earlier decision of the 30th June 2006 by which it had dismissed the Appellants' appeal on the ground which I have mentioned. The Court of Appeal dismissed this motion and quite rightly held that it had no power to cancel or reverse its own decision. Unfortunately the dismissal of this application did not occur until the 10th June 2008, nearly a year after it had been filed.

[4] Subsequently, the Applicants applied to this Court seeking leave to appeal against the dismissal of their motion by the Court of Appeal. That application was dismissed by us on the 7th November 2008. Indeed, it was in the course of the hearing of that application that the Court indicated to counsel that the proper course would have been for an application to have been made to this Court for special leave to appeal against the decision of the Court of Appeal dated the 30th June 2006. Apparently that gratuitous piece of advice was taken to heart and as a result, this application has been filed.

[5] We were careful however, when giving our reasons upon the dismissal of the first application to us for special leave to appeal, to point out that we were not intending to give any indication whatever that an application for special leave to appeal against the Court of Appeal's decision would be either successful or unsuccessful. We have now got to decide what its fate should be. Ought we to

grant leave at this stage to appeal against the decision of the Court of Appeal of 30th June 2006 in order to permit the Applicants to take advantage of the decision in **Watson v Fernandes**, and to clear the way for the merits of their appeal to the Court of Appeal to be argued and determined? I should have mentioned before that the substantive appeal to the Court of Appeal was against the findings of a Commissioner of Title who had rejected the Applicants' claim to have acquired by prescription the right of ownership over a parcel of land in Guyana. It is not necessary for me to describe those proceedings in any detail. That appeal was based purely on challenges to findings of fact made by the Commissioner who was not satisfied on the evidence that the Applicants had established adverse possession of the land in question for the requisite period.

[6] In deciding whether to grant special leave in this case a number of factors have to be considered and weighed in the balance. The most compelling factor in favour of the application is that as a result of a wrong ruling on a procedural issue, the Applicants have been denied a hearing of their appeal on its merits. On the debit side of the balance however, there are a number of factors which also have to be considered.

[7] There is first of all, the fact that the Applicants did not avail themselves, as the Appellant in **Watson v Fernandes** did, of the facility of appealing to the Caribbean Court of Justice the decision of the Court of Appeal to dismiss their appeal on the procedural ground. Admittedly, the practice of requiring some

formal written authorization of counsel who appeared on an appeal, was a long and settled practice in Guyana. But nevertheless, the possibility was open to the Applicants of challenging the ruling of the Court of Appeal and they failed to do so.

[8] Secondly, after the decision in **Watson v Fernandes**, the Appellants took the wrong procedure in setting about to upset the decision of the Court of Appeal. Instead of applying for an extension of time for appealing to this Court, they tried the hopeless expedient of getting the Court of Appeal to reverse itself. When that failed, they compounded the error by seeking to appeal that decision to this Court. The net result was that further time elapsed between March 2007, when **Watson** was decided, and the filing of this Application towards the end of 2008.

[9] Another important factor which weighs against granting this application is the prejudice which the Respondents have suffered as a result of their land being tied up and the transported owner being prevented from dealing with it as he would have wished. The evidence with regard to the intention of the transported owner in relation to the land is not altogether satisfactory, but the evidence suggests that he lives abroad and that, but for the pendency of these proceedings, he would have disposed of this piece of land already, but is prevented from doing so because of the likelihood of any further transport being opposed by the Applicants.

[10] Finally, there is the question of the Applicants' prospects of success on the hearing of the merits of their appeal. As I have said, the appeal is against findings of fact. Such appeals of course have certain inherent difficulties to overcome, as a Court of Appeal is never prone to reverse findings of fact by a trial judge. We have not investigated either the judgment or the evidence in the proceedings before the Commissioner of Title in sufficient depth to make any pronouncement as to the chances of success or failure of the appeal. What we can say, however, is that there does not appear to be any compelling reason to believe that the success of the appeal is overwhelmingly likely. In other words, there is no basis for concluding that if the appeal is not determined on the merits, there will be a significant risk of a miscarriage of justice. Put another way, it does seem to us that the appeal on the merits would be problematical.

[11] In all of these circumstances, we have a discretion to exercise because the overriding objective of the Court is to pursue a course that will lead to a just result.

[12] I have set out some of the factors which are relevant and in this case the factors are fairly finely balanced. But in the end we have come to the conclusion that it would be unfair to the Respondents, in the circumstances I have outlined, to submit them to further delay in disposing of the land, and further expense by extending these proceedings and giving special leave to appeal to this Court.

[13] We have taken into account that there have been a number of opportunities which the Applicants have failed to grasp to secure a reversal of the decision of the Court of Appeal to strike out their appeal and to obtain a hearing of their appeal on the merits. As a result of their failure to take these opportunities there has been prejudice to the Respondents. We do not consider that given the prospects of success which appear on the material before us, we would be justified in putting a further burden of delay and expense and uncertainty on the backs of the Respondents. In those circumstances, our decision is that the application for special leave is denied and the Applicants must pay the costs of this Application. The costs to be taxed in default of agreement.