IN THE COURT OF APPEAL

SAINT VINCENT

Civil Appeal No. 1 of 1970

Between:

MARTIN FRANCIS — Defendant/Appellant

and

ELIZABETH AMELIA AMBROSE (Administratrix of the Estate of Percival Wallace Ambrose, deceased) — Plaintiff/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice P. Cecil Lewis
The Honourable Mr. Justice St. Bernard (Ag.)

Daniel Williams for the Appellant
E.A.C. Hughes for the Respondent

1970, April 28, 29

JUDGMENT

GORDON, C.J. (Ag.)

On the 13th of February, 1970, the appellant in this case filed what purported to be an appeal from an order which Peterkin J. made on the 14th January, 1970. The order was in the following terms:-

(1) That the hereditaments described in the Schedule to the Summons filed herein on the 3rd day of November, 1969, (hereinafter called "the premises") be sold in satisfaction of the judgment debt, interest and costs outstanding in this Suit.

(2) That an affidavit of valuation of the premises be sworn by a competent valuator to be selected by the Plaintiff such affidavit to be filed herein.

(3) That subsequent to the filing of the affidavit of valuation the terms of the sale shall be fixed by the Registrar and approved by the Court.

On the 14th February, 1970, on an application made by the defendant/appellant the trial judge made an ex parte order enlarging the time for filing the appeal to the 25th February, 1970. The record of appeal was not filed until the 8th April, 1970.

/On the appeal

On the appeal coming on for hearing before this Court yesterday counsel for the respondent sought the leave of the Court to argue certain preliminary objections which he filed on the 24th April, 1970, and served on the defendant that day even though it was not in strict compliance with Rule 18 (1) of the Court of Appeal Rules 1968, (hereinafter referred to in this Judgment as the Rules) which provided that 3 clear days notice of such objections should be given.

Having regard to the fact that the preliminary objections in question merely raised questions of fact as to whether certain documents were or were not filed on specific dates, and the fact that the Court on hearing counsel for the appellant was satisfied that no prejudice or hardship could result to him, in accordance with rule 18 (2) of the Rules gave leave for the preliminary objections as filed to be argued.

Counsel for the respondent urged on the Court that the order appealed from was in the nature of an interlocutory order, and as such an appeal should have been lodged within 14 days as provided for by rule 14 (1) (a) of the Rules, and further that the notice of appeal was not filed in accordance with rule 15 (1) in that no true copy of the notice of appeal had been served on the respondent within the seven days specified in sub-rule 2 of that rule.

Continuing, counsel pointed out that inasmuch as the appeal was lodged on the 13th February, 1970, and the record filed on the 8th April, 1970, the record had not been filed within six weeks from the date when the appeal was brought as prescribed by rule 24 (1), and that because no extension of time was granted by the Court, such filing of the record on the 8th April was irregular.

A further objection advanced by counsel for the respondent was that there was no affidavit of service of the Notice of Appeal on the respondent filed in accordance with rule 24 (1).

The attention of the Court was also drawn to the fact that an application for extension of time for filing the appeal was granted ex parte by the trial judge on the 14th February. The trial judge in making this order purported to act under rules 28 and 29, but as counsel for the respondent rightly pointed out, this order was not made in accordance with sub-rule 2 of rule 29, which required such an application to be

/supported by

supported by affidavit, a copy of which should be served with the summons on the respondent. No such summons or affidavit was in fact served on the respondent.

Counsel for the appellant conceded that the paper purporting to be a notice of appeal handed by the Registrar to counsel for the respondent on the 18th March - the date when the record was settled and when counsel for the appellant stated he indicated that he had attended under protest - did not constitute proper service on the respondent. Accordingly no notice of appeal had been served on the respondent by the appellant within the period prescribed by rule 15 (2) or at all.

Counsel for the appellant further conceded that the record was filed out of time, without any extension of time for the purpose being applied for or granted by the Court; and that there was no affidavit of service of the notice on the respondent filed. He however asked the Court to exercise the power given it by rule 26 (2) and to order that the Notice of Appeal be now served.

Rule 26 (2) however deals with cases coming under rule 24 (1) when an appellant has failed to comply with the requirements of that rule and cannot be extended to cases where no Notice of Appeal has been given to the respondent within the seven days prescribed by Rule 15 (2).

In answer to the objection that the appeal was filed out of time, counsel for the appellant urged that the order made by the trial judge on the 13th January was not an interlocutory order but a final order, and that as such the appeal lodged on the 13th February was well within the six weeks period prescribed by Rule 14 and therefore in time. He however gave no satisfactory explanation as to his reason for making an application on the 14th February for an enlargement of time within which to file an appeal, when in fact an appeal had already been lodged on the 13th February, 1970.

Owing to the view which I have taken of the circumstances under which this appeal has been filed, it is unnecessary to decide whether the order made by the learned trial judge was an interlocutory order or a final order. Whether it was the one or the other, the fact remains that no Notice of Appeal was served on the respondent in accordance with rule 15 (2). Such a circumstance in my view created an

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appellant without a respondent. The omission is accordingly fatal, and I would dismiss this appeal with costs.

(K. L. Gordon)
Acting Chief Justice

P. CECIL LEWIS, J.A.

In this matter four preliminary objections, notice of which was given to the appellant, were raised on behalf of the respondent. They are as follows:-

> "That the Appeal was brought out of time; that notice of appeal was not served; that the record was filed out of time and that no affidavit of service has been filed."

In her notice the respondent gave the following grounds of the said objections:-

> "(1) That the appeal was not brought within the time prescribed by Rule 14 of the Court of Appeal Rules, 1968, (hereinafter referred to as "the Rules").
>
> (2) That Notice of Appeal was not served as required by Rule 15 of the Rules or at all.
>
> (3) That the Record was not filed within the time prescribed by Rule 24 (1) (i) (a) of the Rules.
>
> (4) That no affidavit of service has been filed as required by Rule 24 (1) (i) (b) of the Rules."

Counsel for the appellant conceded that he had failed to observe the requirements of the several rules referred to in the grounds of objections (2), (3) and (4), and thus having no satisfactory answers to the arguments adduced by counsel for the respondent he sought to persuade the Court either that it had certain inherent powers to do what was just according to the circumstances of the case, or alternatively, (to use the concluding words of paragraph (2) of Rule 26), "to make such other order as the justice of the case may require." Shortly put, what counsel meant to imply was that the Court should allow him an adjournment and give him leave to serve the notice of appeal. In my view, however, this cannot be done, for the Court is bound to observe the rules

/which are made

which are made for regulating appeals which are brought before it, and if in these rules the Court is empowered to do certain things or "to make such other order as the justice of the case may require", the Court must observe the provisions of the particular rule by which it is empowered to act.

If counsel for the appellant meant to imply by his argument that the Court had power to go outside the prescribed rules and to make an ad hoc rule to suit the circumstances of a particular case either in order to avoid undue hardship or for any other reason, then of course I must disagree with him. The Court is in duty bound to interpret the rules in accordance with the accepted canons of legal interpretation, and where it has a discretion given to it, it has to exercise this discretion judicially. It cannot put a strained interpretation on the rules in order to overcome a hardship if one is thought to exist.

I now turn to the second ground of objection, that the notice of appeal was not served as required by rule 15 of the Rules or at all. Paragraph (2) of rule 15 of the Court of Appeal Rules 1968 requires a true copy of the notice to be served upon the respondent within seven days after the original notice has been filed. This the appellant admits has not been done, but he has submitted that since the Court has power under paragraph (1) of rule 15 to direct a notice of appeal to be served on a person not a party to the action and to postpone or adjourn the hearing of the appeal upon such terms as may be just, then it has power to make a similar order in respect of a respondent who has not been served. I am unable to accept this submission on the simple ground that a respondent is in a different position from a third party. A respondent is a person directly affected by an appeal and service on him is mandatory. Until a respondent is served there is no other party to the purported appeal and the appeal is incomplete. An appeal presupposes the existence not only of an appellant but of a respondent, and since, admittedly, there was no one served as a respondent in this matter there was never any properly constituted appeal which could be brought before this Court. It is only necessary to deal with this point as it is sufficient to dispose of the appeal. I would accordingly dismiss the appeal with costs.

(P. Cecil Lewis)
Justice of Appeal

ST. BERNARD, J.A. (Ag):

I concur in the judgments just delivered and agree that that the appeal should be dismissed with costs.

(E.L. St. Bernard)
Justice of Appeal (Ag.)