IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
APPELLATE JURISDICTION

Civil Appeal No. 127 of 2016

BETWEEN:

1. **SHERENE MONGROO**
Appellant/Plaintiff

2. **ZENOBIA ROSENBURG** pursuant to Order of Court of the Honourable Justice George dated the 4th day of February, 2013.
Added Plaintiff

-and-

1) **SASEDAI KUMARIE PERSAUD,** personally and in her capacity as the named executrix in the purported Last Will and Testament of **YUSUF MONGROO,** deceased, who dies on the 15th August, 2010.

2) **INDRANIE MULCHAND**
Respondents/Defendants

CORAM:

Hon. Mde. Justice D. Gregory	**- Justice of Appeal**
Hon. Mr. Justice R. Persaud	**- Justice of Appeal**
Hon. Dr. Justice A. Bulkan	**- Justice of Appeal**

Appearances

Mr. N. Boston, SC for Applicant First Named Appellant.
Mr. H. N. Ramkarran, SC for First Named Respondent.
Mr. R. Satram for Second Named Respondent.

Dates:

14th February, 2018.
31st May, 2018

Decision of the Court delivered by Gregory JA

Introduction

[1] The Applicant, **Sherene Mongroo**, was one of the plaintiffs in High Court proceedings in which she disputed a will presented as being that of her deceased father, Yusuf Mongroo. It is not disputed that at the time of his death Yusuf Mongroo owned two properties in Guyana, lot 6-7 Commerce and Longden Streets and lot 107 New Garden Street,

Georgetown and that he carried on a business known as Horseshoe Racing Service. The respondents, Sasedai Kumarie Persaud and Indranie Mulchand are the beneficiaries under the will and were defendants in the High Court action. After a trial the Honourable Justice Roxane George, as she then was, dismissed the plaintiffs' case and gave judgment for the defendants on their counterclaim. By her judgment delivered on December 16, 2016 George J ordered:

> **The Plaintiffs' claim to be dismissed with costs to [each] Defendant and for reasons stated pleadings on defence and counterclaim of the 1st named Defendant to be amended to reflect that a copy of the will should be admitted to probate and [further] that the Will presented to the court be probated in solemn form as sought in the counter claim.**

[2] A Notice of Appeal to the Court of Appeal was filed by the plaintiffs, followed shortly after by an application, filed by Sherene Mongroo, for a stay of execution of the judgment of the High Court. The summons was heard in chambers by the Honourable Justice of Appeal BS Roy under Order 2 Rule 16 (1) (c) of the Court of Appeal Rules which empowers a single judge of the Court of Appeal to hear applications for a stay of execution pending appeal. On February 16, 2017 Roy JA ordered:-

> **[A] Stay of Execution of the Judgment dated the 16th day of December, 2016 be and is hereby granted upon the following conditions: (a) the executor of the last will and testament of the deceased be and is hereby permitted to apply for Probate of the Estate of the deceased (b) Title to the immovable property of the Estate of the deceased shall not be vested pending the hearing and determination of the Appeal**

[3] By way of an amended motion to the Full Bench of the Court of Appeal the Applicant now seeks the discharge of that part of the order of Roy JA which gave leave to the first-named Respondent as executrix of the will (a) to apply for Probate of the estate and (b) ordered that title to the immovable property of the estate shall not be vested pending the hearing and determination of the appeal. In effect, the Applicant seeks a

full stay of the order of the High Court until the hearing and determination of the appeal.

[4] Order 2 Rule 16 (2) of the Court of Appeal Rules provides that every order made by a single Judge in pursuance of Rule 16 may be discharged or varied by any Judges of the Court having power to hear and determine the appeal. In exercising the jurisdiction under this rule the Full Bench has only a review jurisdiction of orders made by the single Judge and cannot thereby embark upon a second exercise of the jurisdiction. As Bernard C explained in **Gahindra Naraine et al v National Bank of Industry and Commerce Ltd [2001-2002] GLR 279 at 284:**

> **[A]n Applicant having chosen to apply for an order under Rule 16 (1) to a single judge of the Court cannot now come to the Full Bench on a fresh application; one can only come to the Full Bench for a review of the order made by the single judge.... The delegation of jurisdiction to a single judge for applications listed in R 16 (1) having been made the Court is deemed to have acted; it is the same jurisdiction being exercised by the Full Bench.**

[5] Therefore, an applicant would not be entitled to consideration by the Full Bench of facts which were known at the time of the hearing of the application for the stay but were not placed before the judge in chambers. In determining whether the order or part of the order granted in chambers ought to be discharged, the Full Bench must consider whether the principles applicable to the exercise of the discretion to grant a stay pending appeal were correctly applied having regard to the facts and the circumstances of the case.

[6] It was contended on behalf of the applicant that having granted the stay of execution of the judgement of the High Court, the order permitting the executrix to apply for probate of the estate and ordering that title to the immovable property not be vested pending the appeal was unreasonable and inconsistent with the stay granted.

The Application before the Full Bench

[7] After setting out the grounds of appeal in her affidavit in support of the amended motion, the applicant stated that her appeal was likely to succeed. She deposed (para 12) that the deceased owned movable and immovable property including shares in companies and bank accounts in Guyana and abroad. She listed several bank accounts and other movable assets held by the deceased abroad at the date of his death, stating (para 18) that a grant of probate could be resealed abroad thereby giving the executrix unlawful access to assets of the deceased in Guyana and abroad. She also deposed (para 13) to an order dated August 31, 2010 of the Honourable Chief Justice (ag) Ian Chang giving leave to Sasedai Kumarie Persaud to carry on the business of Horseshoe Racing Service and ordering that the accounting operations be supervised by a named accounting firm. That order also directed that copies of audited accounts of the business be given to her. The applicant further deposed that Sasedai Kumarie was still carrying on the business and she pointed out that damages would not be an adequate remedy. She asked the Court to ensure that if her appeal is successful it would not be rendered nugatory. The Applicant called upon the Court's power to preserve the status quo in order to ensure that its judgments are not rendered valueless by an unjustified disposal of assets pending the appeal.

[8] Thus the main complaint in the application to the Full Bench was the access to movable property in Guyana and abroad which the executrix would have, in addition to the access she already had to the business proceeds of Horseshoe Racing Service, as a consequence of her being allowed to apply for probate pending the determination of the appeal. However, details of these assets of the deceased and the perceived risks were not mentioned in the application for the stay of execution.

[9] It was pointed out by Sasedai Kumarie Persaud in her Affidavit in Answer before the Full Bench that no evidence had been led at the trial of assets abroad and she denied knowledge of any such assets. She had been advised that the order of Chang CJ in relation to the accounts of

Horseshoe Racing Service could not be subject to any application in these proceedings, such matters not having arisen in the High Court trial or having been mentioned in the proceedings before Roy JA. In resisting the application, the respondent deposed that as the executrix named in the last will and testament, she had the lawful authority to carry on the business bequeathed to her by the deceased and to divide the profits with the second-named respondent in the appeal as the deceased had directed in the will.

The proceedings before Roy JA

[10] Among the grounds of appeal in the Notice of Appeal exhibited to the application for the stay were contentions that the learned Trial Judge's finding that Yusuf Mongroo was of testamentary capacity on the date the will was executed, was against the weight of the evidence; that the Trial Judge applied the law relating to wills erroneously when she found for the validity of the will; and that the will did not comply with the provisions of the Wills Act.

[11] In her Affidavit in Support the applicant swore that at the time immediately preceding his death the deceased's medical condition was so bad that he could not have been of testamentary capacity. She related the testimony of pathologist, Dr. Nehaul Singh as to the reduced condition of the brain as found at the post mortem examination. According to Dr. Singh, the various illnesses from which the deceased suffered at the time of the making and execution of the will would have meant that his bodily and mental functions were seriously deteriorated. He could therefore not have been of mind to make or sign any will. She further deposed that though Sasedai Kumarie and her supporting witnesses had testified to the will being the original will of the deceased, fraud had been exposed by an expert witness who testified that it was not an inked-signature original, but a photocopy of an original of some sort. She complained that although no application had been made by the defence for the photocopy to be admitted to probate in place of the original, the trial judge had so ordered. After alluding to the misappropriation of US$4 million, she stated that the execution of

two other wills at the Woodlands Hospital on the same date of the Guyana will was a suspicious circumstance surrounding the will.

[12] Sherene deposed that these circumstances warranted a moving of the conscience of the Court into holding that the will was invalid and void. It would be unjust therefore for the Respondents to probate the will before the appeal was heard by the Court of Appeal. Without a stay of execution, the estate of her father Yusuf Mongroo would be ruined and the carrying into effect of the order of the High Court before the hearing of the appeal, would render the appeal nugatory and only of academic value.

[13] In her Affidavit in Answer, Sasedai Kumarie addressed all the issues raised by the applicant as tending to impugn the will. She deposed that Mr. Vidyanand Persaud, Attorney-at-law had given evidence at the trial that he had seen and spoken to the deceased shortly before his death while he was in hospital. He had taken instructions from the deceased on the preparation of the will and had received instructions to make corrections. Dr Rohan Jabour had given evidence of speaking to the deceased on the day he signed the will and she, Sasedai, had also given evidence of speaking to the deceased on the day he died. They had all said that he was lucid, that he understood what was told to him, he had responded intelligently and his mental faculties were intact.

[14] Sasedai deposed that Dr. Jabour had further testified to reading the will over to the deceased who confirmed that he knew the beneficiaries and knew that he was leaving his estate to them. Both Mr. Vidyanand Persaud and Dr Rohan Jabour had identified the will as appearing to be the original. Further, Dr Rohan Jabour gave evidence that he, one Dr. Kumar and the deceased were in a room at the same time and that each of them had signed or acknowledged his signature in the presence of each other. Evidence had been led on her behalf by a witness from the Guyana Police Force that the signature on the will was that of the deceased. Sasedai complained that the deceased had died over six years earlier but she had been unable to access the resources of the estate to

which, on the basis of the decision of the learned Trial Judge, she was entitled immediately after his death. She was entitled to the fruits of her judgment which would be delayed for several more years until the appeal was heard if the stay of execution prayed for were granted.

[15] For her part, Indranie Mulchand, the second-named Respondent deposed in her Affidavit in Answer that since the death of Yusuf Mangroo she had received nothing. An application made by her to the High Court for maintenance had not been granted on the ground that no order could be made under the law protecting dependents of the deceased until the estate was administered. There was in place no order for her benefit or protection hence the stay of execution would further protract her suffering.

[16] As can be seen, the detailed affidavits before Roy JA focused primarily on the contested facts of the case in relation to the validity of the will and clearly were directed at the merits of the appeal. While the applicant sought to highlight the evidence which undermined the trial judge's findings of fact, the respondent stressed the evidence which contradicted that relied on by the applicant while suggesting that the trial judge's findings of fact were unlikely to be disturbed on appeal. Indranie Mulchand's affidavit highlighted the hardship which a stay would create if the beneficiaries were deprived of the fruits of their judgment. These were the competing factors which Roy JA had to consider in determining the application for the stay of execution.

Did Roy JA exercise his discretion wrongly in granting the orders of February 16, 2017?

[17] Lord Woolf MR in **AEI Rediffusion Music Ltd v. Phonographic Performance Ltd v [1999] 1 WLR 1507 at 1523** quoted the following passage from Roache v. News Group Newspaper Ltd. [1998] E.M.L.R 161 at 172 on appellate courts reviewing the exercise of a judge's discretion:

Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered or that his decision was wholly wrong because the court is forced to the conclusion that he has not fairly balanced the various factors fairly in the scale.

[18] Several authorities have set out the principles which must guide the exercise of judicial discretion to grant or refuse a stay of execution pending appeal. It is accepted that the principles set out in **Linotype-Hell Finance Ltd v Baker [1992] 4 All E R 887** express the current approach and the correct basis on which such an application is granted or refused pending an appeal. The headnote reads in part:

Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

[19] Mr. Boston argued that Roy JA wrongly exercised his discretion by placing the conditions on the stay. In support, he cited several authorities such as **Wilson v. Church (No. 2), [1879] 12 Ch D 454, Polini v Gray [1879] 12 Ch D 438 , Orion Property Trust Ltd. and Others v. Du Cane Court Ltd and others [1962] 3 All 466** in which the Court had intervened to restrain an act that might deprive an appellant of the results of his appeal or to stay a judgment appealed from so as to prevent an appeal, if successful, from being rendered nugatory and he urged this Court to do likewise.

[20] Mr. Boston had also complained earlier in his submissions that after the hearing in chambers Roy JA had received proposals by letter from Mr. Ramkarran in terms of the order later made. Mr. Ramkarran's response was that he had made further submissions by letter on the day following the hearing which had been copied to all parties. He pointed out that Roy JA had made the order some time after his letter was sent and Roy JA had taken time to reflect on the case before making the order on February 16, 2017. Having considered the record on this

aspect, we do not observe any prejudice to the applicant in that there was an interval of over one week between the hearing on February 6, 2017 and the date on which the order was made. During which time Counsel for the applicant could have sought an opportunity to further address the Court in response to Mr. Ramkarran's proposals but Counsel on record did not do so.

[21] Mr. Ramkarran submitted that this was a case based on questions of fact and that the concern raised by the applicant at the hearing was in relation to immovable property. The Court of Appeal had no power to make any order relating to an issue not pronounced upon by Roy JA or not before him.

[22] We agree that this case revolved around contentious facts which called upon the trial judge for careful assessment and evaluation. These facts had to be taken into account by the judge in chambers when deciding whether or not to grant a stay of execution of the trial judge's order and, if granting the stay, whether to impose conditions. The Caribbean Court of Justice in **Bibi Zarida v Omeshwar Misir [2016] CCJ 19 (AJ)** noted that on an application for a stay of execution pending an appeal the court should not be trying the appeal but the court must take account of the nature of the appeal and make a provisional weighing of the issues. The court should not refuse to look into factual matters merely because there are conflicting assertions (para 12).

Findings of the Full Bench

[23] Having regard to the nature of the case as revealed in the affidavits, the grounds of appeal and the submissions before this Court, we are of the view that the applicant made out before Roy JA that she had an arguable appeal. Although the case would have turned substantially on the credibility of witnesses, important inferences regarding testamentary capacity and the testator's intention had to be drawn by the trial judge in arriving at her decision. The case will therefore bring into play well established principles as to the approach of an appellate court to findings of fact by a trial judge who has seen and observed

witnesses and had the opportunity of assessing their credibility. (See the discussion of these principles and cases in **Campbell v Narine (2016) 88 WIR 319** at paras. **[38] to [42]).**

[24] On the other hand, as noted in **Grenada Electricity Services Limited v Isaac Peters Civil Appeal No 10/2002 (OECS unreported)** a case endorsed by **Campbell v Narine**, in the drawing of inferences or in the evaluation of facts an appellate court is generally in as good a position as the trial court. The inferences drawn by the trial judge have been disputed and will at the hearing of the appeal fall to be examined in light of the evidence. We therefore agree that the applicant has an arguable appeal.

[25] On the question of ruin, it was common ground that the estate comprised the immovable properties which were the subject of the conditions in the order of Roy JA. in our view, allowing the trial Judge's order directing probate of the will to proceed subject to the restriction on vesting of title secured the estate from ruin pending the appeal and thereby secured the appeal, if successful, from being rendered nugatory.

[26] The contents of the will, business assets and movable assets in Guyana not having been disclosed in the affidavits before the Judge in chambers, his order allowing the probate to proceed subject to the condition was not, in our view, an unreasonable or arbitrary exercise of his discretion. As earlier discussed, the business of Horseshoe Racing Service, bank accounts and other assets were not matters for Roy JA's consideration.

[27] In a Supplementary affidavit in Answer in these proceedings, Sasedai Kumarie Persaud deposed:

> **Since the filing of the said Amended Notice of Motion, the Honourable Chancellor (ag) Justice Yonette Cummings-Edwards (in Chambers), upon the hearing of a second Summons filed on the 7th day of March, 2017 by the Applicant for a stay of execution, ordered on 31st day of July, 2017, that I,**

as the executrix named in the Last Will and Testament of the deceased Yusuf Mongroo dated 12th August, 2010, be restrained from distributing any part of the movable or immovable assets of the estate of Yusuf Mongroo until the hearing and determination of the appeal.

[28] This fortifies our position that the business of Horseshoe Racing Service was not part of the proceedings before Roy JA.

[29] For the reasons set out above, we find no basis in this application or in principle to interfere with the orders of Roy JA.

[30] The motion is dismissed with costs to the respondent in the sum of $75,000.

COURT OF APPEAL
OF THE SUPREME COURT OF JUDICATURE

Gregory JA