

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 5/99

MOTION NO. 32/99

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN ANDREW WRIGHT DEFENDANT/APPELLANT
AND ERIC MIGHTEN PLAINTIFF/RESPONDENT

NANCY ANDERSON instructed by Dorrell N. Wilcott for
defendant/appellant

RAPHAEL CODLIN for plaintiff/respondent

November 15, 16, 1999 and January 31, 2000

BINGHAM J.A

When this motion came before the Court on the 15th November, it was framed as one in which the applicant sought the leave of the Court by way of a motion to restore this appeal to the list and to file Grounds of Appeal out of time. Upon an objection being taken in limine by learned counsel for the respondent that up to this point in time there was no appeal pending before the Court to ground such an application, the matter was adjourned to the following day to permit the appellant to amend the motion to one seeking leave to appeal out of time.

On 16th November, 1999 upon the amendment being applied for and granted learned counsel for the respondent took an objection in limine on the ground that this Court having previously heard similar arguments in the matter and refused the application on the ground that it had no jurisdiction, the matter was now res judicata.

The Court nevertheless heard submissions from counsel touching on the application. At the end of these submissions we reserved our judgment.

At the first blush it would appear that the outcome of this application turns upon an interpretation of section 256 of the Judicature (Resident Magistrates) Act. The section reads:-

"256. 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 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 two hundred dollars as security for the due prosecution of the appeal, and shall further within fourteen days after taking or lodging of the appeal give security, to the extent of two thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgement and orders of the Court of Appeal."

For a proper appreciation of the matter now before us it is necessary to resort to the factual background leading up to the application which is fully

rehearsed and set out in the affidavit sworn to by Mr. Dorrell Wilcott in support of the motion. The relevant part reads as follows:

"I, DORRELL N. WILCOTT, being duly sworn make oath and say as follows:

1. That I have my postal and business address in care of MESSRS. CRAFTON S. MILLER & COMPANY, Attorneys-at-Law of 1A Duke Street, in the City and Parish of Kingston and I am an Attorney-at-Law.
2. That on the 14th day of April, 1999 a Motion was filed in this Honourable Court for Leave to File Grounds of Appeal Out of Time in this matter due to the fact that although the Notice of Appeal was filed on the 14th day of July, 1997, the Notes of Evidence were not delivered until February 1999 and the Grounds were not filed within the time set out in the Judicature (Resident Magistrate's Court) Act.
3. That on the 19th day of July 1999 this Motion was dismissed on the preliminary point that this Honourable Court had no jurisdiction to hear the matter as the Applicant/Appellant was in breach of Section 256 of the Judicature (Resident Magistrate's Court) Act since he had failed to satisfy the monetary

requirements for due prosecution and for security for costs.

4. That no written reasons were given for the decision although this Honourable Court emphasized the breach of Section 256 when verbally dismissing the Motion.

5. That the Appellant had given to me the amount of \$2,000.00 in cash on the 17th day of July 1997, and that on that day, I sent Mrs. Janeth Diggs-White, then employed by me as a Secretary, with the money to be paid to the Clerk/Accountant at the Resident Magistrate's Court for the parish of Clarendon in May Pen at the Court's Office.

6. That a receipt for \$221.00 was issued but not a receipt for \$2,000.00.

7. That I obtained from Mrs. Janeth Diggs-White an Affidavit and filed same in this Honourable Court to the effect that she had received the sum of \$2,000.00 and that both these sums were paid to the Clerk/Accountant.

8. That by a letter dated 7th July 1999 from the Honourable Resident Magistrate for the parish of

Clarendon reported to the Registrar of the Court that the Clerk/Accountant at his Court denied receiving \$2,200.00 and this Honourable Court, at the hearing of the Motion, accepted this denial of the Clerk/Accountant and the Motion was dismissed and I attach as "Exhibit "D.N.W.1" a copy of this letter."

This affidavit raised an issue as to whether the proper security had been forwarded to the Clerk of Courts for Clarendon, when the notice of appeal was lodged at the Court's office. The matter came on for hearing on April 19, and 22, when this Court, [Rattray P, Downer J.A., Panton J.A. (acting)] ordered the Registrar of the Court to direct the senior Resident Magistrate for Clarendon to enquire into the matter of the deposit.

Acting upon this the learned Resident Magistrate reported as follows:

"The Registrar
Court of Appeal
P.O. Box 629
Kingston
Jamaica

July 7, 1999

ATTENTION: MRS. G. PATRICIA LEVERS

**RE: ANDREW WRIGHT V. ERIC MIGHTEN AND
MURIEL SHAW - R.M.C.A. 5/99**

Your memorandum of the 28th June 1999, was referred to me by the Clerk of Court.

I was informed that:

- a) Notice of Appeal was filed in the Resident Magistrate's Court, Clarendon on the 17th July, 1999. (sic).
- b) The notice of Appeal was stamped, by the typist at the time Miss P. Mills, with the court's office stamp acknowledging receipt of the same.
- c) The Court stamp placed on this document is not on acknowledgment by Miss P. Mills that she received the sum of \$2,000.00 deposit as security for the due prosecution of the appeal or \$200.00 as security for cost of the above matter.
- d) It is the Accountant Miss Farquharson who is the person that collect any payment for appeals filed.
- e) She states she only collected \$221.00 for the above named appeal which copy receipt no. 677240 is in the receipt book.
- f) She further states that for the year 1997 she was collecting only \$221.00 for payment of appeals because she was unaware that there was an amendment to the tariff of fees affecting appeal. She states that it is only since March 1998 after the changes were brought to her attention that she started to collect the sum of \$2,200.00 for appeals.
- g) All papers, including the notice of appeal was sent to the Registrar of the Court of Appeal.

Yours

Courtney Daye
Resident Magistrate,
Clarendon

c.c. Mr. Dorrell N. Wilcott
Attorney-At-Law
May Pen
Clarendon."

When the Court resumed on 19th July (the Court per, Rattray P, Downer and Langrin J.J.A.), acting upon the report upheld the preliminary objection and refused the application. As the matter which has so far informed the judgment of the Court was concerned with a motion seeking the leave of the Court to file grounds of appeal out of time, given the wording of Section 256 of the Judicature (Resident Magistrates) Act the failure to lodge the proper security for the due prosecution of the appeal meant that there was no appeal pending to ground the application being made to the Court. In that regard the submission of learned counsel for the respondent was well taken.

The question now before this Court, concerned as it is with an application for leave to file an appeal out of time, is cast in a different mould. What now faces us for our determination is whether this Court has the inherent power to grant such leave to enable the applicant to lodge and so perfect his appeal.

Learned counsel for the applicant contends that the Court has such a power. She relies in support on **Charles Stewart and Glennis Rose** (unreported) Motion 15/97; (plaint # 477/89) delivered on 17th June, 1997 (subsequently RMCA 7/97).

Learned counsel for the respondent in arguing to the contrary sought to rely on the authority of **Patterson and Nicely v Lynch** [1973] 12 J.L.R. 1241.

For a proper understanding of the ratio decidendi touching on the latter case, it is sufficient to set out the headnote. It reads:

" 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) 6J.L.R. 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 J.J.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 appeal proceedings so as to enable that requirement to be complied with at a later date. (Emphasis supplied)."

As the decision shows, the Court in that case was concerned with an appeal which was set down for hearing and was about to be heard, but in respect of which the proceedings were being rendered nugatory because of the failure on the part of the appellants to lodge the proper deposit required for the due prosecution of the appeal.

The matter now before us, as the affidavits of Mr. Wilcott and that of the senior Resident Magistrate for Clarendon clearly indicate, is concerned with an attempt by the applicant to lodge an appeal well within the time-table prescribed by law, which attempt was rendered

unsuccessful due to an administrative error on the part of the proper officer carrying out the duties of filing civil appeals at the Court's office at May Pen. It is important to refer to paragraph (f) of the Senior Resident Magistrates' report which states:

"(f) She further states that for the years 1997 she was collecting only \$221.00 for payment of appeals because she was unaware that there was an amendment to the tariff of fees affecting appeal. She states that it is only since March 1998 after the changes were brought to her attention that she started to collect the sum of \$2,200.00 for appeals. (Emphasis supplied).

Given the circumstances of the case it could not have been within the contemplation of the legislators that a litigant's statutory right of appeal could be rendered nugatory due to no failure on the litigant's part to comply with the time table prescribed by the statute regulating civil appeals.

In order to consider how the matter ought now to be addressed much assistance can be gained from an examination of Section 266 of the Judicature (Resident Magistrates) Act. This section reads as follows:-

" **266.** - The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed literally in favour of such right; and in case any of the formalities prescribed by the 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."

It is at this stage that one now has to turn to section 12 of the Judicature (Appellate Jurisdiction) Act. This section which provides for the manner in which appeals from the Resident Magistrate's Court are to be considered and determined also covers how an application for extension of time for filing an appeal is to be dealt with. The section reads:-

" **12.-** (1) Subject to the provisions of this Act, to the Provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made under that Act, an appeal shall lie to the Court from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.

(2) Notwithstanding anything to the contrary the time within which -

- (a) notice of Appeal may be given, or served;
- (b) security for the 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." (Emphasis supplied).

The underlined words is a direct reference to this present Motion. On any proper reading of the section it is clear that the provision gives to this Court the necessary discretionary powers in an appropriate case to extend the time for filing an appeal, in the process calling in aid ,if necessary, the rules of the Court: (viz. the Judicature (Civil Procedure Code) Law and the Court of Appeal Rules).

Section 12 of the Judicature (Appellate Jurisdiction) Act has been resorted to in the past, in order to deal with a similar application to that now before us. In **Charles Stewart and Glennis Rose** (supra), the application was by way of Motion Seeking the leave of the Court to extend time for filing an appeal and for stay of execution. The ground advanced in calling for the exercise of the Court's discretion to be granted in favour of the applicant was one of inadvertence on the part of the attorney-at-law for the applicant. The Motion was granted on terms. In dealing with the powers of the Court to entertain such applications, and having set out in extenso section 12, Downer J.A. at page 14 of the judgment expressed himself in the following vein :-

"All these direct statutory provisions make it clear that this Court has always been empowered to grant extension of time as prayed. Because even without the statutory provision Section 4 of the Judicature (Supreme Court) Act and section 9 of the Judicature (Appellate Jurisdiction) Act by necessary implication and section 576 of the Civil Procedure Code expressly accorded this court the power to extend time."

In **Wright v Salmon** [1964] 7 W.I.R. 50 this Court (per Duffus P.) while not doubting the effect of section 266 of the Judicature (Resident Magistrates) Act in enabling the Court to deal with such applications refused the application on different grounds.

In this case it is clear from the facts and circumstances before us that there is a conscious desire on the applicant's part to pursue this appeal. It is also clear that, but for the administrative error on the part of the officer responsible

for filing civil appeals at the May Pen Courts Office, the appeal would have been lodged and perfected well within the time prescribed by the statute regulating civil appeals. As the situation now existing was not brought about by any inadvertence, ignorance or necessity on the applicant's part the justice of the case requires that this application be granted.

Leave is accordingly granted to the applicant to file an appeal and grounds of appeal within fourteen (14) days hereof. It is further ordered that there be a stay of execution pending the hearing and determination of the appeal.

No order as to costs.