

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 1/70

BEFORE: The Hon. Mr. Justice Luckhoo (Presiding)

The Hon. Mr. Justice Smith

The Hon. Mr. Justice Hercules (Acting)

BETWEEN AVORY HEWART McCAEDIE HENRIQUES - Petitioner/Appellant

AND ORTRUD HENRIQUES - Respondent

Mr. R.H. Williams for the Respondent/Respondent

Mr. Hugh Small for the Petitioner Appellant

29th January 1971

HERCULES, J.A. (Actg.)

In these proceedings there are three matters to be taken into consideration:

- (1) An appeal dated 2nd of January, 1970, by the Petitioner/appellant, Civil Appeal No. 1/70, that an order of Mr. Justice Monteith on the 16th of December, 1969, approving payment of \$2,421.70, expenses incurred by the Respondent, be set aside.
- (2) A motion dated the 5th of January, 1971 by the Respondent that the appeal No. 1/70 be dismissed for want of prosecution in that the Petitioner/appellant failed to file the record in compliance with Rule 30(1) of the Court of Appeal Rules, 1962.
- (3) A motion dated 22nd of January, 1971 by the Petitioner/appellant for an order that notwithstanding that the time limited by the Court of Appeal Rules has expired, a further extension of three months be granted to file the record of appeal herein.

As regards (1), it would seem that on the 29th of April, 1969, Lopez, J. made an order that the Petitioner/appellant pay travelling expenses for both Respondent and an infant, Dean, to Canada and return,

as also...

as also medical, hospital and specialist expenses and other reasonable expenses incidental thereto. The Respondent filed a notice of appeal against the said order of Lopez, J. on the 14th of May, 1969. That is now pending Civil Appeal No. 19/69.

On the 16th of December, 1969, Monteith, J. pursuant to the order of Lopez, J. approved expenses in the sum of \$2,421.70 to be paid by the Respondent to the Plaintiff/appellant. Civil Appeal No. 1/70 was filed on the 2nd of January, 1970 against the order of Monteith, J. and that appeal is now also pending. (2) and (3) of these three matters are before the court today.

As regards (2), Rule No. 30(1) provides:-

"The appellant shall within six weeks from the date when the appeal is brought or within such extended time as may be granted by the court or by a judge thereof file the record together with four copies thereof for the use of the judges and the registrar."

Moreover, Rule 32(1) of the said Rules provides:-

"If the appellant has failed to comply with the requirements of paragraph 1 of Rule 30 or any part thereof the respondent may apply to the court to dismiss the appeal for want of prosecution and the court, if satisfied that the appellant has so failed, may dismiss the appeal or make such other order as the justice of the case may require."

Now, according to the affidavit filed in support of the motion seeking an extension of time within which to file the record, it would appear that the notes of evidence in Civil Appeal No. 19/69 were obtained by the Petitioner/appellant's solicitor sometime around August, 1969 and that appeal is now awaiting a date for hearing.

While the order of Lopez, J. appears to be the substantial appeal, it seems nevertheless that the Petitioner/appellant does not wish to abandon No. 1/70 and it is also apparent that No. 1/70 will greatly depend on the result of No. 19/69. The Petitioner/appellant's solicitor has sworn by affidavit dated the 22nd of January, 1971, that

after some efforts; (paragraphs 9, 10 and 11 of affidavit), he only managed to get the notes of evidence in No. 1/70 on the 22nd of January, 1971.

Since this application turns very largely on paragraphs 9, 10 and 11 of the affidavit of the Petitioner/appellant's solicitor, I would set them out as follows:-

Paragraph 9 - "That the appellant intended to pursue Civil Appeal No. 1/70 but has been hindered in filing the record therein as the notes of evidence of Mr. Justice Monteith has not been obtained, although by letter dated 30th of January, 1970, I applied to the Registrar of the Supreme Court for same and I exhibit and annex hereto a copy of the said letter which is marked "A" for identity (that letter is dated the 30th of January, 1970)."

Paragraph 10 - "That from time to time my office checked the Supreme Court Registry to ascertain as to whether or not the notes are available. On the last check there my office was informed that the notes were not then available and I understood that the reason for delay was that notes of evidence in other cases which were filed before Civil Appeal No. 1/70 were still being prepared and that there is a roster for applications for notes of evidence, and so as soon as my application takes its place on the roster the notes of evidence will be prepared and my office notified."

Paragraph 11 - "That my office was not so informed by the Supreme Court Registry. That as a result of certain documents being served on my office enquiry was again made at the Supreme Court Registry and the notes were received

Today and it is prayed that this honourable Court will grant an application to extend the time for filing the record in this matter for a further date as all the other documents have been copied and ready for filing."

The Respondent's solicitor has, however, also filed an affidavit dated the 25th of January, 1971, referring to the above quoted paragraphs 9, 10 and 11 of the affidavit of the Petitioner/appellant's solicitor.

The Respondent's solicitor swears that the notes of evidence were ready and available from October, 1970, and he did in fact obtain a typed copy on the 19th of October, 1970. The question that now falls for determination is to what effect should this court exercise its discretion under Rule 32(1) of the Court of Appeal Rules. Should it accede to the motion of the Respondent to dismiss Appeal No. 1/70, or to the Petitioner/appellant's motion seeking an extension of time in which to file the record?

Learned Counsel for the Respondent has adverted to the fact that nothing transpired from the 30th of January, 1970 to the 5th of January, 1971 when the Respondent filed the notice to dismiss the appeal for want of prosecution, a matter of 10½ months after the record was due to be filed. He has submitted that the husband has been guilty of a clear and grave breach of the Rules of Court, that no explanation has been offered as to why no steps, for example, an application for extension of time were taken. He has further submitted that there is no evidence that the husband had at all material times a serious, continuing intention to prosecute his appeal. He added that the rules of this court ought to be obeyed and in the instant case there is no reason why the court's discretion should be exercised in favour of the Petitioner/appellant. He cited four cases in support of his contention; the first in time was the case of Wright vs. Salmon reported at (1964) 7 W.L.R. at page 50. This was a case dealing with grounds of appeal. The appellant was late in filing his grounds of appeal. Learned Counsel for the Respondent sought, in my view, quite properly, to apply the principle laid down in that case to the instant case. At page 52 Duffus, P. had this to say:-

115

"We have no doubt that the power is vested in this court now to grant relief to appellants who are late with the filing of their grounds of appeal, but it is a discretion which the court has to exercise judicially and with care to see that no injustice is done to any of the parties in the case. In the instant case it is my view that the applicant has not shown any good cause or reason why this court should exercise any discretion in his favour. The delay in this case has been extensive and we have been complaining from this bench for some time past of the obvious carelessness with which appellants and some practitioners, counsel as well as solicitors, appear to conduct their business, and unless real good cause is shown and the court is satisfied that every effort has been made to cure any defect that might have existed in the appeal proceedings, that we should be slow to exercise that discretion."

This principle was again dealt with in the case of Ratnam vs. Cumarasamy reported in (1964) 3 All E.R. at page 933 where at page 935 Lord Guest stated:-

"The rules of court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation."

Learned counsel also referred us to the case of City Printery vs. Gleaner Co. Ltd. reported at 13 W.L.R., 136; there the principle was reaffirmed and again reaffirmed in the case of Revici vs. Prentice Hall Inc. and Others reported (1969) 1 All E.R. at page 172.

The delay in this case was a matter of a year, and there is no explanation forthcoming and no evidence of a serious continuing intention to prosecute the appeal.

186

Mr. Small conceded that the Petitioner/appellant has been guilty of a breach of Rule 30(1) and also that there was no proper explanation forthcoming for the failure to make application for an extension of time. He further conceded that the Rules of Court ought to be obeyed, but he has asked this court to hold that there is material upon which the discretion of the court can be exercised and he has pointed to certain disadvantages which he contends will accrue to the Petitioner/appellant if he were denied the opportunity to prosecute his appeal.

Having considered both affidavits referred to above, I am not at all impressed with the efforts made by the Petitioner/appellant's solicitor to get the notes of evidence as described in paragraphs 9, 10 and 11 of his affidavit. After writing a letter to the Registrar as far back as the 30th of January, 1970, all the affidavit discloses is that from time to time the office of the solicitor checked the Supreme Court Registry. On the authorities cited by Mr. Williams, it appears that the gap between the 9th of October, 1970, when the notes became available to Respondent's Solicitor, and the 21st of January, 1971, is a very wide gap indeed, and obviously no check whatever was made for more than three months.

If the favourable discretion of this court is to be invoked, the party seeking to do so must show that he acted with all due diligence and has made a full and frank disclosure in that regard. Only so will the court be moved.

I am afraid that in these proceedings I would accede to the motion of the Respondent. Appeal No. 1/70, therefore, stands dismissed and I would refuse to accede to the motion of the Petitioner/appellant for an extension of time within which to file the record. Costs to be the Respondent's on both motions.

R. M. Hercules.

SMITH, J.A.

I agree.

K. J. Smith

LUCKHOO, J.A.

I agree.

The order of the court will be that the Respondent's motion is granted. The Appeal No. 1/70 is dismissed for want of prosecution with costs to the Respondent. The Appellant's application for an extension of time for filing the record of appeal and copies thereof is refused with costs to the Respondent.