[2012] UKPC 13
**Privy Council Appeal No 0117 of 2010**

# JUDGMENT

# Margaret Toumany and John Mullegadoo *v* Mardaynaiken Veerasamy

## From the Supreme Court of Mauritius

**before**

**Lord Hope**
**Lord Brown**
**Lord Mance**
**Lord Dyson**
**Lord Sumption**

## JUDGMENT DELIVERED BY LORD BROWN ON

## 10 May 2012

**Heard on 30 March 2012**

| *Appellant* | *Respondent* |
| --- | --- |
| Nandkishore Ramburn<br>Jennifer Wong Ten Yuen<br><br>(Instructed by SB Solicitors) | Not Represented |

**LORD BROWN**

1. Is there a mango tree in the respondent's back yard at No 303 Nelson Mandela Avenue, Quatre Bornes? Was the first appellant, the respondent's neighbour, authorised by the respondent's predecessor in title to construct a balcony as close as she did to the boundary line between the two properties with windows opening onto the respondent's yard? These and other such factual questions were first raised almost a decade ago in litigation between the parties, yet astonishingly they remain to this day unaddressed and unresolved. How has this come about? It is, in the Board's view, a sorry tale.

2. The respondent issued her claim by proecipe as long ago as 30 September 2002. Certain particulars of it were sought and given and on 27 May 2003 the appellants filed their defence. The second appellant is the first appellant's son and used to live at the premises with her. In circumstances which are far from clear the Municipality of Quatre Bornes was at some stage joined in the proceedings as "co-defendant".

3. The case was initially fixed for a hearing in the Intermediate Court on 8 December 2003 but, on the joint application of counsel for both main parties, was on that day adjourned and re-fixed for 24 June 2004. On 24 June 2004 counsel for the defendants was in court but the case was postponed initially to 7 July 2004 at the request of the co-defendant and then again to 4 August 2004 for the co-defendant to file its plea. On 4 August 2004 the co-defendant duly filed its plea and the case was finally fixed for hearing on 15 February 2005. Regrettably, however, the defendant's attorney had at that stage lost the case file and so was unaware of that fixed date.

4. As it happens, on 10 February 2005 the respondent's attorney wrote to the presiding magistrate at the court, noted that the respondent's counsel had taken up a post at the Financial Services Commission and was no longer available and asked for the case to be removed from the list on 15 February so that fresh counsel could be instructed. The letter was not, however, copied to the appellants and, as already indicated, it in fact played no part in their absence from court on 15 February. But the respondent's attorney did attend court on 15 February and, finding the appellants absent and unrepresented, he proceeded to call the respondent to make out his case and thus secured judgment (the co-defendant's attorney offering no objection to this course since no relief was being sought against the Municipality).

5. By that judgment (given by Magistrate Mr B Marie Joseph) the first appellant was directed "to pull down the balcony protruding onto the boundary line"; the

respondent was authorised "to extend the height of the wall found on the boundary line" (as apparently he has since done to the height of some 20ft); both appellants were directed "to stop interfering with the respondent's quiet and peaceful enjoyment of his immovable property" and both appellants were ordered to pay the respondent "jointly and in solido the sum of Rs50,000 as damages with costs."

6. The appellant learned of the judgment only in March when they observed the respondent raising the boundary wall but it was not until some three months later, on 3 June 2005, that their attorney (still the same attorney as had earlier lost their file) came to file an application for the judgment to be set aside, execution stayed and a new trial ordered.

7. That application was heard by Magistrate Mrs R Seetohul-Toolsee inter partes on 7 December 2005 and on 26 January 2006 was refused. Rules 62-72 of the District and Intermediate Courts (Civil Jurisdiction) Rules govern the grant of a new trial, those most pertinent here being rules 63 and 65:

> "63 The magistrate shall have power (on such conditions as to security for the amount of the judgment or for damages and as to payment of costs, as he may deem proper), to grant a new trial, in any case where it shall be in his opinion necessary so to do for the ends of justice.
>
> 65 Such application for a new trial must be made at any time within 15 days from the date of the judgment, if the judgment has been given in the presence of both parties, or within 15 days after the execution of such judgment when it has been given for the plaintiff, in the absence of the defendant."

8. On its face rule 65 requires any application for a new trial to be made within 15 days (here 15 days after execution of the judgment) and could be read as disabling the magistrate from granting the application even if, within the meaning of Rule 62, in the magistrate's opinion the grant of a new trial is "necessary . . . for the ends of justice."

9. Clearly, however, that would be a wrong construction: the rule is discretionary rather than mandatory or, in more modern terms, the rulemaking authority cannot have intended so drastic a consequence to follow necessarily and automatically from a (perhaps only marginally) late application. Nor, indeed, did the magistrate in the present case suggest that she was debarred from granting the application by virtue only of its being out of time. On the contrary, her ruling ends: "For all these reasons, this court declines to exercise its discretion to grant a new trial."

10. As for the reasons given, the Board confesses to some puzzlement. For example, having cited authority for the proposition that: "We must however be careful to see to it that counsel's conduct be not unfairly reflected on the appellant unless there is at least some indication of negligence on his part as well", the magistrate's ruling continued:

> "Had this been the case, the attorney would have been perfectly entitled to inform the court by writing of that predicament well before trial date for the needful to be done until the file had been traced out. But unfortunately, no such step seemed to have been undertaken."

What can this mean? It certainly looks as if the attorney's negligence has after all been visited on the appellants. Before further considering this, however, the Board must explain how it came about that, even at the next stage of the litigation, the appellants were still denied a judgment on the merits.

11. On 15 February 2006, just three weeks after the magistrate's rejection of their application for a new trial, the appellants issued proceedings by way of an appeal against that ruling to the Supreme Court. By this stage they had come to be represented by, amongst others, Sir Hamid Moolan QC. Following the usual interlocutory processes the appeal was first (on 22 June 2006) fixed for hearing on the merits on 7 June 2007, next (on 5 June 2007) fixed for hearing on 30 July 2008 and finally (on 2 September 2008) fixed for hearing on 26 October 2009.

12. There is before the Board a transcript of the hearing before the Supreme Court (Judge S Peeroo and Judge S B Domah) on 26 October 2009 and the great bulk of it records the submissions of both parties on the appropriateness or otherwise of the Intermediate Court ruling as it had. Towards the end of the hearing, however, counsel for the respondents suddenly, with no previous intimation whatsoever, took a jurisdictional point. His submission was that the Supreme Court had not been properly seised of the appeal.

13. It is necessary at this stage to interrupt the Board's account of the litigation and explain, as briefly as may be, just how this jurisdictional point comes about. The Supreme Court, as presently constituted, was created by the 1968 Constitution and, pursuant respectively to section 80 and section 82(2) of the Constitution, had conferred upon it certain appellate jurisdictions. The material parts of those sections (insofar as they govern civil appeals) are as follows:

> "80(1) There shall be a Court of Civil Appeal . . . which shall be a division of the Supreme Court.

(2) The Court of Civil Appeal shall have such jurisdiction and powers to hear and determine appeals in civil matters . . . as may be conferred . . . by this constitution or any other law.

(3) The judges of the Court of Civil Appeal . . . shall be the judges for the time being of the Supreme Court."

"82(2) An appeal shall lie to the Supreme Court from decisions of subordinate Courts in the following cases . . .

(d) In such other cases as may be prescribed: . . ."

14. Before the 1968 Constitution there already existed a Supreme Court and by section 2 of the Court of the Civil Appeal Act 1963 a Court of Civil Appeal was for the first time created so that appeals from a single Supreme Court judge could be heard within Mauritius rather than have to be appealed to the Judicial Committee of the Privy Council. Section 3(1) of the 1963 Act provided that:

"Subject to this Act and to any rules of Court made under it, any party aggrieved by any judgment or order of a Judge sitting alone in the exercise in Court of his original civil jurisdiction may appeal from such judgment or order to the Court of Civil Appeal."

15. Section 3(1) of the 1963 Act was the only example provided to us of where, pursuant to section 80 of the Constitution, the Court of Civil Appeal now has jurisdiction over civil appeals. Whether other examples exist, however, is for present purposes immaterial. More important is section 2(4) of the 1963 Act which provides:

"The Chief Justice, or where he is absent or is for any reason unable to sit on the Court of Civil Appeal, the Senior Puisne Judge, shall preside over the Court of Civil Appeal."

One can readily see why, if the appeal jurisdiction being exercised by the Supreme Court is that from a Judge (himself or herself ex-officio a Judge of that Court), it is desirable that the presiding judge shall be the Chief Justice or the Senior Puisne Judge.

16. That, however, appears to be the only material difference existing procedurally or substantively in the nature of appeals before the Supreme Court which is made dependant on the particular appellate jurisdiction being exercised by the Supreme Court in a particular way.

17. Clearly there was no question in the present case of the appeal coming before the Supreme Court under section 80 of the Constitution. Rather the jurisdiction to hear it arose under section 82(2)(d), an appeal to the Supreme Court being "prescribed" here by section 69(1) of the Courts Act 1945:

> "69(1) Subject to any other enactment, the Supreme Court shall have full power and jurisdiction to hear and determine all appeals, . . . made to the Court from . . . (e) the Intermediate Court; . . ."

Their Lordships may add that none of the above has ever been in doubt or dispute in the present litigation.

18. That is the only explanation necessary of the background to the jurisdictional point taken here by the respondent's counsel late in the argument before the Supreme Court on 26 October 2009. The bald point taken was that certain of the formal Court documents launching this appeal erroneously referred to "The Supreme Court of Mauritius, Court of Civil Appeal". Perhaps unsurprisingly, the Court's initial reaction to the point appears to have been unenthusiastic: ". . . you haven't taken this as a preliminary objection and the Court is already being seized (sic)." And a little later the Court can be seen criticising the respondent's attorney at the original hearing for not having elicited any evidence as to whether or not the first appellant, as pleaded, had in fact had the relevant authorisation for the building works.

19. In the event, however, by its judgment dated 11 November 2009, the Court accepted the respondent's jurisdictional point and dismissed the appeal solely on that basis. The judgment extends only to one and a half pages and can be briefly summarised. Having accepted that not all the documentation pointed to the appeal being wrongly directed to the Court of Civil Appeal – for example, "in the body of the notice and ground of appeal it is stated that the appellants do 'hereby appeal to the Supreme Court of Mauritius'" – the Court continued:

> "We take the view that this, in the light of the heading of the notice of appeal and the *praecipe*, cannot conclusively show that the appeal is directed to the Supreme Court, since the Court of Civil Appeal is also a division of the Supreme Court as provided by section 2(2) of the Court of Civil Appeal Act. At the most, it only goes to indicate that there is some ambiguity and confusion as to the jurisdiction that is being seized, but it does not unequivocally show that this appeal from the decision of a magistrate has been lodged before the Supreme Court as opposed to the Court of Civil Appeal, which is a different and separate jurisdiction that can only hear appeal from a judgment or order of a judge in the exercise of his original civil jurisdiction."

A little later the Court concluded:

> "In the circumstances, the appellants being uncertain in what capacity they have seized the present Court – whether as a Court of Civil Appeal which, pursuant to section 80 of the Constitution, is a division of the Supreme Court, or as the Supreme Court, a separate and distinct jurisdiction which, by virtue of section 82(2) of the Constitution, hears appeals from decisions of subordinate courts, and since the jurisdiction of a court is a matter of public order, they can only ignore the competence of the court they are seising at their own risk and peril. For the above reasons, irrespective of whether there may be substance in this appeal, we have no alternative than to set it aside with costs."

20. We come finally in the history to the Supreme Court's own grant of conditional leave to appeal to the Judicial Committee dated 4 June 2010 which, to the Board's mind, clearly suggests a degree of unease about Mauritius' present jurisprudence on the point. Having recognised that the value of the dispute in any event entitled the appellants to appeal as of right, the Supreme Court continued:

> "For the above reason, *and also in view of the state of our jurisprudence in respect of appeals which have been either lodged before or directed to the wrong jurisdiction*, we grant leave to the applicants to appeal to the Judicial Committee." (emphasis added)

Should this appeal to the Supreme Court have been dismissed on jurisdictional grounds as it was? That is the critical first question now for decision by the Board and we should be dissimulating were we to answer it other than by a categorical and resounding NO.

21. The Board is aware that this is by no means the only case where the Court has adopted a highly technical approach to the jurisdictional point here raised. Indeed a series of such cases is rehearsed in the Supreme Court's judgment, dated 28 April 2011, given by the Chief Justice and the Senior Puisne Judge in *Begue v The Mauritius Union Assurance Co Ltd* [2011] SCJ 104, a judgment which itself dismissed an appeal – from a judge's award of damages in a fatal accident claim – because the notice of appeal bore the heading "In the Supreme Court of Mauritius" instead of, as the subsequent proecipe did, "In the Supreme Court of Mauritius, Court of Civil Appeal". Having referred to a number of cases in which a similar mistake had been held fatal to the appeal, the Court concluded: "In the light of the decided cases . . . we uphold the preliminary objection. This appeal cannot proceed since the notice of appeal, which is the initiating process, is itself defective so that it cannot be cured down the line."

22. True, of course, in some of the cases, including *Begue* itself, the mistake in the documentation could theoretically have led to the court being wrongly constituted ie without the Chief Justice or the Senior Puisne Judge presiding. But in none of the cases is this referred to as a possibly relevant consideration and plainly it caused no problem in *Begue* (where, indeed, both the Chief Justice and the Senior Puisne Judge were in fact sitting). Still less could it cause a problem in a case like the present where the Court could properly comprise, as it did, any two Supreme Court judges.

23. The Board has sought in the past to encourage the courts of Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections – see in particular *Woventex Ltd (In Receivership) v J I Benichou and Others* [2005] PRV 27 (para 17 of Lord Walker's judgment) and *Fun World Co Ltd v The Municipal Council of Quatre Bornes* [2008] PRV 46 (paras 24 and 25 of Lord Mance's judgment). No doubt, as the Supreme Court observed in *Mosque v A R Rossaye and Another* [2007] SCJ 322 (yet another in the present line of cases), *Woventex* has no direct application to the particular question which these cases raise. We find it impossible to accept, however, the Supreme Court's conclusion in *Mosque* that: "the Court of Civil Appeal, though forming part of the Supreme Court, is nevertheless a different juridical entity. We accordingly consider that the appeal as presently lodged cannot be entertained."

24. Let the Board now state as emphatically as it can its clear conclusion on this appeal. In cases like these, where mistakes appear in the documentation as to which particular appellate jurisdiction of the Supreme Court has been invoked, those mistakes should be identified and corrected (without penalty unless they have genuinely created a problem) as soon as practicable and the Court should proceed without delay to deal with the substantive issues raised before it on the merits.

25. The line of authority represented by the Supreme Court's decision in the present case constitutes a blot on Mauritius's generally estimable record for the fair administration of justice. It must not be allowed to continue.

26. As we noted at the outset, it is now almost ten years since issue was joined between these neighbours. Rather than at this point remit the case back to the Supreme Court so that it may properly decide the appeal before it on the merits, or remit the case back to the Intermediate Court for it to decide afresh on whether the appellants should be granted a new trial (they being apparently blameless for their non-attendance at the original hearing), it seems to the Board imperative that there should indeed now be a new trial to be fixed as soon as possible for substantive hearing by the Intermediate Court on the merits. The Board, therefore, allow the appeal and so direct.

27. Clearly the appellants (or more properly, as we have no doubt will readily be recognised, their original negligent attorneys) should pay the costs thrown away by both the earlier hearings before the Intermediate Court (the hearing at which judgment was given and that at which a new trial was refused). We shall make no order as to the costs of the proceedings before the Supreme Court although would observe that the appellants' lawyers instructed on that appeal can hardly seek to charge their clients given the problems brought about by their erroneous documentation. The appellants' costs on the appeal to the Board should, however, be paid by the respondent. On this final appeal he chose not to appear. Perhaps he recognised that a signal injustice had been occasioned to these appellants. It is high time that at last it was rectified.