

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 19 OF 1998

BETWEEN:

[1] ANN MARIE DANIEL  
[2] SYDNEY ROSEMBERT  
[3] FERDELIA DOCTON ROSEMBERT  
[4] ANN JOSEPH  
[5] JOSEPH DANIEL

Appellants

and

KENNETH LOUISON

Respondent

Before:

The Hon. C.M. Dennis Byron  
The Hon. Satrohan Singh  
The Hon. Albert Redhead

Chief Justice  
Justice of Appeal  
Justice of Appeal

Appearances:

Mr. Parry Husbands, Q.C. for the Appellant  
Mr. Kenneth Foster, Q.C. for the Respondent

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2000: January 25;  
February 7.  
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JUDGMENT

[1] **BYRON, C.J.:** At the hearing we dismissed this application. Counsel for the appellant has asked for written reasons.

[2] These proceedings commenced by an application to “restore this appeal which had been dismissed on 26th October, 1999” and to grant an extension of time to file the record of appeal which was filed on 3<sup>rd</sup> November 1999.

## **The background**

- [3] I have decided to explain the long, and complicated history of the proceedings, because there were two distinct matters with the same reference number and in the course of argument learned Queen's Counsel for the appellant confused them. There were two writs of summons issued in the High Court.
- [4] In one suit 776 of 1996, the Respondent, Kenneth Louison claimed against Ann Marie Daniel, Ann M. Joseph, Sydney Rosembert, Ferdilia D. Rosembert and Parry Husbands. In substance he claimed that the first four defendants as trustees of certain lands, and the fifth defendant as their solicitor and real estate agent, agreed to sell the said lands to the plaintiff; that the fifth defendant received a substantial part of the purchase price; that the plaintiff signed a deed of sale prepared by the fifth defendant; that the fifth defendant assisted the plaintiff in obtaining a bank loan for the balance of the purchase price made payable to the fifth defendant; and that the plaintiff and the fifth defendant then fell out over the quantum of fees requested by the fifth defendant, for his assistance to the plaintiff; and that the fifth defendant then became a stumbling block preventing the completion of the sale, payment of the vendor's tax registration of title to the plaintiff and delivery of possession of the said lands to the plaintiff.
- [5] No defence has ever been filed and on 5<sup>th</sup> February 1997 the plaintiff entered default judgment. On 3<sup>rd</sup> February 1998 the plaintiff issued a summons for assessment of damages. On 13<sup>th</sup> February 1998 the defendant Parry Husbands applied to have the judgment set aside against him, on the ground that the suit was deemed abandoned by virtue of Order 34 of the Rules of the Supreme Court. It was significant that no application to set aside the judgment was made on behalf of the other defendants. On 13<sup>th</sup> March 1998 Archibald J delivered a written judgment in which he ruled that the judgment was irregular, but dismissed the application on the ground that the action was not deemed abandoned under Order 34.
- [6] On 3<sup>rd</sup> April 1998 Parry Husbands obtained leave to appeal against this judgment. He had fourteen days in which to file his Notice of Appeal but never did so. On 17<sup>th</sup> December 1998 some

eight months after the time for filing the Notice of Appeal had expired, he applied for leave to file out of time. The applications with regard to this matter were given the file number of Civil Appeal 19 of 1998. On 27<sup>th</sup> January 1999 in a decision written by Singh J.A., the Court of Appeal dismissed the application for leave to file the Notice of Appeal out of time.

[7] In the meantime, on 22<sup>nd</sup> January 1999, d'Auvergne J, delivered a written judgment ordering that the plaintiff be at liberty to enter judgment in default of defence against all 5 defendants.

[8] On 12<sup>th</sup> February 1999 Parry Husbands applied for leave to set aside and re-hear the application for leave to file the Notice of Appeal. The application was dismissed. On 18<sup>th</sup> June 1999 an application for leave to appeal to Privy Council was filed in the same matter by Parry Husbands as Solicitor on behalf of all the defendants in the original action although there was no appeal on their behalf. This too was dismissed.

[9] In suit 55 of 1995 the plaintiffs were Ann Marie Daniel, Ann M. Joseph, Sydney Rosembert, Ferdilia D. Rosembert and the defendant Kenneth Louison. The plaintiffs claimed specific performance of a contract of sale and the defendant counterclaimed for specific performance of the contract as they understood the same. The pleadings were closed and a request for hearing filed. On 25<sup>th</sup> September 1998 the applicant Joseph Daniel applied for leave to be added as a plaintiff, on the ground that he purchased a parcel of the said land from the plaintiffs and constructed a house thereon. On 6<sup>th</sup> November, 1998 in a written judgment, Mitchell J granted leave for the applicant Joseph Daniel to be joined as a party. He stated that the injunction previously granted is to continue until the determination of the suit or further order. A Notice of Appeal against this decision was filed on 26<sup>th</sup> February 1999 on behalf of all five plaintiffs. The appeal sought to have the injunction discharged, and the Deed of Sale issued to Kenneth Louison declared null and void. The Notice of Appeal did not challenge the issue upon which the trial judge adjudicated. This Notice of Appeal was also given the file number 19 of 1998.

[10] The Notice of Appeal was filed more than 14 weeks after the judgment. This is much later than permitted by any Rule of Court. The record does not reveal that any extension of time to file the Notice of Appeal was granted. In effect there was never any appeal.

[11] Nonetheless, on 18<sup>th</sup> June 1999 the appellants issued a summons for an Extension of Time to file the Record of Appeal. Matthew J.A. sitting as a single judge of appeal granted leave to file and serve the record of proceedings no later than 27<sup>th</sup> August 1999 failing which the appeal would stand dismissed. The record of proceedings has never been filed.

[12] On 26<sup>th</sup> August 1999 the appellant applied for a further extension of time to file the Record of Appeal. On 8<sup>th</sup> September 1999 Redhead J.A. sitting as a single judge of appeal adjourned the application to the full court. On 25<sup>th</sup> October 1999 the court dismissed the application with costs on the basis that the appeal had stood dismissed on the 27<sup>th</sup> August 1999. On the 3<sup>rd</sup> November 1999 the appellant applied to restore the appeal. This is the application we dismissed and in respect of which we were asked to provide written reasons.

### **Power to Restore**

[13] The Court of Appeal Rules 34 prescribes:

“When an appeal has been struck out owing to the non-appearance of the appellant the Court may on application by the appellant by notice to the Court, if it thinks fit, and on such terms as it may deem just, direct the appeal to be re-entered for rehearing. Provided that no application under this rule shall be made after the expiration of twenty-one days from the date of the judgment or order sought to be set aside.”

[14] Assuming that the application could have been made, it was too late to be considered. The application was presented more than 21 days after the order of Matthew J.A. dismissing the appeal, and more than 21 days after the date on which the appeal became dismissed as a result of the said order. The simple and complete answer to the application, however, is that the rule cannot apply, as the appeal had not been struck out as a result of the non-appearance of the appellant. It was dismissed for non-compliance with an order to file the Record of Proceedings within a prescribed time. Consequently the application for an extension of time to file the record must fail, as there is no pending appeal.

[15] The professional conduct of learned counsel for the appellants in this matter raise concerns. His interests as a litigant in suit 776 of 1996 conflict with his professional responsibilities to his clients, who are co-litigants. The interests of Joseph Daniel are in conflict with those of the co-plaintiffs in

suit 55 of 1995. It could not be considered proper for the same counsel to be acting on behalf of all those parties. It is clear that there is no merit whatsoever in the application to restore that is before this court. The litigants have been severely disadvantaged by the fact that over 5 years have elapsed since this matter has been commenced. There is no good reason why the determination of the justiciable questions that remain should not commence in the quickest possible time. I am disposed to direct that these two suits be given priority on the fixture lists.

### **Order**

[16] The application is dismissed with costs to the respondent. I direct that the pending proceedings in suits 55 of 1995 and 776 of 1996 have an early hearing date.

**Dennis Byron**  
Chief Justice

I concur

**Satrohan Singh**  
Justice of Appeal

I concur

**Albert Redhead**  
Justice of Appeal