

CANADA / JUDGMENT

Gichuru v. Purewal

2018 BCCA 267

COURT

British Columbia Court of Appeal

DECIDED

20 June 2018

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2018 BCCA 267 Gichuru v. Purewal COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gichuru v. Purewal, 2018 BCCA 267 Date: 20180620 Dockets: CA45115; CA45116 Docket: CA45115 Between: Mokua Gichuru Appellant (Plaintiff) And Kulbir Purewal and Sukhbir Purewal Respondents (Defendants)

- and - Docket: CA45116 Between: Mokua Gichuru Appellant (Petitioner) And Kulbir Singh Purewal, Sukhbir Purewal aka Sukhbir Purawal and The BC Human Rights Tribunal Respondents (Respondents) Before: The Honourable Madam Justice Bennett The Honourable Madam Justice Fenlon The Honourable Madam Justice Griffin On appeal from: An order of the Supreme Court of British Columbia, dated January 26, 2018 (Gichuru v. Purewal, Vancouver Docket Nos. S167828 and S172318) Oral Reasons for Judgment Appellant appearing in person: M. Gichuru Counsel for the Respondent S. Purewal: A. E. Syer Place and Date of Hearing: Vancouver, British Columbia June 20, 2018 Place and Date of Judgment: Vancouver, British Columbia June 20, 2018 Summary: Mr. Gichuru applies to vary an order denying him leave to appeal two costs orders. The first order dismissed his application for "deemed service" and ordered special costs against him. The second order related to a recusal application brought by Mr. Gichuru which resulted in the respondents' security for costs applications being adjourned to be heard by another judge. The judge ordered Mr. Gichuru to pay costs of those applications at Scale C in any event of the cause. Held: order varied to allow leave to appeal the Scale C costs order and the appeal of that order allowed. The judge erred in ordering costs against Mr. Gichuru in light of his successful recusal application, and could not in any event order costs at Scale C as a punitive measure.
- [1] FENLON J.A.: Mr. Gichuru seeks to vary the order of a single justice in chambers pursuant to s. 9 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. He contends the single justice erred in denying him leave to appeal two costs orders made against him by a chambers judge in the court below.
- [2] The costs orders relate to applications made in two proceedings heard by the chambers judge on January 26, 2018. Both proceedings arose out of a landlord-tenant relationship, which the justice described in her reasons:

- [3] Between December 2010 and December 2014, Mr. Gichuru rented an apartment owned by Ms. Purewal.
- [4] After Mr. Gichuru moved out of the apartment, he filed a human rights complaint against Ms. Purewal and her son, Kulbir Singh Purewal, alleging discrimination in the course of his tenancy (the "Discrimination Complaint").
- [5] Mr. Gichuru's complaint was heard by the British Columbia Human Rights Tribunal (the "Tribunal") in April and June 2016.
- [6] In reasons indexed as *Gichuru v. Purewal and another*, 2017 BCHRT 19, the Tribunal determined that Mr. Gichuru's complaint was justified. The Tribunal ordered Mr. and Ms. Purewal to cease harassing Mr. Gichuru, but declined to award him any monetary remedy because of the role he played in provoking and escalating the events that were the subject of his complaint.
- [7] On March 10, 2017, Mr. Gichuru filed a petition for judicial review of the Tribunal's decision.
- [8] In addition to the judicial review of the Discrimination Complaint, on August 24, 2016, approximately two months after the Discrimination Complaint hearing concluded, Mr. Gichuru filed a notice of civil claim alleging that Ms. Purewal and her son, Mr. Kulbir Purewal, had defamed him (the "Defamation Action").
- [3] The justice described the background to the underlying applications as follows:
 - [11] On March 28, 2017, Mr. Gichuru applied to have Ms. Syer removed as counsel for Ms. Purewal in both proceedings, and also to have Mr. Purewal deemed to have been served with the petition for judicial review of the Discrimination Complaint. The deemed service application was adjourned, and the application to remove Ms. Syer was dismissed at first instance and on appeal.
 - [12] On January 12, 2018, Ms. Purewal sought security for costs and special costs against Mr. Gichuru in both proceedings.
 - [13] The parties scheduled Ms. Purewal's applications to be heard together with Mr. Gichuru's application for deemed service on January 24, 2018, but Mr. Gichuru was unprepared for court and they had to be adjourned. Chambers Decision
 - [14] Mr. Gichuru and Ms. Purewal's applications were heard by Mr. Justice Groves in chambers on January 26, 2018.
 - [15] At the beginning of the hearing, there was some confusion about whose application would be heard first. At that time, Mr. Gichuru explained that he would be applying for the judge to recuse himself from hearing Ms. Purewal's applications. The judge determined that Mr. Gichuru's application would be heard first, as it was the first in time, and that both the recusal and security for costs applications would follow.

- [16] The judge dismissed Mr. Gichuru's application that service upon Ms. Syer be deemed service of Mr. Purewal because Ms. Syer was not - nor is she now - Mr. Purewal's lawyer, a fact that Mr. Gichuru was aware of as early as January 18, 2017.
- [4] The chambers judge ordered Mr. Gichuru to pay special costs of the deemed service application for the hearings on both January 24 and 26, 2018. The justice continued with her review of the underlying applications:
- [18] Ms. Purewal's applications for security for costs were heard over the following two hours. However, at the end of the parties' submissions, the judge determined that he should recuse himself from those applications. The judge adjourned the matter to a later date, and ordered costs of the January 26 hearing against Mr. Gichuru on Scale C, in any event of the cause. The Application for Leave to Appeal
- [5] Mr. Gichuru filed an application for leave to appeal both costs orders as required by s. 7 of the Court of Appeal Act and R. 2.1(f) of the Court of Appeal Rules. The single justice hearing the application correctly identified the test for leave to appeal set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326. She noted that the criteria are to be considered under the rubric of the interests of justice: *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10, and observed that the test is to be applied particularly stringently with respect to costs orders because they are discretionary and subject to limited appellate review: *Price v. Robson*, 2017 BCCA 419 at para. 50. Ultimately, the single justice concluded that leave should be denied. The Application to Vary the Order Denying Leave to Appeal
- [6] Mr. Gichuru seeks to vary the order denying him leave on the basis that the justice did not address the merits of all of his three proposed grounds of appeal which can be summarized this way: · the chambers judge's refusal to permit him to make submissions; · the chambers judge's making of costs orders against him even though the judge had determined he should recuse himself; · the judge's decision to award costs on Scale C as a punitive measure.
- [7] I begin by noting that an application to review or vary an order of a single justice is not a rehearing of the application. The issue before us is whether the single justice erred in law, in principle, or misapprehended material facts.
- [8] I will address the denial of leave to appeal in relation to each of the two costs orders. Special Costs
- [9] The single justice began by reviewing the decision of the chambers judge:
- [17] The judge also awarded special costs of the [deemed service] application to Ms. Purewal, finding that Mr. Gichuru's conduct in the course of the litigation was reprehensible. Notwithstanding his awareness that Ms. Syer did not act for Mr. Purewal, Mr. Gichuru continued to request that delivery of the judicial review petition to Ms. Syer be deemed service, which also had the effect of requiring her to appear at the hearings of his application. Further, at some point in the hearing Mr. Gichuru abandoned his request for deemed service, instead requesting directions; however, the judge found that Mr. Gichuru

was well aware of his options under the Rules, as he had already succeeded in obtaining an order for substituted service of Mr. Purewal from Master McDiarmid in the Defamation Action. The judge concluded Mr. Gichuru had simply declined to exercise the options available to him. Consequently, the judge concluded that Mr. Gichuru was actively increasing the amount of litigation and costs for Ms. Purewal. The judge considered Mr. Gichuru's conduct in the proceeding to be reprehensible and ordered special costs against him for both the January 24 and 26 hearing dates.

- [10] Ultimately, the justice concluded the chambers judge had exercised his discretion in a judicial manner and there was no possibility of Mr. Gichuru overcoming the highly deferential standard of review applicable to costs orders.
- [11] I see no error in the justice's assessment of Mr. Gichuru's application for leave to appeal the costs order on the deemed service application. Mr. Gichuru submitted on this review hearing that the order was tainted by the subsequent recusal decision and should not have been made. I would not accede to that submission in light of Mr. Gichuru taking the clear position before the chambers judge that he could proceed with the deemed service application and his subsequent participation in cost submissions on that application without objection. Although Mr. Gichuru did object to a costs award being made in relation to the original hearing date of January 24, 2018 -- costs thrown away because Mr. Gichuru had left his materials at home and was not ready to proceed -- I see no error in the justice's conclusion that the challenge to those costs too was without merit. I would accordingly decline to vary her order denying leave to appeal the special costs awarded in relation to the deemed service application. Costs at Scale C
- [12] I turn now to the refusal of leave to appeal the order made in relation to the January 26, 2018 costs of the respondents' applications for security in the two proceedings.
- [13] In my respectful view, the single justice erred in denying leave because she did not consider two of Mr. Gichuru's three proposed grounds of appeal. The justice addressed the contention that the chambers judge had not permitted Mr. Gichuru to make his submissions (at para. 27) but did not address either the putative error in awarding costs at Scale C as a punitive measure or the putative error in ordering costs against Mr. Gichuru when he had succeeded on his application for recusal.
- [14] In my opinion, there is merit to the latter grounds of appeal and I would therefore vary the justice's order and grant leave to appeal the second costs order. The Substantive Appeal
- [15] At the hearing before us we asked the parties if they wished us to address the merits of the appeal if we determined that leave should be granted. Counsel for the respondents agreed we should do so in the interests of proportionality and expedience given the fractious and protracted nature of the proceedings to date. Mr. Gichuru also agreed we should decide the appeal, although he sought an opportunity to make further written submissions. I conclude that further submissions are unnecessary and would accordingly dispose of the appeal on its merits.

- [16] In my view, the chambers judge erred in awarding costs against Mr. Gichuru after deciding that his application for recusal should be granted and the respondents' applications adjourned to be heard by another judge. Although the judge did so on the basis that he had lost his patience with Mr. Gichuru and it was therefore pragmatic to step aside to avoid giving Mr. Gichuru yet another opportunity to appeal a decision, he nonetheless concluded he should not hear the matter. Having done so, in my respectful view the chambers judge should not have awarded costs against Mr. Gichuru. The chambers judge made that order even though Mr. Gichuru had won the recusal application, citing Mr. Gichuru's refusal to follow the judge's instructions during submissions -- a contention which, in my view and with respect, is not borne out by the transcript. In this regard, I note that Mr. Gichuru relied on the same submissions and subsequently succeeded before Madam Justice Adair in defeating the respondents' application for security for costs.
- [17] The chambers judge's loss of patience with Mr. Gichuru also led him to award increased costs at Scale C for what he described as reprehensible conduct. This Court has held that increased costs at Scale C cannot be used to punish a party for improper conduct: *Carrier v. Tate*, 2009 BCCA 183 at para. 55.
- [18] In light of these errors, I would allow the appeal, set aside the second costs order, and order that costs of the recusal/security for costs applications on January 26, 2018 are in the cause.
- [19] Finally, the respondents asked the division to make an order on our own motion under s. 29 of the Court of Appeal Act to declare Mr. Gichuru a vexatious litigant. Mr. Gichuru took issue with this request based on a lack of notice and an inability to respond. I would not address this issue at this time given the limited record before us.
- [20] Because success on this application to vary has been divided, I am of the view that each party should bear their own costs, both as to this hearing and the hearing before the single justice.
- [21] BENNETT J.A.: I agree.
- [22] GRIFFIN J.A.: I agree.
- [23] BENNETT J.A.: The review is allowed to the extent that leave to appeal is granted with respect to CA45116 and dismissed with respect to CA45115. The appeal with respect to CA45116 is allowed. The order is set aside and instead the cost of those applications will be in the cause. In this Court, each party will bear their own costs of this hearing including the applications before the single justice. "The Honourable Madam Justice Fenlon"

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Prepared on 29 October 2026 · Esheria