JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO: 79 OF 2007

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN:	**JACQUELINE ARCHIBALD**	**APPLICANT**
AND	**LESTER ROBERTS**	**RESPONDENT**

Miss G. Mullings, instructed by Patrick Bailey & Co. for the Applicant

Mr. Owen Crosbie for the Respondent

July 3 & 4 & December 20, 2007

K. HARRISON, J.A:

This is an appeal from the judgment of His Honour Mr. Oswald Burchenson, Resident Magistrate for the parish of Manchester, who on the 6th March, 2007 ordered the defendant Jacqueline Archibald ("the Appellant") to vacate premises situate at Greenvale Road, Mandeville, Manchester on or before June 5, 2007. A Notice of Appeal was filed in the Mandeville Resident Magistrate's Court on the 20th March, 2007 but the payment of security for the due prosecution of the appeal and the security for the payment of costs of the appeal were not paid into court until the 22nd March, 2007.

In view of the late payment, the Appellant made an application to the Court of Appeal on July 3, 2007, for an extension of time for payment of the security for the due prosecution of the appeal. At this hearing, the Respondent made a preliminary objection contending that there was no appeal before the Court. The objection succeeded and on July 4, 2007 we dismissed the appeal with costs to the Respondent. An oral judgment was delivered and we promised then to put our reasons in writing for dismissing the appeal. This is a fulfilment of that promise.

The background facts

On June 7, 2007 the Appellant had filed an amended application in the Registry of the Court of Appeal seeking the following orders:

1. That leave be granted for stay of execution of the Judgment dated March 6, 2007 pending the hearing of the Resident Magistrate Civil Appeal; and
2. That service of the Notice and Grounds of Appeal be regularized and time extended for service of the Notice and Grounds of Appeal.

On June 27, 2007 a further amended notice of application was filed seeking the following orders:

> "(1) ...
>
> (2) That the time for the payment of the security for costs of the appeal and for the due and faithful performance of the judgment and orders of the court of appeal and for the service of the Notice of Grounds of Appeal be extended by the court and same accordingly be regularized.
>
> (3)....."

The Appellant alleged that her non-compliance was unintentional and done through inadvertence.

An affidavit in support of the application which was sworn to on the 27th June 2007 by Stephanie N. R. Gritton deposed inter alia:

> "(1)....
>
> (2)....
>
> (3) That a Notice of Appeal in this matter was filed on the 20th March, 2007 by my office.
>
> (4) That on that date I was requested to file the Notice of Appeal in Mandeville as I had been asked to assist in this matter as Messrs. Patrick Bailey & Co., Attorneys at Law who do not have an office in Manchester.
>
> (5) That the funds to pay the security for the Appeal were sent in cash to my bank account in Mandeville on March 21, 2007.
>
> (6) That unfortunately I was not aware that both Notice of Appeal and the security for the due prosecution of the Appeal would have to be submitted together. That the funds were accepted by the Mandeville Resident Magistrates Court on the 22nd of March 2007 (sic) and I was not aware that there had been any problems in respect of same.
>
> (7) That this was inadvertent and not intended to delay the matter and I had not realized the implication thereof.
>
> (8) That I am instructed and do verily believe that the Appellant has an appeal with great prospects of success.
>
> (9) In the circumstances, I humbly pray that the time to file the Notice of Appeal be extended".

Dukharan, J.A (Ag.), granted an interim order for stay of execution and ordered that the matter be heard *inter partes.* On June 19, 2007

McCalla, J. A. (as she then was), adjourned the application into open court for hearing.

The objection in limine

Mr. Owen Crosbie who appeared for the Respondent, submitted that there was no appeal in existence at the time when the matter was dealt with by Dukharan, J.A. (Ag.), since section 256 of the Judicature (Resident Magistrates) Act ("the Act") was not complied with, particularly, as it relates to payment of the Six Hundred Dollars ($600.00) for the due prosecution of the appeal though the Notice of Appeal was filed in the Mandeville Resident Magistrate's Court. He submitted that failure to pay this sum at the time of lodging the appeal was fatal and it was therefore not competent for this Court to entertain the appeal. Section 256 of the Act provides as follows:

> "The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Courts, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of six hundred dollars as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of six thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
>
> Such last-mentioned security shall be given either by deposit of money in the Court, or by the party appealing entering into a bond, with two sureties to be approved by the respondent, or, in case of dispute, by the Clerk of the Courts with an appeal to the Magistrate. No stamp duty shall be payable on such bond."

Mr. Crosbie submitted that the following cases "buttressed" his argument that there is no appeal in existence:

(a) ***Eric Christian v Wesley Brown*** (1973) 12 JLR 1039

(b) ***Patterson & Nicely v Lynch*** (1973) 12 JLR 1241.

(c) ***Orett McNamee v Greta Webb*** (1973) 12 JLR 1490

(d) ***Connolly and Anor. v Watler*** (1973) 12 JLR 1361.

In ***Christian*** (supra) the Court of Appeal held:

> "The payment of the sum of $1 as security for the due prosecution of an appeal from a judgment of a resident magistrate is not a formality in respect of which the Court of Appeal can exercise a discretion to allow the time for payment of such security to be extended, such payment being a condition precedent to the jurisdiction of the Court".
>
> *Appeal dismissed.*

The headnote of ***Patterson and Nicely*** (supra) reads as follows:

> "At the time of lodging the appeal herein the sum of one dollar only instead of two dollars, was deposited as security for the due prosecution of the appeal. On the appeal coming on for hearing the respondent submitted *in limine* that the court had no jurisdiction in the circumstances to entertain the appeal. For the appellant it was argued on the authority of ***Aarons v Lindo*** [(1953), 6 JLR 205], a decision of the former Court of Appeal, that the deposit for security for the due prosecution of the appeal was a mere formality and since the omission to deposit the full amount arose from inadvertence and since the justice of the case required the appellants to be allowed to impeach the magistrate's judgment it was perfectly competent for the court to hear the appeal.
>
> *Held:* (per Luckhoo and Robinson JJ.A; Fox, J.A., dissenting): that the requirement as to the deposit for the due prosecution of an appeal from a resident magistrate's court at the time of taking or lodging the appeal was a condition precedent to the jurisdiction of the Court of Appeal, and this court had no power to reset the timetable regulating the conduct of the appeal proceedings so as to enable that requirement to be complied with at a later date."
>
> *Appeal dismissed.*

In ***Orrett McNamee*** (supra) the appellant had lodged a sum of $25 in respect of security for the costs of his appeal instead of the sum of $24 as is required by s. 256 of the Judicature (Resident Magistrates) Law, Cap. 179. He did not, however, assert in his notice of appeal that he had lodged the sum of $1.00 for the due prosecution of the appeal. It was held:

> "(Edun, J.A., dissenting): that the payment of the sum of $1 as security for the due prosecution of the appeal was a condition precedent to the jurisdiction of the court and the court had, therefore, no jurisdiction to entertain the appeal."

Connolly and Another (supra) was a case from the Cayman Islands and also followed the principles enunciated in ***Christian, Patterson and Nicely*** cases (supra).

Miss Mullings for the Appellant submitted however, that the Court was competent to hear the appeal by virtue of the provisions of sections 256 and 266 of the Act. Section 256 is referred to above. Section 266 states as follows:

> "The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

She submitted that the Respondent was advocating a restrictive interpretation of the words "at the time" and that they ought to be given a liberal

interpretation. She argued that to give those words a meaning that the funds should be paid into court within a specific period would be to add words that are not presently included in the enactment. She argued that at no time are the words "*forthwith, immediately, at the same point in time, within the day, or within the hour*" used in section 256 of the Act and submitted that since the section itself is unclear some words must be read into it to give it efficacy. Miss Mullings further submitted that the words "*at the time*" referred to in section 256 could not mean "*at the same time*" and would be unfounded on the basis of the provisions of section 266 of the Act (supra). She contended that the words "*at the time*" must bear a liberal interpretation and in the circumstances, the payment and acceptance of the funds in respect of the due prosecution of the appeal and the security for costs on March 22nd 2007, is not a ground on which the validity of the appeal can be impugned.

Finally, Miss Mullings submitted that section 266 of the Act must be construed as a whole and that the word '*matters*' used in the section must include the matter of making the deposit as the legislature has given a very wide jurisdiction to the Court of Appeal. She argued that this is a separate jurisdiction to that which the Court of Appeal exercises under the Judicature (Appellate Jurisdiction) Act which was in fact a jurisdiction which preceded the latter Act.

The determination of the preliminary objection

It is abundantly clear that the appellant had in fact failed to comply with section 256 of the Act since she had failed to pay the deposit of Six Hundred Dollars ($600.00) into court for the due prosecution of the appeal. This

provision requires an appellant to deposit Six Hundred Dollars ($600.00) for security for the due prosecution of the appeal at the time of pronouncing judgment when the appeal is taken and minuted or if not so taken then within 14 days after the date of the judgment when a written notice of appeal is lodged. A further Six Thousand Dollars ($6,000.00) is to be paid as security for costs within 14 days of the taking or lodging of the appeal.

The question that had to be determined was whether non-compliance with the section vitiates or terminates the appeal process. In addition it had to be decided whether the Court of Appeal can grant an application by an appellant for an extension of time to comply with the section. The question to be decided is this: Can this Court reset the timetable regulating the conduct of appeal proceedings so as to enable that requirement to be complied with?

Section 12 of the Judicature (Appellate Jurisdiction) Act provides:

> "(2) Notwithstanding anything to the contrary the time within which —
>
> (a) notice of appeal may be given, or served;
>
> (b) security for costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;
>
> (c) grounds of appeal may be filed or served, in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time".

The section clearly allows for the extension of time for the payment of security for costs. However, no mention is made of the payment of security for the due prosecution of the appeal. Fox J.A. in ***Patterson and Nicely v***

Lyn [1973] 12 JLR 1241 held that this omission was deliberate and not the result of an oversight. It was aimed he said, at resolving the earlier cases of **Aaron v Lindo** [1953] 6 JLR 205 and ***Welds v Montego Bay Ice Co. Ltd. and Smith*** [1962] 8 JLR 83. In the earlier case, the Court of Appeal treated the requirement to pay security for costs as a formality, though no reasons were given by the court for so holding. The court in the ***Welds'*** case took a different view concluding that the requirement is a condition precedent, see also ***Christian v Brown*** (supra). It was the opinion of the court that s.11(2) of the Judicature (Appellate Jurisdiction) Law 1962 only gave the court power to extend time for the giving of notice of appeal and filing grounds of appeal. Therefore, the payment of security for costs and for the due prosecution of appeal were conditions precedent and there could be no allowance of time given by the court for the compliance with these requirements. The court however expressed the view that the omissions ought to be remedied by the Legislature. This was done by s.3 of the Judicature (Appellate Jurisdiction) (Amendment) Act 1970 which repealed and re-enacted s.11 (2) which has become s.12 of the Act.

It seems clear that by the re-enactment of s.11 (2), now s.12, the Legislature had intended that the payment of security for costs be a formality for which the Court of Appeal could allow an appellant an extension of time within which to comply at a later date. However, the payment of security for the due prosecution of the appeal still remained a condition precedent, being omitted from section 12. ***Christian v Brown*** (supra) reinforced the statutory amendments of 1970 and other cases confirmed.

In my judgment, there was no effective notice of appeal. The giving of security for the due prosecution of the appeal was not a formality but was rather a condition precedent to the prosecution of the appeal. It was for these reasons why we upheld the preliminary objection and dismissed the appeal. Costs to the respondent in the sum of $15,000.00.