

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO.26/69

FOR REFERENCE ONLY

BEFORE: The Hon. Mr. Justice Fox, J.A. Presiding
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A. (Atg.)

B E T W E E N

HAZEL MASON
and - Plaintiffs/Appellants
ESMIE MASON

A N D

DOUGLAS VALMORE FLETCHER - Defendant/Respondent

Mr. Trevor Levy for Plaintiffs/Appellants

Mr. Harvey DaCosta, Q.C.) for Defendant/Respondent
Mr. R.N.A. Henriques)

7th May, 1973

FOX, J.A.:

On 18th July, 1969, Hercules, J. disposed of an action in negligence brought by the plaintiffs/appellants against the first respondent in this case, Mr. Douglas Fletcher, a member of the firm of attorneys-at-law Messrs. Myers, Fletcher and Gordon, with offices in Kingston. There were other defendants to the action - George Brown and George Roman - in respect of whom the action was dismissed. Judgment was entered in favour of Fletcher with costs.

The record of appeal was filed in the Registry of this court on the 31st of December, 1969. The appeal came on for hearing before this court on the 26th of July, 1971. It is relevant and important to note that the order settling the record was made on the 27th of August, 1969. In pursuance of that order sixteen exhibits were to be included in the record. When the appeal came on for hearing on the 26th of July, 1971, Mr. Harvey DaCosta, Q.C., on behalf of the respondent, Fletcher, moved

in accordance with a notice to that effect, to dismiss the appeal for want of prosecution. The default upon which this motion was made was the failure in the appellants to file the exhibits ordered on the 27th of August, 1969.

In the exercise of its discretion, this court made an order in which time was given to the appellants up to the 1st of November, 1971, to enable completion of the record on appeal by filing the exhibits. The court further ordered that upon failure to file these exhibits within the time specified, the appeal was to stand dismissed with costs. Costs of the motion to be taxed or agreed were also ordered in favour of the respondent Fletcher. The appeal was adjourned sine die to enable the appellants to comply with the order of the court.

On the 29th October, 1971, an application was filed in the Registry of this court by the appellants' solicitor, Mr. Eli F. Hanna, seeking an extension of time within which to complete the record. The date upon which this application was sought to be presented to the court was the 2nd of November, 1971. There is nothing on the record to indicate that this application came before the court. Under the provisions of Rule 33(i) of the Court of Appeal Rules, 1962, a single judge of the court may, upon application, make orders for extension of time. These provisions have neither competency nor relevancy in relation to an order such as was made by this court on the 26th of July, 1971. A single judge would have no power to cancel an order made by the court dismissing an appeal on the occurrence of an event; in this case, the failure to file the exhibits on or before the 1st of November, 1971.

A record has been attached to the bundle delivered to each judge. This purports to be the sixteen exhibits ordered to be filed to complete the record. The usual date stamp of the Registry is absent from this record in the judge's bundle. It is also absent from the bundle filed in the Registry. It is not known when this record was filed. In the absence of the usual criteria of the Registry date stamp which establishes a filing, it is, perhaps, incorrect to state that this record was filed in the Registry. However that may be, having regard to the application to extend time which was made on the 29th of October, 1971, the clear implication is that the exhibits came into the Registry

subsequent to the 1st November, 1971.

When this matter again came before the court today, Mr. Harvey DaCosta, Q.C., quite rightly, described the circumstances which have been related above. He submitted that as a result of the failure to file the exhibits in time, the appeal stood dismissed as a consequence of the order of the court on the 26th of July, 1971.

Mr. Trevor Levy, who appeared for the appellants, did not seek to controvert or to modify in any way the picture represented by Mr. DaCosta, but applied at this stage for the exercise of the court's discretion in making an order allowing time to enable his instructing solicitor to file an affidavit stating when the exhibits were actually filed. This application comes at much^{too}/late a stage. In all the circumstances, we consider that there is no other proper alternative now open to the court but to refuse the application. In the result, the order of this court made on the 26th of July, 1971, has come into effect. The appeal stands dismissed as from that date with the consequential orders made then. The respondent Fletcher is to have the costs of the appeal.