

CANADA / JUDGMENT

Gichuru v. Vancouver Swing Society

2020 BCCA 40

COURT

British Columbia Court of Appeal

DECIDED

24 January 2020

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2020 BCCA 40 Gichuru v. Vancouver Swing Society

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gichuru v. Vancouver Swing Society,

2020 BCCA 40

Date: 20200124

Docket: CA46012

Between:

Mokua Gichuru

Appellant

(Petitioner)

And

Vancouver Swing Society, Matthew Lam, Kaitlin Russell,

Angelena Weddell and The BC Human Rights Tribunal

Respondents

(Respondents)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On an application to vary: An order of the Court of Appeal for British Columbia, dated October 25, 2019 (Gichuru v. Vancouver Swing Society,

Vancouver Docket CA46012).

Oral Reasons for Judgment

Appearing as agent for the Appellant:

G. Kimani

Counsel for the Respondents, Vancouver Swing Society, Matthew Lam, Kaitlin Russell and Angelena Weddell:

G. Henry

Place and Date of Hearing:

Vancouver, British Columbia

January 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 24, 2020

Summary:

The appellant's application to vary an order he post security for costs is allowed only to the extent of extending the time for doing so, and setting aside the order he pay costs of the application for security for costs in any event of the cause. Comment on denial of request to hear the application by telephone because the applicant is in a foreign jurisdiction.

- [1] SAUNDERS J.A.: By order of Madam Justice Dickson made October 25, 2019, the appellant, Mr. Gichuru, was ordered to post security for costs of his appeal in the amount of \$7,000 by December 31, 2019, pending which the appeal is stayed, with liberty to the respondents to apply to dismiss the appeal in the event the monies are not posted in the time provided.
- [2] Mr. Gichuru applies to vary that order pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.
- [3] As a preliminary matter, I will record that on Friday, January 17, 2020, we received a letter from Mr. Gichuru explaining (as he had to the single justice) that he is currently resident in Korea and unable to attend today. He asked that we hear him by telephone, and provided what he said was his telephone number in Korea. Mr. Gichuru made a similar request of the justice hearing the security for costs application in October. We declined that request, as had the justice hearing the application in October. Such a procedure is neither effective nor efficient, and erroneously puts the onus on the court in respect to matters outside our jurisdiction. Generally speaking, it is not a practice we would adopt. We did agree, however,

that Mr. Gichuru could have an agent attend on his behalf today, and today Ms. Kimani helpfully attended and presented orally a statement authored by Mr. Gichuru.

- [4] With that explanation, I turn to the application before us. It is well established that an application to vary an order of a single justice is not a rehearing of the original application: the approach a division of the court will bring to the matter is highly deferential and it is not enough to allege that the justice erred in the exercise of discretion. The court may interfere with the order of a single justice if there has been an error in principle, the justice was wrong in the legal sense, the justice misconceived the facts, or relevant information was not brought to the justice's attention: *DeFehr v. DeFehr*, 2002 BCCA 139; *Haldorson v. Coquitlam (City)*, 2000 BCCA 672.
- [5] In this case, the application before the justice was for an order Mr. Gichuru post security for costs. That application fell to be decided on consideration of the four factors discussed by Mr. Justice Lowry in the case referred to by the justice, *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285:
1. the appellant's financial means;
 2. the merits of the appeal;
 3. the timeliness of the application; and
 4. whether the costs will be readily recoverable.
- [6] In his application to vary, Mr. Gichuru does not say the justice recited the incorrect factors, but says instead that she erred in her assessment of those factors. In particular he contends the justice erred in:
- 1) failing to give pre-eminent weight to the respondents' tardiness in filing their application (I note that that complaint is strengthened and repeated today in the statement read by Ms. Kimani);
 - 2) determining the appeal "lacks obvious merit";
 - 3) referring to comments of Madam Justice Garson in *Gichuru v. Pallai*, 2018 BCCA 78, to the effect that he had paid numerous court fees in pursuing a series of actions over the past decade;
 - 4) failing to limit the order to costs incurred after the date of the application,
 - 5) establishing the deadline for posting the security; and
 - 6) ordering costs in favour of the respondents in any event of the cause.
- [7] Mr. Gichuru also complains that he was denied an adjournment of the hearing in October 2019, and that the justice failed to accommodate the difficulties he was encountering in pursuing this matter while a resident of a foreign country.

- [8] In the statement read today, Mr. Gichuru referred us to the recent decision of a single justice, *Jacques v. Muir*, 2019 BCCA 456, in which Mr. Justice Groberman declined to order security for costs because the application was brought after filings were complete, saying: "This Court has generally refused late applications for security for costs."
- [9] Justice Dickson described the circumstances of the appeal and the application in this fashion:
- [3] The application concerns the British Columbia Human Rights Tribunal's ("HRT") refusal to accept a complaint of Mr. Gichuru's for filing. Mr. Gichuru unsuccessfully sought reconsideration of this decision and then judicial review. He now appeals the dismissal of his judicial review application (indexed at *Gichuru v. Vancouver Swing Society*, 2019 BCSC 402).
- [4] Mr. Gichuru complained that VSS discriminated against him on the basis of age, sex and race and, in particular, for being an older black male. The chambers judge summarized the dispute as follows:
- [11] ... the crux of Mr. Gichuru's complaint to the Tribunal involved what can be described as a dispute on Facebook over Mr. Gichuru's conduct related to other female members of the VSS. Mr. Gichuru felt as if he had been harassed on Facebook by female members of the VSS and raised the issue with Ms. Wendell and Mr. Lam. It is clear that Mr. Gichuru expected the VSS executive to take his side on the issue, but they did not. Ultimately, the VSS executive asked other members of the VSS for input on Mr. Gichuru's behavior and determined that it was his behavior that was problematic, although this was not known to Mr. Gichuru at the time. In response, Mr. Lam agreed to meet with Mr. Gichuru and provided him with three documents: a Facebook post written from the perspective of an older man in the swing community about older men crossing lines with younger women with romantic pursuits; a document on "Emotional Labour", which included sections discussing "toxic masculinity"; and an article titled "How To Not Be Creepy", which Mr. Lam recognized as having an inflammatory title in his email.
- [5] On March 21, 2019, the judge held that the HRT had jurisdiction to screen the complaint and found the decisions in question were not patently unreasonable.
- [6] Mr. Gichuru filed a notice of appeal on April 11, 2019. Although he has not filed any affidavit material in response to the security for costs application, in his written submission filed yesterday he asserts that VSS indicated an intention to apply for an order for security for costs. However, they did not do so until September 23, 2019, when they brought this application. By that time, the materials for the appeal had already been filed by all parties. VSS offered no explanation for the delay. In his written submission, Mr. Gichuru asserts that he spent approximately 100 hours on the appeal between April 18, 2019 and September 23, 2019.

- [10] In my view, none of the submissions advanced by Mr. Gichuru provide a basis upon which we can or should interfere with the order for security for costs. I would give him some relief, however, on the deadline for posting the security for costs, and on the order for costs of the application.
- [11] I address first Mr. Gichuru's submissions concerning the court process. I have reviewed the file material carefully and see no basis for complaint. Mr. Gichuru has had the ability to communicate with this court electronically and has done so, and he has been accorded the opportunity to have an agent appear on his behalf, including today. Just as we have had the opportunity to review the file materials, so, too, the justice hearing the security for costs application had materials before her and referred to them in her decision. In particular, I would reject, as I have explained above, the proposition that Mr. Gichuru was entitled to the telephone attendances that he proposed.
- [12] I turn now to the criteria for the order that Mr. Gichuru seeks to vary, starting with the merits factor. Mr. Gichuru contends that the justice mis-assessed the merits of the appeal. He says that the reasons of the Human Rights Tribunal wrongly treated his complaint as one the Tribunal could decline to file, but it was not open to the Tribunal to decline to file a complaint after the 2002 amendments to the Human Rights Code, R.S.B.C. 1996, c. 210. He says Mr. Justice Masuhara erred when he found otherwise.
- [13] I see no error in the justice's assessment of the merits of the appeal. Justice Masuhara found that s. 27 of the Human Rights Code gave the Human Rights Tribunal jurisdiction to dismiss an appeal summarily and said, after reviewing the substance of the Tribunal's decision: "this is what happened here the complaint did not allege an act or omission that contravened the Code". He referred to the language of the Tribunal's decision of refusing to file the complaint as an artifact of the previous legislation and said "but it is clear upon close evaluation of the statutory regime that the Tribunal had the authority to dismiss his complaint for the reasons given." That authority is found in s. 21, not s. 27. I see no real prospect that a division of this court would interfere with the substance of the conclusion that the Tribunal had the jurisdiction required to do as it did. In sum, I find no basis to interfere with the justice's conclusion that the appeal lacks obvious merit.
- [14] Nor do I see error in her evaluation of Mr. Gichuru's financial circumstances, or that the respondents, if successful on appeal, will be unlikely to readily recover costs that may be ordered in their favour. The justice observed that a search of Mr. Gichuru's history of initiating actions resulted in 84 reported judgments on CanLII. That level of court activity demonstrates that Mr. Gichuru has been able to pay numerous court fees in pursuing actions over the years. The justice observed that she had no evidence before her that Mr. Gichuru would be unable to pursue his appeal were he required to post the security for costs. While he makes that submission, the submission is unsupported by the record.

- [15] On the other hand, there was evidence before the justice that Mr. Gichuru does not own real property in British Columbia and he is currently living in a foreign jurisdiction. Mr. Gichuru himself did not depose to having exigible assets in this jurisdiction, and he concedes in fact in his written argument at para. 48:
48. Nevertheless, and in the alternative, the application should have been rejected on the basis that although the respondents' chances of recovering their costs in the event they are successful on the appeal is doubtful, appellants who are without the financial ability to post security should not be precluded from pursuing a meritorious appeal for that reason alone.
- [Emphasis added.]
- [16] It was open to the justice to conclude that the respondents would have difficulty in recovering payment on an order in their favour for payment of costs of the appeal. One cannot say the justice erred in her application of the financial considerations.
- [17] All of this left the issue of the timeliness of the application which was, as the justice recognized, the only factor weighing against the respondents' application. While timeliness is, generally speaking, important, it is not an invariable rule that an application brought after all the necessary filings have been made will be denied. It is, in the end, always an exercise of discretion taking all the circumstances into account. What is required of the justice is consideration of the entire picture. I conclude the justice here based her decision that security for costs should be posted on the entire circumstances before her, as she was required to do. Although we are referred to *Jacques*, that case does not reflect the difficult financial circumstances of the respondent arising from this litigation noted by Justice Dickson in her para. 23 of the reasons for the order that is sought to be varied:
- [23] [Vancouver Swing Society] is a small non-profit society, its resources have been exhausted by this litigation, and its directors have had to pay out-of-pocket to continue defending themselves in this litigation. This factor weighs further in favour of a security for costs order.
- [18] I see no basis upon which we can, properly, interfere with that decision.
- [19] Nor do I see a basis upon which to say the justice was required to limit the amount posted to costs going forward as Mr. Gichuru now proposes. While that was one alternative available to her, it was not presented to her, and she cannot be faulted for declining to reduce the amount sought to be posted as security.
- [20] This leaves the time established by the order for the posting of security for costs, and the order for costs of the application to the respondents. The justice directed that the security for costs be posted by December 31, 2019. That date has come and gone. This application to vary the order was filed within time, but the reasons of the justice were not available to Mr. Gichuru for some time and I cannot see how Mr. Gichuru could have had this application heard by a division by the deadline of December 31, 2019 in all the circumstances. I consider it is appropriate to allow Mr. Gichuru some further time to file the security for costs. I would

extend the time for filing security for costs to February 28, 2020.

- [21] The final question is the order for costs of the application before the justice. The usual order is that costs are in the cause. While I consider the appeal to be one of dim merit, that result is not a total foregone conclusion. There is, in my view, no reason that the respondents should be entitled to costs of the application in the event Mr. Gichuru's appeal is successful.
- [22] I would allow the application to vary only to the limited extent of extending the time for Mr. Gichuru's compliance with the order to post security for costs to February 28, 2020, and setting aside the order for costs of the application before Justice Dickson in favour of the respondents.
- [23] FITCH J.A.: I agree.
- [24] BUTLER J.A.: I agree.
- [25] SAUNDERS J.A.: The application to vary is allowed to the extent the time for posting the security for costs is now February 28, 2020. The order made by Justice Dickson for costs of that application in favour of the respondents is set aside.

"The Honourable Madam Justice Saunders"

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