JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/06

APPLICATION NO. 139/09

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**APPLICANTS**
AND	**DONOVAN FOOTE**	**RESPONDENT**

Maurice Manning & Miss Tavia Dunn instructed by Nunes, Scholefield, DeLeon & Co. for the applicants

John Givans for the respondent

2nd & 4th November 2009

ORAL JUDGMENT

PANTON, P.

1. This is an application by National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc. to strike out the appeal filed by the respondent Donovan Foote.

2. On the 16th November 2006, Mr. Justice Brooks had given judgment in favour of the applicants in the sum of $2,708,627.00 plus interest at the rate of 25% per annum from May 1, 2000 to the date of payment.

3. Notice of Appeal was filed by the respondent Foote on the 1st December 2006. According to the applicants, to date that Notice of Appeal has not been served on them in keeping with the Rules.

4. Rule 1.11 of the Court of Appeal Rules, which came into effect on the 1st January 2003 sets out the time for filing and serving Notice of Appeal. The applicants say that they became aware of the existence of an appeal on the 26th February 2009 when the purported record of appeal was served on them which included the Notice of Appeal.

5. The submissions that we heard on Monday of this week were by Mr. Manning for the applicants and Mr. Givans for the respondent. Mr. Manning submitted that if the rules are to be upheld and time limits met, the Notice of Appeal must be served on the other party within the time provided by the rules and that the court cannot overlook the failure to serve same. He said that a lot depends on the service of the Notice of Appeal and that it is an essential requirement of the litigation process which sets in train certain events. He said that this is not really a mere procedural defect. It is fundamental. He submitted that a party who fails to serve the Notice of Appeal may apply for extension of time, citing the reasons for the delay, but in this case, he pointed out, there has

been no such application before the court. He conceded that there is flexibility for the court to grant extensions in a proper case but points out that the respondent Foote has not even made an application for the court to exercise its discretion in his favour. He said consequently, the appeal should be struck out.

6. Mr. John Givans, for Mr. Foote, said that he was not sanctioning what had happened in the case, but he contended that the appeal was filed within time and that far be it from the applicants to say that they were not served. They were indeed served, he said, but not in the normal way. He said that when the respondent served the record of appeal in February, it included the first substantive document, that is, the filed Notice of Appeal and so the notice was then, on that day served although outside the prescribed time. The issue, he said, now becomes what is the effect in law of that very late service. He said that one cannot infer that the late service means that it is fatal to the appeal process and that it was not intended that the appeal should be dismissed. Furthermore, he said, nothing has been shown to this court to indicate that the late service has prejudiced the applicants and so, he submitted, the appeal should not be struck out. He said, if the appeal is struck out, it would indicate a triumph of form and procedure over substance.

7. We have considered the circumstances of this case and the submissions that have been made. In our view, it is factual to say that there has been no proper service in keeping with Rule 1.11 and it is also factual that there has been

no application made for the Court to extend the time for service. We cannot countenance that blatant disregard of Rule 1.11. We wish to point out that even prior to the Rules being brought into effect in 2003, this court has advised litigants and attorneys on many occasions that they run a great risk when they disregard rules of procedure.

8. In the case ***Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Company*** SCCA No. 18/2001 delivered March 11, 2002, at a time prior to the commencement of these rules, the court had occasion to comment on the need for litigants and attorneys to keep within time limits set by the rules of procedure. That case was one in which Mr. Justice Reckord had granted the respondents leave to file statement of claim out of time and within seven (7) days of his order. He had also refused the appellant's summons to dismiss for want of prosecution, the action brought by the respondents. In that case the respondents had filed their writ of summons but failed to file their statement of claim.

9. On page 2 of the judgment of the President, Mr. Justice Forte, it is recorded thus:

> "After the filing of the writ, [which was done on January 26, 1996] the plaintiffs remained dormant until the 10th January 2000 when they filed a summons for extension of time within which to file statement of claim. This summons was returnable on the 25th January 2000; exactly four years after the writ had been filed. Significantly, the writ was not

> served upon the appellants until the 24th January 1997."

The learned President concluded that –

> "In ... all the circumstances, the evidence establishes that having regard to the inordinate and inexcusable delay there [was] substantial risk that it is not possible to have a fair trial of the issues ... ."

The appeal was allowed and the action was ordered to be dismissed for want of prosecution.

10. In the same matter, I had this to say on pages 9 and 10:

> "I agree with the learned President that this appeal should be allowed. However, I wish to add a few words. In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ...
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> For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

11. We find that the circumstances in the instant matter are not significantly different from those that existed in the ***Port Services*** case and bearing in mind the coming into force, and the reasons for the coming into force, of the Court of

Appeal Rules, 2002, we have no sympathy with the respondent in this matter and we have no choice but to grant the application that has been made and order that the appeal be struck out with costs to be agreed or taxed in favour of the applicants.