JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 18/72

BEFORE: The Hon. Mr. Justice Fox - presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

- ELECTION PETITION -

Seymour Stewart - Petitioner

Lynden Newland and
R. A. Edman - Respondents

Horace Edwards, Q.C.,
David Muirhead, Q.C.,
Noel Edwards, Q.C., and
W.K.ChinSee for Appellant Stewart

R. S. Pershadsingh, Q.C.,
Norman Hill, Q.C. and
Richard Ashenheim for Respondent Newland

May 16, 17 and 18, 1973

FOX, J.A. :

This is an appeal from a judgment of Rowe, J., refusing applications on a summons for -

(a) an extension of time for the service of an election petition and other statutory documents;

(b) an order for substituted service of these documents; and

(c) an order deeming the publicity given in the press and on radio and television, to the filing in the Supreme Court of these documents as sufficient service of them on the respondent, and sufficient notice to him of the presentation of the petition.

The petitioner was an unsuccessful candidate in the general elections which were held on the 29th February, 1972. His opponent, the respondent Newland, was duly returned on 8th March, 1972, by

the returning officer as the member elected for the constituency of eastern St.Thomas. In compliance with the provisions of s.4(2) of the Election Petitions Law, Cap.107, requiring the petition to be presented within twenty-one days of the return of the respondent, the petition was presented to the Supreme Court on the 20th March, 1972, but a copy of the petition and the prescribed statutory notice of its presentation and of the nature of the proposed security, were not served by the petitioner on the respondent 'within ten days after the presentation of the petition', as required by the provisions of s.6 of the Law. Hence the application to Rowe, J.

In a long and careful judgment that learned and experienced judge held that the provisions of s.6 were mandatory and must be strictly complied with; that the court had no power to extend the time for service beyond the time prescribed in s.6; and that the application for substituted service and any consequential order therein must be effected within the period of ten days prescribed in s.6. As a corollary to these findings in law, the learned judge considered the delay in filing the summons showed that the petitioner had not been sufficiently vigilant in presenting his case, and that for this reason any discretion which may have been at his disposal to exercise in favour of the petitioner should not be exercised.

The basis of the judgment of Rowe, J., was the decision in Allen v. Wright (No.2), (1960) 2 W.I.R. p.102. In that case the Federal Supreme Court upheld a decision of Waddington, J., and said that the provision regarding time in s.6 was a matter of substantive law and could not be dispensed with by the Court. Counsel for the petitioner said that Allen v. Wright was bad law. In lengthy and detailed submissions which received our close and undivided attention, he invited us to held that the requirement as to time in s.6 was procedural; that the court had power to enlarge time by virtue of the combined provisions of s.23 Cap.107 (making the provisions of the Judicature (Civil Procedure Code) Cap.177

applicable to election petitions), and s.676 of the Code (allowing the court power to enlarge or abridge the time appointed by law); that the material in the affidavit filed in support of the application showed that the respondent was evading service; and that this evasion was sufficient ground for exercise of the discretion to grant the applications for extension of time for service of the petition and for substituted service.

In support of the application for extension of time, Counsel's submission to us traversed substantially the same ground covered by Counsel for the petitioner in Allen v. Wright, and employed substantially the same authorities. The answers to these submissions in the judgment of Waddington, J., (it is to be regretted that this excellent judgment has not found its way into the Law reports) and in the no less effective and convincing judgments of the three judges in the Federal Supreme Court remain, in my respectful view, as complete and sufficient today as they were in 1960 when Allen v. Wright was decided. No real purpose will be served by repeating those answers here. The reasons for the decision are impeccable and I hold, to use the language of Waddington, J., that -

> "the statutory conditions contained in s.6 of the Law are not merely matters of procedure but are conditions precedent which must be strictly observed before the petition can be deemed to be at issue as provided by s.7 of the Law ".

In Allen v. Wright, substituted service was not applied for, and consequently although Waddington J., made suggestions, that question did not arise for decision. Under s.9 of Cap.107 -

> "Service of any notices required to be served shall subject to any directions given by the Chief Justice be effected in accordance with the rules in force in the Supreme Court.......".

No directions have been given by the Chief Justice pursuant to the power conferred on him by s.9 or, to state this fact with

greater precision, the Court has not been referred to any such direction. In this respect the position in Jamaica differs from that in England where rules providing for service on a respondent to an election petition exist. In Jamaica, service of an election petition and other documents falls under the provisions of s.35 of the Code. Service must be by delivery to the respondent -

> " but if it be made to appear to the Court or the Judge that the (petitioner) is from any cause unable promptly to affect service in manner aforesaid, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise as may be just."

Under s.44 of the Code -

> " Every application to the Court or a judge for an order for substituted or other service or for the substitution of notice for service, shall be supported by an affidavit, setting forth the ground upon which the application is made."

In support of submissions that the respondent was evading service and that there was therefore a good ground for the exercise of the court's discretion to order substituted service, counsel for the petitioner drew attention to the unsuccessful efforts to locate the respondent within the constituency of eastern St.Thomas and in the Corporate Area, by the petitioner and bailiffs in St.Thomas and St.Andrew within the period 21st March and up to 20th April, 1972, when the summons was taken out. Counsel also referred to the petitioner's affidavit which established that on the evening and on the night of the 20th March, 1972, information as to the filing of the petition was given over both radio stations and on television, and that on the 21st March, 1972, the fact of the filing of the petition had appeared in the press.

In my view, to become entitled to an order for substituted service, it would not be necessary for the petitioner to go so far as to show that the respondent was evading service. Wilful evasion is a complex concept consisting of knowledge of the thing to be

evaded and the taking of deliberate steps to effect evasion. To show that a person in the responsible position of the respondent had wilfully evaded service, could be a matter of considerable difficulty which may involve the problem as to the required degree of proof. I consider that if enquiry for the respondent at places where he could reasonably have been expected to be found proved unsuccessful, a sufficient and acceptable cause for the petitioner's inability promptly to effect personal service upon him would have been shown. On the affidavits filed it would be possible to have established such a cause well within the period of ten days stipulated in s.6. The summons could, therefore, have been taken out within that period. It should have been taken out. The inability to find the respondent could then have been deployed before the court or a judge with compelling force, having regard to the disastrous consequences of failure to serve the relevant documents upon the respondent within the time limit in s.6. For it must be appreciated that s.35 Cap.177 provides only for a mode of service of documents. A power to direct the manner in which a thing is to be done does not carry with it a power to nullify, or in any way to modify or affect an essential element of the thing itself; in this case, the requirement of service within a prescribed period. For these reasons I agree with Rowe, J., that on the law as it stands an order for substituted service must be made and executed within the ten-day period prescribed by s.6.

One other matter remains for my consideration. Counsel for the petitioner submitted that where an act or a thing is required by statute as a condition precedent to the jurisdiction of a tribunal, compliance may be dispensed with if it can be shown that performance of the act or thing is frustrated by impossibility. The authorities advanced in support of this proposition were Morgan v. Edwards (1860) 5 H. & N. 415, and Wills & Sons, v. McSherry, 1913 (1) K.B.20. The proposition appears in the first case where Channel, B., is reported as saying at 419 that -

> ".....when an appellant may have done all that he could do in order to comply with the statute, as, for instance, supposing personal service on the defendant to be necessary and made

> impracticable by his keeping out of the way, there might be ground for considering whether a party might not be allowed to enter his case, though the statute may not have been strictly complied with."

In the second case justices had found in a claim in favour of nine seamen, all of whom but one, were foreigners. On a case stated by the justices it was shown that the appellants' solicitor had made every effort to serve the nine seamen with the necessary notices in writing of the appeal, but had been unable to do so as the whereabouts of the respondents could not be ascertained except that they were either at sea or abroad. The Divisional Court held that notwithstanding the want of service, in the circumstances it had jurisdiction to hear the appeal.

The first point to notice is that the statement of Channel, B. in Morgan v. Edwards was obiter, and that in Wills v. McSherry, the court applied the proposition to the facts of the case with an hesitancy apparent in all three judgments. The second point to notice is the important distinction between both cases and the instant case. This distinction is in two parts. The first part consists of the circumstance that both cases are concerned with appeals to a higher court where the exercise of a discretion may be permissible, whereas the instant case is concerned with the initiation of proceedings in a court, and the doing of things prescribed by statute as being necessary to enable the proceedings to be at issue. The second distinction arises as a result of the alternative course open to a petitioner whose efforts to locate a respondent have been unsuccessful. The petitioner may move for substituted service in accordance with s.35 of Cap.177. No such alternative course prescribed by statute was available to the appellants in the two cases cited. So I agree further with Rowe, J., that these two cases cannot help the petitioner.

I also agree with Rowe, J., that even if the court had power to exercise a discretion in favour of the petitioner, it should not be exercised. The exercise of the discretion would depend not only upon the impossibility of locating the respondent, but also upon the steps

taken by the petitioner to secure prompt exercise of the discretion. Having regard to the element of urgency which is clearly discernible in the provisions of Cap.107 for a rigid timetable of the steps which must be taken by all parties to bring the petition to issue, it was incumbent upon the petitioner to act with vigilance, and assiduously, in moving for an order for substituted service. To have waited until 20th of April, 1972, 20 days after the expiration of the time prescribed in s.6, to take out the summons was not in accord with the vigilance demanded of him.

In the light of these considerations, I am of the view that the appeal should be dismissed with the result that the petition is now devoid of all legal effect and should be struck out.

SMITH, J.A. :

On the question whether or not there was power in the court below to extend time for service of the stated documents on the respondent Newland, the judgments in Allen v. Wright (No.2) (1960) 2 W.I.R.,102, show that the arguments addressed to the court in that case on the identical point were the same as those addressed to us. In my opinion, no valid reason has been shown why we should hold that Allen v. Wright (No.2) was either wrongly decided or can be distinguished from the case under consideration. The decision in that case, with which I respectfully agree, is conclusive of this question, which was raised in the first ground of appeal.

The second question, namely that there was power in the court below to deem service effected in the circumstances of this case, was based on the principle which,it is contended, was established in the cases culminating in Wills & Sons v. McSherry et al, (1913) 1 K.B.20. The judgments in that case do not inspire confidence in the validity of the principle which they are said to establish. We have not been referred to any case since 1912, when that case was decided, in which the principle has been accepted and applied. This is not surprising in view of the hope expressed by Channel,B. (at page 26) that 'this decision will not be used as an authority in cases where the facts

are very different'. There the question was whether there was jurisdiction to hear an appeal where a condition precedent regarding service in relation to the appeal had not been complied with. That is, of course, very different from a case, which is the case here, where the condition precedent regarding service, which had not been complied with, relates to the initiation of proceedings in a court of first instance. I am in no doubt that the alleged principle, if valid, cannot apply to such a case. In any event such a principle could not apply to a case where, as here, there are statutory provisions to meet a case where service cannot be effected either because of impossibility, impracticability or evasion.

If the prescribed period of ten days for service of an election petition is proved to be too short a time within which to successfully apply for, obtain and comply with an order for substituted service, then it is the legislature who must extend this period. It is perhaps not without interest, however, to observe that since 1868 the corresponding prescribed period in England is five days and this has, apparently, worked no hardship. The answer appears to be the prescribing of rules, as has been done elsewhere, which would ensure service in one form or another within the prescribed period.

For these reasons I agree that the appeal should be dismissed with costs to the respondent Newland.

GRAHAM-PERKINS, J.A. :

I agree that this appeal must be dismissed. In my view the decision in Allen v. Wright (No.2), although of persuasive authority only, compels the same result in this case because that decision was plainly right.

Quite apart, however, from the decision in Allen's case, I hold the firm view that no question as to substituted service can arise when once the statutory period of ten days within which the petition is to be served has elapsed. If a petitioner can satisfy a judge in chambers that he is, from any cause, unable promptly to effect personal service of his petition, the judge will, almost always, make an order for substituted service or such other form of

service as the circumstances of the case may dictate. Any such order must be obtained and executed within ten days of the presentation of the petition. To hold otherwise, would, in my view, be equivalent to judicial legislation.

I am also satisfied, and this seems to follow from the foregoing, that the Supreme Court of Jamaica, in the present state of the Election Petition Law, Cap.107, has no authority to deem service of an election petition to have been effected and the provisions of s.6 of Cap.107 to have been complied with when service of that petition has not in fact been effected. I am unable to detect any relevance to this case of the decision in Wills & Sons v. McSherry et al, so strongly relied on by Mr. Horace Edwards.

It is perhaps desirable to say that it is the clear duty of counsel not to cite as authorities for propositions advanced by them, decisions which have no relevance to those propositions. In this connection it is well to recall the admonition of Halsbury, L.C., in Quinn v. Leathem, 1901 A.C.,495, at page 506 -

> " There are two observations of a general character which I wish to make, and one is to repeat what I have often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

FOX, J.A. :

The formal decision of the Court is that the appeal is dismissed with costs to the respondent Newland.