

CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL No. 8/80

BEFORE: The Hon. Mr. Justice Zacca, President (Ag.)
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

BETWEEN - GERALDINE THOMPSON - PLAINTIFF/APPELLANT
AND - ELBERT E. THOMPSON - DEFENDANT/RESPONDENT
(EXECUTOR OF
NORMAN E. THOMPSON,
DEC'D.)

Mr. C. Adams for Appellant.

Mr. R. Alberga, Q.C. and
Mr. J. Stafford for Respondent.

June 23 and 24, & August 12, 1980

ZACCA, P. (Ag.):

On June 24 we refused this application and promised to put our reasons in writing. This we now do.

This is an application by the Plaintiff seeking leave of the Court to file a notice of appeal notwithstanding that the time limited by the Rules of the Court for appealing had expired. The Notice of Motion seeking the extension of time was filed on June 18, 1980. The Judgment of the Grand Court from which the Appellant is seeking leave to appeal was given on September 21, 1977.

The Appellant and Norman Thompson were married and lived together for about 25 years. In May 1973 they were living separate and apart. Norman Thompson died on August 22, 1978.

The Appellant has been contending that she is entitled to an interest in the house (hereinafter referred to as "the property") which she had lived with her husband. It is necessary to set out the history of the proceedings which have been instituted since 1973.

- (1) In 1973 Plaint 33 of 1973 was filed by the Defendant asking for an order setting aside a Deed of Gift which had been executed by the Plaintiff transferring "the property" to herself. On September 19, 1973, by Consent, it was ordered that the Deed of Gift be delivered up to the Defendant and that the Entry in the Register of Lands be cancelled.
- (2) On January 8, 1975, a petition filed by the Appellant claiming joint ownership of "the property", was disallowed by the Land Adjudicator.
- (3) The Appellant filed an appeal against the Order of the Land Adjudicator, which appeal was dismissed by the Grand Court on September 21, 1979.
- (4) On 26th April, 1977, the Appellant filed proceedings in the Grand Court being Plaint 288 of 1977. These proceedings also related to "the property" and were discontinued by the Appellant.
- (5) On May 24, 1977, the Appellant filed Plaint 336 of 1977 claiming an interest in "the property". This claim was heard by the Grand Court Judge who on September 21, 1977, entered judgment for the Respondent on the basis that the proceedings were res judicata having regard to the proceedings brought in Plaint 33 of 1973.

At the time of the hearing of Plaintiff 336 of 1977, the appeal from the Land Adjudicator was still pending.

(6) On September 14, 1979, the Appellant filed Plaintiff 415 of 1979. This Plaintiff related once more to the same property. Certain paragraphs of the statement of Claim were subsequently struck out on an application of the Respondent. This Plaintiff remains undetermined.

It is abundantly clear that the Appellant instead of appealing against the judgment in Plaintiff 336 of 1977, continued to file various actions relating to the same property, hoping perhaps to establish her claim to an interest in the property. When all other claims have failed, she now seeks to appeal against the judgment in Plaintiff 336 of 1977 delivered on September 21, 1977.

Rule 13 of the Court of Appeal (Jamaica) Rules 1962 which apply to the Cayman Islands gives a party to an action 6 weeks from date of judgment within which to appeal. However s. 21 of the Court of Appeal Law, Law 9 of 1975, gives the Court power to extend the time for appealing.

S. 21 states:

"Notwithstanding any other provision of this law, the Court may at any time, upon application made in such manner as may be prescribed by the rules of court, extend the time within which
(a) Notice of appeal may be given or served;
.....

Rule 9 (2) of the Court of Appeal (Jamaica) Rules provide for this application to be made by way of Motion and Rule 9 (3) provides as follows:

"Every motion under the preceding paragraph shall be supported by affidavit, a copy of which shall be served with the notice of motion, setting out concisely the reasons why the act or proceeding was not taken within the prescribed time."

Where there is non-compliance with the rules, it must be explained. When an application is made to enlarge the time for appeal, there must be some proper grounds for supporting it. The delay in the instant case was 1 year and 9 months. This application was supported by two affidavits of Colin Charles Adams,

the Attorney for the Appellant. These affidavits relate to a period commencing on June 14, 1979, and were dated June 6 and 19, 1980.

These affidavits do not seek to explain the long delay in failing to file a notice of appeal within the prescribed time. No Affidavit has been filed in support of the application by the Appellant herself. In the final analysis there has been no explanation given for the non-compliance with the rules. It is clear that the first intimation of her intention to appeal against Plaintiff 336 of 1977 was the filing of this application.

Mr. Adams on behalf of the Applicant on the question of the delay relied on Re A Debtor (1958) 1 A.E.R. 581. However, in that case the delay was caused by the party who was seeking to rely on the delay. That case cannot therefore be of any assistance to the Appellant.

Mr. Alberga for the Respondent relied on three cases on the question of delay:

- (1) Revici v. Prentice Hall Incorporated and Others
(1969) 1 A.E.R. 772.
- (2) Ratnam v. Cumarasamy and Another
(1964) 3 A.E.R. 933.
- (3) City Printery Ltd. v. The Gleaner Co. Ltd.
(1968) 10 J.L.R. 506.

The principle to be extracted from these cases is that where there has been non-compliance with the rules and where there has been delay, there must be a satisfactory explanation to ground an extension of time.

In Revici's case there was a delay of eleven weeks and at page 774 (B) Lord Denning, M.R., had this to say:

"Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered.) Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3½ months in which to lodge his notice of appeal to the judge and he did not do so. "

At page 774 (E) Edmund Davies, L.J. states:

"The notice of appeal herein submits (in effect) that that question calls for an affirmative answer, certainly in cases where it is not shown that the other side have suffered irreparable damage as a result of the delay. I disagree. On the contrary, the rules are there to be observed; and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted. "

In Ratnam's case, at page 935 (A) Lord Guest had this to say:

"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 time table for the conduct of litigation. "

In City Printery Ltd. v. The Gleaner Co. Ltd. there was a delay of two years in filing the Record of Appeal. It was held that neglect of the solicitor to file the Record of Appeal due to clerical changes in his staff and change of office premises could not be considered as material sufficient to warrant the favourable exercise of the court's discretion. At page 512 (A) Fox, J.A. quoted Lord Diplock in Allen v. Sir Alfred McAlpine & Sons Ltd. (1968) 1 A.E.R. 543 -

"generally the ordinary litigant, once he has consulted his solicitor, is helpless before the mysterious arena of the law. Delay when it occurs from this stage onwards is usually not his own fault but that of his solicitor. "

At page 512 (B) Fox, J.A. said:

"I do not ignore this view, but the delay here is so prolonged that it is difficult to resist the thought that if the appellant had a really serious continuing intention of prosecuting the appeal, at least on one occasion, some action would have been taken to show this intention. There is nothing to this effect in the affidavits filed. "

In Melbourne Watler v. Omega Bay Estates Ltd. Cayman Islands Civil Appeal No. 14/77, July 19, 1978, an application for leave to appeal out of time was granted. In this case which was an appeal from the Land Adjudicator to the Grand Court, there was a delay of about nine months. The Grand Court had refused leave to appeal out of time but the Court of Appeal in granting the application stated that some reasonable excuse had been shown for the late filing of the appeal and that their decision was limited to the particular law under consideration - The Land Adjudication Law.

In the application before us we have considered the circumstances of the case, and the affidavits filed by the Appellant's Attorney. No material has been placed before the court on which the court could exercise its discretion in her favour. There is nothing to support a prior intention to appeal against the judgment in Plaint 336 of 1977. The inordinate delay has not been explained.

For these reasons we refused the application and awarded costs to the Respondent to be agreed or taxed.