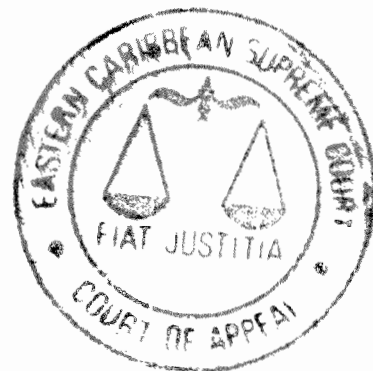


IN THE COURT OF APPEAL
SAINT VINCENT



Application No. 2 of 1972

Between: EMMANUEL FATIMA ADAMS Appellant

and

RANDOLPH B. RUSSEL & Respondents
FELIX ALEXANDER

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Bishop (Ag.)

C.O.R. Phillips, Q.C. for appellant
A.F. Williams for first respondent
The Honourable Attorney General with Miss Monica Joseph
(Legal Assistant) for second respondent

1972, September 21

JUDGMENT

ST. BERNARD, J.A.

This is an application under paragraphs (1) and (2) of rule 6 of order 64 of the Rules of the Supreme Court, 1970, asking the Court to extend the time within which the applicant may file a notice of appeal. Judgment in this matter was delivered on the 7th July, 1972, and pursuant to rule 5 of the said Rules the applicant had six weeks within which to file his notice of appeal. This period of time expired on the 18th August, 1972. On the 23rd August, 1972, the applicant filed his application under rule 6 of Order 64 of the Rules of the Supreme Court.

Paragraph (2) of rule 6 of Order 64 reads:

"Every application for extension of time when made to a judge of the Court shall be made by summons and when made to the Court shall be made by motion. Every summons or notice of motion filed shall be supported by an affidavit setting forth substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor."

Attached to the application is an affidavit by the applicant in support of his application in which he alleges in paragraph 7 thereof that he considers the grounds

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set out therein to be substantial grounds.

The relevant parts of the affidavit are as follows

- (a) That judgment was delivered on the 7th of July, 1972 and on that very date the applicant received a copy of the judgment.
- (b) He applied on the same day for an extra copy which was not received as it was unavailable.
- (c) After that time he had to make stenciled copies and time elapsed.
- (d) Having made the stenciled copies, he dispatched a copy to his leading counsel in Antigua, in order to obtain his opinion and advice.
- (e) Leading counsel was preparing these grounds of appeal and had to leave for London.
- (f) Every effort was made to get in touch with leading counsel who was well acquainted with the facts, and arguments of the matter.

The question for this court is whether the facts set out in the affidavit are substantial reasons for extending the time for filing notice of appeal.

Learned counsel for the applicant urged the Court to accept the material set out in the affidavit as amounting to substantial reasons for the applicant's failure to file the notice of appeal within the appropriate time. He asked the court to consider that the delay was minimal in that it was only three or four days beyond the time for appealing and that in such cases even though the material in the affidavit was not so substantial the court should grant the application. He further submitted that the delay in getting the best available advice from counsel was a good reason, and in support of that submission he cited the case of McC(RD) v. McC(JA) and another, (1971) 2 AER 1097. Counsel referred the court to a passage in the judgment of Stamp L.J. at page 1104 in which the learned judge cited a passage from the judgment of Swinfen Eady M.R. in the case of Re J. Wigfull & Sons' Trade Marks (1919) 1 Ch 52 which reads:

"It is not enough to say the time has expired;
it expired more than two years ago, and therefore
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I cannot appeal without the time being enlarged; because it has expired, therefore I ask that it may be enlarged. That alone is no ground. In my judgment also, it is not necessarily a ground for enlarging the time that in some subsequent case a different view is taken of the construction of an Act of Parliament. The parties in the previous litigation had their advisers at hand; the judgment was pronounced in the Court of first instance; they had an opportunity of considering whether they should or should not appeal; and after considering, they determined not to appeal; and if years are allowed to go by without any appeal being presented, I am of opinion that a strong case on the facts should be made out before leave should be granted

In my opinion this passage is no authority for stating that failure to obtain the best available legal advice is substantial reason. In the passage quoted the judge was only commenting on the fact that the applicants in that case had their legal advisers at hand.

Counsel further asked the court to interpret the expression "substantial reasons" in paragraph 2 of rule 6 order 64 to mean the same as "special circumstances under the English Practice." Counsel, in support of his contention, cited Revici v. Prentice Hall Incorporated & Others (1969) 1 All E.R. p. 772 at page 774. The passage referred to is in the judgment of Edmund Davies L.J. as follows:

"On the contrary, the rules are to be observed; and if there is non-compliance (other than a minimal kind) that is something which has to be explained away Substantial delay has occurred, and simply no explanation for it has even now, in my judgment, been proffered."

Counsel also cited a passage in the judgment of Crane J.A. in the case of Waverley Moses v. Cecilia Kumar and another (1969) 14 W.I.R. 328 at page 334. This passage reads:

"Coming as late as that time, the appellant necessarily had to comply with O. 2 r. 3 (4). This requires a statement of exceptional circumstances in her affidavit in support. She had to adduce exceptional circumstances in excuse of her being so late, because /she

she did not, in the first place, file her notice of appeal within six weeks after date of judgment, nor, in the second place, file an application for an enlargement of time to do so within one month thereafter. Her affidavit merely stated why she did not so ask at the time she was applying for leave in forma pauperis. Therein, she was suggesting that she ought to have made an application for leave to appeal at that time."

In my opinion neither of the cases cited lays down the principle that where the delay in filing notice of appeal is minimal and the grounds are not so substantial the court should grant leave. In my view whether the delay is minimal or not there must be material in the affidavit showing why the notice of appeal was not filed within the time prescribed by the rules. If there is tardiness in making the application the affidavit must show a substantial reason. In my view the affidavit in support of this application discloses no material on which this court would exercise its discretion. Litigants have six weeks within which to file a notice of appeal. If for some reason a litigant is unable to file his appeal within the time prescribed by the rules then he must show that something substantial militated against him and prevented his complying with the rules. If the reason given for the delay in an application for extension of time for filing notice of appeal is "my leading counsel was in London and I could not get his advice", and this reason is accepted by the court as a substantial reason then all that is necessary in an affidavit in support of such an application is to state that the best legal advice was unavailable to me and every party in breach of the rules would be entitled to an extension of time.

Counsel for the first respondent submitted that the affidavit disclosed no material on which the court could exercise its discretion. He cited the case of Ratham v. Cumarasamy and another (1964) 3 All E.R. 933 where Lord Guest delivering the judgment of the Privy Council stated at page 935 -

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"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. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant."

The Attorney General on behalf of the second respondent supported the contention of counsel for the first respondent.

I have already stated that I find no substantial reasons set out in the affidavit in support of this application - to say that delay was caused because leading counsel was preparing the grounds of appeal and had to leave for London is not a substantial reason. Senior counsel for the applicant stated that the grounds of appeal filed with the application were not drafted by him. This shows that the unavailability of advice from senior counsel is not a reason for delay in filing a notice of appeal. I would dismiss the application with costs.

E.L. St. Bernard
JUSTICE OF APPEAL

LEWIS, C.J. (Ag.)

I agree.

P. Cecil Lewis
ACTING CHIEF JUSTICE

/BISHOP, J.A. (Ag.)

BISHOP, J.A. (Ag.)

I agree.

Eric H.A. Bishop
JUSTICE OF APPEAL (Ag.)