JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL MOTION NO. 13/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN	MIGUEL THOMAS JOSEPHINE THOMAS	APPLICANTS
A N D	WILLIAM JOHNSON KATHLEEN JOHNSON	RESPONDENTS

Mr. Dennis Forsythe for applicants

Mr. Herbert Rose for respondents

2nd & 20th December, 1991

BINGHAM, J.A. (AG.)

On 2nd December, 1991 this Court heard arguments addressed to us by counsel in respect of a motion seeking leave to appeal out of time from two orders made in chambers by Langrin, J., on 3rd October, 1989 and 16th October, 1990. At the end of the hearing we granted the application. We now put our reasons into writing.

The facts leading up to the hearing before Langrin, J., below and rehearsed before us disclose what amounted to a remarkable state of affairs. As these facts will have to be examined, if and when the matter comes on for the hearing of the appeal against the respective orders made by Langrin, J., I do not propose to go fully into them.

The power of this Court to enlarge or extend time is contained in Rule 9 of the Court of Appeal Rules 1962 Proclamations Rules and Regulations dated 11th October, 1962, which reads:

> "(9) Subject to the provisions of subsection 3 of section 15 of the Law and to Rule 23 of these Rules, the court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply,

> "or may direct a departure from these Rules in any other way where this is required in the interest of justice." (Emphasis supplied).

The affidavit in support of the motion seeking leave to appeal are sworn to by the applicants, Miguel and Josephine Thomas and their attorney-at-law Welton Forsythe. These affidavits insofar as they are material state:

> " WE, MIGUEL THOMAS AND JOSEPHINE THOMAS being duly sworn make oath and say as follows:-
>
> 1. That our true place of abode and postal address is 14 Greendale Boulevard, Spanish Town in the parish of Saint Catherine and we are Interior Decorator and Hairdresser respectively by occupation.
>
> 2. That two separate but related Orders were entered against our deceased mother Etheline Dayes and in favour of the abovenamed Respondents on October 3rd, 1989 and October 16th, 1990, respectively in this matter by Justice Langrin, and I exhibit herewith marked with the letters 'T1' and 'T2' copies of these two Orders.
>
> 3. That both Orders relate to the granting of Specific Performance of an Agreement of Sale for Land dated 12th day of February 1988 signed between Etheline Dayes (vendor) and WILLIAM/KATHLEEN JOHNSON (purchasers).
>
> 4. That both Orders were obtained most irregularly and constitute a great injustice against us because:-
>
> (a) Etheline Dayes, our mother, died on the 1st January 1990 before the Order of Specific Performance was completed and yet this action was carried on against and in the name of the deceased when it should have been continued against us as the personal representatives of the deceased.
>
> (b) That the Respondents knew of the death of our mother and yet chose to ignore this fact when they continued suit E 293 of 1988 against the deceased as sole defendant some eight months after her death. We refer to Exhibit 'T3' which is the Affidavit of Herbert Rose dated 25th September

" (c) That we do have an interest in this matter as executor of the duly executed Will of the deceased probate of which was obtained on the 15th day of March 1991 and is exhibited herewith and marked 'T4' for identification.

(d) That we have an interest in this matter also as the transferee of the said property, see exhibit 'T5'.

(e) That the Respondents were well aware of our existence because a few months before her death our mother wrote to the Respondents advising them of her enfeebled condition and that she was turning over her interests to her 'daughter.'

See Letter dated 17th March, 1988 and marked 'T6' for identification.

(f) Inspite of these facts we were never joined in this action as a party upon the death of our mother, nor even served with Notice of these proceedings.

(g) That on the 16th day of October 1990 when the crucial order was made instructing the Registrar of the Supreme Court to authorise and sign the Transfer neither my mother Etheline Dayes nor her personal representative was represented, that Judgment was in effect obtained exparte."

" I, NELTON FORSYTHE, being duly sworn make oath and say as follows:

1. That I reside at 160 Patrick Drive, Patrick City, Kingston 20 in the parish of Saint Andrew and my postal address is 51a Duke Street, Kingston and I am an Attorney-at-Law.

2. That since the Appellants retained me in this matter they have had a serious and continuing intention to appeal the Orders in question.

3. That there are good and substantial reasons for the Appellants' failure to bring this appeal within the prescribed time.

4. That the Appellants were not joined in the action by the abovenamed Respondents despite an interest in that action, nor were they served with notice of the proceedings.

"5. That the Appellants were deprived of their substantial rights without any notice thereof and without those orders having been obtained in the 'regular' manner.

6. That both Orders against which this Leave for Appeal is sought were obtained in flagrant departure from the law:-

(a) The Order for Specific Performance obtained on the 3rd day of October 1989 should not have been granted on Originating Summons but by Writ, as there were serious issues and disputes surrounding the relevant Agreement for Sale.

(Section 531 Judicature (Civil Procedure Code).

(b) The Order dated 16th October was highly irregular.

(i) The party named, as Respondent had died some 6 months before the filing of that action.

(ii) The present Appellants and Representative of the deceased estate were not notified of this action though they should have been.

(iii) The Court had no jurisdiction in the circumstances to designate the Registrar of the Supreme Court as the person to authorise and sign the Transfer to the land.

(iv) It was highly improper and prejudicial to the estate of Etheline Dayes that Herbert Rose was 'declared to have carriage of sale' when Herbert Rose was acting for the other side in this matter.

7. That the time for the filing of this appeal had long passed when I came into this matter."

There has been no attempt made by learned counsel for the respondents to challenge or traverse any of the facts alluded to in these affidavits. In moving the Court to exercise its discretion in favour of the applicants, learned counsel relied on **Petro Brown v. Ambrozine Neil and Ernest Neil** (1972) 12 J.L.R. 669 in contending that the requirements as to the standard necessary to qualify for the

exercise of the Court's discretion are:

> 1. That at all material times there must be a serious and continuing intention to prosecute the appeal.
>
> 2. There must be merits to which the Court should pay heed.
>
> 3. The delay in lodging the appeal within time is understandable and excusable.

Learned counsel for the respondents conceded that the action was commenced by the wrong procedure. This in effect bears out the irregular nature of the proceedings below. There was a failure to follow the correct procedure for launching the action for specific performance in conformity with section 6 of the Judicature (Civil Procedure Code) Law. The section lays down as a mandatory requirement, that such proceedings shall be commenced by writ of summons. Here the respondents had gone by way of an originating summons. A failure to adhere to the correct procedure would be fatal to the action going as it did, to the question of jurisdiction.

There are good reasons for this rule. Such an action for specific performance affecting as it did, rights of a proprietory nature had of necessity, to be adjudicated upon in open court by way of viva voce evidence and not as occurred in this case by an originating summons supported by affidavit evidence and a hearing in chambers. The jurisdictional question having been determined in the applicant's favour, the entire proceedings before Langrin, J., are bad and a nullity. Needless to say any subsequent proceedings based upon this order for specific performance would be itself a nullity.

In light of the above, the submissions of learned counsel for the applicants, regarding the factors which an Appellate Court ought to consider in exercise of its discretion, have considerable merit and in consideration thereof, we proceeded to grant the application for leave to appeal within fourteen days and ordered

that the costs of this hearing to be costs in the cause.

WRIGHT, J.A.

I agree.

DOWNER, J.A.

I agree.