IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. CV 299 of 2023

BETWEEN:

DAVIS YAMA

(as the Administrator of the Estate of Andres Yama)

Claimant/Respondent

and

MAYOLA MARIA YAMA

Defendant/Applicant

Appearances:

Mr. Rene Montero for the Claimant/Respondent
Mr. Aaron Tillett for the Defendant/Applicant

2024: November 12;

November 27.

RULING

Civil Practice and Procedure – Stay of Execution – Court of Appeal Rules 16(1)(c) and 17(1) – Applicable Tests for Stay.

[1] **ALEXANDER, J.**: This is an application for a stay of execution of an order pending appeal made on 24th April 2024 and perfected on 7th May 2024 ("the order"). The order was made following a trial of the fixed date claim to which the defendant/applicant ("the applicant") did not respond. Enforcement proceedings were taken out by the respondent on 24th May 2024. The applicant appealed the order by Notice of Appeal filed on 28th May 2024.

[2] As part of the judgment order, the applicant was removed from the property, which formed part of the estate of Andres Yama ("the deceased"). The notice of application for the stay of execution was filed on 20th June 2024. By that application, this court was asked to stay the execution of its order, as the applicant is experiencing severe hardship and financial challenges. The applicant also claimed that to make the application before the Court of Appeal would be inconvenient and cause delay. This latter argument was not addressed or fleshed out in her submissions.

[3] In her affidavit in support, the applicant says that she has a good arguable appeal, with a reasonable prospect of success. She averred that she and her children are experiencing "inconvenience" and hardship. She claimed that this would continue should the stay of execution be refused. Basically, by this application, the applicant wants to return to the property from which she was removed pursuant to the order of this court, rather than await the outcome of the appeal.

[4] On the evidence before me, I am not satisfied that the applicant was facing hardship and ruin as alleged or that she was entitled to return to the pre-judgment status quo pending the outcome of the appeal.

[5] I, therefore, dismiss the application.

Background

[6] The parties are siblings. The respondent is the brother of the applicant and the administrator of the estate of their deceased father who died on 14th June 2021 ("the deceased"). By fixed date claim filed on 12th May 2023, the respondent sought to prevent the applicant from interfering with the properties in the estate of the deceased, by selling or transferring them, and to be allowed to administer the estate.

[7] The first hearing of the fixed date claim form was listed for 26th July 2023 at 1:30 p.m.

[8] Despite being personally served with the claim, the applicant did not file an acknowledgement of service or a defence nor did she participate in the proceedings by attending any of the *virtual* hearings herself or through counsel. The applicant "responded" to the claim by letter dated 13th July 2023 ("the first letter") sent to the court, advising of medical reasons requiring "absolute rest" as excusing her non-participation in the virtual hearings. She attached a medical certificate to her first letter. The applicant did not retain counsel to appear on her behalf or to take steps to defend the claim and she did not provide any explanation for this failure in her correspondence. The matter was adjourned to 11th October 2023. The respondent was directed to serve the applicant with notice of the adjourned date of the hearing, and to re-serve all documents filed in the matter.

[9] On 11th October 2023, the applicant did not attend the virtual hearing. There was no communication with the court before or on the date of that hearing. The court directed the respondent to file a second affidavit detailing the evidence in support of his claim and directed that it be served on the applicant on or before 20th October 2023. On the said hearing date of 11th October 2023, the court also ordered the respondent to file written submissions in the matter by 31st October 2023. An affidavit of service was filed on 27th October 2023 by the respondent confirming that personal service of the **second affidavit** in the matter, and all accompanying documents, was effected on the applicant on 22nd October 2023. In response, on 30th October 2023 the applicant submitted another letter ("the second letter") to the court, annexing a second medical certificate advising of the need for "more rest".

[10] The second affidavit provided comprehensive evidence on the claim, including documentary evidence of quotations relative to the special damages or losses sustained. There was no indication in the applicant's two letters as to when, or if, the applicant's medical issues would be "improved" to enable her *virtual* attendance at court or to allow her an opportunity to get an attorney to respond to the claim.

[11] On 24th April 2024, the court heard oral submissions on the evidence before it and gave judgment. There was no participation of the applicant at the virtual trial of the claim, so it proceeded undefended.

[12] By her affidavit in support of the application for a stay, the applicant alleged that the court had failed to consider her "notices" to the court of her inability to attend the hearings because of medical issues, requiring ongoing "rest". She also stated that the court failed to consider the "relevant evidence" in coming to its decision.

Issues

[13] I have identified the primary issue for determination by this court as being whether the applicant has satisfied the elements to be granted a stay of execution of the judgment? Therefore, I treated with the present application as a single issue one.

[14] Counsel for the respondent, Mr. Montero, raised as a preliminary point the jurisdiction of this court to deal with the present matter. He argued that given that the appeal was filed on 20th June 2024, during the June Court of Appeal session, there was no issue of unavailability of the appellate court to deal with the present application nor was there any evidence of inconvenience or delay[1] advanced to show a justification for approaching the High Court with this application.

[15] This issue was not addressed by counsel for the applicant, Mr. Tillett, in his submissions. There was no dispute by both counsel that the High Court has the jurisdiction to deal with applications for stays under the Senior Courts Act.[2] Thus, Mr. Tillett pursued the application for a stay of execution before this court, and it was disposed of accordingly.[3]

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[1] Linda Bowman v Pricilla Herrera (as Executrix of the Estate of William Henry Bowman) et al Claim No. 370 of 2020 and Claim No. 801 of 2019; see also Dorian Gryffyn v FBS Markets Inc. Claim No. 42 of 2020.
[2] Act No. 27 of 2022 Schedule II Court of Appeal Rules, Order II Civil Appeals, Section 16, Gazette dated 15th November 2022.
[3] Fowler Works Enterprises Ltd v Minister of Natural Resources, Petroleum and Mining et al Claim No. 725 of 2022 (No. 2).

The Law

[16] The Senior Courts Act[4] ("SCA") makes provision for the receipt of applications for stay of execution by the High Court. Sections 16, 17 and 19 are reproduced hereunder:

> "16(1) In any cause or matter pending before the Court a single judge of the Court may upon application make orders for –
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> …
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> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
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> 17(1) Applications referred to in rule 16 shall ordinarily be made to a judge of the Court where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule.
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> …
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> 19(1) An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order, and no intermediate act or proceeding shall be invalidated except so far as the Court may direct."'

[17] In the interpretation section of SCA, Schedule 11 of the Court of Appeal Rules, Order 1 page 612, "the Court" means the Court of Appeal and the "court below" means the High Court of Belize.

[18] CPR 26.1(2)(e) provides that the court has the power to stay the whole or part of any proceedings generally or until a specified date or event.

[4] Act No. 27 of 2022 Schedule II Court of Appeal Rules, Order II Civil Appeals, Section 16 page 621-622, Gazette dated 15th November 2022.

Discussion

Whether the applicants have satisfied the elements to be granted a stay of execution?

[19] An application for a stay of execution pending an appeal seeks to halt the enforcement of the judgment until the appeal can be decided on the merits. As such, an order granting a stay is not made by a judicial sleight of hand. Essentially, an order to stay the execution of a first instant judgment is an exception rather than the rule.

[20] Before a court grants a stay of the execution of its judgment, it will first carefully consider the application, since a successful party is entitled to the fruits of its judgment. It is the applicant's responsibility, therefore, to show why the stay ought to be imposed.

[21] In the present proceedings, the overarching consideration used to determine the issue is the risk of injustice likely to arise, from imposing or refusing the stay.

[22] Regarding the issue of injustice, the Caribbean Court Justice has identified certain factors to be considered before exercising the discretion on a stay of execution: see **Rodrigues Architects Limited** v **New Building Society Limited**.[5] These include the prospect of success on the appeal, any ruin or diminishing of the effects of a successful outcome of the appeal, and the reasonable probability or improbability of enforcing judgment after a successful or failed appeal.

[23] I now liberally set out our apex court's guidance in **Rodrigues** on the modern approach to stay orders. JCCJ Hayton states:

> "[22] A stay of execution is the exception rather than the rule and the onus is firmly on the applicant to make out the case for a stay, which requires the *court to answer the essential question whether, in all the circumstances, there is a risk of injustice to one or other of the parties if it grants or refuses a stay.*

[5] [2018] CCJ 09 (AJ).

> [23] To answer this question, the first issue is whether the applicant for a stay can satisfy the court that the applicant's appeal has a good prospect of success or, as the applicant argued before this Court in **Ramdehol v Ramdehol**, has a "good arguable appeal." If not, no stay should be granted.
> …
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> [24] The second issue is can the defendant establish he would be ruined or his appeal otherwise be stifled if forced to pay out the judgment sum immediately, instead of after an unsuccessful appeal? If not, prima facie a stay should not be granted unless an affirmative answer is given as to the third issue. The onus is on the defendant to provide full, frank and clear details of his financial position.
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> [25] The third issue is can the defendant establish that there is no reasonable probability that the claimant will be in a position to repay the monies paid to him by the defendant to satisfy the money judgment if the defendant's appeal succeeds? If the defendant can affirmatively establish that no such probability exists, prima facie a stay should be granted. The onus is on the defendant to produce a measure of evidence of the claimant's financial weakness sufficient to make it necessary for rebuttal by the claimant who has easily available personal knowledge of the claimant's own detailed financial position. If the claimant's financial position is sound then no stay should be granted.
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> [26] A fourth issue that may arise is what are the risks that the claimant will be unable to enforce the judgment if a stay is granted and the defendant's appeal fails? Here it may be that the just solution is for the defendant to pay the judgment sum into court to await the outcome of the defendant's appeal, assuming that such payment would not stifle the appeal and that payment to the claimant (rather than into court) might well lead to the monies being irrecoverable by the defendant from the claimant. This, however, ought to be a last resort so that the claimant if possible can have the monies available for entrepreneurial or investment opportunities."

[24] I now turn to the evidence provided in the present matter.

(a) Prospect of Success

[25] The applicant says in her affidavit that she was aware of the first hearing date of 26th July 2023 but did not attend due to health issues. She also had financial challenges in retaining counsel. She provided no evidence of her financial challenges save to say that the attorney that she had retained to transfer the deceased properties to herself

did not agree to act in this matter for her. Further, she stated that after she was served with the court documents, she was only able to attend clinic and consult with her physician who wrote the first letter in July on her behalf. I assume that her attendance at the medical clinic was in person. She stated that after dispatching her first letter to the court, she did not hear anything from the court or the respondent until October 2023, when she received the notice of another hearing date. She then visited another doctor to find out if she could attend court and was advised of the need for "more rest". The second letter was sent to the court. She was unaware if there was a trial and/or if any evidence was brought to the attention of the court.

[26] She claims that she has arguable grounds of appeal because a summary judgment was given on a fixed date claim; the relevant evidence was not considered before a decision was made, and the "notices" of her medical issues were not considered by the court.

[27] Regarding the consideration of the court before granting the judgment against the applicant, there is no dispute that the applicant was served with the second affidavit of the respondent. The second affidavit comprehensively detailed the evidence before the court at the trial, and annexed documentary proof of losses. The applicant was also afforded several adjournments but did not defend the claim, retain counsel or even attend the virtual hearings. The two letters or "notices" as they are called by the applicant were not in evidence before the court nor were they capable of providing an answer to the claim served on the applicant. In any event, it is not for the court to pursue the applicant to convince her to attend its hearings or to respond to a claim that she acknowledged was served personally on her.

[28] The applicant stated that she has a reasonable prospect of success at the appeal because all the properties in the deceased's estate were "gifted" to her by him, a couple of weeks before his untimely passing. Through her attorney, she was in the process of transferring the titles of the properties into her name when the deceased died. However, the deceased who suffered from Parkinson's disease had already

signed the transfers with his own hand so after his demise, she had instructed her attorney to complete the transfers. She claimed equitable titles in all the properties as the legal basis on which she would succeed on the appeal.

[29] Mr. Montero submitted that it is settled law that the appellate court will not disturb a trial judge's finding of fact unless it could be demonstrated that either the judge made some material error of law, there was no basis on the evidence for the finding of fact, the judge failed to consider relevant evidence, or the findings of fact cannot be reasonably explained or justified. Mr. Montero also submitted that in the present matter, the requirements for overturning a first instant order did not exist nor are they satisfied.

[30] Mr. Montero also argued that the applicant, by conduct, has deprived herself of the right to appeal. She failed to participate in the present matter by acknowledging service, filing a defence or even attending the virtual hearings so based on her conduct, she has no right to appeal an order entered in her absence: see s. 201 (4)(f) of the SCA. He submitted that as the order was made where the applicant was in default, no appeal would lie in such circumstances, Mr. Montero then submitted that his arguments are fortified by CPR 39.5. I will set out below both provisions.

[31] The SCA stipulates when an appeal can be made or not. Section 201(4)(f) SCA provides that:

> "201(4) No appeal shall lie under this part-
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> …
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> (f) where an order has been made against a party in default of his appearing or filing a defence or where the party is otherwise in default,
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> Provided that nothing in this paragraph shall be deemed to affect the right of such party to move the court of first instance for the setting aside of the default order."

[32] CPR 39.5 reads as follows:

> "39.5 (1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended, some other judgment or order might have been given or made."

[33] Accordingly, Mr. Montero advanced that the applicant ought to have filed her application pursuant to the above provisions and not by way of an appeal. Having failed to defend the claim, the applicant has no basis to argue that she has some prospect of success.

[34] I have considered the arguments of the applicant and respondent, as advanced by their counsel in the present application. I refuse to grant the present application.

[35] The order granting the judgment in the present proceedings was made pursuant to a judicial exercise, where the evidence before the court was perused and considered. However, the evidence was limited only to the respondent's case, as the applicant did not participate in or advance any evidence at the summary trial. At the time also, submissions were only obtained from counsel for the respondent.

[36] In disposing of this matter, I have considered that the applicant's evidence of her case is not before me to enable any determination on the prospect of success at the appeal. My conclusions on this application are reached in circumstances where the matter was undefended, and the applicant has limited to no evidence before me except her claim of equitable entitlement to the entirety of the estate of her deceased father. I noted the submission of Mr. Montero that the absence of a defence poses a challenge to determining the prospect of success. While I noted that the affidavit of the applicant did raise the issue of equitable rights to the properties in the estate, I am not satisfied that this limited evidence can rescue the present application from being dismissed.

(b) Ruin

[37] The applicant says in her affidavit that she is likely to face ruin if the judgment is not stayed. She claims that the order caused her to be evicted from her usual place of residence. Consequently, she is forced to rely on her sons for housing and financial assistance and she is now a burden to her family. She avers also that should she be successful on appeal; she would be unable to recover the property at which she lived if the respondent chooses to sell or transfer the property to a third party in the interim. She is likely to suffer irremediable harm, but the respondent is unlikely to suffer any prejudice or similar detriment if the stay is ordered.

[38] She provided no evidence to support her assertions of undue hardship. She averred simply that the respondent has his own house and family so she should be entitled to occupy the property "gifted" to her by her deceased father before he died. I was not sure how the evidence of the respondent's ownership of his house or having his family was relevant to this application. Also, she made no averments about the several other properties that she claimed to be equitably entitled to and which she was in the process of transferring when the deceased died.

[39] I am not satisfied that the material contained in the applicant's affidavit evidence demonstrated that she would be ruined absent a stay.[6] The applicant is required to show me that she would face ruin or that some serious risk of irremediable harm exists if I do not grant the stay. The affidavit evidence falls way short of that.

(c) Risk of Injustice in Stifling the Appeal

[40] I consider briefly and generally if, in the context of this case, there is a risk of injustice likely to be suffered by any party should I grant or refuse the stay. I conclude that there is none nor is there any likely risks of an appeal being stifled if entertained. This is a

[6] Commissioner of Sales Tax et al v Sanitation Enterprises Ltd Civil Appeal No. 36 of 2010.

case involving the administration of the deceased's estate, and where the respondent, as administrator, is required to distribute the properties in the estate. The applicant is one among other siblings with beneficial interest in the estate. However, Mr. Tillett, the applicant's counsel, argued that she would be prejudiced because the applicant is equitably entitled to **all** the deceased's properties. I was not convinced by the argument.

[41] In my view, allowing the respondent to administer the estate gives rise to no injustice. I find that the greater risk of injustice lies in granting the stay and stymying the administration of the deceased's estate. I find no present or looming ruination being faced by the applicant nor am I able to, on the evidence before me, say that the applicant's prospect of success on the appeal is likely to be stifled if I dismiss this application. I have no sufficient evidence before me that would lead to that conclusion.

[42] Given my conclusions above, it is clear that I refuse to suspend the execution of the judgment.

Costs

[43] Costs should follow the event. The respondent seeks BZ$3,000.00 in costs.

[44] I find the sums claimed in costs to be skewed on the higher side of the scale of reasonableness for the work done in this matter. I order that the applicant is to pay the costs of the application, on the basis of what is reasonable and proportional to the work done in responding to the application.

Disposition

[45] It is ordered that:

1. The application to stay the execution is refused.

2. The applicant is to pay the claimant's costs of the application in the sum of BZ$2,500.00.

Martha Alexander
High Court Judge